admissible thing? SET I

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. No. 1029/84

BETWEEN LINDA MARIE TANNER

Appellant

A N D POLICE DEPARTMENT

Respondent

Hearing: 30th November, 1984.

Counsel: P. T. Rishworth for Appellant.
D. P. H. Jones for Respondent.

Judgment: 11th December, 1984.

JUDGMENT OF TOMPKINS, J.

The Appellant has appealed against her conviction on the 29th May, 1984, in the District Court at Auckland of possession of cannabis for the purpose of supply. She also appealed against the sentence imposed of five months' periodic detention. At the hearing of the appeal Mr. Rishworth, for the Appellant, made no submissions on the sentence imposed.

The evidence called by the prosecution established that on the 19th January, 1984, a police party searched a house at Massey. The Defendant was present. She was sitting in a chair in the lounge. The police officers found on the chair upon which she had been sitting a plastic carry bag, inside which was another smaller plastic bag that in turn contained sixteen clear plastic bags each containing green plant material. Constable Hadwin said:-

> " I immediately asked the defendant who the bag and its contents belonged to and she said that it was hers. I asked her how the bag had come to the address. She said she had brought it with her earlier in the afternoon. When asked what the contents of the bag were she said 'you know what it is, it is cannabis'. I then asked her if she

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was selling it and she wouldn't immediately answer the question, so I repeated it, and she said that some of it was for her own use and that she was going to sell the rest. "

The Constable also found on the chair a notebook upon one page of which was written the Appellant's name in full and also a reference to bags and figures. The Appellant acknowledged that the notebook was hers. She said that the figures on the page were the prices of the deal bags.

Another police constable gave evidence of finding in a bedroom the Appellant acknowledged was hers some empty plastic bags. He also found in the pocket of the jacket the Appellant was wearing what he described as a cannabis reefer. When asked about it the Appellant denied any knowledge of how it came to be where it was found.

The prosecution sought to put in as evidence a certificate signed by an analyst employed by the Department of Scientific and Industrial Research relating to the material found when the search was carried out. However, the prosecution had failed to comply with the requirements of s.31 of the Misuse of Drugs Act, 1975. The Judge ruled that the certificate was inadmissible because it had not been served on the Appellant within the statutory seven days.

There was therefore no admissible scientific evidence concerning the material found in the possession of the Appellant. The Appellant did not give evidence, so the only evidence before the Court was the Appellant's admission, together with the production of the plastic bags containing the green plant material as an exhibit in Court.

After considering written submissions concerning

the admissibility of the Appellant's admission, the Judge found that the Appellant had the necessary background knowledge to be qualified to express a reliable opinion that what was found in her flat in the sixteen bags was the drug cannabis from which the resin had not been removed. He reinforced that finding by his opinion of the appearance of the material produced before him. He therefore found that the prosecution had proved that the material was the Class C controlled drug cannabis. He further held that although the statutory presumption of supply could not apply in the absence of admissible evidence of the weight of the material, the notebook, the sixteen separate bags, and the Appellant's admission of her intention to sell some of it was sufficient to establish that the Appellant had cannabis in her possession for the purpose of supply. She was therefore convicted.

The principal ground advanced on behalf of the Appellant was that her admission that the material in her possession was cannabis should not have been relied on by the Court. Without that admission there was no other admissible evidence to prove that the material was cannabis.

In Bird v. Adams (1972) Crim.L.R.174, the defendant admitted having 15 tablets of L.S.D. and that he had supplied them to other persons. There was no other evidence to prove the tablets were L.S.D. The report is a brief one, but in R. v. Chatwood (1980) 1 W.L.R. 874, part of the judgment of Lord Widgery, C.J. is cited in full at p.877. He said:-

> " If a man admits possession of a substance which he says is a dangerous drug, if he admits it in circumstances like the present where he also admits that he has been peddling the drug, it is of course possible that the item in question was not a specific drug at all, but the admission in those circumstances is not an admission of some fact about which the admitter knows nothing. This is the kind of case in which the appellant had certainly sufficient knowledge of the circumstances of his conduct to make his admission at least prima facie evidence of its truth . . . . . "

