

## REGINA v. WHITFORD AND WIDDOWSON (No. 2)

1980. Court of Criminal Appeal: Green C.J., Crawford and Cosgrove JJ.

Aug. 25, 26, Nov. 7, 1980.

*Medicine — Drugs — Offences — Trafficking in prohibited substances and plants — Meaning of "trafficking" — Evidence — Effect of s. 47(7) — Alternative verdicts — Duty to take — In respect of what offences — Poisons Act 1971 (No. 81 of 1971), ss. 47, 49, 55\*.*

*Criminal Law — Jurisdiction, practice and procedure — Verdict — Alternative verdicts — Duty to take — Crown's duty to specify verdicts sought — Only one verdict on one count — Poisons Act 1971, ss. 47(9), 49, 55\*.*

*Criminal Law — Jurisdiction, practice and procedure — Verdict — General verdict taken though alternative verdicts possible but not sought — Trial thereby concluded.*

*Criminal law — Appeal and new trial — Alternative verdicts not taken — General verdict alone taken — New trial limited to alternative verdicts — Duty of Crown to specify offences.*

*Maxims, Words and Phrases — "Trafficking" — Poisons Act 1971, s. 47(3)\*.*

\* *Poisons Act 1971, s. 47 — (1) No person shall—*

*(a) sell or supply a raw narcotic or narcotic substance; or*

*(b) traffic in a raw narcotic or narcotic substance,*

*unless . . .*

*. . .*

*(3) No person shall —*

*(a) sell or supply a prohibited plant or prohibited substance to any person; or*

*(b) traffic in such a plant or substance.*

*. . .*

*(7) On an indictment under this section, proof that the accused person had in his possession, at the time of the alleged crime, more than the maximum permissible quantity of a raw narcotic or narcotic substance to which the indictment relates is evidence that he had it in his possession for the purposes of sale or supply to another person, or for the purpose of trafficking in that raw narcotic or narcotic substance, as the case may be.*

*. . .*

*(9) On an indictment under subsection (3) of this section, the accused person may be convicted of an offence under section forty-nine or section fifty-five and punished as provided in the relevant section.*

*. . .*

Against the accused, charged with trafficking in a prohibited substance and a prohibited plant contrary to the *Poisons Act* 1971, s. 47, there was evidence that they had grown cannabis and prepared it for sale and intended to sell it. The judge held that this was no evidence of trafficking and that it was unfair to take the alternative verdicts under s. 47(9). The jury gave a verdict of not guilty at his direction and were discharged.

*Held*, that—

- (a) there was no evidence of trafficking:

*Burton v. The Queen*, 1979 Tas.R. 193, applied: *Reg. v. Whitford*, 1980 Tas.R. 98, affirmed on this point;

- (b) the judge had no discretion not to put the alternative verdicts to the jury:

*Reg. v. Whitford*, 1980 Tas.R. 98, overruled on this point;

- (c) as the judge had taken a general verdict bringing the trial to an end the verdict must be set aside and the accused tried on the alternatives;

- (d) the Crown should specify before the new trial those charges on which it would rely; and

- (e) there can be only one conviction on each count:

*Reg. v. Ashman*, [1957] V.R. 364, approved on this point and *Reg. v. Whatley*, 1980 Tas.R. 152, not approved.

Per Cosgrove J. Section 47(7) applies only to prosecutions for trafficking in a raw narcotic or narcotic substance under s. 47(1) and not to prosecutions under s. 47(3) even if the plant or substance trafficked in was also a raw narcotic or narcotic substance and this was held by Everett J. below and Nettlefold J. at first instance in *Reg. v. Burton* (Unreported, Hobart Sessions, April and May, 1979).

For trafficking there must be a chain of traffic which is not confined to movement, for manufacture under a contract to provide the substance could be part of the chain and amount to trafficking.

In a prosecution for trafficking under s. 47(3) only the alternative offences on which a *prima facie* case has been made out should go to the jury and at the close of its case, if not before, the Crown should nominate the offences it claims to be in issue.

#### APPLICATION FOR LEAVE TO APPEAL.

Because of the acquittal of the defendants in *Reg. v. Whitford* 1980 Tas.R. 98 the Attorney-General applied for leave to appeal on the ground that:

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S. 49 — (1) No person shall have in his possession—

- (a) a prohibited plant, whether in its original form or not; or  
(b) any part of a prohibited plant,

unless . . .

