

1735
Heard: 5th May 1976.

Delivered: 17 MAY 1976

IN THE SUPREME COURT
OF WESTERN AUSTRALIA.

LAVAN J.

Appeal No. 123 of 1975

IN THE MATTER of the Justices Act 1902 as amended

-and-

IN THE MATTER of the Poisons Act 1964-1970

-and-

IN THE MATTER of the decision of Mr. R.C. Hold J.P.
and Mr. G. Jager given in the Court of Petty Sessions
held at Wickham on 2nd July 1975 on the hearing of a
complaint made by EDWIN GRAEME LIENERT against
RUSSELL WAYNE VIBERT

RUSSELL WAYNE VIBERT

Appellant (Defendant)

v.

EDWIN GRAEME LIENERT

Respondent (Complainant)

Mr. M.C. Lee for appellant, instructed by Downing & Downing.

Mr. D.G. Rodway for respondent, instructed by State Crown Solicitor.

AUTHORITIES:

re S. (an infant) v. Manchester Recorder, 1971, A.C. 481, 489, 491.
Slater v. Marshall, 1965, W.A.R. 222, 230, 231.
Di Camillo v. Wilcox, 1964, W.A.R. 44, 46.
Wills v. Williams, 1971, W.A.R. 29, 33.
R. v. Bentham (1972) 3 All E.R. 271, 275
Ianella v. French (1969) 119 C.L.R. 84, 93, per Barwick C.J.
Warner v. Metropolitan Police (1968) 2 All E.R. 356, 387.
R. v. Tolson (1889) 23 Q.B.D. 168, 181.
Archbold (38th Edn), para. 3368.

On 1st July 1975 in the Court of Petty Sessions at Wickham
the appellant was charged that on 30th June 1975 not being a person
authorised under the provisions of the Poisons Act he had in his
possession a prohibited plant, to wit cannabis contrary to s.41A(3)
of the Poisons Act.

To the charge the appellant pleaded guilty whereupon the Justices
fined him the sum of \$500 and ordered him to pay the costs of the
complainant.

Section 197(1)(b) of the Justices Act provides that where a person who has been convicted by Justices after he has pleaded guilty shows by affidavit to the satisfaction of a Judge that there are reasons which are sufficient to show that the decision of the Justices in convicting the person should be reviewed, a Judge may grant the applicant an order nisi calling on the party interested in maintaining the decision to show cause why the decision should not be reviewed.

On 17th September 1975 the appellant made an application for an order nisi to review. In his affidavit in support of his motion for the order he deposed that on 30th June 1975 while leaving the shopping centre at Wickham in the company of one Peter George Martin whom he had known for the previous three years he had been approached by two Customs officers and that he had at their request accompanied them to the Customs Office where he was interrogated. He stated:

"I was asked my name and address, how long I had known Peter George Martin and then allowed to go. I returned to my room at the single men's quarters and it occurred to me that Peter had in his room three small cannabis plants. I went to his room and as it was locked I put my arm through the vent and unlocked the door from the inside. I went to his wardrobe and pulled out the three plants which were in paper cups. The plants broke off at the roots and I put the three tops of the plants in my pocket and wrapped the paper cups in a paper bag. As I left the room I bit off the tops of the plants and threw them in some small bushes along the footpath. I put the bag with the paper cups in it in the rubbish bin. I then went back to my room. Some time later I went to Peter's room and found him there with three or four policemen; the police appeared to know of the existence of the cannabis plants and asked me if I knew what had become of them. I said: 'Yes, I have destroyed them'. The charge referred to

was then laid against me. " The appellant also deposed:

"At the hearing of the charge before the Justices of the Peace on 2nd July I pleaded guilty because I thought that what I had done in fact amounted to the offence with which I had been charged and made me guilty of it. I no longer think that this is the case as all I did was to destroy the cannabis."

This is the return of an order nisi granted to the appellant on 17th September 1975 calling upon the respondent/complainant to show cause why the conviction should not be reviewed on the grounds that -

- (a) in the circumstances of the case the appellant had a triable defence to the complaint alleged and it would be unjust to allow the conviction to stand, the appellant being unrepresented at the time the conviction was entered on his own plea of guilty, or
- (b) (alternatively) the learned Justices erred in law in failing to invite the appellant to withdraw his plea of guilty and in failing to enter a plea of not guilty after they had heard a statement of facts alleged in support of the complaint, and
- (c) why the penalty should not be reviewed on the ground that a fine of \$500 was manifestly excessive in the circumstances.

