

NO. 74-2189

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

JOHN WINSTON ONO LENNON,

Petitioner,

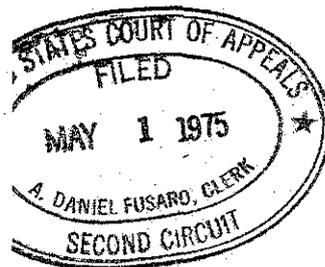
v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for Review of Deportation Order

**BRIEF OF ASSOCIATION OF IMMIGRATION
AND NATIONALITY LAWYERS,
AMICUS CURIAE**



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STATEMENT OF INTEREST

The Association of Immigration and Nationality Law is a national organization chartered under the laws of State of New York. Its members are attorneys specializing in immigration, naturalization and nationality matters. interest in the *mens rea* issue raised by the deportation order below prompts us to file this brief.

ISSUE INVOLVED

Whether petitioner's marihuana conviction on November 28, 1968 under the Dangerous Drugs Act of 1965 of Great Britain was a conviction for a crime involving *mens rea* as known to our jurisprudence and whether such conviction rendered petitioner ineligible under 8 U.S.C. 1182 (23) for adjustment of status to permanent residence pursuant to 8 U.S.C. 1255.

STATUTES AND REGULATIONS INVOLVED

8 U.S.C. 1255 (Section 245 of the Immigration and Nationality Act) provides in part:

"The status of an alien *** may be adjusted by the Attorney General, in his discretion *** to that of an alien lawfully admitted for permanent residence if *** (2) the alien is eligible to receive an immigration visa, and is admissible to the United States for permanent residence ***."

8 U.S.C. 1182 (Section 212(a)(23) of the Immigration and Nationality Act) provides for the exclusion of:

"Any alien who has been convicted of a violation of, or a conspiracy to violate any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, ***"

8 C.F.R. 242. 17 provides in part:

"The respondent may apply to the special inquiry officer for *** adjustment of status under 245 of the Act ***"

Section 13 of the Dangerous Drugs Act of 1965 of Great Britain provides in part:

"A person - (a) who acts in contravention of *** a regulation made under this Act *** shall be guilty of an offense against this Act."

Section 9 of the Regulations [Dangerous Drugs (No. 2 Regulations 1964)] provides:

"A person shall not be in possession of a drug *** unless he is generally authorized or under this regulation so licensed or authorized."

Section 20 of the Regulations defines possession by stating:

"For the purposes of these regulations a person shall be deemed to be in possession of a drug if it is in his actual custody or is held by some other person subject to his control or for him and on his behalf."

STATEMENT

In deportation proceedings pursuant to 8 C.F.R. 242. 17, petitioner applied for adjustment of status to that of permanent residence under 8 U.S.C. 1255. His application was denied by an Immigration Judge (Special Inquiry Officer) upon the ground that he was ineligible under 8 U.S.C. 1182(a)(23) by reason of a November 28, 1968 conviction in England for possession of a prohibited drug (cannabis resin) in violation of the Dangerous Drugs Act of 1965.

Petitioner asserts that a binocular case containing cannabis resin was found in his house, that he had no knowledge of the presence of the drug and pleaded guilty because such lack of knowledge was not a defense.

Affirming the Immigration Judge, the Board of Immigration Appeals stated on July 10, 1974 in *Matter of Lennon*, Interim Decision 2304 p. 14:

