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COUNTY COURT of VICTORIA

R v BURGESS

Stabey J

17 August 1976

CRIMINAL LAW – EVIDENCE – DRUG IMPORTATION/POSSESSION OF DRUGS NAMELY CANNABIS RESIN – BOTANICAL QUESTION OF CANNABIS CONSIDERED – WHETHER CANNABIS MONOTYPIC OR POLYTYPIC – JUDGE TO INSTRUCT JURY THAT CANNABIS IS POLYTYPIC – JURY DIRECTED TO ACQUIT: *CUSTOMS ACT* 1901-1973, S233B(1).

What the trial judge had to determine as a question of fact was whether, as at 1971, the opinion held by most botanists and taxonomists was that there was only one species of the genus Cannabis. If it was so found then the judge had to consider whether the words 'of the genus sativa' Cannabis were to be construed as referring to any or all species of Cannabis. If the judge found that the words were not to be so construed he had to consider whether it was open to a reasonable jury properly instructed to be satisfied beyond reasonable doubt that Cannabis was monotypic. That is to say a genus which had only one species. A genus is polytypic if it has more than one species.

HELD: It would not be open to a jury to find that Cannabis was monotypic for the reasons that the preponderance of published writings was in favour of the polytypic view. Secondly, the fact that only Miss Todd of the three expert witnesses would not concede a reasonable doubt. Thirdly, that there was no way of comparing the credibility of the evidence of Miss Todd with that of the others, and, in particular, Mr Phippard, to come to the conclusion that Mr Phippard's opinion was without any reasonable doubt, wrong and to be rejected. Further, the jury should be directed to acquit because it would be dangerous to convict on the evidence because of the very natural and very strong abhorrence which the jury would be expected to feel in respect of the importation of such a large quantity of cannabis resin.

STABEY J: Winston Charles Burgess is before this court on two counts. Each for an offence created by s233B of the *Customs Act* 1901-1974. He is charged firstly that he did import into Australia prohibited imports, to which the section applies, to wit, 'Narcotic Drugs consisting of Cannabis resin'. The second count is that he did, without reasonable excuse, have such goods in his possession.

At the close of the prosecution case I heard the submission that I should at that stage direct the jury that a verdict of not guilty be returned. After hearing arguments from both learned counsel and for reasons then stated I decided not to so direct at that stage.

Mr Lazarus then opened his case. Pursuant to an agreement between counsel and endorsed by me, Mr Lazarus then immediately called the evidence intended to be called by him, on what I will call 'the botanical question' and thereupon he again submitted that I should so direct the jury. It was further agreed by counsel and endorsed by me that as Mr Lazarus' submission relates solely to the botanical question that it is in the interests of everybody that I should consider the submission at this stage and so avoid possible waste of time.

The submission is that on the proper interpretation of the relevant words of the Act, and the botanical evidence, the Crown has not proved that s233B(1) of the Act applied to the Cannabis resin referred to in the presentment. It is clear that no further evidence which Mr Lazarus might call could have any relevance to that submission and so it seemed proper to me to adopt the agreement of counsel, because the proposed course could not cause any increase in the time and expenditure in disposing of the case and might, on the other hand avoid the calling of a considerable body of evidence which, if I uphold the submission, would not be considered.

The submission really falls into two separate parts, although if Mr Lazarus fails on the first part then the second part does not arise. It has to be established by the Crown, as an essential element of each count, that the Cannabis resin was obtained from a Cannabis plant, or plants, as defined

by Section 4, sub-s(1) of the Act. By the section it is provided that 'Cannabis plant means a plant of the genus Cannabis sativa'. If Cannabis sativa is only one of two or more species of Cannabis plants then unless the relevant words of Section 4, sub-s(1) are to be interpreted as embracing all species of Cannabis, the prosecution must fail because the evidence of chemical analysis is not capable of preying that the Cannabis resin alleged to have been imported, or possessed, was obtained from any particular species.

The first part of Mr Lazarus' submission is then that by reason of the use of the words 'of the genus Cannabis sativa' in the relevant section, the prosecution must prove that Cannabis resin referred to in the presentment was obtained from a Cannabis plant, or plants, which is a species having the species name sativa.

