38/73

SUPREME COURT OF VICTORIA

ANGLIM & COOKE v THOMAS

Harris J

8, 9, 20 November 1973 — [1974] VicRp 45; [1974] VR 363

CRIMINAL LAW – DRUGS OF ADDICTION – DEFENDANT CHARGED WITH POSSESSION AND USE OF DRUGS OF ADDICTION AND SHOPBREAKING AND ENTERING A CHEMIST'S SHOP AND STEALING DRUGS – DEFENDANT FOUND GUILTY OF EACH CHARGE – ADMISSIONS MADE BY DEFENDANT AS TO HIS FAMILIARITY WITH DRUGS OF ADDICTION AND HIS USE OF THEM ON NUMEROUS OCCASIONS – CERTIFICATE OF ANALYSIS ADMITTED INTO EVIDENCE – NO EVIDENCE LED BY PROSECUTION AS TO THE OWNER OF THE CHEMIST'S SHOP FROM WHICH THE DRUGS WERE STOLEN – WHETHER MAGISTRATE IN ERROR: *POISONS ACT* 1962, SS27(1), 56; *CRIMES ACT* 1958, S134.

HELD: In relation to the informations under the *Poisons Act* order nisi discharged. In relation to the charge under the *Crimes Act* order nisi absolute.

1. Section 56(1) of the *Poisons Act* 1962 is intended to facilitate the proof of what has been done by an expert. Section 56(2) is drafted in negative terms which support the view that it only excludes the admission of a certificate where there is evidence to establish that a certificate, otherwise admissible, must be excluded by reason of the failure to give the copy or by reason of a notice requiring the analyst's attendance at the court.

2. As a result, a certificate is admissible provided subs(1) is complied with and that it remains admissible unless there is evidence to show that the provisions of subs(2) come into operation. There was no such evidence and accordingly, ground 1(b) of the order nisi to review was not made out.

3. In relation to the submission that the wording of the certificate of analysis did not establish that Oughtred was an "analyst" within s56, in the certificate Oughtred described himself as "an analyst employed by the Government of Victoria". Section 56(1) says that a certificate "purporting to be signed by an analyst" shall be sufficient evidence of the matters referred to in s56(1)(a). Section 56(5) defines an "analyst". One meaning is "a person employed by the Government of Victoria as an analyst". The words used in the certificate did not merely show that Oughtred was an analyst and was employed by the Government of Victoria in some unspecified capacity, but showed that he was a person employed by the Government of Victoria as an analyst. It followed that the order nisi to review the conviction for unlawful possession of drugs of addiction was discharged.

4. The evidence before the Magistrate showed a considerable degree of familiarity by the defendant with what were classified in the *Poisons Act* as drugs of addiction. This degree of familiarity was such as to enable the defendant to have a reasonably reliable knowledge of what it was that he had in his possession. The defendant admitted that he had taken the drugs from a chemist's shop and from a dangerous drugs cupboard in that chemist's shop. For a man who also admitted to having been addicted to drugs by injecting them into himself and to having done that for some time, the Magistrates' Court was quite justified in accepting the admission which he made as to the nature of the substances found in his possession and in relying upon that evidence as sufficient to justify a conviction. The defendant admitted he had taken cocaine from the chemist's shop and admitted that he had in the past administered cocaine to himself.

5. The failure by the prosecution to specify the owner of the property stolen from the chemist's shop was a serious omission. Proof of larceny was one element of this charge and there were well-established principles of law relating to the charge of larceny which control the significance of the proof that the property stolen was the property of a person. The information may lay the property in a specific person, or it may lay the property in persons unknown. If the property is laid as being the property of a person named, then there must be, at all events, some evidence to show that that named person was the owner of the goods which were alleged to have been stolen. If the property is alleged to be the property of persons unknown, then the evidence must show that the Crown is unable to ascertain who was the owner of the goods.

6. Accordingly, the Magistrate was wrong in convicting the defendant in that there was no evidence or no sufficient evidence of the ownership of the goods alleged to have been stolen and that there was no evidence that the goods alleged to have been stolen were the property of the said Clifford Matthews.

HARRIS J: On 3 June 1971 Constable Victor Laurence Hanson went to premises at 6 Wellington Street, Brighton. He there found the defendant, Rodney James Thomas, with a plastic bag containing a number of packages and articles in it. Constable Hanson questioned the defendant at those premises and again later on the same day at the Brighton Police Station.

