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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v HOLMAN and BRINKMAN

Lush, Anderson and Tadgell JJ

25 November 1981 — [1982] VicRp 46; [1982] VR 471; (1981) 4 A Crim R 446

CRIMINAL LAW – TRAFFICKING, POSSESSION OF SUBSTANTIAL QUANTITY OF CANNABIS L FOR THE PURPOSE OF TRAFFICKING IN THE FUTURE – NOT SUFFICIENT TO CONVICT ON TRAFFICKING CHARGE: *POISONS ACT* 1962, S32.

LUSH J: On 1st September 1981 the two applicants were before the County Court upon a presentment containing two counts of trafficking in a drug of addiction. The applicant Holman was charged alone on the first count. On the second count, the two applicants were charged together. In the first count, the time attributed to the commission of the offence was the period 27th October 1977 to 23rd December 1977. The offence charged in the second count was alleged to have happened on 23rd December 1977. Both applicants pleaded not guilty to the appropriate counts. Holman was found not guilty on count 1; both were found guilty on count 2.

Count 1 arose out of the finding, on 27th October 1977, in the Mount Toolebewong area south-east of Healesville of a small plantation of cannabis. The second count arose out of the finding by police on 14th December 1977 in the same area, of three fenced plots each containing growing cannabis plants. The plants were in considerable number, and the total weight of them when the police removed them was 610 kilograms. Police officers kept the three plots under surveillance, and on 23rd December arrested the two applicants in their vicinity. The Crown relied, in proof of the charge in count 2, upon the fact that cannabis was growing in the three plots in large quantities and the fact that the two applicants had been found in close proximity and had given what the Crown submitted were unsatisfactory explanations for their presence. In addition, evidence was given that on 17th August 1977 Brinkman had signed as purchaser a Sale Note by the terms of which he purchased an area of about 93 acres within which the three plots were found. It appeared that Brinkman depended upon obtaining finance to complete this sale, but was refused a loan after making application.

No formal step seems to have been taken to end the contract, though there was some evidence that persons connected with it regarded it as at an end. Certainly, it was not completed according to its terms. However, after his arrest, according to the evidence, Brinkman had shown a continuing interest in the purchase of the land. There was also evidence that Brinkman had done some manual work upon the 93 acres. He described this as clearing a track: the Crown's allegation was that what he had been doing had been making the tracks impassable by felling trees across them. The plots were fenced with wire and wire netting, and there was some evidence, admitted as scientific, that a pair of pliers found in Holman's possession had been used in the construction of the fences. Further, a search of Brinkman's dwelling led to the finding of a number of pamphlets and books dealing with cannabis.

The same grounds of appeal were taken by each applicant, raising two substantial propositions. The first of these was that the learned Judge did not direct the jury correctly on the offence of trafficking, and the second was that there was no proper direction as to what facts might be found to constitute possession of the land on which the three plots were found, or might constitute the controlling of the growing crops, for the purposes of *Poisons Act* 1962 s28.

The first of these points was developed by Mr Cummins and Mr Dane, who appeared for Holman, into the proposition that there was in fact no evidence which could support a conviction for trafficking. Mr Barnett, who appeared for Brinkman, adopted and supported this argument, and relied also upon the second proposition in the notices of application for leave to appeal, namely that there had not been a proper direction as to what constituted possession or occupation of land or

control of the growing crop for the purposes of *Poisons Act* s28. Counsel for Holman were at first disposed to abandon this second proposition, but later reasserted it. The substantial argument, however, was whether the evidence was sufficient to support a conviction for trafficking.

The charge was laid under *Poisons Act* 1962 s32(1), which provides that "Every person who prepares, manufactures, sells or deals or trafficks in, the fresh or dried parts" of cannabis shall be guilty of a misdemeanour. Section 32(5) provides that where a person has in his possession fresh or dried parts of cannabis in a quantity exceeding that specified in Schedule Eleven (the quantity found on the three plots exceed the quantity specified) then the finding of the relevant material in the relevant quantity in his possession "shall be *prima facie* evidence that the person had those parts in that quantity in his possession for the purpose of trafficking therein." There appears to be a typographical error in the printing of the line following the words "the finding in his possession" in the sub-section, but no point was made of this before us. If there is an error, it goes back to the original printing of s32 in Act No. 8961, s6, in 1976.