The second part of Mr Lazarus' submission is that there are at least two species of the genus Cannabis, one of which species is Cannabis sativa. 'At any rate', says Mr Lazarus, 'the Crown has not proved and cannot prove, beyond reasonable doubt that there is only one species of Cannabis, namely, Cannabis sativa'. The words genus Cannabis sativa are not words of ordinary English usage, as is indicated by the way in which they are printed in Section 4, sub-s(1). They are technical words used by botanists and taxonomists to name a particular species of plant. It is therefore necessary to have regard to the evidence as to the botanical or taxonomical usage of words, and of those words in particular in construing the relevant part of the Act.

It is common ground that as the construction of the Act is a question of law for the judge that any questions of fact, required to be determined for the purpose of construction, are to be determined by the judge.

Mr Kelly contends that the evidence establishes that at the relevant date in 1971, when the *Customs Act* was amended to use the words 'of the genus Cannabis sativa' the most common and generally accepted view was that there was only one species, namely, 'sativa' of the genus Cannabis, and that therefore Parliament is to be understood as intending to refer to all plants of the Cannabis genus so that even if there are species other than sativa those other species are intended, by Parliament, to be included notwithstanding the use of the word sativa.

Further, or alternatively, Mr Kelly submits that the only species of the genus Cannabis is the species sativa.

What I have to determine, therefore, as a question of fact is whether, as at 1971, the opinion held by most botanists and taxonomists was that there was only one species of the genus Cannabis. If I so find then I must consider whether, therefore, the words 'of the genus sativa' Cannabis are to be construed as referring to any or all species of Cannabis. If I find that the words are not to be so construed I must consider whether it would be open to a reasonable jury properly instructed to be satisfied beyond reasonable doubt that Cannabis is monotypic. That is to say is a genus which has only one species. A genus is polytypic if it has more than one species.

The botanists and taxonomists start off with the widest category of order, that is, all plants are first divided into orders. Each order may be constituted by one or more families. Each family may be constituted by one or more genera and so on. The six categories are order, family, genus, species, variety and cultivax.

When a botanist or taxonomist desires to identify a plant by its species he first uses the one word, which is the word which describes its genus, and places after that word the one word which is the name of the particular species.

The facts that I have so far stated are not in dispute. What is in dispute is whether Cannabis is monotypic and whether, even if it is polytypic, it was in 1971 so generally thought to be monotypic that that should be taken to have been the view accepted by the Parliament of Australia in 1971.

Three experts in botany and taxonomy were called, namely, Mr Kleinschmidt and Miss Todd, for the Crown and Mr Phippard on behalf of the defendant. Those called by the Crown swore that in their opinions Cannabis is monotypic; while the third expert swore that in his opinion Cannabis is polytypic.

I found the evidence of those experts very interesting. What appeared clearly was that among those botanists and taxonomists who have had papers published in learned publications there is a difference of opinion as to whether Cannabis is monotypic. However, of the several papers or writings referred to in the evidence only those of Small and his collaborators set out to support the monotypic view and it is to be noted that Small's view was, first published in 1972. It is true that in 1969 Schultes, while indicating that he had doubts as to the correctness of that view, did indicate that he accepted that Cannabis was monotypic. However, Schultes has, since 1971, published a paper strongly maintaining the polytypic opinion.

It was common ground among the three witnesses that prior to 1971 it was well known to botanists and taxonomists of any standing that serious and highly reputed botanists and taxonomists had identified and described, or claimed to have identified and described, a species of Cannabis distinct from Cannabis sativa among such other species, or claimed species, were Cannabis indica, which was first described in 1783 and Cannabis ruderalis, which was first described in 1924. I am satisfied that in 1971 it was clear to any botanist of standing that there was at least a substantial body of opinion to the effect that Cannabis is polytypic. Further, I am satisfied that any such botanist, even if he adopted the monotypic opinion, would not deny the good standing of those who hold that Cannabis is polytypic. He would concede that their views must be taken quite seriously. Indeed, I am satisfied that in 1971 at least, on a world-wide basis, the more general view was that Cannabis is polytypic.

