

LAWLER v. PRIDEAUX

[C.A. 209/1993]

Court of Appeal (Macrossan C.J., Fitzgerald P., Cullinane J.)

15 September; 19 October 1993

Criminal law – Particular offences – Drug offences – Possession – Presumption of possession by occupier – Drug on another’s person in occupied premises – Drugs Misuse Act 1986 s. 57(c). (A.Dig. 3rd [367]).

Section 57(c) of the *Drugs Misuse Act* 1986 provides:

“Evidentiary provisions

57. In respect of a charge against a person of having committed an offence defined in Part 2

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...

(c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person’s possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place;”

While P. was in premises occupied, managed or controlled by the appellant P. had in his hand in the presence of the appellant a quantity of heroin. The appellant admitted that he was aware that P. had the heroin in his possession and that it was intended that each of them would share it. The appellant was convicted of unlawfully having possession of the heroin, a magistrate holding that in the circumstances s. 57(c) applied.

Held, that the conviction would be set aside.

Per Macrossan C.J.: The intended operation of s. 57(c) of the *Drugs Misuse Act* is confined to cases where there is no immediate relationship of physical possession demonstrated by a person in proximity to the item in question. It is not to be accepted that the legislature intended to construct a new offence in the case of occupiers who without complicity are simply aware of the location of drugs in the possession of another person.

Per Fitzgerald P.: Knowledge by the appellant of the whereabouts of the drug was insufficient of itself to establish the offence of which he was convicted. Section 57(c) had no material operation because the drugs “on” the other person, i.e. “in” his hand, were not “in or on” a “place” of which the appellant was in occupation, management or control.

Per Cullinane J.: Section 57(c) has no application to a situation where a drug is in the actual possession of a person other than the accused, as the relevant “place” is then the person of the possessor of which place the accused cannot be in possession or control.

CASES CITED

The following cases are cited in the judgments:

R. v. Brauer [1990] 1 Qd.R. 332.

Symes v. Lawler [1995] 1 Qd.R. 226.

The following additional cases were cited in argument:

Carr v. The Queen (1988) 165 C.L.R. 314.

Egart v. Deal [1994] 2 Qd.R. 117.

McKinney v. The Queen (1991) 171 C.L.R. 468.

R. v. Fischer (Dowsett J., 17 February 1989, unreported).

R. v. Marabito (1990) 50 A.Crim.R. 412.

R. v. Sargent [1994] 1 Qd.R. 655.

R. v. Solway [1984] 2 Qd.R. 75.

CRIMINAL APPEAL

B. G. Devereaux for the appellant.

Section 57(c) of the *Drugs Misuse Act* 1986 did not apply to the facts of this case because the dangerous drug was not in or on a place occupied by the appellant. It was on the person of one who had just arrived at the place. The words “a place of which that person was the occupier” in s. 57(c) imply the drug must be found in or on a place that can be occupied or managed or controlled. A person does not fit this description.

M. J. Byrne for the respondent.

The drug here in question was clearly “in or on” the premises occupied

by the appellant. It could not be said that the drug was not “in” the unit, simply because it was “on” the person of someone.

C.A.V.

5 **MACROSSAN C.J.:** The facts involved in this matter and the issues to which argument has been directed are set out in the reasons prepared by Cullinane J. I agree with the conclusion which he states but shall add some observations.

10 The prosecution in the present case attempted to make use of s. 57(c) of the *Drugs Misuse Act* 1986 for the purpose of attributing to the appellant possession of a drug which was being held in the hand of his friend Pickett in circumstances where the magistrate concluded that Pickett was or may have been asserting his own independent possession of the drug. The magistrate accepted the prosecution’s argument giving a wide effect to the subsection and he did this because Pickett was at the relevant time standing
15 within a flat of which it was accepted the appellant was the occupier or concerned in the management and control. However, the more the consequences of such a wide construction of the subsection are considered the greater becomes the conviction that the subsection was not intended to have that effect.

20 A simple example may be taken for the purpose of illustration of some of the problems which, on the prosecution’s argument, arise. Someone enters the house of another and reveals to the owner that he is holding a quantity of drug in his hand. At the very moment that knowledge of the presence of the drug is acquired the householder is, according to the
25 argument, constructively taken to be possessed of it and this will be so although he may have no wish at all to play host to it and may earnestly desire its removal. There will be a difficulty in redeeming the situation of the owner by resorting to s. 23 of the *Criminal Code* as was suggested by the Crown because it is not for any “act” of the owner that a criminal
30 liability will arise but because of a statutory attribution of possession to him: see also *R. v. Brauer* [1990] 1 Qd.R. 332 at 360. Whatever is the exact effect in the circumstances of s. 23 it should be accepted as sufficiently clear that the intended operation of s. 57(c) of the *Drugs Misuse Act* is confined to cases where there is no immediate relationship of physical
35 possession demonstrated by a person in proximity to the item, that is where there is no immediately obvious possessor, and the legislature has thought it necessary or desirable to attribute possession to someone.

