07/78

SUPREME COURT OF VICTORIA

HENRY v HASTY

Murphy J

30 November 1977

DRUGS – POSSESS/USE CANNABIS – VEGETABLE MATTER SEIZED BY POLICE OFFICER GIVEN TO ANOTHER OFFICER TO BE CONVEYED FOR ANALYSIS – OFFICER CONVEYING NOT CALLED AS A WITNESS – CONTINUITY BETWEEN SEIZURE AND ANALYSIS AS TO IDENTIFICATION OF TETRAHYDROCANNABINOL AS AN ACTIVE PRINCIPLE OF CANNABIS (INDIAN HEMP) – MAGISTRATE RELIED ON CERTIFICATE PRODUCED – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR – DEFENDANT'S FAMILIARITY WITH DRUGS – WHETHER MAGISTRATE COULD ACT ON ADMISSIONS MADE BY DEFENDANT: *POISONS ACT* 1962, SS27, 31, 56(1).

The informations against the defendant charged her with possession and with smoking "tetrahydrocannabinol", an active principle of Cannabis (Indian Hemp). The defendant had made admissions as to possession etc. of "grass" and "marijuana". A certificate of analysis was tendered indicating that the samples received contained "tetrahydrocannabinol" an active principle of Cannabis (Indian Hemp). Hasty, a police officer, gave evidence that he seized vegetable matter which he gave to Sgt. Little. The certificate of analysis showed that the liaison officer at Forensic Science had received the sample from Sgt. Little. However Sgt. Little did not give evidence. The question was whether there had been a break in the chain of continuity.

HELD: Orders nisi discharged.

1. The question to be decided was whether the failure to call Sgt BP Little to depose to what he did with the 'home-made' cigarette and plastic bag with green vegetable matter in it which was given to him by Senior Constable Hasty, meant that it was not open to the Magistrate to find that the certificate of analysis referred to articles in fact seized by Senior Constable Hasty when he apprehended the defendant. There was nothing to suggest that there was any mix-up that occurred. There was nothing led to challenge such an inference being drawn. It was open to the Magistrate to draw such an inference. It would have been far better had Sergeant BP Little given evidence, but his failure to do so did not prevent the Magistrate from arriving at such a conclusion on a consideration of all the evidence and of the statutory provision.

***Anglim & Cooke v Thomas* [1974] VicRp 45; (1974) VR 363 at pp366-7, referred to.**

2. Once the articles analysed were identified with the articles seized there was evidence that they contained tetrahydrocannabinol, an active principle of Cannabis (Indian Hemp) and a drug of addiction under Schedule 8 of the *Poisons Act* 1962.

3. If it was found that it was not open to identify the articles analysed with the articles seized, the case would have been remitted to the Magistrates' Court with a direction that the Magistrate consider whether or not he was satisfied on the defendant's alleged admissions that the defendant was found in possession of Cannabis (Indian Hemp) and either that the Certificate of Analysis sufficed to provide evidence that tetrahydrocannabinol was an active principle of cannabis L or that leaving the certificate on one side altogether, the informations should have been amended to substitute 'Indian Hemp' or 'Cannabis' for the words 'Tetrahydrocannabinol an active principle of cannabis (Indian Hemp)' appearing in the informations.

MURPHY J: ... What was submitted was that there was no evidence or no sufficient evidence to link the materials referred to in the analyst's possession on that night, and accordingly as no admissions were made or evidence led to show that tetrahydrocannabinol was necessarily present in marijuana or grass or Indian Hemp, the information as laid should have been dismissed. Section 56(1) of the *Poisons Act* 1962 reads:

> '(1) In any legal proceedings for an offence against this Act the production of a certificate purporting to be signed by an analyst ... with respect to any analysis or examination made by him shall, without proof of the signature of the person appearing to have signed the certificate or that he is an analyst ... be sufficient evidence—
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> (a) in the case of a certificate purporting to be signed by an analyst of the identity of the thing analysed, of the result of the analysis and of the matters relevant to such proceedings stated in the certificate;'

The certificate in question purports to be a Certificate of Analysis, and the person making out the certificate claims to be an analyst within the meaning of s56. It is thus 'sufficient evidence' of the identity of the thing analysed' and 'of the result of the analysis' and of 'the matters relevant to such proceedings stated in the certificate'.

What is the meaning then of the words 'the identity of the thing analysed'? Identity with what? 'Identity' may mean the quality or condition of being the same, but the question remains the same as what? It may be that the use of the word 'identity' here is a modern use meaning something that serves to identify the thing analysed – a similar usage to that found in the expression 'Identity card or disc'.

