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IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY GR.80/84

BETWEEN BRYAN

43

Appellant

A N D POLICE

Respondent

Hearing: 23 November 1984

Counsel: R.B. Walton for Appellant
N.J. Scott for Respondent

ORAL JUDGMENT OF HARDIE BOYS J.

This appeal is against conviction on a charge of possession of cannabis for the purpose of sale or supply and on a charge of possession of pipes for the purpose of the commission of the offence of smoking cannabis. The evidence is that the police found in the appellant's possession five plastic bags that appeared to contain the same kind of material and to be of the same weight, and it is acknowledged that those bags contained cannabis. They also found what is acknowledged to have been a cannabis bullet and some butts of cannabis cigarettes. There was no real evidence that the appellant had this material in his possession for one of the prohibited purposes and the prosecution therefore had to rely on the presumption created by s 6(6) of the Misuse of Drugs Act. For that purpose it had to establish that the cannabis material weighed 28 grams or more. To establish that it produced a certificate from an analyst which, as a result of the recent decision of the Court of Appeal in Police v Ramzan (CA.93/84, 16 August 1984), must be held to have failed to comply with the criteria for admissibility and so cannot be taken into account. Therefore in order for the prosecution to rely on the presumption it had to rely on such other evidence of weight as was available. The police sergeant who

found the material said that he weighed the five bags and found them all to be of a similar weight, approximately 6 grams each. He did not weigh the bullet, and I put aside for present purposes the residual material and the butts because I do not think that ought to be taken into account at all in assessing the quantity held for the purposes of supply, and anyway it was clearly very small. The sergeant did not say what the total weight was of the material that he weighed; he gave no evidence as to the equipment on which he weighed it; and when he was asked in cross-examination about what he did, he said that he also weighed the plastic bags; and as indicated he said that although they looked as though they held the same weight, he did find that they varied slightly.

One of the purposes of the Legislature in enabling a certificate from the Dominion Analyst to be used in these cases is to ensure accuracy of weight, and that is a critical matter in cases of this kind where a presumption of guilt arises automatically once a certain weight is found. In my view it would be totally improper to rely on the police sergeant's evidence to establish that there was in fact 28 grams of cannabis material. He did not indicate what the total weight was; he had weighed the plastic bags; there is no evidence as to the accuracy of the scales he used; and there is no means of knowing the extent to which the bags may have contained other material that the Dominion Analyst certainly would not have taken into account in his weighing procedures. There was therefore no evidence upon which the Court could safely act that the weight of this cannabis material was such as to give rise to the presumption. It has not been suggested there was any other sufficient evidence to indicate the purpose of supply. Therefore that charge cannot be sustained on the evidence placed before the Court. Mr Scott, however, has submitted that consistent with the practice adopted by Roper J. and later approved by the Court of Appeal in R v Morgan [1980] 1 NZLR 432, I ought to refer the case back to the District Court in order that the Judge could give the opportunity to the prosecution to rectify this defect in its case. Morgan's case was one under

the blood alcohol legislation but I see no reason in principle why the same practice ought not to be available under the Misuse of Drugs Act. It is in this Court, as it would have been in the District Court, a matter for the Court's discretion as to whether that course should be followed. At the end of the prosecution case Mr Walton, on behalf of the appellant, submitted that there was no prima facie case for his client to answer and he relied upon the decision of Roper J. in Ramzan which he informed the Judge was under appeal to the Court of Appeal with the result that has already been referred to. The Judge seems to have felt that Ramzan as decided in this Court ought not to be followed unless it had to be and he was relieved of that necessity because having adjourned the matter for several days he was furnished with a copy of a judgment of Sinclair J. in the case of Adams v Police (Auckland, M.131/83, 29 April, 1983) in which that Judge took a contrary view to the view held by Roper J. The District Court Judge preferred the view of Sinclair J, and accordingly he ruled that the analyst's certificate was admissible. Had the prosecutor either at that time or at the stage when Mr Walton first raised the point sought leave to call evidence from the analyst or to obtain a fresh certificate then I have little doubt that leave would have been given and this Court would not have held that ruling to have been incorrect. That is not what happened. The prosecution did not take the opportunity it had and chose instead to run the risk that the decision in Ramzan would be upheld, which was the case.