“The provisions of section 212(a)(23) were intended to deal with foreign as well as domestic convictions. See *Matter of Gardos*, 10 I&N, Dec. 261 (BIA 1963), aff’d., *Gardos v. INS*, 324 F.2d 179 (2 Cir. 1963); cf. S. Rep. No. 1515, 81st Cong., 2d Sess. 410 (1950). However, under federal law, in order to be convicted of the crime of possession of marihuana one must have knowledge or intent to possess. 21 U.S.C. 844. The same is true under the law of the District of Columbia, *United States v. Weaver*, 458 F.2d 825 (D.C. Cir. 1972), as well as the law of the vast majority of states. See Annot., 91 A.L.R. 2d 810, 821 et seq. (1963) and supplements. Therefore, it is fair to state that in enacting section 212(a)(23), Congress did not intend to exclude persons who were entirely unaware that a prohibited substance was in their possession. Cf. *Varga v. Rosenberg*, 237 F. Supp. 282 (S.D. Cal. 1964); *Matter of Sum*, 13 I&N Dec. 569 (BIA 1970). Since the respondent has raised a significant question regarding the knowledge requirement of the British statute, we believe that an in-depth discussion of the British law is warranted.”

The Board concluded that a majority of the court (consisting of Lords Reid, Pearce and Wilberforce) in *Warner v. Metropolitan Police Commissioner* [1968] 2 All E.R. 356 (H.L.), “believed that there was a substantial knowledge requirement for conviction for possession of a dangerous

drug” and that the majority view in *Warner* was the prevailing interpretation at the time of petitioner’s conviction. It further held that:

“We conclude that the statute under which the respondent was convicted contained a sufficient knowledge requirement to ensure that persons whose possession was entirely innocent would not be convicted.”

* * * * *

“Conviction for possession of cannabis resin under the Dangerous Drugs Act of 1965 required that the defendant have had knowledge that he possessed an illicit substance which proved to be cannabis resin. A person who was entirely unaware that he possessed any illicit substance would not have been convicted under the Dangerous Drugs Act of 1965. The respondent’s plea of guilty of the charge of possession of cannabis resin under the Dangerous Drugs Act of 1965 is a conviction of a law relating to the illicit possession of marihuana within the meaning of section 212(a)(23) of the Immigration and Nationality Act.”

ARGUMENT

I. PETITIONER WAS NOT CONVICTED OF A CRIME INVOLVING *MENS REA* AS KNOWN TO OUR JURISPRUDENCE

The concept that punishable criminal activity, except for certain police offenses, requires a concurrence of an evil mind or *mens rea* and evil doing took deep root in

the jurisprudence on American soil. *Morissette v. United States*, 342 U.S. 246 (1951).

As the Board of Immigration Appeals observed in *Matter of Lennon*, Interim Decision 2304 p. 14, 21 U.S.C. 844 requires "a person knowingly or intentionally to possess a controlled substance" to ground a prosecution and conviction. Knowledge of the fact that one possesses or controls a prohibited drug is of the essence of the crime. See *United States v. Olivares-Vega*, 495 F.2d 827, 830 (2nd Cir., 1974); *United States v. Joy*, 493 F.2d 672, 676 (2nd Cir., 1974).

The law of the majority of the states [Anno., 91 A.L.R. 2d 810, 81 et seq. (1963) and supplements] as well as the District of Columbia, *United States v. Weaver*, 458 F.2d 825 (D.C. Cir., 1972), Canada, *Beaver v. Regina* (1957) S.C.R. 531 and South Africa, *Rex v. Langa* (1936) S.A. L.R. (Cape Province Div.) 158 require knowledge of the fact that possession is of a controlled or prohibited substance.

On the contrary, the English law as it existed at the time of petitioner's conviction, did not require this type of *mens rea*. This is emphasized by the following:

1. The fact that the Dangerous Drugs Act of 1965 and its regulations in terms did not require knowing or intentional possession.

2. The repeal of the Dangerous Drugs Act in 1971 and its replacement by the Misuse of Drug Act of 1971 providing in its Section 28(3)(b) that a defendant should be acquitted

" *** if he proves that he neither believed nor suspected nor had reason to suspect that the

substance or product in question was a controlled drug."

There is legislative history supporting the view that amendment was required because the 1965 Act provided for absolute liability and no *mens rea*. 808 Parl. Deba H.C. (5th Ser.) 617-18 (1970).