I found Mr Phippard a more convincing witness than either Mr Kleinschmidt or Miss Todd and I have come to the conclusion that it is more probable than not that Cannabis is polytypic.

It seems to me to be clear that it would be quite wrong to ascribe to Parliament ignorance of the existence of the polytypic opinion. It would be equally wrong to impute to Parliament that it was unaware that the technically correct way to describe a species is to state the name of the genus to which it belongs and to follow that with the species name. Parliament must be taken also to have known, firstly, that even if sativa is the only known species of Cannabis there is always the possibility that another species will be identified; secondly, that a newly discovered species might not have the narcotic characteristics of Cannabis sativa; thirdly, that if it desired to deal with any and every known, or subsequently discovered species of Cannabis, then if it used the words 'plant of the genus Cannabis' that would, with certainty, include sativa and, if there were any other species, any such other species and fourthly, that if it used the words 'of the genus Cannabis sativa' they would or could give rise to argument and uncertainty as to whether what was without doubt Cannabis, was Cannabis sativa.

Of course, it is a well known canon of statutory construction that in the absence of other reasons to the contrary a court does not adopt an interpretation which would allow no operation to a word. To construe the words under consideration as meaning any species of Cannabis, would clearly be to allow no operation to the word sativa. I can see no reason for not giving effect to the canon, to which I have referred. It seems to me that applying the accepted rules of construction, Parliament is to be taken as either adopting the polytypic opinion or at least indicating clearly that it accepted the possibility that species, other than sativa, would in the future be identified and that the section would then only apply to sativa.

Finally, on the evidence, the only persons who published monotypic opinions were from the English speaking countries and botanists and taxonomists from other countries had considerably earlier than 1971 espoused the polytypic view. It is extremely unlikely that in a statute dealing with importation of goods Parliament would have ignored the latter view. I would therefore, for myself, accept Mr Lazarus' submission.

Before I finally so decide that that is the correct interpretation I must have regard to a decision of the Full Court of the Supreme Court of Western Australia in *Yager's case* [1977] WAR 17; (1976) 27 FLR 475; 11 ALR 646; aff'd by (1977) 139 CLR 28; 51 ALJR 367; 13 ALR 247. That decision was delivered on the 5th of this month, that is, since this trial was commenced. I have had the advantage of reading the reasons of Mr Justice Burt and Mr Justice Brinsden and I am informed by Mr Kelly that the Chief Justice Jackson, in fact did not deliver separate reasons but concurred in the reasons of Mr Justice Burt. Of course, although I am not bound by that decision, it is a powerful persuasive authority and I ought to follow it, if there does not appear to me to be good

reason to the contrary. I have, nevertheless, come to the conclusion that I should not follow that case and I list my reasons for that course as follows:

Firstly, on the evidence before him, the trial Judge apparently found that in 1971 the generally accepted or majority opinion and doctrine in botanical circles was that cannabis was monotypic. On the evidence before me, I am compelled to find to the contrary.

Secondly, the reasons of Burt J and probably those also of Brinsden J proceed on the basis that on the evidence the monotypic opinion is or was that all specimens of cannabis fall within the genus cannabis sativa, that is, using both words 'cannabis' and 'sativa' as descriptive of the genus, whereas on the evidence before me, all the experts adopted the view that only the word 'cannabis' described the genus and that the word 'sativa' referred to the species, whether or not it was, in fact, the only species of the genus.

Thirdly, apparently the Full Court did not have the *Customs Act* 1967 drawn to its attention. That Act amended the *Customs Act*, and by its reference in its s3 to the *Narcotic Drug Act* of 1967, it gave statutory recognition to the *Single Convention on Narcotic Drugs* 1961, which convention used the words 'of the genus cannabis' without the added word, 'sativa'. (See Article 1, Clause 10 of the *Convention* as set out in the First Schedule of the *Narcotic Drug Act* of 1967). When the *Customs Act* was amended in 1971, so as to, in substance, change the words 'of the genus cannabis' to 'of the genus cannabis sativa', Parliament must be taken to have deliberately used the word 'sativa' and it seems to me to be inescapable, therefore, that Parliament is to be taken to have intended to achieve a different result, than if it had continued to use the word 'cannabis' without the word 'sativa'.

