46/01; [2001] VSCA 238

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v CREHAN & ROWE

Brooking, Phillips and Vincent JJ A

15 November, 19 December 2001 — (2001) 4 VR 189; (2001) 127 A Crim R 256

CRIMINAL LAW – STATUTORY INTERPRETATION – TRAFFICKING IN COMMERCIAL QUANTITY OF DRUG OF DEPENDENCE – REFERENCE IN ACT TO METHYLAMPHETAMINE AND METHYLAMINO – EXPERT EVIDENCE GIVEN THAT DRUGS ARE SAME SUBSTANCE – TWO INCONSISTENT SETS OF PROVISIONS IN RELATION TO SAME DRUG – PROVISIONS INTRODUCED BY AMENDMENT AT DIFFERENT TIMES – WHETHER LATER ENACTMENT REPEALS EARLIER ONE BY IMPLICATION: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, Sched 11.

C. and R. were charged with trafficking in a drug of dependence namely, methylamphetamine in a quantity not less than the commercial quantity applicable to that drug. The quantity of the drug was 518.7 grams pure. The specified commercial quantity in the *Drugs, Poisons and Controlled Substances Act* 1981 ('Act') Part 3 of Schedule 11 was 250 grams. Part 1 of Schedule 11 of the Act referred to methylamino and specified the commercial quantity as 2.0 kilograms. A forensic scientist at the committal proceeding gave evidence that methylamphetamine and methylamino were the same substance. On 1 September 1997, the Act was amended in relation to methylamphetamine whereby the quantity of pure drug constituting a commercial quantity was reduced from 2 kilograms to 250 grams. The magistrate declined to commit C. and R. for trial. On a case stated by a judge of the County Court—

HELD: The two inconsistent provisions in the Act were both introduced by amendment at different times. The two regimes in respect of the same drug cannot stand together. There being two inconsistent sets of provisions contained in an Act of Parliament, the later, introduced by subsequent amendment repeals the earlier by implication. Accordingly, the item relating to methylamino was repealed by implication on 1 September 1997.

BROOKING JA:

1. Michael Crehan and William Rowe were charged that, contrary to s71(1)(a) of the *Drugs, Poisons and Controlled Substances Act* 1981 ("the Principal Act"), they trafficked in a drug of dependence namely methylamphetamine on or about 6 August 1999 and that the trafficking was in a quantity not less than the commercial quantity applicable to that drug. The magistrate declined to commit them for trial on that charge, upholding a submission that the quantity of the drug the subject of the evidence for the prosecution – 518.7 grams pure – was less than the commercial quantity. He took this view because there were, at the relevant time, two items in Schedule 11 of the Principal Act, each of which, on the evidence before him, concerned the same substance. One item related to "methylamphetamine" and was contained in Part 3 of Schedule 11, the specified commercial quantity being only 250 grams of pure drug. The second item was contained in Part 1 of Schedule 11. It related to "1-phenyl-2-methylamino propane" (which I shall call "methylamino"). This item specified as the commercial quantity, not 250 grams, but 2.0 kilograms. A forensic scientist who gave evidence at the committal swore that methylamphetamine and methylamino were the same substance. The magistrate, in declining to commit for trial, accepted a defence submission that the defendants were entitled to the benefit, as it were, of the less severe provision, so that the specified commercial quantity had to be taken to be 2.0 kilograms.

2. The Director of Public Prosecutions, being dissatisfied with the magistrate's decision, proceeded by way of direct presentment, and a judge of the County Court was told by counsel for the accused that they were prepared to plead guilty to a charge of trafficking in a commercial or non-commercial quantity according as this Court, on a case stated, determined that the specified commercial quantity was 250 grams or on the other hand 2.0 kilograms. His Honour accordingly stated a case pursuant to s446(2) of the *Crimes Act* 1958.

