44/93

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v EDWARDS

Phillips CJ, Crockett and McDonald, JJ

15, 21 June 1993 — (1993) 67 A Crim R 539

CRIMINAL LAW – EVIDENCE – TRAFFICKING IN/POSSESSION OF CANNABIS – EVIDENCE OF POSSESSION OF SCALES AND PLASTIC BAGS – WHETHER EVIDENCE RELEVANT AND ADMISSIBLE – SENTENCING – POSSESSION OF 4½ KGS OF CANNABIS (RETAIL VALUE $33200) – RELEVANT PRIOR CONVICTIONS – WHETHER 28 MONTHS' IMPRISONMENT WITH 20 MONTHS MINIMUM MANIFESTLY EXCESSIVE.

(1) Evidence of possession of tools is admissible where it appears that the tools might have been used to carry out an alleged crime.

***Thompson and Wran v R* [1968] HCA 21; (1968) 117 CLR 313; [1968] ALR 432; 42 ALJR 16, distinguished.**

(2) Where there was evidence that a set of scales, weights and a quantity of plastic bags were located in the defendant's premises, it was open to the jury to conclude that such equipment might have been used to commit the crime of trafficking in a drug of dependence. Such evidence was relevant and admissible.

(3) Where a person was found guilty of trafficking in a drug of dependence by possessing 4½ kilograms of cannabis (retail value $33200) and admitted a conviction for cultivation of a narcotic plant and four counts of possession of a drug of dependence, no error was shown in sentencing the person to an effective term of 28 months' imprisonment with a minimum of 20 months.

PHILLIPS CJ, CROCKETT and McDONALD JJ: [1] The applicant pleaded not guilty in the County Court at Melbourne to a charge of trafficking in cannabis L, a drug of dependence. The case for the prosecution was that the applicant had been found to be in possession of cannabis L in such quantities and in such circumstances as to lead to the inference that he was engaged in trafficking in the drug. The sole issue at the trial was whether the cannabis that he admittedly possessed was for the applicant's personal use or was trafficked in by him. He was convicted. He also pleaded guilty to a charge of possession of a small quantity of methylamphetamine. The Crown did not dispute that this was for the applicant's own consumption.

The applicant, who is 36, admitted 35 previous convictions from 16 court appearances. They include a conviction for cultivation of a narcotic plant and four counts of possession of a drug of dependence. After hearing a plea for leniency the judge sentenced the applicant to 28 months' imprisonment on the count of possession. The effective term was one of 28 months' imprisonment. A non-parole period of 20 months was fixed. The applicant now seeks leave to appeal against both his conviction and sentence. Before turning to those applications something further should be said about the nature of the applicant's possession of cannabis L and the quantities of the drug.

Police intercepted a motor car being driven by the applicant. It was searched. A travel bag was found. In it **[2]** were two plastic bags each containing dried cannabis L. The applicant was taken to a police station where he was searched. There were detected in his underclothes a plastic bag containing cannabis L and a plastic bag containing less than two grams of pure methylamphetamine. It was this latter possession to which the applicant's guilty plea relates. The applicant was then taken by police to his home where a further search took place. In a cupboard in the kitchen were discovered a plastic bucket and a plastic bag each of which contained cannabis L. Also in the cupboard was a suitcase inside which were three plastic bags each containing cannabis L and a brown paper bag which contained two plastic bags each of which held cannabis L. In a cabinet in the sunroom was found a large quantity of loose cannabis L. Further loose cannabis L was found on the top shelf of a storage cupboard in the same room. In the bedroom was discovered on the floor under a dresser a small plastic bag containing a small quantity of

cannabis L. In the backyard of the house were found five marijuana plants about 6 to 7 feet high. They were growing in pots. Beneath the bonnet of a car in the carport was found a dried cannabis L plant about 4 to 5 feet long. There was also a garage on the premises. In it were two marijuana plants about 5 to 6 feet long. They were hanging from the rafters. In a food cooler on the floor of the garage were two large plastic bags. Each contained cannabis L. Finally, there were found in another cupboard in the kitchen a set of balance scales, a box containing precision weights and a quantity of re-sealable plastic bags.

