33/77

HIGH COURT OF AUSTRALIA

YAGER v R

Barwick CJ, Gibbs, Stephen, Mason and Murphy JJ

25 February 1977 — [1977] HCA 10; (1977) 139 CLR 28; 51 ALJR 367; 13 ALR 247

CRIMINAL LAW – GENUS "CANNABIS" OR GENUS "CANNABIS SATIVA" AS USED IN *CUSTOMS ACT* – CUSTOMS – PROHIBITED IMPORTS – POSSESSION OF PROHIBITED IMPORTS – NARCOTIC GOODS – CANNABIS PLANT MATERIAL – WHETHER MATERIAL OF NATURE OF A "PLANT OF THE GENUS CANNABIS SATIVA" – CANNABIS SATIVA ONE OF THREE SPECIES OF GENUS CANNABIS: *CUSTOMS ACT* 1901-1975 (CTH), SS4, 233B(1)(b), (c); *CUSTOMS (PROHIBITED IMPORTS) REGULATIONS* (CTH), R5.

Y. was convicted of possessing cannabis, a prohibited import, and of importing same contrary to *Customs Act* wherein cannabis is defined as a "plant of the genus cannabis sativa". Expert evidence had been given that at the time of that definition in the Act it was a commonly accepted botanical view that all specimens of cannabis fell within the genus cannabis sativa, but that subsequent botanical view was that cannabis sativa was one of at least three species of the genus cannabis. The Supreme Court' of West Australia held (1977 11 ALR 646) that the intention of the legislation as gathered from the words used was to use the expression cannabis sativa in a general sense thereby including any species subsequently identified.

HELD: Per the Court, (Murphy J dissenting) Appeal dismissed.
1. As "cannabis sativa" is a technical name or description, expert evidence as to its denotation and identifying characteristics was receivable by the Court. Although the existence of a conflict of evidence on this question may have created an issue of fact, in the circumstances of this case it was not necessary to resolve the conflict because, the construction of the statute always remaining a question of law, it was for the judge to decide whether the statutory description should be read as a reference to a genus or as a reference to a species only.

2. In deciding this question the judge was bound to have regard to and to evaluate, as a matter of construction, the presence of the word "genus" before the technical words "cannabis sativa". In this respect the language is plain enough and admits of no contradiction – the judge was driven to the inescapable conclusion that Parliament specified a genus and not a species. This conclusion stems not only from the word "genus" but from the generality of the definition of "cannabis" in s4 of the *Customs Act* which strongly indicates that the definitions looked to the genus and not to one species of the genus.

3. It follows then that the description must be taken to refer to the genus cannabis and not to a particular species of cannabis. At best the applicant's case was that Parliament was mistaken in treating cannabis sativa as a genus, but this cannot alter the circumstance that Parliament prescribed a genus; it does not allow the High Court to say that Parliament prescribed a species. Nor does it permit the Court to say that the statutory definition should be ignored or treated as if it was of no effect.

MASON J: ... 6. It was the applicant's case before the District Court and the Court of Criminal Appeal, based largely on the evidence of an expert botanist, Professor Emboden, that the reference in the statutory definition of "cannabis plant" to "a plant of the genus Cannabis sativa" is a reference not to a genus but to the species cannabis sativa and that it was impossible to determine whether the material admitted to be in the possession of the applicant was cannabis sativa, cannabis indica or cannabis ruderalis, each being in the opinion of the professor a species of the genus cannabis.

The burden of the applicant's case and that of Professor Emboden's evidence was summarized by Burt J in the Court of Criminal Appeal in these words:

> "although up to the year 1971 – which is the year in which the definition was enacted and which for present purposes is I think the material date – and perhaps for a year or two beyond that date it may have been the generally accepted opinion and accepted doctrine in botanical circles that all specimens of cannabis fell within the genus then called cannabis sativa, cannabis indica and cannabis ruderalis, which were then known, then being regarded as specimens within that description – the

monotypic view – it had subsequently been discovered – and it had come to be accepted by some learned botanists that this was an error, the true position being that each cannabis sativa, cannabis indica and cannabis ruderalis were true species, the genus being cannabis – the polytypic view. This being so, it was contended that 'cannabis plant' as defined was descriptive of the species 'cannabis sativa' and thus did not describe or embrace the other species. Hence it was contended that unless it could be proved that the imported material was cannabis sativa regarded as a species of the genus cannabis, the offence had not been proved."

7. On the other hand, the Crown case was that the statute looks to the genus cannabis, whether it be correctly or incorrectly described as the genus cannabis sativa. Two experts called by the Crown who were protagonists of the monotypic view gave evidence positively identifying the plant material in question as cannabis sativa.

