47/93

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v RAIACOVICI

Phillips CJ, Crockett and Hampel JJ

1 November 1993 — (1994) 70 A Crim R 46

CRIMINAL LAW – DRUG TRAFFICKING – POSSESSION OF TRAFFICKABLE QUANTITY – DEEMING PROVISION – WHETHER POSSESSION FOR SALE – NO EVIDENCE ADDUCED BY ACCUSED – EFFECT OF: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, S73(2).

Five packets containing 11.4 grams of pure heroin (street value $22800) were found in R.'s pocket. He was subsequently charged with trafficking in a drug of dependence. At the trial R. stood mute and adduced no evidence. The charge was found proved and R. was sentenced to three years' imprisonment with a minimum of two years. Upon application for leave to appeal against conviction,

HELD: Application dismissed.
1. Once the jury was satisfied beyond reasonable doubt that:
(a) the substance found in R's pocket was heroin; and
(b) R. knew it was heroin, it was open to conclude that R. was guilty of trafficking by reason of possession of sale having regard to:
(i) the deeming provision of s73(2) of the *Drugs, Poisons and Controlled Substances Act* 1981; and (ii) the quantity of heroin found, its value, the way in which it was packaged and the finding of it in R.'s pocket.

2. The jury was entitled to consider that R.'s silence at the trial permitted a more ready acceptance of the inferences as to the purpose of R.'s possession.
***R v Neilan* [1992] VicRp 5; [1992] 1 VR 57; (1991) 52 A Crim R 303, referred to.**

THE COURT: [1] The applicant who is aged 31 was convicted by a jury in the County Court at Melbourne in April last of one count of trafficking in a drug of dependence, namely heroin. There had been an alternative charge of possession of the drug on the presentment upon which count it was not necessary for a verdict to be taken. The offence was said to have been committed at Richmond on the 19th February, 1991. The applicant admitted 26 prior convictions between July, 1988 and March, 1989 of which six were for trafficking in a drug of dependence. After hearing a plea of leniency, the judge sentenced the applicant to be imprisoned for three years. A non-parole period of two years was fixed and a declaration made as to pre-sentence detention.

The applicant lodged notices of application for leave to appeal against conviction and sentence pleading various grounds. The application with respect to sentence was later abandoned and by order of the first of September last, Master Gaffney granted leave to amend the grounds of appeal relating to conviction as follows;

> "1. That the learned trial judge misdirected the jury about the effect of s73(2) of the *Drugs Poisons and Controlled Substances Act* 1981 by directing the jury that possession of a trafficable quantity of heroin was *prima facie* evidence of possession for sale. Alternatively, that he failed to direct the jury adequately with respect to the effect of s73(2).
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> **[2]** 2. That the learned trial judge ought to have directed the jury that if it found that the applicant knew the substance was heroin, the jury could not use the false denial in support of the charge of trafficking unless satisfied beyond reasonable doubt that the lie was uttered from a consciousness of guilt of the charge of trafficking.
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> 3. That in the circumstances the conviction of the applicant is unsafe and unsatisfactory and ought to be quashed."

It is now necessary to set out in summary form the facts of this matter. At about 8:00 p.m. on 19th February 1991, police officers, under warrant, searched flat 146, block 106 Elizabeth

Street, Richmond. Present at the premises were one, Predrag Velovan, his wife and children and the applicant. Both Velovan and the applicant were personally searched and five bags of powder were located in the right hand pocket of the applicant's shorts. In the rear pocket of the shorts was $120 in cash. Nothing else of consequence was found. Analysis of the powder, which was white and contained pieces of a hard white substance, established that its weight was 20.7 grams of which 11.4 grams (or 55%) was pure heroin. At the applicant's trial evidence of a Detective Senior Constable Barlow was to the effect that the street value of the powder was $22,800, assuming it was further diluted until it was 10% pure heroin and 90% cutting agent.

When the applicant was interviewed by the police he said that he had been carrying his children's toys when entering the block of flats. A plastic bag containing building blocks had broken and the contents **[3]** had fallen to the ground. While collecting them, he came upon a cigarette packet which he opened. He found therein, the five bags of white powder which he put in his pocket so he could examine them later. He threw the cigarette packet away. He declared that he had no idea what the powder was and denied that he had taken heroin to his flat for the purposes of sale.

The witnesses for the prosecution at the applicant's trial included the police who conducted the search of the premises; a police officer who gave evidence of the powder's street value and the scientist from the State Forensic Laboratory who conducted the analysis. The applicant stood mute and no evidence was adduced by him.

The learned trial judge directed the jury that it was open to it to draw inferences from established facts and explained that reasoning process. He then referred to the Crown contention that the jury:

> "Ought to be satisfied beyond reasonable doubt that he (the applicant) was in possession of heroin and the reason for possession was to sell it and therefore he trafficked in it, and that that is an inference that you should draw from being satisfied beyond reasonable doubt that he possessed heroin, that he had it for sale and therefore trafficked."

