SYMES *v.* LAWLER

[C.A. 204/1993]

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

17 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 –

…

(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;"

Held:

(1) That s. 57(c) did not create a presumption of possession against an accused person where, although the immediate "place" where a dangerous drug was "in or on" was not occupied, managed or controlled by him, that "place" was itself "in or on" a larger "place" which he did occupy, manage or control.

(2) That accordingly s. 57(c) had no material operation against an accused person in circumstances in which the place in or on which a dangerous drug was located might have been the person of another person in premises which the accused person occupied.

CASES CITED

The following cases are cited in the judgments:

He Kaw Teh v. The Queen (1985) 157 C.L.R. 523.

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

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

CRIMINAL APPEAL

B. G. Devereaux for the appellant.

There was no evidence that the appellant was aware of the presence of drugs on the premises. It was erroneous to infer knowledge simply because s. 57(c) of the *Drugs Misuse Act* 1986 applied to the case: *R. v. Sargent* [1994] 1 Qd.R. 655. A verdict based on s. 57(c) was insupportable.

J. Fraser for the respondent.

C.A.V.

MACROSSAN C.J.: I agree with the conclusion expressed by the President and Cullinane J. and with their reasons subject to such qualification on one matter as may appear in the following observations.

The offence of possessing dangerous drugs is provided for by s. 9 of the *Drugs Misuse Act* 1986. That section which appears in Part 2 of the Act refers to "a person who unlawfully has possession of a dangerous drug". A definition is provided of "unlawfully". Section 4 of the Act says that it means "without authorisation, justification or excuse by law".

The evidentiary provision contained in s. 57(c) applicable in the case of a charge of having committed an offence under Part 2 is declared to have the result that, in the circumstances specified in the subsection, there "is conclusive evidence that the drug was then in the person's possession". The effect of this provision taken in conjunction with the words of s. 9 has to be determined in the usual way as a matter of statutory construction. There is no sufficient reason to adopt an interpretation other than that in a situation where a drug "is … in the person's possession" (s. 57(c)) the legislature is

treating it as an instance where the person "has possession of a dangerous drug" (s. 9). That is, no distinction is to be drawn between being in possession of the thing (s. 57(c)) and having possession of it (s. 9) so as to introduce a requirement of an additional mental element under s. 9 with knowledge as an ingredient. Once that is accepted it seems inevitable that the views stated in *R. v. Sargent* [1994] 1 Qd.R. 655 should also be accepted. The prosecution's proof of possession by reliance on s. 57(c) does not carry with it an implication of knowledge on the part of the defendant. The necessity of proof of any mental element is simply by-passed, leaving such a matter, if it is to be raised at all, to be raised by way of defence under the concluding words of the subsection. In other words, when the subsection is relied on, the prosecution has the benefit of a situation of strict liability in the sense in which that phrase is used by Dawson J. in *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523 at 590.

It also seems likely that as a matter of statutory construction, the legislature has affected the possible application of at least one provision in Ch. 5 of the *Criminal Code* dealing with criminal responsibility, i.e. s. 24 because it has largely, if not fully, confined a relevant defence against a charge to the situation where the accused shows "that he or she then neither knew nor had reason to suspect that the drug was in or on that place". However, it is not necessary to say more about this topic on this occasion.

FITZGERALD P. and CULLINANE J.: Section 57(c) of the *Drugs Misuse Act* continues to give difficulty. It provides that, in respect of a charge against a person of having committed an offence against Part II of that Act:

> "(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."

In *R. v. Sargent* [1994] 1 Qd.R. 655, Fitzgerald P. said that the possession presumed by s. 57(c) does not include a presumption of knowledge. On further consideration, we think it better to leave for another occasion whether the statutory concept of possession includes knowledge: see the discussion by Cooper J. in *R. v. Brauer* [1990] 1 Qd.R. 332, 360, in which reference is made to *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523 and earlier authorities. However, neither view provides a solution to the central problem created by s. 57(c) which is that it is only open to an accused person to defeat the statutory presumption by proof of absence of knowledge or reason for suspicion that a dangerous drug was "in or on" the material "place".

The section makes no express provision for the rebuttal of the presumption of possession by proof by an accused that, although present in or on a place occupied or managed or controlled by him, the drug was not physically in his custody or under his physical control. Nor does it expressly provide for rebuttal of the presumption of possession by proof that the drug is in or on the place against his will. If given its widest literal construction then, subject to the possible operation of Chapter V of the *Criminal Code*, the subsection means that, if a drug is brought in or on to, or perhaps delivered to, a place, eg. by post, without the knowledge and even against the will of the occupier or person concerned with the

management or control of the place, that person is guilty of an offence the instant he knows or has reason to suspect the presence of the drug; e.g. upon opening a package.

Such an approach can plainly lead to injustice, which Parliament cannot have intended. In part, at least, that outcome can be avoided by accepting that the subsection proceeds from an assumption that its application is related to circumstances in which no person has physical custody or control of a drug which is simply "in or on" a "place".

In the present case, the appellant was an occupier of premises in which another person had quantities of three dangerous drugs in a pouch which he threw from a window while police officers were attempting to force entry. Although there is some lack of clarity in the expression of the magistrate's findings, he seems to have concluded that the appellant knew of the other person's possession of the drugs. This seems to have been an inference from the circumstances surrounding the police entry into the premises. After knocking and calling out for a period measured at 41 seconds, without being accorded entry although they could hear movement inside, police officers forced their way in. By then, the other person in the unit with the appellant had thrown the pouch containing the drugs out of the window. The appellant was in a different part of the premises.

On that evidence, it could not be concluded beyond reasonable doubt that the appellant had possession of the drugs unless that conclusion arises as part of a presumption of possession pursuant to s. 57(c). This raises the question whether, when in the other person's possession, the drug was "in or on a place of which" the appellant "was the occupier or concerned in the management or control of".

That compendious phrase cannot be satisfactorily construed by an analysis of its separate components. It focuses upon the precise "place" "in or on" which a drug is found and requires that the "place" be occupied, managed or controlled by the accused. A distinction is to be drawn between any place which is, and any place which is not, occupied, managed or controlled by the accused and the location of the drug must, for the purposes of the section, properly be ascribable to the former, not the latter. It is to misread and misapply the section to create a presumption of possession against the accused by demonstrating that, although the immediate "place" which the drug is "in or on" is not occupied, managed or controlled by the accused, that "place" is itself "in or on" a larger "place" which the accused does occupy, manage or control.

In the present case, the "place" "in or on" which the drugs were located might on the evidence have been the person of the other person in the unit. The prosecution did not prove to the contrary beyond reasonable doubt. That being so, in our opinion s. 57(c) had no material operation against the appellant notwithstanding that he was an "occupier" of the premises.

We 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