34/86

SUPREME COURT OF VICTORIA — FULL COURT

R v CLARKE and JOHNSTONE

Crockett, McGarvie and Southwell JJ

13, 14, 17, 18 March; 24 April 1986

[1986] VicRp 64; [1986] VR 643; (1986) 21 A Crim R 135

CRIMINAL LAW – DRUG OFFENCES – TRAFFICKING IN A DRUG OF DEPENDENCE – CANNABIS L. – 'PLANTATION' CASE – OCCASIONAL VISITOR TO PLANTATION - EXERCISING DOMINION OVER – WHETHER PLANTATION "OCCUPIED" BY VISITOR – OCCUPIER DEEMED TO BE IN POSSESSION OF DRUG – ONUS OF PROOF – DEEMING PROVISION WHERE TRAFFICKABLE QUANTITY – WHETHER ONUS OF PROOF REVERSED – MEANING OF "POSSESSION" – WHETHER LIMIT TO *PRIMA FACIE* EVIDENCE OF TRAFFICKING: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, SS5, 71(1), 73(2).

Per Curiam:
1. The evidentiary effect of s5 of the *Drugs, Poisons and Controlled Substances Act* 1981 ('Act') is that facts establishing less than the possession of a drug by an accused are deemed to establish possession unless the accused satisfies the Court on the balance of probabilities that he was not in possession of it. Accordingly, a person proved beyond reasonable doubt to be in occupation of relevant land, is deemed to be in possession of any substance found on that land unless he proves on the balance of probabilities that he was not in possession of it within the common law meaning of the word "possession".

2. In order to determine whether a person is in occupation of the relevant land, it is not necessary to show constant physical presence. A person is an occupier of property where he regards himself as having dominion over the whole of a farm and having power to grant or deny other access to the property, notwithstanding that he only visits the property occasionally.

3. Where a court is satisfied that a traffickable quantity of a drug of dependence was on land occupied by an accused and not satisfied that the accused was not in possession of the drug, he is to be treated as having it in his possession and liable to the deeming provision of s73(2) of the Act, that is, that such possession is *prima facie* evidence of trafficking in that drug.

4. Such deeming provision does not deem any fact to exist nor reverse the onus of proof. If further evidence is placed before the Court on the issue of trafficking, the court is to decide on the whole of the evidence whether it is satisfied that the accused trafficked in the drug.

5. In construing the word "possession" in s73(2) of the Act, it should be given its ordinary meaning by which a person may be in possession of something by himself or his employees or agents. The word is not limited to meaning a personal possession.

6. The deeming provisions of s73(2) of the Act are not to be read as providing *prima facie* evidence of trafficking in all the ways in which one may traffick within the common law or the definition of "Traffick" in s71(1).

CROCKETT J: (with whom McGarvie and Southwell, JJ agreed) *[after setting out the facts, continued]* ... **[5]** Ground 1 read:

> "That His Honour the learned trial Judge erred in failing to direct the jury as to the meaning of 'possession' at common law."

The learned trial Judge did not give directions to the jury as to the meaning of possession at common law. The question is whether this amounted to a fatal non-direction. It was submitted by Mr Faris that this was not a "normal" trafficking case – that is to say not a case where a person was found in actual possession of a quantity of cannabis in circumstances which led to the conclusion that that possession was linked with an illicit trade in the drug; it was said this was a "plantation case" where the Crown relied upon the use of statutory fictions concerning possession.

Here the Crown relied upon s5 and s73(2) of the *Drugs, Poisons and Controlled Substances Act* 1981 which read:

> **[6]** "5. Without restricting the meaning of the word "possession", any substance shall be deemed for the purpose of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary."
>
> "73.(2) Where a person has in his possession, without being authorised 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."