3. The reported cases at the time of petitioner's conviction reinforce the absence of the *mens rea* requirement in 1968.

Lockyer v. Gibb [1967] 2 Q.B. 243, [1966] 2 All 653 related to a woman who claimed that someone had dumped a bottle of tablets into her bag and that she did not know the nature of the tablets or that they were dangerous drugs. The Court by Lord Parker, C.J. upheld conviction noting that the word, knowingly was absent from the statute and that

" *** under this provision, while it is necessary to show that appellant knew that she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug and a drug of a particular character."

* * * * *

"I should say that I regret that, in doing so, I find myself unable to follow the persuasive authority that counsel for the appellant has drawn to our attention of *Beaver v. R* [(1957) S.C.R. 531 heard on appeal from the Court of Appeals of Ontario. It was there held that one who had physical possession of a package which he believed to contain a harmless substance and which in fact contained a narcotic drug could not be

convicted of being in possession of the drug. ***
 There was another case from South Africa which was really to the same effect. *R v. Langa.*" [(1936) S.A.L.R. (C.P. Div.) 158]

The Canadian case of *Beaver v. Regina.* (1957) S.C.R. 531, holding that one who has physical possession of a package which he believes to contain a harmless substance cannot be found guilty of possession of a prohibited drug emphasizes the requirement of *mens rea* absent from the British interpretation. *Rex v. Langa.* (1936) S.A.L.R. (Cape Province Div.) 158 similarly expresses the South African view that *mens rea* i.e., guilty knowledge of possession of the prohibited drug is an essential element of the crime.

Warner v. Metropolitan Police Commissioner [1968] 2 All E.R. 356 (H.L.), however, clearly sanctions the elimination of *mens rea* as expressed by the Canadian and South African cases. There the defendant's van was stopped by the police. They found two parcels, one containing bottles of perfume and the other containing pep pills. Defendant picked up the parcels at a cafe and claimed that he believed both contained perfume which he sold as a sideline. The defendant was convicted and the Court of Appeals in affirming *R. v. Warner.* (1967) 3 All E.R. 93 (C.A. stated that: "The fact that he did not know that what it (the parcel) contained was drugs, is no defense ***."

Upon appeal to the House of Lords the conviction was affirmed.

Lord Morris, voting to dismiss the appeal, approved and applied the language of *Lockyer v. Gibb*, holding that "while it is necessary to show she knew she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug and a drug of a particular character." 2 All E.R. at 375.

Lord Guest's view was that the offense was absolute that "to require *mens rea* would largely defeat the purpose and object of the Act of 1964." 2 All E.R. 385.

Lord Pearce believed that the term, possession, "is defined by a knowledge of the existence of the thing itself and not its qualities and that ignorance or mistake as to its qualities is not a excuse *** Though I reasonably believe the tablets which I possess to be aspirin, yet if it turns out to be heroin, I am in possession of heroin tablets." However, he believed that although defendant v improperly denied an opportunity to prove that he had no suspicion that the parcel contained something illegal no properly directed jury would have acquitted him. All E.R. 388, 391.

Lord Wilberforce concluded that *Lockyer v. Gibb* was "correct, for there the accused had, and knew that she had control of the tablets, but possibly did not know what they were." Inconsistently, however, he agreed with the Canadian case of *Beaver v. Regina* and then added

"First, in my opinion, there is no need, and no room, for an inquiry whether any separate requirement of *mens rea* is to be imported into the statutory offense. We have a statute absolute in its terms ***."

However Lord Wilberforce voted to dismiss the appeal upon the ground that charging the jury that possession meant control was erroneous but that a properly charged jury would have found defendant guilty and hence the error was harmless. 2 All E.R. 393, 394.

