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SUPREME COURT OF VICTORIA

HARDY v GILLETTE

Anderson J

19, 27 November 1975 — [1976] VicRp 36; [1976] VR 392

CRIMINAL LAW – POSSESS/SMOKE A DRUG OF ADDICTION NAMELY INDIAN HEMP – EVIDENCE GIVEN BY ANALYST AS TO HIS ACADEMIC QUALIFICATIONS AND THE RESULTS OF HIS ANALYSIS – SUCH EVIDENCE NOT CONTRADICTED – CHARGES DISMISSED BY MAGISTRATE – FINDING BY MAGISTRATE THAT THE ACTIVE INGREDIENT WAS FOUND IN PLANTS OTHER THAN CANNABIS SATIVA L – WHETHER MAGISTRATE IN ERROR: *POISONS ACT* 1962, SS27, 31.

HELD: Order nisi absolute. Matters remitted to the Magistrates' Court for hearing and determination by another magistrate.
1. On general principles, where uncontradicted evidence, which is inherently reasonable, probable, and conclusive of the matter, has been given, the court is bound to accept it.

2. The magistrate misdirected himself. The essence of his decision was that he could not say that the three so-called species of cannabis, Indica, Americana and Australis, were the same as Cannabis sativa L. But that was not what the magistrate had to determine. The issue was whether the substance was Cannabis sativa L, which, according to the uncontradicted evidence of the analyst it was.

3. In reaching the conclusion that he did, the magistrate failed to consider the whole of the evidence which was before him and was accordingly in error. Had it appeared that he had considered the whole of the evidence different considerations might have applied. In his remarks he had given a reason why he did not act upon the circumstance that Tetrahydro Cannabinol was present in the substance analysed, because it was an element present in the other so-called species, but he gave no indication of having considered the rest of the evidence. Either he did not consider it, or, if he did and rejected it, he gave no reason for rejecting evidence which appeared to be uncontradicted and which was inherently reasonable, probable and conclusive if accepted.

4. Accordingly, it appeared that the magistrate misdirected himself and failed to take into account the whole of the evidence and the second ground in each of the orders nisi has been established.

ANDERSON J: There are before me two orders nisi to review two decisions of a stipendiary magistrate constituting the Magistrates' Court at Melbourne on 27 March 1975, dismissing two informations against the defendant, Garry John Gillette, one for having in his possession a drug of addiction, to wit, Indian Hemp, contrary to s27 of the *Poisons Act* 1962, and one for smoking a drug of addiction, to wit Indian Hemp, contrary to s31 of the same Act.

Some discussion took place before me as to whether the informations were correctly framed. Section 27(1) under which the defendant was charged with possessing the drug reads:

> "No person...shall have in his possession...any... Indian Hemp or other drug of addiction or any specified drug or any preparation of them or any of them."

Section 26(1) defines "Indian Hemp" as meaning "the fresh or dried aerial parts of the plant known as Cannabis sativa L whether or not the resin has been extracted therefrom and any resinous or other extract obtained from the plant by whatever name such parts or extracts are called." "Drug of addiction" is defined in s3(1) as meaning "any substance or preparation specified in Schedule Eight to this Act or added thereto by proclamation". And when one looks to the Schedule Eight, one finds included in the list "Cannabis (Indian Hemp)". Thus, Indian Hemp really gets two mentions in s27(1), once as "Indian Hemp" in its own right, and once as a drug of addiction.

The information under s27(1) charged the defendant with being in possession of a drug

of addiction, "to wit, Indian Hemp". The information would have been more precisely expressed had it said, "to wit cannabis", or "cannabis (Indian Hemp)", or alternatively, if it had read merely that the defendant had been in possession of "Indian Hemp". But, by whatever name the drug is called, one returns always to a consideration as to whether the substance was derived from Cannabis sativa L, for, by reference back to the definition of Indian Hemp in s26, that is the drug of addiction mentioned in the Schedule, and that is the plant from which Indian Hemp, as defined, is obtained.

Nothing turns in either of the cases on any inelegance in the wording of the charge, and it is not disputed that this court on the return of an order nisi may appropriately amend an information in the circumstances of this case (*Molyneux v McPherson* (1902) 8 ALR 120; 23 ALT 228).

