

DELIVERED

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WRIGHT v. SAMUELS

No. 25 of 1977

Date of Hearing: 16th February, 1977

IN THE FULL COURT

Coram: Bray C.J., Walters and Zelling JJ.

J U D G M E N T of the Honourable the Chief Justice

(On appeal from Mr. P. M. St. L. Kelly, sitting
as a court of summary jurisdiction at Adelaide)

(The Hon. Mr. Justice Zelling concurring)

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| Counsel for the Appellant: | Mr. S.W. Tilmouth |
| Solicitor for the Appellant: | D.C. Burrell |
| Counsel for the Respondent: | Mr. A.R. Bishop |
| Solicitor for the Respondent: | G.C. Prior |

Judgment No. 3249

Full Court

Bray C.J.

This is an appeal against a conviction for a breach of sec.5(1)(c) of the Narcotic and Psychotropic Drugs Act 1934 as amended, referred to this court by order of Wells J. dated 19th January, 1977.

The information laid against the appellant alleges that on the 15th day of August, 1976 at Magill, he had in his possession a pipe for use in connection with the smoking of Indian Hemp, a drug to which the Narcotic and Psychotropic Drugs Act 1934 as amended applies, contrary to the provisions of sec.5(1)(c) of the Narcotic and Psychotropic Drugs Act 1934 as amended.

According to the prosecution evidence the appellant was interviewed outside certain premises where there was a parked car. He was questioned about the car but those answers are not relevant to the present charge. On the back seat of the car the police saw a pipe. The police officer then deposed to the following conversation.

"I said, 'Is that your pipe?' He said, 'Yes.'
I said, 'What do you use it for?' He said,
'For smoking.' I said, 'For smoking what?'
He said, 'Grass, but I haven't used it for a
while.' I said, 'Do you mean Indian Hemp?' He
said, 'Yes.' I said, 'I am going to ask you some
further questions which you are not obliged to
answer, but anything you do say may be used in
evidence. do you understand?' He said, 'Yes.'
I said, 'When did you last use the pipe for
smoking Indian Hemp?' He said, 'I think it was
about a month ago.' I said, 'How long have you
had the pipe.' He said, 'That I am not too sure
of.' I said, 'What is it doing in the back of
your car?' He said, 'I lent it to a friend and
only just got it back.' I said, 'When did you
get it back?' He said, 'Yesterday.'"

Expert evidence was given that Indian Hemp within the meaning of the statute was present in the pipe.

Substantially that was the evidence for the prosecution.

It was submitted that there was no case to answer. The learned special magistrate ruled that there was. The offence is a minor indictable offence but the appellant elected to be dealt with summarily. He also elected to call no evidence. His counsel made further submissions. The learned special magistrate convicted.

He construed the relevant section of the Act which reads:

"5. (1) A person who -

(c) has in his possession any pipes, syringes or other utensils or any appliance or thing for use in connection with the preparation, smoking or administration of any drug to which this Act applies, shall be guilty of an offence against this Act."

He held that all that was required to establish the charge was that the appellant consciously had the pipe in his possession and that it had recently been used for smoking Indian Hemp. He laid stress on the presence of the word 'knowingly' in another subsection of sec.5(1) and its absence in subsection (c). He held that the words of the subsection were impersonal and did not import any mental element beyond the consciousness of possession of the pipe or other instrument.

Two days after the learned Special Magistrate had convicted the appellant, the Court of Criminal Appeal delivered judgment in the case of R. v. Ladner (judgment delivered 10th December, 1976). In that case I held, and I do not think my brethren disagreed with me, that the phrase "for use in connection with the preparation, smoking or administration of any drug to which this Act applies" refers to the purpose for which the possessor intends to use the thing in the future, not to the purpose for which the thing was manufactured or designed.

It is obvious that if the learned Special Magistrate had had that case before him he could not have decided as he did. It would have directed his attention to the question whether there was any evidence that the appellant had possession of the pipe for the purpose of using it in the future in connection with the smoking of Indian Hemp. He did not do that.

Hence it is apparent that the conviction cannot stand. The Crown did not dispute that. All that was argued before us was the nature of the consequential order.

Mr. Tilmouth, for the appellant argued that the proper order was an acquittal or a dismissal of the information. Mr. Bishop for the respondent argued that the proper order was an order for a new trial.

I do not think it can be said that there was no evidence on which a reasonable tribunal applying the proper legal test could have convicted.

I think that the court was entitled to treat the appellant's admission that he had used the pipe for smoking Indian Hemp at its fact value, (see R. v. Pfitzner (judgment of the Court of Criminal Appeal 10th December, 1976) referred to by the learned Special Magistrate in an addendum to his reasons), particularly since there was expert evidence that the pipe did in fact contain traces of Indian Hemp. From the admission of personal use of the pipe for the purpose of smoking Indian Hemp about a month ago, together with his statement that the pipe had been lent and had only been returned into his possession on the previous day, I think that a court could infer, if it thought fit, that the appellant intended to use the thing just returned into his possession for the same purpose. The inference is far from compelling.

I cannot say that it could not legitimately be drawn in the absence of more detailed information or explanation by the appellant.

I cannot therefore say there was no case to answer and it would seem then, that the proper order is an order for a retrial. Mr. Tilmouth however argued that if there was any evidence it was no more than a scintilla and that it would be oppressive on the appellant and impose hardship on him to order a new trial and subject him to further costs. He referred to such cases as R. v. Leak 1969 S.A.S.R. 172.