As a result, the informants, Christopher David Anglim and Eric Cooke, laid three informations against the defendant. Two of the informations were laid under the *Poisons Act* 1962. One of these alleged that the defendant on 3 June 1971, at Brighton in the State of Victoria, not being authorized under Pt I of the *Poisons Act* 1962, did have in his possession drugs of addiction, to wit, an amount of cocaine, an amount of heroin, an amount of dilaudid, an amount of gum of opium, an amount of pethilorfan and an amount of physeptone. That information was laid under s27(1) of that Act.

The other information under the *Poisons Act* was that on 2 June 1971 at Brighton, the defendant did use a drug of addiction, to wit, cocaine, for the purpose of self-administration. That information was laid under s23 of that Act.

The third information was that the defendant on 25 May 1971, at Brighton, did break and enter the shop of Clifford Matthews, situate at 24 Church Street, Brighton, and did steal therein a quantity of drugs of addiction, the property of the said Clifford Matthews and valued in all at about $182.47. That information was laid under s134 of the *Crimes Act* 1958.

On 20 June 1972 the defendant appeared at the Magistrates' Court at Brighton to answer these informations. He was represented by counsel. He agreed to the information under the *Crimes Act* being dealt with summarily and to the three informations being heard together. He pleaded not guilty to all the informations. The prosecution was conducted by one of the informants.

The only evidence called for the prosecution was that of Constable Hanson. Constable Hanson's evidence related to the two incidents which had occurred on 3 June 1971. The first incident occurred when Constable Hanson went to the premises at No. 6 Wellington Street. After he had intercepted the defendant with the plastic bag, he questioned the defendant about the bottles and containers which were in the bag. The defendant gave a number of answers to these questions. Later on the same day the defendant was questioned at the police station at Brighton. Again he gave answers to questions put to him and the written record of interview by which these questions and answers were recorded was put in evidence. The only other evidence consisted of a certificate of analysis certifying to the result of an analysis of substances alleged to have been those in the bottles and containers which the defendant had when he was found by Constable Hanson.

The defendant's counsel put a number of submissions to the court, first as to there being no case to answer and then, when that submission was rejected, as to the argument that the informations should be dismissed. The defendant did not call any evidence. The court rejected all the submissions and convicted the defendant on all three informations. On 20 July 1972 the defendant obtained an order nisi to review each of these convictions.

The return of the three orders nisi came on for hearing before me on 7 and 8 November 1973. It is appropriate at this stage to observe that very great delays have occurred between the date upon which the alleged offences occurred and the date of the final determination of them. It took some twelve months from the date upon which the defendant was apprehended before his case was heard at the Brighton Magistrates' Court. It has taken some sixteen months from the date on which the orders nisi were obtained before the matters could be heard in this court. The delay in this court has been due to the great congestion which exists in the lists, including the Miscellaneous Causes list. It is a very unsatisfactory state of affairs that an appeal on a point of law from a Magistrates' Court should take such an extraordinary length of time before it could be heard in this court.

In this Court Mr Richter of counsel appeared for the defendant to move the orders nisi absolute and Mr Douglas Graham of counsel appeared for the informants to show cause. Both counsel argued their cases well and their arguments have been of great assistance to me in reaching a decision in the three cases.

It will be appreciated that the matters in respect of which the defendant was charged were of a serious nature. All related to the improper use, in one way or another, of what are described in the *Poisons Act* as "drugs of addiction". These are all narcotic drugs. Matters relating to the improper use of drugs are rightly regarded by the community as serious matters. There is, however, an equally important principle at stake in this case. This principle is that a defendant can only be convicted on proper evidence and then only in accordance with the correct application of the law.

The manner in which the prosecution was conducted gave scope for considerable criticism. Much has been made by way of criticism of the conduct of the prosecution by counsel for the defendant in this Court. What has to be considered by me is: is there a basis upon which it can be shown that there are legal flaws in the conduct of the case by the prosecution and in the decision of the Magistrates' Court?

A convenient course to adopt in dealing with the three matters (which were also heard together before me in this Court) is to take the information which was laid under s27(1) of the *Poisons Act* 1962 first.

Section 27(1) provides:–

> "No person other than an authorized person shall have in his possession or disposition any raw opium, prepared opium, medicinal opium, coca leaves, crude cocaine, ecgonine, Indian hemp or other drug of addiction or any specified drug or any preparation of them or any of them."

Section 3(1) contains a definition of "drug of addiction". That expression is there defined to mean:

> "Any substance or preparation specified in Schedule Eight to this Act or added thereto by proclamation."