The most likely meaning is, I believe, individuality or make up. However, the meaning of these words is not altogether free from ambiguity in my mind. Nor is the meaning of the words 'the matters relevant to such proceedings' clear. The certificate states that the analyst received 'from the Liaison Officer a sealed plastic bag labelled '5.25 9.40 a.m. 1/3/77 HENRY L.J B.P. LITTLE SERGEANT 14795' and containing ... (1) 3 gram of green vegetable material (2) A 'home-made' cigarette containing green vegetable material and tobacco.'

There is evidence that the Senior Constable took from the defendant's possession a home-made cigarette (he saw her roll it) and a plastic bag 'containing a greenish coloured substance' described by the defendant as 'grass' by which she meant 'marijuana'. The constable also described the contents of the plastic bag as 'green vegetable matter'.

He said that he gave the plastic bag containing the green vegetable matter and the cigarette to Sergeant B.P. Little, and of course the name 'B.P. Little, Sergeant' appears in the certificate. These matters do point to the sameness of the articles seized and the articles analysed. The certificate also states that the label had the name 'Henry L.J' written on it, and this, of course, would correspond with the name of the defendant, namely 'Lynda Jane Henry'. From a consideration of the certificate in this case and the certificate which was being considered in *Anglim and Cooke v Thomas* [1974] VicRp 45; (1974) VR 363 at 366, it would seem that the practice of the Forensic Science Laboratory is to label articles which have been presented for analysis in this way.

The chain of identification of the articles seized from the defendant appears to be broken by the failure to call Sergeant B.P. Little to say what he did with the articles that were given to him by Senior Constable Hasty, and there was no explanation given as to why he was not called as a witness.

The question therefore becomes, does the failure to call B.P. Little to depose to what he did with the 'home-made' cigarette and plastic bag with green vegetable matter in it which was given to him by Senior Constable Hasty, mean that it was not open to the Magistrate to find that the certificate of analysis referred to articles in fact seized by Senior Constable Hasty when he apprehended the defendant? I do not think so. There is nothing to suggest that there was any mix-up that occurred. There was nothing led to challenge such an inference being drawn. I think that it was open to the Magistrate to draw such an inference. It would, of course, have been far better had Sergeant BP Little given evidence, but his failure to do so did not prevent the Magistrate from arriving at such a conclusion on a consideration of all the evidence and of the statutory provision: Cf. *Anglim & Cooke v Thomas* [1974] VicRp 45; (1974) VR 363 at pp366-7.

Once the articles analysed are identified with the articles seized there is evidence that they contain tetrahydrocannabinol, an active principle of Cannabis (Indian Hemp) and a drug of addiction under Schedule 8 of the *Poisons Act* 1962. I will accordingly discharge both orders nisi. Even had I found that it was not open to identify the articles analysed with the articles seized, I would have remitted the case to the Magistrates' Court. I would have directed that the Magistrate consider whether or not he was satisfied on the defendant's alleged admissions that the defendant was found in possession of Cannabis (Indian Hemp) and either that the Certificate of Analysis sufficed to provide evidence that tetrahydrocannabinol is an active principle of cannabis L or that leaving the certificate on one side altogether, the informations should be amended to substitute 'Indian Hemp' or 'Cannabis' for the words 'Tetrahydrocannabinol an active principle of cannabis (Indian Hemp)' appearing in the informations.

It appears to me that such an amendment to the informations could and, indeed, should have been made on all the facts of this case if the evidence as to tetrahydrocannabinol had been lacking. I, myself, tend to the view that marijuana, grass, cannabis, reefers, pot and Indian Hemp are all becoming so well-known terms in the community today as synonymous terms, that to say that 'I smoke two reefers' or 'I smoke two cigarettes of marijuana' or 'I smoked pot' is equally as probative of the fact that the person smoked cannabis, as saying 'I had six whiskeys' or 'I had half a dozen beers' or 'gins' or 'rums' or 'Pernods' or 'glasses of wine' is of probative value to prove that a person has drunk alcohol. In the latter case it is, of course, not considered necessary to prove that gin or wine or any other of the fluids mentioned are alcoholic. It is not necessary to prove that Pernod is more alcoholic.

When a person is charged with driving a motor car while under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of the motor car contrary to s80B of the *Motor Car Act*, his admission that he drank ten beers is of probative value and does not require an analysis to establish that the beer in fact drunk contained alcohol or that alcohol is an active principle of beer. These are, however, matters which in the present case are really irrelevant, save possibly on the first count, where they need not, in my opinion, be relied upon.

Both orders nisi shall be discharged with costs which I fix at $200 in each case.
