IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No.17/1082 CoA/CRMA

BETWEEN: SEAN WINSLETT and JUSTIN WINSLETT
Appellants

AND: PUBLIC PROSECUTOR
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr. John Malcolm for the Appellant Sean Winslett*
Mr Nigel Morrison for the Appellant Justin Winslett
Mr. Simcha Bessing for the Public Prosecutor

Date of Hearing: *9th Nov. 2017*
Date of Judgment: *17th Nov. 2017*

JUDGMENT

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1. On July 5th, 2017 both appellants were convicted after trial on one count each of Possession of Cannabis contrary to Section 2(62) of the Dangerous Drugs Act [CAP. 12] and one count each of Cultivation of Cannabis contrary to Section 4 of the Dangerous Drugs Act [CAP. 12].

2. The appellants now appeal against their convictions, sentencing not yet having taken place. The grounds of appeal may be summarised as follows:

   (a) the prosecution failed to prove that the plant substance allegedly in the appellants' possession and cultivated by them was cannabis;

   (b) the verdict was not supported by the evidence;

(c) the judge wrongly admitted a bundle of cannabis photographs which were then used to support the guilty verdict.

3. On March 2nd 2016, the police conducted a search at the home of Mr. Sean Winslett located near Independence Park in Port Vila. The police officers attending searched the main house, a garage on the property and an adjacent servant's quarters. It was discovered that the servant's quarters had been converted and used as a grow house to cultivate what was alleged to be cannabis plants. Inside the servant's quarters the police found black polystyrene bags and black plastic containers in which it was alleged cannabis plants were planted. Coconut husks were spread around each plant. What was alleged to be dry cannabis plants were suspended from the roof of the servant's quarters. A number of other items were found by the police including containers, white plastic bags allegedly containing cannabis together with nutrients, an air conditioning system, a solar panel and electric fan, a timer and various electrical items and tools all of which were indicia of an operation designed for the cultivation of cannabis. Significant quantities of plant material alleged to be cannabis were located on two tables in the grow house.

4. Sergeant Tony Berry, the officer in charge of the crime scene, gave evidence that he measured and weighted the cannabis plants and carried out field tests on "*two plants from each table*" and found them to be of the genus cannabis. The total number of cannabis plants allegedly located by the police were 97, weighing a total of 4,999.71 grams. In addition, the police located 150 cannabis seeds. Sgt. Berry's evidence was also that he removed the cannabis material and took it back to the police station for further "cross checks" to verify the field tests. Those cross checks were to be undertaken by Corporal Atis Yosef who was the officer in charge of the forensics laboratory at the time.

5. No evidence was provided to the trial judge as to how the field tests were undertaken, what the device used to carry out the field tests was or how the device could establish that the material in question was cannabis. There was also no evidence before the trial judge as to whether the verification by the cross checks was actually undertaken and, if so, the results of the cross checks.

6. The trial took place over a total of 8 days. After the prosecution had presented its evidence counsel for the appellants made a submission of no case to answer. In a judgment issued on May 18th 2017 the judge rejected

that submission and in accordance with Section 164(2) of the Criminal Procedure Code [CAP.136] the court called upon the accused for their defence.

7. In the judgment of May 18th the judge identified the argument of counsel for the appellants as being that the plants discovered by the police could not be cannabis plants as field tests were only done to 10 plants which were not verified by a certificate confirming that they were in fact cannabis plants. The judge recorded counsel's submissions that without any certification there was no evidence the plants found were cannabis. The judge dealt with this at paragraph 22 of his judgment where he stated:

> "*This argument is rejected as untenable. First counsel had not pointed to any specific section of the Drugs Act requiring certification of cannabis to be proof of the substance. Second, Sgt. Berry's evidence was that field test were done using the same equipment used in the office to verify the result of the field tests. So the result is the same. All tests were positive showing the plants grown in the grow house were of the type genus cannabis*".

