56/77

SUPREME COURT OF VICTORIA — FULL COURT

BOYD and ORS v TORNEY

Gillard, Menhennitt and Harris JJ

22, 26, 27 April, 28 June 1977 — [1977] VicRp 55; [1977] VR 479

CRIMINAL LAW – DRUG OFFENCES – RELEVANT ADMISSIONS MADE BY ACCUSED – EVIDENCE CALLED REFERRED TO CANNABIS SATIVA AND NOT TO OTHER SPECIES – ACCUSED ADMITTED HE USED INDIAN HEMP – FINDING BY MAGISTRATE THAT THE PROSECUTION FAILED TO PROVE THAT THE DRUG WAS AN ACTIVE PRINCIPLE OF CANNABIS SATIVA – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *POISONS ACT* 1962, SS27, 31, 32.

HELD: Order absolute. Dismissals set aside.
1. The fundamental error into which the Magistrate fell was in regarding the issue before him as one to be determined solely by evidence. The prime issue before him was, on the contrary, one of statutory construction. The evidence before him by the expert witnesses as to the meaning of the statute may have been admissible to assist in construing technical language but it could not prevail against the true interpretation of the expressions used in the statute by Parliament.

2. There is no reason for not giving the word "Cannabis" in the Schedule its plain, ordinary, natural meaning as comprehending all forms of cannabis. The words in brackets "(Indian Hemp)" are not words of qualification: they are no more than a colloquial equivalent. Even if they could be regarded as words of qualification, on the technical evidence the active principle of Indian hemp was tetrahydro-cannabinol.

3. The apparent objects and purposes of the Act, namely, to prevent the possession and use of a wide range of drugs of addiction, supports the construction that the word "Cannabis" in Schedule Eight should be given a wide rather that a narrow meaning.

4. It follows that all the elements necessary to prove the informations numbered (1), (2) and (5) were established by the evidence called on behalf of the informants against the respondent and he should have been convicted thereon.

5. The definition of "Indian hemp" in s26(1) comprehending all forms of cannabis and the respondent having been proved and having admitted to possessing and smoking a form of cannabis, he should have been convicted on the informations numbered (4) and (6).

GILLARD, MENHENNITT and HARRIS JJ delivered the following written judgment: On 25 and 26 August 1976 six informations under the *Poisons Act* 1962 against the respondent Ross Maxwell Torney were heard together at the Magistrates' Court at Melbourne. In three informations the informant was Donald Macgregor Boyd, in two the informant was Lee Marilyn Barker and in one the informant was Geoffrey Cleve Jory. The allegations in the informations were that the respondent:

> (1) On 27 January 1976 at South Caulfield in the State of Victoria not being authorized by or licensed under the provisions of the *Poisons Act* 1962 did sell tetrahydro-cannabinol an active principle of Indian Hemp (s32(b));
>
> (2) On 28 January 1976 at South Melbourne in the State of Victoria not being a person authorized under Pt 1 of the *Poisons Act* 1962 did have in his possession tetrahydro-cannabinol an active principle of Indian Hemp (s27(1));
> (3) On 28 January 1976 at South Caulfield in the State of Victoria not being authorized by or licensed under the provisions of the *Poisons Act* 1962 did sell tetrahydro-cannabinol an active principle of Indian Hemp (s32(b));
>
> (4) Between 23 January 1976 and 26 January 1976 at South Caulfield in the State of Victoria did smoke Indian Hemp (s31(1));

(5) On 28 January 1976 at South Caulfield in the State of Victoria not being a person authorized under Pt 1 of the *Poisons Act* 1962 did have in his possession tetrahydro-cannabinol an active principle of Indian Hemp (s27(1));

(6) On 28 January 1976 at South Melbourne in the State of Victoria not being authorized by or licensed under the provisions of the *Poisons Act* 1962 did sell Indian Hemp (s32(a)). (The sections of the *Poisons Act* 1962 under which each information was laid are indicated in brackets after each information).

On 26 August 1976 all six informations were dismissed. On 8 September 1976 the informants were granted six orders nisi to review the six orders of dismissal. On 8 February 1977 Gillard J, ordered that the orders nisi be referred to the Full Court and they came on for hearing on 22, 26 and 27 April 1977. The six cases were heard together.

The provisions of the *Poisons Act* 1962 under which the respondent was charged are as follows:

S27(1):
"No person other than an authorized person shall have in his possession or disposition any raw opium, prepared opium, medicinal opium, coca leaves, crude cocaine, ecgonine, Indian hemp or other drug of addiction or any specified drug or any preparation of them or any of them."
S31(1):
"No person shall smoke opium Indian hemp or any other drug of addiction or any specified drug."

