76/76

COUNTY COURT OF VICTORIA

R v SAWYERS

Hogg J — 2 July 1976

CRIMINAL LAW – ACCUSED CHARGED WITH SELLING INDIAN HEMP – BOTANICAL QUESTIONS OF CANNABIS CONSIDERED – NO CASE SUBMISSION MADE – UPHELD: *POISONS ACT* 1958, SS26(1), 32(B).

HELD: No case for accused to answer on two grounds.
On reading the definition of Indian Hemp, it seems that a substance cannot be Indian Hemp if the relevant material in the substance is synthetic THC. Such does not comply with the definition. The state of the evidence was that Mr Perkel was unable to distinguish between synthetic and natural THC as a result of the chemical tests conducted by him. He did not conduct a microscopic examination. He said in his evidence-in-chief that he found each sample to contain Cannabis Indian Hemp and that the active principle ingredient was THC which was produced from the resin of the plant or the aerial part of the plant. But this conclusion was based upon his chemical tests, and when, in cross-examination he said, by reason of his chemical tests he was unable to distinguish between synthetic and natural THC the foundation of his earlier evidence collapsed. The Crown had not called sufficient evidence to satisfy this part of the case. The difficulty in which the Crown found itself was caused by charging the accused with selling Indian Hemp, which was specifically defined. If the accused had been charged with selling some other drug of addiction which was not defined, then this submission would not have been available to the accused.

HOGG J: Mr Richter has submitted that there is no case for his client to answer on the ground that there is no evidence that the substance alleged to be sold falls within the *Poisons Act* as Cannabis sativa L. The submission was based on three separate grounds.

The first ground is based upon the evidence of Mr Perkel, when he said that the tests which he conducted on Exhibit "B" would not distinguish between synthetic and natural Tetrahydrocannabinol THC. He said that THC was an active principle of Cannabis Indian Hemp. By reason of the presence of THC Mr Perkel formed opinion that the substance was Indian Hemp. Mr Richter then relied upon the definition of Indian Hemp in s26(1) of the Act and said that synthetic THC could not fall within the definition. Thus, he argued, the Crown has not proved that Exhibit "B" was Indian Hemp.

Mr Belson submitted that the definition of "Indian Hemp" in s26(1) is extended by reason of s32(b) and the rider in the 8th Schedule. He argued that an active principle of Cannabis Indian Hemp is a drug of addiction, by reason of the rider and that s32(b) covers drugs of addiction. He also argued that the wording of the definition of "Indian Hemp" in s26(1) referred to the resin, whatever name it is known by or called. He also relied upon s34(7) of the Act and argued that the onus of proof was cast upon the accused. I refer to the presentment, and emphasize that the accused is charged with selling Indian Hemp, and not with selling THC or any other drug. As a result, one must refer back to the definition of "Indian Hemp" is s26(1) to ascertain whether Exhibit "B" falls within the definition.
See *Hardy v Gillette* [1976] VicRp 36; (1976) VR 392 at p393; *Whitmore v Harding* (1974) 9 SASR 312).

On reading the definition, it seems me that a substance cannot be Indian Hemp if the relevant material in the substance is synthetic THC. Such does not comply with the definition. The state of the evidence is that Mr Perkel is unable to distinguish between synthetic and natural THC as a result of the chemical tests conducted by him. He did not conduct a microscopic examination. He said in his evidence-in-chief that he found each sample to contain Cannabis Indian Hemp and that the active principle ingredient was THC which was produced from the resin of the plant or the aerial part of the plant. But this conclusion is based upon his chemical tests, and when, in cross-examination he said, by reason of his chemical tests he was unable to distinguish between synthetic and natural THC the foundation of his earlier evidence collapsed. I consider that the Crown has not called sufficient evidence to satisfy this part of the case. The difficulty in which the Crown finds itself, in my view, is caused by charging the accused with selling Indian Hemp,