8. For the applicant reliance was placed on three factors to support the submission that the statutory definition of "cannabis plant" refers to cannabis sativa as a species and not as a genus. The first was that in the definition of "cannabis" and "cannabis resin" contained in s4 of the *Narcotic Drugs Act* 1967, they are expressed to have the same respective meanings as they have in the Single Convention on Narcotic Drugs, 1961. By art. 1 of the Single Convention, "cannabis" is defined in terms of "the flowering or fruiting tops of the cannabis plant", and "cannabis plant" is defined to mean "any plant of the genus cannabis". Although the definition of "cannabis" and "cannabis plant" for the purposes of the *Narcotic Drugs Act* differs from that contained in s4 of the *Customs Act*, this is of no avail to the applicant. The existence of different definitions of the same subject matter in statutes of the one Parliament is by no means uncommon. A statutory definition exists for the purposes of the particular statute in which it is contained, unless it appears in a statute expressed to have a more general application, such as the Act Interpretation Act. Indeed, the opening words of s4 of the *Narcotic Drugs Act*, "In this Act, unless the contrary intention appears", explicitly confine the operation of the definitions there contained to the operative provisions of the Act itself. There is, therefore, no legitimate foundation for resorting to the definitions contained in the Narcotic Drugs Act for the purpose of modifying or qualifying another statutory definition contained in a different Act of Parliament. There is perhaps even stronger reason for reaching this conclusion when one statute is domestic in character and the other is a statute which gives effect to an international convention and is consequently bound to apply the definitions which the convention contains.

9. The second matter on which the applicant relies to qualify the statutory definitions contained in s4 of the *Customs Act* is arts. 20 and 23 of the *International Code of Botanical Nomenclature* adopted by the Eleventh International Botanical Conference at Seattle in August 1969. The code was not published until 1973, after the relevant amendment to the *Customs Act* came into operation, but the applicant submitted that the provisions of the two articles were identical with, or substantially similar to, the provisions of the International Code promulgated at Edinburgh and published in 1966. Whether the two versions of the code are identical or substantially similar does not appear from the material placed before the Court but I shall assume that there is such an identity or substantial similarity. Article 20 provides that the name of a genus may not consist of two words unless these words are joined by a hyphen. Article 23 provides that the name of a species is a binary combination consisting of the name of the genus followed by a single specific epithet. If an epithet consists of two or more words these are to be united or hyphened. The applicant then says that as it is inadmissible for a genus to consist of two names without a hyphen, the description "cannabis sativa" without a hyphen must refer to the genus cannabis species sativa.

10. This submission is also misconceived. There is no basis on which the provisions of an international convention can control or influence the meaning of words or expressions used in a statute, unless it appears that the statute was intended to give effect to the convention, in which event it is legitimate to resort to the convention to resolve an ambiguity in the statute (*Salomon v Commissioners of Customs and Excise* (1967) 2 QB 116, at pp143-144; [1966] 2 All ER 340; [1966] 2 Lloyds Rep 460; [1966] 3 WLR 36; *The Banco* [1971] 1 All ER 524; [1971] 1 Lloyds Rep 49; (1971) P 137, at pp151, 157, 161). Still less is there any foundation for resorting to the provisions of such a convention for the purpose of qualifying or modifying an express definition contained in a statute.

11. The applicant's third argument fares no better. This argument asserts that in 1967 the *Customs Act* definition of "narcotic drug" was linked to the definition of that expression in the

Narcotic Drugs Act 1967 and that it is to be inferred that in 1971 the *Customs Act* definition of "cannabis plant" was no wider in its denotation than the definition of "cannabis plant" contained in the Single Convention on Narcotic Drugs, 1961 which was, as I have said, incorporated into the statute. By the *Customs Act* No. 54 of 1967 the expression "narcotic drug" was defined for the purposes of that Act to mean "goods consisting of a substance or mixture that is a drug as defined by sub-section one of section four of the *Narcotic Drugs Act* . . ." By s4 of the last mentioned Act (No. 53 of 1967) the word "drug" was so defined as to include "cannabis", a drug specified in the First Schedule to the Single Convention on Narcotic Drugs, 1961. Article 1 of that convention, as already appears, defined "cannabis" in terms of the cannabis plant and also defined "cannabis plant" as meaning "any plant of the genus Cannabis". The point then sought to be made is that when in 1971 the *Customs Act* definition of "cannabis plant" was introduced it must have been intended as a species, and not as a genus, description.

12. As a matter of speculation this is all very interesting, but it has very little, if anything, to do with the construction of the Customs Act and what is meant by the statutory definition of "cannabis plant" there contained. As "cannabis sativa" is a technical name or description expert evidence as to its denotation and identifying characteristics was receivable. Although the existence of a conflict of evidence on this question may have created an issue of fact, in the circumstances of this case it was not necessary to resolve the conflict because, the construction of the statute always remaining a question of law, it was for the judge to decide whether the statutory description should be read as a reference to a genus or as a reference to a species only. In deciding this question the learned judge was bound to have regard to and to evaluate, as a matter of construction, the presence of the word "genus" before the technical words "cannabis sativa". In this respect the language is plain enough and admits of no contradiction – the learned judge was driven to the inescapable conclusion that Parliament specified a genus and not a species. This conclusion stems not only from the word "genus" but from the generality of the definition of "cannabis" in s4 of the Act which strongly indicates that the definitions looked to the genus and not to one species of the genus.

13. It follows, then that the description must be taken to refer to the genus cannabis and not to a particular species of cannabis. At best the applicant's case is that Parliament was mistaken in treating cannabis sativa as a genus, but this cannot alter the circumstance that Parliament prescribed a genus; it does not allow us to say that Parliament prescribed a species. Nor does it permit us to say that the statutory definition should be ignored or treated as if it was of no effect. ...