Mr Faris submitted that the learned trial Judge misdirected the jury on a number of occasions as a result, it was said, of an incorrect interpretation of s5, in particular of the words "unless the person satisfies the court to the contrary". It was said that on a number of occasions the jury were directed that proof "to the contrary" meant and meant no more than proof that the applicant did not know of the existence of the cannabis crop. This, it was said, wrongly confined the issue – the true meaning of s5 was that the occupier of land upon which cannabis was found would be deemed to be in possession of the cannabis unless he proved that he was not in possession of it – that is to say, that proof "to the contrary" meant proof that he was not in possession. Accordingly, it was said, it was necessary that the jury be directed carefully as to the meaning of "possession" at common law, and that there would then be elements other than mere knowledge which the jury would have to consider; for example, it was said, the jury might be satisfied the applicant had **[7]** knowledge of the crop, nevertheless he would not necessarily be guilty because he may have had no guilty intent in relation to the existence of the crop nor feel bound to interfere with the existence of the crop upon land in which he had no legal estate.

We must first consider the true interpretation of s5. For this purpose it is useful to note that its precursor was s28 of the *Poisons Act* 1962 which read as follows:

> "Without restricting the meaning of the word 'possession' a substance shall be deemed for the purposes of this Part to be in the possession of any person so long as it is upon any land or premises occupied by him or is used enjoyed or controlled by him in any place whatever unless it be shown that he had no knowledge thereof."

Section 5 of the Act, when it was enacted in 1981 (as earlier stated, it did not come into operation until 18 December 1983 – hence the commencing date of the offence as set out in the presentment) read as follows:

> "5. Without restricting the meaning of the word 'possession', any substance, money or other valuable thing shall be deemed for the purposes of this Act to be in possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless it is shown that he had no knowledge of the existence of that substance, money or valuable thing."

In 1983, before the Act of 1981 came into operation s5 of it was amended by Act No. 10002 to its present form set out above. We consider that Mr Faris' submission is correct namely, that what must be proved by an occupier of relevant land is that he was not in possession of the substance within the common law meaning of the word "possession". **[8]** Some meaning must be given to the words in s5 "unless the person satisfies the court to the contrary". The section clearly casts upon the prosecution the onus of proving either occupation of the relevant land or that the prohibited substance was used, enjoyed or controlled by the accused. The legislature could not have intended to enact that an accused person was called upon to disprove occupation or to prove that he did not use, enjoy or control the substance. If the latter words of the section are to be given any meaning at all it must follow that a person proved to be in occupation of relevant land is deemed to be in possession of the substance unless he proves that he was not in possession of it. That can only mean possession as it is known in common law.

In his charge the learned trial Judge when first dealing with s5 said:

> "Now the effect of that section is that if you were satisfied beyond reasonable doubt that the accused

> whose case you are considering was an occupier of the land known as Running Creek, then that person is deemed to be in possession of marijuana unless that person satisfies you that he or she was not."

That direction, Mr Faris submitted, was correct. We add that it serves to demonstrate that his Honour was under no misapprehension as to the meaning of the section. However, on a number of occasions thereafter the learned trial Judge used different terminology, for example:

> "If you did conclude and were satisfied beyond reasonable doubt that she was the occupier then of course it throws on to her the burden of proving that she did not know the cannabis was there."

(This passage was dealing with the case against a co-accused). **[9]** There are some seven further occasions where his Honour used similar terminology – that is, he told the jury that if they were satisfied the accused was an occupier of the property then the burden lay upon that accused to prove on the balance of probabilities that he or she did not know of the existence of the cannabis crop. Mr Faris submitted that the combined effect of those directions would have over-ridden the correct direction earlier given.

Mr Fitzgerald QC, who with Mr Bartlett appeared for the respondent, first submitted that there had been no objection taken to the charge in respect of any of the grounds of appeal, a subject to which we later return. He submitted that there had been no misdirection or non-direction; indeed it was said that in this case, involving as it does, complex legislation, it would confuse the jury were they directed about the law in respect of matters which were not put in issue at the trial. He submitted that the trial was conducted upon the basis that there was really only one issue – whether the accused knew of the cannabis plantation. Later, in discussion he said that, in the circumstances of this case, the question whether knowledge was proved was really indistinguishable from the question whether the joint agreement to grow the drug was proved.

