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COURT OF APPEAL (UK)

R v CARVER

Lord Widgery CJ, Michael Davies and Drake JJ

13, 14 April, 9 May 1978

[1978] 2 WLR 872; [1978] QB 472; [1978] 3 All ER 60; 67 Cr APP R 352; (pet. dis. [1978] 1 WLR 925 (HL))

CRIME – DRUGS – UNAUTHORISED POSSESSION OF – QUANTITY – TRACES OF CANNABIS IN ROACH END AND BOX – MINUTE QUANTITY INCAPABLE OF PROHIBITED USE – WHETHER CONVICTION FOR POSSESSION JUSTIFIED: *MISUSE OF DRUGS ACT* 1971 (C.38), S5(2).

The appellant was in possession of a filter and a wooden box; scientific examination of the filter produced a reaction indicating the presence of not less than 20 micro-grammes of cannabis resin, and two milligrammes of cannabis resin were recovered by scraping the hinges and cracks in the lid of the box. The appellant was charged with unlawful possession of cannabis resin, contrary to section 5(2) of the *Misuse of Drugs Act* 1971. Expert evidence was that the 20 microgrammes were invisible to the naked eye and that neither they nor the two milligrammes, which were about two pinheads in size, could have been used in any manner intended to be prohibited by the misuse of drugs legislation. The appellant was convicted.

HELD: Appeal allowed. Conviction quashed.

1. Whilst it would be inappropriate to rely upon the ordinary maxim of *de minimis*, if the quantity of the drug found is so minute as in the light of common sense to amount to nothing or, even if that cannot in a particular case be said, if the evidence be that the quantity is so minute that it is not usable in any manner which the *Misuse of Drugs Act* 1971 was intended to prohibit, then a conviction for being in possession of the minute quantity of the drug would not be justified. It remains open to the prosecution in an appropriate case to rely upon the possession of a minute quantity as evidence in support of possession at some earlier time. But no doubt rarely would such evidence alone enable a charge of possession at an earlier time to be justified.

2. In the present case, applying the commonsense test, probably the 20 microgrammes ought to be regarded as amounting to nothing. *Bocking v Roberts* ought no longer to be relied upon in support of a contrary view. So far as the two milligrammes are concerned, and *a fortiori* the 20 microgrammes, on the evidence of Dr Scott these quantities were too small to be usable for any purpose which the statute was intended to prohibit. It follows that there was no evidence in the present case to justify a conviction of the appellant because he was not demonstrated in law and on the evidence to have been "in unlawful possession of cannabis resin".

***Bocking v Roberts* (1974) QB 307, not followed.**

MICHAEL DAVIES J read the following judgment of the court. On June 21, 1977, at the Crown Court at Nottingham before Judge Ellis and a jury the appellant and another young man named Stephen Charles Dunstan were convicted of unlawful possession of cannabis resin. The appellant was fined the sum of £25 or one month's imprisonment in default. He now appeals against that conviction by leave of the single judge.

This is another case involving an allegation of possession of dangerous drugs where the quantity of the drug in question is very small. The facts are very short and were not in dispute at the trial. On November 6, 1976, police officers searched a flat in Nottingham occupied by the appellant and his co-defendant. Two roach ends (filters made of rolled cardboard) were found in one room. These were taken at the trial to relate to Dunstan. However, in a room used by the appellant were found one further roach end and a wooden box containing traces of vegetable matter. When the appellant was later seen by the police he admitted that he had "smoked dope" and that what had been found in his room, including the wooden box, was his property.

What had been found was submitted to Dr. Scott of the Home Office Forensic Science Laboratory

at Nottingham and he gave evidence at the trial on behalf of the prosecution. Scientific examination by Dr Scott of the roach ends produced a reaction indicating the presence of not less than 20 micro-grammes of cannabis resin, invisible to the naked eye, in each roach end. To illustrate the minuteness of this quantity it was pointed out that one ounce is the equivalent of 30 million microgrammes. From the hinges and cracks in the lid of the wooden box Dr Scott recovered two milligrammes of cannabis resin by means of scraping with a scalpel. Dr Scott stated that two milligramnes of cannabis resin would have been about the size of a couple of pinheads. In Dr Scott's opinion there was no way at all in which 20 microgrammes could have been used; and the same really applied to the two milligrammes, for, as Dr Scott added, in order to make a cannabis resin cigarette somewhere between 50 and 100 milligrammes of the drug would be required. By the word "used" the witness plainly meant "used in any manner which it was intended by the misuse of drugs legislation to prohibit".

At the close of the prosecution's case a submission was made on behalf of both the appellant and his co-defendant that the case should be withdrawn from the jury. The arguments advanced and repeated in this court, may be briefly summarised as follows. First, that the quantities of the drug were so minute that common sense would equate them with nothing. Secondly, that, as the mischief which the statute is intended to strike at is the use of dangerous drugs, possession of a quantity too small to be used ought to be ignored. Thirdly, that a defendant ought not to be held in law to be in possession of a drug unless he has knowledge of the material alleged to be possessed and an intention to exercise control over it.

It is to be noted that the *Misuse of Drugs Act* 1971, under the provisions of which the appellant was prosecuted, prescribed that it is an offence "for a person to have a controlled drug in his possession". It is customary, as in this case, to charge the possession of a "quantity" of the controlled drug, but that word does not appear in the relevant sections of the Act and there is no definition in the Act of what constitutes a "quantity". Furthermore, there is no statutory definition of possession which assists in a case like the present one. No doubt it is for these reasons there have been numerous reported cases in which the questions arising in this appeal have been debated. We have been referred by counsel to a number of the earlier decisions; and also to cases in other English speaking jurisdictions where similar problems have arisen.