The principles upon which a Court should act in considering an appeal of this nature have been canvassed in a number of cases. The basic philosophy against which s. 197(1) in section B of the Justices Act was enacted is reflected in the passage from the judgment of Madden C.J. in R. v. Inglis (1970) V.L.R. 672 that "it is a matter of interest for every judge who tries a prisoner to be as nearly sure as human prevision can make him, that the prisoner ... may not be mere accident or ignorance plead guilty to an offence of which on investigation by a constituted tribunal he

might be acquitted". The same proposition was stated by Hale J. in Thomason v. Martin, 1964 W.A.R. 136 at p.142: "It is axiomatic that every Court should to the best of its ability see that no man is convicted on a confession of guilt if there appears to be a defence worthy of investigation."

The respondent Det. Sgt. Lienert in an affidavit filed in relation to this appeal deposed that he had been present at the conclusion of an interview between Constable Roberts and the appellant during which the appellant had made and signed a statement. The relevant passages of that statement read: "After I left the office I went to my room, emptied my pockets and then went to Peter's room as I knew he had three marihuana plants growing in his cupboard. The door to Peter's room was locked so I removed the vent from the door, reached in and unlocked it, then replaced the vent. Once inside I went to the cupboard where the plants were, took them from the cups that they were growing in, left the room and headed towards my own room, and on the way I threw the plants into the bush after having first bitten the tops off two of them. My reason for taking the marihuana plants is that I knew that they were there and that it is illegal to have them and that Peter could be charged if they were found in his room. Over the past week I have shared cigarettes with Peter that have contained marihuana; these have been smoked in Peter's room in the main but we had one or two in my room."

Det. Sgt. Lienert further deposed that after the appellant had acknowledged the correctness of the statement he had advised him that he would be charged with possessing a prohibited plant and that at the request of the appellant he had explained to him the meaning of the charge. He had also advised him to get in touch with a

solicitor but the appellant had declined to do so. In Court, after the appellant had pleaded guilty to the charge the deponent in the capacity of prosecutor had given to the Justices the following account of the facts:

"Accused was in company of another person, namely one Peter George Martin when Martin was found in possession of a quantity of cannabis. Martin was arrested and the accused Vibert was allowed to go. Vibert immediately went to Martin's room in the single men's quarters and broke in by removing the ventilator. Once inside he removed three cannabis plants that were growing in Martin's room; he took them outside, bit the tops off the plants and threw the soil and containers into the rubbish bin.

"Interviewed by police, accused admitted that he went to the room because he knew that Martin had been cultivating cannabis plants and that he wanted to get rid of them before police searched the room. He knew it was wrong to possess cannabis or the plants. Accused stated that he had been smoking and using cannabis for about four years and that he had used harder drugs. Accused smoked cannabis two nights prior to his arrest for this offence."

The appellant had acknowledged that the facts as stated were correct and advised the Justices that he had nothing to say. He was thereupon convicted and fined.

Section 41A of the Poisons Act provides as follows:

"(1) Subject to this Act the Commissioner may grant to any person a licence to ... have in his possession any prohibited plant.

(3) A person shall not ... have in his possession any prohibited plant unless he is licensed under this section to do so.

According to s. 5 of the Act "prohibited plant" means

"any plant from which a drug of addiction may be obtained, derived or manufactured, or such other plant as the Governor declares and is hereby authorised to declare from time to time to be a prohibited plant for the purposes of this Act ..."

"Drug of addiction" means "any substance specified in the Eighth Schedule or added to that schedule by order in Council."

The Eighth Schedule of Appendix A to the Poisons Act which was proclaimed on 2nd April 1974 concludes the item: "Cannabis and cannabis resin and extracts and tinctures of cannabis".

It is apparent that a cannabis plant is in fact a prohibited plant within the meaning of s.41A(3) of the Poisons Act. The appellant argues however -

- (a) that there was no or no sufficient evidence that the appellant was in possession of a prohibited plant, contrary to s.41A(3) of the Poisons Act either at the time of his arrest or at all,
- (b) that the learned Justices erred in fact and in law in failing to ascertain whether a plea of guilty was being made through mistake or ignorance before accepting the plea, and
- (c) that the penalty imposed was manifestly excessive in the circumstances.

The appellant in an affidavit sworn subsequent to the granting of the order nisi deposed that when asked by the Chairman of the Court whether he agreed that the statement of facts presented by the respondent was true, he had replied that it was not completely true; he had denied that he had indulged in the use of "hard" drugs at any time. He stated that he had been prompted to plead guilty to the charge preferred against him by reason of -

- (1) his inability to raise bail and his consequent fear of losing his employment were he to be remanded in custody,
- (2) the cost of obtaining legal representation, and
- (3) his belief after discussing the matter with certain police officers that he would probably be convicted in any event.

