40/90

SUPREME COURT OF VICTORIA

COSGRIFF v BATEMAN

Southwell J

22 October 1990

CRIMINAL LAW – DRUG OF DEPENDENCE – CANNABIS L. – NO ADMISSION MADE AS TO NATURE OF DRUG – WHETHER OF EVIDENTIAL WEIGHT – WHETHER EVIDENCE OF DEGREE OF FAMILIARITY WITH DRUG – DRUG ANALYSED – CONTINUITY – NO EVIDENCE LINKING SUBSTANCE SEIZED WITH SUBSTANCE EXAMINED – WHETHER SUFFICIENT EVIDENCE TO FIND CHARGE PROVEN: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, SS73(1), 120.

When C. was intercepted driving a motor, a quantity of green plant material was found in the boot. When asked what the material was, C. replied: "You know as well as I do'. C. was subsequently charged with being in possession of Cannabis L. and at the hearing, a botanist's certificate was admitted into evidence showing the name of a police officer other than the informant. The charge was found proved. Upon order nisi to review—

HELD: Order absolute. Remitted for further hearing.
1. Where a person shows a degree of familiarity with a drug of dependence, any admission by that person as to the nature of the substance is admissible as evidence of that fact. In the present case, C's answer was not sufficient to satisfy a court that he was admitting, with the basis of some knowledge, that the substance found in the boot was Cannabis L.
***Anglim and Cooke v Thomas* [1974] VicRp 45; (1974) VR 363, referred to.**
[See also, *Coe v Murphy* MC 5/1989, Ed.]

2. The certificate tendered did not provide direct proof linking the subject seized with the substance examined by the botanist. Accordingly, a court could not be satisfied beyond reasonable doubt that the substances were the same.

SOUTHWELL J: [1] This is the return of an order nisi to review, a decision of the Magistrates' Court at Heidelberg on 18 August 1989, when the court found that a charge laid by information under section 73(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 ("the Act") had been proved. The court ordered that the plaintiff in these proceedings (who was the defendant in the court below and who I shall in these reasons refer to as "the defendant") be placed on a bond for 12 months pursuant to section 76 of the Act upon condition that he pay $250 into the court poor box and that he pay $20 costs.

On 31 October 1988 the defendant was apprehended while driving a car along the Burwood Highway in Box Hill. The defendant in the present proceedings who was the informant in the court below (who I shall in these reasons call "the informant") spoke to the defendant. There was a conversation about the possibility of the defendant having consumed alcohol. In due course the defendant was subjected to a breathalyser test and later again pleaded guilty to an offence in respect to it. At the roadside the informant searched the defendant's car. He gave evidence that in the boot thereof he saw a plastic shopping bag "and inside that I observed a box which contained green plant material." The box and the bag were tendered in evidence. The informant said "I then said to the defendant 'Is this what I think it is?' The defendant answered 'Yes' I then said 'Well, what's this then?' and the defendant answered 'You know as well as I **[2]** do.'' The defendant admitted owning the car and said that both he and his wife drove it, his wife only occasionally.

In the court below the prosecutor then asked the informant "Have you got a certificate of a botanist?" to which the informant replied "Yes". The certificate was duly tendered. That was a certificate which was admissible pursuant to section 120(1) of the Act. That subsection provides:

> "In any legal proceedings for an offence against this Act the production of a certificate purporting to be signed by an analyst or by a botanist with respect to any analysis or examination made by him shall, without proof of the signature of the person appearing to have signed the certificate or that he is an analyst or botanist (as the case requires) be sufficient evidence—

(a) in the case of a certificate purporting to be signed by an analyst, of the identity and quantity of the thing analysed, of the result of the analysis and of the matters relevant to such proceedings stated in the certificate; and

(b) in the case of the certificate purporting to be signed by a botanist, of the identity and quantity of the thing examined."

Subsection (2) provides:

"The provisions of subsection (1) do not apply—
(a) if a copy of the certificate was not served on the defendant at least seven days before the hearing; or

(b) if the defendant, at least three days before the hearing, gave notice in writing personally or by post to the informant and to the analyst or botanist (as the case requires) that he requires the analyst or botanist to attend as a witness."

[3] The contents of the certificate were the subject of some debate before me and it is desirable in those circumstances that the photocopy of it now before the court (with errors uncorrected) be set out.

"COSGRIFF Damien Francis FORM 860 STATE FORENSIC SCIENCE LABORATORY Forensic Drive, MACLEOD, VIC. 3085. 22/11/88

"CERTIFICATE OF A BOTANIST

I, Susan Elizabeth FIDDIAN of the State Forensic Science Laboratory, Forensic Drive, Macleod, being employed by the Government of Victoria as a botanist and authorized by the Government Botanist for the purposes of Section 120 Sub-section (6) of the *Drugs, Poisons and Controlled Substances Act* 1981 (as amended) hereby certify:-

That on the 18/11/88 in the presence of Senior Constable HILL I examined plant material presented to me by that person and found it to be: Cannabis L. mixed with plant material which was not identified. The total weight of this mixture was 23.00 grams. placed a determinavit slip with the item(s). Signature S FIDDIAN Qualifications M. Sc. Date"

With that evidence the informant closed his case. Counsel for the defendant then commenced to make a submission. Various points were argued which ultimately were the subject of grounds in the order nisi. Some of those grounds were here abandoned and it is therefore necessary to refer only to the one relied upon. That was **[4]** to the effect that there was no evidence that the material which had been examined by the botanist and had been found to contain Cannabis L. was the same material as had been found by the informant in the boot of the defendant's car. The issue became in effect a simple one of proof of continuity. When asked by the Magistrate whether he was making a submission of no case to answer or whether he intended to call evidence counsel said that he did not intend to call evidence. After hearing submissions from the prosecutor and from counsel, the Magistrate found in these terms:

"I am against the submissions made by defence counsel. There is an assumption (*sic*) of regularity and I cannot assume against that regularity. I cannot assume that the material found was only small traces. Accordingly I find the charge proved."