S. 55 — (4) Notwithstanding any other provision of this Part, a person . . . who—

- (a) imports or brings into the State a prohibited substance;  
(b) makes, refines, prepares, sells, or supplies a prohibited substance;  
(c) has in his possession a prohibited substance; or  
(d) uses a prohibited substance,

is guilty of an offence against this Part.

...

"The Learned Trial Judge erred in law in holding that the Respondents had no case to answer, and in directing the jury that it should return a verdict of not guilty in respect to each of the Respondents in that—

- (1) The Learned Trial Judge ruled that subsection (7) of Section 47 of the Poisons Act 1971 had no application to an indictment laid under subsection (3) of that Section;
- (2) The Learned Trial Judge ruled that there was insufficient evidence in the Crown case on which either Respondent could lawfully be convicted of charges of trafficking;
- (3) The Learned Trial Judge ruled that subsection (9) of Section 47 of the said Act had no application to the case against the Respondents."

*K. B. Procter* for the Attorney-General.

*D. J. Porter* for the respondent Whitford.

*H. J. Kable* for the respondent Widdowson.

The following cases were referred to in argument:

*Falconer v. Andersen* [1974] V.R. 185.

*Reg. v. Peacock* [1974] Tas.S.R. (N.C.) 3.

*Kannan v. The Queen* (Unreported, C.C.A., 25th October, 1979).

*Burton v. The Queen* 1979 Tas.R. 193.

*Reg. v. Plain* (1967) 51 Cr.App.R. 91.

*Cur. adv. vult.*

NOVEMBER 7.

GREEN C.J. referred to the nature of the proceedings and continued:

*Ground 1.*

The learned trial judge held that even without resort to the provisions of s. 47(7) the evidence before the jury was capable of supporting a finding that each respondent intended to traffic in a prohibited substance and a prohibited plant. As counsel for the applicant recognized when making his submissions to this Court, it is thus unnecessary for the purposes of this appeal to determine whether the trial judge's ruling that s. 47(7) had no application was correct.

*Ground 2.*

I agree with the other members of the Court in concluding that the learned trial judge was correct in holding that upon the evidence neither accused could be lawfully convicted of trafficking. It is not necessary to attempt a comprehensive definition of the expression. It is sufficient to say that the trial judge, guided by the decision of this

Court in *Burton v. The Queen* 1979 Tas.R. 193 correctly held that upon no view of the circumstances revealed by the evidence could it be said that the respondents had engaged in any activity which amounted to trafficking: there was evidence that they had grown a prohibited plant and that they intended to traffic in a prohibited substance and a prohibited plant, but there was no evidence that they had dealt in or traded in or distributed a prohibited substance or a prohibited plant or that they had actually embarked upon any other activity which put that intention into effect.

*Ground 3.*

The description in this ground of the trial judge's decision not to ask the jury to return alternative verdicts as a "ruling" may not be apt. The reasons given by his Honour for arriving at that decision and, in particular, his opinion that to do so would not be "just", do not appear to me to have been directed towards the question of the proper construction of the relevant statutory provisions, but seem rather to have been considerations which he was taking into account in the exercise of a discretion. In my view, no such discretion resided in the trial judge. By the *Poisons Act* 1971, s. 47(9), Parliament has provided that on an indictment under s. 47(3) an accused person may be convicted of other offences. Where the evidence establishes a sufficient foundation for such an alternative verdict the provisions of s. 47(9) plainly form part of "the law applicable to the case" as to which by virtue of the *Criminal Code*, s. 371(j) a trial judge is obliged to instruct the jury. Although made in relation to appeals against convictions for murder, I see no reason for not regarding the following statements about the duty of trial judges in respect of alternative verdicts as of general application:

"The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it." Per Viscount Simon L.C. in *Mancini v. D.P.P.* [1942] A.C. 1, at p. 7.

"It is the duty of the judge on the trial of a charge of murder to direct a jury that a verdict of manslaughter is open to them if there is a basis in the evidence for such a possible verdict: see *Gammage v. The Queen* (1969) 122 C.L.R. 444; *Varley v. The Queen* (1976) 51 A.L.J.R., at p. 245." Per Gibbs A.C.J. in *Markby v. The Queen* (1978) 140 C.L.R. 108, at p. 113.