3. When this came before us last month we asked counsel whether it was possible that, notwithstanding the evidence given at the committal, methylamphetamine and methylamino were in fact not the same substance. We did this because the question had been determined only at the committal stage and raised again only at a preliminary hearing in the County Court, so that

there could be no question of unfairly depriving the accused of a finding of fact to which they were entitled on the evidence led on a trial or plea. All counsel accepted that it was undesirable that the Court should deal with the question posed by the case stated if there was a possibility that the critical fact in the case stated was not correct. We were later informed that we should proceed on the basis that the two substances were one and the same.

4. I shall now trace the history of the legislation, as briefly as possible. One can begin with the changes wrought by the *Drugs, Poisons and Controlled Substances (Amendment) Act* 1983. As a result of those changes an item appeared in Part 1 of Schedule 11 to the *Drugs, Poisons and Controlled Substances Act* 1981 in respect of methylamphetamine and this item prescribed 2.0 kilograms as the commercial quantity and 2.0 grams as the traffickable quantity. Part 1 of the Schedule was amended by the Governor in Council by proclamation[1] with effect from 18 December 1984, and one of these amendments was to introduce into the Schedule for the first time the item relating to "1-phenyl-2-methylamino propane", which I have been calling "methylamino". This item prescribed as the commercial quantity and traffickable quantity the same quantities – 2.0 kilograms and 2.0 grams respectively – as the existing item prescribed for methylamphetamine. These two substances are one and the same. The two items continued to co-exist in Part 1 of Schedule 11 until 1 September 1997, when, as a result of an amendment made by the *Sentencing and Other Acts (Amendment) Act* 1997, the entry relating to methylamphetamine in Part 1 of Schedule 11 to the Principal Act was repealed. At the same time methylamphetamine was made to appear for the first time as an item in the drastically recast Part 3 of Schedule 11, the specified commercial quantity being only 250 grams.

5. The amendments made to Part 3 of Schedule 11 by the Act of 1997 were far-reaching. In the first place, before its amendment that Part related only to "any substance containing tetrahydrocannabinol". After its amendment the Part dealt with a number of drugs, including methylamphetamine, all of which had been removed from Part 1; and after the amendment the quantities specified – in Part 3 – as the commercial quantities were much smaller than those which had been specified in Part 1. In the second place, Part 3, as given effect to by the substituted definition of "commercial quantity" in s70 of the Principal Act, introduced a new and alternative means of establishing a commercial quantity. This was done by providing that *any* amount of the drug was a commercial quantity if it was contained in or mixed with another substance and the quantity of that mixture was not less than the quantity specified in respect of mixtures.

6. The result of the 1997 amendments as regards methylamphetamine was that the quantity of pure drug constituting a commercial quantity was reduced from two kilograms to 250 grams and in addition that *any* quantity of that drug became a commercial quantity if contained in a mixture which had a total weight of 1.25 kilograms. Both these changes were to the disadvantage of drug traffickers, and it is upon the first of them that attention has been concentrated in the argument put for the accused men. But the amending Act of 1997 made not only those two changes but also two others as regards methylamphetamine, and these two others both *favoured* accused persons. In the first place, the introduction of methylamphetamine into Part 3 resulted in the specification of 6.0 grams as a traffickable quantity, but when the drug appeared in Part 1 the traffickable quantity was only 2.0 grams. (Section 73(2) makes possession of a traffickable quantity prima facie evidence of trafficking.) In the second place, the introduction of methylamphetamine into Part 3 meant that for the first time a "small quantity" was specified for that drug. The result of this, and of the amendments made to s76 of the Principal Act by the amending Act of 1997, was to extend the beneficial provisions of that section (dealing with not proceeding to a conviction) to cases of a small quantity of methylamphetamine. Thus the 1997 amendments made two pairs of changes in relation to the quantity of that drug, the first pair being adverse to an offender and the second beneficial.