[3] The cannabis was seized by the police officers. The applicant was interviewed. He admitted that the drugs had been discovered as above described. He claimed that the entire quantity was for his own use. However, he disclaimed prior knowledge of one particular nominated quantity contained in a plastic bag. However, he admitted that all the large quantities belonged to him. He said he used cannabis L for the relief of pain. He denied that the scales, weights and bags – which admittedly were his property – were used for weighing out and packaging quantities of marijuana.

A prosecution witness stated that the total quantity of dried cannabis L was approximately 1.4 kilograms. The weight of the eight plants was 3.35 kilograms. The total weight of all the cannabis L found by the police was approximately 4½ kilograms. A significant proportion (estimated two-thirds) of this would consist of roots, stalks and stems and thus not be useable. The wholesale value of the reduced quantity was estimated to be $20,800 and the retail value at $33,200. The applicant gave unsworn evidence. On this occasion he admitted ownership of all the cannabis L found by the police. He said that quantities of harvested cannabis L were placed in various parts of the house in order to dry out. He repeated his claim that he used the drug for the relief of pain. He gave an innocent explanation for his possession and use of the scales. He claimed that he did not sell and that he had no intention of selling any of the cannabis L.

[4] The sole ground upon which leave to appeal against conviction on the trafficking count is sought states that the judge "erred in allowing evidence to be led that a set of scales and a quantity of plastic bags were located in the applicant's premises thereby occasioning a miscarriage of justice". The argument addressed to the court was that there was no link or connection between the scales, weights and bags on the one hand and the quantities of cannabis L in the applicant's possession on the other hand. That is to say there was no evidence that they had been used to weigh out and package parcels of cannabis L for sale. Accordingly, evidence of their having been found in the house was irrelevant and inadmissible. At most they could evidence a propensity to sell (i.e. traffick) and if so the evidence was inadmissible on policy grounds. Finally it was said that, even if the evidence were relevant, it ought to have been excluded on the ground that its probative value was outweighed by its prejudicial effect. No obligation for such a ruling was made at the trial. Counsel for the applicant relied upon *Thompson and Wran v R* [1968] HCA 21; (1968) 117 CLR 313; [1968] ALR 432; 42 ALJR 16 and he sought to distinguish *Hofer* – a decision of this court – 55 A Crim R.

It should be noted that the judge gave no direction to the jury as to the way in which the evidence could be used by it. However, it is obvious that the Crown must have suggested that the scales and bags were used to parcel up in precise quantities packages of the drug that could when so treated only have been used for the purpose of sale. At all **[5]** events no ground has been taken in which reliance is placed upon any such alleged omission by His Honour.

We do not think that *Thompson and Wran* is of assistance to the applicant. In their joint judgment (with which McTiernan J agreed) Barwick CJ and Menzies J (at p316) made it clear that evidence of the possession of tools was admissible not only when it appeared that such tools were used in carrying out the alleged crime, but also when it appeared that such tools might have been used. That is this case. But it was not the case on the facts in *Thompson and Wran*. In the latter case evidence as to possession, *inter alia*, of tools able to be used in the opening and breaking into safes other than by the use of explosives was admitted. The court held that such evidence was wrongly admitted as the Crown case was that the safe in question was opened by the use of explosives. The joint judgment went on to point out that possession of tools of crime may be admissible to negative mistaken identity. In this connection their Honours said:

> "In all cases, however, where such evidence is admitted, it is to identify an accused person with the crime charged against him, and evidence that possession of the tools of crime other than those

> which were or might have been used to commit the crime charged, or tools of such a nature, is in the absence of some special connexion, inadmissible because it does no more than prove criminal disposition."

The present case is not concerned with disproof of mistaken identity. Nor is the case concerned to rely on evidence as to possession of the scales and bags as showing no more than the existence of criminal disposition. The evidence led is evidence as to possession of equipment that it was open to the jury to conclude might have been used to commit the crime **[6]** of trafficking. As such it was plainly relevant and so admissible. Moreover, it was cogent evidence of guilt when it is considered together with the fact that the scales, weights and bags were found in the same house as a large quantity of cannabis including quantities that had already been packaged in plastic bags similar to those found with the scales. There is no "special connexion" between the impugned evidence and the case relied upon by the Crown to establish the applicant's guilt. The evidence is relevant by reference to ordinary principles. As such it is admissible.