As I have already indicated, the reference to "small traces" of Cannabis L. is now no longer relevant and it is conceded by counsel for the informant in these proceedings that the intended reference to and the reliance upon a presumption of regularity cannot be sustained. Thus it is that the principal issues on the return of this order nisi were firstly whether there was indeed evidence before the Magistrate which entitled him to find that the material examined was the material seized, and secondly, if he was not so entitled to find, how would the matter be disposed of.

Mr T Forrest, counsel for the defendant, submitted that there was no evidence upon which the court could achieve satisfaction that the material examined by the **[5]** botanist was the same as the material seized from the boot. He submitted that the fact that the name of the defendant appeared at the top of the certificate proved nothing and that in the absence of Constable Hill who, so it appears from the certificate, may have been able to give some evidence to prove continuity,

there was in fact no evidence in direct proof and no evidence from which any rational inference could be drawn that the material was one and the same. He submitted that the conversation between the informant and the defendant, while that may well have overtones – which is my expression – could not be relied upon as constituting any admission that the material found in the boot in fact contained Cannabis L. He referred to and attempted to distinguish the case of *Anglim and Cooke v Thomas* [1974] VicRp 45; (1974) VR 363. In that case a suspect who had been found in possession of certain substances which were classified under the *Poisons Act*, was convicted of offences. It was held by Harris J that having regard to the fact that the defendant there had been proven to have shown a considerable degree of familiarity with the various classified substances, then an admission by him as to the nature of the substance was admissible as evidence of that fact. In the present case of course it has not been shown that the defendant was familiar with Cannabis L. or any other substance, other than by way of any inference which may be drawn from the very brief conversation to which I have referred.

I am not in doubt that in this day and age an affirmative response to a question asked of any young **[6]** person, "Have you smoked marijuana" or "pot" or some such similar expression, could be regarded as some evidence against that person that he had smoked a substance containing Cannabis L. I think in the present case it may be said that if the informant had asked the defendant whether the material was Cannabis L. or was marijuana and the defendant had acknowledged that, then that may well have provided some evidence that the defendant was indeed in possession of Cannabis L. Be that as it may, I am unable to be satisfied that the conversation deposed to was sufficient to enable the court to be satisfied that the defendant was admitting, with the basis of some knowledge, that the substance in the boot contained Cannabis L. Mr Gebhardt, counsel for the informant, submitted, on the contrary, that conversation, at least in combination with the existence on the top of the certificate of the name of the defendant, was sufficient to enable the court to reach satisfaction on the point in issue. I am unable to accept that submission. In my opinion there is significance in the different terminology to be seen in section 120(1)(a) and 120(1)(b). As Murphy J has pointed out in *Henry v Hasty* (unreported 30 November 1977) section 120(1)(a) of the Act provides proof of the identity of the thing analysed, of the result of the analysis and of the matters relevant to such proceedings stated in the certificate (emphasis added). However, section 120(1)(b) omits any reference to "the matters relevant to such proceedings stated in the **[7]** certificate." Accordingly, as it seems to me, the certificate here under consideration, is admissible to prove only one thing and that is the identity and/or quantity of the thing examined.

I respectfully agree with Murphy J in *Henry v Hasty* that the word "identity" means "individuality or make-up" or perhaps, put another way, it may be said to mean the nature of the substance. However, the fact that the name of the defendant appears at the top of the certificate and the fact that there is a reference in the body of the certificate to the fact that the examination of the seized substance was made in the presence of Senior Constable Hill, do not I think advance the prosecution case. Whilst it is true that there is not here, as there was not in *Henry v Hasty*, any evidence or suggestion of the existence of a mix-up in the samples, there was in the case of *Henry v Hasty* much more satisfactory evidence linking the substance seized to the substance examined, than exists in the present case. Even if the certificate was admissible to prove that Constable Hill presented the plant material to the botanist, still there is simply no direct evidence as to the manner in which or the source from which the material came into Constable Hill's possession; nor any evidence of a set practice or procedure which might form the basis for any inference of continuity.

In my opinion, in the absence of satisfactory evidence linking the substance seized with the substance examined by the botanist, the court below should not have achieved satisfaction beyond reasonable doubt that the substances **[8]** were the same. The question then arises as to the appropriate disposition of the matter. Mr Gebhardt submitted that this was a case where there was a technical defect in proof which the prosecution ought to be allowed to amend or at least ought to be allowed to apply to amend, by calling a witness to provide the link in continuity; whereas Mr Forrest submits that this is not a technical defect but that it went to the heart of the matter, that is the identity of the material in issue.

In my opinion, if the Magistrate had held that the evidence was not sufficient, he would have entertained an application by the prosecutor to call evidence to prove the continuity. Since the defendant had not gone into evidence, it would not appear that the granting of such an

application could have unfairly prejudiced him; although the question of costs may have fallen for consideration. Although it is not for this court to direct that the Magistrate should grant such an application, I must say that it does seem to me that there might be considerable difficulties in counsel for the defendant showing why that should not be done. **[9]** Accordingly, the order nisi must be made absolute. The matter will be remitted to the Magistrates' Court at Heidelberg to be further dealt with according to law.

APPEARANCES: For the applicant Cosgriff: Mr T Forrest, counsel. Michael Stapleton, solicitor. For the respondent Bateman: Mr SP Gebhardt, counsel. Victorian Government Solicitor.