S32:
"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; or

(b) any drug of addiction or specified drug without being authorized by or licensed under this Act so to do
— 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."

For the purposes of the Act generally the expression "drug of addiction" is defined in s3(1) in these terms:

"Drug of addiction' means any substance or preparation specified in Schedule Eight to this Act or added thereto by proclamation."

Attention should be drawn to the portion of this definition which assigns a meaning to the expression in terms of "substance or preparation". Included among the many substances and preparations specified in Schedule Eight is an item in these terms: "Cannabis (Indian Hemp)". At the end of the Schedule, there is a further item specified in the form of this paragraph:

"Any active principle, any natural or synthetic derivative, any salt and any compound of the substances specified in this Schedule and any preparation or admixture of such substances, active principles, derivatives, salts or compounds unless otherwise provided for in this or any other Schedule."

Sections 27, s31 and s32 are contained in Pt III of the Act, which is headed "DRUGS OF ADDICTION". The first section in that Part is s26, subs(1) of which provides, *inter alia*: -

"In this Part unless inconsistent with the context or subject matter— ... 'Indian hemp' means the fresh or dried aerial parts of the plant known as Cannabis sativa L. whether or not the resin has been extracted therefrom and any resinous or other extract obtained from the plant by whatever name such parts or extracts are called." Here attention should be drawn to the fact that this definition is expressed in terms of the words defined being part of a "plant".

Having set out these provisions in the Act one can see the bases upon which the allegations in the informations have been made. In the informations numbered (1), (2), (3) and (5) above the relevant allegations refer to "tetrahydro - cannabinol an active principle of Indian Hemp." Thus what is there relied upon is the definition of "drug of addiction" in s3(1) of the Act. That definition takes one to Schedule Eight. One of the "substances or preparations" specified in that Schedule is "Cannabis (Indian Hemp)". The use of the brackets shows that that "substance or preparation" can

be described either as "Cannabis" or as "Indian Hemp". Then the item at the end of the Schedule brings in "any active principle" of a substance specified in the Schedule. What is alleged is that "tetrahydro-cannabinol" is an "active principle" of the substance "Indian Hemp" (i.e., "Cannabis (Indian Hemp)").

On the other hand, in the informations numbered (4) and (6) above the relevant allegations refer to "Indian Hemp". Here it is clear that what is relied upon is the definition of "Indian Hemp" in s26(1).

The evidence for the informants was given by two narcotics agents, who were officers of the Australian Bureau of Narcotics, two police officers, a botanist and a chemist. The respondent called one witness only, a botanist, but did not give evidence himself. The evidence of the narcotics agents and the police officers related to an incident at South Melbourne on 28 January 1976 when a van driven by the respondent was intercepted by the narcotics agents, and a resulting search by them and the police officers of premises at South Caulfield where the respondent lived, and a subsequent interview between the police officers and the respondent. A record of the interview signed by the respondent was put in evidence. The evidence of these witnesses was not the subject of any real challenge and was expressly accepted by the Stipendiary Magistrate.

The narcotics agents gave evidence as follows. On 28 January 1976 they intercepted a van when it was leaving the rear of the yard of the South Melbourne Post Office. The respondent was driving the van. The van was searched. In it were found a large green plastic bag, containing an amount of green vegetable matter, a plastic-wrapped slab of brown resinous substance in a blue denim bag and a bag containing $5700 in notes. When asked what the green vegetable matter was the respondent said "grass" and agreed that by that he meant cannabis. The respondent said that the $5700 belonged to him and his wife. When asked what the brown resinous substance was the respondent said "hash". He said he had got it in Prahran and that it was his. Later on the same day the narcotics agents, the police officers and the respondent went to the respondent's premises at South Caulfield. The premises were searched. In the yard at the rear of the premises there were some plants growing in a corner with wire netting around them. The respondent said that they were Indian hemp plants and that he had planted them to see what would happen. In the respondent's bedroom one of the police officers removed the mattress from the bed. Beneath the mattress, he found a brown supermarket shopping bag. The bag contained five slabs of brown resinous substance. When asked what they were, the respondent said "Hash", the same as the other one". When asked who owned the "hash" the respondent said "A guy dropped it in for me" and that it was that man who had put it under the bed. A set of scales and weights were found in the house and in the respondent's wallet a piece of paper with names and figures on it. After the search, and after the respondent had been questioned by the narcotics agents, he was interviewed by the informant Boyd. The informants Barker and Jory were also present.

