05/89

SUPREME COURT OF VICTORIA

COE v MURPHY

Murphy J

4 November 1988

CRIMINAL LAW – ADMISSIONS – DRUG OF DEPENDENCE – DESCRIPTION BY ACCUSED AS TO HOW DRUG OBTAINED – DRUG NAMED – AMOUNT PAID – DESCRIPTION AS TO METHOD OF SELF-ADMINISTRATION AND SUBSEQUENT PHYSICAL REACTION – WHETHER "SETTING" SHOWS SUFFICIENT DEGREE OF FAMILIARITY WITH SUBSTANCE: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, S75.

C. was found lying on the ground in an unconscious state. After some time he was resuscitated and taken to a police station where he was questioned by a police officer M. During the interview, C. admitted self-administering some white powder he said he had previously bought as heroin in "a cap" for $25.00. He described the manner in which he had liquefied the white powder on a spoon, transferred it to a syringe and injected it into his arm, which led to a physical reaction and loss of consciousness. C. was charged with using a drug of dependence namely heroin and was later convicted. Upon order nisi to review the conviction—

HELD: Order nisi discharged.
Having regard to the setting in which C.'s admissions were made, it was open to the magistrate to be satisfied that C. showed a sufficient degree of familiarity with the substance to enable proof beyond reasonable doubt that the substance was a drug of dependence.
***Reardon v Baker* [1987] VicRp 72; (1987) VR 887; (1987) 25 A Crim R 203; and**
***Anglim and Cooke v Thomas* [1974] VicRp 45; (1974) VR 363, referred to.**

MURPHY J: [1] This was a return of an order nisi to review the decision of the Magistrates' Court at Preston sitting at Brunswick when on 19 April 1988 the magistrate found that the applicant Allan Eric Coe was guilty of a breach of the *Drugs, Poisons and Controlled Substances Act* 1981 in that he used a drug of dependence namely heroin, not being authorised or licensed to do so. He was convicted and fined $500.00. The applicant sought and obtained an order nisi which **[2]** was granted by Master Brett on 26 May 1988 and the grounds upon which it was sought to review the Magistrate's decision were:-

> "(A) That the learned magistrate was wrong in holding that there was sufficient evidence to find beyond reasonable doubt that the applicant had used heroin at Reservoir on 31 October 1987.
>
> (B) That there being no certificate of analysis available to the court, nor any expert evidence as to the identity of the substance said to be heroin, the learned magistrate was wrong in law in that he held that the admissions alleged to have been made by the applicant constituted sufficient evidence of identification of the substance which was allegedly used by the applicant at Reservoir on 31 October 1987.
>
> (C) The learned magistrate was wrong in law in convicting the applicant of the charge of use of heroin at Reservoir on 31 October 1987."

Miss Brodie of counsel appeared to move the order absolute and Mr Southall of counsel appeared to show cause. The applicant himself swore an affidavit on 16 April 1988 in support of the order nisi and this affidavit set out the circumstances of the alleged offence and of the evidence which was given in the court below as well as the details of the magistrate's decision. An answering affidavit sworn by Colin Edward Murphy on 31 October 1988, was also filed and set out in some little more detail the contents of **[3]** Constable Murphy's evidence in the court below relating to the conversation which he had had with the applicant at the Reservoir police station on 31 October 1987 and which conversation contained the admission upon which the informant relied to support the conviction.

Miss Brodie in a comprehensive submission relied in essence upon the fact that there

was no sufficient evidence that the applicant had the necessary degree of familiarity with the substance, heroin, to enable the Magistrates' Court and the magistrate to rely upon the admissions that were made to support a conclusion beyond reasonable doubt that the substance which he had admittedly used on the occasion was in fact heroin as charged. There was no debate in the case as to the making of the admissions in question nor as to the circumstances in which the applicant was found nor indeed as to any matters other than that it was not open as a matter of law, so the submission went, for the magistrate to be satisfied beyond reasonable doubt that the substance in question was heroin.

The absence of any certificate of analysis or any expert evidence was said in the circumstances of the present case to render defective the conviction which had been entered and the reliance which the magistrate clearly made upon the admissions of the applicant himself were said to be correspondingly **[4]** defective because of the lack of degree of familiarity of the applicant with the substance in question on the evidence that was led.

