IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP No 18/97

BETWEEN HARRIS

Appellant

AND POLICE

Respondent

Hearing: 12 March 1997

Counsel: M Greenhough for Appellant
M Bodie for Respondent

Decision: 12 March 1997

ORAL DECISION OF GENDALL J

Solicitors:

M Greenhough, Barrister, Wellington for Appellant
Crown Solicitor's Office, Wellington for Respondent

This is an appeal against five convictions entered against the appellant under the Misuse of Drugs Act 1975 in the District Court at Wellington on 29 October 1996. Those offences related to possession of utensils, cultivation of cannabis, possession of cannabis oil, possession of cannabis plant for supply and permitting premises to be used for the commission of an offence against the Misuse of Drugs Act 1975.

The essential point in this appeal relates to the appellant's objection to the introduction in evidence of drug paraphernalia, items or exhibits observed and obtained by the Police from the flat premises in which the appellant was living, without which exhibits or evidence convictions could not have been entered. In the District Court the appellant objected to the introduction of such evidence on the basis that it had been obtained as a consequence of unlawful entry by Police officers into the premises of the appellant. That objection was dealt with by the learned District Court Judge conducting a voir dire and hearing evidence of the circumstances of the Police officers entry into the flat. At the conclusion of the voir dire the learned District Court Judge ruled that the Police officers entry into the dwelling was lawful and thereafter the appellant, through her counsel, acquiesced in the hearing proceeding through the Police witness's statements being read and exhibits being produced with the inevitable conclusion that convictions followed.

The facts of the matter are that the appellant and some companions were having a party of some sort in her flat on 23 March 1996 and into the early hours of Sunday 24 March 1996. Disorder broke out at some stage and a fight occurred both inside and outside the flat between some persons who were present. It seems that a member of the group telephoned the Wellington Central Police Station and it is a fair inference that that telephone call was not made simply to educate the Police about a fight but rather to seek some assistance or attendance at the flat. Police officers were directed to go to the premises and on arrival the first officer, Sergeant May, saw a woman in the street outside the flat in a distressed state. He spoke to her. As a result of what she told him he concluded that she had been assaulted and that the offender named by her, but not identified by him at that stage, was inside the premises. Further Police vehicles by then had arrived. Officers entered the

flat, after knocking on the door but having no person come to it. The door was open. The officers entered the premises they said, in the voir dire evidence, for two purposes. First, because of having been directed to attend the disturbance or fight in the flat, they thought the fight might have been continuing; and secondly, because of the information given to Sergeant May by the victim of an alleged assault who was then outside, the Police wished to locate and arrest this alleged offender. Indeed the evidence of Constable Withington was that:

> "... we are going in to try and locate the offender and secondly we are going in for safety of a number of persons."

And further, when tested as to the intention that existed in his mind at the time of entry concerning arrest, ConstableWithington said:

> "At the point of entry we were under the belief that he [the offender] was responsible for an assault and at that stage obviously there is power to arrest, but obviously we would like to speak to him instead of going in and arrest him straight away".

Once inside the flat, it became clear that the "fight" had ceased. Questions were asked of the gathering, members of which were in various stages of intoxication, in order to locate and identify the person who had allegedly assaulted the female victim. This took a short while but eventually a person acknowledged that he bore the name of the alleged offender and was spoken to prior to arrest. At that time Constable Withington was in a position in the flat where he happened to observe the incriminating items relating to cannabis oil use and drug paraphernalia and thereupon proceeded to take possession of those items and, in technical terms, conduct a search. In real terms the items were well visible without there having to be active search of furniture, cupboards and the like in the flat. In so acting Constable Withington said that he was exercising his powers of search under the Misuse of Drugs Act 1975. The appellant accepts that such was permissible if the entry had been lawful.

The appellant submitted that the entry by the Police into the flat was unlawful there being neither statutory authority under s317 of the Crimes Act 1961 nor any implied license to enter. The appellant submitted that both Sergeant May and Constable Withington at the point they entered the flat had no lawful authority to do so and because the entry was unlawful all the evidence obtained in the search, and subsequently, was inadmissible. The learned District Court Judge rejected those submissions holding that the officers entered the flat pursuant to their power and entitlement under s317(2) of the Crimes Act. The learned District Court Judge also found that the officers were exercising powers conferred under s317(1).

