36/86

SUPREME COURT OF VICTORIA — FULL COURT

R v UYMAZ

Kaye, O'Bryan and Tadgell JJ

10 April 1986

CRIMINAL LAW – DRUG OFFENCES – TRAFFICKING IN A DRUG OF DEPENDENCE – POSSESSION OF NOT LESS THAN TRAFFICKABLE QUANTITY - DEEMING PROVISION - WHETHER SUCH PROVISION CONFINED TO SENTENCING CONSIDERATIONS – "TRAFFICK" – EXTENT OF DEFINITION: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, SS70, 71(1) 72, 73.

(1) The definition of "traffick" in s70(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 ('Act') is not an exclusive one; it does not exclude the common law concept of trafficking nor any other concept.

(2) The provisions of s73(2) of the Act do not operate only in relation to the sentencing of a person convicted of possession of a drug of dependence. Section 73(2) is an evidentiary provision upon which the prosecution may rely in proof of the commission of an offence of trafficking in a drug of dependence under s71(1) of the Act.

***R v Trani* (unrep, Vic Sup Ct, Full Court, 18 June 1984), considered.**

KAYE J: (with whom O'Bryan and Tadgell JJ agreed) **[1]** Before the Court there are applications for leave to appeal against conviction and sentence. On 6th May 1985, when presented before the County Court at Mildura presided over by His Honour Judge Walsh, the applicant pleaded not guilty to count one, being a charge of trafficking in a drug of dependence, namely heroin; count two, possession of heroin, and counts four and five, trafficking in Cannabis L. He pleaded guilty to the third count of possession of Cannabis L. After trial, he was found guilty of trafficking in heroin under count one and not guilty of trafficking in Cannabis under counts four and five. No verdict was taken on count two, it being in the alternative to count one.

Subsequently, after hearing a plea made by counsel on his behalf, the learned trial Judge sentenced the applicant on the first count, trafficking in heroin, to a term of seven years' imprisonment, directing that he serve a period of five years' **[2]** imprisonment before which he would become eligible for parole. The applicant was fined the sum of $250, in default 14 days' imprisonment, on the third count, possession of Cannabis.

The convictions arose out of happenings which occurred during the mid-afternoon of 12th March 1985, in the vicinity of Lake Hawthorn Caravan Park near Merbein. The applicant was apprehended by police as he was driving a motor car some two or three kilometres' distance from the park. Under the driver's seat of the car police found a bag containing silver foil packages, which the applicant acknowledged belonged to him. He identified the white powder contained in the packages as heroin. He denied that the heroin was for his own use and that he was a user of heroin. From there, he was accompanied by police to his home. In the wardrobe of the bedroom of his home police discovered a plastic lunch-bag containing green vegetable matter which the applicant identified as "grass". This was Cannabis. He said that a friend had purchased the grass for him in an hotel on a previous evening. Subsequently, upon analysis, the foil packets of white powder were found to weigh 30.6 grams and to contain 20 per cent heroin.

The pure weight of the heroin was 8.2 grams, being in excess of the traffickable quantity of two grams of heroin fixed by the Eleventh Schedule of the *Drugs, Poisons and Controlled Substances Act* 1981. The street value of the heroin was approximately $22,500. The Cannabis was found to weigh 16.12 grams. In the course of a record of interview the applicant repeated that the plastic bags were put under the seat of the car by him. He declined to say where and when he acquired the heroin and how much he had paid for it. He denied, however, that he intended to sell the heroin or use it for himself. **[3]** As to the Cannabis, he said that it was purchased for him by a friend for $100. He said that he smoked marijuana each day in the loungeroom of his home.

The grounds upon which he makes application for leave to appeal against sentence are that the trial Judge wrongly applied sub-s2 of s73 of the *Drugs, Poisons and Controlled Substances Act* 1981; that the evidence was insufficient to justify a reasonable jury in reaching a verdict of guilty, and that there was insufficient evidence upon which a jury could have convicted him.

