

30/84

SUPREME COURT OF VICTORIA

D'ALOIA v BRILLIANT

Hampel J

19 June 1984

CRIMINAL LAW – DRUG OF ADDICTION – DRUG GIVEN TO FRIENDS ON SEVERAL OCCASIONS WITHOUT RECEIVING MONEY IN RETURN – WHETHER "DEALING" IN A DRUG OF ADDICTION: POISONS ACT 1962, s32(1).

D. was charged with "dealing" in a drug of addiction to wit, Indian Hemp within the meaning of s32(1) of the *Poisons Act* 1962. The evidence was that D. admitted having given a total of half an ounce of marijuana to close friends on approximately 6 or 8 occasions; he denied having received any money or other consideration in return. There was evidence to the effect that D. had bought 8 ozs. of Cannabis, that he had spent \$2000 on marijuana notwithstanding that he had been unemployed at the time, and that a set of scales and weights were found at his house. D. was convicted and sentenced to a term of imprisonment. On order nisi to review—

HELD: Order absolute.

(1) Insofar as the phrase "deals in" as used in s32(1) of the *Poisons Act* 1962 can be said to be capable of several meanings, it should be construed strictly.

R v Elem [1982] VicRp 27; [1982] VR 295; 4 A Crim R 331, applied.

(2) Where a word or a phrase is said to be capable of several meanings, the context in which it appears is of great significance.

FCT v Applegate [1979] FCA 37; 38 FLR 1; [1979] 27 ALR 114, applied.

(3) In construing the phrase "deals in" strictly, and considering the context in which the phrase appears, it follows that the phrase "deals in" is intended to have a commercial element about it.

(4) In the circumstances, it could not be said that D.'s gift of the drug of addiction supported the inference of an activity in a commercial setting. Accordingly, the conviction and sentence should be set aside.

HAMPEL J: [After setting out the grounds of the Order Nisi and the facts, His Honour continued]: ... [3] The first issue for my consideration is whether the expression "deals in" in s32(1) of the *Poisons Act* connotes an activity which must include a commercial element or whether it is sufficient to establish that a person deals in a drug of addiction by proving a gift of such a drug. The subsection is in the following terms:

"Every person who prepares, manufactures, sells or deals or traffics in, the fresh or dried parts of any plant of the genus *Cannabis* L. (by whatever name those parts are called) in any form, without being authorised by or licensed under this Act so to do, shall be guilty of a misdemeanour and shall be liable to imprisonment for a term of not more than ten years or to a penalty of not more than \$4,000 or to both such imprisonment and penalty."

The expression "deals in" is not defined in the Act nor does there appear to be any Victorian or other decision relating to drug offences where this expression has been defined or commented upon. In construing this expression, two principles of statutory interpretation are in my opinion particularly relevant. The first is that since the expression is used in a penal provision any ambiguity or doubt as to its proper meaning should be resolved in favour of the person liable to incur the penalty imposed by such a provision. (See *Tuck & Sons v Priester* [1887] 19 QBD 629 p638; 3 TLR 326 per Lord Esher MR; *London County Commercial Properties Investments Limited v A-G* [1953] 1 All ER 436; [1953] 1 WLR 312, at p319 per Upjohn J; and *Re HPC Productions Ltd* (1962) Ch 466, at p485 per Plowman J). Although the approach of Australian [4] Courts has not been as strict as that of their English counterparts, the fundamental principle has survived. (*Scott v Cawsey* [1907] HCA 80; [1907] 5 CLR 132, at p154; 13 ALR 568 per Isaacs J; *R v Adams* [1935] HCA 62; (1935) 53 CLR 563 at pp567-568; [1935] ALR 421; 8 ABC 97; *Beckwith v R* [1976] HCA 55; (1976) 135 CLR 569; (1976) 12 ALR 333 at p339; 51 ALJR 247; 28 ALT 39 per Gibbs J.)

The Full Court has advocated this approach in the interpretation of this provision. In *R v Elem* [1982] VicRp 27; [1982] VR 295 at p299; 4 A Crim R 331 the court said that sections 28 and 32 "have been introduced into the *Poisons Act* in order to attempt to deal with a particularly dangerous type of offence and one which (the legislature) no doubt felt demands Draconian treatment. It behoves the courts, however, to be astute to see that provisions of this kind are strictly construed and fairly applied". The second principle is that where two or more words which are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense. Thus, where a word has many shades of meaning, the context in which it appears is of great significance. See *FCT v Applegate* [1979] FCA 37; 38 FLR 1; [1979] 27 ALR 114.

The *Oxford Dictionary* attributes 21 meanings to the verb "to deal". These are divided generally into two groups of definitions. The first includes meanings such as "to divide" "distribute" "share" and the second "to take part in, have to do with, occupy oneself, do business, act". The definitions in the first group tend to favour the interpretation contended for by the respondent in that there does not appear to be a need for a commercial element. Definition 13 which is "to carry on commercial transactions" "to do business, trade, traffic" which appears in the second group favours the [5] applicant's contention, the commercial element being clearly present. In my view the verb "to deal" as used in the section insofar as it can be said to be ambiguous or capable of a number of meanings should be construed strictly in the applicant's favour. The words "deals in" on that basis should be read as requiring a commercial element and not applying to a gift. I have come to the conclusion that this is so for a number of additional reasons.