Miss Brodie referred me to the authorities on the subject-matter of the use of admissions which might be in many circumstances based upon hearsay in a criminal case such as the present. The most recent of the decisions of this court is the decision of Phillips J in *Reardon v Baker* [1987] VicRp 72; (1987) VR 887; (1987) 25 A Crim R 203 in which His Honour traced the development of the law upon the subject matter. An earlier decision of Harris J in *Anglim and Cooke v Thomas* [1974] VicRp 45; (1974) VR 363 which also traces even in more detailed fashion the law upon the subject-matter. There are decisions in Queensland to which I do not intend to go which might appear to run counter to some of the decisions in other jurisdictions.

The decision of the Court of Criminal Appeal in *Bird v Adams* (1972) Crim LR 174, relies to a large degree upon an earlier decision of the Court of Appeal in England in *R v Chatwood* [1980] 1 WLR 874; [1980] 1 All ER 467 at 469; 70 Cr App R 39. No doubt the references which appear in the cases to the degree of familiarity that an accused person may be **[5]** found to have had with the substance as to which he has made an admission is often proven by other admissions that he makes perhaps as to the frequency with which he has used the substance in question or the fact that he has been engaged in peddling the substance in question or trafficking in the same and admissions to like effect, but the degree of familiarity can in my view be demonstrated not only in this way but also by the acts which the accused person himself has performed. As Gibbs J, (as he was then) said in the case of *Horn v Comino Ex parte Comino* [1966] Qd R 202, "all the circumstances" must be considered in order to determine whether or not the degree of familiarity which may be seen to be necessary has been evidenced in any particular case.

It is necessary to "consider the setting", as Phillips J said in *Reardon v Baker*, in which any such admissions upon which reliance is to be placed are made: see (1987) VR at page 895. In the present case, Miss Brodie has argued strenuously that there was no such degree of familiarity demonstrated as would be necessary to enable a magistrate to rely upon the admissions as proof beyond reasonable doubt of the fact that the substance in question here was heroin and she argued by way of analogy by referring to a case where a person might without any previous **[6]** knowledge of the constituents be given a steak and mushroom pie to eat. She submitted in such circumstances having no such familiarity with the substances contained in the pie, such a person could not make an admission after having eaten the pie which would be admissible against him or her in any criminal proceedings that might on this hypothesis arise out of the consumption of a steak and mushroom pie.

Mr Southall said this was quite an inapt analogy and said that in the present case where there was a process involved it would be more apt to consider a person eating scrambled eggs. I do not think that either analogy is much assistance to me in determining the issue that I have before me, namely whether on the evidence that was led in the court below it was open to the magistrate to conclude that he was satisfied beyond reasonable doubt that the substance in question which the applicant injected into himself was heroin.

The setting in which the applicant was arrested appears to have been that he was found in an unconscious state lying on the ground and after some time was resuscitated and taken to the Reservoir police station where he was questioned by the informant. There appears in the initial stages of the conversation to have been some doubt or at all events **[7]** some questions directed

by the informant to him to ensure that he felt like answering the questions that were about to be put to him and even questions as to whether or not he might remember anything that he had done during the day in question.

Some of his earlier answers would appear to have demonstrated a degree of amnesia but after some questioning according to the answering affidavit of Mr Murphy, the details of which I accept in accordance with authority, he seems to have remembered rather clearly what he had done during that day in question. When he was found lying on the ground there had been found beside him a silver coloured spoon upon which some white powder remained and also a hypodermic needle or syringe.