Section 34 makes any contravention of s27(1) an offence.

Among the drugs listed in the information were dilaudid and pethilorfan. It may be said at the outset that there was no evidence to show that these drugs were drugs which were included in Schedule Eight to the Act. Their names do not appear in Schedule Eight and there was no evidence that any such drugs had been added to that Schedule by proclamation. Physeptone is not listed in Schedule Eight but it appears that physeptone is another name for the drug methadone and this drug is listed in Schedule Eight. Gum of opium is a drug which does not appear as such in the Schedule but the Schedule speaks of "opium in any form".

The grounds of the order nisi to review the conviction under s27(1) were:—

(1) That the Court was wrong in convicting the defendant in that—

(a) there was no evidence or no sufficient evidence that the substance left at the Police Laboratory by Constable Hanson were the substances referred to in the analyst's certificate;

(b) there being no evidence given at the hearing herein that the defendant had been given an opportunity to require the attendance of the analyst as a witness, the certificate of analysis should not have been admitted as evidence.

(2) That the Court ought to have dismissed the said information.

Constable Hanson produced to the Magistrates' Court a plastic bag "containing a number of bottles etc." which he identified as being those found in the defendant's possession and as being those taken by him to the Police Forensic Science Laboratory. He further gave evidence that in the presence of a clerk at the laboratory he had placed the bottles and containers into a plastic bag which in his presence had then been sealed, that the details had then been written on it, and that he and the clerk had both signed the bag. The bag had then been placed in a box specifically kept for that purpose. The certificate of analysis had been signed by one Terry Edward Oughtred. Constable Hanson had not handed anything to Oughtred. The certificate was dated 29 June 1971. It was on the notepaper of "The Norman McCallum Police Forensic Science Laboratory" and it was headed "Certificate of Analysis". The certificate stated that Oughtred certified that on

23 June 1971 he had received a sealed plastic bag labelled "10.40 a.m. 4/6/71 re Rodney James Thomas V L. Hanson 1/C 14893", and that that sealed plastic bag contained five items which are then listed in the certificate. Oughtred certified in the certificate that he had analysed samples of those items with the results that he then set out in the certificate.

The results do not refer to two of the five items. Of the three items for which results are given two refer to drugs which are not listed in the information. One does refer to a drug listed in the information. This item consisted of 17 white tablets which are stated to be "Physeptone tablets which contain Methadone".

Mr Richter submitted that there was a gap in the evidence which left it unclear or at least did not establish with any precision that the substances left by Constable Hanson at the laboratory were the substances which were the subject of analysis by Oughtred. He relied upon the absence of evidence expressly linking the substances left by Constable Hanson with those received by the analyst, upon the discrepancies between the information on the one hand and the certificate on the other hand and upon the fact that the analyst did not give an answer with respect to a number of the substances analysed.

All these matters are proper matters for criticism but the Magistrates' Court did in fact accept the certificate as evidence. It was a question of fact for the Magistrates' Court to decide whether there was sufficient evidence that the substances found in the defendants' possession by Constable Hanson were the substances referred to in the analyst's certificate. The point was argued before the Magistrates' Court and that court was satisfied on this point. I am not persuaded that this decision was one which no reasonable court could come to on the evidence. After all, there is an inherent probability that the substances would have been properly dealt with at the laboratory. Furthermore, there is the description on the label as recorded in the certificate of analysis which does afford evidence linking what was left by Constable Hanson with what was analysed by Oughtred. I therefore hold that this ground of the order nisi is not made out.

Ground 1(b) is based upon the argument that it is for the prosecution to establish that the provisions of s56(2) of the *Poisons Act* have been complied with. Section 56, in its present form, was inserted in the Act by the *Poisons (Amendment) Act* 1971 (No. 8233). It is first necessary to point out that the *Poisons (Amendment) Act* 1971 was enacted on 14 December 1971. The certificate is dated 29 June 1971, and the hearing at the Brighton Magistrates' Court was 20 June 1972. The result was that for the certificate to be admissible at the hearing, it had to comply with the Act No. 8233, notwithstanding the fact that it had been issued at a time when the earlier section was in operation.

Section 56(1) makes a certificate purporting to be signed by an analyst evidence of the result of an analysis. Section 56(2) provides that the provisions of s56(1) do not apply if a copy of the certificate was not served on the defendant at least seven days before the hearing, or if the defendant gave a notice requiring the analyst to attend as a witness.