Later his Honour again referred to the Crown case in these terms:

> "In this case the Crown says, members of the jury, that the accused trafficked in heroin a drug of dependence because he had heroin in his possession for sale. The Act provides that 'traffic' in relation to a drug of dependence includes to have the drug in one's possession for sale. If you have the drug in your possession for sale then the Act **[4]** provides that you traffic in the drug and the Crown says that you should be satisfied beyond reasonable doubt that the accused had heroin in his possession on 19th February 1991 for sale."

His Honour directed the jury further that before it could find that the accused was in possession of heroin it had to be satisfied beyond reasonable doubt, first, that the substance was heroin and secondly, that the accused knew that it was heroin. His Honour pointed out that there was no argument that the police found five packets of the substance in the accused's pocket. The Judge then referred to what he called the third element and directed the jury thus;

> "The third element, members of the jury, if you are satisfied beyond reasonable doubt of both those elements, is that he had the heroin in his possession for sale. So, you have to be satisfied beyond reasonable doubt not only that he had heroin in his possession, but that he had it for sale. Again, that is in dispute. The Crown, in effect say that you should draw an inference in the circumstances from all the evidence and particularly the quantity of heroin in his possession, that he had it for sale. The law is that if a person has possession of more than two grams of heroin, that is *prima facie* evidence of trafficking by that person in that drug. The evidence, of course, is that there was more than two grams of heroin, that is, if you are satisfied beyond reasonable doubt that the substance analysed was the substance that he had in his pocket. My recollection is that – counsel will correct me if I am wrong – it is a bit over eleven grams of pure heroin that the analyst found in the substance that he analysed. So, that is *prima facie* evidence of trafficking by the accused in that drug. That means trafficking in a way which is consistent with the evidence in the case, with the way in which the Crown puts its case, and as I have already pointed out to you, in this case the Crown says that he **[5]** trafficked by having it in his possession for sale. If you are satisfied beyond reasonable doubt, members of the jury, that he was in possession of the heroin that was analysed, the substance that was analysed by the laboratories and found to contain that amount of heroin, that is *prima facie* evidence of trafficking by the accused in the sense of having it in his possession for sale. In essence,

> as I understand it, that is really the factor that the Crown points to. I was not aware, Mr Gucciardo can correct me if I am wrong, that the Crown was really referring to any other evidence. Mr Punshon has already said there was no evidence of paraphernalia and things of that nature, and that is clearly true. What the Crown in essence is referring to is the quantity of the drug as indicating, and they make use of the evidence of Mr Barlow in this regard as to what it was worth both on the street and sold as it was, as establishing that the purpose was for sale. Mr Punshon, of course, submits that you should not be satisfied beyond reasonable doubt of that, even if you were satisfied beyond reasonable doubt of his possession of the heroin. It is important, members of the jury, to understand that being *prima facie* evidence, that is the quantity, does not mean that any fact is deemed to exist or that it reverses the onus of proof of the Crown to establish beyond reasonable doubt that the accused trafficked in heroin in that he had it in his possession for sale. The onus of proving that remains on the Crown and they have to prove it beyond reasonable doubt. So, you are still obliged, members of the jury, to look at the whole of the evidence in the case, including that *prima facie* evidence, that is, the evidence relating to the quantity, to see if it satisfies you beyond reasonable doubt that he trafficked in heroin. You have to look at the whole of the evidence, including the *prima facie* evidence, to see if it satisfies you beyond reasonable doubt that the accused trafficked in heroin. If you are satisfied beyond reasonable doubt that he had possession of the heroin for sale, then the charge is proven. If you are not satisfied beyond reasonable doubt that he had the heroin in his possession for sale, **[6]** then the charge of trafficking is not proven".

During its deliberations the jury asked the judge to repeat "what the law says about trafficking". His Honour, again, made it clear that the Crown must prove beyond reasonable doubt that the accused had possession of heroin for sale. His Honour said:

> "The onus remains on the Crown to establish beyond reasonable doubt that he trafficked, that is, that he had it in his possession for sale."

He continued:

> "You are still obliged to look at the whole of the evidence, including that *prima facie* evidence, that's the evidence of quantity, to see if the Crown has satisfied you beyond reasonable doubt that the accused trafficked in heroin in that he had possession of heroin for sale. Does that help, Mr Foreman, ladies and gentlemen of the jury; I've just taken you through again the elements as I explained them last time in relation to trafficking and as I've said, very much in dispute as to whether the substance found in his pocket was heroin, very much in dispute whether, if it was, satisfied beyond reasonable doubt it was, whether he knew that it was heroin and it's also very much in dispute if it was heroin and he knew it was heroin, that he had the heroin in his possession for sale."

The offence of trafficking in a drug of dependence is created by s71 of the *Drugs, Poisons and Controlled Substances Act* 1981. "Traffic" in relation to a drug of dependence includes having a drug of dependence in ones possession for sale. "Sell" and "sale" have an extensive definition by virtue of s4 of the Act. Section 73(2) provides:

> "Where a person has in his possession, without being authorised by or licensed under this Act or the regulations to do so, a drug of dependence in a quantity that is not less **[7]** than the traffickable quantity applicable to that drug of dependence, in the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence."

