RM Set 7

IN THE COURT OF APPEAL OF NEW ZEALAND CA 55/95

THE QUEEN

v.

NEVILLE ANDREW MACDONALD

Coram: Eichelbaum CJ
Casey J
Williamson J

Hearing: 12 June 1995 (at Christchurch)

Counsel: K W Clay and I R Kearney for Appellant
J Farish for Crown

Judgment: 6 July 1995

JUDGMENT OF THE COURT DELIVERED BY WILLIAMSON J

Evidence identifying a substance as cannabis is challenged in this appeal. During pre trial rulings a District Court Judge decided that two young men who stole a quantity of a substance had sufficient experience to give credible opinion evidence as to the identity of the substance they had stolen and that their evidence of identification was admissible.

The appellant faces charges of kidnapping and assaulting with intent to injure the two young men who stole the substance. He is also charged in the same indictment

with wilful damage and with possession of a Class C controlled drug, namely, cannabis plant for supply. It is this latter charge to which the challenged evidence relates.

The two relevant witnesses, an 18 and a 19 year old, stated in their evidence taken at the preliminary hearing, that during Easter weekend of 1994 they stayed in a hut at Greenpark. One evening they broke into another hut in the same area and found 2 cardboard boxes containing plastic bags with a plant substance. There were 50 to 60 bags each containing approximately one ounce of the material. The witnesses removed the substance which appeared to them to be cannabis, and divided it equally. Later they buried it in other containers. On 5 April 1994 the two men were approached by others including the appellant. After being assaulted and threatened, they took these men to the places where the bulk of the material had been hidden. Later they were beaten and kicked as punishment and one of the men had the tyres of his car slashed.

Both witnesses said that the substance they stole was cannabis. Counsel for the appellant objected to this evidence and, accordingly, a pre trial application under s 344A was made. No voir dire was held to determine whether the witnesses had any special qualifications or experience to give opinion evidence so that the application was determined upon the basis of what the men had said during depositions. One of them had told the Court that he had seen cannabis on a number of occasions, in excess of 20, previously, while the other said that he had seen cannabis "quite a few times - more than 15" and that he had used cannabis himself. Neither of the witnesses had used or smoked the material which they stole.

After hearing submissions the District Court Judge ruled in the following terms:-

> "While Smith and Crawford have no experience with the drug taken by them on the particular day the evidence of the identification is in my judgment fit evidence to go to a jury for it

> to consider. An examination of the depositions will not always reveal the extent to which a witness has been involved in drug taking. Clearly Smith and Crawford have been involved in drug taking. That experience may at trial appear to be wider or perhaps less wide than the depositions suggest but at the moment with the depositions only it seems to me that they have established that they have sufficient experience to give credible opinion evidence of what they stole."

Counsel for the appellant submitted that the evidence of the two witnesses identifying the substance as cannabis was inadmissible because they were not qualified as experts to give opinion evidence. He appeared to accept that the witnesses would be entitled to give evidence that the substance which they stole had the same appearance and characteristics as the substance which they had previously used.

Expert evidence to establish that a substance or plant material is a controlled drug under the Misuse of Drugs Act 1975 is usually given by a scientist. Identification of such a substance, however, need not always be by way of chemical analysis. It may be proved by a combination of circumstances including the visual or other sensory observations of witnesses. In a number of cases lay persons with sufficient experience in relation to cannabis have given evidence as to the nature of a substance which they saw or dealt with. The position is clearly set out in the case of *R v Cruse* [1989] 2 NZLR 279 at 285 as follows:-

> "In the Misuse of Drugs Act 1975, Third Schedule, cannabis plant (whether fresh, dried or otherwise) is defined as any part of 'any plant of the genus *Cannabis* except a part from which all the resin has been extracted'. Evidence of scientific analysis is of course recognised as admissible, but in the present instance there was and could be none, because no cannabis was found by the police. Mr Williams also concedes that evidence of lay persons who are sufficiently experienced with cannabis may be adequate, and he includes in that concession evidence of police officers having had experience of cases concerning the drug; but he maintains that in the absence of what he calls 'lay expert evidence' one cannot rely on an admission or, as we understand the argument, on circumstantial evidence which might be thought in common sense to support an inference of cannabis. Counsel went as far as to put it that as a matter of horse sense the substance in this case was

cannabis but that the Judge was not entitled to allow the jury to reach that conclusion. These submissions probably need only to be stated to carry their own rejection.