During the questioning of the applicant it was put to him
"Have you seen this spoon before",
and he was shown the silver coloured spoon that Constable Murphy had said he had found at the scene.
He answered "Yeah, it's familiar".
He asked "Where have you seen it?"
He answered "In Nick's car".
"When did you see it last?" "This afternoon."
"Can you see the remains of a white substance on the spoon?"
And he answered "Yes".
Question "Did you use the spoon today?"
He then said "Yes, all right, I remember".
[8] Question "Can you tell me what you used it for?"
And he answered "I used it to hit up the drug".
He was asked "What drug"?
And he said "Heroin".
Asked "Where did you get the heroin?"
He said "Footscray".
Question "Did you buy the drug in the arcade off Barkly Street?"
Answer "Yes, I paid $25 for it".
Question "How much heroin did you buy?"
Answer "A cap".
Question "Have you used the drug?"
Answer "Yes".
Question "How did you use it?"
Answer "I put the heroin on the spoon and heated it up".
Question "Why did you heat it up?"
Answer "So that it would liquefy so I could put it into a syringe".
Question" Is this the syringe?"
And at this stage the applicant was shown by Constable Murphy a small plastic white-coloured syringe.
He answered "Yes, it looks like it".
Question "What did you do when you put the drug into the syringe?"
Answer "I injected it into me".
Question "Where did you inject it?"
Answer "Into my arm".
And at this stage the applicant showed Constable Murphy a puncture mark on his left inner elbow joint. He was asked
"Did any other person assist you in injecting the drug?"
Answer "No, I did it myself".
He said that he had injected the drug into himself whilst he was in the back of Nick's car – Nick being the companion with whom he had spent the evening.
[9] He was asked "What reaction did the drug have on you?"
He said "At first I felt really good then all of a sudden I blacked out".
Later he was asked "You were treated by an ambulance officer at about 8.30 tonight for a drug overdose, have you had any other drugs today?"
Answer "No, I haven't".
Question "If you've had no other drugs, how do you explain the reaction you had?"
Answer "Well, I had a few drinks before I got the heroin so that could explain it, I don't know".

Mr Southall relies strongly on these circumstances to submit that the accused gave, what Mr Southall referred to as a relatively sophisticated explanation as to the procedures that he followed for the self administration of the substance which involved the use of the spoon, the white powder identified by the applicant as being heroin contained in the spoon, the application of heat to the underside of the spoon so as to liquefy the powdered substance, the drawing of the liquid substance into the syringe and the subsequent self-administration into the left inner elbow joint of the arm.

He relied upon this along with the oral evidence of the accused as to the acquisition of the substance in capsule form in "a cap" as the applicant had said and the payment of what Mr Southall referred to as a substantial sum of money for a relatively small quantity of the substance which was contained in the "cap" as well as **[10]** upon the evidence of the physical reaction produced upon the applicant following administration of the substance and his consciousness of that fact, and I would think presumably of the fact that it may have combined with the drinks that he had had beforehand and with the observations by the informant of the puncture mark upon the accused's left inner elbow, as supporting the magistrate's conclusion that the applicant's degree of familiarity with the substance in question was such that he could rely upon the admissions as satisfying him beyond reasonable doubt that the substance in question was in fact heroin.

There is no doubt but that the applicant believed that he was injecting heroin into himself and the only question is really whether the applicant's admission in this respect as I say was sufficient to enable the magistrate to arrive at the conclusion which he did.

In the court below it appears from the affidavit material, particularly the affidavit material filed by the applicant, that counsel for the applicant in the court below made submissions to the magistrate which would seem were not far removed from those submissions which were made to me today by Miss Brodie. The magistrate was handed copies of the decisions of Harris J in *Anglim and Cooke v Thomas* and a copy of the decision of Phillips J, **[11]** more recently in *Reardon v Baker*. And the affidavit reads to the following effect that having been handed those reports the magistrate "after perusing them for 15 minutes adjourned the court so he could consider the matter further."

It was approximately another 30 minutes later that the magistrate re-convened the court having read the decisions to which he referred and indicated that he was satisfied and held the defendant's statement as to buying and possessing heroin – satisfied him that the charge for use of heroin by the defendant was made out. He dismissed the charge of possession of heroin finding I think implicitly either that it would be unfair to charge the applicant with both use of the heroin and possession or on the basis of Mr Southall's submission here this morning, presumably on the basis of *autrefois convict*, I think rather upon the former than upon the latter basis.

The affidavit material states further that the applicant then found the charge of using heroin proven beyond reasonable doubt and went on to convict the applicant and fine him the sum of $500. Having considered the decisions to which reference has been made by counsel on both sides of the bar table this morning as to the submissions that have been made to me fully and as contained in **[12]** writing as well as in the oral submissions made from the bar table, I am not satisfied that it was not open to the magistrate to find as he did. In fact in my view the magistrate was quite entitled to find as he did in the circumstances having regard to all of the facts and matters and the setting in which the statements by way of admission were made by the applicant in this case. In my view the order nisi should be dismissed and I dismiss the same.