The whole scheme of the Act indicates that the conduct proscribed by s32 requires a commercial element about it although it is not necessary in my view that the accused need receive any reward for his part in the particular activity. In *Falconer v Pedersen* [1974] VicRp 24; [1974] VR 185 at 187 Anderson J said:

"Section 32(a) of the *Poisons Act* is cast in very wide terms. The draftsman has collected all the conventional verbs and has attempted to prohibit any association with drugs of addiction not covered by s27 which prohibits the possession or disposition of such drugs, and s32 which prohibits their being smoked."

It may be added that s18 prohibits the unauthorised sale and supply of any poison or deleterious substance and s23 prohibits the self-administration of drugs of addiction. The legislation has seen fit to differentiate between the penalties prescribed for the various offences created by these sections. Breaches of sections 18 and 23 carry fines of not more than \$200 while breaches of sections 27 and 31 carry a fine of not more than \$500 or imprisonment for a term of not more than 12 months or both. Section 32, however, provides much more substantial penalties. Sub-section (1) carries a penalty of not more than \$4,000 and imprisonment of not more [6] than ten years or both and sub-section (2) \$100,000 or imprisonment for not more than 15 years or both. In my opinion the mischief which the legislature sought to prevent by prescribing such penalties in s32 is the commercial preparation, sale and movement in drugs of addiction. Such legislation, described as "Draconian" in *Elem's case* by providing such penalties did not in my view intend to embrace conduct such as a mere gift of a drug of addiction. Had that been intended it would have been simple for the draftsman to use such an expression as to "give" or to "distribute".

The context in which the expression "deals in" appears namely "every person who prepares, manufactures, sells or deals or traffics in" in my view supports the conclusion that the expression "deals in" is intended to have a commercial element about it. The words "manufacture" and "sell" clearly connote some commercial element. The word "prepares" was considered by Jenkinson J in *Dennis v Bonogurore* (unreported 18th September 1980, MC 1/1981) in the context of the division into quantities appropriate for sale or distribution and the placing of a quantity of a drug into capsules for the purpose of distribution. As to the words "traffics in" the doubts previously expressed in *Falconer v Pedersen* [1974] VicRp 24; [1974] VR 185 are now dispelled by the decision of the Full Court in *R v Holman* [1982] VicRp 46; [1982] VR 471; (1981) 4 A Crim R 446. The words clearly connote an activity in a commercial setting. (See also *Matthews v Towers* [1922] VicLawRp 40; [1922] VLR 476; 28 ALR 233; 43 ALT 212).

[7] The conclusion I have reached gains some support from the definition of the word "sell"

in s3(1) of the *Poisons Act* which includes "dealing in". Other Victorian Acts are of some assistance in that expressions such as "dealing" or "dealer" are used in the commercial context. Examples are "wholesale dealer" in s259 and s270B of the *Health Act* 1958; "secondhand dealer" in s3 of the *Second-Hand Dealers Act* 1958, and the word "dealing" in s4 of the *Security Industry (Victoria Code)*. A number of cases, although not relating to a drug legislation, are also of some assistance. In *Ex parte Joseph; Re Stonham* [1949] 67 WN (NSW) 107, the Full Court held that the words "deals in" in s23 of the *Hawkers and Pedlers Act* 1901 apply to any transaction which shows that the applicant for a licence was doing business or trading or trafficking in some article or carrying on commercial transactions in relation to the same. In *Raine v Police* [1963] NZLR 702 the word "dealer" as used in the *Motor Vehicle Dealers Act* 1958 was considered by Woodhouse J who said:

"A dealer is one who buys and sells some form of merchandise or who trades in some commodity and to carry on business as a dealer suggests the organization of some activity into a course of conduct ... "
(See also *Schneider v Dawson* [1960] 2 QB 106)

This interpretation of the phrase "deals in" in s32 does not mean that a gift of a drug is not caught by the Act. Clearly, the giver and receiver in a non-commercial situation are both at different points of time guilty of possession. In the present case the applicant was in fact [8] convicted of possessing a drug of addiction in breach of s27. In the light of my conclusion as to the meaning of the expression "deals in" in s32 it is necessary to consider whether there was sufficient evidence to sustain the applicant's conviction. Mr Barnett, who appeared for the respondent, submitted that there were three matters which created the commercial setting in this case. They were the purchase of 8 ounces of cannabis, the fact that the applicant had been unemployed for over three years and yet spent some \$2,000 on marijuana in a short space of time, and the fact that a set of scales and weights were found at the house.

The defendant explained these factors by saying that he had purchased a large quantity so that he would not have to look for it on each occasion which would be difficult, and the supply which he purchased would last him approximately six months. He claimed that the drug was purchased with money he had won at the races, and in that context he gave precise dates, race meetings, names of horses and the amounts of the bets which he claimed produced total winnings of \$2,900. He said that the scales which had belonged to his sister were used by him to check the weight of marijuana purchased by him for his own use.

I have reviewed the evidence in the material before me about which there seemed to be no dispute, and I agree with the contention by Mr Faris, who appeared for the applicant, that the evidence is equivocal and incapable of supporting the inference to the required degree that the applicant was dealing in a drug of addiction in the sense in [9] which I have found that word is used in the section. In my opinion, the applicant has made out the three grounds in the Order Nisi which should be made absolute. In the result, I will not remit this matter to the Magistrate but order that the conviction and sentence be set aside.

APPEARANCES: Mr P Faris, counsel for the Applicant D'Aloia. Mr JH Barnett, counsel for the Crown.