There are other matters which are relevant now to the exercise of discretion. A certain amount of time has gone by and although that must always happen, in these cases it is a matter to be taken into account. More importantly though is the fact that on any view of the matter the quantity of cannabis material in the appellant's possession was only slightly in excess of the weight at which the presumption comes into play and the matter is confused because the analyst's report refers to six plastic bags, whereas the police evidence is that there were only five, and as there is a difference of almost 2 grams between the weight of the lightest and the heaviest, if the lightest were brought into account rather than the heaviest,

then it would be very close indeed to the 28 gram level. There is one other matter in regard to the exercise of discretion. Mr Walton acknowledged that it would be quite proper for this Court to substitute for the charge of possession for supply, a simple charge of possession. The weight of the material involved was so close to the level at which the presumption arises, which is fixed on the basis that 28 grams is the most a user of cannabis would reasonably require for his own purposes, that justice would be done if the appellant were dealt with on the basis of that lesser charge.

I therefore decline to exercise my discretion to order the matter to be re-opened in the District Court and I allow the appeal on the charge of possession for supply but amend the information so that it alleges the offence possession of cannabis under s 7.

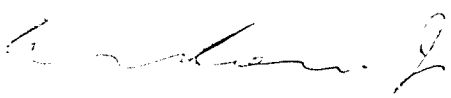
Turning now to the charge of possession of pipes, the analyst's certificate was also relied on to show that one or two pipes - I think there were 10 of them in all - had been used for the smoking of cannabis. That certificate cannot be used in connection with this charge any more than it could for the other charge. There was evidence from the police sergeant, who has had considerable experience with drug offending, that the pipes appeared to him to have been used. He did not say what they had been used for, but I think Mr Scott is right in his submission that one must infer with items such as these, which are clearly items designed for smoking cannabis, that it would have been cannabis that was smoked in them. But the section does not make it an offence to possess pipes that are capable of being used for smoking cannabis or that are adapted for that purpose. It requires that the purpose of the person in whose possession they are be that they are used for smoking, whether by him or some other person.

The appellant gave evidence to the effect that he had collected pipes over a number of years and the pipes which he had, which can properly be described as works of art of their kind, were purchased as part of his collection. He acknowledged that he smoked cannabis, quite a lot of it, but he

denied that he had ever used the pipes for smoking. He said that just prior to Christmas last he and his wife separated and his wife took the pipes with her to Invercargill. Three or four months later he brought them back to his home here and, he said, he has not used them since. In fact he said he had tried to sell them. He had put them in a box behind his bedroom door and that was where the police found them. He also said that his wife does not smoke but he knew who had used the pipes but was not willing to say who it was. It is quite clear that acknowledgment related to the period when the pipes were in his wife's possession and he referred to the fact that someone was living in the house with her at that time. The Judge seems not to have accepted that evidence. It is difficult to see the basis on which he rejected it, but that was his right having seen the appellant give his evidence. But to reject that evidence does not supply positive evidence of the appellant's own purpose in having the pipes in his possession and there is really no evidence at all that he had the pipes in his possession for the purpose of them being used for smoking cannabis.

The appeal is accordingly in relation to that charge also allowed and the conviction quashed.

Now we have the question of sentence on the charge of possession. This being the appellant's first offence against this legislation, a monetary penalty will adequately meet the case. Having regard to his present financial circumstances I fix that at a fine of $200.00.



Solicitors:

Walton & Stubbs, TIMARU, for Appellant
Crown Solicitor, TIMARU, for Respondent.