If it be assumed that the jury found, upon sufficient evidence, that the applicants "occupied" either the three fenced plots or some larger area including them, or that the applicants controlled the crops in the plots, the applicants were by the operation of s28 deemed to be in possession of the crops. The crops constituted fresh parts of cannabis plants exceeding 100 grams and accordingly by the operation of s32(5) the finding of them in the possession of the applicants was *prima facie* evidence that they had the parts in the quantity exceeding 600 kilograms in their possession for the purpose of trafficking in them. The identification of entire growing plants as the "fresh parts" of plants is in accordance with the decision of this Court in *R v Tsesmetzis* (28.4.80).

The jury was entitled to infer, if they considered that the facts were that the applicants were in possession of the land or in control, of the crops, that the applicants had planted the crops either as seed or seedlings, and had tended them during growths. The question then is whether those facts and presumptions combined can support a finding that the applicants trafficked in cannabis.

Before turning to the meaning of the word trafficking, there are further comments to be made on the Act. In the first place, there is no offence of "being in possession for the purpose of trafficking", nor, any offences of preparing or intending to traffic. Secondly, if the growing of a substantial crop of cannabis was itself to be placed in the same criminal category as preparing, manufacturing, selling or dealing, one would have expected that, at least in s32(1) which deals with cannabis only, growing would have been expressly mentioned. It is common knowledge that cannabis can be grown in a variety of Australian climates. Thirdly, and reinforcing the second comment, the words selected by the draftsman of s32(1) – "prepares, manufactures, sells or deals ... in the fresh or dried parts" do not suggest an intention to include the growing of plants, but rather to apply controls at the point when the plants are being put into saleable form by preparation or manufacture, and at subsequent times when they become the subject of selling or dealing. This approach leads to the result that "growing" will only lie within the section if, and in circumstances in which, it can be classed as trafficking, and trafficking or "traffics in" are curious words to select to achieve this result.

In the case of *Tsesmetzis* (above), upon facts very similar to the present in the respects now under consideration, the charge laid was "selling", and the conviction obtained by the Crown was upheld upon the basis that, the applicant having admitted that he intended ultimately to sell the crop, it was in his possession for sale, and the definition of "sell" in s3 produced the result that he was guilty of the offence of selling. Here however the charge is trafficking, a word which is not defined, and in the interpretation of which the definition of "sell" cannot be called in aid.

As a matter of construction of the words of the Act unaided by authority, I would hold that the facts here proved, or, for the purposes of this judgment, assumed, established an offence of possession contrary to s27, which was not charged, and no other offence. The only fact or inference available from the possession of the applicants as growers is that they were in possession for the purposes of trafficking, (s35(5)), but this is not a separate offence. The facts, independently of s35(5), justify no further inference beyond that established by the sub-section. The cannabis was plainly destined, at some time and in some way, for a market, but to attempt to answer the questions "when?" and "how?" would be to guess. Accordingly, nothing more is shown beyond the fact that

the applicants were in possession for the purposes of trafficking. By contract, in *Tsesmetzis' Case* there was evidence of an intention to sell in the future. In *R v Piscitelli* (unreported, Full Court, 7.8.1979) a grower of cannabis who had been convicted of trafficking was before the Court. He abandoned his application for leave to appeal against conviction, and the question whether he had properly been convicted was therefore not considered by the Court. His subsequent unsuccessful attempt to revive his appeal is reported in [1981] VicRp 6; [1981] VR 50; (1980) 6 A Crim R 368.

The authorities do not, in my view, lead to a conclusion different from that which I have derived from the words of the sub-section. I would refer first to the decision of this Court in *R v Jed Elem* [1982] VicRp 27; [1982] VR 295; 4 A Crim R 331. At page 9 of the joint judgment of the members of the Court (Young CJ, Crockett and King JJ) the following passage occurs:-

> "It (s32(5)) does not of itself provide evidence of trafficking, but it is nevertheless an important provision from the point of view of the Crown because once there is evidence of possession for the purposes of trafficking, then slight evidence of acts which might amount to trafficking may be all that is necessary to complete the Crown Case."

The Court went on to refer to the use in combination, as in the present case, of the presumptions provided in ss28 and 32(5), and observed:-

> "It behoves the Courts, however, to be astute to see that provisions of this kind are strictly construed and fairly applied ...But the deeming provisions should be allowed no greater operation or effect than Parliament has expressed."