The relevant admissions made by the respondent in the record of interview included the following. A green plastic bag containing a quantity of "grass", a blue denim bag containing a block of "hash", some money and three capsules containing "coke" had been found in his van that day at South Melbourne. By "grass" he meant "marijuana, Indian hemp", by "hash" he meant "a form of marijuana or Indian hemp" and by "coke" he meant "cocaine". There were about five pounds of Indian hemp in the green plastic bag and the "hash" weighed about one pound. A "guy" he knew named "Tony" had dropped the Indian hemp and the hash into his residence on the preceding Monday night for him. He had paid him, in cash, $1800 for the Indian hemp and about $1100 for the "hash". He had bought the Indian hemp to distribute between friends and he had sold a piece of "hash" for $50 the preceding night to a friend. He intended to sell some of the "grass" and the "hash", but some friends had put in money and some of it was for them. Of the $5700 found in the van about $3000 was the proceeds of selling Indian hemp. The five blocks of hashish found under the mattress were not his. "Tony" had dropped them in for him but he had not paid him for them. The five blocks were far in excess of what a person might be expected to have for his own use. He intended to return the five blocks. He could not sell them. He had no intention of selling the "hash" that had been found in the bedroom. He had tried smoking Indian hemp. The last time had been the previous weekend. The effect he got from it was "stoned". He was not a doctor of medicine a pharmaceutical chemist, a veterinary surgeon and he had not been authorized by the Chief Health Officer of Victoria to have Indian hemp or a drug of addiction in his possession.

The botanist called by the informants, Raymond Vaughan Smith, after giving his qualifications, gave the following evidence. The contents of the green plastic bag taken from the respondent's van at South Melbourne had been examined by him. He said the contents consisted of the upper parts, or tops, of female plants of Cannabis sativa L. It was composed of the stems, leaves, female flowers and fruits. In cross-examination he said, in substance, that, in his opinion, cannabis was a monotypic genus of plants and that the one species of the genus was Cannabis sativa. He said that in the last few years some botanists had expressed the view that there was more than one species of cannabis, but that, in the great majority of the books on plant taxonomy that had come out in the last century or so, only one species of cannabis had been given. He said that Cannabis indica had been described a very long time ago. He said that Cannabis ruderalis, a plant grown in Russia, had been first described by a Russian botanist in 1924. (Other material placed before this Court showed that until 1970 this information was available only in Russia and that it was only in that year that an English translation of the Russian work Flora of the USSR was published. In it there was an entry for Cannabis ruderalis.)

The chemist called by the informants, Trevor Graham Wilson, gave the following evidence. He had analysed the single slab of brown resinous material (i.e., the one found in the respondent's van) and the five slabs of brown resinous material (i.e., the ones found under the respondent's bed). He said that the material weighed approximately five and a half lbs. (i.e., the six slabs) and it contained seven per cent of tetrahydro-cannabinol and that tetrahydro- cannabinol was the active constituent that was found in cannabis.

The botanist called by the respondent, John Harry Phippard, gave the following evidence. He said that, in his opinion, the genus Cannabis was polytypic and that he thought it consisted of three species, which he named as Cannabis sativa, Cannabis indica and Cannabis ruderalis. He said that Cannabis sativa had been described by the botanist Linnaeus in 1753, sativa meaning "cultivated", that in the 1780's another botanist, Lamarck, had described Cannabis indica and that in 1924 a Russian botanist, Janischewsky, had described Cannabis ruderalis. He said that many botanists believed the genus Cannabis to be monotypic but that the bulk of botanists who had carried out work on cannabis (i.e., who had done this recently) were of the opinion that there were two or three species, depending generally on the area they were working in and that these species may not include the entire genus. He said that the description "Indian hemp" did not have a definite meaning, botanically, for a taxonomic botanist. He said that Cannabis indica, translated into English, meant "Indian hemp". He said that it had been generally accepted by scientists that the active principle of cannabis was tetrahydro-cannabinol, and that there was no evidence to suggest at the moment that these compounds were not present in all the species of cannabis. He said that it was this active principle that was looked upon by pharmacologist as the reason for the activity of cannabis as an hallucinogenic. In cross-examination he said that tetrahydro-cannabinol was found in the whole of the genus Cannabis.

It will be seen from the evidence to which we have referred that in the Magistrates' Court the informants' cases were conducted on the basis that the charges against the respondent were established as follows (identifying the informations by the numbers we have used above).