The two informations were heard together by the magistrate on 27 March 1975, and were both dismissed for the same reason, following submissions by counsel for the defendant after the prosecution had closed its case.

The evidence for the informants was that at about 9 p.m. on 17 March 1975, a number of narcotics agents of the Australian Bureau of Narcotics visited premises in Armadale, of which the defendant was the lessee, and they were there handed by the defendant a red overnight bag containing a number of bags each in turn containing a quantity of green vegetable matter suspected by the agents to be cannabis. The contents of several bags were subsequently analysed by one Michael Perkal, a qualified chemist employed by the Norman McCallum Police Forensic Laboratory and found to be "cannabis (Indian Hemp)".

On the early morning of 18 March 1975, Detective Senior Constable Hardy interviewed the defendant at the Department of Customs and Excise, and the defendant made admissions which indicated that he had had the cannabis in his possession at the address at Armadale the previous evening, that the quantity was about 15 pounds and that he had paid $250.00 (two hundred and fifty dollars) a pound for it, that he did not intend to sell it but that it was for his own use and that of his friends. He also admitted smoking marihuana about two days earlier. In the interview the substance was referred to as "cannabis" and "marihuana", alternative names, it seems, for the same substance.

The interview was recorded in a record of interview which was signed by the defendant as being true. Shortly after the interview had been conducted, Hardy said to the defendant: "In the interview I have mentioned 'cannabis' and 'marihuana', do you know it as any other name?" The defendant said: "Yes it is also called Indian Hemp." Hardy said: "And are you aware that it is a drug of addiction and therefore unlawful to possess it or smoke it?" The defendant said: "Yes". No challenge by the defendant's counsel was made to the record of interview, but counsel challenged Hardy's evidence as to the conversation after the record of interview, alleging it did not take place. Hardy denied the allegation.

I have delayed mentioning in detail until this stage the evidence of the analyst, Michael Perkal, because it is his evidence that is critical in both of these orders to review. He gave evidence that he was a qualified analyst employed by the Norman McCallum Police Forensic Science Laboratory. He held a Diploma of Applied Chemistry. He said that on 18 March 1975, he had received from Detective Senior Constable Hardy twelve bags containing green vegetable matter, that he took a sample from each bag and sealed each in its own sample bag, that he took possession of the twelve sample bags and returned the others to Hardy, that he analysed the contents of each sample bag and found each bag contained "cannabis (Indian Hemp)".

Mr Perkal was cross-examined by counsel for the defendant, and the questions and answers were as follows: -

> "Are you a qualified chemist?" "Yes, I hold a Diploma in Applied Chemistry." "How was the vegetable material analysed?" "Microscopically and chemically by thin layer chromatography." "You analysed for the active constituent Tetrahydro Cannabinol?" "That is correct, but I also observed the physical characteristics microscopically." "Are you a qualified botanist?" "No, but with my experience and reading on the subject I could distinguish between cannabis and other plants." "Have you heard of 'Cannabis Indica' 'Cannabis Americana' and 'Cannabis Australis'?" "Yes, but they all contain the active

> principal which is the Tetrahydro Cannabinol." "Do you agree that there is a controversy amongst botanist over these names?" "Yes, but Cannabis sativa L is generally accepted as the only species." "But you are aware that amongst botanists, some maintain that there are numerous varieties of cannabis and that Cannabis sativa L is only one of such varieties?" "Yes."
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> Re-examined the witness was asked: —
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> "Are you satisfied that the samples you analysed are Cannabis sativa L?" "Yes."

I should say that there was tendered in evidence a certificate of analysis purporting to be pursuant to s56 of the *Poisons Act*, but it was dated only two days before the hearing of the informations and it had not been served on the defendant at least seven clear days before the hearing as required by s56(2). On this account it was not admissible as provided in the section: it had no evidentiary value and has not been taken into consideration in this judgment.

After hearing a submission by counsel for the defendant that the prosecution had not proved its cases beyond reasonable doubt, the magistrate said, that although he was possibly prepared to hold in fact that the substance was Cannabis sativa L, he was also prepared to hold that the active ingredient Tetrahydro Cannabinol was found in Cannabis sativa L, and also in Cannabis Indica, Cannabis Americana and Cannabis Australis, and that he could not say that these three plants were the same as Cannabis sativa L and that it would be unwise to convict. Accordingly he dismissed both informations.