In *Matthews v Towers* [1922] VicLawRp 40; (1922) VLR 476 at p479; 28 ALR 233; 43 ALT 212, Irvine CJ, delivering the judgment of the Court in a case in which the ultimate decision was that the making of a gift of liquor was not trafficking in liquor within the meaning of the *Licensing Act* 1915, said:-

> "The word 'traffic' as an English word, has at least two distinct meanings, and possibly more; but we think that, in connection with the subject of this Act, only one of those meanings is applicable, and that is, a dealing in or handing over of liquor in exchange for money or other consideration. It was, in effect, admitted that such is the natural or 'dictionary' meaning; but it was argued, first, that the context shows that it has a different and wider meaning; and, secondly, that the history of the licensing law in Victoria shows that it was intended to have the sense of any disposal of liquor, whether for consideration or without consideration. In support of the first argument, reliance was placed upon the connotation of the words 'sale or barter of or traffic in,' and it was contended that if 'traffic' is to receive any interpretation distinct from 'sale' or 'barter' it must include gift. We do not think such an inference a legitimate one."

In *Falconer v Pedersen* [1974] VicRp 24; (1974) VR 185, dealing with a case in which a messenger without reward obtained Indian hemp from a supplier and delivered it to the buyer who had requested him to get it, Anderson J observed, at p187, that s32(a) of the *Poisons Act*, in its then form, was cast in very wide terms. He referred to the gathering together of a number of verbs in s32(a) and to the definition of "sell" in s3. At p188 he continued:

> "So lavish is the use of verbs in the definition of 'sell' in s3 and in s32 and elsewhere that I do not consider that the expression 'traffic in' appearing in s32 is to be given a limited meaning which is exclusive of the other expressions in the Act; on the contrary, it is used, I think, in an effort to catch up any transaction in a drug of addiction which may have escaped the wide net cast by the other provisions of the Act ... I think that the expression 'traffic in' is intended to encompass any association with a drug of addiction not otherwise dealt with and involves at least the handling of such a drug in a conscious manner in the course of a dealing in it."

I respectfully agree with the view that the words 'traffics in" in s32 are not to be construed as exclusive of the transactions covered by the verbs which the draftsman has used. On the contrary, they may include various acts and transactions covered by the other verbs, and they will certainly include much else, as the facts of *Falconer v Pedersen* indicate. In comparing the facts of that case with those of the present case, it may be pointed out that the defendant in *Falconer v Pedersen* had at one time been in possession of the relevant drug, and when in possession of it had been doing something with it which assisted in the transferring of ownership and possession of the drug to the buyer. He had, in fact, transported and delivered it. In the present case, upon my appreciation of the facts, nothing more than possession and intention to traffic in the future is shown.

In *Falconer v Pedersen*, Anderson J was dealing with a case stated from the County Court. At p188, there is quoted a passage from that case, written by the County Court Judge who stated it, which states that the Judge considered:-

> "that the use of the verb 'traffic' in s32 rendered criminal the acts of a person knowingly engaged in the movement of the drugs specified in the section from the source to the ultimate user in the course of an illicit trade in such drugs, and that this was so whether or not any such acts were performed without reward or on an isolated occasion or at the request of the ultimate user".

The learned Judges whose words I have quoted above were concerned only to say whether the factual situations before them constituted trafficking in the context of the relevant Act. Their words should be read with this in mind, but in the present case, since the question is whether there was anything in the evidence which could possibly justify a finding of trafficking, the inquiry for the meaning of trafficking must be wider. In my opinion, I think consistently with the passages which I have quoted, trafficking connotes an activity in a commercial setting, that is to say a setting in which it can fairly be inferred that someone involved is making a profit, though not necessarily the person charged with trafficking. Secondly, I would adopt the concept that trafficking connotes participation in the progress of goods from source to consumer. The alleged participant may be no more than a carrier, even a voluntary carrier, and it is not necessary that either title or possession should at any stage be his. Thirdly, the concept of movement of the goods between source and consumer implies a contact between the alleged trafficker and at least one other person. Trafficking may be proved by a delivery or selling to another person, or possibly, by purchase or receipt from another person. In some situations it may be sufficient if it appears or can be inferred that there exists some person who plays the role of the previous person or the next person to the alleged trafficker in the relevant movement, even if the identity of that person is unknown. I do not intend this appreciation to be exhaustive of the possible implications of the word trafficking, but I think it is sufficient for the purposes of the present case.