Specifically, as to ground 1 he submitted that the direction given by the learned trial Judge was sufficient in the circumstances of this case. In the charge his Honour, after dealing with the operation of s70(1) of **[10]** the Act – which provides that trafficking includes having a drug of dependence in possession for sale – told the jury:

> "Possession means knowing that you have got cannabis in your possession. In other words you do not commit this serious crime by having something in your possession, either not knowing that you have got it, or not knowing that it is cannabis. You have got to know that you have got it and you have got to know it was cannabis."

And later:

> "So that here you have to be satisfied that the accused were in possession of the drug cannabis, in its plant form or in its leaf form in the hayshed and that they knew that it was cannabis and you have to be satisfied that that being the case they had it for sale."

The question is whether the several references to knowledge, rather than possession, constituted a misdirection. Strictly speaking, it might be thought that if s5 imposes on a proven occupier the onus of proving that he was not in common law possession of the drug the trial Judge would be bound to define the concept of possession at common law. However, it must steadily be borne in mind that a jury need be told only so much of the law as is necessary for them to know having regard to the issues in the trial. If in this case the learned trial Judge had defined the elements of possession he would then have had to direct the jury that the only element relevant in this case was knowledge. That would be so for the reason that at no time in the trial was the issue raised that the applicant knew or may have known of the existence of the crop, but for one reason or another chose not to do anything about it – perhaps taking the attitude that since he was not the owner of the farm he would mind his **[11]** own business and not interfere with Clarke's illegal activity.

Mr Fitzgerald submitted that if a view of the facts was reasonably open that the applicant may have known of the crop but have no guilty intent in respect to it, Counsel could have put that and his Honour may have dealt with it by further definition of possession: but, it was said, there was no need so to direct where it was not raised, and his Honour would have been dealing with the law relating to a fanciful, not reasonable, view of the facts. We think that submission is correct.

We are of opinion that Mr Fitzgerald was correct in submitting that it was inconceivable that the jury would be satisfied that the applicant knew of the plantations, and yet fail to be satisfied that he was a party to the agreement alleged, a matter which must again be referred to in discussing other grounds of appeal. It cannot therefore be said that the failure of the learned trial Judge to define common law possession and his repeated reference to knowledge of the crop as being the only relevant element amounted to a misdirection. Accordingly, ground 1 has not been made out.

Ground 7 reads:

> "That the passage on page 106a 'if you are not satisfied that he was an occupier, it is for the Crown to prove that (that he did know the crops were there) to your satisfaction beyond reasonable doubt' in that it amounted to a direction that to prove trafficking the Crown had only to prove knowledge."

[12] In our opinion that passage refers to the Crown case put as it was on the basis that the applicant aided and abetted Clarke in growing the cannabis. On that basis it was for the Crown to prove that the applicant knew that Clarke was committing a crime. We, therefore, think that there is no substance in this ground.

Ground 8 reads:

> "That His Honour the learned trial judge misdirected the jury in the passage on pages 106a-107a 'if you were satisfied that he was an occupier, then it is up to him to satisfy you on the balance of probabilities that he did not know the crops were growing there' in that it incorrectly states that which is to be proved by the Applicant under Section 5."

This ground and the arguments in support of it were in reality no more than extensions of ground 1 and the reasoning which led to a rejection of ground 1 must produce the same result in respect of this ground. Grounds 2 and 3 were argued together. They read:

> "2. That His Honour the learned trial Judge erred in failing to direct the jury as to whether or not the Crown had to prove that the Applicant, under section 5, was in possession of -
> (a) the whole of the land being the property on the Title;
> (b) any part of the land being the property on the Title;
> (c) the whole of the land containing each crop of cannabis;
> (d) the land containing one or the other crop of cannabis.
> **[13]** 3. His honour the learned trial Judge erred in failing to direct the jury as to the meaning of the word 'premises' in section 5."