At the trial the applicant was represented by counsel. Before this Court the applicant appeared in person. He produced a written submission in support of his grounds of appeal. The submission runs into many pages. It has indications of having been prepared by a person possessed of professional skills. The applicant informed the Court that it was in fact prepared for him by a fellow prisoner at Pentridge.

The first ground of appeal arises out of the ruling made by the learned trial Judge in the course of the trial in his direction to the jury by which His Honour informed the jury, in substance, that the evidence of possession by the applicant of a traffickable quantity of heroin could be used by it as *prima facie* evidence of trafficking. It is sufficient to say that, in my view, His Honour's ruling and His Honour's charge to the jury were correct, and I do so for these reasons. Section 71(1) of the Act creates the offence of trafficking in a drug of dependence. It also provides the penalties which might be incurred by a person convicted of the offence of trafficking.

[4] Section 70(1) contains the meaning to be attributed to trafficking in a drug of dependence. That meaning, however, is not exclusive. The sub-section reads:

> "'Traffick' in relation to a drug of dependence includes—
> (c) sell, exchange, agree to sell, offer for sale or have in possession for sale, a drug of dependence."

Clearly, by the terms in which the definition is expressed, it does not exclude the common law concept of trafficking or any other concept. Section 73 of the Act creates the criminal offence of possession of a drug of dependence. It also provides for the penalty to which a person convicted of the offence is liable upon conviction. By sub-s2 of s73 it is provided that:

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

It was contended by counsel for the applicant at the trial of the applicant and it is submitted in the written submission upon which the applicant relies before this Court, that the provisions of sub-s2 operate only in relation to the penalty which should be imposed on a person upon conviction.

In my view the sub-section by its very terms indicates that it is intended to be an evidentiary provision relating to the commission of the offence. It is the provision upon which the prosecution is entitled to rely in proof of the commission of an offence contrary to s71(1). It is merely evidentiary **[5]** because it provides that the possession of a drug in a traffickable quantity is *prima facie* evidence of trafficking by the person charged.

The legislation enacts offences for trafficking in a drug of dependence by s71 cultivation of a narcotic plant by s72(1) and possession of a drug of dependence by s73(1). It is significant that s72(3) is in almost identical terms to that provided in s73(2), namely, that:

> "Where a person cultivates ... a narcotic plant in a quantity which is not less than the traffickable quantity applicable to a drug of dependence being that narcotic plant the cultivation of the plant in that quantity is *prima facie* evidence of trafficking by that person in a drug of dependence being that plant."

It is clear that sub-s3 of s72 is an evidentiary provision for use in proof of the cultivation of a narcotic plant and, accordingly, in my view evidence of possession of a traffickable quantity of a drug of dependence may be used as evidence of the commission of the offence of trafficking. In this conclusion I am fortified by what was said by Crockett J delivering the judgment of this Court in *R v Ricki Renato Trani* on 18th June 1984, a judgment in which the other members of the Court, Murray and Southwell JJ concurred. The Court there was concerned with a charge

laid under s32(2)(b) of the *Poisons Act* 1962 of trafficking in a drug of addiction. His Honour was concerned with the terms of the legislation in its then form which enacted the crime of trafficking. His Honour said, perhaps by way of *obiter*, as follows:

> "I might add that it might be thought that, if the legislature wished to have possessors of drugs of addiction who are assumed to have such drugs of addiction in their possession for the purpose of trafficking treated as actual traffickers (as it would seem is the intended policy of the legislature) then this should be made clear."

[6] His Honour added:

> "Indeed, this has now been done by the introduction of s73(2) by the amending Act No. 10002 of 1983 to the *Drugs, Poisons and Controlled Substances Act* 1981 which replaced the *Poisons Act* of 1962."

His Honour then set out the section to which I have just been referring. Accordingly, in my view, the first ground of the application has not been made out. The second and third grounds related to the evidence upon which the verdict of guilty was founded. In my view, there was ample evidence upon which the jury might reasonably have found that the applicant was guilty of the crime of trafficking in a drug of dependence, and that evidence was certainly sufficient to found the conviction.