In my opinion, although the possession of the present applicants can be inferred to have a commercial purpose and indeed a purpose of trafficking in the future, it lacks the other necessary elements to make it trafficking in the present. The applicants were the source of the cannabis in question, in my opinion, and at the stage at which they were arrested they were not shown to be involved in the onward movement of the cannabis to the ultimate consumer. Very possibly they would, if undisturbed, have trafficked in the cannabis in the future, but they had done no overt act which constituted trafficking up to the time of their arrest. Further, they were not shown to be in contact with any other person for the purpose of transferring ownership or possession or for taking any step directed to those ends.

In *Ong Ah Chun v Public Prosecutor* [1980] UKPC 32; [1981] AC 648; [1980] 3 WLR 855; [1981] Crim LR 245, (a case in which the accused man had been observed to transport heroin from one point to another point 20 miles away), the Judicial Committee was concerned with the word "traffics" in connection with controlled drugs in a context in which the relevant legislation had provided an extensive definition. The decision, accordingly, may not be regarded as an authority on the use of the word without any such definition, but it is nevertheless, if I may say so, of value in the present context. I have derived from it the concept that an act of trafficking involves more than one person, and that it requires an overt act beyond mere possession. Relevantly to the opinion which I have expressed that in the present case trafficking had not occurred, although it might be expected to occur in some form at some future time, I quote the following passage from the advice at p862:-

> "This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the *Drugs Act* and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of sections 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer."

Section 10 included in any offence the abetting of, and the doing of acts preparatory to or in furtherance of, the offence. Section 3(c) created an offence of doing or offering to do any act preparatory to or for the purpose of trafficking.) In my opinion, the element of a further overt act is lacking in the present case. I do not regard the fact that some form of cultivation or tending accompanies the possession of a growing crop as a relevant act additional to the possession, and no other act which could be classed as relevant is to be found in the evidence.

For these reasons I hold that the evidence was not sufficient to support the charge of trafficking, and my opinion therefore is that leave to appeal against conviction should be granted, the appeal allowed, and the convictions quashed.

ANDERSON J: I agree in the conclusions of my brother Lush and the orders which he proposes.

TADGELL J: I also agree with the conclusion which has been expressed by Lush J. I assume that the Crown had, with the assistance of s2B and s32(5) of the *Poisons Act*, made out a case that the applicants were in possession of a substantial growing crop of Cannabis L and that *prima facie* it was in their possession for the purpose of their trafficking in it. The learned trial Judge instructed the jury in substance that, if they were satisfied that the Crown had made out that case, and were satisfied that the applicants were generating and therefore increasing the cannabis in their possession by growing it, the charge of trafficking in it had been proved.

The Crown case, as it was put to the jury in the Judge's charge, was that trafficking in the plants "is a process which may occur any time from the first conception of the plants after planting of the seeds to the eventual consumption of the consumer. Growing a plant may be part of this process in that it involves bringing into existence a greater quantity of the plant ... If you are satisfied that that process it being carried on, on a scale which obviously from its extent is not for private consumption but for sale for commercial use, then you may find there is trafficking."

I think that that must be regarded as a misdirection. It is not necessarily wrong to say that the growing of cannabis may be part of a commercial involvement with it which amounts to trafficking. In my opinion, however, merely to grow it in commercial quantities for the purpose of trafficking in it is not to traffic in it. As a matter of accepted use of language, trafficking in a commodity connotes at least an arrangement involving intercourse. It cannot occur unilaterally any more than a conversation can. So much appears to have been implicit in the conclusion of this Court in *Curtin v Farren* [1918] VicLawRp 16; (1918) VLR 144.

The decision of *R v Jed Elem* [1982] VicRp 27; [1982] VR 295; 4 A Crim R 331 to which Lush J has referred also supports the view, as does the decision of the Judicial Committee in *Ong Ah Chun v Public Prosecutor* [1980] UKPC 32. As Lush J has pointed out, the legislation under consideration in the last-mentioned case contained a definition of the verb 'traffic' whereas there is none in our own. It may be noted, however, that the Board said (at p861) that:-

> "Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied."

There was in the present case no evidence that what the appellants had done in relation to the growing crop in their possession in any way concerned others than themselves, either presently or prospectively. The Crown case was therefore deficient. Even had the learned Judge's charge been correct a conviction was not properly open.

I would allow the applications accordingly and agree with the orders which have been proposed.