The trial judge in the present case rejected the submission made on behalf of the defendants. They did not give evidence or call witnesses. The trial judge summed up the case in accordance with his understanding of the position in law and the jury convicted both the appellant and his co-defendant. It is clear that Judge Ellis leaned heavily on the decision of the Divisional Court in *Bocking v Roberts* (1974) 2 QB 307 to which he had been referred. It seems very probable that in the last five years judges and indeed prosecuting authorities have relied upon *Bocking's ease* as authority for the proposition that a quantity as minute as 20 microgrammes is sufficient to sustain a charge of being in unlawful possession of a controlled drug. In our view the present appeal provides a suitable opportunity for the re-examination and explanation of that case.

Before doing so however, it is necessary to consider one or two of the other cases to which we were referred. In *Reg. v Worsell* (Note) (1970) 1 WLR 111, possession of a tube containing a few small droplets of a drug which were only discernible microscopically and were impossible to measure or pour out, much less use, was held not to constitute an offence. In delivering the judgment of the court, Salmon LJ said, at p112:

> "But before the offence can be committed it is necessary to show that the accused is in truth in possession of a drug. This court has come to the clear conclusion that inasmuch as this tube was in reality empty (that is the droplets which were in it were invisible to the human eye and could only be discerned under a microscope and could not be measured or poured out) that makes it impossible to hold that there was any evidence that this tube contained a drug. Whatever it contained, obviously it could not be used and could not be sold. There was nothing in reality in the tube."

These observations are the foundation of the appellant's first submission set out above, the "common sense" argument; and also lend some support to his second submission, that no offence is committed where the quantity of drugs found in the accused's possession is too small to be used.

In *Reg v Graham* (Note) (1970) 1 WLR 113, decided by another division of this court a few weeks later, a very small quantity of cannabis was held to be sufficient to justify a conviction for being

in possession, apparently on the ground that it was capable of being weighed and measured. It is to be observed that in *Graham's case* the defence apparently did not advance the submission either that what was found in reality amounted to nothing or that it was too small to be used in any manner which the *Misuse of Drugs Act* 1971 was intended to prohibit.

Bocking v Roberts (1974) QB 307 was strikingly similar to the present case that the trace of cannabis resin relied upon to sustain the charge was measurable in the sense that as in the roach ends in the present case it must have consisted of at least 20 microgrammes. The Divisional Court considered both *Worsell's case* and *Graham's case* and the majority of the court (Lord Widgery CJ and Bean J) found the distinction to be that in *Worsell's case* the quantity of cannabis was insufficient to be measured at all whereas in *Graham's case* it was capable of measurement. Lord Widgery CJ said, at p309:

> "In my judgment it is quite clear that when dealing with a charge of possessing a dangerous drug without authority, the ordinary maxim of *de minimis* is not to be applied. In other words, if it is clearly established that the accused had a dangerous drug in his possession without authority, it is no answer for him to say that the quantity of the drug which he possessed was so small that the law should take no account of it. The doctrine of *de minimis* as such in my judgment does not apply, but on the other hand since the offence is possessing a dangerous drug, it is quite clear that the prosecution have to prove that there was some of the drug in the possession of the defendant to justify the charge, and the distinction which has to be drawn in cases of this kind is whether the quantity of the drug was enough to justify the conclusion that the defendant was possessed of a quantity of the drug or whether, on the other hand, the traces were so slight that they really indicated no more than that at some previous time he had been in possession of the drug. It seems to me that that is the distinction that has to be drawn, although its application to individual cases is by no means easy."

We accept the reasoning contained in this passage. However, we do not consider that it is inconsistent with the first two arguments advanced on behalf of the present appellant. It must be remembered that in *Bocking v Roberts* (1974) QB 307 the Divisional Court was dealing with a case stated by justices. They had found that there was a measurable quantity of cannabis "which presumably could be smoked again". The Divisional Court decided that there was evidence to justify their finding.

However, this Court is of the opinion that, whilst it would be inappropriate to rely upon the ordinary maxim of *de minimis*, if the quantity of the drug found is so minute as in the light of common sense to amount to nothing or, even if that cannot in a particular case be said, if the evidence be that the quantity is so minute that it is not usable in any manner which the *Misuse of Drugs Act* 1971 was intended to prohibit, then a conviction for being in possession of the minute quantity of the drug would not be justified. Of course, it remains open to the prosecution in an appropriate case to rely upon the possession of a minute quantity as evidence in support of possession at some earlier time. But no doubt rarely would such evidence alone enable a charge of possession at an earlier time to be justified.

In the present case, applying the commonsense test, probably the 20 microgrammes ought to be regarded as amounting to nothing. *Bocking v Roberts* ought no longer to be relied upon in support of a contrary view. So far as the two milligrammes are concerned, and *a fortiori* the 20 microgrammes, on the evidence of Dr Scott these quantities were too small to be usable for any purpose which the statute was intended to prohibit. It follows that there was in our judgment no evidence in the present case to justify a conviction of the appellant because he was not demonstrated in law and on the evidence to have been "in unlawful possession of cannabis resin".

This is sufficient to dispose of the present appeal and it is unnecessary to deal with the appellant's third submission and the difficult problems which may arise in connection with the meaning of "possession" and its application to the facts of a particular case. These were fully and authoritatively dealt with by the House of Lords in *Reg. v Warner* (1969) 2 AC 256.

Accordingly this appeal is allowed and the conviction of the appellant quashed.
