01/81

SUPREME COURT OF VICTORIA

DENNIS v BONOGUORE

Jenkinson J

18 September 1980

CRIMINAL LAW – TRAFFICK/POSSESS/SMOKE DRUGS – GUILTY PLEA TAKEN – CERTIFICATE OF ANALYSIS TENDERED TO COURT – PLEA CHANGED TO 'NOT GUILTY' – SUBMISSION THAT CHARGES OF TRAFFICKING AND POSSESSING SHOULD BE DISMISSED ON THE BASIS THAT THE SUBSTANCE CONTAINED TETRAHYDROCANNABINOL IN A QUANTITY WHICH WAS MORE THAN 3% – CERTIFICATE DID NOT PROVIDE ANY EVIDENCE OF SUCH A QUANTITY – SUBMISSION UPHELD BY MAGISTRATE – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *POISONS ACT* 1971, SS32(3),(4), 56.

HELD: Order nisi absolute. Remitted to the magistrate for further determination.
Proof that the substance in relation to which the charges were brought contained tetrahydrocannabinol in a quantity which was more than 3% was not required. Accordingly, the magistrate was in error in dismissing the charges on that ground.

JENKINSON J: The respondent came before the Magistrates' Court at Heidelberg on 18 August 1979 charged on information with four offences. The respondent was charged that he, not being authorised or licensed under the provisions of the *Poisons Act* 1962, did traffic in a drug of addiction to wit tetrahydrocannabinol; that he, not being authorised or licensed as aforesaid did prepare a drug of addiction to wit tetrahydrocannabinol; that he, not being authorised as aforesaid did have in his possession a drug of addiction to wit tetrahydrocannabinol; and that he did smoke a drug of addiction to wit tetrahydrocannabinol.

The respondent may be supposed to have consented to the hearing and determination in a summary way before the Magistrates' Court of the charge of trafficking and of the charge of preparing. He pleaded guilty to each of the four charges. Evidence was then adduced on behalf of the informant in the course of which a document was tendered in evidence as being a certificate admissible under the provisions of s56 of the *Poisons Act*.

The legal practitioner then appearing for the respondent and a legal practitioner then appearing for another man who was being tried with him made application to the learned magistrate that each of the accused be permitted to withdraw his plea of guilty. Those applications were granted and counsel for each of the accused then made a submission to the magistrate concerning the document which may be referred to as a certificate. The submission involved the proposition that no conviction could be made in respect of the trafficking charge or the preparing charge unless the tribunal was persuaded that the substance in relation to which the charge was brought contained tetrahydrocannabinol in a quantity which was more than three per centum. The certificate did not provide any evidence of such a quantity and so it was apparently submitted that each of the charges of trafficking and preparing should be dismissed.

On the return of the orders nisi counsel for the respondent did not seek to contend that proof of such a quantity was required in order to sustain either of those charges, and I find no basis for the suggestion that such proof was necessary.

The learned magistrate heard argument upon the submissions and after considering the matter dismissed each of the charges of trafficking and preparing on the ground that the submission concerning quantity, which if that was all, the order nisi in each case would be made absolute. But there is more. Counsel for the respondent sought before me to justify the order of dismissal of the charges on several grounds. First it was said that the charges should have been dismissed because the certificate did not assert that the substance to which the certificate related was tetrahydrocannabinol. The certificate asserted that the substance analysed "contained Tetrahydrocannabinol which is an Active Principle of Cannabis (Indian Hemp)". It was submitted that, although tetrahydrocannabinol was one of the substances named in Schedule 8 of the *Poisons*

Act 1962 as a drug of addiction, that to which the certificate referred was not a substance which fell within the description contained in s32(2)(b) of the *Poisons Act*. It was said that a substance named in that Schedule was comprehended by the expression in s32(2)(b) 'any other drug of addiction' only if it was a substance which did not answer a description found in the preceding provisions of s32(2). Reliance was placed in support of the submission upon the reasoning of Lord Diplock in *DPP v Goodchild* (1977) 1 WLR 473; (1977) 64 Cr App R 100.

