18/95; [1995] VSC 173

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v COVIELLO

Phillips CJ, Hayne JA, Crockett AJA

3, 11 July 1995 — (1995) 81 A Crim R 293

CRIMINAL LAW – TRAFFICKING IN DRUGS – CANNABIS CROP – PARTS OF CROP UNUSABLE – WHETHER DISTINCTION TO BE DRAWN BETWEEN USABLE AND UNUSABLE PARTS – RELEVANCE OF UNUSABLE PARTS: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, SS70(1), 73(2).

Where a person in possession of a crop of cannabis was charged with trafficking in a drug of addiction (of no less than a commercial quantity) the question to be decided by the tribunal of fact was: How much of the drug was for sale? This did not require a distinction to be drawn between that which was usable and that which was not usable. Whether any part of the cannabis was usable or not did not make that part any the less cannabis. The only relevance of the unusable parts was that that fact might allow an inference to be drawn that that part was not being possessed for sale.

THE COURT: [1] The applicant was tried for and convicted of the offence of trafficking in a drug of addiction, namely Cannabis L upon presentment in the County Court at Wangaratta. After hearing a plea for leniency the judge sentenced the applicant to a term of imprisonment. He now seeks leave to appeal against both his conviction and sentence.

The application concerning conviction is supported by four grounds. They are:

> "1. The learned trial Judge erred in that he did not direct the jury to consider the quantity of cannabis possessed for sale by the applicant.
>
> 2. The learned trial Judge erred in directing the jury that if the weight of the plants was in excess of 100 kilograms the applicant was guilty of trafficking in a commercial quantity.
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> 3. The learned trial Judge erred in leaving to the jury the averment that the applicant trafficked in not less than a commercial quantity of a drug of dependence.
>
> 4. That the applicant should not have been convicted of trafficking in a commercial quantity of a drug of dependence."

The grounds all involve one question, namely, what did the applicant possess for sale when he grew a crop of cannabis? It is that question which falls for resolution. Upon the outcome hinges the question as to whether the applicant trafficked in a "commercial" quantity or merely, a "traffickable quantity". A "commercial" quantity of Cannabis L is 100 kilograms. See definition in s70(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 (the "Act"). By **[2]** the same subsection "traffickable" quantity is defined as 250 grams. The difference is of considerable importance. For trafficking in a commercial quantity the offender is liable to a penalty of 25 years' imprisonment and a penalty of not more than 2,500 penalty units. On the other hand the trafficker of a traffickable quantity is exposed to a penalty of up to 15 years' imprisonment and a fine of 1,000 penalty units – s71(1) of the Act.

The presentment expressly averred (or alleged a circumstance of aggravation if that be the correct terminology) that "this trafficking was in relation to a quantity of that drug of dependence that was no less than the commercial quantity applicable to that drug of dependence". The jury was correctly told that it had to determine if the Crown had proved this allegation beyond reasonable doubt. Before any examination of the legislation and relevant case law is undertaken some reference must be made to the facts.

The applicant had for some time up to 14 March 1992 by leave or licence from the owner occupied and lived upon a farm property at Tolmie near Mansfield. Police learned that crops of cannabis were being cultivated on the property. Surveillance was undertaken between 5 March

and 14 March 1992. The applicant was observed to be engaged in activities that disclosed that he was aware of the crops and had employed himself in various acts of cultivation in relation to them. On 14 March police staked out the premises. The applicant was seen to cull some plants found later to be male plants and to activate a watering system. He was then arrested. When questioned he claimed to have been unaware of **[3]** the existence of the crops until shortly before his apprehension.

At the applicant's trial the Crown, in addition to police evidence to the substance of which we have referred, called two expert witnesses. The first was a forensic botanist, Ms Fiddian. The other was a Detective Sergeant Hewitt from the Drug Squad. He was qualified to express an opinion about various aspects of trading in the drug cannabis. Among other things Ms Fiddian, who assisted in the removal and weighing of the plants, said that there were over 1,000 plants in total with a combined weight of 139 kilograms. They were when weighed fresh, that is "green" as opposed to being "dried". They were also wet from rain water. Some mud or dirt adhered to the roots and stems. The plant material that was weighed included stalks as well as the roots and stems. The plants were 25 centimetres to 1.4 metres in height and were estimated to be three to four months old.

Hewitt's evidence included the opinion that the crops would have produced a "sellable" drug weight of 46.43 kilograms the bulk sale price of which was between $416,000 and $520,000. At street level that quantity could be sold for a total of about $1,000,000. On the other hand, had the crops grown to maturity their all-up estimated value would then be $3,500,000. Ms Fiddian testified that the roots had a "very low tetrahydrocannabinol (THC) content" and are usually discarded as dross or scrap. The witness also said that "the stalks do have THC and they can be used but they do have a **[4]** much lower THC than the rest of the plant". She added, "I believe that they are used from time to time by various people but they're certainly less potent."