40 For this purpose it selects the occupier or controller of the place where the item is found. Yet it is not to be accepted that the legislature has intended to construct a new offence in the case of occupiers (although not non-occupiers) who without complicity are simply aware of the location of drugs in the possession of another person. Further, it is a more natural meaning of the words “in or on a place of which (a person) was the occupier or concerned in the management or control of” to say that they do
45 not extend to the case where the item is in the hand or pockets of another person who is the owner and possessor.

I agree that the appeal should be allowed and the conviction set aside.

50 **FITZGERALD P.:** The facts of this matter are set out in the reasons for judgment prepared by Cullinane J.

For the reasons given in *Symes v. Lawler* [1995] 1 Qd.R. 226, I agree that the appeal should be allowed. While in this case the appellant knew of the whereabouts of the drug, that of itself is insufficient to establish the

offence. Further, s. 57(c) of the *Drugs Misuse Act* 1986 had no material operation because the drugs “on” the other person, i.e. “in” his hand, were not “in or on” a “place” of which the appellant was in occupation, management or control.

CULLINANE J.: The appellant was convicted on 4 June 1993 in the Magistrates Court at Cairns of the offence of unlawfully having possession of a dangerous drug, namely heroin, on 4 January 1993 at Cairns. 5

He appeals against his conviction for that offence.

The relevant circumstances may be summarised briefly.

Police officers had for some time had premises at 1/22 Lily Street, Cairns, under surveillance. After the police, on the afternoon of 4 January 1993, went to these premises and executed a search warrant, the appellant and another person, one Pickett, arrived at the residence. 10

Upon a search of the appellant, a syringe and two needles were found.

One of the police officers noticed that Pickett had in his hand a piece of magazine paper. Heroin was found inside this. 15

In a discussion with the police, the appellant is said to have acknowledged that he was aware that Pickett had the heroin in his possession and it was intended that each of them would share it.

There was evidence that the appellant gave 1/22 Lily Street, Cairns, as his address and there was other evidence associating him with those premises. He apparently had a key to the phone which was in the premises and there was evidence which suggested that one of the bedrooms in the premises was used by him. 20

The prosecution, before the learned stipendiary magistrate, contended for two bases upon which the appellant should be convicted. It is not necessary to refer to the first of these as the learned stipendiary magistrate found for the appellant on this and it is not contended here that this finding was wrong. 25

The second basis upon which it was contended the appellant ought to be convicted of the offence was based upon s. 57(c) of the *Drugs Misuse Act* 1986 as amended. This provides as follows: 30

“57. **Evidentiary provisions.** In respect of a charge against a person of having committed an offence defined in Part II –

... 35
(c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person’s possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place;” 40

It is with the terms of this provision and its application to the circumstances described above that the appeal is concerned.

The learned stipendiary magistrate, after referring to s. 57(c), concluded that the appellant was the occupier or a person concerned in the management and control of the premises. 45

This finding is not contested. The learned stipendiary magistrate then proceeded to convict the appellant upon the basis that the provisions of s. 57(c) applied and in view of the evidence that the appellant was aware of the possession by the other person of the heroin, the presumption could not have been rebutted. 50

For the appellant, it was argued that s. 57(c) has no application to a

situation where the drug is in the actual possession of another person. In that case it was argued the drug is on the person of the possessor, which is thus the relevant place when one considers the provision with the result here that, at the relevant time, the place in or on which the drugs were, was the person of Pickett.

For the respondent, it was said that notwithstanding Pickett's actual possession of the heroin, the relevant place was the premises in which Pickett then was and of which the appellant was the occupier, or a person concerned in the management or control.

There is no reason why, in my view, the person of Pickett should not be regarded as the place on which the heroin was when its existence was detected. This was its direct and immediate location and repository, and there is nothing in the language which would require the more expansive approach contended for by the respondent. If, for example, Pickett had been apprehended in the street with the heroin, one would not ordinarily regard the street to be the place in or on which the heroin then was. Furthermore, such a construction gives full effect to the whole of the expression "in or on", whereas the respondent's construction tends to emphasise only the first part of it.

It follows that the appellant was not in possession of or in control of the relevant place.

Such a conclusion accords with the purpose of the provision, in my view. The provision effects a statutory possession of drugs in an occupier of or person concerned in the control and management of premises. It should not, in my view, be construed as doing so where some other person is in actual possession of such drugs. The provision might be said to proceed from an assumption that no one is in possession in fact of the drug and fixes the person or persons with the relevant connection with the premises with possession.

There are difficulties with the construction for which the respondent contends and some consequences of this construction could bring about unjust, and presumably, unintended results. The respondent initially accepted this but in supplementary argument suggested that these results could be avoided by either the operation of s. 23 of the *Criminal Code* or by what amounts to the placing of a gloss on the provision. I am satisfied that there is no justification for the latter, and the former is contrary to what was said about s. 57(c) by Cooper J. in *R. v. Brauer* [1990] 1 Qd.R. 332, with whose views I respectfully agree.

In my view, the appellant's construction accords with the natural meaning of the words of the provision and is consistent with its apparent purpose.

I would allow the appeal and set aside the conviction.

Appeal allowed.

Solicitors: *Legal Aid Office* (appellant); *Director of Prosecutions* (respondent).

P. MATUS
Barrister

Corrigenda

- No Corrigenda