

27A/73

SUPREME COURT OF VICTORIA

PEDERSEN v FALCONER

Anderson J

18 September, 11 October 1973 — [1974] VicRp 24; [1974] VR 185

CRIMINAL LAW – TRAFFICKING IN INDIAN HEMP – DEFENDANT PURCHASED A QUANTITY OF INDIAN HEMP ON SEVERAL OCCASIONS FOR HIS OWN USE – DEFENDANT AGREED TO BUY SOME INDIAN HEMP FOR ANOTHER PERSON – DEFENDANT PURCHASED A QUANTITY OF INDIAN HEMP AND DELIVERED IT TO THE OTHER PERSON – NO FINANCIAL PROFIT ACCRUED TO THE DEFENDANT FOR THIS TRANSACTION – "TRAFFICK" – MEANING OF – WHETHER THERE MUST BE A COMMERCIAL ELEMENT TO ANY TRANSACTION TO AMOUNT TO TRAFFICKING: POISONS ACT 1962, S32(a).

1. The expression "traffic in" is intended to encompass any association with a drug of addiction not otherwise dealt with and involves at least the handling of such a drug in a conscious manner in the course of a dealing in it. It is not relevant in order to constitute trafficking in a drug that the person so accused acted without reward, but if some commercial quality was required for the transaction to constitute trafficking, such an ingredient was supplied in the present case by the fact that a sale and purchase of Indian hemp took place and the appellant was involved as the link between the parties to that transaction. The part he played was to obtain the order and the money from the buyer, convey the order and the money to the vendor, pay the vendor and receive the drug, convey the drug and deliver or arrange for the delivery of the drug to the purchaser. The circumstance that only one such series of acts was proved was not material. A single incident in relation to one person may constitute trafficking.

2. The evidence in the present case shows that there was more than an isolated incident for it shows the availability to the appellant of drugs at the hotel, for the previous week he had himself purchased Indian hemp from a man at the same hotel.

3. In the case stated the County Court judge found the charge proved because he considered "that the use of the verb 'traffic' in s32 rendered criminal the acts of a person knowingly engaged in the movement of the drugs specified in the section from the source to the ultimate user in the course of an illicit trade in such drugs, and that this was so whether or not any such acts were performed without reward or on an isolated occasion or at the request of the ultimate user".

4. This aptly described the operation of the section in respect of the facts of this case. A finding that there was an illicit trade was open on the evidence, and the appellant was knowingly engaged in the movement of the drug from the vendor to the purchaser. The other considerations urged on behalf of the appellant, namely, that he acted without reward and that it was an isolated occasion, were immaterial, once the trading was established.

ANDERSON J: This is a case stated by the learned County Court judge for the opinion of the Supreme Court pursuant to s152 of the *Justices Act* 1958.

The appellant Einar Karl Pedersen was convicted by the Magistrates' Court at Ferntree Gully on 25 October 1972 for that he did, contrary to s32(a) of the *Poisons Act* 1962, traffic in Indian hemp, and he was sentenced to be imprisoned for six months. He appealed against both conviction and sentence to the County Court at Melbourne which on 12 April 1973 confirmed the conviction but varied the sentence by substituting for the period of six months' imprisonment a sentence of imprisonment for 12 months, fixing a minimum term of four months before which he was not eligible for parole. The learned County Court judge who constituted the County Court has now stated a case for the opinion of the Supreme Court as to whether the conviction was properly confirmed.

The facts as found by the learned judge were as follows:–

- (1) That on Friday 6 October 1972, the appellant purchased a quantity of Indian hemp at an hotel in South Yarra called the South Yarra Arms from a man whose name he did not know;

(2) That he smoked this Indian hemp himself over the following weekend;

(3) That on Saturday 14 October 1972, one Sandra Gita Macs telephoned the appellant and requested him to buy \$10 worth of Indian hemp for her. The appellant agreed to do so and arranged to meet her later that day in order to obtain the sum of \$10 from her with which to make the purchase;

(4) That at the time of agreeing to obtain the Indian hemp, the appellant believed that he would be able to purchase the same from the person who had previously sold Indian hemp to him at the South Yarra Arms Hotel;

(5) That later on the same day the appellant, having obtained \$10 from Sandra Gita Macs, went to the South Yarra Arms Hotel and there purchased a quantity of Indian hemp in the form of a block of hashish and later that night arranged for its delivery to Sandra Gita Macs. The Indian hemp was subsequently delivered to her as arranged.

(6) That in making the purchase the appellant used the sum of \$10 obtained by him from Sandra Gita Macs;

(7) That the appellant did not in fact gain or stand to gain any remuneration or other reward for his part in the transaction.

