

13/84

SUPREME COURT OF VICTORIA

GAUCI v DRISCOLL

O'Bryan J

19 March, 16 April 1984 — [1985] VicRp 47; [1985] VR 428

CRIMINAL LAW – DRUGS OF ADDICTION – CANNABIS L. (INDIAN HEMP) – OFFERING TO SELL HARMLESS VEGETABLE MATTER BELIEVED BY OFFEROR TO BE INDIAN HEMP – WHETHER "SELLING": POISONS ACT 1962, SS3, 32.

Section 3 of the *Poisons Act* 1962 provided as follows:

"Sell" includes sell whether by wholesale or retail and barter or exchange; also dealing in agreeing to sell or offering or exposing for sale or keeping or having in possession for sale or sending forwarding delivering or receiving for sale or on sale or authorizing directing causing suffering permitting or attempting any of such acts or things; and "Sale" and each of the other derivatives of "Sell" have corresponding interpretations.

Armed with an appropriate warrant, G. visited D's premises and found a quantity of foil packages containing green vegetable matter. When questioned about the packages, D. said that they contained marijuana; that he had smoked some of them making him relaxed and feeling tired; and that he had offered to sell them to his "mates" but had not yet made a sale. D. was charged with selling the drug which when analysed, contained an unidentified plant material, not Cannabis L. It was common ground that D. believed the packages contained Indian Hemp and that his belief was erroneous. The magistrate upheld a submission of no case on the ground that the substance found was not one of the substances proscribed by the Act. On order nisi to review—

HELD: Order nisi absolute.

(1) The offence created by s32 of the *Poisons Act* 1962 is selling Indian Hemp.

(2) As the act of "offering for sale" is included within the definition of "sale", the essential elements of the offence were established by the evidence of D's making the offer to sell the packages in the belief and with the intention that he was selling Indian Hemp.

Haggard v Mason [1976] 1 All ER 337; [1976] 1 WLR 187; and
R v Brown [1978] 2 NZLR 174, considered.

O'BRYAN J: *[After setting out the grounds of the order nisi, the facts, and the provisions of ss3 and 32 of the Poisons Act 1962, His Honour continued]:* ... [5] The question for decision here is whether the respondent could be convicted of selling Indian Hemp contrary to the Act when he offered to sell harmless vegetable matter which he believed at all material times was Indian Hemp. Mr Weinberg of counsel submits that the question should be answered in the affirmative.

He relies upon two authorities. The first *Haggard v Mason* [1976] 1 All ER 337; [1976] 1 WLR 187. The appellant possessed a substance which he believed to be LSD, a controlled drug. He offered to sell the substance to a purchaser who also believed the substance was LSD. In fact the substance was not LSD and was not a controlled drug. The appellant was charged and convicted of offering to supply a controlled drug contrary to s4 of the *Misuse of Drugs Act* 1971 which makes it unlawful for a person to supply or offer to supply a controlled drug to another". It was contended by the prosecutor, firstly, that in the ordinary meaning of the words of the section the offence was complete once an offer had been made unlawfully to supply a controlled drug. Secondly, that it was the making of the offer which was forbidden by the section and the existence of the specific controlled drug actually supplied was immaterial. The appellant contended that the offence required that any substance proffered as a controlled drug must in fact be a controlled drug and that if a controlled drug is not proffered pursuant to the offer there is no unlawful offer to supply within the section. The appeal was dismissed. Lawson J delivered the principal judgment of the court which was concurred in by the Chief Justice Lord Widgery and O'Connor J. The contention of the prosecution that the offence was completed at the time when the appellant met a person and offered to sell him a quantity of LSD was upheld. His Honour observed:

"Of course if the charge had been supplying a controlled drug, it is clear that the fact that [7] a controlled drug was not in fact supplied would mean that that offence could not have been established".

Mr Richter of counsel for the respondent contends that because the charge in the present case is one of selling Indian Hemp, the fact that Indian Hemp was not being sold means that no offence could be established and, therefore, the learned magistrate was correct in dismissing the information. Mr Weinberg, on the other hand contends that the extended meaning of "sell" in the Act has the result that the offence was complete when the appellant met his "mates" and offered to sell them Indian Hemp which he believed, and the "mates" believed, was available in the possession of the respondent.

The test prescribed by *Haggard's case* is: What is the act forbidden by the law, not what will be the consequences of doing the forbidden act? See *Director of Public Prosecutions v Nock* [1978] AC 979. The second authority referred to is *R v Brown* [1976] 2 NZLR 174. The appellant was convicted under s5 of the *Narcotics Act* of offering to supply, (one count), and of offering to sell, (two counts), a narcotic LSD to an undercover policeman. The substance offered as LSD was not a scheduled drug at all. On appeal it was held that it was an offence to offer to supply or offer to sell a scheduled drug with the intention that the offer should be understood as being genuine, even though the substance offered for supply or sale was in fact not a scheduled drug or the offeror could not supply the drug. The Court of Appeal in New Zealand held that the section [8] bears the natural and ordinary meaning that the making of an intimation by the person charged to another that he is ready on request to supply to that other drugs of a kind prohibited by the statute with the intention that it should be understood as a genuine offer is an offence. The *actus reus* was the making of the offer and the *mens rea* necessary to prove the offer was the intention to offer to sell the prohibited drug.

Mr Richter submits that, if the specific statutory offence is selling Indian Hemp, the *actus reus* is the sale of Indian Hemp. In the absence of a substance which is Indian Hemp there cannot be an offence, Mr Richter submits. Mr Richter further submits that the extended meaning of "sell" does not create an offence of "offering to sell" but denotes what is to be included in a sale. Mr Richter argues that s32 should be construed strictly because it is a penal provision and upon its proper construction the offence of selling Cannabis L. requires as an ingredient or essential element the presence of the prohibited substance.

It is clear beyond dispute that the respondent offered to sell Indian Hemp to persons in small foil packages. In my opinion, the effect of s3 is to make an "offer to sell" a sale of Indian Hemp. "'Sell' includes ... offering ... for sale; and 'Sale' and each of the other derivatives of 'Sell' have corresponding interpretations." (S3(1)) The legislature clearly intended to widen the concept of 'sell' to include an offer to sell. Therefore, the making of the offer to sell Indian Hemp to another person in the belief that the small foil packages contained [9] Indian Hemp became the doing of an act prohibited by s32 with the necessary criminal intent. The applicant did not have to prove that a sale was completed in the sense that property in the goods passed to the purchaser; it was enough that the vendor offered the goods for sale believing at the time that he was selling Indian Hemp. In my opinion, that is the plain meaning and effect of s32 read in conjunction with the extended meaning of "sale".

I agree with Mr Richter's proposition that there is no statutory offence of "offering for sale" Indian Hemp. The offence created by s32 is selling Indian Hemp. However, the legislature has chosen to include the act of "offering for sale" as the act of "sale". The essential elements of the offence were established in the present case by the informant when evidence was tendered of the making of the offer to sell the packages by the respondent in the belief and with the intention that he was selling Indian Hemp. Accordingly, the order nisi is made absolute on both grounds.

Solicitor for the applicant: D Yeaman, Crown Solicitor.
Solicitors for the respondent: Melasecca Tobin and Zayler.