8. It is clear that the judge regarded that as proof beyond reasonable doubt of the fact that the plant substance seized by the police was cannabis. In his verdict delivered on July 5th, 2017 the judge stated at paragraph 4:

> "*4. And the issue in my view was not whether the plants discovered by the police in the grow house were in fact and in law cannabis plants, rather it is whether or not both defendants had knowledge that the plants existed and were being cultivated in the grow house.*
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> *5. That being the real issue, the submissions by Mr. Morrison that the plant not being certified by an expert analyst to be cannabis plants in untenable and is rejected. The real defence is of the defendants as I understand them to be at their no-case submission is not what the plants were, but who constructed the house in question and who could be responsible for cultivating and possessing them*".

9. While there were a number of grounds contained in the Notices of Appeal for the appellants the appeal may be determined on one issue alone, that issue being whether or not the prosecution established beyond reasonable doubt the plant substance seized by the police was cannabis.

10. Given the appellants maintained their Supreme Court submissions we considered it appropriate to invite the Public Prosecutor to identify the evidence which he said proved the material seized by the Police was cannabis.

11. Before identifying that evidence Mr. Blessing submitted that the question of whether the plant material found by the police was cannabis was not a matter contested at trial and was not a matter put by the defence to the officers who gave evidence at the trial and that therefore it was not open to the appellants to raise the matter on appeal.

12. Such a submission is without any proper foundation. To accept Mr. Blessing's submissions would be to reverse the onus and burden of proof. The burden of proof rests clearly on the prosecution at all times to establish the essential elements of an offence. That burden does not shift. It was therefore necessary, in the absence of an express concession by the appellants, for the prosecution to establish beyond reasonable doubt that the plant substance was cannabis.

13. In this case, it is abundantly clear that there was no concession by defence counsel that the material seized by the police was cannabis.

14. As to the identification of evidence proving that the material seized was cannabis Mr. Blessing placed reliance on the evidence of Sgt. Berry and the field tests conducted by him.

15. There are a number of ways in which evidence establishing that the plant substance in question was cannabis could have been tendered to the Court. The following list is not intended to be an exhaustive list but may be of some assistance for future prosecutions:

    (a) The prosecution could have tendered a certificate pursuant to Section 15 of the Dangerous Drugs Act. Section 15 provides that:

    > *"A certificate of contents purporting to be signed by and on behalf of the government analyst of any country approved for the purpose by the Ministers responsible for health, if it relates to any prohibited drug or to any traces of a prohibited drug found on any syringe, pipe, utensil or other material whatsoever which appear to have been used for the smoking, consumption, ingestion or injection of any of the substances listed in Section 2 shall be admissible in any proceedings and shall be evidence of the facts stated".*

    We were advised by counsel that there is no government analyst available in Vanuatu and in such circumstances clearly the substance in question would need to be sent overseas for analysis. A section 15 certificate would, however, provide admissible evidence of the identity of the substance in question.

Mr Blessing submitted that section 15 was not applicable to prosecutions of this type. We reject this submission. The section is clearly for the purpose of enabling proof of the identity of any prohibited drug to be established by production of a certificate obtained pursuant to that section. There is absolutely no basis for the Court to "read down" or limit the provision in the way suggested by Mr. Blessing.

(b) In the absence of a section 15 certificate it is possible that the plant substance in question could be the subject of analysis by a suitably qualified expert such as a chemist or botanist. Whether or not such a person would qualify as an expert entitled to provide admissible opinion evidence would be dependent upon their expertise and experience. All that is required is proof that the material in question is of the genus cannabis.

(c) The court may accept the evidence of a suitably experienced and qualified police officer who has had appropriate experience in cases concerning the drug, sufficient to be able to identify it.