Lord Reid believed that:

“ *** a right to prove absence of *mens rea* would sometimes go too far. *Mens rea* or its absence is a subjective test and any attempt to substitute an objective test for a serious crime has been successfully resisted. If, however, there is to be a halfway house between the common law doctrine and absolute liability, there could be an objective test; not whether the accused knew, but whether a reasonable man in his shoes would have known or have had reason to suspect that there was something wrong.”

This objective test would only be applied to businessmen. Lord Reid agreed to decide the case on the narrower ground suggested by Lord Wilberforce and Lord Pearce stating:

“It enables justice to be done in all cases which resemble this case. But it still leaves subject to injustice persons who in innocent circumstances take into possession what they genuinely and reasonably believe to be an ordinary medicine, if in fact the substance turns out to be a prohibited drug.” 2 All E.R. 367, 369.

In evaluating the *Warner* case, an article “Aspects of British Drug Legislation,” 20 University of Toronto Law Journal 88, 101 (1970) states:

“In *Warner* the majority of the House of Lords reached the decision that the offense in question was one of strict liability and was intended to be so by parliament on the basis of a construction of the wording of the 1964 Act, the gravity of the social evil which it was sought to prevent and the difficulty of enforcement if *mens rea* was required.”

26 Cambridge Law Journal 179 (1969) notes that opinion of Lords Norris, Guest, Pearce and perhaps Wilberforce was that the offense did not require *mens rea* and that any requisite mental element must be inherent in concept of ‘possession’.”

R. v. Fernandez (1970) Crim. L. Rev. 277 involved a merchant seaman who claimed he did not know the package he was carrying contained prohibited drugs. The judge charged the jury:

“ *** if a person were to receive the package under circumstances whereby it would be clear to any person of ordinary common sense that it might well contain either drugs or some other article which ought not to be in distribution the mere fact that it could not be shown that the carrier knew the exact contents would not prevent him being guilty *** the mere fact that the prosecution cannot show the exact nature of the drug would not matter if he did know that the package might well contain some prohibited article and if in fact it did contain a prohibited drug.”

The Court could find no indication in *Sweet v. Parslow* (1969) 2 W.L.R. 470 that the views expressed in *Warner* had been altered.

The Board of Immigration Appeals without discussing whether the British statute imposed strict liability and eliminated *mens rea*, concluded that:

“ *** it is evident that a majority of the court (in *Warner*) consisting of Lords Reid, Pearce, and Wilberforce, believed that there was a substantial knowledge requirement for conviction of possess

of a dangerous drug. *** A person who was entirely unaware that he possessed any illicit substance would not have been convicted under the Dangerous Drugs Act of 1965.”

It is clear from the cases that a person could be convicted in England in 1968 even though he was unaware that he possessed an illicit substance and that the analysis and conclusions of the Board of Immigration Appeals were erroneous. *Mens rea* was not an essential element of the English crime in 1968. Petitioner was convicted of a crime which lacked *mens rea*.

II. EXCLUSION FOR A MARIHUANA CRIME WHICH EXCLUDES *MENS REA* IS NOT MANDATED BY CONGRESS

We agree with the Board of Immigration Appeals that Congress intended to deal with foreign and domestic convictions in 8 U.S.C. 1182(a)(23) and that “Congress did not intend to exclude persons who were entirely unaware that a prohibited substance was in their possession.” *Matter of Lennon*, p. 14, *supra*.

Recently in defining adultery under 8 U.S.C. 1101(f) the Court of Appeals for the District of Columbia in *Kim v. U.S. Immigration and Naturalization Service*, (No. 73-1965, March 5, 1975) 43 L.W. 2393 stated:

“This Court is satisfied that Congress intended uniformity in the application of its enactments.”

Uniformity in the application of the immigration statute requires nonrecognition of the conviction herein for the purpose of exclusion and ineligibility for adjustment under 8 U.S.C. 1255.

CONCLUSION

For the reasons set forth herein, we urge rejection of the decision denying adjustment of status.

Respectfully submitted,

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