So far as is relevant, the two sub-sections are in the following terms:–

> "56.(1) In any legal proceedings for offences against this Act the production of a certificate purporting to be signed by an analyst...with respect to any analysis...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—
>
> (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; ....
>
> (2) The provisions of subs(1) do not apply—
>
> (a) if a copy of the certificate was not served on the defendant at least seven days before the hearing; or
>
> (b) if the defendant, at least three days before the hearing, gave notice in writing personally or by post to the informant and to the analyst...that he requires the analyst...to attend as a witness."

In substance, Mr Richter's submission was that the provisions of s56(2) and, in particular of subs(2)(a), constituted a condition precedent to the admissibility of a certificate under subs(1),

and that it was necessary for the prosecution to give evidence of service of a copy of the certificate to show that the section had been strictly complied with. Mr Graham submitted that subs(1) was an enabling section and that subs(2) provided circumstances under which the certificate could not be used as evidence but that subs(2) only operated where the defendant adduced evidence, either through a witness for the prosecution or by himself calling evidence to show that those prohibitory provisions came into effect.

In my opinion, it is the latter contention which is the correct way of reading this section. In my opinion, s56(1) is intended to facilitate the proof of what has been done by an expert. Section 56(2) is drafted in negative terms which support the view that it only excludes the admission of a certificate where there is evidence to establish that a certificate, otherwise admissible, must be excluded by reason of the failure to give the copy or by reason of a notice requiring the analyst's attendance at the court. (With s56(1) and s56(2) may be contrasted s80F(1), s80F(2), and s80F(3) of the *Motor Car Act* 1958.)

The result is that I hold that a certificate is admissible provided subs(1) is complied with and that it remains admissible unless there is evidence to show that the provisions of subs(2) come into operation. There was no such evidence and I therefore find that ground 1(b) of the order nisi to review has not been made out.

What is stated as ground 2 of the order nisi is "that the court ought to have dismissed the said information". There might be no objection to the use of these extremely general terms, if the words were linked to a ground which particularized some specified matter in relation to the conviction. However, in my opinion, there is very grave objection to a ground being expressed in terms such as this. In my opinion, it does not amount to a ground at all and its use should be avoided. *[His Honour then considered and refused an application to amend ground 2 of the order nisi and then continued:–]*

In fairness to Mr Richter's argument I add that, even if it had been open to him to make the wider attack upon this conviction which he desired to do, I would not have found any error in the conviction. This is partly because the certificate of analysis established possession of at least one drug of addiction (Methadone) and this would have been sufficient on its own to sustain the conviction. The further reason is as will be apparent from what I shall say later with respect to the admissions by the defendant that I consider that there was evidence before the Magistrates' Court which established possession of all the drugs of addiction listed in the information.

There was also one other point argued by Mr Richter which though outside the grounds of the order nisi, should be mentioned. Mr Richter submitted that the wording of the certificate of analysis did not establish that Oughtred was an "analyst" within s56. In the certificate Oughtred described himself as "an analyst employed by the Government of Victoria". Section 56(1) says that a certificate "purporting to be signed by an analyst" shall be sufficient evidence of the matters referred to in s56(1)(a). Section 56(5) defines an "analyst". One meaning is "a person employed by the Government of Victoria as an analyst". In my opinion, the words used in the certificate did not merely show that Oughtred was an analyst and was employed by the Government of Victoria in some unspecified capacity, but showed that he was a person employed by the Government of Victoria as an analyst. It follows from what I have said that the order nisi to review the conviction for unlawful possession of drugs of addiction will be discharged.

I turn now to deal with the order nisi to review the conviction for the use of a drug of addiction. Only one drug was alleged to have been used by the defendant for the purpose of self-administration. This drug was cocaine. The grounds of the order nisi to review this conviction are as follows:–

(1) That the Court was wrong in convicting the defendant in that—

(a) there was no evidence other than the admission of the defendant that the drug used was cocaine;

(b) that in the absence of any evidence as to the defendant's qualification or ability to know whether the substance used for self-administration was in fact cocaine the Court should have found that there was no admissible evidence of such user of the drug by the defendant;

(c) that there was no evidence or no sufficient evidence of user of such drug on 2 June 1971.

(2) That the Court ought to have dismissed the said information.

Grounds 1(a) and (b) are, in substance, different ways of expressing the same point. In order to understand the point it is necessary to turn to the evidence which was relied upon by the prosecution to establish that the defendant had used cocaine for the purpose of self-administration. The question of the date upon which the drug was used will be left on one side for the moment.