Information (1): S32(b) makes it an offence for a person to sell, *inter alia*, "any drug of addiction" without being authorized or licensed under the Act so to do. The respondent admitted that he had sold "hash" for $50 at his home at South Caulfield on the night before he was interviewed (i.e., on 27 January 1976). He admitted that by "hash" he meant "Indian hemp" and he admitted that he was not one of the persons authorized or licensed to sell drugs of addiction (see s9, s10). "Drugs of addiction" comprise the substances specified in Schedule Eight to the Act. "Cannabis (Indian Hemp)" was a substance specified in that Schedule. Any active principle of "Cannabis (Indian Hemp)" was also specified in the Schedule by virtue of the paragraph at the end of the Schedule. The active principle of "Cannabis (Indian Hemp)" was tetrahydro-cannabinol. Hence, it was said, the charge in information (1) above had been made out.

Information (2): S27(1) makes it an offence for a person other than an authorized person to have in his possession, *inter alia*, "any drug of addiction". On 28 January 1976 a slab of brown resinous material was found in the respondent's van at South Melbourne. It was therefore in his possession. The respondent admitted that the material was "hash" and said that "hash" meant a form of "Indian hemp". He admitted he was not an authorized person (see s26(1)). The slab was

analysed and it contained tetrahydro-cannabinol. For the reasons stated in relation to information (1) this was a "drug of addiction". Hence, it was said, the charge in information (2) above had been made out.

Information (3): Information (3) was also laid under s32(b). On 28 January 1976 the respondent had five slabs of brown resinous material in his possession at his home at South Caulfield. The inference should be that he had this material in his possession for sale. If that was so, he "sold" the material within the meaning of s32(b) because of the definition of the word "sell" in s3(1). As in information (2), this material was shown to be a "drug of addiction". Hence, it was said, the information in (3) above had been made out.

Information (4): S31(1) makes it an offence for a person to smoke Indian hemp. The defendant admitted that he had smoked Indian hemp on a date which was 23 January 1976. "Indian hemp" meant "Indian hemp" as defined in s26(1). All plants within the genus Cannabis were within the plants so defined and so what the respondent smoked must have been "Indian hemp" within the definition. Hence, it was said, the information in (4) above had been made out.

Information (5): Information (5) was also laid under s27(1). This information was laid in the alternative to information (3). (Compare *R v Tideman* (1976) 14 SASR 130). If the inference were not drawn that the respondent had the material in his possession for sale, then he had it in his possession. Hence, it was said, the information in (5) above had been made out, if the information in (3) above was held not to have been made out.

Information (6): This information was laid under s32(a). On 28 January 1976 the respondent had a green plastic bag containing vegetable material in his possession in his van at South Melbourne. He admitted that this material was "grass", that by "grass" he meant "Indian hemp", and that he intended to sell some of this material. The material was identified as the upper parts of plants of Cannabis sativa L. "Indian hemp" is defined as meaning "the ... aerial parts of the plant known as Cannabis sativa L. ...". The material was therefore "Indian hemp" within the definition in s26(1). Hence, it was said, the information in (6) above had been made out. (It may be noted that no charge was laid with respect to the plants found growing at the respondent's home).

In the Magistrates' Court the case for the respondent was conducted on the basis that the charges should be dismissed on the following grounds. The Magistrate should find on the evidence of the botanist called by the respondent that the genus of plants Cannabis contained at least three species and that these were Cannabis sativa, Cannabis indica and Cannabis ruderalis. The definition of "Indian Hemp" in s26(1) referred to only one of these species, namely Cannabis sativa L. The expression "Cannabis (Indian Hemp)" in Schedule Eight should also be given this meaning and *Hardy v Gillette* [1976] VicRp 36; [1976] VR 392 was relied upon as authority for this proposition. The evidence of the botanist called by the informants was that he did not recognize more than one species of the genus Cannabis and hence his evidence did not sufficiently identify the plant material as, consistently with his evidence, the material could have been Cannabis indica or Cannabis ruderalis. The evidence of the chemist called by the informants referred only to tetrahydro-cannabinol as an active principle (constituent) of cannabis and it was consistent with this that all the brown resinous material came from Cannabis indica or Cannabis ruderalis and, if that were so, no offences were disclosed. In so far as admission by the respondent were or could be relied upon, since the expression used by him was "Indian hemp", his admission in relation to this material was too general an expression to justify his admission as establishing what was proscribed by the Act.

