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SUPREME COURT OF QUEENSLAND — COURT OF CRIMINAL APPEAL

R v WRIGHT

Wanstall SPJ, Matthews and Dunn JJ

11 December 1975 — QCA No 119 of 1975

PRACTICE AND PROCEDURE – TWO POLICE OFFICERS INVOLVED IN DETECTION OF ALLEGED OFFENCE – ONE POLICE OFFICER DID NOT ATTEND COURT TO GIVE EVIDENCE – PROSECUTOR SAID THE OFFICER WAS ON SICK LEAVE – MAGISTRATE FOUND CHARGE PROVED – WEIGHT OF EVIDENCE – OBJECTION TO STATEMENT BY PROSECUTOR – OBJECTION OVERRULED – MAGISTRATE SAID HE WOULD ACT ONLY ON THE EVIDENCE OF THE OFFICER WHO GAVE EVIDENCE – IN GIVING HIS REASONS FOR DECISION, THE MAGISTRATE REFERRED TO THE REASON WHY THE ABSENT OFFICER WAS NOT AT COURT – WHETHER JUSTICE HAD BEEN DONE OR SEEN TO BE DONE – WHETHER CONVICTION SHOULD BE SET ASIDE.

HELD: Conviction set aside.
The Magistrate's reference to the prosecutor's explanation of the absence of the police officer constituted either a departure from his assurance that he would not act on anything but the evidence, or an apparent departure. Justice had either not been done or appeared not to have been done. Consequently, the conviction was set aside, and the matter remitted to the Magistrates' Court to enter up the necessary adjournment for a new trial.

JUDGMENT: The appellant was convicted by a Magistrate of the offence of having in his possession a prohibited plant namely Indian Hemp (Cannabis Sativa) and a preparation which contained a portion of the dangerous drug Tetrahydrocannabinol. The circumstances, as particularised by the prosecution, were that police searching his flat found, on top of a wardrobe a match box containing the quantity of cannabis seeds and the pieces of hashish involved in the charge.

The arresting police constable, Dennis John Koch, testified that the appellant freely admitted ownership of the matchbox and its contents, identifying them for what they are. There were at least two other occupants of the flat. The same police officer had thoroughly searched the flat including the top of the wardrobe two days previously but did not find any drugs. On the day he did find the subject drugs he was accompanied by Constable Lewis. His testimony included an account of a rather curious incident in which he said that, upon their entry, the appellant fled towards the back door putting something into his mouth which he then chewed and swallowed. When asked what it was that he ate the appellant replied, 'I was just having a joint and I couldn't find anywhere else to put it, so I ate it'. He elaborated that the 'joint' was a cigarette of cannabis.

The defence in cross-examination strenuously challenged the veracity of Constable Koch's evidence as to the last-mentioned incident, and as to the making of the admissions of ownership and possession of the drugs; and the allegation was put to him that Constable Lewis struck the appellant twice over the ear whilst the search was in progress. The appellant gave evidence in which he denied ownership, possession and knowledge of the existence of the matchbox or its contents denied making any of the admissions attributed to him, denied the incident in which he was said to have eaten a 'joint'. He also testified that Lewis boxed his ear twice during the search. An incident occurred just before the close of the prosecution case from which arises the only ground of substance argued on the appeal. The prosecutor announced that he had no further witnesses because, as he understood, Constable Lewis was on sick leave and unable to give evidence. Defence counsel called for clarification of the prosecution's intention. The Magistrate asked, 'Are you closing your case or are you seeking an adjournment, Sergeant?' The prosecutor thereupon formally closed his case. Counsel then took objection to the use of the prosecutor's statement as evidence explaining his not having called Constable Lewis.

Counsel for the defence was acting prudently in seeking to maintain a position in which he could call for the evaluation of the evidence of Constable Koch — evidence which he had strongly

impugned — in the light of an unexplained failure of the prosecution to call a witness who should have been able to corroborate it in several most material aspects, if it was truthful.

All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted', said Lord Mansfield in *Blatch v Archer* (1974) 1 Cowp 63, at 65; 98 BR 969 an observation quoted by Issacs J in *Morgan v Babcock & Wilson Ltd* [1929] HCA 25; (1929) 43 CLR 163 at 178.

Counsel's objection induced the Magistrate to rule, in effect, as I construe his words, that there was no evidence to explain the failure of the prosecution to call Constable Lewis, and that he intended to act only upon what was in evidence before him. Counsel then called his client who, as I have outlined, contradicted all the evidence of Koch which might have incriminated him. In this state of conflicting evidence counsel relied strongly in his address (which is recorded) on the failure of the prosecution to call Lewis or explain his absence, and invited the Magistrate to entertain a reasonable doubt as to proof of the offence.

The Magistrate convicted after declaring that Constable Koch was an honest and truthful witness whose testimony he preferred to that of the defendant. He was entitled to resolve the conflict of credibility in this way, and if he had left it at that his finding would have been unassailable. But he did not. After saying 'in my view (Constable Koch) was an honest witness. I consider he was a truthful witness', he added:

> 'I also consider it would have been preferable from a court point of view for the court to have heard what Constable Lewis had to say as regards the charge before the court. No evidence has been given as to his non-appearance, but the prosecutor, Sergeant McRae, did give an explanation as to the court, as to why he is not here today.'

In my view the Magistrate's reference to the prosecutor's explanation of the absence of Lewis constitutes either a departure from his assurance that he would not act on anything but the evidence, or an apparent departure. Justice has either not been done or appears not to have been done. Consequently, the conviction should be set aside, and the matter remitted to the Magistrates' Court to enter up the necessary adjournment so that a new trial may be had.
