33/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v MEDICI

Crockett, Gray and Phillips JJ

3 February 1989 — (1989) 40 A Crim R 413

CRIMINAL LAW – TRAFFICKING IN CANNABIS L. – POSSESSION OF TRAFFICKABLE QUANTITY – BURDEN OF PROOF RE POSSESSION – *PRIMA FACIE* PROVISION AS TO TRAFFICKING – WHETHER ONUS OF PROOF REVERSED: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, SS5, 73(2).

1. Where the provisions of s73(2) of the *Drugs, Poisons and Controlled Substances Act* 1981 establish *prima facie* evidence of trafficking by an accused, the onus of proof is not reversed. That is, whilst an evidentiary burden is cast upon the accused, the ultimate legal burden of proving all the elements of the offence beyond reasonable doubt rests on the prosecution.
***R v Clarke and Johnstone* [1986] VicRp 64; [1986] VR 643; (1986) 21 A Crim R 135, applied.**

2. Where a judge directed a jury to the effect that the burden of proof shifted where a person was in possession of a traffickable quantity of a drug of dependence, there was a possibility that the jury may have been confused as to where the burden of proof lay and as to the relevant standard of proof, and accordingly the conviction and sentence was set aside and a new trial ordered.

CROCKETT J: [1] This is an application for leave to appeal against conviction on the part of an applicant who was convicted in the County Court on a charge of trafficking in a drug of dependence – to wit, cannabis. She had been presented for trial on a presentment which included a charge of trafficking and also possession of a drug of dependence. On the jury's finding her guilty of the trafficking offence, as the possession charge was an alternative count, no verdict was taken on it. The first ground of a number of grounds upon which the applicant seeks to rely in support of her application is:

> "The learned trial Judge erred in his directing the jury on the onus of proof of the elements of the offence charged."

Without the application's being opened to the Court, counsel for the applicant drew to the Court's attention some passages in the charge which he contended made out the ground to which I have just referred. The matter was not **[2]** further elaborated upon other than to make reference to the sections of the *Drugs, Poisons and Controlled Substances Act* 1981 that bore on the matter and to refer to a passage from *R v Clarke and Johnstone* [1986] VicRp 64; [1986] VR 643 at p659; (1986) 21 A Crim R 135. Counsel contented himself with the submission that those references were sufficient to render demonstrable error on the part of the Judge in what he had to say to the jury on the question of the onus of proof in relation to the count of trafficking.

Counsel for the Crown then conceded that the submission was correct and that the Judge had, in fact, erred in what he said to the jury on the question of the burden of proof. In those circumstances, the Court has been asked to set aside the conviction, with, no doubt, an accompanying order for a new trial, without any further investigation of the matter and in particular without any further references to the charge. In such circumstances, the Court has considered it appropriate to limit its own investigation by a reliance upon what it is that counsel has drawn to its attention. That being so, it is of the view that the concession made by counsel for the Crown was a proper one, and the Court is, therefore, prepared to act upon it. It is unnecessary, we think, fully to investigate the matter in such circumstances, other than to refer to what we think is the gravamen of the particular ground said to be so clearly established.

The Crown case was that the applicant was the occupier of certain land and, accordingly, was the person to **[3]** whom s5 of the Act had application. The substance of that section is in these terms:

> "Without restricting the meaning of the word 'possession', any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him ..."

It was on the land of which the applicant was the occupier on which, so the Crown case was, the drug of dependence was found. The Crown relied then upon s73(2) to produce on the part of the applicant, so it was said, *prima facie* evidence of her having trafficked in a drug, s5 having operated to allow it to be found that she was in possession of it. However, it is important to note that s5 concludes with the words "...unless the person satisfies the court to the contrary." No such words as that appear in s73(2), which is in these terms:

> "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."

These provisions were referred to by this Court in *R v Clarke and Johnstone*, *supra*, at p659. The Court in a joint judgment there said:

> "There is a distinct difference in operation between ss5 and 73(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 **[4]** 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."