The account of what took place when the defendant was intercepted at 6 Wellington Street is to be taken from the answering affidavit of Constable Hanson. In that affidavit he sets out what he swears to be an accurate statement of the examination-in-chief of his evidence at the Magistrates' Court.

Constable Hanson's evidence was that what took place at 6 Wellington Street was that he saw the defendant tiptoeing through a rear door of the premises. The defendant was carrying a plastic bag with a number of packages and parcels in it. Hanson asked the defendant his name, which he gave. Hanson asked the defendant what he had in the plastic bag. The defendant did not answer immediately. Hanson opened the bag and looked at what was in it. There was a container in which there were a number of used syringes with their tips and a number of bottles and cardboard containers. On three of the containers were the words "Pethilorfan". On one of the bottles in the container was the word "Physeptone". Another bottle was marked "Gum of Opium", and there were numerous other items similarly marked. The defendant admitted that he knew what the bottles and packages contained and he said that he had used the syringes to administer the drugs that he had into himself. The words used seemed clearly enough to refer to the drugs which the defendant had in his possession when intercepted. Hanson then asked the further question: "What are the drugs known to you to be?" The defendant answered: "There is cocaine, morphine and diamorphine and physeptone." Hanson said: "Do you realize that these are drugs of addiction?", and the defendant said, yes he did. The defendant then said that he had obtained these drugs by breaking and entering a chemist's shop in Brighton and getting the drugs from what the defendant called "the locked drug cabinet". That is all that transpired at 6 Wellington Street which is relevant to this charge.

Later at the police station questions were put to the defendant, and these and his answers were recorded in the record of interview. That record shows that the constable put to the defendant the statement that he had found in his possession drugs, the names of which were specified. Among them was cocaine. The defendant was asked if this was correct. He answered "Yes", and again in answer to a question said that he realized that the drugs were drugs of addiction. He said he was hiding the drugs so that he wouldn't get caught with them. He said he had been taking and administering the drugs to himself by intravenous injection by way of a syringe. When asked specifically "What drugs have you administered in this way?", the defendant replied: "cocaine, morphine and diamorphine." He was then asked how many times he had done this. He answered about 70 or 80 times in all. He then explained that he had obtained the drugs by breaking into a chemist's shop in Church Street, Brighton, and stealing them. He pointed out how he got into the shop and said that he went to the drug cupboard which was open and that he then placed the drugs into a pillow-case and took them back to 6 Wellington Street. The constable asked him what he did when he got there, and his answer was that he "sorted the shit out". He was asked to explain what he meant by this and he answered: "I sorted out which of the drugs that I could use and that I couldn't use. I put the stuff I couldn't use in a bag and eventually gave it to one of my mates to throw away."

Mr Richter submitted that the admissions which are contained in the evidence that I have referred to were not sufficient to enable the court to convict the defendant. He submitted that it was not clear what it was that the defendant was admitting and, further and more importantly, that there was nothing in the materials to show that the defendant was an expert in the identification of the materials he was found with. Counsel therefore submitted that the admission of the identity of the drugs was based on hearsay evidence. He contended that all that had happened was that Hanson had read what was on the labels, that the constable had then put the names he had read to the defendant and that the defendant had agreed with what the constable had put to him. Thus, said Mr Richter, the defendant was doing no more than giving hearsay evidence, derived from the

names on the labels, about a matter of which he had no personal knowledge. He submitted that expert evidence was required to identify the drugs but that even if technically the evidence of the defendant's admission was admissible it was of such little weight that it was insufficient to afford a basis for the conviction of the defendant.

There is a body of authority which deals with the law relating to the admissibility of evidence by way of admission where the admission relates to something of which the person making the admission had no personal knowledge. Some of these authorities deal directly with the question of the extent to which such evidence is admissible. Others of the cases deal with the extent to which a court may or may not be entitled to rely on such admissions as forming a satisfactory and proper basis for the conviction of a defendant. Some of the authorities deal with the matter in the context of a civil case, some deal with it in the context of a criminal charge.

Stated in chronological order, the cases dealing with this matter are: *Lustre Hosiery Ltd v York* [1935] HCA 71; (1935) 54 CLR 134; *Smith v Joyce* [1954] HCA 15; (1954) 89 CLR 529; *Allen v Roughley* [1955] HCA 62; (1955) 94 CLR 98; [1955] ALR 1017; *Surujpaul v R* [1958] UKPC 17; [1958] 1 WLR 1050; [1958] 3 All ER 300; (1958) 42 Cr App R 266; *Comptroller of Customs v Western Lectric Co Ltd* [1966] AC 367; [1965] 3 All ER 599; *Horne v Comino; Ex parte Comino* [1966] Qd R 202; *Bird v Adams* [1972] Crim LR 174.