In determining the weight of the drug it is appropriate to make the measurement in the light of the conditions existing at the time that the offence is seen to be committed. Thus, if a crop is "green" it is its weight in such condition which is to be measured. The crop is not to be taken as that which it would be when "dried" even though the drug only becomes usable when in that condition. Cf *R v Tsesmetzsis* (CCA, 28 April 1980). In our view, it is beyond argument that such factors as rain water, dirt and mud, male plants culled or to be culled and the like, whether taken singly or in combination with themselves, could not on the evidence have been responsible for reducing the total weight of the drug below 100 kilograms. Or, to put it another way, in order to make such a reduction the tribunal of fact would have to be satisfied beyond reasonable doubt (or, more strictly, not be satisfied beyond reasonable doubt that the contrary might not be true) that the roots, stalks and stems were not in the applicant's possession for sale. There is no doubt that those parts of the plants are cannabis, not only by reason of the evidence to which reference has been made concerning their THC content, but also because of the definition of that expression in s70(1) of the Act. So much was not in contest at the hearing.

The applicant's contention is that the expert evidence, to the substance of which we have referred, was **[5]** capable of raising in the mind of the jury a reasonable doubt as to whether an inference might not be drawn from that evidence that the applicant possessed for sale the plants after they had been stripped of stems, stalks and roots. If this were the jury's view, then it could not be satisfied that any more than a total of 46.43 kilograms of cannabis was possessed for sale. The applicant complains (as is the fact) that the judge did not leave such an issue to the jury together with appropriate instructions as to the significance of the issue and how it was to be dealt with. In fact defence counsel submitted that the state of the evidence was such that the averment should have been removed from the presentment.

The matter was the subject of submissions shortly before addresses and in the absence of the jury. The prosecutor argued that the directions as to a "commercial" quantity which the judge proposed to give were correct and in accord with the decision of the Court in *R v Kardogeros* [1991] VicRp 19; [1991] 1 VR 269; (1990) 49 A Crim R 352 (to which further reference will shortly be made). In addition it was said that his Honour should, accordingly, leave the averment on the presentment for determination by the jury. The judge ruled as follows:

> "I've come to the conclusion that my first initial response to this is right, that is to say that this Act does not purport to draw any distinction between crops which are fresh and crops which are dried.

> If the total amount of the plant is in excess of 100 kilograms, at the time when the Act operates, whether by its deeming provisions, or by operation of the definition of trafficking, as having in possession for sale, then the person responsible for it has in fact, trafficked in a commercial quantity, that is to say, has committed the aggravated offence, and it's my opinion that that was the purpose which was sought to be achieved by the Act ... I propose to leave the averment on the presentment."

[6] No doubt what the judge said was correct. But it did not deal with the point that is in issue now. Counsel for the accused did submit that a distinction was to be drawn between the weight of the crop when fresh and the weight that it would have had when dried, but also submitted that a distinction should be made between the parts of the cannabis that were "usable" and those that were not. Thus the debate turns upon whether cannabis, part of which it is not intended to sell because it is "dross", can by reason of such a circumstance be said not to be in the applicant's possession for sale.

A brief reference may be made to the relevant legislative provisions of the Act in order to see how the requirement that the drug be in the offender's "possession for sale" becomes an element in a charge such as that laid against the applicant. The term "traffick" in relation to a drug of dependence is defined in s70(1) as including "have in possession for sale". "Possession" of any substance is deemed for the purposes of the Act "so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever ..." Then s73(2) provides that:

> "Where a person has in his possession ... a drug of dependence in a quantity that is not less than the traffickable quantity applicable to that drug of dependence, the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence."

The nature of the trafficking alleged in the case was possession by the applicant of the drug for sale. The distinction between s5 and s73(2) is explained in *R v* **[7]** *Clarke and Johnstone* [1986] VicRp 64; [1986] VR 643 at 659; (1986) 21 A Crim R 135. Nevertheless, it is plain that the applicant was at the relevant time trafficking in a drug of dependence, namely Cannabis L. That act of trafficking arose from his possession of the drug for sale. So much was not contested by the applicant.

The question remains, however, as to how much of the drug was "for sale". This was an issue of fact for determination by the jury. The applicant contends that the evidence allowed the jury, if it thought fit to do so, to have a reasonable doubt as to the stems, stalks and roots being "for sale". The applicant stood mute and so the jury were without his evidence as to what he intended to do with those parts of the crop. However, by his counsel he maintained that the jury could infer from the evidence, particularly that of Ms Fiddian, that the applicant would not have intended (and thus did not intend) to sell such parts. At all events, so it was said, such evidence was sufficient to raise a reasonable doubt in the minds of the jurors that such an intention to sell existed and so the substance's weight as being such as to qualify as a commercial quantity had not been proved.

