NZLR

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY AP No.9/98

BETWEEN
FERGUSSON

Appellant

A N D POLICE

Respondent

Hearing: 6 April 1998

Counsel: J A Farrow for Appellant
R P Bates for Respondent

Judgment: 9 April 1998

JUDGMENT OF BARKER J

On 26 February 1998 the Appellant was convicted in the District Court at Dunedin on two charges of possession of a Class A controlled drug, heroin, and one charge of possession of a Class B controlled drug, cannabis oil.

The charges followed the execution of a search warrant on 26 February 1997 when the Police found a spoon containing a brown substance lying on the kitchen bench at the Appellant's residence at Abbotsford. They found also a syringe needle and cigarette filters as well as further spoons in the freezer containing a brown liquid substance. Tinfoil and a small amount of what turned out to be cannabis oil was on the kitchen bench: spotting knives and bongs were also found. The Appellant was found to have had in his

possession some 11 morphine sulphate tablets. These had been legitimately prescribed for him by a medical practitioner for the relief of pain.

When interviewed by the arresting police officer, the Appellant admitted that he had been boiling the morphine sulphate tablets to produce a substance which he could inject into himself in liquid form. He described in some detail the process he employed for producing the brown substance from the morphine sulphate tablets. He asserted that all he was doing in carrying out the cooking process, was transforming the morphine into a liquid form which, when injected, gave him far more immediate relief from pain than did the tablets.

He defended both heroin possession charges and the cannabis oil charge on the ground that it was not proved that there had been a useable quantity of the prohibited drug. That submission was rejected by the District Court Judge in respect of all three charges.

There is no appeal in respect of the cannabis oil charge. This means that the sentence imposed by the District Court Judge of nine months' supervision on special terms as to undertaking treatment and/or counselling as directed, still stands. It had been imposed concurrently for all three offences. The Appellant does not contest this sentence but seeks to have quashed on appeal the convictions for possession of a Class A controlled drug.

In respect of the heroin possession charges, there was also a further defence, also rejected by the District Court Judge, namely, that it was not proved beyond reasonable doubt that the Appellant had the necessary *mens rea* for possession of heroin. It was submitted both to the Court below and to this Court that there was a reasonable possibility at least that the Appellant believed that he was turning the morphine sulphate tablets into a form of morphine which, when injected, would enhance his euphoric feelings and diminish his pain.

I deal first with the defence that the Appellant lacked *mens rea*. The Appellant gave evidence to the effect that he did not believe that he was making heroin. He admitted that he had learnt how to treat morphine sulphate tablets when he had attended in Periodic Detention or when he had viewed an instructional video at the Dunedin Intravenous Organisation. The District Court Judge refused to believe the Appellant. He noted that the Appellant had been prescribed morphine sulphate tablets for more than a year, that he had admitted having undertaken the fairly complicated cooking process on at least 12 occasions over six months, that cannabis oil and other drug paraphenalia had been found. The Judge considered that looking at the Appellant's overall background and involvement with drugs, both prescribed and otherwise, he was satisfied that the Appellant knew precisely what he was doing.

In his cross-examination, the Appellant was asked by the prosecutor, who had taught him this cooking process. He replied:

> "No-one particularly, a lot of people over the years have said a lot of different things, having to come to places such as this, PD, DIVO has an instructional video on how to go about taking the coating off, crushing the pill."

He agreed that drug addicts carried out the process to get a "high", even when not suffering from pain. He was then asked:

> "So they don't take the pill, they inject themself, they convert it to heroin and inject themselves with it, that's right, isn't it? Depends who you believe I suppose, I don't know."
>
> So you're telling us that of all your dealings with these people you've heard word by mouth how to convert it, that no-one ever suggested that it turns it to heroin?
> No, from what I know of heroin it is a powder that comes in a packet that you don't have to add acidic anhydride with - just add water with and from what I can gather there hasn't been any heroin in New Zealand for quite some time. I actually thought heroin was a substance all of its own.

The expert witness called by the defence, Dr Fawcett from the School of Pharmacy at the University of Otago, acknowledged that the cooking process could be described as breaking the pill down making it more useable or injectable. It could produce acetylated derivatives which could be more active than morphine. Dr Fawcett carried out the cooking process described by the Appellant. Having done what the Appellant said he had done, Dr Fawcett found that the yield of heroin was nil. On the other hand, Dr Lavis, who analysed the substance seized, was of the view that heroin was a major component in the brown substance, although she did not measure the amount of heroin in the substance.

Normally once the jury or, in the case of a summary trial the District Court Judge, disbelieves an accused, then the prosecution evidence against the accused must be assessed on the basis whether it has established proof beyond reasonable doubt. Lies told by an accused, whether out of Court or at the hearing, do not usually make the prosecution case stronger: see *R v Dehar [1969] NZLR 763; R v Toia [1982] 1 NZLR 555; Broadhurst v The Queen [1964] AC 441*. The situation was neatly summarised by Bisson J in the Court of Appeal in *R v Gye (1989), 5 CRNZ 245, 248* thus:

> "As with the situation of lies told by an accused, the mere fact that the defence evidence is rejected as untrue does not by itself add anything to the Crown case. As recognised by this Court in *R v Gibbons* [1973] 1 NZLR 376, there are situations where inferences favourable to the Crown's case may be drawn from the fact that an accused has told lies, although in more recent decisions we have sounded warnings against too ready an acceptance of such inferences. But in *Gibbons*, McCarthy J pointed out at p 377 that:
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> > '... if the case happens to be one where lies told in the witness box make the prosecution's case no stronger than it would be if the accused had not given evidence at all, then those lies should be disregarded as adding nothing positive to the case for the prosecution.'
>
> That is very much the situation in this case. If the jury reject the defence evidence, they can be told that the prosecution evidence stands uncontradicted, but that evidence must be sufficient to satisfy them beyond reasonable doubt of the accused's guilt."