We perhaps should add that we have worked out for ourselves the statements of the ways in which the case for the informants and the case for the respondent must have been put from an analysis of the evidence. There is a transcript of the evidence given in the Magistrates' Court, and of the Magistrate's reasons, but there is no statement of the arguments put to the Court. It seems to us that the hearing must have proceeded substantially on the basis we have set out. We have set it out in some detail in order to make these rather complex proceedings more comprehensible.

The magistrate's reasons for dismissing the six informations were very comprehensive and in order to discover how he arrived at his conclusions, we set them out in full, viz.:

"The prosecution seeks convictions on one charge of selling THC – I will call it – on 27 January and relies on admissions. On 28 January at South Melbourne possession of THC – the one block – and a notional charge of selling Indian hemp.

"The notional charge is supported by the quantity of alleged Indian hemp, money and admissions, paper writings with names and addresses and amounts, and, on 28 January at Caulfield – when the raid was made on the house. Also are counts of possessions of THC and of selling of THC Apparently by an oversight, no charge has been laid in respect of the growing of plants of the alleged Indian hemp.

"There is another charge of smoking Indian hemp. Now, the case that binds me is the decision of his Honour Mr Justice Anderson – *Hardy v Gillette* [1976] VicRp 36; [1976] VR 392 and, of course, the first thing which *Hardy and Gillette* shows is that the Indian hemp referred to in the *Poisons Act* is Cannabis sativa and Cannabis sativa only. In that particular case one botanist was called by the Crown who spoke of Cannabis being a monotypic genus and an analyst was called by the defence. In cross-examination questions were raised as to there being then other species of the genus Cannabis, Americana and Australis species, which have not been put forward in this hearing, and Mr Justice Anderson, the whole ratio of his decision there was – 'You have heard the botanist, even though he may have been wounded a little by cross-examination, he is still the only expert who stood there and said the subject material is Cannabis sativa, which is what is proscribed by the Act. He (the botanist) was questioned about his identification etc., but he is the one and only expert.'

"It is common ground, I think, that it is incumbent on the prosecution to prove beyond reasonable doubt every element of their case and I will say here and now the police evidence is not challenged. I accept the police evidence; it may have been challenged, some of it, but I accept the police evidence as to the facts, what they found, what was said in the record of interview in toto. There may be some slight evidence of admissions as to the identity of the subject matter made in the record of interview which I have to accept, but they are made by a layman and in view of the expert evidence, called on both sides, I say that admissions as to identity of the substances are of no value whatsoever in this particular case.

"Now, Mr Smith, the botanist from the Herbarium, he is a "monotypic" man. He belongs to the school which says there is only one genus and one species of Cannabis, (i.e. Cannabis sativa). He admits the existence of a view amongst botanist, but, in his opinion not an acceptable view, that there could be other species of the plant. He admits that writings of the botanist and the experts go back to the 18th Century when species other than sativa were claimed by eminent botanists.

"On the other hand is Mr Lazarus's expert, Mr Phippard, and I would accept him as a botanist. He is a man with pharmaceutical, pharmacognosy, and pharmacological qualifications - an expert. I would accept him in plant taxonomy and is generally a very good all-round expert, in my view. I cannot help but feel this man knows his subject and he knows not only botany, he knows the chemical side of it. He struck me as a very honest and very learned expert, and I would accept his evidence that there are generally accepted amongst botanists the view that there are at least three different species of the genus Cannabis.

"This man's honesty showed out. One would draw the inference from his own evidence here that – with the vegetable material – that one of the species would be excluded.

"He was asked by the Sergeant, quite cunningly I thought, whether he could identify the exhibits put to him. I think Mr Lazarus feared for one moment he might fill the gaps in the prosecutor's case. I think there was a great fear if he was forced into a test with a magnifying glass he could well have done it but I prefer his evidence, as an expert, to that of Mr Smith. He is such an all-rounder on both the chemical, pharmacognosy and botanical side.

"I accept that there are the three different species and even though we exempt the small growing plant, the ruderalis, there is open to be the Cannabis indica or Cannabis sativa – the vegetable material before the court.

"Now, Mr Smith admits he is a monotypic man and admits that he never makes any species test; he does not allow there is a difference in species. So, even though he is an expert I think facts here are different to the facts in *Hardy and Gillette* – there, you had one expert botanist who said that the plant there was the one and only plant genus Cannabis sativa. I accept on the evidence before me, beyond reasonable doubt, that there are at least three species of the genus Cannabis. Mr Smith makes no test to see whether it is one of any different species. He does not admit that there is such a number of species.

