File Set I

DIVETT v POLICE (Evidence)

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M 304/84

BETWEEN GRAHAM MATTHEW DIVETT
Appellant

AND POLICE
Respondent

Hearing: 2 October 1984

Counsel: Mr Connell for appellant
Mr Morgan for respondent

Judgment: 2 October 1984

ORAL JUDGMENT OF HILLYER J

This is an appeal against a conviction entered by District Court Judge Green in the District Court at Hamilton on 15 July 1984. The appellant was convicted on one charge of having in his possession a class C controlled drug, namely cannabis leaf. He was sentenced to three months imprisonment, but there is no appeal against the sentence.

The facts as revealed by the evidence were that on 21 May, appellant was one of half a dozen people present at a house at 42 Boundary Road, Hamilton. They were sitting around a room watching television when the police raided the premises. Evidence was given by the officer in charge of the Police, Detective Sergeant Joyce, that as he entered the premises there was a divan immediately on his left, and seated on the divan were the appellant and a female person. He said :

> "Upon entering I noticed Mr Divett place his hand immediately behind his back, that was his right hand, as though he was concealing something. I did not see what he had in his hand. ... Very shortly thereafter I inspected the divan particularly in the area in which Mr Divett was seated. I located a small clear plastic bag which contained green vegetation which in my experience as a drug investigating detective I had good reason to believe was the class C controlled drug, cannabis plant. Nothing was found immediately behind Mr Divett but to his immediate left was this plastic bag of vegetation."

The learned District Court Judge clearly found that the appellant had had that plastic bag in his possession, and going on to find that the plastic bag contained cannabis, convicted the appellant.

Before me Mr Connell has challenged the finding that the appellant had the plastic bag in his possession. The District Court Judge also found that the appellant knew that the substance which was in the plastic bag was cannabis, and that finding was not challenged by Mr Connell. He pointed however to the two cases of Police v Rowles (1974) 2 NZLR.756, 758 and Police v Emirali (1976) 1 NZLR 286,288 to support his submission that to prove unlawful possession it is necessary to prove first that the substance was in the physical custody of the appellant and secondly that that possession was with guilty knowledge. It is the first of those ingredients which Mr Connell submitted was not established.

He submitted that an inference which was open to the District Court Judge was that the appellant was attempting to stand at the time, and had put his hand behind him for that purpose. I do not accept that submission for two reasons. First a person attempting to stand would not put his hand immediately behind him for the purpose of assisting himself to rise. Secondly, Detective Sergeant Joyce said:

> "My very first recollection of Mr Divett upon my entry was his being seated and attempting to conceal something behind his back. He was not at that stage in the process of attempting to stand."

Mr Connell however, went on to point out that the plastic bag was not found immediately behind the appellant, it was found a short distance to his left.

The plastic bag, it was clear, belonged to a Mr McClure who was present at the time, and who admitted that it was his, and who indeed was charged with and pleaded guilty and was convicted of having the cannabis. It is clear from the

evidence that at some stage in the evening, shortly before the police entered, Mr McClure had been seated to the appellant's left. It is possible therefore that the plastic bag was found in the position that it was through it being left there, or put there by Mr McClure.

The detective was quite clear in his evidence that the appellant put his hand directly behind him. He said that the hand was his right hand. For the plastic bag then to be found to the left of the place where the appellant was sitting, does not in my view lead to the inference that when the appellant put his hand behind him, he was putting the bag in the position in which it was found. If the bag had been found directly behind him, then there would have been justification for the finding made by the District Court Judge, but the fact that it was in a position other than the position in which the detective said he saw the appellant put his hand, coupled with the fact that the owner of the bag was sitting in that position, leaves open an inference that the plastic bag had been left there by the owner, and not placed there by the appellant.

This of course being a criminal charge where two inferences are open, the one most favourable to the accused must be taken. In those circumstances there is no proof that the appellant had possession of the plastic bag and therefore of the cannabis inside it.

The second point raised by Mr Connell which I deal with for the sake of completeness, although the finding I have made is sufficient to dispose of the appeal, was that there was no proof that the substance in the plastic bag was cannabis. In support of the allegation that it was, the prosecution put forward three matters, first a certificate from the Department of Scientific and Industrial Research saying that it was; secondly the statement already referred to from Detective Sergeant Joyce; thirdly the statement made by Mr McClure that it was his cannabis and that it was cannabis. — Huh — How come No possession?

The recent decision of the Court of Appeal in the case of Police v Ramzan CA 93/84 Judgment delivered 16 August 1984, is sufficient to prohibit the use of the certificate as evidence, in that the certificate is merely signed "Susan Louise Nolan, Analyst". The certificate of course is on headed notepaper "DSIR Government Analyst" etc. but the Misuse of Drugs Act 1975 provides in S.31(2) in effect that the certificate must purport to be signed by the Dominion Analyst or a Government Analyst, or an officer of the Department of Scientific and Industrial Research authorised in that behalf by the Dominion Analyst or Government Analyst, either generally or in any particular case. There is no allegation that Susan Louise Nolan was the Dominion Analyst or the Government Analyst, and although it might be inferred that she was an officer of the DSIR, it is not stated that she was authorised in that regard by the Dominion Analyst or a Government Analyst. The certificate therefore, on the basis of Ramzan's case is not admissible to establish that the substance was cannabis.

The Detective said that he had good reason to believe the substance was a class C controlled drug. He did not say that he did believe it, nor did he in my view sufficiently qualify himself. He simply said from his experience as a drug investigating detective he had "good reason to believe". I would not accept that the detective was qualified to, or did give evidence that the substance was cannabis.

Finally the statement made by Mr McClure that the substance was cannabis is a statement made by a person who did not qualify himself by saying that he had long experience of cannabis, and was abie to identify cannabis. Both Mr Morgan and I have a recollection of a case in which it was held that the mere statement by a person that he had cannabis in his possession was not sufficient to establish that he did, unless he qualified himself as an expert in that regard. In the time available the case has not been located, but I have the clear recollection of it, and that in my view would be sufficient to render the evidence of Mr McClure insufficient to establish that the substance was cannabis.

For the reason however, that I earlier gave, that the appellant was not established to have had the plastic bag in his possession, the appeal is allowed and the appellant will be discharged.
I do not allow costs.

P.G. Hillyer J

Solicitors:
O'Neill Allen & Co for appellant
Crown Law office for respondent