Mr Batt, for the informants, moving the orders absolute, submitted that the magistrate was in error because, on the uncontradicted evidence of Detective Senior Constable Hardy and the analyst Michael Perkal, the only conclusion which could reasonably be arrived at was that the substance was Cannabis sativa L. Mr Moskinsky, for the defendant, on the other hand, submitted that the orders dismissing the informations could only be set aside if a decision contrary to the view of the magistrate was the only possible decision that the evidence on any reasonable view could support. He referred to and relied on the decisions of Herring CJ, in *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301, of the Full Court in *Taylor v Armour and Company Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232, and the remarks of Stephen J, in *Spurling v Development Underwriting (Vic.) Pty Ltd* [1973] VicRp 1; [1973] VR 1, at p11; (1972) 30 LGRA 19.

He submitted that, in the case of any question of fact, which he contended the issue in these cases was, the Court should treat the matter as an appeal from the verdict of a jury and should not make up its mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come. Such a submission has particular reference to the case where evidence has been called by both sides on an issue, and where a decision, though surprising, nevertheless has evidence to support the conclusion reached by the court, and, with respect, the analogy by Herring CJ, and the other Judges, to an appeal from a jury verdict is apt. But where evidence is uncontradicted and is reasonable and inherently probable, different or additional considerations may apply. In *Richards v Jager* [1909] VicLawRp 26; [1909] VLR 140, at p147; 15 ALR 119; 30 ALT 163, Madden CJ had this to say: -

> "In determining matters which it has fully heard, any Bench (whether composed of Judges or of justices) is bound to decide the case according to the evidence. Evidence means true evidence. They are not bound to decide the case upon evidence which is palpably untrue; they are not bound to adopt that which is palpably false, or shown to be palpably false, or that which is inherently so incredible that reasonable men would not accept it as true; in all those cases they may and should reject the evidence and refuse to act upon it. If there is a conflict of evidence, I am not at all sure that they are called upon, or how far they are called upon, to explain why they are in favour of the evidence of one side and not in favour of that of the other. Ordinarily this court does say why it objects to that of the one and why it accepts that of the other. Whether justices are bound to do so, I do not know, and I do not for the present decide. But I feel sure that where there is evidence sworn to prove one side of the issue, and there is no evidence whatever sworn on the other side to contradict it, the court is bound to accept it unless that evidence is in itself so incredible and so unreasonable that no reasonable man could accept it. If for any reason which recommends itself to the minds of the Bench who deal with the matter they think fit not to accept the evidence of the witness who is the only witness before the court, and are founding their decision on their disbelief of him, they are bound to disclose it. If they do not, then they are deciding in the teeth of the evidence without

showing why they do so, and I do not think that is reasonable in any court of justice, or according to the principles applied by courts of justice."

In the present cases there is no valid reason why any of the evidence of the analyst should be regarded as being so incredible and so unreasonable that no reasonable man could accept it. Though counsel for the defendant submitted that the analyst was not a botanist, the witness stated his qualifications and his claim to experience and reading on the subject which was not challenged, and it was in what I consider misplaced reliance on part only of the analyst's evidence that the magistrate based his decision.

It appears to me that the magistrate in reaching the conclusion that he did misdirected himself as to what he was required to find before convicting the defendant on the evidence before him. The charges were for possessing and for smoking a particular substance, and the evidence before the magistrate which was uncontradicted was that the substance was Cannabis (Indian Hemp), i.e. Cannabis sativa L. That conclusion flowed from the admission by the defendant that the substance was known as Indian Hemp, which was challenged in cross-examination, but was not contradicted by any evidence, and from the uncontradicted evidence of the analyst.