Sundry cases were cited by counsel: *R v Celani* (1983) 35 SASR 255, *R v Chatwood* [1980] 1 All ER 467, *Police v Driscoll* (Wellington, M 328/83, 3 October 1983, Jeffries J), *Free v Police* (1986) 2 CRNZ 298, *Police v Hawkins* (Rotorua, M 231/84, 21 December 1984, Quilliam J), *Police v Coward* [1976] 2 NZLR 86, 89; *Higgins v Police* (1984) 1 CRNZ 187, *Police v Porter* (Wellington, M 258/85, 1 August 1985, Savage J), *R v Goodchild (No 2)* [1977] 1 WLR 1213, *Blackie v Police* [1966] NZLR 910, *R v Lord and Doyle* [1970] NZLR 526, *R v Scott* (CA 169/84, 19 June 1985). We have reviewed these cases but we can find nothing in them that persuades us that a finding that material was cannabis beyond reasonable doubt may not be made on any evidence which as a matter of fact in the particular case is capable of sustaining that conclusion. The Courts have accepted various kinds of evidence short of scientific analysis as capable of proving beyond reasonable doubt that a particular substance was the controlled drug. We can see no justification for any judicial attempt to limit what may suffice. It must always be a question of fact in the particular case. There is no logical reason why circumstantial evidence may not be sufficient, although obviously always care must be taken to ensure that it is capable of pointing unequivocally to the nature of the substance."

In this case the evidence of the two witnesses is only one part of a number of circumstances relied upon to establish the nature of the substance. Significantly a portion of the substance was actually retained by one of the witnesses and handed to the police. Upon analysis this portion or sample was found to be cannabis.

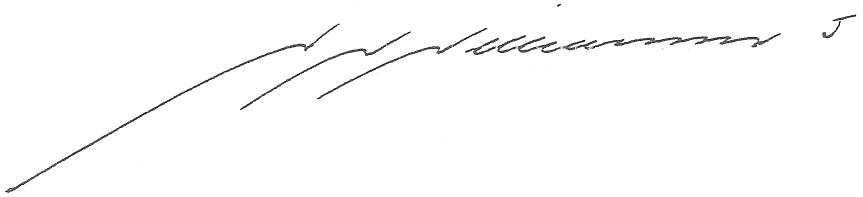
During the course of argument on appeal, it became increasingly plain that the appellant's argument was based upon the form of the words used by the witnesses rather than the essential purport of their evidence. In effect the two witnesses are testifying that the substance they stole appeared to them to be cannabis and that they were able to recognise it because they had seen the substance previously. It is evidence of a visual identification. Ultimately a jury must carefully consider all of the evidence relating to the nature of the substance, including the evidence of these two witnesses,

before arriving at a conclusion as to whether or not the material has been proved beyond reasonable doubt to be cannabis. To label the evidence that they would give "opinion" evidence is subjecting it to a somewhat artificial or unreal analysis. In visual identification cases a non expert may often state a conclusion about the appearance of a person or substance without qualifying such statements as a belief or opinion.

In our view the two witnesses in this case are entitled to give evidence to the effect that the substance which they stole had the appearance of cannabis which they had seen or used on a number of previous occasions. Indeed, when the evidence is heard in full and the entire ambit of the witness's experience with cannabis is elicited, the witnesses may also be able to go further and state positively that in their opinion this substance was cannabis. Like the District Court Judge, we must limit any rulings at this stage to the evidence contained within the depositions. Such a ruling does not preclude further evidence as to the witnesses' experience.

It follows from that we have said that in our view these witnesses are able to make a visual identification of the substance which they stole.

Although we have expressed our conclusion in slightly more restrictive terms than those used by the Judge, in substance the appeal has failed. Leave to appeal is granted but the appeal is dismissed.



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