I agree with the conclusion reached by Crawford J. and Cosgrove J. that in the circumstances under which they were obtained the verdicts returned by the jury must be regarded as general verdicts which had the effect of acquitting the respondents of

the crimes charged in the indictment together with all other offences of which they might have been convicted on the indictment. See *Reg. v. Ashman* [1957] V.R. 364; *D.P.P. v. Nasralla* [1967] 2 A.C. 238 and *O'Halloran v. O'Byrne* [1974] W.A.R. 45. But insofar as the general verdicts were verdicts of acquittal in respect of those other offences they were returned after the jury had been given an incomplete direction as to the law and as the result of a direction to acquit which was not warranted in respect of those offences and it cannot therefore be said that the respondents have been tried in accordance with law in respect of them.

I would grant leave to appeal. I agree with the orders proposed by Crawford J.

CRAWFORD J. referred to the previous proceedings, set forth the ground of the application before the Court, and turned first to its second paragraph. He set forth evidence relevant to the charges of trafficking, set forth the relevant part of the trial judge's reason for ruling that there was no case to answer on those charges (*supra*, pp. 101-105), and continued:

His Honour said that there was "evidence of some degree of negotiation with respect to a sale", but concluded "there is in my opinion insufficient evidence on which either accused could lawfully be convicted of charges of trafficking". With respect I agree with his Honour's reasons and his ruling. In my ruling in *Reg. v. Whatley* 1980 Tas.R. 152, at p. 154, a case of alleged trafficking, I held that an accused "should not be convicted by merely being the grower. It is not sufficient if he grew the prohibited substance with intent that it be sold".

As to paragraph (1) of the application, his Honour after setting forth s. 4(7), continued:

It is unnecessary to consider this ground because, even if his Honour had ruled that the subsection was applicable, it would have been evidence of no more than that the substance and the plant were in the possession of each accused for the purpose of trafficking in the substance and the plant and that took the matter no further than the evidence before the jury as to which the trial judge observed in his ruling:

"The jury also would in my view, be in no doubt that each accused intended to traffic in a prohibited substance and a prohibited plant."

For these reasons the learned trial judge did not err in law in holding that the respondents had no case to answer and that the jury should return a verdict of not guilty so far as it related to the offences specifically charged.

The matter numbered (3) in the notice of application relates to a ruling by the trial judge on a submission of counsel for the Crown made while replying to the submission that there was no case to

answer. That submission relied on the *Poisons Act* 1971, s. 47(9) [which his Honour set forth].

On the first count, there was evidence upon which each accused could lawfully have been convicted of at least one offence under s. 55(1)(c):

“55— (1) . . . a person . . . who—

. . .

(c) has in his possession a prohibited substance . . .

is guilty of an offence against this Part.”

and possibly of other offences created in other paragraphs of that section.

On the second count, there was evidence upon which each accused could lawfully have been convicted of having in his possession a prohibited plant or part of a prohibited plant. [His Honour set forth s. 49(1) and referred to the definitions of “prohibited plant” and “Indian hemp” in s. 3(1).]

As I held in *Reg. v. Whatley* 1980 Tas.R. 152, at p. 154, subs. (9) “means that an accused person, if, and only if, he is acquitted of trafficking in a prohibited substance” (and I would now include “in a prohibited plant”) “may be convicted in the alternative of an offence under s. 49 or s. 55”.

The learned trial judge ruled upon the submission of counsel for the Crown [his Honour set forth the trial judge’s ruling on this (*supra*, p. 105)].

His Honour then set forth the portion of the transcript containing the judge’s direction to the jury and the taking of the verdict, and continued:

As was observed by Lord Devlin, delivering the judgment of the Board on appeal to the Privy Council in *D.P.P. v. Nasralla* [1967] 2 A.C. 238, at pp. 248-249:

“There are three categories of verdict in a criminal case. The first is the general verdict which is of conviction or acquittal upon the whole count. The second is the partial verdict. When at common law or by statute a jury is empowered to convict of a lesser or different crime to that charged in the count, they can be asked to return partial verdicts specifying the crime to which each verdict refers. The third category, which is not suggested as being applicable in the present case, is the special verdict, . . .”

The third category is not applicable in this case. The *Criminal Code*, s. 383, does not refer specifically to the second category of the partial verdict. Section 383(1) provides:

“Upon the trial of an indictment the jury may in any case—

- (a) return a general verdict of ‘guilty’, or ‘not guilty’;
- (b) find specially upon all the facts necessary to enable the judge to pass judgment; or
- (c) if they return a general verdict, find specially upon any

question submitted to them by the judge.”

