IN THE SUPREME COURT OF FIJI
Criminal Appeal No. 66 of 1957

KANDHAIYALAL — Appellant
v.
REGINA — Respondent

Possession of Indian Hemp; whether Crown is required to prove *mens rea*; to what extent any onus lies on accused:

The appellant was convicted of being in possession of Indian hemp contrary to section 8(*b*) of the Dangerous Drugs Ordinance, Cap. 112 (now Cap. 129). His explanation as to how he came to be in such possession was not accepted as reasonable by the trial Magistrate. On appeal it was contended that the Crown was under a duty to prove that the appellant knew that the hemp was in his possession and not merely that it was found in his motor vehicle, hidden in the " boot " under a piece of rag.

Held.—(1) " Possession " in section 8(*b*) of the Dangerous Drugs Ordinance has its ordinary dictionary meaning.

(2) Mere possession of Indian hemp is an offence under the Ordinance. It is not necessary for the Crown to prove *mens rea*, or knowledge of possession.

(3) In the absence of a reasonable explanation by an accused as to how he came to be in possession, a trial court is justified in convicting.

Cases referred to:—

re James William Campbell, 8 C.A.R., 75.

Remtullah Panju v. Rex, 10 E.A.C.A., 94.

R. V. Marsh, 107 E.R. (K.B.), 550.

J. N. Falvey for appellant.

D. M. N. McFarlane for respondent.

LOWE, C.J. [12th June, 1958]—

The appellant was charged before and convicted by the trial Magistrate of being found in possession of Indian hemp on the 8th of October, 1957, and was sentenced to six months imprisonment with hard labour. He appeals against his conviction and sentence.

Counsel for the appellant preferred not to deal with the grounds of appeal in detail but made general submissions to which I will refer where necessary, in due course.

At the outset Counsel for the appellant accepted that knowledge of possession could be inferred from the evidence but he urged that there was no direct evidence of such knowledge by the appellant and that from the evidence of the prosecution the learned Magistrate was not justified in drawing the inference that the appellant not only was found in possession of the hemp but also must have been aware that it was in the boot of his taxi where it was found by the Police on a second search, which apparently took place about ninety minutes after a previous Police search of that taxi. The correct inference to be drawn from the fact of the second search, according to Counsel for the appellant, is that some person had " tipped off " the

Police. That, of course, is one possible inference but it is not at all difficult to think of many others. One, perhaps quite as reasonable, is that the officer directing the Police search was not satisfied with the first search and ordered another in case the appellant had put the suspected hemp in a place difficult to find. It is all conjecture and as I am not so favourably placed as was the trial Magistrate who could more readily assess the value of evidence given before him and the credibility of the witnesses he heard, I am not prepared to accept any specific inference suggested by Counsel unless I am satisfied that it must be drawn with reasonable certainty. The inference suggested by Counsel does not have the merit of such certainty. He then turned to the evidence of Ambika Prasad Maharaj, also a taxi driver. Counsel said that the fact of this witness saying to the Police " You are too late " as they approached to make the second search necessarily implicates that witness as the person who had " planted " the hemp. That proposition I cannot accept for the reasons I have already given. The Magistrate applied his mind to the evidence of the witness and believed him when he said the appellant had told him he had removed the hemp, which the witness referred to as " it ". Whatever he thought " it " was, it is clear that he considered it to be whatever the Police were searching for. It is noted also by the learned Magistrate that a defence witness heard that prosecution witness tell the Police they were too late.

Counsel for the appellant also criticised the admission of evidence given by Dectective Sergeant Waisea Waqa that the first search was made as a result of a complaint received by the Police. The result of the first search, which was all the Sergeant spoke of, was negative. In any event his evidence, including the portion which was inadmissible, could not have affected the course of the trial and the Magistrate rightly ignored it in his judgment.

I cannot agree with Counsel that it prejudiced the Magistrate against the appellant from the start of the trial. I can find no evidence of such fact. It is clear that the Magistrate kept his mind firmly on the undoubted fact of the hemp having been found, concealed, in a corner in the boot of the appellant's taxi and covered by a piece of rag.

The case of *James William Pearson Campbell*, 8 C.A.R. 75 at 78 was cited to show that this appeal should be allowed because of the admission of the evidence of a complaint to the police but, with respect, I agree with the *dictum* of the then Lord Chief Justice when he said towards the end of his judgment:

> " The Court has often pointed out that even if inadmissible evidence is given at the trial, the appeal may be dismissed on the ground that there has been no miscarriage of justice; but, so far as I can remember, in no case has the Court done so where there has been improper admission of substantial evidence."

The evidence complained of in this case cannot be said to be " substantial ", no do I consider that any miscarriage of justice has been brought about as a result of its improper admission.

I do not think it necessary to refer in more detail to the submissions of Counsel for the appellant, except to the novel suggestion that in order to find the true meaning of " possession " in one Ordinance the Court should look to another Ordinance to see what it means in the latter and then apply that meaning to the word in the former. I have no comment to make on such an untenable proposition. " Possession " as in the charge means what it says, in its ordinary dictionary meaning, and once the appellant was found to be in possession of the hemp the learned Magistrate was entitled to convict

in the absence of any reasonable explanation by the appellant. I would refer to the case of *Remtullah Panju v. Rex*, 10 E.A.C.A. 94 where the then President of the Court of Appeal for Eastern Africa in dealing with a case where the appellant was charged with and convicted of being in unlawful possession of raw gold, held:

> " The offence was of ' being in unlawful possession ' and therefore the burden of proof was upon the appellant to show that he came by the gold lawfully, and not upon the prosecution to show that the appellant was knowingly in unlawful possession."

It will be noted that in that particular case the charge was of being in " unlawful " possession whereas in the instant case the charge is merely that of being in " possession ". The legislature, by Section 8 of the Dangerous Drugs Ordinance, has put an absolute prohibition on the possession of hemp and it is not necessary for the prosecution to show that an accused had guilty knowledge.

I would refer also to the *dictum* of *Bayley J.* in *R. v. Marsh*, 2 B. & C. 717, at 723: 107 E.R. (K.B.) 550.

> " The general rule as to convictions is this. The information must bring the case within the clause imposing the penalty. . . . Then as to knowledge the clause itself does nothing about it. If that had been introduced, evidence to establish knowledge must have been given on the part of the prosecutor, but under this enactment the party charged must show a degree of ignorance sufficient to excuse him."

The explanation the appellant made in the instant case was not accepted as reasonable and I can find no fault with the Magistrate's rejection of it. The prosecution witnesses were believed and I cannot say that the belief of their evidence was unjustified or even unreasonable. All the admissible evidence points to the guilt of the accused.

As to sentence, I was of the opinion that it erred on the light side for an offence of the nature disclosed and it would have been my inclination to have enhanced it had it not been for the fact that Counsel for the Crown, specifically stated that he did not ask for enhancement. It seems to me that anyone in unlawful possession of a drug the mere possession of which is prohibited and which is well known to be injurious to health, deserves to have his activities curbed severely but in the circumstances of the instant case and in view of the attitude of Counsel for the Crown, I will merely say that in the future in similar cases my attitude towards sentence might well be different from the course I take now in dismissing this appeal without in any way varying the sentence.