In order to make good the submission, it is necessary that I be able to proceed on the basis that tetrahydrocannabinol may be found as a resinous or other extract obtained from a plant of the genus Cannabis L, or from a part of that plant. Then it would be necessary that I should assume that the substance to which the certificate referred was a resinous or other extract obtained from a plant of that genus or from a part of that plant. If I were to make those assumptions and otherwise to accept the submission, as to which I think I need express no opinion, there would yet remain the question as to whether the charge ought to have been amended by substituting for the words "a drug of addiction to wit tetrahydrocannabinol" the words "a resinous extract obtained from a plant of the genus Cannabis L."

The submission advanced in this court was not the subject of any submission in the court below, so far as appears. If it had been, there are a number of possible outcomes and it is not in my opinion at all clear that the only outcome of acceptance of the submission would have been dismissal of the charges.

Then it was submitted that the order of dismissal was justified because there was no evidence that the substance to which the certificate refers was the substance concerning which evidence had been given by the applicant. That appears to be correct, but it is clear that until the pleas were changed to not guilty the informant was merely providing the magistrate, in accordance with practice, with the substantial evidence and had no need to concern himself with technicalities of proof. Proof was available from the plea of guilty. There is nothing in the material before me to enable me to tell whether the informant ever closed his case. Even if it be assumed that the informant did close his case before the order for dismissal was made, if the point now under consideration had been raised as a justification for dismissal of the charge it would have been in my opinion clearly open to the magistrate in those circumstances to have permitted the informant to re-open his case, if the magistrate had been of the view that the informant had been caught out in deficiencies of proof because he had been surprised by the change of plea and by the changed circumstances in which the informant found himself.

Then it was said that the endorsement on the back of the certificate showed, as it does, that a copy of the certificate had been served on the day of the hearing of the charges. I assume that I was invited to infer from that circumstance that no copy of the certificate had been served at least seven days before the hearing, in accordance with the provisions of sub-s(2) of s56. But this point was not taken, if it had been taken, the circumstances which would have been disclosed to the magistrate would have required him to provide the informant with an opportunity of making good his proofs, either by oral evidence, or by some other course which did justice between the parties.

Then it was said that what the evidence showed to have been done in relation to the substance could not satisfy the requirements of the word "prepares" in s32(2) and that for that reason the charge of preparing should have been dismissed. This point had not been taken before the magistrate. The evidence might support a conclusion that the abstraction of the substance from a jar by means of a syringe and the transfer of the substance from the syringe to a number of capsules were undertaken solely for the purpose of dividing the quantity of the substance which was in the jar into parcels of a quantity appropriate for sale or distribution to persons who would make use of the substance.

The evidence might, on the other hand, support a conclusion that the transfer of particular quantities of a substance into the capsules had other objects. But, even if the respondent's activity in dividing the substance and placing particular quantities into particular capsules had no purpose other than convenience of distribution, I think that what was done would answer the meaning of the word "prepares". I think that any activity in relation to the substance which brings it to a condition more convenient for actual use as a drug than it had previously been answers the conception

which is expressed by the word "prepares" in s32(2). But, I do not express any concluded opinion on the points. It seems to me that the hearing of these charges went so thoroughly away from the course which the law requires, in consequence of the no doubt understandable and exciting discovery of a possible technical defence to the charges, that the only proper course is for the order to be set aside and the matter remitted for further hearing in accordance with law. This does not seem to me to be a case in which the hearing of the charges should commence again *de novo* or before a court differently constituted. I think it is impossible for me to tell from the affidavits what justice now requires in the conduct of the proceeding. It is likely, however, that the learned magistrate before whom the charges were heard would be in a position to judge what procedural steps, whether by way of re-opening the informant's case or amendment or otherwise, ought to be taken.

The order that I make in each case is that the order nisi be made absolute and that the order of the Magistrates' Court in each case be set aside and that the information in each case be remitted to the Magistrates' Court at Heidelberg to be further heard and determined according to law. I will make the orders as in chambers.