The Crown case relied on occupancy of the land and, as there was no evidence to the contrary given by the applicant on whom the burden of proof lay, it was established by force of s5 that she was in possession of the drug of dependence. The provisions of s73(2) were then in turn relied upon by the Crown to establish *prima facie* trafficking on the part of the applicant. At this point her defence, or at least principal defence, was that she had no knowledge that the drug was on the premises. Accordingly, she could not (so she said) be found to have trafficked in it. That was the issue of fact for the jury in the way in which the case was conducted.

The Judge, in dealing with the burden of proof as it was introduced into the case by the Crown's reliance on the two provisions to which I have referred, said this:

> "Now trafficking, you will recall, is trafficking for sale; possession is *simpliciter* possession. Now, the Act also says that if you are in possession, that is, the amount of the drug is over the 250 grams and 93 kilograms is within the range of drugs of weight that is required, then the Act says you are deemed to be trafficking because you are possessing a traffickable quantity of the drug, and what it means then is that the burden of proving lack of knowledge is on the balance of probabilities and because of the provisions of the Act it falls upon the accused."

[5] The Judge said that in the course of a redirection to the jury, and the applicant contends and the Crown concedes that the Judge's statement that the applicant's admitted possession had the effect of imposing on the applicant a burden on the balance of probabilities of proving lack of knowledge – and thus that she did not traffick in the drug – was incorrect. His Honour then on the following page and following some interruptions by counsel, referred the jury to s73(2) saying:

> "The clearest way probably is to read the Act to you. 'Where the amount is a traffickable proportion then the possession of that drug of dependence, even in that quantity, is *prima facie* evidence of trafficking by that person in that drug.'"

His Honour then went on to say:

> "In other words, because it is 93 kilograms, possession is deemed to be possession by the Act, possession of that drug in that quantity is *prima facie* evidence of trafficking by this person."

Now if the matter had stopped there, it may be that what the Judge had said was correct. But he added the words:

> "Then of course the burden shifts. Now, is that clear?"

It would seem to the Court that the submissions of both counsel are correct. The reference to the shifting burden in the context of a direction concerning proof of trafficking by reliance upon s73(2) is, at the least, confusing. The nature of the defence meant that the question, of course, of who bore the onus of proof or disproof on the issue which had been raised in defence by the applicant was naturally of some considerable importance.

[6] The jury asked a question which led to the Judge's saying a little later something further to them about this particular matter. What he said was:

> "Now, the second part of trafficking is contained also in the Act which says that where the person has in her possession – and you are deemed to be in possession of a drug which is of a traffickable quantity, and I tell you as a matter of law that 93 kilograms of cannabis is a traffickable quantity within the meaning of the Act – the possession of that drug in that quantity is *prima facie* evidence of trafficking by that person in that drug. Right? So unless she satisfies you to the contrary that she was in possession of that drug, right, then you are entitled under the Act, you are obliged under the Act, to deem her to be in possession. Because she is in occupation and because the quantity of the drug is a traffickable quantity, that is *prima facie* evidence which you can act upon of trafficking. Okay? As to possession, which is the alternate charge, and you will remember that *prima facie* evidence is simply – perhaps I should tell you what is meant by that. It is evidence which would be sufficient to convict the accused in the absence of evidence to the contrary."

Again the Court finds itself in agreement with what counsel have contended, namely, that that further passage in answer to a jury's query at the least must be said to have left the jury in some state of confusion as to where precisely the burden of proof lay and what the standard of proof in the circumstances was in relation to the relevant issues with which the jury were confronted having regard to the way in which the case was conducted.

Accordingly, the Court is of the view that the application should be granted, the appeal instituted and heard instanter and allowed, that the conviction and sentence be set aside, and that a new trial in the County Court at Melbourne be ordered.

APPEARANCES: For the applicant Medici: Mr P Waye, counsel. Phillips, Fox, solicitors. For the Crown: Mr J Bowen, counsel. JM Buckley, Solicitor for the DPP.