The case stated contained his Honour's reasons for his decision as follows:—

"On the above facts I held that the appellant had on 14 October 1972, trafficked in Indian hemp on the ground that the use of the verb 'traffic' in s32 rendered criminal the acts of a person knowingly engaged in the movement of the drugs specified in the section from the source to the ultimate user in the course of an illicit trade in such drugs, and that this was so whether or not any such act was performed without reward or on an isolated occasion or at the request of the ultimate user.

"The question for the determination of the Supreme Court is whether the aforesaid conduct of the appellant amounted in law to 'trafficking' within the meaning of s32(a) of the *Poisons Act 1962*."

Section 32(a) of the *Poisons Act 1962* under which the appellant was charged provides, so far as relevant:—

"Every person who prepares, manufactures, sells or deals or traffics in—

(a) opium or Indian hemp or other drug of addiction or specified drug in a form suitable for smoking ... shall be guilty of a misdemeanour and shall be liable to imprisonment for a term of not more than ten years or to a penalty of not more than \$4,000 or to both such imprisonment and penalty."

It is a curious fact that the law reports, other than the *Victorian Law Reports*, are almost entirely bereft of any case dealing with the verb "traffic". There are a few Scottish cases which deal with that word in the context of excise and licensing law, but are not relevant to the present case. English legislation, when dealing with drugs, does not use the word "traffic", and it is left to the Victorian *Licensing Acts* to provide a number of occasions when this Court has had to consider the meaning of the word which appeared for many years in a section (*Licensing Act 1958*, s173, and its predecessors) in the following terms:—

"Every licensed person—

(a) on whose licensed premises on Sunday ... any sale disposal or barter of or traffic in liquor takes place... shall be liable to various penalties."

Decisions under this section were referred to by counsel for both the appellant and the respondent, as well as dictionary definitions of the word "traffic" from the time of Samuel Johnson onwards.

Mr Alston, for the appellant, submitted that before it could be said that a person was trafficking, it must be shown that what was involved was some commercial enterprise whereby the persons stood to benefit in a financial sense. He referred to *Curtin v Farren* [1918] VicLawRp 16; [1918] VLR 144, where the handling of liquor without any evidence of an act of supplying or of an agreement to supply was held not to be trafficking, and to *Matthews v Towers* [1922] VicLawRp 40; [1922] VLR 476; 28 ALR 233; 43 ALT 212, where the Victorian Full Court held that a gift of some bottles of liquor was not a trafficking in liquor. In *Matthews v Towers* at (VLR) p479, Irvine,

CJ, delivering the judgment of the Court said:-

"The word 'traffic' as an English word, has at least two distinct meanings, and possibly more; but we think that, in connection with the subject of this Act, only one of those meanings is applicable, and that is, a dealing in or handing over of liquor in exchange for money or other consideration. It was, in effect, admitted that such is the natural or 'dictionary' meaning; but it was argued, first, that the context shows that it has a different and wider meaning; and secondly, that the history of the licensing law in Victoria shows that it was intended to have the sense of any disposal of liquor, whether for consideration or without consideration."

Mr Alston also referred to a number of dictionaries which gave a variety of meanings to the verb "traffic", most of them with some connotation of trade or business or commerce. It is to be noted also, however, that some of the meanings given to "traffic" contain an implication that the activity involved is illicit or sinister or otherwise discreditable. And some of the meanings, too, have overtones implying transportation. I do not think one can select any one of the several meanings given in the various dictionaries and attribute to the phrase "traffic in" appearing in s32(a) that particular dictionary meaning, and leave it at that. One must interpret the phrase as used in its context, assisted as it may be, but not necessarily bound, by one of a variety of dictionary definitions.

In *Matthews v Towers*, *supra*, in the absence of any element of trade, the Full Court held that there was no trafficking. The facts of that case are significant. On the Sunday in question the licensee was absent from the premises. Prior to leaving the premises, he had locked the bar and the storeroom and had left one dozen bottles of beer in charge of a housemaid for the lawful use of servants and lodgers during the weekend, and with instructions not to dispose of the beer to any stranger. In disobedience of those instructions, the housemaid made a free gift of some of the beer to a man whom she knew, who was not a servant or lodger, for the purpose of use at a christening party at which she intended to be present. It was the licensee who was charged, as the section made him vicariously liable if a trafficking took place on his licensed premises. What took place, as the Full Court held, was the making of a gift, not any kind of business transaction. Had anything occurred to give the incident a commercial quality, e.g. payment, a different conclusion may well have been reached.

