60/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v APOSTOLIDES

Crockett, Fullagar and Marks JJ

19, 20, 21 June 1989

CRIMINAL LAW – POSSESSION OF DRUGS – FOUND IN PREMISES IN WHICH OFFENDER FOUND – QUESTION OF OCCUPATION – WHETHER ONE OF FACT OR INVOLVES LEGAL RIGHTS: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, S5.

THE COURT: Where there was evidence that a person occupied a room in rented premises in which drugs of dependence were found, the question of "occupation" was one of fact namely, whether the person was a visitor or a resident, that is to say, was or was not an occupier.

Per Fullagar and Marks JJ: The notion of occupation does not involve the question of legal rights: it is a matter of factual control.

***Hall v Foster* MC 32/1984, doubted.**

CROCKETT J: *[After setting out the nature of the charges, the accused's antecedents, the sentences imposed and aspects of the evidence concerning the accused's occupancy of the subject premises, His Honour continued]* ... **[6]** The applicant stood mute and the jury in due course returned the verdicts to which I have already referred. In the course of the trial, the applicant withdrew his counsel's instructions and he thereafter represented himself. He now seeks leave to appeal against both his conviction and the sentences imposed upon him. His application for leave to appeal against conviction relies upon three grounds. The first is that the Judge failed whilst charging the jury to give them any directions as to what in law it was said was meant by the expression "occupied".

The question of occupancy was of some importance, as the Crown had put its case of possession of the drugs of dependence by reliance upon s5 of the *Drugs, Poisons and Controlled Substances Act*. That section states :

> "Without restricting the meaning of the word 'possession', any substance shall be deemed for the purpose of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary."

In this case it was said that so far as the drugs found in his room were concerned, the room being occupied by the applicant, those drugs were thus deemed to be in his possession. So far as the drugs found in the lounge room were concerned, it was said as that room was occupied by the applicant jointly with the other persons resident in the premises, then those drugs were deemed to be in his joint possession. It is perfectly true that the Judge did not, in the course of his charge, explain to the jury what was **[7]** involved in the use of the word "occupied" or give any examples to the jury of what might or might not constitute occupancy, nor did he lay down for their guidance any test which might be used by them to determine whether or not as a matter of fact the applicant was in occupation of one or other or both of the rooms of the house to which I have referred. In my opinion, there was no necessity, in the circumstances of the case, for the Judge to have given any such directions. It may be allowed there may be cases in which some direction or amplification of the meaning of the term is called for. However, this, in my view, is not one of those cases. The applicant, as I have indicated, stood mute. He confined himself, as had his counsel before him, to seeking to make out what defence he could by way of cross-examination of the Crown witnesses. From that cross-examination it appears that the issue which was being raised was whether or not the applicant was at the material time a resident in the subject premises or was merely a visitor. He was suggesting in the course of his cross-examination that he was no more than a visitor, but these suggestions were rejected by the witnesses to whom they were put. The applicant, of course, was particularly suggesting by his cross-examination that he was not a resident.

The manner in which the case was conducted shows, therefore, that the dispute, if it were a dispute, was concerned with the question as to whether the applicant was a visitor or resident, that is to say was or was not an occupier. There was no difficulty in comprehending the **[8]** issue, and it in no way involved any disputation or lack of understanding as to what was meant by the expression "occupied". The debate was whether or not the applicant did occupy the premises, not what was meant by the expression "occupation". I think, therefore, that the first ground has not been sustained.

In a ground that was not in fact made specifically articulate but which appears to have been treated as ancillary to the first ground, counsel for the applicant maintained that the Judge was in error in failing to point out specifically to the jury that proof of occupancy of land or premises was something that was required to be made out by the Crown and had to be established beyond reasonable doubt to the jury's satisfaction. The Judge gave the conventional direction concerning the onus of proof and the nature of the burden which rested upon the Crown. But the applicant's contention was that, as there were references to the question of occupancy of the premises immediately after the Judge had referred to s5, some additional direction was required to be given concerning the burden which rested upon the Crown of establishing to the jury's satisfaction beyond reasonable doubt the applicant's occupancy of the relevant parts of the premises. It was said that that need arose from the fact that, by having just referred to s5 at that point in his charge, the Judge had had occasion to point out that the onus of disproving possession rested upon the applicant, and that he could discharge that onus by merely proving non-possession to the jury's satisfaction on the balance of probabilities.

