12/79

HIGH COURT OF AUSTRALIA

WILLIAMS v R

Gibbs, Mason, Jacobs, Murphy and Aickin JJ

2 June, 8 December 1978

[1978] HCA 49; (1978) 140 CLR 591; 53 ALJR 101; 22 ALR 195

CRIMINAL LAW – DRUGS – STATUTORY OFFENCE – PROHIBITED PLANT – POSSESSION – MINUTE QUANTITY IN ACCUSED'S CLOTHING – VESTIGIAL REMNANTS OF PAST POSSESSION – KNOWLEDGE – WHETHER REQUIREMENT FOR POSSESSION – STATUTORY INTERPRETATION – POSSESSION OF PROHIBITED PLANT – NO SPECIFICATION OF QUANTITY REQUIRED TO MAKE POSSESSION CRIMINAL – POSSESSION OF QUANTITY INSUFFICIENT – APPLICATION OF MAXIM *DE MINIMIS NON CURAT LEX*: *HEALTH ACT* 1937 (QLD), SS5, 130, 130j.

Police officers found fragments of green leaf material in the pockets of two coats belonging to the applicant. The material was mixed with other debris. The police evidence was that the applicant said the material was "probably cannabis". In answer to a question "is it yours?", the applicant replied "if it's cannabis, it would be". The material was examined microscopically and found to contain *cannabis sativa.* While of insufficient bulk to be weighed, it was estimated to weigh micrograms. Williams was convicted of having in his possession a prohibited plant, Indian Hemp (*Cannabis Sativa*), not being licensed under the *Health Act* 1937) Qld). An appeal to the Court of Criminal Appeal of Queensland was dismissed. Mr Williams applied to the High Court of Australia for special leave to appeal.

HELD: Special leave granted. Appeal allowed.
Per Gibbs, Mason and Jacobs JJ:
1. To say that a person in the position of the applicant has possession of prohibited material merely because by scientific means it is possible to conclude that there are some specks or fragments measurable in micrograms in the pocket of his coat is in reality to penalise him for a possession of the material in the past, for all that remains are the vestigial remnants of a past possession.

2. An Act which creates the offence of having in possession a dangerous drug, or a prohibited plant, without adverting to quantity contemplates possession, not of a minute quantity incapable of discernment by the naked eye or detectable only by scientific means, but a possession of such a quantity as makes it reasonable to say, as a matter of common sense and reality, that it is the prohibited plant or drug of which the person is presently in possession.
***R v Worsell* (1969) 2 All ER 1183;**
***R v Graham* (1969) 2 All ER 1181; and**
***Becking v Roberts* (1974) QB 307; (1973) 3 All ER 962, referred to.**

3. The test of "measurable" or "usable" quantities, as expressed in *Police v Emirali* (1976) 2 NZLR 476, and applied in *People v Leal* (1966) 413 P (2d) 665, and *Edelin v United States* (1967) 221 A (2d) 395, disapproved.
***R v Carver* (1978) 2 WLR 872, applied.**
***Barrett v Broughton* (Full Court, SC (Tas) (1978) 2 Crim LJ 174), disapproved by Jacobs J.**

Cur. adv. vult.

GIBBS and MASON JJ: ... The point of the case, and it is an important point, is that the quantity of the drug found in the applicant's possession was minute, so small that it was not measured, the applicant's case being that a person must be in possession of a measurable quantity of a prohibited plant before he can commit the offence of having possession of that plant.

The problem which arises in this case has been considered in the United Kingdom and in New Zealand. In *R v Worsell* (1969) 2 All ER 1183 possession of a tube containing a few small droplets of a drug discernible only with the aid of a microscope, incapable of measurement or use, was held not to constitute the offence of having possession of the drug. Salmon LJ, after observing that the droplets were invisible to the human eye said (at p1184):

> 'Whatever it (the tube) contained, obviously it could not be used and could not be sold. There was nothing in reality in the tube.'

This expression of the criterion to be applied was recently accepted by the Court of Appeal in *R v Carver* (1978) 2 WLR 872, where the quantity of cannabis resin was invisible to the naked eye and consisted of not less than 20 micrograms in each of two roach ends. The evidence was that 20 micrograms could not be used and that for use in any manner prohibited by the statute a quantity of not less than 50 milligrams would be required. It was held that, applying a common sense test, the quantity was so minute as to amount to nothing. In its judgment (at p876) the Court of Appeal said:

> "However, this court is of the opinion that, whilst it would be inappropriate to rely upon the ordinary maxim of *de minimus*, if the quantity of the drug found is so minute as in the light of common sense to amount to nothing or, even if that cannot in a particular case be said, if the evidence be that the quantity is so minute that it is not usable in any manner which the *Misuse of Drugs Act* 1971 was intended to prohibit, then a conviction for being in possession of the minute quantity of the drug could not be justified."

Leave to appeal from the decision of the Court of Appeal was refused by the House of Lords (1978) 1 WLR 925.

We are left, then, with the general question of what is meant by possession of a drug or a prohibited plant when it is made the foundation of an offence. Could it be rationally intended by Parliament that a person commits an offence where he is found to have in his clothes or effects a quantity of the offending material so minute that it is invisible to the naked eye? ...

If it were otherwise, countless examples might be given of circumstances in which innocent persons might be found guilty of an offence without knowing that they were in possession of the drug or plant in question. A person whose container or clothing has been used temporarily to hold a prohibited material would be guilty of the offence merely because specks or fragments of the material measurable only in micrograms continue to adhere to the container or clothing after the contents have been removed and it is, to all intents and purposes, empty. To say that a person in the position of the applicant has possession of the prohibited material merely because by scientific means it is possible to conclude that there are some specks or fragments measurable in micrograms in the pocket of his coat is in reality to penalize him for a possession of the material in the past, for all that remains are the vestigial remnants of a past possession.

A consideration of these situations confirms us in thinking that when the Act creates the offence of having possession of a dangerous drug or a prohibited plant without adverting to quantity, it contemplates possession, not of a minute quantity incapable of discernment by the naked eye and detectable only by scientific means but a possession of such a quantity as makes it reasonable to say as a matter of common sense and reality that it is the prohibited plant or drug of which the person is presently in possession. Even though the statute is aimed at a social evil, if it is ambiguous or silent upon a particular point it is permissible to construe the statutory provision so as to avoid an unfair or unjust result.

We prefer to express the concept of possession of the terms which we have used rather than in terms of 'measurable' or 'usable' quantities. A minute quantity is none the less measurable by scientific instruments and techniques. And to adopt the test of 'usable' quantity would be, as Stable SPJ pointed out in the Queensland Court of Criminal Appeal to promote a never-ending disputation as to what is meant by and as to what constitutes, a usable quantity of a particular drug or prohibited plant. As was pointed out in *Police v Emirali*, in applying the quantity found could be combined with other quantities so as to make an effective quantity. This in itself would create an extra dimension of uncertainty in the application of the suggested test. For these reasons we would grant special leave to appeal and allow the appeal.