Accepting the District Court Judge's findings of fact and his disbelief of the Appellant, I nevertheless have difficulty in seeing that the prosecution evidence amounts to a finding beyond reasonable doubt that the Appellant knew that what he was making

was heroin. The fact that he had attended Periodic Detention, had viewed the DIVO video and had used cannabis oil does not lead to the inevitable conclusion that he necessarily knew that the cooking of morphine sulphate tablets would yield heroin. With respect to the District Court Judge I cannot see how, even disbelieving the Appellant, the prosecution case was proved beyond reasonable doubt.

If the Judge had sought to rely on the lies told by the Appellant in evidence as strengthening the prosecution case, he should have undertaken the thought processes discussed in the cases. He should have noted the warnings about readily inferring guilt because of lies told. He should then have considered whether this was one of those cases where the accused's lies would lead to a finding of guilt. He may well have come to this conclusion, but he did not go through the exercise which is always told to juries in such cases.

I am unable to see how, even allowing for the "strands in the rope" approach to circumstantial evidence, there was enough in the prosecution case to infer beyond a reasonable doubt that the accused knew that heroin was the end product of his cooking the morphine sulphate tablets. There were certainly grounds for suspicion, but that is not enough. The first ground of appeal is therefore made out.

Dealing with the second ground of appeal, ie no useable quantity of heroin proved, the District Court Judge referred

to the *Police v Emirali, [1976] 2 NZLR 476* and to an unreported decision of Roper J in *Ramzen v Police (4/2/83 M 848/82 Christchurch Registry)*. In *Emirali,* there is the frequently quoted statement of the Court of Appeal at 480:

> It is important that the Court should give every proper support to those who have the responsibility of controlling the serious problem of drug abuse, but when one attempts to understand the ambit of s6 of the Narcotics Act it is necessary to keep in mind that the real purpose of the statute is not to proscribe the existence of narcotics as an end in itself. Instead it is to prevent their illicit use. That general purpose indicates the sort of test that can and should be applied in such a case as this, and we think Mahon J was quite right in the conclusion he reached. Of course, a decision as to the utility of a given sample of a narcotic substance will depend not merely upon its size or whether it is capable or incapable of measurement by weight but also upon the nature of the narcotic itself, and the condition in which the sample is found."

In *R v Brabet (unreported CA 6/12/88)* reference was made to Part I of the Second Schedule of the Misuse of Drugs Act 1975, paragraph 5, which provides that substances containing any proportion of a substance mentioned in clause 1 of the Schedule are themselves Class B controlled drugs. The same applies to Class A drugs because of paragraph 5 of the First Schedule in the same Act. Paragraph 2 of that Schedule refers to isomers of Class A drugs whenever their extraction is possible within the specific chemical designation. Isomers of heroin were found to have been present by the analysing scientist.

In *Brabet*, the Appellant had started to implement a recipe for making homebake morphine with the intention of obtaining morphine from the process. The scientific evidence was that the

brown substance seized by the Police contained morphine. In other words, the process had reached the point where morphine had been brought into being. The Court of Appeal upheld a charge of manufacturing morphine, holding that there was no room in the statutory scheme for reading in a qualification directed to the immediate usability of the substance without any further processing. The brown liquid discovered by the Police in that case had contained both morphine and codeine. More processing would have been needed to produce crystalline morphine. Unlike in the present case, the scientist was able to give a view of the quantities of each substance.

Whilst Dr Lavis had conducted a qualitative analysis, namely that a major part of the brown substance contained heroin, she did not undertake a quantitative analysis. She stated quite candidly in cross-examination that the additional steps required for a quantitative analysis would have cost additional money. Dr Fawcett, on the other hand, viewed Dr Lavis' results and understood the basis for them. He was prepared to accept that he could make sense of the situation only if any quantity of heroin was thought to be a useable quantity. In other words, he said that his view of Dr Lavis' statement that heroin was a major component of the brown substance, must mean that the most prevalent molecule present was heroin.

The District Court Judge accepted that there was a useable quantity from the evidence of Dr Lavis despite the fact that

she had not measured the quantity. One notes that in *Emirali* that the quantity was minute. The Court of Appeal pointed out that utility of a given sample will depend not merely upon its size or whether it is capable or incapable of measurement by weight but also upon the nature of the narcotic itself and the condition in which the sample is found. The District Court Judge noted that the Appellant intended to inject himself with the brown liquid and that clearly the Appellant considered there was a useable dose.

I consider that the District Court Judge was quite entitled to find that there was a useable quantity of heroin. It would have been preferable for the scientist to have been asked to analyse the quantity as well as the quality of the substance. As the Court of Appeal pointed out, one looks at the circumstances *(Emirali)* one also has regard to paragraph 5 of Schedule 1 *(Brabet)*, I do not think it can be said that the District Court Judge was wrong to have found that there was a useable quantity.

However, because the Appellant has succeeded on the first ground, the appeal will be allowed and the convictions quashed.

R. D. Barker J

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