In Thomason v. Martin, 1964 W.A.R. 136 at p. 142 Hale J. stated:

"Where a man of normal faculties hears a charge clearly read and then pleads guilty, there must be a strong presumption that he has understood the charge and that he is in fact guilty ... Clearly no rigid rules can be formulated and every judge and magistrate must exercise his discretion in each individual case as to whether any enquiry should be made from, or explanation given to, any individual accused, ... It appears ... clear that if justice is to be done and to be seen to be done then where the offence charged is of a complex nature ... and ... the facts and circumstances under which the charge is brought before the Court are such as to lead a magistrate to conclude that there is a real possibility that the accused person has a triable defence, then, if the accused person is not represented the magistrate is under a duty to satisfy himself that a plea of guilty is not being made through mistake or ignorance, the only criterion which can be applied in the enquiry whether what was said was calculated in a particular case to produce a just result. "

It is argued by Mr. Lee on behalf of the appellant that Part IV of the Poisons Act is directed at controlling the manufacture and preparation of drugs of addiction, that s.41A is a licensing provision and that subs.(3) of that section is aimed at penalising unlicensed persons from trafficking in drugs of addiction in commercial quantities. The mere possession of a marihuana plant is

not in his submission conduct at which the section is directed. He claims the charge was one of complexity and as the appellant was not represented by counsel his conviction should not be allowed to stand. Had the appellant pleaded not guilty the prosecution would have been required to prove strictly -

- (a) that the plant in question was a prohibited plant as defined by the Act,
- (b) that the plant was in the possession of the appellant in the sense indicated in the Poisons Act,
- (c) that the defendant was not licensed to have the plant in his possession.

In the circumstances he argues that the Justices after hearing the statement of facts should have declined to accept the plea of guilty and ordered a plea of not guilty to be recorded.

The defendant has not attempted at any time to assert that the plants which he removed from Martin's room and destroyed was other than marihuana and it cannot be open to doubt that once that identity has been established the plant in question falls squarely within the definition of "prohibited plant" as defined in the Poisons Act.

Mr. Lee however urges on me that in order to constitute possession the manner in which the appellant acquired and disposed of the plant must demonstrate his intention to exercise control and domination over it; in order to satisfy the Statute the "possession" must have a continuing and not a momentary quality: R. v. Bentham, 1972, 3 All E.R. 271 at p. 275. In his submission the conduct of the appellant negatives the suggestion that at any relevant time he possessed the plants. Counsel cited a number of authorities

in which the question of what constitutes possession were discussed, but each such case depended upon its particular facts and I was unable to derive any great assistance from them. "Possession", as was stated by Burbury C.J. in St. Leger v. Bailey, 1962, Tas. S.R. 131 at p. 137, "is a flexible concept and chameleon-like takes its meaning from the legal context in which it falls to be considered." Mr. Lee would have it said that the Poisons Act being essentially a licensing Act, the question of whether the appellant was in fact in possession of the plants should be given a somewhat restricted meaning. When however one has regard to the preamble to the Act one observes that it is "an Act to regulate and control the possession, sale and use of poisons and other substances". In my opinion the statement of facts made to the Justices by the respondent clearly indicated that at the relevant time the appellant was in possession of the cannabis plants and that there is no reason why the Justices should have invited the appellant to withdraw his plea of guilty or to refrain from recording a conviction against him.

I would discharge the order nisi to review in so far as it relates to the conviction of the appellant.

I do not however take the same view of the appeal in so far as it relates to the penalty imposed by the Justices. It is well settled that a Court of Appeal will only interfere with a sentence that is manifestly inadequate or excessive. "The Court must come to the conclusion that there has been some mistake or wrong principle adopted or something which we can say renders it inequitable that the sentence should be allowed to remain". Gipps v. R., 19 W.A.L.R. per McMillan C.J. at p. 12.

The appellant is 21 years of age and is a trade assistant by occupation. Until his present conviction he had a clean record.

Pursuant to s.44 of the Poisons Act a person who commits an offence against Part IV of the Act (which includes s.41A) "... is liable, upon conviction to a fine of ₦2,000 or imprisonment for a term of 3 years or to both the fine and imprisonment."

Martin who was apprehended with the appellant and was subsequently charged with both the cultivation and the possession of cannabis was fined the sum of ₦500 in respect of each charge. According to his affidavit, filed in support of this appeal, the cultivation of the cannabis was his own venture and the appellant was in no way involved or connected with it. Additionally the appellant deposes to having been informed by Martin that he had admitted to the police that he had been for several years a user of hard drugs.

It seems to me likely that in informing the Justices that the appellant had admitted having been a user of hard drugs the prosecutor made an honest mistake and that the Justices without the knowledge that Martin accepted full responsibility for the cultivation of the cannabis, may well have reached the conclusion that both accused were equally culpable. In my opinion I think the Justices were in error in penalising each of the accused in the same manner. I would allow the appeal in so far as the penalty is concerned; the order nisi to that extent will be made absolute, the fine of ₦500 will be set aside and in lieu thereof a fine of ₦200 will be substituted.