In *Lustre Hosiery Ltd v York*, *supra*, the High Court examined such authorities as existed at that date with respect to the admission of evidence of this character. The cases examined were all civil cases as was the case then before the Court. However, the Court (in a joint judgment delivered by Rich, Dixon, Evatt and McTiernan, JJ) stated the principle in unqualified terms. After a review of the authorities, their Honours said (at pp143-4):

> "This course of authority seems consistent with the view that words or conduct amount to an admission receivable in evidence against the party if they disclose an intention to affirm or acknowledge the existence of a fact whatever be the party's source of information or belief. In determining whether he intends to affirm or acknowledge a state of facts the party's knowledge or source of information may be material. For if he states that another person has told him of it, and it appears that he has additional sources of information to the like effect, it may be right to understand him as implying a belief in what he repeats ... But although the meaning of his words or conduct may depend upon the state of his knowledge, once that meaning appears and an intention is disclosed to assert or acknowledge the state of facts, its admissibility in evidence as an admission is independent of the party's actual knowledge of the true facts. When admitted in evidence, however, its probative force must be determined by reference to the circumstances in which it is made and may depend altogether upon the party's source of knowledge. If it appears that he had no knowledge or that, although he had some means of knowledge, he had formed no certain or considered belief and indicated nothing amounting to a personal judgment or conclusion of his own, the probative force of the admission may be so small that a jury ought not to be allowed to act upon it alone, or in preference to opposing evidence." (See also pp138-9).

In *Smith v Joyce*, *supra*, the High Court, in another joint judgment (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ) reaffirmed the principle in a passage which included this sentence (at p535):

> "Indeed, if the words are sufficiently clear they will constitute such evidence" (i.e. of an admission) "even though it may appear quite clearly that the party had no knowledge whatever of the fact or facts which he has purported to admit."

In *Allen v Roughley*, *supra*, Kitto J applied the principle in relation to an admission of title to land (at p142).

All these cases were civil cases. *Surujpaul v R*, *supra*, and *Comptroller of Customs v Western Lectric Co Ltd*, *supra*, are both criminal cases. Each is a decision of the Privy Council and, in each case, the Judicial Committee refused to allow a criminal conviction to stand when the only evidence to support it was evidence by way of an admission by the accused, which was shown to relate to matters of which the person making it had no personal knowledge. The rejection of the admission in each case was emphatic, but it was expressed in language which, in my opinion, related to weight and not admissibility.

The language used in *Surujpaul v R*, *supra*, is certainly very strong. This may have been due to the seriousness of the matter, for the admission was by an alleged accessory to his co-conspirators committing murder, although he had no personal knowledge of the matter and although the co-conspirators were acquitted of murder by the jury who also tried the appellant. What their Lordships said (at WLR p1056) was:

> "It is difficult to see how it (the admission) can afford any evidence as to the actual commission of the crime at which by their verdict the jury have found he was not proved to have been present and assisting. A voluntary statement made by an accused person is admissible as a 'confession'. He can confess as to his own acts, knowledge or intentions, but he cannot 'confess' as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an 'admission' of this nature."

In my opinion, what is intended to be conveyed by this passage is that, although such a "confession" or "admission" may still be called by those names, such a "confession" or "admission" will not suffice to prove the matter confessed or admitted. The "confession" or "admission" has no weight, is what, in my opinion, their Lordships were saying.

In my opinion, that this was what was intended is borne out by the judgment in *Comptroller of Customs v Western Lectric Co Ltd*, *supra*.

In that case, the admission was as to the country of origin of certain goods. It was clear that the only source of the declarant's knowledge was the labels on the goods. The defendant had been convicted of a Customs offence and the Judicial Committee said (at AC p371):

> "Their Lordships are of opinion that the conviction ought not to be allowed to rest on the admission alone. If a man admits something of which he knows nothing it is of no real evidential value ... Their Lordships do not regard the admission here made as of evidential value so as to support the conviction of the respondents."

The passage between the sentences quoted refers to *Bulley v Bulley* (1874) 9 Ch App 739. This is also a case where an admission based on hearsay was rejected as of no evidential value: per Mellish LJ, at p751; see also the reference to this case in *Lustre Hosiery Ltd v York*, *supra*, at p143.