Section 311(6) provides:

“(6) Where there are more counts than one in an indictment each count shall be regarded as a separate indictment.”

A “partial verdict” is clearly a general verdict of “guilty” or “not guilty” of any crime or offence of which an accused may be convicted on a count (whether the crime charged or not). It is clear that the learned trial judge, in ruling that he proposed “to direct the jury that it should return a verdict of not guilty in respect of each accused” and then in directing the jury “your only lawful verdict can in the light of my ruling be not guilty of each count so far as each accused is concerned” directed the jury to return a general verdict of not guilty upon each count and, in effect, directed the jury that no alternative offences were to be considered. Although the associate, as clerk of the court, took verdicts specifically on each count of trafficking against each accused, I am of the opinion that the verdicts must be regarded as general verdicts on each count against each accused. However, even if, contrary to that opinion, the verdicts by reason of the nature of the questions of the clerk of the court and the answers given were partial verdicts, the trial judge was in error in not specifically leaving to the jury the alternative offences upon which the accused might have been convicted on the evidence. As Lord Parker, C.J., delivering the judgment of the Court of Criminal Appeal in *Reg. v. Carter* [1964] 2 Q.B. 1 (a case where the law provided for an alternative conviction), at p. 6, said:

“In the judgment of this court a verdict is not complete until a jury have dealt with all the possible verdicts on the indictment, and, if a judge discharges a prisoner before the jury have completed their verdict, in the view of this court that discharge is a complete nullity.”

In *Leighton v. The Queen* (Unreported, C.C.A., 14th April, 1960) Burbury C.J. with whose judgment Crisp J. and I concurred, referred to the:

“... plain duty of the trial judge imposed by the law to direct the jury as to the constituent elements of manslaughter appropriate to the case where there is a foundation in the evidence for a verdict of manslaughter. The proposition that a man charged with murder who gives evidence or relies upon evidence which while tending to negative intent to kill also supports a verdict of manslaughter is entitled to confine the application of that evidence to the charge of murder is, I think, an impossible one. He cannot escape the consequences for which the law itself positively provides. It does not lie in his mouth to confine the evidence to the charge of murder alone without running the risk of a conviction for manslaughter. If there is evidence given at a trial for murder which may properly

lead to a conviction for manslaughter in the event of the accused's being acquitted of murder, justice to the community requires that the jury should be directed as to manslaughter and in my opinion the law clearly so provides . . . There is, I think, no room for the view that upon an indictment for murder the Crown is obliged to provide particulars of the statutory alternative crime of manslaughter not charged by the indictment and which indeed cannot be charged by the indictment by virtue of the provisions of s. 311(3) of the *Code* itself. It becomes the duty of the trial judge, whether the alternative is referred to or not by counsel, to direct the jury as to that crime if there is evidence to support it. Indeed, the evidence supporting the crime of manslaughter may in many cases come only from the accused himself. The law in that case clearly requires the alternative to be left to the jury."

See also my reference to *Reg. v. Lillis (infra)*.

In the present case, after the verdicts, the trial judge discharged each accused and, in telling the members of the jury that they might leave the court and attend the following morning to join the jury panel for another trial, must be taken to have discharged the jury.

In giving his reasons for his ruling, his Honour seems to have exercised a discretion, but it is clear that Parliament has provided for the possibility of alternative convictions, and a judge, in my opinion, has no discretion to withhold such a possible conviction from the jury if there is, as here, a foundation for a conviction in the evidence. In *Reg. v. Lillis* [1972] 2 Q.B. 236, after referring on p. 241 to a possible alternative conviction, Lawton L.J. said:

"... the judge can and should ask the jury to consider whether that other offence has been proved." [1972] 2 Q.B., at p. 242.

and went on to consider how a possible injustice from the presentation of the possibility of alternative convictions could be corrected by the exercise of a discretion, saying that that was "by granting adjournments or even by discharging the jury if an adjournment would have to be a long one and requiring the prosecution to start again on the reduced charge".