Mr Faris submitted that there were a number of entities to which s5 could apply – the house, the small crop, the large crop, the whole farm. It was said that his Honour without distinguishing between them, used expressions such as "the land", "the farm", "the property", "Running Creek", "the premises", "the house". It was said that the jury might be satisfied of occupancy of, for example, the house but not of any part of the farm and in particular not of the relevant crops. We do not think that the jury could have been confused by the use of these different expressions. There is no valid reason for distinguishing between, for example, the house on the one hand and the remainder of the land on the other.

In *Newcastle City Council v Royal Newcastle Hospital* [1959] AC 248; 52 R & IT 293; [1959] UKPC 5; [1959] 1 All ER 734; [1959] 2 WLR 476; 4 RRC 371, Lord Denning, speaking for the Privy Council said at p736 in discussing the meaning of "occupied":

> "No-one would describe a bombed site or an empty unlocked house as 'occupied' by anyone: but everyone would say that a farmer 'occupies' the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another."

In any event, in this case the applicant in his unsworn statement, as will later be seen, made it clear that he regarded himself as having dominion over the whole of the farm.

Grounds 4, 5, 6, 10(b), 10(c), and 10(d) were argued together. They read:

[14] "4. That His Honour the learned trial judge misdirected the jury as to the meaning of the word

'occupation' in section 5.
5. That His Honour the learned trial Judge misdirected the jury that 'occupation' in section 5 included occupation by an agent.
6. That His Honour the learned trial Judge erred in failing to direct the jury as to the meaning of the word 'agent'.
10. That His Honour the learned trial Judge erred in failing to direct the jury as to the law of concert:
(b) as to the meaning of 'agent' (page 13a);
(c) as to the legal nature of the possession by an agent;
(d) as to the relationship of the occupation of the land or premises by the agent to the provisions of section 5 ..."

In dealing with "occupation" the learned trial Judge told the jury:

> Now whether or not any of the accused was in occupation of Running Creek is a question of fact for you. Occupation in that context means more than having the right to occupy. It requires that the accused whose case you are considering did actually occupy the land. It would be sufficient if the accused maintained a physical presence by constantly being present. He or she could occupy the farm by being there themselves, or by their agents. Thus a person may occupy land or premises even though he or she visits those premises only rarely, if he or she has someone else constantly at the premises for him or her. Thus a man may occupy a factory by having his employees there five days a week. He could well be the occupier although he only went there rarely or not at all .... If you were satisfied beyond reasonable doubt that the accused whose case you are considering did in fact occupy the farm in the sense that he or she was actually in occupation herself or by **[15]** her agent, then this section would come into operation and if it did it would then be for that accused to satisfy you that he or she did not know that the cannabis was there."

It should first be said that the first part of that passage is too favourable to the accused. The requirement of "constant" physical presence is not necessary for proof of occupation. Authority for that proposition may be found in *Poowong Shire v Gillen* [1907] VicLawRp 8; (1907) VLR 37, per Hood J at p40; 12 ALR 522; 28 ALT 123 where his Honour said:

> "If (the owner) furnishes it (the house) and keeps it ready for habitation whenever he pleases to go to it he is an occupier, though he may not reside in it one day in a year."

The complaint here made is that the reference to occupation by agents was an unwarranted extension of s5, a section which as Mr Faris quite correctly pointed out is a penal section with a deeming provision, a circumstance which demands that a strict interpretation be placed upon the section. It was then said that his Honour did not define "agent" adequately or at all and that the jury were left without any or any sufficient guidance as to the way in which occupation by an agent may be held occupation by the principal.