Fourthly, there is no reference by the Full Court to the state of regulations made under the Act as they stood immediately prior to and since the passing of the 1971 Act. The regulations at all times, like the Act prior to the amendment, referred to a plant of the genus cannabis. So that before the Act any cannabis or cannabis derivative was a prohibited import, the importation of which was punishable either as the importation of a prohibited import *simpliciter* or as a prohibited import to which s233B applied. The effect of the 1971 Act, if Mr Lazarus' submission is correct, is not that some cannabis or its derivatives may be freely imported; clearly, on any view, all cannabis, whether sativa ruderalis, indica or any other species, is a prohibited import and the importation is an offence pursuant to s233 and all that has been wrought by the 1971 Act, if Mr Lazarus' submission is correct is that only sativa and its derivatives attract the higher penalties of s233B. Parliament cannot be assumed to have not been aware of regulations already made under its own Act. Mr Kelly has referred me to 1971 Parliamentary Paper No.204, that is the report of the Senate Select Committee on *Drug Trafficking and Drug Abuse*, Part 1, and, in particular, to pages 52-60 thereof. That report which was available to Parliament prior to the passing of the 1971 Act does use the words 'cannabis sativa' in a way which suggests that the committee did not understand that some botanists maintain that cannabis is polytypic and that sativa is one only of two or more species. However, in my view, that cannot justify, assuming that Parliament laboured under any such misapprehension.

Having decided that the prosecution must prove that cannabis resin referred to in the presentment was obtained from a cannabis plant or cannabis plants of the sativa species, I turn to the question as to whether it is open to the jury to so find. The jury could not so find unless it be satisfied beyond reasonable doubt that cannabis is monotypic, and that therefore, if the resin was derived from plants of the genus cannabis, it must, of necessity, have been from the sativa species because there is no other species.

Mr Kleinschmidt himself was not so convinced as to claim to be satisfied beyond a reasonable doubt that there were no species other than sativa, while Miss Todd admitted to no such doubt. Her interest in cannabis had first begun only two or three years ago and it was by no means a major interest. Although her explanation of the significance of discontinuance or lack of discontinuance in determining whether specimens were of the same species or merely different varieties of the same species enabled me to understand, something which Mr Kleinschmidt was unable to explain to me, I think it was clear that neither she nor Mr Kleinschmidt had anything like the broad knowledge of the relevant literature which Mr Phippard very clearly did have. When I refer to Mr Kleinschmidt's inability to explain, I am, of course, referring to his expressed inability to explain

why the questions I put to him with reference to horses, mules and donkeys on the one hand, and to peaches, nectarines and plums on the other, did not show that it was wrong to say, as he had said, that he would not accept that two specimens of cannabis were sufficiently diverse to constitute two species because there was a third specimen which shared some characteristics with each of the other two specimens.

Of course I cannot and must not impose my views upon the jury, and if this was an issue arising in a civil case, I should think that notwithstanding, I would find that the polytypic view was probably correct, it would not be proper for me to conclude that it was not open to a jury to find that the monotypic view was probably correct.

However, it seems to me that I should conclude that it is not open to a jury to so find, and I do so for the following reasons: Firstly, the preponderance of published writings is in favour of the polytypic view. Secondly, the fact that only Miss Todd of the three expert witnesses would not concede a reasonable doubt. Thirdly, that there is no way of comparing the credibility of the evidence of Miss Todd with that of the others, and, in particular, Mr Phippard, to come to the conclusion that Mr Phippard's opinion was without any reasonable doubt, wrong and to be rejected.

Further, I believe I should more readily direct the jury to acquit because it would be dangerous to convict on the evidence. I more readily take this course because of the very natural and very strong abhorrence which I would expect the jury to feel in respect of the importation of such a large quantity of cannabis resin.

Now, I take it, gentlemen, there is no reason urged as to why I should not bring in the jury and direct a verdict accordingly?
