

08/80

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v ELEM

Sir John Young CJ, Crockett and King JJ

27 July 1979 — [1982] VicRp 27; [1982] VR 295; 4 A Crim R 331

CRIMINAL LAW – DRUGS – HEROIN – TRAFFICKING IN – POSSESSION OF – ACCUSED SIGNED FOR AND TOOK POSSESSION OF A PARCEL AT THE AIRPORT FREIGHT TERMINAL – ACCUSED INTERCEPTED BY POLICE AT TERMINAL – PARCEL OPENED AND CONTAINED \$1000 AND TWO BAGS OF 5.5 GRAMS OF HEROIN – ACCUSED SAID THAT HE DID NOT KNOW THAT THE PARCEL CONTAINED HEROIN – ACCUSED SUBSEQUENTLY CHARGED WITH TRAFFICKING IN HEROIN – ACCUSED FOUND GUILTY – "POSSESSION" – "TRAFFICKING" – "CONTROL" – WHETHER TRIAL JUDGE IN ERROR IN CHARGE TO JURY: *POISONS ACT* 1962, SS28, 32.

1. In relation to the argument that the control referred to in s28 of the *Poisons Act* 1962 ('Act') was a control that involved a mental element, the Court stated: [T]his argument should not be accepted. The ordinary meaning of the word "control" does not necessarily involve knowledge of the thing controlled and the final words of the section show conclusively that an element of knowledge of the thing controlled is not to be imported. One of the clear purposes of the section is to reverse the onus of proof in relation to this very element. That is to say, once it is shown that an accused is in fact in control of the substance, it is for him to show that he had no knowledge thereof. "Thereof" must mean "of the substance". It was conceded that the accused controlled the parcel when he was apprehended and however elaborate an explanation had been given the jury must inevitably have concluded that the accused controlled the substance which the parcel contained.

2. In relation to the argument that the evidentiary provision contained in s52(5) of the Act related to possession and not to trafficking, the Court held the sub-s(5) is an evidentiary provision. It provides in substance that the finding in the possession of a person of a specified quantity of a specified drug is to be *prima facie* evidence that the person had that drug in that quantity in his possession for the purposes of trafficking therein. It does not of itself provide evidence of trafficking but it is nevertheless an important provision from the point of view of the Crown because once there is evidence of possession for the purpose of trafficking, then slight evidence of acts which might amount to trafficking may be all that is necessary to complete the Crown case.

3. In relation to the argument that the notion of trafficking involves a commercial element, the Court stated: Trafficking involves a commercial element. A study of the various meanings of the noun and verb "traffic" in the *Oxford English Dictionary* shows that the word does connote some dealing of a commercial character. The definition is that "traffic" in s32 rendered criminal the acts of a person knowingly engaged in the movement of 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 definition does not require the Crown to prove that an accused received anything in the nature of a reward for his part in the transaction. It is sufficient if the Crown proves that the handling by the accused is in the course of trade.