Roper, J. was concerned with a similar issue in Police v. Coward (1976) 2 N.Z.L.R. 86. The Appellant had been convicted of using and being in possession of cocaine. The only evidence on the "using" charge was the appellant's admission to a witness that he had used cocaine on previous occasions by "snorting". Roper, J. considered that what authority there was supported the view that an accused's admissions are only evidence against him where it appears that he had personal knowledge of the facts admitted. If he has no personal knowledge of the facts admitted but is in effect merely adopting the statement of another, that statement appears to be inadmissible.

He considered on the facts of that case that, the appellant not giving evidence, the Court was left with an unqualified admission of fact made in such circumstances that a clear inference was open that the appellant was speaking from personal knowledge and knew what he was speaking about.

In Chatwood the appellants, who were experienced in the use of heroin, admitted that they had injected themselves with heroin. They were charged with possession. No analysis evidence was adduced. The Court, after reviewing the authorities in England and adopting in particular the approach in Bird, considered that the appellants, as drug abusers, were expressing an opinion, and an informed opinion, that, having used the substance which they did use, it was indeed heroin because they were experienced in the effects of heroin.

I have also considered other authorities where this issue has been raised, including R. v. Wells (1976) Crim.L.R. 518, Hine v. Police (M.104/80, Auckland Registry, 11 August, 1980, Vautier, J.), Barnard v. Police (M.208/80, Hamilton Registry, 5 December, 1980, Greig, J.) and R. v. Bryce (M.125/81, Auckland Registry, 15 September, 1981,

Chilwell, J.). These provide examples of circumstances where the principles set out in Bird and Coward have been applied with the result that in some the admissions were held admissible, in others they were not.

The issue therefore is whether on the facts as found it can properly be inferred that the Appellant had personal knowledge of the nature of the material found in her possession - knowledge derived from something more than reliance on the statement of some other persons.

The Judge placed some reliance on the notebook. As I have indicated the Appellant said that the particular page contained the prices of the deal bags. And there was other police evidence that would justify a finding that the figures on the page were consistent with the prices of a cannabis deal. The Judge found that the notebook, without any evidence to the contrary, raises a clear inference that there had been transactions involving bags. With respect to the Judge I do not consider that that inference is justified. There is nothing in the notebook or elsewhere in the evidence to support an inference that the transactions to which the notebook referred were transactions that had already taken place rather than transactions that the Appellant was contemplating. There was no doubt from the nature of her admission that the Appellant intended to sell some of the material that, by her admission, she thought was cannabis. The notes in the notebook are consistent with this intention. But there is no evidence either in the notebook or elsewhere to establish that she had at any time prior to the police raid sold to anybody any part of the material found in her possession. Nor is there any evidence that she had herself smoked any of it.

So I can find nothing in the surrounding circumstances as established by admissible evidence to justify

a conclusion that she knew from her personal knowledge, apart from what she may have been told when she acquired it, that the material in her possession was cannabis. Therefore her admission, without more, was not sufficient to discharge the onus resting on the prosecution of proving that the material was a prohibited drug.

The Judge also took into account his personal view of the green plant material that was produced before him as an exhibit. He accepted that he was not able to say that the material was cannabis. He considered that he could properly take into account that the material produced to him, while not having been established scientifically as being cannabis from which the resin had not been extracted, certainly bore a remarkable resemblance to the many bags of cannabis that he had seen when presiding in cases of this kind.

He used this to reinforce the admission made by the Appellant which he had considered admissible. But if, as I consider to be the case, that admission should not have been admitted, then clearly the Judge's opinion of the material produced to him would not be sufficient to establish to the required standard that that material was a prohibited drug.

Without the admission the conviction cannot stand. The appeal is therefore allowed. The conviction is set aside.

Solicitors:

Russell, McVeagh, McKenzie, Bartleet & Co., Auckland, for Appellant.

Crown Solicitor, Auckland, for Respondent.