A sound reason for ruling that a trial judge has no discretion to withhold from a jury a possible conviction of an alternative offence properly open on the evidence is that, if a general verdict of not guilty is directed on a count of which such a conviction is provided for by law, the exercise of his discretion would, contrary to the intention of Parliament, in this case expressed in s. 47(9), enable a person so convicted and later charged with an alternative offence successfully to plead under the *Criminal Code*, s. 355, that he had already been acquitted upon an indictment upon which he might have been convicted of that crime or, if that section is not applicable (as in the present case) where offences under the *Poisons Act* 1971,



ss. 47, 55 are not crimes but summary offences not indictable, to plead successfully *autrefois acquit* at common law. See *Reg. v. Quinn* (1952) 53 S.R. (N.S.W.) 21; *Reg. v. Ashman* [1957] V.R. 364; *D.P.P. v. Nasralla* [1962] 2 A.C. 238; *O'Halloran v. O'Byrne* [1974] W.A.R. 45. *Leighton v. The Queen* (*supra*) is authority that the trial judge has no such discretion.

I would give leave to the Attorney-General to appeal on the ground that this is a fit case for appeal against acquittal on a question of law alone. I would allow the appeal and order that the verdict of acquittal on each count in so far as it is an acquittal of any offence under s. 49 or s. 55 of the *Poisons Act* 1971 be set aside, that the order discharging both respondents in respect of offences under those sections be set aside, that a new trial be had of the first count limited to such offence or offences under s. 55 of the *Poisons Act* 1971 as the Crown specifies and that a new trial be had of the second count limited to such offence or offences under s. 49 of the *Poisons Act* 1971 as the Crown specifies.

In *Reg. v. Whatley* 1980 Tas.R. 152, at p. 157, I said:

"I have reached the conclusion that the proper interpretation of the subsection is to read the words 'an offence' as 'offences', reading the plural for the singular, applying the *Acts Interpretation Act* 1931, s. 24. There is nothing, in my view, in the *Acts Interpretation Act* 1931, s. 4, to prevent that being done. I am also of opinion that 'or' appearing between the words 'section 49 or section 55' should be read as 'and', and it should be left to the jury, if they are considering alternative convictions, to convict an accused in the alternative of *more than one offence* under s. 49 and s. 55."

I am now of opinion that that was an incorrect statement of law. In *Reg. v. Ashman* [1957] V.R. 364 Barry J. was dealing with a similar situation — see the Victorian *Crimes (Driving Offences) Act* 1955, ss. 2, 3, set out on pp. 365 and 366. At p. 367, Barry J. said:

"Where the presentment charges manslaughter" (one offence) "only, however, I think it is in accordance with established practice that the jury should be directed, as they were in this case, that if they are not satisfied that the accused is guilty of manslaughter, they may, where the evidence warrants it, convict him of either of the statutory misdemeanours, but *not of both*."

"... It follows from the rule that every count of a presentment must charge one offence and no more" (as is provided by the Tasmanian *Criminal Code*, s. 311(4)) "that there may be one conviction only in respect of any one count, and this is true whether the conviction is for the offence charged, or for some offence less than that charged of which the jury are empowered, either by common law or by statute, to convict the

accused. I think Parliament must be taken to have legislated with this fundamental rule of fairness in mind, and to have intended that where the presentment charges manslaughter, and the jury are not satisfied to convict of that offence, they may on that presentment convict of *one only* of the misdemeanours created by the legislation.”

I prefer the reasoning of Barry J.

COSGROVE J. referred to the nature of the proceedings, set forth the *Poisons Act* 1971, ss. 47, 49 and 55, referred to the evidence and what occurred at the conclusion of the Crown's case, set forth the ground of the Attorney-General's application, and dealt with its first paragraph, saying as to s. 47(7):

However, it is important to note that even if the subsection were given full application to the Crown case, it could at best amount to evidence that the accused persons jointly had cannabis in their possession for the purpose of sale, supply, or trafficking. As the learned trial judge had ruled that there was evidence from which the jury could infer that the twenty-nine bags of cannabis material were packaged with a view to subsequent sale and that each accused intended to traffic in a prohibited substance, and a prohibited plant, a decision that the subsection was applicable would not advance the Crown case any further.

The learned trial judge declined to apply it because he took the view that it was intended to apply to prosecution for trafficking in a narcotic *qua* narcotic and not to prosecutions for trafficking in a prohibited substance, even though the substance in question was a narcotic. Subsection (2) provides that where a narcotic substance is also a prohibited substance, no indictment may be brought for trafficking in a narcotic substance. The indictment must be for trafficking in that substance as a prohibited substance. It follows that no indictment may be brought for trafficking in the narcotic substance “cannabis”. That product is treated for the purposes of indictment only as a prohibited substance. Evidence of possession of more than the maximum permissible quantity would be, if the section is to be applied, evidence of a purpose or intention to traffic in it as a narcotic substance, and that is irrelevant to the only charge which may be laid, namely, of trafficking in a prohibited substance. This was, I think, the burden of his Honour's ruling and of the passage which he quoted, and followed, from the ruling of Nettlefold J. at first instance in *Reg. v. Burton* (Unreported, Hobart Sessions, April and May 1979) (*supra*, pp. 102, 103).