"Now, it has got to be proved to me beyond reasonable doubt that this is Cannabis sativa. The evidence, that the vegetable matter I am referring to in the evidence is Cannabis sativa leaves me far

short of that; so, the charges in respect of selling Indian hemp on 28 January and smoking Indian hemp over a period prior to that will be dismissed.

"Now, we come to the charges, 28 January, of selling THC, two charges; possession, two charges. Because of the definition at the end of Schedule 8, 'any active principle' of Indian hemp - that is what he is charged with. Well, we go first to look at the definition of Indian hemp. I correct myself - the definition of cannabis, after it, Indian hemp. I see that that restricts the meaning of cannabis to Indian hemp; as the definition in s26 Indian hemp means the 'fresh or dried aerial parts of the plant known as Cannabis sativa L...' Now, it is impossible to show in my view, that the Indian hemp is an active principle. That is something I looked up this morning. First, I thought it was a misprint in the Act and it should have been principal but then I looked up an old edition we have here - a 1936 Oxford Dictionary – I found definitions of 'principle' as 'rudiment', 'element',but then I found something – see 'chemical', and for a chemical definition, 'one of the constituents of the substance as obtained by chemical analysis usually one which gives rise to some characteristic quality of some special action or effect.'

"I am satisfied, on the evidence of Mr Phippard, that THC is an active constituent of all the genus Cannabis. On the evidence of the analyst who analysed the brown material, 7½% was this THC He (the analyst) cannot say whether the material was produced by chemical reaction or whether it is simply a distillation from some vegetable matter but one would draw the inference that this material has been imported into Australia but there is no evidence before me to show that it did in fact come from Cannabis sativa.

"It is very open: on the evidence it could be one out of at least three species that it came from. With the vegetable matter it was one out of two but here it is one out of at least three and the Crown have to prove it beyond reasonable doubt. This falls a long way short of that one out of three. I say that their task is to prove beyond reasonable doubt that it is an active principle of Cannabis sativa and they have not done that; so in the result of the THC charges, both possession and selling, every charge is dismissed except the possession of heroin."

Despite the care taken in expressing his reasons, we have concluded that the Magistrate was wrong in dismissing the informations and that, on the evidence before him, the respondent should have been convicted on the informations, which we have numbered above (1), (2), (4), (5) and (6).

The fundamental error into which the Magistrate fell was in regarding the issue before him as one to be determined solely by evidence. The prime issue before him was, on the contrary, one of the statutory construction. The evidence before him by the expert witnesses as to the meaning of the statute may have been admissible to assist in construing technical language but it could not prevail against the true interpretation of the expressions used in the statute by Parliament. (Compare *Yager v R* [1977] HCA 10; 139 CLR 28; (1977) 13 ALR 247; 51 ALJR 367, particularly in the reasons for judgment of Mason J at page 258, which reasoning was agreed in by Barwick CJ, Gibbs J and Stephen J).

The informations which we have numbered (1), (2), (3) and (5) (as we have said above) all referred to "tetrahydro-cannabinol an active principle of Indian Hemp" and, we repeat, were therefore based upon the definition of "drug of addiction" in s3(1) of the Act and Schedule Eight thereto, which contains a reference to the active principle of substance named "Cannabis (Indian Hemp)", which, the technical evidence clearly established, was tetrahydro-cannabinol.

There is no reason for not giving the word "Cannabis" in the Schedule its plain, ordinary, natural meaning as comprehending all forms of cannabis. The words in brackets "(Indian Hemp)" are not words of qualification: they are no more than a colloquial equivalent. Even if they could be regarded as words of qualification, on the technical evidence the active principle of Indian hemp was tetrahydro-cannabinol. The apparent objects and purposes of the Act, namely, to prevent the possession and use of a wide range of drugs of addiction, supports the construction that the word "Cannabis" in Schedule Eight should be given a wide rather that a narrow meaning.

Further, "drug of addiction" is defined is s3(1) of the Act, which in effect, incorporates Schedule Eight for the whole Act except where the context is inconsistent therewith. When s27 and s32 of the Act use the expression "other drug of addiction" they thereby refer to the various substances in the Schedule Eight, including Cannabis (Indian Hemp) with its ordinary meaning. Even if "Indian hemp" as defined in s26(1) of the Act were given a narrower meaning than "Cannabis

(Indian Hemp)" as appearing in Schedule Eight, it would, for several reasons, be quite unjustifiable statutory construction to import into Schedule Eight the definition of "Indian hemp" in s26(1).

First, s27 and s32 use both expressions "Indian hemp" and "other drug of addiction". This patently points to their not being necessarily the same. This distinction clearly negatives any inconsistencies that could be said to arise from the context. On the other hand, even if this were not so, it would be erroneous to use a definition of the expression "Indian hemp", which is expressly stated by s26 to be a definition limited for the purposes of Pt III to construe the meaning of "Cannabis (Indian Hemp)" which, for the purposes of Schedule Eight, is defined not in Pt III but by s3(1), which is in Pt I, and which specifically refers to the substances set out in Schedule Eight. If in *Hardy v Gillette* [1976] VicRp 36; [1976] VR 392, at p393 Anderson J decided to the contrary of what we have just stated, then, with respect, for the reasons we have given we are unable to agree with him.

It follows from what we have said that all the elements necessary to prove the informations numbered (1), (2) and (5) above were established by the evidence called on behalf of the informants against the respondent and he should have been convicted thereon. We have concluded that he should have been convicted on information numbered (5) rather than information numbered (3). He made contradictory admissions as to whether or not he intended to sell the substance referred to in those two informations. His admissions and the evidence of the narcotics agents clearly established that he had the substance in his possession. In our view it was more clearly proved that he was guilty of the alternative charge and so should be convicted of it rather than on information (3).

We turn to the informations we have numbered (4) and (6) above, which refer to Indian hemp as defined in s26(1) of the Act. It might at first be thought that the use in the same section of the expressions "Indian hemp" and "other drug of addiction", which latter expression by definition includes "Cannabis (Indian Hemp)" in Schedule Eight, might lead to the conclusion that the expression "Indian hemp" as defined in s26(1) should be given a narrower meaning than "Cannabis (Indian Hemp)" as appearing in Schedule Eight, because otherwise there might be duplication so far as cannabis is concerned.

There are, however, two good reasons for both expressions being given their full meaning. One is that, by s4(1) of the Act, substances set out in the Eighth Schedule are declared to be also deleterious substances and are classified as "substances or preparations which are addiction producing drugs or potentially addiction producing drugs including those so classified by the United Nations Organization or its agencies." The stress throughout those statutory provisions is on "substances or preparations". Deleterious substances under that description are dealt with comprehensively under the provisions of s9, s10, s11, s12, s13, s14, s15, s16, s17, s18, s19, s20, s21, s22, s23, s24, s47, s49, s52, s53, s58, s59, s60, s61, s62, s62A of the Act. Those sections do not themselves refer expressly to "Indian Hemp". Hence it was necessary for "Cannabis (Indian Hemp)" to be included in Schedule Eight if cannabis were to be comprehended by those sections. In the second place, s26(1) of the Act, as we have already emphasized, defines cannabis primarily as a plant, although by extensive definition it also includes extracts therefrom, whereas "other drugs of addiction", which attracts the definition in s3(1) and Schedule Eight, deals primarily as we have seen with substances or preparations.

Accordingly, there is no reason for not giving the definition of "Indian hemp" in s26(1) of the Act its full meaning. The meaning given is "the fresh or dried aerial parts of the plant known as Cannabis sativa L.". The words Cannabis sativa are Latin words meaning "cultivated hemp" and, accordingly, it might at first be thought that the definition limited the meaning to "cultivated hemp". The definition, however, refers to a plant "known as Cannabis sativa L." This immediately suggests a known or well-recognized meaning. The presence of the letter "L." implies that there is some well known meaning related to or arising from the use of the letter "L.". This is in fact so. The "L." stands for Linnaeus, which is the Latinized form of a famous 18th century Swedish botanist, Carl von Linne, who is the founder of a modern botanical taxonomy or classification. Linnaeus (as he is commonly known and as we shall refer to him) has been famous ever since his lifetime, which was from 1707 to 1778. He was an expert in botany, he travelled extensively and he produced a large number of books of botanical classifications. The most famous of these is his Species Plantarum, published in 1753, in which he classified all the plants in the world known

to him. It is the origin of all modern botanical classification. (In the facsimile reproduction of the first edition which is in the Public Library of Victoria the frontpiece is a photograph of a superb Wedgewood portrait medallion of Linnaeus).