I would therefore refuse the application for leave to appeal against conviction. The applicant relied upon two grounds in support of his application for leave to appeal against sentence. Those grounds are:

> "1. That the sentence was excessive having regard to the circumstances of the case.
>
> 2. That the sentence was excessive having regard to the circumstances of the appellant."

The applicant was 32 years of age at the time of the offence, having been born on 10th August 1952, in Turkey. He came to this country in 1974. He has no criminal record, so that he was a first offender, and the learned trial Judge treated him as such.

The maximum punishment for which the applicant was liable on conviction for trafficking in a drug of dependence, being heroin, is 25 years' imprisonment. The evils associated **[7]** with that form of criminal activity on the part of a person who chooses to traffick in a drug such as heroin were amply and properly stated by the learned trial Judge. I do not consider that any useful purpose would be served in repeating what His Honour then said. If I were to do so, it would merely be saying the same thing but using different words.

However, it must be well understood by all those who are tempted to indulge in the wicked practice of trafficking in drugs of dependence which have a corrupting effect upon other members of the community, that they must expect to experience the full force of the criminal law.

I find nothing in the circumstances of the applicant which mitigated against his conduct. There was nothing which His Honour said when passing sentence, or which he failed to take into account, which shows that the sentence was excessive. In my view, it was a proper sentence to be passed having regard to all the circumstances of the crime of trafficking in a drug of dependence and matters personal to the applicant. I would therefore refuse both applications.

O'BRYAN J: I agree for the reasons which have been expressed by the presiding Judge.

TADGELL J: I also agree with the conclusions expressed by the learned presiding Judge. I would simply add this. The principal contention put forward on behalf of the accused at the trial and by the applicant in writing before us, which has now been made central to this application, was that sub-s2 of s73 of the *Drugs, Poisons and Controlled Substances Act* (as amended) should be confined to providing evidence for the purpose of determination of the sentence to be awarded to a person convicted under s73(8) of possession of a drug of dependence. It was said also that the provisions found in sub-s3 and sub-s4 of s72, which are *mutatis mutandis* along the same lines as those in sub-s2 of s73, are confined in their use of sentencing purposes when there has been a conviction under s72. The argument was that it followed that these evidentiary provisions were

not applicable at all to assist the Crown to sustain conviction for an offence alleged against s71.

It is true enough that there are differences of penalty under ss72 and 73 according as to whether or not the cultivation in the one case and possession in the other were for purposes related to trafficking of the plant or drug in question. The differences in penalty do not depend on the question whether cultivation in s72 or the possession in s73 amounted to trafficking in the plant or the drug in question. It is to be noted that in sub-s2 of s73 the facts there referred to, if proved, are *prima facie* evidence of trafficking. That is to say, they establish that the facts provide *prima facie* evidence of something which goes far and away beyond what is necessary to be taken into account for purposes of sentence in the case of an offence under ss72 and 73.

It is very noticeable that whilst the provisions of sub-s2 of s73 bear some relation to the provisions of the *Poisons Act* 1962, s32(5), they go much beyond the earlier provision. It was because of a lack of some such provision as is now contained in s73(2) that the Crown failed in such cases as *R v Holman* [1982] VicRp 46; [1982] VR 471; (1981) 4 A Crim R 446 and *R v Trani*, **[8]** to which Kaye J has referred.

One might at first blush regard the position of sub-s2 of s73 in Part V as being curious or even illogical. It might be thought that it would be better found in s71, if it were concerned to provide evidence of trafficking, rather than to be found where it is. A study of the scheme of Part V of the Act as a whole satisfies me, however, that when the scheme the draftsman has used is understood, there is no argument of a satisfactory kind which can be mounted simply by virtue of the position in the legislation where s73(2) is to be found. Subject to what I have said, I agree with the learned presiding Judge in his reasons for dismissing both of these applications.

KAYE J: The order of the Court is that the applications be dismissed.