Although the determination of the arguments raised by the Crown can have no effect on the outcome of the appeal it may be relevant to further proceedings against the respondents. It is therefore desirable to express a firm view. With respect I would agree with the interpretation of the subsection arrived at by Everett and

Nettlefold JJ. I would add that as this is a penal statute affecting the burden of proof it should be strictly construed. On a strict construction it cannot be said, in my opinion, that it can be applied on an indictment under subsection (3) so as to render evidence of the possession of cannabis in a quantity more than the maximum permissible, evidence of possession for the purpose of sale or supply.

*The complaint that the learned trial judge was wrong in holding that there was not sufficient evidence of trafficking to go to the jury.*

The evidence amounted to no more than this.

- (a) The respondents had jointly grown cannabis.
- (b) They had jointly harvested it.
- (c) They had jointly packaged it.
- (d) They intended to sell some for \$20 per deal.
- (e) They had been approached by a buyer, who had rejected their product as not suitable to his requirements.

The learned trial judge held that this evidence was insufficient to ground a conviction for trafficking. He said that it was clearly sufficient to justify a conviction for being in possession of a prohibited substance and a prohibited plant, and for growing a prohibited plant. He added that a jury would "be in no doubt that each accused *intended* to traffic in a prohibited substance and a prohibited plant." But he said: "the essence of a charge under s. 47(3) is not the formation of an intention; it is the commission of an act which amounts to trafficking, as that word should be interpreted on the facts of each individual case, in accordance with the binding decision of the Court of Criminal Appeal of Tasmania in *Burton v. The Queen*." (1979 Tas.R. 193)

In other words, he ruled that the evidence showed no more than a preparation for trafficking. In my opinion, his ruling was correct.

Without attempting to define "traffic" or "trafficking" it may be useful to suggest that in any analysis of evidence being made for the purpose of determining whether the activity thereby established amounts to trafficking, it would be useful to bear in mind that what must be made out is traffic *in the substance*. The question must be asked: Does the evidence show the existence of a traffic in the substance under consideration? If the substance can be said to have moved into a chain of distribution, then any act which is designed to protect the chain or move the substance may be trafficking, even though the accused is not himself moving or handling it. On the other hand, if the substance has not yet reached the traffic chain, then handling of it will not be trafficking. The chain is not always to be confined to movement. Manufacture pursuant to a contract to provide the substance could be part of the chain and amount to trafficking. In most cases, though, manufacture or growing in the hope of being able to enter the chain will not be trafficking. Something more than mere production of a substance and intention

to distribute it must be seen to appear. That something may appear from past activities or from surrounding circumstances. But, in order to give an activity the character of trafficking, the traffic itself must be shown to exist. In this case there was no circumstance which could give the growth and packaging the character of an existing traffic. As the learned trial judge ruled, the traffic had not begun.

This complaint of error also fails.

*The complaint that the learned trial judge refused to apply s. 47(9) of the Poisons Act.*

His Honour did refuse to apply this subsection and by discharging the accused generally, i.e., from the whole indictment, and not only from the crimes of trafficking, and subsequently discharging the jury, he effectively prevented the jury from considering the guilt or otherwise of the accused in relation to offences under ss. 49 and 55.

His Honour set forth the relevant part of the ruling (*supra*, at pp. 102, 103) and continued:

Section 47(9) is a difficult provision and it is easy to sympathize with his Honour's view that it smacks of injustice to put citizens on trial on inadequate evidence and then require them in that trial to defend themselves against innominate and unparticularized charges of a considerable variety of other offences. There is much to be said, in my view, for the institution of a practice whereby the Crown is required to specify, at the commencement of its case, which of the offences created by ss. 49 and 55 may fall to be considered by the jury.

But, be that as it may, the sections clearly envisage that once the accused had been arraigned on the indictment, they were in peril of a conviction for at least one of the offences created by those sections.