7. In her Second Reading Speech[2] on the Bill for the amending Act of 1997 the Attorney-General said this:

> "The *Drugs Poisons and Controlled Substances Act* 1981 currently specifies quantities of drugs, possession of which raises a presumption that an offender is trafficking or trafficking in a commercial quantity. It was considered that the quantities currently set in schedule 11 of the act are at such high levels that large scale drug ventures which are blatantly commercial in nature are not being caught by the Victorian provisions. Because the motivation for trafficking drugs is primarily economic profit, the levels set for the different drugs in schedule 11 will reflect a consistent monetary value

> or number of doses of a drug. The bill reduces quantities to a level that more realistically reflects the commercial nature of criminal ventures. This bill will amend only the quantities of the six most common illicit drugs. The other illicit drugs specified in schedule 11 will be reviewed over the coming year to bring them into line with the above values. To reflect the commercial nature of certain criminal enterprises in the drug trade, the bill introduces a new method of calculating the size of the criminal activity. For instance, where an offender has 500 cannabis plants, this will amount to trafficking in a commercial quantity of drugs irrespective of the weight of the plants."

8. The case has been argued for the accused men on the basis that the result of the retention of methylamino in Part 1 and the transfer of methylamphetamine to Part 3 was simply that, whereas before there had been consistency, the same commercial and traffickable quantity being specified in each case, there was now inconsistency, in that the commercial quantity for methylamphetamine was reduced to 250 grams while it remained 2.0 kilograms for methylamino. But this is seen to be only a partial and inaccurate statement of the effect of the changes. The contention of the accused that, there being two inconsistent provisions in the criminal law, they are entitled to the benefit of the more lenient or advantageous provision, cannot be a submission that accused persons are to be dealt with in all cases under the regime laid down in respect of methylamino. It must be a submission that they are entitled to pick and choose between the two regimes according as, on the facts, the one or the other would be more beneficial to them. That might be thought to be a strange result.

9. Since the coming into force of the 1997 amendments the Act has, in relation to the same drug, contained two inconsistent regimes as regards the matters of quantity — commercial, traffickable and small. An attempt could be made to reconcile the regimes, but it would be unsatisfactory. The Crown accepts that it should not be undertaken. I do not think it necessary to discuss such quite unpersuasive arguments as might have been, but in fact were not, put in support of the view that the two regimes are not inconsistent.

10. If the provisions in question had simply been enacted at the same time in a single piece of legislation, interesting questions would have arisen. On the one hand, reliance might have been placed on what was once said by Dixon J:

> "Notionally to write the earlier provision into the later may be a useful way of testing the consistency of the two provisions, but in its application it must be remembered that, when two apparently inconsistent provisions occur in one Act of Parliament, to reconcile them by interpretation is the only course open. They cannot both receive their full meaning as it is expressed. In other words no-one can say that two provisions cannot live together when the legislature which gave them life found room for them in the one enactment."[3]

See too *Castrique v Page*[4], *Re Holt*[5] and *Sheffield Corporation v Sheffield Electric Light Co*[6]. The problem is discussed in *Wilberforce on Statute Law*, pp315-8, and, more briefly, *Craies on Statute Law*, 7th ed, p372.[7] I do not think it is possible to use interpretation to reconcile these two sets of provisions by, in the words of Dixon J, not allowing one of them to receive its full meaning as it is expressed.

11. The present is not a case where two inconsistent provisions have been enacted at the same time as part of the same statute. They appear in the same statute[8], but they were both introduced by amendment, and the two amendments were made at different times. Once it is accepted, as all parties do, and as must be done, that the two sets of provisions are inconsistent, the case is governed by the rule that a later enactment inconsistent with an earlier one impliedly repeals the earlier one. The two regimes in respect of the same drug cannot stand together and the later must prevail.

12. The present case is not one of mere change of penalty. What amounts to a traffickable quantity bears on whether the Crown can invoke the provision making possession of a traffickable quantity *prima facie* evidence of trafficking (s73(2)). The provisions about "small quantity" bear on whether in all the circumstances the court should proceed to a conviction (s76). It is none the less of interest to note the cases dealing with whether a statute altering a penalty impliedly repeals an earlier statute. The case most commonly cited on this is *R v Davis*[9], but a number of other decisions are mentioned in *Wilberforce on Statute Law*, pp322-6 and *Craies on Statute Law*, 7th ed, pp370-1.