Section 32(a) of the *Poisons Act* is cast in very wide terms. The draftsman has collected all the conventional verbs and has attempted to prohibit any association with drugs of addiction not covered by s27 which prohibits the possession or disposition of such drugs, and s31 which prohibits their being smoked. In addition, the word "sell" is described in s3 as including "sell whether by wholesale or retail and barter or exchange; also dealing in agreeing to sell or offering or exposing for sale or keeping or having in possession for sale or sending, forwarding, delivering or receiving for sale or on sale or authorizing, directing, causing, suffering, permitting or attempting any of such acts or things", and "sale" and each of the derivatives of "sell" have corresponding interpretations.

This elaboration of the word "sell" comprehends almost every dealing that can be thought of which is of a commercial nature, yet s32 in terms prohibits the preparation, manufacture, dealing in and trafficking in Indian hemp, as well as its sale. So lavish is the use of verbs in the definition of "sell" in s3 and in s32 and elsewhere that I do not consider that the expression "traffic in" appearing in s32 is to be given a limited meaning which is exclusive of the other expressions in the Act; on the contrary, it is used, I think, in an effort to catch up any transaction in a drug of addiction which may have escaped the wide net cast by the other provisions of the Act. It was said by Lowe J in *Carter v Mason* [1934] VicLawRp 64; [1934] VLR 310, at p314; [1934] ALR 404, that the word "traffic" as used in the *Licensing Act* was "not to be construed as exclusive of the word 'sale', but as wider than and as inclusive of 'sale'". I think that the same may be said of "traffic" in s32(a) of the *Poisons Act*; indeed, in my view, "traffic" is inclusive of other prohibited acts enumerated in the definition of sell and in s27 and s32.

I think that the expression "traffic in" is intended to encompass any association with a drug of addiction not otherwise dealt with and involves at least the handling of such a drug in a conscious manner in the course of a dealing in it. In *Matthews v Towers*, *supra*, it was held that the making of a gift was not a trafficking. I do not think it relevant in order to constitute trafficking in a drug that the person so accused acted without reward, but if some commercial quality is

required for the transaction to constitute trafficking, I think that such an ingredient is supplied in this case by the fact that a sale and purchase of Indian hemp took place and the appellant was involved as the link between the parties to that transaction. The part he played was to obtain the order and the money from the buyer, convey the order and the money to the vendor, pay the vendor and receive the drug, convey the drug and deliver or arrange for the delivery of the drug to the purchaser.

The circumstance that only one such series of acts was proved is not material. A single incident in relation to one person may constitute trafficking: *Molyneux v McPherson* (1902) 23 ALT 228; 3 ALR 120. However, the evidence here shows that there was more than an isolated incident for it shows the availability to the appellant of drugs at the hotel, for the previous week he had himself purchased Indian hemp from a man at the same hotel. It was said that the evidence did not show that the person from whom the appellant purchased the Indian hemp, the subject of the charge, was the same person from whom the appellant had purchased Indian hemp at the hotel the previous week. Whether it was the same vendor or not, the appellant evidently knew of the availability of Indian hemp from a person, or persons, at that hotel, and acted as a "go-between" in the deal.

In the case stated the learned County Court judge found the charge proved because he considered "that the use of the verb 'traffic' in s32 rendered criminal the acts of a person knowingly engaged in the movement of the drugs specified in the section from the source to the ultimate user in the course of an illicit trade in such drugs, and that this was so whether or not any such acts were performed without reward or on an isolated occasion or at the request of the ultimate user".

I think that the learned County Court judge has aptly described the operation of the section in respect of the facts of this case. A finding that there was an illicit trade was open on the evidence, and the appellant was knowingly engaged in the movement of the drug from the vendor to the purchaser. The other considerations urged on behalf of the appellant, namely, that he acted without reward and that it was an isolated occasion, are to my mind immaterial, once the trading is established.

Mr Dixon, for the respondent, further submitted that in any event the appellant was liable under s77 of the *Justices Act* 1958 in that he aided and abetted the vendor on the basis of *Blackmore v Linton* [1961] VicRp 63; [1961] VR 374, and that as agent for the vendor, or alternatively as agent for the purchaser, he was associated in the deal between them and was, accordingly, trafficking. It is unnecessary to elaborate these further submissions other than to say that they fortify the opinion I have already expressed.

Answering the question in the case stated, I say that the conduct of the appellant set out in the case stated amounted in law to "trafficking" within the meaning of s32(a) of the *Poisons Act* 1962. Question answered accordingly.

Solicitor for the appellant: DJ Bolton.

Solicitor for the respondent: John Downey, Crown Solicitor.