In our opinion the jury were not on this point given all the assistance that they might have been given and at first sight it might be thought that the direction was confusing. However, in this case the use of the word "agent" is justifiable. As will be seen when we deal with the grounds that his Honour misdirected the jury with respect to the law concerning persons acting in concert in the commission of a crime, the Crown case here was that this was an illegal **[16]** joint enterprise, one of the participants being the applicant, and that Clarke and Suzanne Curran were agents in the sense that they were carrying out their activities for and on behalf of and at the request of the applicant. It would not, we think, be necessary for the jury to decide whether Clarke should be regarded as a principal or merely as an agent. If he were a principal, that is, if he is to be regarded as in the nature of a partner of the applicant, then in this joint enterprise the occupation by one partner would be the occupation of the others. In the circumstances the word "agent" requires no elaboration.

In any event, in the circumstances of this case it would seem to us inevitable that, even on the applicant's own version given in his unsworn statement and in answers to the police which are not in dispute, he should be regarded as an occupier. In his unsworn statement he said:

> "After looking at a number of properties she finally decided on Running Creek which we believed after discussions with Mr McNeil could probably run 300 head of cattle. I love getting up there away from Melbourne and away from the pressures of business. I was working out – pressures of business I was in and working outside. I would normally get up in the morning and after breakfast, get out in the tractor and trailer and drive around, firstly checking the boundary fences and picking up and

sawing up old timber wood that had been left lying around from the previous clearing operation, burning off the windows, removing saffron thistles and clearing areas where suckers had started to grow again. I found the work tiring, but healthy ...."

Later he made it clear that he regarded himself as having the power to grant or deny others access to the property. Accordingly, no reasonable jury could entertain any doubt that he was, indeed, an occupier of the property**. [17**] We are not satisfied that there was here a misdirection, and accordingly these grounds are not made out. *[His Honour then considered other grounds of appeal and continued]* ... **[30]** Grounds 13 and 14 are to the effect that the learned Judge erred in his directions in relation to trafficking. The grounds are:

"13. That His Honour the learned trial Judge erred in failing to direct the jury:

(a) as to the meaning of "prima facie" evidence" in section 73 sub-section 2;

(b) as to the distinction between "deemed" in section 5 and "prima facie evidence" in section 73 sub-section 2;

(c) as to precisely what it was that the Applicant must prove to rebut the *prima facie* evidence;

(d) as to the meaning of possession at Common Law.

14. That there was a misdirection with relation to trafficking being possession for sale."

Before turning to the arguments on the grounds we will outline the way in which it was open to the prosecution to rely on the evidence to establish **[31]** trafficking by the applicant. For the reasons set out above there was evidence on which it was open to the jury to be satisfied beyond reasonable doubt that the cannabis was upon land occupied by the applicant. If the jury were satisfied of that, the applicant was, pursuant to s5 of the Act, to be deemed to be in possession of the cannabis unless the jury were satisfied upon the balance of probabilities that he was not in possession of it. The jury would be satisfied that he was not in possession of the cannabis if satisfied that one of the constituents of the common law concept of possession did not exist. The issue raised on this part of the case at the trial was whether the applicant had knowledge that the cannabis was on the farm. He relied on evidence that he had no such knowledge. If the jury were satisfied that the cannabis was on land occupied by the applicant and were not satisfied that he was not in possession of it, he was to be treated as having it in his possession. Then it was open to the prosecution to rely on s73(2), the terms of which have already been set out. In s71(1) there appears the following interpretation clause:

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

[32] The effect of s73(2) is that possession of a traffickable quantity of a drug of dependence is *prima facie* evidence of trafficking. Section 73(2) is not in our opinion to be read as providing that possession of a traffickable quantity of a drug of dependence is *prima facie* evidence of trafficking in all the ways in which one may traffick within the common law meaning of that word or the meanings given by the interpretation clause. We consider that upon a proper construction, possession is *prima facie* evidence of trafficking in the way or ways which are consistent with evidence in the case. For example, in a case where all the evidence showed that the person in possession had not manufactured the drug, the possession would not be *prima facie* evidence of trafficking in that way.