which is specifically defined. If the accused had been charged with selling some other drug of addiction which is not defined, then this submission would not have been available to the accused. The second ground is that synthetic THC is not a derivative of Cannabis Indian Hemp within the meaning of the 8th Schedule. It was argued that the rider to the 8th Schedule only covers natural derivatives of natural substances listed in the 8th Schedule and synthetic derivatives of synthetic substances, as listed. This argument is based upon the word "derivative". Mr Richter argued that a synthetic substance could not be derivative of a natural substance. The word "derivative" is defined in the *Oxford Dictionary* to mean "of a derived kind, derivative, word or substance an offshoot". And the word "derive" to mean "obtain or have from a source, be descended from".

I have doubts as to whether a synthetic substance can be a derivative of a natural substance, but, it is unnecessary to determine this aspect because I consider that this submission is not applicable, because the evidence is that THC is an active Principle and not a derivative. If the evidence was that THC was a derivative, one must still revert back to the definition of "Indian Hemp" because that is what the accused has been charged with in the presentment.

The third ground is that Mr Perkel was not qualified to give the evidence that THC is an active principle of Cannabis Indian Hemp. In cross-examination, Mr Perkel said that the question whether THC is an active principle of Cannabis Indian Hemp is a pharmacological judgment, but also said that he is not qualified in Pharmacology, and that it is a specialist area. He said in evidence-in-chief that he has had some seven years in analysing this plant, but no further details were given of his practical experience. Mr Belson argued that no objection was taken to the evidence and that it is a question of what weight to give to the evidence; it is a matter for the jury.

The evidence may have been inadmissible if the objection was taken at the appropriate time, but, as no objection was taken, the evidence was given. It becomes a question as to what weight I should give to the evidence, in determining the present submission as to whether the Crown has established a *prima facie* case on this aspect.

In view of his answers to the questions put to him in cross-examination – especially in view of the fact that it is a specialist area and that he has not the qualifications, I consider that I should not give the evidence very much weight. It may be that the witness could have qualified himself as an expert by giving detailed evidence of his practical experience or that he conducted non-chemical tests, but, as that was not done, I consider the evidence falls short of the normal requirements. It follows that on the evidence given in this trial, I am not satisfied. I have observed that in *Hardy v Gillette* the evidence of Mr Perkel was accepted by His Honour Anderson J. I agree, with respect, that the evidence should have been accepted and given the appropriate weight in that case, but the evidence in the present trial is entirely different and different problems arise. Further, in *Hardy v Gillette*, Mr Perkel conducted a microscopic test.

The Crown also rely upon the evidence of Mr Matthews and certain questions and answers given in the record of interview. The accused is alleged to have referred to Exhibit "E" as "hash" and was informed that he would be charged with selling Cannabis resin, and with the possession of the same. He also told Mr Matthews that he had hash for sale, and Mr Matthews said that the word "hash" conveyed to him Cannabis resin. In view of the decisions of *Whitmore v Harding* (1974) 9 SASR 312 and *Dimitriou v Samuels* (1975) 10 SASR 331, additional evidence relied upon by the Crown is not sufficient to establish the connection with Cannabis sativa L., as referred to in s26(1) of the Act. The present case is distinguishable from *Anglim & Cooke v Thomas* [1974] VicRp 45; (1974) VR 363. I have considered the provisions of s34(7), but, in my view, they are not relevant to this application.

It follows, that on two grounds I hold that there is no case for the accused to answer. This morning Mr Richter based a submission on s32, and argued that the accused should have been charged under s32(a) and not s32(b). In that particular sub-section, there is a requirement that the particular drug must be in a form suitable for smoking. He submitted there was no evidence that the drug was in a form suitable for smoking. As this matter was raised at the last, Mr Belson has not had an opportunity of replying to it, and further more, that it is unnecessary for me to determine this question, I do not rule upon it, but it is a matter which occurred to me during the course of this trial. I will say no more about it at this point of time. It is for these reasons that I consider there is no case for the accused to answer.