It is necessary to look at all the facts and circumstances surrounding the Police being called to this property and their entry into it in order to determine whether there was unlawful entry. Evidence given at the voir dire makes it quite clear that the occupants or some of them expected the Police to arrive, and that they knew that one of the group at least had telephoned the Police seeking a visit. The appellant herself said in evidence she expected the Police to arrive because of the noise, that she was not surprised when they turned up, that she had no problem with them being inside her house in order "to get Danny" and that she never told them to leave. She said that she had an idea why the Police were there when they first arrived because:

> "I knew that someone would call them because of the fighting".

So, the Police arrived for the purpose of dealing with what they had been told was fighting inside the house. Pursuant to s317(2) of the Crimes Act 1961 the Police they were entitled to enter the premises "to prevent the commission of any offence that would be likely to cause immediate and serious injury to any person or property" if they believed "on reasonable and probable grounds that any such offence is about to be committed". Until they entered the flat the Police officers were not able to form any view contrary to that which had been communicated to them by telephone, namely that there was a fight in progress inside. They had

further knowledge, which arose upon Sergeant May's arrival, namely that one of the victims of the fighting was seen outside in a state of distress. She was able to give to the Police a specific allegation of a specific offence, namely assault, which had been inflicted inside the house on her. This additional feature led the Police officer, or some of them, to conclude that they, or some of them, needed to enter the premises pursuant to their powers under s317(1), namely to arrest any person having good cause to suspect that that person had committed an offence whilst on those premises. I think it is a matter of sophistry to say that s317(1) cannot apply because upon entry the Police did not have any "present intention" to arrest simply because they said that they wished to locate the offender prior to arresting him. He was going to be arrested once located and spoken to. Once inside the premises the Police were not asked to leave.

There is no New Zealand authority that counsel can refer me to on the issue of "implied license" where actual entry to premises occurs. If it were necessary I would be prepared to hold that in this case there was indeed an implied license to enter because of the fact that the Police were telephoned and requested to attend at the property. By implication they were invited to enter because of the disturbance that it was said was occurring inside. The Police are like any other citizen when it comes to being invited onto premises, in such circumstances. The arrival of the officers and their walking into this flat through the open door, thereafter not being asked to leave, with their presence being accepted whilst they were there would satisfy me that there was a license given to the Police to go to the premises and to enter. I would further be satisfied that such license had not been revoked. Naturally it would not have been thought that the Police would observe items of drug use but that is simply a consequence which unfortunately for the appellant arose out of the Police being requested to attend at her flat. I do not think it significant that there is no evidence as to who it was who telephoned the Police because the appellant knew that they had been called and upon their arrival thought that they would take "Danny", as they were intending to do, and she at no time requested they leave so as to revoke their license to be there.

All of those comments relating to implied license, however, are obiter simply because I am fully satisfied that the learned District Court Judge was correct in her conclusion that the Police officers, and particularly Constable Withington who was the officer who located the offending drug apparatus and items, entered the premises lawfully pursuant to s317(1)(b) and s317(2). Their entry was lawful. It is a case similar to ***Ormsby v Police*** (AP 256/94, Wellington High Court, 9.11.94).

I do not need to move further into the areas of law discussed in ***R v Grayson and Taylor*** (CA 225 and 256/96, Court of Appeal, 28.11.96) other than to say that even if the learned District Court Judge had been wrong in her conclusions as to the lawfulness of the search, in my view she would have been entitled in any event to come to the view that the location of those items and exhibits was not unreasonable in the totality of the circumstances of this case. Whilst it is true, as Ms Greenhough has submitted, that people have the right to expect privacy and the right to expect the Police would adhere to that, (and thus, for example, just because a door is open you do not simply walk in), the crucial factor in this case is that a telephone call to the Police requested them to come to a disturbance and never once when they were there were they asked to leave. In those circumstances it would have been perfectly justifiable for the learned District Court Judge to have concluded that the actions were not unreasonable, even if there had been for some technical reason an unlawful entry. Of course, it was not necessary to make such a finding as the entry was lawful.

I have added that comment simply for completeness sake because in the end I am satisfied on the evidence before the District Court, and the applicable principles of law, that the entry by the Police officers into the appellant's flat was lawful. Accordingly the evidence was properly admitted and the convictions justified.

The appeal is dismissed. May I say thank you to both counsel for thorough and excellent argument.

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J W Gendall J