Shortly after *Comptroller of Customs v Western Lectric Co Ltd*, *supra*, had been decided, the Full Court of the Supreme Court of Queensland (Gibbs, Hart and Lucas JJ) considered the question of the effect in criminal cases of admissions based on hearsay. The case was *Horne v Comino; Ex parte Comino*, *supra*. The Court restricted its observations to saying that the two Privy Council cases appeared to show that such admissions were of no evidential value in a criminal case (at p208).

On this analysis, what is said in *Surujpaul v R*, *supra*, and *Comptroller of Customs v Western Lectric Co Ltd*, *supra*, is consistent with what the High Court said in the very carefully expressed statement in *Lustre Hosiery Ltd v York*, *supra*. In my opinion, the result is that evidence consisting of an admission based on hearsay is not inadmissible in a criminal case, any more than it is in a civil case, but the circumstances under which it is of any weight and is capable of supporting an adverse finding against the party making it, may well be far more restricted in a criminal case than in a civil case.

The view that I have just expressed is, in my opinion, supported by a recent decision of a Divisional Court (comprised of Lord Widgery LCJ, O'Connor and Lawson JJ). This case is *Bird v Adams*, *supra*.

That court was considering the propriety of a conviction against a defendant for possession of LSD, contrary to the relevant English legislation. The evidence was that the defendant had admitted that he had LSD in his possession. The contention of the appellant was that this admission was not sufficient to sustain the conviction because it rested simply upon the defendant himself relying upon the hearsay material constituted by some markings on the drugs. The court rejected this contention. They pointed to the existence of evidence in the case that the defendant had

trafficked in LSD. They do not elaborate very much in their reasons but it is a clear inference from what was said that the court took the view that the evidence showed that, because the defendant was a man who had a degree of familiarity with the use of this drug by reason of the fact that he dealt in it, therefore he was in a position to make an admission as to the nature of the substance in his possession which carried weight. Hence the Divisional Court held that it was a reasonable inference for the court below to have concluded that the defendant knew what it was he was talking about when he made the admission that the drug in his possession was LSD, and that therefore there was a proper basis upon which the court below had ruled that there was a case to answer. (The report ends at this point, but as the defendant had been convicted, after calling no evidence, and as the appeal was dismissed, the Divisional Court must have been satisfied that the conviction should not be set aside.)

I return now to the evidence against the defendant in this case. I set this out in some detail earlier. In my opinion, that evidence does justify the submission which Mr Graham made. That submission was that the evidence showed a considerable degree of familiarity by the defendant with what are classified in the *Poisons Act* as drugs of addiction. This degree of familiarity was such as to enable the defendant to have a reasonably reliable knowledge of what it was that he had in his possession. The defendant admitted that he had taken the drugs from a chemist's shop and from a dangerous drugs cupboard in that chemist's shop. For a man who also admitted to having been addicted to drugs by injecting them into himself and to having done that for some time, it seems to me that the Magistrates' Court was quite justified in accepting the admission which he made as to the nature of the substances found in his possession and in relying upon that evidence as sufficient to justify a conviction. The defendant admitted he had taken cocaine from the chemist's shop and admitted that he had in the past administered cocaine to himself.

It is true that the analyst's certificate did not reveal the presence of cocaine in the substances which were analysed by Oughtred. I do not regard this as being sufficient to show that in law the Magistrates' Court was not justified in relying upon the evidence of the defendant that he had taken drugs which included cocaine from a chemist's shop shortly prior to the time when he was intercepted and that he had used those drugs, i.e. those which he had taken, to administer to himself between the time when he took them and the time when he was apprehended by the police. I therefore hold that the ground of the order nisi expressed in par. 1(a) and (b) of the order nisi is not made out.

Ground 1(c) was that there was no evidence, or no sufficient evidence, of user of such drug on 2 June 1971. From what I have already said it will be apparent that I have come to the conclusion that it was open to the Magistrates' Court to find that the defendant had used cocaine taken from the chemist's shop shortly before 3 June 1971 to administer to himself. There was no evidence that this administration had occurred on 2 June 1971, but the evidence did tie it to a period of a week or so prior to 3 June 1971. It is not material for the prosecution to establish the exact date upon which the offence was committed, that is to say, the conviction is not vitiated by the fact that the evidence failed to establish that the offence took place on the very day alleged in the information: *Justices Act* 1958, s88(3). It would be a much more serious matter if the evidence had not indicated any date at all as being the date upon which the self-administration had taken place. An information for an offence under the *Justices Act* 1958 (which covers the laying of the information under the *Poisons Act*) must be laid within 12 months after the commission of the offence. In this case, the evidence showed that the offence had been committed within that period. It follows from what I have said that I hold that this ground of the order nisi has not been made out either, so that this order nisi will also be discharged.