The case is similar to *Hofer*. In that case a book containing instructions as to marijuana cultivation was found at the applicant's home. Plants which the Crown alleged had been cultivated by the applicant were found growing on other premises. The book was ruled admissible in evidence. This court upheld the ruling. The evidence of the similarity between the instructions given in the book and the method being used to cultivate the plants allowed the conclusion to be reached that the book may have been used to assist in the commission of the crime charged. That was a fact tending to prove a fact in issue. We are also of opinion that it cannot be said that the evidence should have been excluded on the ground that its prejudicial effect outweighed its probative value. The application for leave to appeal against conviction must be dismissed.

Three grounds were argued in support of the application for leave to appeal against sentence. The ground upon which principal reliance was placed was that both **[7]** sentence were manifestly excessive. It was pointed out that the effective sentence was really one of 3½ years with a non-parole period of 2½ years before reduction for loss of the right to remissions. We were referred to statistics that it was said suggest that the present sentence is particularly high. Matters of mitigation were drawn to our attention and we were asked to hold that the judge had exceeded the limits of the discretion that it was open to him to exercise. Whilst the sentence was, we think, at the upper range, we are not persuaded that the sentence was beyond the range open to him. The amount of cannabis found was quite considerable. Then the applicant's prior convictions indicate that he is a poor candidate for rehabilitation and that he has an apparent contemptuous disregard for the law. In these circumstances the sentence was required to emphasise retribution and specific deterrence.

However, it was submitted that the judge fell into sentencing error in one or other or both of two ways. The ground alleging the first of the two supposed errors alleged that the judge erred in that he placed "improper reliance upon untested findings that cannabis use inevitably leads to heroin abuse and [equated] cannabis trafficking with heroin trafficking". The passage in the judge's sentencing remarks that has provoked the applicant's complaint is as follows:

> "I do not know if you know of many, or any, people who have ultimately graduated to what are referred to commonly as the heavier drugs, such as heroin and amphetamines, and cocaine, and the rest of it, who did not start with cannabis. There must be some and you probably know some who did not start with cannabis. I have to say that in close to seven years sitting here I have yet to encounter one so it is that one can conclude that somebody involved **[8]** in the commercial movement of cannabis is engaging in a trade which ultimately will bring about the destruction of the lives of many of those who are the ultimate recipients of the drug, and you, yourself, exemplify one of the levels of destruction which comes about."

The passage is not particularly elegantly expressed. However, we conceive that his Honour was not asserting that cannabis use inevitably leads to heroin addiction. What he was saying was that, in his experience, heroin addicts had commenced their drug abuse with the use of cannabis. This is an altogether different proposition from that alleged by the applicant in his notice of application. So understood and bearing in mind that it is not improper for a judge to derive assistance from experience we are unable to detect such error in his Honour's remarks as to require this court's intervention. Nor can it be said that it should be inferred from the judge's remarks that the applicant was being punished as a trafficker of hard drugs. The ground is not established.

The remaining ground complains that the judge failed "to give any or sufficient weight to the applicant's pleas of guilty to the counts of cultivation of cannabis and possession of amphetamines". We have already referred to the plea of guilty to the charge of possession of amphetamines. This was recorded in the absence of the jury.

However, the presentment on which the applicant was arraigned on the count of trafficking (to which he pleaded not guilty) also contained a count of cultivation of a narcotic plant, namely cannabis L. To this count the applicant pleaded guilty before the jury empanelled for his trial on both cannabis counts. Despite that plea of guilty he was not sentenced as, having duly been found guilty of trafficking, the cultivation **[9]** offence was considered to be a lesser alternative to the trafficking offence and thus subsumed by it. Certainly the applicant's confinement of the defence to the single issue of "trafficking" together with admissions as to possession and cultivation reduced the time the case might otherwise have taken.

However, it would have been difficult, and indeed probably unrealistic, to have relied on any other defence. That is to say, such admissions of guilt the applicant made were really part of the defence strategy on the most serious charge. As such they were scarcely to be regarded as evidence of remorse nor attempts to save community expense and deserved little more than token value as mitigating factors. In these circumstances we are not prepared to assign error to the judge such as the ground alleges. As this ground also fails the application for leave to appeal against sentence is also dismissed.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor to the DPP. For the applicant Edwards: Mr P Faris, QC with Mr R Marron, counsel. Grace & Macgregor, solicitors.