We consider this submission to be correct. *Kardogeros* was relied upon by the respondent. That case decided (by a majority) that a determination as to whether cannabis is in possession for sale does not require a distinction between that which is usable and that which is unusable to be drawn. It does not deny that parts of the plant which will not be used nevertheless remain cannabis. The only relevance of the existence of non-usable plant parts is that it is a fact that could bear upon the question **[8]** whether those parts were for sale. The answer to that question might, in turn, bear upon the assessment of the weight of the drug in the offender's possession i.e. whether it is or is not a commercial quantity.

Kardogeros was critically different from the present case. In the former case the applicant had pleaded guilty to a charge of trafficking in a commercial quantity of cannabis. He thereby admitted that he had in his possession for sale a quantity of the substance which was in excess of 100 kilograms in weight. The drug of which he was in possession included stems and roots. If they were excluded the weight dropped to about 80 kilograms. It was argued that those parts were unusable and thus could not be included in the assessment of the weight of the substance. Accordingly he had not committed the offence with which he had been charged. That is to say, on the admitted facts he could not in law be convicted of the offence charged and that his conviction

should be set aside notwithstanding his plea of guilty.

The majority in its joint judgment dealt with that argument in these terms (at 275-276):

> "Here, so Mr Silbert's argument went, the presentment referred to *Cannabis L* and a plea of guilty was entered which, as to the averment on the presentment is, at the least, a formal concession or acceptance by the applicant that he did on the material date traffick in a commercial quantity of the drug thus specified. Mr Silbert also submitted that, significantly, Schedule Eleven of the Act, Pt1 thereof (which does not contain any reference to cannabis) does include columns headed 'Quantity of pure drug' whereas Pt2 of the same schedule, which does refer to *Cannabis L*, lacks any such columns. Mr Silbert concluded by submitting that there was before the court, having regard to the applicant's concession, sufficient evidence of trafficking in a commercial quantity of the drug and that accordingly the conviction should stand leaving **[9]** the applicant open to the range of penalties referred to in s71(1)(a). However, within this sentencing range, the circumstance that some 80 kilograms of the drug only was usable was available to be taken into account – and was taken into account – by the learned judge in fixing an appropriate sentence. The submission made on behalf of the applicant, in our view, equates the concept of 'possession for sale' with that of 'possession of a saleable quantity'. In our opinion a study of the Act and its relevant schedules provides no warrant for such an equation. To determine whether cannabis is relevantly in possession for sale calls for a distinction between that which is for the possessor's own use and that which he has for sale to others. It does not require a distinction between that which is usable and that which is unusable. The contention, implicit in Mr Clelland's argument, that the applicant intended to sell only the 'usable' cannabis in his possession, viz. 80 kilograms is, in our opinion, not only unsupported by the evidence, but controverted by the applicant's plea which, as we have already observed, must be taken to constitute an admission by him of the essential facts and law involved in the presentment. This admission, for present purposes, involves trafficking in not less than the 'commercial quantity' of cannabis - 100 kilograms. In addition, it is to be noted that the applicant never asserted such an intention to the police. The circumstances that a quantity of marijuana plant stalks, from which the branches had been removed, were found by the police – without more – cannot, in our view, be the basis for any inference touching the offence presently under consideration."

So far from assisting the applicant, *Kardogeros*, in our view is authority for the respondent's contentions in the present case. The trial judge should have directed the jury to consider what quantity of cannabis was possessed by the applicant for sale and drawn their attention to the evidence that bore on the question. They should also have been told that, in considering this matter, whether any part of the cannabis was usable or not did not render that part any the less cannabis and the only relevance of its being unusable **[10]** was that that fact might allow an inference to be drawn that the unusable part was not being possessed for sale. The judge's failure in these respects has caused the trial to miscarry. The verdict must be set aside and a new trial had.

ORDER: PHILLIPS CJ: The orders of the Court are –

> The application for leave to appeal against conviction is granted, the appeal treated as instituted heard instanter and allowed. The conviction sustained by the applicant in the court below is quashed and the sentence imposed thereon set aside. The Court directs that a new trial of the applicant be had.

APPEARANCES: For the Crown: Mr B Lindner, counsel. Solicitors for the Crown: PC Wood, Solicitor for Public Prosecutions. For the Applicant: Mr AR Lewis, counsel. Solicitor for the Applicant: Legal Aid Commission of Victoria.