The third information related to the charge laid under the *Crimes Act* 1958. The defendant was charged with breaking and entering a particular shop of a particular person and stealing a quantity of drugs alleged to be the property of a particular person. The prosecution led no evidence at all to establish these facts. There was the admission of the defendant that he had broken and entered a chemist's shop in Church Street, Brighton, and stolen a quantity of drugs from that shop. There was no evidence at all that that shop was located at No. 24 Church Street or that it was the shop of Clifford Matthews or that the goods which were stolen were the property of Clifford Matthews.

This is a serious omission in the case for the prosecution. Proof of larceny was one element

of this charge and there are well-established principles of law relating to the charge of larceny which control the significance of the proof that the property stolen was the property of a person. The information may lay the property in a specific person, or it may lay the property in persons unknown. If the property is laid as being the property of a person named, then there must be, at all events, some evidence to show that that named person was the owner of the goods which are alleged to have been stolen. If the property is alleged to be the property of persons unknown, then the evidence must show that the Crown is unable to ascertain who was the owner of the goods. These principles are to be found set out, so far as Australia is concerned, in an early decision of the Full Court of the Supreme Court of New South Wales. The case is *R v Isaacs* (1884) 5 LR (NSW) 369; 1 WN (NSW) 31. The relevant passage is in the judgment of Martin CJ (at p372) where he said:–

> "It has always been the law, and is one of the things essential in cases of larceny, that the ownership of the property stolen should be proved. If, at the trial, it were shown that the goods stolen were the goods of A., instead of being the goods of B. as charged, an amendment of the information could be made. But here no such amendment was applied for. The prisoner was found guilty of receiving the goods, knowing them to be stolen, and that being so, the question is whether there ought to have been a conviction, there being no proof whatever as to whom the goods belonged. An information charging the prisoner with receiving goods the property of some person to the Attorney-General unknown, would have sufficed; but it would not have sufficed if it turned out that the owner was known. It is an essential thing to show that they were either the property of a person unknown, or of some person named."

This case has the authority of the High Court, for it was specifically approved in *Trainer v R* [1906] HCA 50; (1906) 4 CLR 126; 8 ALR 53, especially at (CLR) pp132-4. See also *R v White* (1783) 1 Leach 252; *R v Hempenstall* [1937] St R Qd 343; 31 QJPR 164; *R v McCoy* [1938] St R Qd 249; 32 QJPR 107; Howard, *Australian Criminal Law*, 2nd ed., p235. I do not consider that the *Presentment Rules* under the *Crimes Act* 1958 have affected these principles: see Sixth Schedule, r6, and cf. Sixth Schedule, Form 11. In my opinion, the application of the principles in these cases leads to the conclusion that the informant failed to establish an essential element of his case.

Mr Graham frankly conceded that there were difficulties in sustaining this conviction. He sought to overcome these by applying for leave to amend the information and then to have it remitted to the Magistrates' Court. I do not consider that this is an appropriate case in which to grant leave to amend.

The order nisi to review this conviction was granted on a number of grounds. These included:–

> (1) That the Court was wrong in convicting the defendant in that—
>
> (c) there was no evidence or no sufficient evidence of the ownership of the goods alleged to have been stolen;
>
> (d) there was no evidence that ... the goods alleged to have been stolen were the property of the said Clifford Matthews.

It follows from what I have said above that I hold that these grounds have been made out and that this order nisi should be made absolute on these grounds.

The orders in each of the matters are as follows:–

> (1) Order nisi to review the conviction of the defendant on the information under s27(1) of the *Poisons Act* 1962: order nisi discharged. No order as to costs.
>
> (2) Order nisi to review the conviction of the defendant on the information under s23 of the *Poisons Act* 1962: order nisi discharged. No order as to costs.
>
> (3) Order nisi to review the conviction of the defendant on the information under s134 of the *Crimes Act* 1958: order nisi made absolute on grounds (1)(c) and (d).

Order of Magistrates' Court at Brighton made 20 June 1972 set aside. In lieu thereof order that the information be dismissed. No order as to costs. Orders accordingly.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: Rainer M. Ellinghaus and Weill.