However, there are some limitations in relation to those charges. First, as Mr Procter conceded the unstated charges must be regarded as alternatives to the crime of trafficking in the same way as alternative convictions are provided for in the *Criminal Code*, Ch. XXXIX, i.e., they fall for consideration only if the accused is acquitted of the charge set out in the indictment. I would think also that the charges of summary offences are themselves alternatives to each other, in that once a conviction is found, the trial ends.

Secondly, the only unstated alternative charges which could go to the jury would be those of which it could be said that a *prima facie* case had been made out in the evidence adduced by the Crown.

Thirdly, at the close of the Crown case, if not before, the Crown should nominate which of the alternatives it claims to be in issue, so that the question can then be debated as to whether any *prima facie* case has been made out.

But subject to these limitations, an indictment under s. 47(3)

effectively carries, as a sort of hidden freight, one or more of the full possible cargo of charges of offences under ss. 49 and 55. And it did so in this case. When the verdict of not guilty of trafficking was pronounced, the accused were "entitled to be forthwith discharged, so far as regards that crime" (*Criminal Code*, s. 384). But the indictment did not thereby fail or become exhausted of all content, as his Honour seems to have concluded. It was not like a case where the indictment itself is quashed, and it and everything it contains, falls to the ground. In this case, the obvious content (i.e., the charge of the crimes of trafficking) was disposed of, but the unstated charges remained. As to those charges, and subject to the limitations I have suggested, the trial should have continued. As his Honour said, there was a strong case against them in relation to some at least of the charges. Mr Procter did, at the trial, suggest that charges of possession of the plants and the substances should go on. But he did not formulate any charges with precision. Nevertheless, in aborting the trial, his Honour, in my respectful view, fell into error, and as a result the accused were not tried according to law. Mr Kable's argument to the contrary was not, in my view, at all persuasive. Nor was his concentration that this was a case for the application of the proviso under s. 402(2). It cannot be said, in my view, that the complete failure to call upon the accused to answer any of the unstated charges and the evidence which bore thereon was anything other than a miscarriage of justice.

There remains the question as to the orders, if any, which this Court should make.

In order to resolve that question, it is necessary to consider the effect of the jury's verdict. If it is a general verdict of acquittal of all charges which could be carried by the indictment then the Crown appeal is competent, and the Court may order a new trial. The verdict would also, in the appropriate case, found a plea of *autrefois acquit*.

If, on the other hand, there has been no verdict on any of the unstated charges, there can be no appeal, no order for a new trial, and there has been no acquittal which would found a plea of *autrefois acquit*.

The general verdict has a long history. In Hale's *Pleas of the Crown*, Vol. 2, edn. of 1800, p. 245, the author says:

"But, if a man be acquit generally upon an indictment of murder, *autrefois acquit* is a good plea to an indictment for manslaughter of the same person, or *é converso* if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same."

In *Reg. v. Quinn* (1953) 53 S.R. (N.S.W.) 21, the respondent was indicted for murder and acquitted of that charge. The jury were

unable to agree as to whether he was guilty or not guilty of manslaughter and were discharged. The respondent was subsequently indicted for manslaughter and a plea of *autrefois acquit* upheld. It was held by the Court of Criminal Appeal (Street C.J., Owen and Herron JJ.) that the plea should have failed because there was no general verdict of acquittal. The respondent "undoubtedly stood in peril of a conviction for manslaughter on his first trial, but the jury did not deliver him", (Owen J., with whom Street C.J. concurred, at p. 23). Herron J. said (at p. 28):

"In the case before the Court, there was no general verdict of not guilty. If there had been, Mr. *Hidden's* argument would have been well founded." (Mr. Hidden was endeavouring to support the finding of *autrefois acquit*.)

*Reg. v. Quinn* was specifically approved by the Privy Council in *D.P.P. v. Nasralla* [1967] A.C. 238. At p. 251, their Lordships said:

"In their Lordships' opinion the law on this point is as stated in *Hale* and in that statement the word 'generally' is of vital import. If on a plea of *autrefois acquit* the accused proves a general acquittal on a previous indictment, the plea is good for every crime for which he could on that indictment have been convicted. If he proves a partial acquittal, the plea is undoubtedly good for the crime specified in the verdict of acquittal. Whether or not it is good for any other crime must depend on the circumstances in which it is given. Their Lordships do not intend to deal exhaustively with all the consequences of partial verdicts. It may well be that if on any count a jury have delivered partial verdicts, whether of conviction or acquittal, on all the crimes which they have been told to consider, the verdicts taken together will support a plea of *autrefois acquit* on any other crime of which the accused could have been found guilty on that count. It must depend upon what inference can in the circumstances of a particular case properly be drawn from the verdict."