16. In R v. Cruse[1] the New Zealand Court of Appeal stated:

> "*The courts have accepted various kinds of evidence short of scientific analysis as capable of proving beyond reasonable doubt the particular substance was the controlled drug. We can see no justification for any judicial attempt to limit what may suffice. It must always be a question of fact in a particular case. There is no logical reason why circumstantial evidence may not be sufficient, although obviously always care must be taken to ensure that it is capable of pointing unequivocally to the nature of the substance*".

17. The judgment of the NZ Court of Appeal in R v. Pope & Pope[2] is an example of a police officer giving evidence to establish the identity of a substance as cannabis oil. The Court accepted, as expert evidence, the evidence of a senior constable who identified a substance as cannabis oil. The officer had given evidence of having being involved in "*hundreds if not thousands*" of cannabis growing operations in his duties as a police officer, his experience in identifying cannabis oil, training received in order to identify cannabis and evidence as to the physical characteristics of the substance which contributed to his expressing the opinion that the substance in question was cannabis oil.

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[1] *Court of Appeal of New Zealand CA11/89 at 15/89 at May 1989*
[2] *[2008] NZCA 284*

18. In the judgment of the NZ High Court in Kamo v. Police[3], Venning J. held that a police officer who had had 4 years experience in the police, a bachelor of science in botany and 6 years experience as a door supervisor in the UK which involved advanced drug training was sufficiently qualified as an expert to the extent of being able to recognise cannabis when he saw it.

19. In order to be able to rely upon the evidence of Sgt. Berry the trial judge would have to have been satisfied that the officer qualified as an expert able to provide admissible opinion evidence regarding the identity of the plant substance seized by the police.

20. The evidence in this case falls very significantly short of qualifying Sgt. Berry as such an expert. While he gave evidence that he located cannabis branches, leaves and seeds and referred to the air inside the "*grow house*" as having a strong smell of cannabis he gave no evidence as to his experience as a police officer in dealing with cases involving cannabis, of any training which he may have received in the identification of cannabis or any other qualification which may have established him as an expert witness able to give admissible evidence identifying the plant substance seized as cannabis.

21. While Sgt. Berry gave evidence all of the cannabis found at the grow house was tested and proved positive as cannabis before he took the plants and other substances to the police station, there was no evidence as to how that test was conducted.

22. Where testing devices are used for purposes such as these it is common for there to be legislative provisions which confirm the devices as approved for the purpose for which they are being used and which provide that the results of any test are admissible in court proceedings. Where is no such legislative provision there would need to be further evidence, for example, from the manufacturer of the device confirming that the device was operating in accordance with all applicable specifications at the time it was in use and explaining how the devise operated to enable the Court to be satisfied any reading or results tendered could be considered as admissible evidence for the purposes for which the results were tendered.

23. In addition, the evidence of Sgt. Berry was that he took the exhibits and handed them to Cpl. Yosef for further examination. Cpl. Yosef was the officer in charge of the forensic laboratory at that time. The evidence of Sgt.

[3] *(High Court of New Zealand CRI/2011/404/00044, 13 July 2011)*

Berry was they were referred to Cpl. Yosef in order for "*cross-check*" to be conducted. Sgt. Berry gave evidence this was done in order to verify the field tests, however no evidence was given as to any subsequent test carried out in respect of the seized material.

24. The judge was wrong to regard the field test undertaken by Sgt. Berry as establishing the plant materials seized was cannabis. There is no admissible evidence justifying such a conclusion. The judge was also wrong to regard the evidence of Sgt. Berry as sufficient to be able to be accepted as proof beyond reasonable doubt, that the plant material seized was cannabis.

25. We are satisfied the trial Judge should have ruled there was no case to answer and pronounced a verdict of "not guilty" in respect of both appellants pursuant to Section 164(2) of the Criminal Procedure Code [CAP. 136].

26. For these reasons the appeal is allowed and the convictions of the appellants entered on July 5th, 2017 are quashed.

DATED at Port Vila, this 17th day of November, 2017

BY THE COURT

Hon. Chief Justice Vincent Lunabek.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU