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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v MARABITO

Crockett, O'Bryan and McDonald JJ

15, 16 October 1990 — (1990) 50 A Crim R 412

CRIMINAL LAW – DRUGS – POSSESSION OF HEROIN – DEEMING PROVISION RE POSSESSION – WHETHER SUCH PROVISION CREATES AN OFFENCE – WHETHER ONUS ON PROSECUTION TO PROVE KNOWLEDGE OF DRUGS: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT*, 1981, SS5, 73.

In relation to the question whether *mens rea* is required to be proved by the prosecution, a distinction should be drawn between a statutory provision which creates an offence (such as *Customs Act* 1901 (Cth.) s233B(1)(b) and (c)) and one which facilitates proof of an offence (such as *Drugs, Poisons and Controlled Substances Act* 1981 s5). Where a provision such as the latter is relevant and applicable, the prosecution is not required to prove beyond reasonable doubt that an accused person had some knowledge of the existence of a drug of dependence.

CROCKETT J: **[1]** O'Bryan J will deliver the first judgment.

O'BRYAN J: The applicant stood his trial in the County Court in June 1990 following a plea of not guilty to a presentment which contained two counts. The first count alleged that he trafficked in a drug of dependence, namely heroin, on 12th December 1988, contrary to s71 of the *Drugs, Poisons and Controlled Substances Act* 1981. The second count alleged that he had in his possession on the said date a drug of dependence, namely heroin, contrary to s73 of the said Act. On the first count the Crown led no evidence and a verdict of not guilty was entered by the trial Judge. On the second count the applicant was convicted by the jury and sentenced to serve a term of imprisonment of two and a half years. A minimum term of two years was fixed before the applicant will become eligible for parole.

The applicant has applied for leave to appeal against his conviction on two grounds. The first ground asserts that the verdict was contrary to the evidence and the weight of the evidence and unreasonable in all the circumstances. The second ground asserts that the learned Judge erred in directing the jury that when considering whether the accused had possession of a drug of dependence they could apply in the alternate the definition of "possession" provided in s5 of the *Drugs, Poisons and Controlled Substances Act* and the common law definition of possession.

The facts are that on the relevant date police officers attended at the applicant's residence situate at **[2]** 280 Elder Street, Greensborough, to conduct a search of the premises pursuant to a search warrant. The applicant and his wife resided within the premises and it was not seriously disputed that both of them were in occupation of the premises in Greensborough. Constable Hermans also conducted a search of the applicant's land outside the house. When the search was being conducted in the vicinity of the front seat area of the car, Constable Hermans observed that the applicant became nervous and anxious. The applicant moved closer to the car and stated to Constable Hermans that his wife usually drove the car because the car had "baby stuff in it". Constable Hermans renewed the search, in particular near the driver's seat, and found concealed beneath the carpet a matchbox in which was a quantity of white powder. Upon analysis the powder was found to contain approximately .8 grams of heroin. When questioned regarding the matchbox, the applicant denied any knowledge of the matchbox or its contents and stated that Constable Hermans must have put it there. During a subsequent police interview the applicant stated that only he and his wife drove the car and that the car was kept locked when he was not driving it.

At the trial the applicant gave sworn evidence in his defence. He denied any knowledge of the matchbox and said that he knew nothing at all of it. He also said that his friends sometimes used the car and on occasions persons named Gino and Tony had borrowed the car. **[3]** Mrs

Marabito also gave evidence in the applicant's defence. She said that she used the car for domestic purposes and that in September the car had been serviced by a garage in Coburg over a period of three days.

Ground 2 was argued first. Counsel for the applicant submitted that the learned Judge erred in directing the jury in relation to the element of possession of the drug. The learned Judge informed the jury that the Crown relied upon the extended meaning of possession through s5 of the *Drugs, Poisons and Controlled Substances Act*. Section 5 relevantly reads:

> "5. 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 ... unless the person satisfies the court to the contrary."

The learned Judge directed the jury as follows:

> "The effect of that section is if you were satisfied beyond reasonable doubt that the accused occupied the land at 280 Elder Street, Greensborough, then the accused is deemed to be in possession of the substance unless he satisfies you that he was not in such possession. Whether the accused was in occupation of that land is a question of fact solely for you. If you were satisfied beyond reasonable doubt that the accused was actually in occupation of that land then this section would come into operation and it would then be for the accused to satisfy you that he was not in possession of the substance found, according to the evidence of the police, in the car. The standard which would rest upon the accused to so satisfy you would be on the balance of probabilities, that is, that if you were satisfied that he probably was not in possession of the substance, then you would be satisfied to the standard required by the particular section. If the accused satisfied you that he was probably not in possession of the substance then you are satisfied according to the standard of the section."

[4] Counsel for the applicant submitted the Crown was required to prove that the applicant had some knowledge of the existence of heroin on "land or premises occupied by him" before possession shall be deemed for the purposes of s73 of the Act. This proposition, it was submitted, is supported by the decision in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. *Teh's case* was concerned with two offences; importing heroin and possession of heroin contrary to paragraphs (b) and (c) of s233B(1) of the *Customs Act* 1901 (Commonwealth). The prosecution relied upon sub-s(1A) of s233B, which provided:

> "On the prosecution of a person for an offence against the last preceding subsection, being an offence to which paragraph (c) of that sub-section applies, it is not necessary for the prosecution to prove that the person knew that the goods in his possession or of which he attempted to obtain possession had been imported into Australia in contravention of this Act, but it is a defence if the person proves that he did not know that the goods in his possession or of which he attempted to obtain possession had been imported into Australia in contravention of this Act."

The Court held in *Teh* that notwithstanding sub-s(1A), the prosecution carried the onus of proving that the accused knew of the existence of the prohibited import that was in his exclusive physical control, because the presumption that *mens rea* is required before a person can be held guilty of a grave criminal offence is not displaced in relation to s233B(1)(b) and (c).

In my opinion, the proposition contended by counsel is not supported by the decision in *Teh*. In *Teh* the Court was concerned with statutory provisions which created an offence, not with a section which simply facilitates proof of an offence. The distinction is **[5]** important. A statute which creates an offence is presumed by law in the absence of a contrary intention disclosed in the statute to include mens rea. *Mens rea* is usually required before a person can be found guilty of a statutory offence. A section, such as s5, which simply facilitates proof of an element of an offence, is not subject to the same rule. In *R v Clarke and Johnstone* [1986] VicRp 64; [1986] VR 643; (1986) 21 A Crim R 135 this Court considered the proper construction of s5. The Court held that the section casts upon the prosecution the onus of proving either occupation of the relevant land by the accused, or that the prohibited substance was used, enjoyed or controlled by an accused. When the prosecution proves that a person is in occupation of relevant land, he is deemed to be in possession of the substance unless he proves that he was not in possession of the substance within the common law meaning of the word "possession".

In the charge the learned Judge adverted to this construction of s5. His Honour directed the jury that at common law a person has in his possession whatever is to his own knowledge physically in his custody or under his control: cf. *R v Maio* [1989] VicRp 23; [1989] VR 281; (1988) 38 A Crim R 25. The learned Judge said:

> "If, therefore, you are satisfied beyond reasonable doubt that the accused knew that the substance was in his car and that the substance was physically in his custody or under his physical control, then he was in possession of the substance according to ordinary principles of common law."

His Honour then directed the jury consistently with the construction of s5 as determined in *Clarke and Johnstone*. He said:

> "You will remember that I said that, if you were **[6]** satisfied beyond reasonable doubt that the accused occupied the land then the section operated and it then rested upon the accused to satisfy you upon the balance of probabilities that he was not in possession of the substance, so the directions I have given you about possession according to the ordinary principles of law are relevant to that question. If you come to that question, that is, whether you would be satisfied on the balance of probabilities that the accused was not in possession of that substance, those directions I have given you about the possession according to the ordinary principles of common law apply and must be considered by you."

In my opinion, no error was made in these directions. It was correct, based upon *Clarke and Johnstone*, correct, to instruct the jury that if it found the accused was in occupation of the land upon which the substance was found, then the accused was deemed to be in possession unless he satisfied the jury on the balance of probabilities that he did not know the substance was physically in his custody or under his physical control in the car. The applicant, in his defence, denied all knowledge of the matchbox, and offered several explanations as to how other persons who had access to his car might have placed the matchbox under the floor covering without his knowledge. The issue for the jury in the trial was really very clear, and in my view the directions to the jury were correct in relation to s5.

Counsel for the applicant also submitted that the learned Judge was in error because he acceded to a request by the Crown to leave the case to the jury in the alternative based upon common law possession. The learned Judge did so upon the basis that the jury might not be **[7]** satisfied that the accused was in occupation of the land upon which his car was parked. Counsel submitted that in introducing the common law principles of possession the charge became confused, and error resulted from including in the charge a reference to common law possession.

In my view, the Crown was also entitled to have the case put to the jury based upon the principle of possession at common law. Although the land was occupied by both the applicant and his wife, and no serious issue arose at the trial regarding occupation of the land by the applicant, the Crown was entitled to have the alternate case considered by the jury. In my view, the alternate case was put before the jury with sufficient clarity, and accordingly ground 2 fails.

The first ground may be dealt with very briefly. Counsel submitted that the only nexus between the heroin found in the car and the applicant was his state of nervousness and anxiety observed by Constable Hermans as the car search began. This connection, it was said, was too tenuous to allow the conviction to stand against the applicant's immediate denial, and denial on oath at the trial, of any knowledge of the heroin found in the car. In my opinion, the weight to be given the evidence that the applicant appeared nervous when the car was being searched was a matter for the jury. If the jury accepted the evidence that the applicant appeared nervous it was entitled to infer that the applicant knew that something incriminating was in the car. This important piece of evidence, in conjunction with 'deemed possession' **[8]** of the substance found in the car, was sufficient, in my opinion, for a reasonable jury, acting reasonably, to convict the applicant. Accordingly ground 1 also fails.

There is also an application before the Court for leave to appeal against the sentence on the ground that the sentence is manifestly excessive. The applicant, who was 46 years of age at the date of the offence, admitted several prior convictions for offences of dishonesty and one prior conviction for preparing cannabis in December 1983. The learned Judge said that he was not satisfied on the balance of probabilities that the offence was not committed for any purpose relating to trafficking in the substance. He also said that the evidence did not disclose that the applicant was a user

of the substance. In the learned Judge's reasons for sentence he observed that the sentence was imposed on the applicant "to make it clear to you that you cannot re-offend without incurring heavy consequences". Possession of heroin in the circumstances disclosed was a serious matter. Offences of this kind usually attract a custodial sentence in the higher Courts. The sentence selected by the learned Judge, in my opinion, was within the range of sentence appropriate for the offence and was not manifestly excessive. The ground, in my opinion, must fail.

CROCKETT J: I agree.

McDONALD J: I agree.

CROCKETT J: Both applications will be dismissed.

APPEARANCES: For the Crown: Ms C Douglas, counsel. JM Buckley, Solicitor for the DPP. For the applicant Marabito: Mr K Milte, counsel. Home Wilkinson & Lowry, solicitors.