The complaint under ground 1 is that the elements of the crime charged were not correctly defined for the jury. It was contended by Mr Richter QC for the applicant that s73(2) does not in itself afford evidence of possession for sale by the possessor unless there is other evidence capable of pointing to that purpose. The case for the Crown having been put on the basis of possession for sale as the form of trafficking alleged, it was necessary, so it was submitted, for the jury to be directed as to the meaning of "trafficking". It was said that in this case there was no evidence of the purpose of possession to support any form of trafficking. The jury should have been instructed that s73(2) operates to aid the prosecution in a case where there is evidence, other than of bare possession, which might point to the purpose for which the accused had possession. It was submitted that the jury should have been directed that, if it were satisfied that the applicant was in possession, there were nevertheless "non-trafficking possibilities" which the Crown must exclude. Thus, it was contended, the failure to define trafficking for the jury by reference to such "non-trafficking for the jury by reference to such "non-trafficking possibilities" meant that such possibilities could not be properly considered by the jury. They had to be considered and excluded, it was argued, before the **[8]** jury could be satisfied that the applicant was in possession for the purpose of sale.

While in theory this argument has its attraction, in our opinion, it fails for two reasons. First, that in this case there was evidence from which the jury, once satisfied that the accused was in possession of the quantity of heroin involved, could, with the aid of s73(2), come to the conclusion that what was involved was trafficking by reason of possession for sale. That inference was open from the combined force of the evidence of the quantity of heroin found, the finding of it in the pocket of the applicant, the fact that it was packaged in five separate bags, and its value. It is of significance that in the face of the evidence that the five packets were found in his pocket, the accused stood mute at the trial and there was no reason advanced why he was not in a position to give evidence. This was a situation in which it was highly likely that the accused would be in a position to explain the true circumstances in which he had possession of the five packets of white powder. Although his silence at the trial could not properly be regarded as evidence of guilt of the crime of trafficking, the jury would have been entitled, as is this Court, to consider that such silence in the circumstances of this case permitted of a more ready acceptance of the inferences for which the Crown was contending as to the purpose of the possession by the accused. (See *R v Neilan* [1992] VicRp 5; [1992] 1 VR 57; (1991) 52 A Crim R 303). There **[9]** was in fact no evidence which called for the consideration of any alternative "trafficking possibilities". The real question on this aspect of the case was whether possession of the relevant quantity of heroin was for sale.

Secondly, it is apparent from the passages we have cited from his Honour's charge that the jury was left in no doubt but that it had to acquit, unless it was satisfied beyond reasonable doubt, that the possession was for sale. Understandably, therefore, no exceptions were taken by counsel in relation to the directions or redirection by the learned judge on this topic.

In our opinion, there is also no substance in ground 2 of this application which complains of a failure to direct the jury as to how it may use evidence of false denials. It was contended that the jury ought to have been instructed that, if it found the accused's explanation to the police as to how he came to have the heroin in his pocket to be false, such falsity could not be used upon the issue of trafficking unless the jury found that the falsity emanated from a consciousness of guilt of trafficking rather than of mere possession. It was said that without such a direction the jury might well have used the finding of falsity in an impermissible way because the Crown relied upon the false explanation given by the accused to the police. The difficulty with that submission is that the Crown did not rely on the falsity of the accused's explanation **[10]** as indicating a consciousness of guilt of the particular crime of trafficking. The explanation given by the accused to the police was simply another factor in the case which the jury would have had to consider when dealing with the issue which was central to the defence, namely whether the accused was in possession in the sense that he knew that the substance he had was heroin.

Accordingly no question of "false denials" as such arose in the trial as a circumstance from which the jury could draw the inference of a consciousness of guilt of trafficking. There was no need, therefore, for a direction of the kind which is required when false denials are relied on by the prosecution as founding an inference of guilt of a specific crime. In fact the manner in which his Honour dealt with the accused's explanation was appropriate and no exception was taken by counsel to this part of the charge.

Under ground 3 it was argued that the verdict of the jury is unsafe and unsatisfactory because this was not a case in which it was possible for the Crown to exclude, other than by impermissible speculation, the alternative hypotheses to the one raised by it, namely that the applicant was guilty of trafficking by having the required quantity of heroin in his possession for sale. It was said that the rejection of the applicant's explanation could go no further than to put him in a position of mere possession of the heroin. This is so, it was argued, because there was no other evidence which could safely lead to the inference that the possession **[11]** was for the purpose alleged by the Crown, namely for sale.

In our opinion, this ground, in the context of this case, raises no more than the issues raised by the two other grounds. An examination of the evidence at the trial leads us to the conclusion that it was open for a reasonable jury to be satisfied beyond reasonable doubt that the accused was guilty of trafficking in heroin. The application for leave to appeal against conviction dismissed.

APPEARANCES: For the Crown: Mr W Morgan-Payler, counsel. JM Buckley, Solicitor to the DPP. For the applicant Raiacovici: Mr R Richter, QC. Valos Black & Associates, solicitors.