In his Species Plantarum, Linnaeus classifies plants into a series of classes each of which has a chapter number and name, and in each chapter there are various orders with names, and, under each order, plants are named by their genus and under each genus are specified its species. Class XXII in Linnaeus' work is named DIOECIA. One of the orders in that class is named DIANDRIA. One genus in that family is named Cannabis. However, in that genus there is but one species, namely, Cannabis sativa. Examples of that one species are given by the author, namely, Cannabis foliis digitatis, Cannabis sativa, Cannabis mas., Cannabis erratica and Cannabis femina. It will be observed that not only does Linnaeus include under the one species Cannabis sativa the examples Cannabis sativa (cultivated hemp) and male and female cannabis and Cannabis foliis digitatis (cannabis with foliage like digits or fingers), but he also gives, as an example of the species, Cannabis erratica (wild hemp). Hence he not only names one species, but despite its name, which would be translated "cultivated hemp", he includes in the one species both cultivated and wild hemp and thereby comprehends all forms of "cannabis". Hence, where reference is made to Cannabis sativa as classified by Linnaeus, it means in our view all forms of cannabis.

When the Victorian Parliament, in enacting the *Poisons Act* in 1962, defined "Indian hemp" in s26(1) as meaning "the fresh or dried aerial parts of the plant known as Cannabis sativa L.", it was, by incorporating the letter "L.", obviously referring to what Linnaeus meant by Cannabis sativa, namely all forms of cannabis.

This being the definition adopted by Parliament, the expert evidence, save in so far as it might have established that the respondent had possession of and smoked a form of cannabis, was irrelevant in determining the true meaning of the statute. Nonetheless, the expert evidence and the numerous scientific works and dictionaries to which we were referred in argument all support the conclusion that the plant known in 1962 as Cannabis sativa L. comprehended all forms of the plant cannabis (cf. *Yager's Case*, *supra*).

We should add that, even if, since 1962, more sophisticated classifications of cannabis may have been adopted, this would not justify reading down in 1976 the meaning of the expression used by Parliament in 1962 when the statute was enacted. It is a recognized principle of construction that a generic expression may be given an extended meaning with the passing of time. (Compare, for example, *R v Brislan; Ex parte Williams* [1935] HCA 78; (1935) 54 CLR 262; [1936] ALR 45, where the expression "postal, telegraphic, telephonic and other like services" was held to comprehend radio broadcasting). As was rightly conceded by counsel for the respondent, there is no justification either on authority or principle for giving the meaning of an expression in a statute at the time it was enacted a more restricted meaning with the passing of time, even if scientists have subsequently adopted more sophisticated classifications.

The definition of "Indian hemp" in s26(1) comprehending all forms of cannabis and the respondent having been proved and having admitted to possessing and smoking a form of cannabis, he should have been convicted on the informations we have numbered (4) and (6). It was submitted for the respondent that, if we reached this conclusion, we should remit the informations to the Magistrate. Evidence had been called before the Magistrate for the respondent and the cases for the respondent were closed. In these circumstances we think that we should make the orders nisi absolute and record convictions and penalties against the respondent.

In fixing the penalties we have regard to the acknowledgements before the Magistrate that nothing was known against the respondent. The maximum penalty for the offences in the informations we have numbered (1) and (6) are 10 years' imprisonment or a fine of $4000 or both, which are very severe maximum penalties. Although the evidence suggests that the respondent was carrying on an extensive business in the purchase and sale of cannabis, we are of the opinion that, because of his prior good character and his age and having regard to the fact that these are test cases, a gaol sentence is not called for, but we mark the seriousness of the offences by imposing fines of $1000 on each of the informations we have numbered (1) and (6) and $50 on each of the others, making a total of $2150. By imposing these penalties it will be appreciated by any persons who might be inclined to commit similar offences that they may not have the same

leniency extended to them and that they will run the risk of having gaol sentences imposed upon them.

Accordingly, the orders of the Court are that the orders nisi in the informations we have numbered (1), (2), (4), (5) and (6) be made absolute, that the dismissals of each of those informations be set aside, that the respondent be convicted on each of those informations and that he be fined on those informations as follows, namely, on information we have numbered (1) $1000, on information we have numbered (2) $50, on information we have numbered (4) $50, on information we have numbered (5) $50 and on information we have numbered (6) $1000 and it is ordered that the respondent pay the informants' taxed costs of the orders to review on those informations not exceeding $200 in each case. The order nisi in respect of information numbered (3) is discharged without costs. The respondent is granted a certificate pursuant to s13 of the Appeal Costs Fund Act.
Orders accordingly.

Solicitor for the informants: EL Lane, Crown Solicitor.
Solicitors for the defendant: Ellinghaus and Weill.