In this case, if, as a result of the application of s5, the jury were satisfied that the applicant was in possession of the growing cannabis plants that would be *prima facie* evidence of trafficking by having the cannabis in possession for sale. There was evidence indicating that cannabis had been cut and placed in bays in the hay-shed. It was conceded by Mr Faris that that was some evidence of trafficking in cannabis in the common law sense, by moving it from its source towards the ultimate user in the course of trade.

If the jury were satisfied that the applicant was in possession of that cut cannabis that

would be *prima facie* evidence of trafficking in the common law sense. Mr Faris submitted that the judge failed to **[33]** explain to the jury the meaning of "prima facie evidence" in s73(2), had failed to distinguish the evidentiary effect of that sub-section from that of s5 and had failed to tell the jury what the applicant could do to overcome the effect of the *prima facie* evidence provision.

There is a distinct difference in operation between s5 and s73(2). The former section operates so that facts establishing less than the possession of a drug by an accused are deemed to establish possession unless the accused satisfies the jury on the balance of probabilities that he was not in possession of it. The latter sub-section operates so that if the accused has in his possession a traffickable quantity of drugs that is *prima facie* evidence of trafficking by the accused. However, it does not deem any fact to exist nor reverse an onus of proof. If further evidence is placed before the jury on the issue of trafficking the jury decides on the whole of the evidence whether they are satisfied that the accused trafficked in the drug.

If there had been an issue whether whoever had possession of the cannabis in this case had trafficked by having it in possession for sale, it would have been necessary to explain precisely what was the evidentiary effect of s73(2). However, it was common ground at the trial that with such a large quantity of cannabis, whoever possessed it was obviously growing it for sale. The judge told the jury that. In the circumstances of this trial, to explain the evidentiary effect of s73(2) where no evidence suggested that the cannabis was possessed other **[34]** than for sale, and it was common ground that it was so possessed, would have been to load the jury with unnecessary information. It was neither necessary nor desirable for the judge to do so.

Mr Faris argued that the possession referred to in s73(2) was limited to a personal possession. He relied on the established principle of adopting the more limited construction of a provision creating a criminal offence if two constructions are fairly open. It does not seem to us, however, that there is anything to indicate that the word "possession" may have a meaning other than the ordinary meaning by which a person may be in possession of something by himself or his employees or agents. Mr Faris submitted that the legislation was draconian and every aspect which could result in an acquittal should be explained to the jury. However draconian the legislation, the issues to be explained and left to the jury should be those which are raised on the evidence.

Yet again we must point out that the central issue in the trial was whether the accused knew the cannabis was there. Strictly the issues of knowledge which arose, arose under s5 of the Act and in the context of the part of the prosecution case which relied on aiding and abetting. If s5 applied the onus was upon the applicant to establish upon the balance of probabilities that he did not know the cannabis was on the farm.

Insofar as the case was based on aiding and abetting the onus was on the prosecution to establish beyond reasonable doubt that the applicant knew that the cannabis was there. **[35]** It was necessary to establish that the applicant knew that Marcus Clarke was committing a crime.

However, as mentioned above, the learned Judge told the jury a number of times, in terms which applied to both the ways in which the prosecution put its case, that to convict, the jury had to be satisfied that the particular accused knew that cannabis was being grown on the farm. This direction was too favourable to the accused. It had the effect of placing upon the prosecution throughout the case the onus of establishing upon the criminal standard that the accused knew the cannabis was there. In our opinion neither of grounds 13 or 14 is made out.

[His Honour then considered the remaining grounds of appeal]

Solicitors for the applicant Johnstone: Galbally and Rolfe.
Solicitors for the applicant Clarke: Legal Aid Commission.
Solicitor for the respondent: JM Buckley, solicitor to the Director of Public Prosecutions.