On general principles, where uncontradicted evidence, which is inherently reasonable, probable, and conclusive of the matter, has been given, the court is bound to accept it. It is unnecessary to examine the many cases to that effect which are in the reports, and it is sufficient merely to refer to some of them: *Richards v Jager* [1909] VicLawRp 26; [1909) VLR 140; 15 ALR 119; 30 ALT 163; *Swinburne v David Syme and Co* [1909] VicLawRp 92; [1909] VLR 550, at p565; 15 ALR 579; 31 ALT 81; *Thompson v Calder* (1922) 44 ALT 98; *Wilson v Jones* [1915] VicLawRp 94; [1915] VLR 636; 21 ALR 490; 37 ALT 198; *Stephens v McKenzie* [1904] VicLawRp 89; (1904) 29 VLR 652; *Murphy v Kenny* [1916] VicLawRp 44; [1916] VLR 335; 22 ALR 167; 38 ALT 1; *Lennox v Callaghan* [1915] VicLawRp 69; [1915] VLR 461; 37 ALT 18; *Bunker v Mahoney* [1917] VicLawRp 7; [1917] VLR 65; *Llewellyn v Reynolds* [1952] VicLawRp 24; [1952] VLR 171; [1952] ALR 358.

There is the qualification, of course, that no judge or tribunal is bound to accept evidence which is in itself inherently improbable and unreasonable which is hesitating, shuffling, inconclusive and unconvincing (*Swinburne v David Syme and Co* [1909] VicLawRp 92; [1909] VLR 550 at p565; 15 ALR 579; 31 ALT 81) but that is not the position in the present cases. The cases I have cited fortify the view I have taken, they are merely ancillary, for, as I have said, in my opinion the magistrate misdirected himself. The essence of his decision was that he could not say that the three so-called species of cannabis, Indica, Americana and Australis, were the same as Cannabis sativa L. But that was not what the magistrate had to determine. The issue was whether the substance was Cannabis sativa L, which, according to the uncontradicted evidence of the analyst it was.

The analyst had sworn that it was, because he had analysed it both microscopically and chemically by thin layer chromatography. He had analysed it for the active constituent Tetrahydro Cannabinol, which, incidentally was the active principle of the three so-called species, but he had also observed its characteristics microscopically. The fact that the other so-called species also contained the active principle Tetrahydro Cannabinol was incidental and apparently a feature or quality or constituent of Cannabis, to whatever so-called species it belonged. But it was not that the substance contained Tetrahydro Cannabinol that alone determined that the substance was Cannabis sativa L, it was the result of the whole of his analysis which included microscopic analysis. He was not challenged on his microscopic observations, and it was not suggested that what he had observed microscopically was attributable or referable to any other species than Cannabis sativa L.

That being the case, and in any event, it was immaterial whether botanists differed as to the classification of so-called different species of cannabis or whether Cannabis sativa L was generally accepted as the only species.

To my mind, the magistrate directed his attention only to the circumstances that the active constituent Tetrahydro Cannabinol was present in the so-called other species as well as in Cannabis sativa L, and he does not appear to have taken into consideration the other evidence, which was unequivocal, that the substance possessed the physical characteristics of Cannabis

sativa L. In reaching the conclusion that he did, I think the magistrate failed to consider the whole of the evidence which was before him and was accordingly in error. Had it appeared that he had considered the whole of the evidence different considerations might have applied. In his remarks he has given a reason why he did not act upon the circumstance that Tetrahydro Cannabinol was present in the substance analysed, because it was an element present in the other so-called species, but he has given no indication of having considered the rest of the evidence. Either he did not consider it, or, if he did and rejected it, he has given no reason for rejecting evidence which appeared to be uncontradicted and which was inherently reasonable, probable and conclusive if accepted.

Since it appears to me that the magistrate misdirected himself and failed to take into account the whole of the evidence, I think that the second ground in each of the orders nisi has been established, namely:

> "In holding that the green vegetable matter produced before him may not have been, or was not sufficiently proved to have been, Cannabis sativa L, the stipendiary magistrate did not take into account sufficiently or at all the evidence of Michael Perkal as to his physical microscopic examination of samples of such matter, and of his identification of such samples thereby as Cannabis sativa L"

I am of this view quite apart from the admission made by the defendant to Detective Senior Constable Hardy that the substance was Indian Hemp. That evidence, likewise uncontradicted, fortifies the view I have taken. (See *Anglim and Cooke v Thomas* [1974] VicRp 45; [1974] VR 363.)

Orders nisi made absolute. Cases sent back for hearing *de novo* before a different magistrate. Costs fixed and certificate under *Appeals Costs Act* granted.

Solicitor for the informants: John Downey, Crown Solicitor.
Solicitor for the defendant: Solly Ellenberg.