In Victoria, Barry J. in *Reg. v. Ashman* [1957] V.R. 364, at p. 369 considered a similar problem and said this:

"The authorities appear to me to establish the following propositions:—

1. A presentment operates to charge the accused, not only with the offence it specifies, but also with any lesser offence for which, on that presentment, it is lawful to convict him (*R. v. Quinn* (1953), 53 S.R. (N.S.W.) 21, at pp. 26-27, per Herron, J.; cf. *Callaghan v. The Queen* (1952), 87 C.L.R. 115, at p. 125; *Kelly v. The King* (1923), 32 C.L.R. 509, at p. 517; *R. v. Kolacz*, [1950] V.L.R. 200, at p. 202).
2. While the jury are empowered by s. 2(2) to return as their

verdict that the accused is not guilty of manslaughter but is guilty of the statutory misdemeanour created by s. 2(1), if they return a general verdict of acquittal, that verdict would deliver the accused not only of the charge of manslaughter, but also of the other offences of which it was within their power to convict him (Chitty's Criminal Law (2nd ed., 1826), at p. 454, and see p. 640; *R. v. Quinn*, ante, at p. 23, per Owen, J., and at pp. 25-26, per Herron, J.; Spencer Bower on Res Judicata, at p. 123).

3. Where it appears clearly from the record (or would appear if the record were made up) that, although they found him not guilty of the offence for which he was presented, the jury were unable to agree upon a verdict in respect of an offence of which (though it was not specified in the presentment) they could legally have convicted him, and that they did not acquit him of that offence, the accused has not been delivered by the jury in respect of the latter offence, and he may be presented and tried again for that offence (*Selvester v. U.S.* (1897), 170 U.S. 262, at p. 270; *O'Connell v. The Queen* (1855), 11 Cl. & F. 155, at pp. 296-297; *Reg. v. Quinn*, ante, at p. 23, per Owen J.; *Kelly v. The King*, ante, at p. 517; *Callaghan v. The Queen*, ante, at p. 125; *R. v. Kolacz*, ante, at p. 202)."

In Western Australia the Full Court considered the matter in *O'Halloran v. O'Byrne* [1974] W.A.R. 45. *Reg. v. Quinn* and *D.P.P. v. Nasralla* were applied and followed. The respondent in that case had been charged with the rape of a fifteen year old girl and acquitted. On that indictment, he could have been convicted of unlawful carnal knowledge. The trial judge declined to direct the jury as to their power to do so. Accordingly, the only question put to them was "On the charge of rape, how say you? Is Barry Douglas O'Byrne guilty or not guilty." Upon being subsequently charged with unlawful carnal knowledge, a plea of *autrefois acquit* was upheld. An appeal to the Full Court was dismissed on the basis that the verdict was one of general acquittal.

When Everett J., having directed the jury that they were bound to follow his direction, ruled that there was insufficient evidence for the "*trial*" to proceed and then told the jury that it was their duty to bring in a verdict of not guilty, he was plainly inviting them to bring in a general verdict of acquittal. They must be taken to have done so. There is no circumstance which leads to any other conclusion.

That being so, the appeal is within power, and for the reasons given above must succeed. There is clearly a case against the accused in respect of offences under s. 49 and s. 55 and they have not been tried in respect of any of those offences. There should be an order for

a new trial limited to such offences under s. 49 or s. 55 as the Crown specifies prior to trial.

1. *Application for leave to appeal granted.*
2. *Appeal allowed.*
3. *Verdict of acquittal on each count insofar as it is an acquittal in respect of offences under s. 49 or s. 55 of the Poisons Act 1971, set aside.*
4. *The order discharging both respondents in respect of offences under s. 49 or s. 55 of the Poisons Act 1971 set aside.*
5. *That a new trial be had of the first count in the indictment limited to such offence or offences under s. 55 of the Poisons Act 1971 as the Crown specifies and that a new trial be had of the second count in the indictment limited to such offence or offences under s. 49 of the Poisons Act 1971 as the Crown specifies.*
6. *Respondents remanded for trial at a place and a time to be fixed.*

Attorneys for the respondents: *McManus, Palmer & Zeeman, H. J. Kable & Co.*

F.D.C.S.