[9] I think, when reading the whole of the charge and seeing the manner in which the Judge had dealt with the question of the burden of proof, there was no risk that the jury would have suffered any confusion concerning on whom it was that there rested the duty of establishing occupancy by the applicant and what the extent of that burden of proof was, and I find that that particular submission also has not been made out.

Ground 2 is really an extension of ground 1, and rests upon a contention that the evidence in all the circumstances fell short of establishing the necessary degree of occupancy by the applicant to allow s5 to have application, and in consequence proof of possession of the prohibited substances by the applicant had not been satisfactorily established. In my view, the evidence was quite sufficient to justify the conclusions to which the jury must have come, and I am of opinion that the second ground has not been sustained also. *[His Honour then dealt with matters not relevant to this report].*

FULLAGAR J: [16] I agree with the reasons and conclusions of the learned presiding Judge on both the application for leave to appeal against conviction and the application for leave to appeal against sentence, and I wish to add only a word upon one matter on which the learned presiding Judge said nothing. It is my opinion that the decision, and the proposition of law relied upon for it by Hampel J, in the unreported case of *Hall v Foster*, 1 August 1984, Order to Review No. 8372, are of dubious validity. His Honour, in dealing with sub-s(1) of s40 in the *Firearms Act*, said this:

> "In my opinion ... to be an occupier of premises or part of premises within the meaning of s40(1) a person must have a sufficient degree of control over those premises, or part of them, either alone or in combination with other co-occupiers, so as to have the right or power to exclude others from entering or bringing unauthorised articles into the premises, or part thereof. In the present case, there is no evidence that the applicant had such rights."

Earlier passages show, I think, that his Honour had in mind legal rights. In my opinion, the legislature, when enacting the subsection of the *Firearms Act*, and when enacting s5 of the *Drugs, Poisons and Controlled Substances Act*, was recognising the very considerable technicality and **[17]** complexity of the legal concept of possession and was seeking, by the use of a non-technical and ordinary English word, to place in certain circumstances the burden of proving non-possession upon the person accused of the offence. It would, in my opinion, greatly detract from that object if the concept which was used to create the *prima facie* situation, namely occupation, were itself treated as some highly technical word.

In the case of *Newcastle City Council v Royal Newcastle Hospital* (1959) AC 248 Lord Denning, speaking for the Privy Council, said this:

> "Occupation is matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering."

That, I think, more accurately expresses the notion of occupation in the section, being a matter of factual control. I do not wish to say any more about it now than I have and, subject to those observations, I agree with the judgment that has been delivered.

MARKS J: I also agree for the reasons given by the other members of the Court that the application for leave to appeal against conviction should be dismissed and that the application in relation to sentence should be granted. I am also of the view for the reasons stated by Fullagar J that the decision of *Hall v Foster* is of dubious validity. When one gives consideration to the judgment in full, it would appear that his Honour in the upshot concluded that the facts did not justify the finding of the Magistrate whose order he had under review. However, statements in the course of his Honour's judgment **[18]** would indicate that his Honour was erroneously of the view that the prosecution had an obligation "to prove the legal right in the defendant to prevent unauthorised entry by persons who were non-occupiers." (See p9a). If the matter is one of fact, as I believe the law states it is, then there will be a number of considerations. However, a person in premises without any rights in law could nevertheless be in "occupation" within the meaning of a statutory provision such as the one here under consideration. It seems to me that once the law states that "occupation" is a question of fact, it is not correct to introduce a need to prove certain legal rights, although proof of the existence of such rights might have very real cogency of proof of "occupation".

APPEARANCES: For the Crown: Mr R Langton, counsel. JM Buckley, Solicitor for the DPP. For the applicant Apostolides: Mr D Grace, counsel. Grace & Macgregor, solicitors.