Undoubtedly the Court of Criminal Appeal has on occasions thought it right to refrain from inflicting the burden of a new trial on a successful appellant notwithstanding the existence of some evidence on which a jury could possibly convict. It has taken this course when it thought that a jury properly directed would probably acquit (Leak's case above at p.176) and that a new trial would inflict hardship on the appellant. Indeed, sometimes such hardship has been allowed even greater weight.

This however is not in my view a case in which it could be said that any reasonable tribunal, properly directed on the question of law involved, would probably acquit on the meagre evidence before it. Equally it cannot in my view be said that it would probably convict. It could decide either way. As I have said, I think that such a tribunal, directing its attention to the correct legal issue, could, but again I do not say that it would, find that on the evidence for the prosecution a prima facie case had been made out. If that case were unanswered then, again, I think that it might, though I do not say that it would, hold the case proved beyond

reasonable doubt. If the appellant gave some explanation, either by making an unsworn statement if the trial was before a tribunal where he could do that, or by giving evidence on oath, the whole case for good or ill might bear an entirely different complexion.

Accordingly I think there will have to be a retrial but I am impressed with the hardship on the appellant of having to bear the costs of two trials and an appeal as well, when through no fault of his the true legal issue was not decided. The normal practice of this court is that costs are not allowed in appeals against convictions for minor indictable offences, on the analogy of appeals against the verdict of a jury, and there is no doubt that this rule operates for the benefit of appellant defendants in more cases than it does to their detriment. But in exceptional cases the court has departed from the rule and allowed costs to a successful appellant against conviction for a minor indictable offence when the trial miscarried through no fault of his, Mines v. Doddrell 1938 S.A.S.R. 90.

I think this is such a case. We told Mr. Bishop at the conclusion of the argument that, if a retrial were ordered, we thought it was a proper case in which the appellant should have the costs of the appeal and he very properly expressed no opposition to that course and indeed I think he agreed with it.

Accordingly, I think that there must be a rehearing of the case and in all the circumstances it might be better if it were before another special magistrate. Of course the appellant, if he wishes, can on the rehearing elect in favour of a jury trial.

In my opinion the appeal should be allowed and the conviction set aside and the information remitted for hearing before another special magistrate and the appellant's costs of the appeal should be taxed and paid by the respondent.

Zelling J.

I concur.

WRIGHT v. SAMUELS

Full Court

Walters J.

I have had the advantage of reading the judgment of the learned Chief Justice, and I agree with both his reasoning and his conclusions. I would add a few observations of my own.

The decision of this Court in R. v. Ladner (Full Court: 10th December 1976) clearly calls for an order allowing this appeal. I do not think it is a case of quashing the conviction simpliciter, because in my view, the facts capable of being proved in evidence by the prosecution could be sufficient to raise a prima facie case against the appellant. And if the prosecution evidence were left unanswered by him, that evidence - subject to proper directions in point of law, or, if the charge were tried summarily, to the application of correct legal principles - could suffice to support a conviction. I do not think it is unjust to the appellant that a retrial should be granted to enable the evidence to be again submitted to another court. But in this connection, I wish to say something about the costs of the appeal.

By contrast with the provisions of sec. 127 of the Justices Act 1921-1976, which denies to a court of summary jurisdiction the power to award costs upon an order dismissing a charge of a minor indictable offence, there is nothing in the Act which shews an intention of the legislature to take away any jurisdiction in this Court with respect to the costs of a successful appeal against a conviction entered on a charge of a minor indictable offence. By sec. 163 of the Justices Act, the right is given to any person aggrieved by

any conviction, order or adjudication of a court of summary jurisdiction (including a conviction for a minor indictable offence) to appeal to this Court from such conviction, order or adjudication. It seems to me that, as a matter of general principle, a convicted person, who exercises his right to invoke the aid of this Court to remedy an error of law in the decision of the lower court and who is able to shew that the conviction was entered on a mistaken view of the law, should ordinarily be entitled to the costs incurred by him in having the mistake rectified.

Although sec. 177 of the Justices Act empowers this Court, on the hearing of an appeal, to "make such further or other order for costs or otherwise as the case requires", it has been long-standing practice in this Court to make no order with respect to the costs of an appeal from a conviction for a minor indictable offence (Green v. Ralphs (1971) 1 S.A.S.R. 433). No doubt this practice has much to do with the concept that where imprisonment has been ordered, an unsuccessful appellant, like the unsuccessful appellant on appeal from a conviction on information presented in the criminal jurisdiction of this Court, ought not to be ordered to pay costs. However, I think there should be a tendency to relax the strictness of the practice and to order costs in favour of a successful appellant where it is apparent that the conviction complained of cannot be justified as a matter of law. The expense of litigation is steadily increasing, and I believe it is wrong that a successful appellant should find himself left in the position of having to pay for errors of law in the court below. It seems to me, as it did to the Full Court in Mines v. Dodderell [1938] S.A.S.R. 90, that in exceptional cases, or, as I think, in cases where a patent

error of law has had to be rectified on appeal, the discretion of the appellate court ought not to be "fettered by any inflexible rule of practice". The extent to which the accepted rule of practice should be modified in any given case cannot be kept within precise limits, but I think that in the exercise of its inherent jurisdiction, the Court should ensure that obedience to a rule of practice is consistent with the use of "the court's process ... fairly and conveniently by both sides" (Connelly v. D.P.P. [1964] A.C. 1254, per Lord Devlin at p.1347). In the circumstances of the present case, I think an order for costs in the appellant's favour is warranted.

I therefore agree with the Chief Justice that the conviction should be quashed and a new trial ordered, and that the respondent should pay the appellant's taxed costs of the appeal, to be paid over as provided by sec. 178 of the Justices Act.