13. Where two inconsistent statutes were passed on the same day, the one empowering a municipality to buy an undertaking in return for its irredeemable stock and the other taking away its power to issue that stock, North J said, "Then I am asked, What can be the meaning of the inconsistency? Was there a mistake, or how was it? I do not know how it has happened, and I cannot explain it. I must construe the orders as I find them ... ": *Sheffield Corporation v Sheffield Electric Light Co*[10]. What has happened in the present case? If there was a mistake, then it was one of fact, in that two names were thought to be the names of different drugs when in fact they were different names for the same drug. Errors of fact in legislation are discussed by Bennion, *Statutory Interpretation*, 3rd ed., p681. An enactment cannot be disregarded on the suggested ground that it was made as a result of incorrect information: *Labrador Co v R*[11]; *Hoani Te Heuheu Teukino v Aotea District Maori Land Board*[12]. Of course no one has suggested, or could suggest, that the item in Part 1 concerning methylamino is to be ignored on the basis that the Governor-in-Council mistakenly believed that it was a different drug from methylamphetamine.[13] Perhaps it is legitimate to say that methylamino was introduced into Part 1 because of a mistaken belief that it was a different drug from methylamphetamine. But I do not think that this conclusion bears on the determination of the question with which we are concerned. That question must be answered by saying that, there being two inconsistent sets of provisions contained in an Act of Parliament, the later, introduced by subsequent amendment, repeals by implication the earlier. There is no doubt about the inconsistency, and no doubt about the repeal: the conclusion is irresistible. The item in Part 1 of Schedule 11 relating to what I have been calling methylamino ("1-phenyl-2-methylamino propane") was repealed by implication on 1 September 1997. This is the result of the ancient rule that a later enactment inconsistent with an earlier one repeals it by implication. The question reserved should be answered accordingly.

PHILLIPS JA:

14. I agree with Brooking JA that for the reasons given by his Honour the "commercial quantity" of the drug in question is as specified in Part 3 of Schedule 11 of the *Drugs, Poisons and Controlled Substances Act* 1981, as amended by the *Sentencing and Other Acts (Amendment) Act* 1997. That is because, as established by the evidence given at the committal proceeding and accepted by the parties before us, methylamphetamine is the same as 1-phenyl-2-methylamino propane.

VINCENT JA:

15. I agree for the reasons advanced by Brooking JA in his judgment.

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[1] Statutory Rule No. 1 of 1985, made in the exercise of the power conferred by s9 of the Principal Act.
[2] Hansard, Legislative Assembly, 24 April 1997, p876.
[3] *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* [1939] HCA 40; (1939) 62 C.L.R. 603 at 626-7; [1940] ALR 1.
[4] [1853] EngR 402; (1853) 13 CB 458; 138 ER 1278.
[5] (1878) LR 4 QBD 29.
[6] [1898] 1 Ch 203.
[7] Query whether the rule that the provision nearer to the end of the instrument prevails might be applied in a case where all else failed. See Bennion, *Statutory Interpretation*, 3rd ed., pp902-3.
[8] The inconsistency has been removed by the deletion from Part I of Schedule 11 of the item concerning methylamino by Statutory Rule No. 85 of 2000, made in the exercise of the power given by s12M and paragraph (2cb) of s132 of the Principal Act. This took effect from 29 August 2000.
[9] [1783] EngR 20; (1783) 1 Leach 271; 168 ER 238.
[10] [1898] 1 Ch 203 at 210.
[11] [1893] AC 104.
[12] [1941] AC 308; [1941] 2 All ER 93.
[13] (We are of course here concerned with an amendment made by statutory instrument.)

APPEARANCES: For the DPP: Mr PA Coghlan QC with Mr CJ Ryan counsel. Ms K Robertson, Solicitor for Public Prosecutions. For the Accused Crehan: Mr RF Redlich QC with Mr D Sheales, counsel. Yianoulatos Lawyers, solicitors. For the Accused Rowe: Mr A Schwartz, counsel. Lewenberg & Lewenberg, solicitors.
