Gokel v Gualandi [2001] NTCA 6

PARTIES:	NOEL JOHN GOKEL
	v
	GREGORY SEBASTIAN GUALANDI
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AP2 of 2001
DELIVERED:	24 August 2001
HEARING DATES:	2 August 2001
JUDGMENT OF:	MARTIN CJ, MILDREN & RILEY JJ

CATCHWORDS:

Criminal law – appeal – appeal against quashing of conviction

Criminal law – drug offences – unlawful possession – mistaken belief as to nature of drug – whether precise identity of drug is an element of the offence – identity of drug relevant to the appropriate sentence to be applied

Chaplin (1991) 58 A Crim R 194, approved.
R v Clare [1994] 2 Qd R 619, considered.
Dunn (1986) 32 A Crim R 203, considered.

Misuse of Drugs Act 1990 (NT), s 9(1), s 9(2), s 9(2)(c)(ii), s 9(2)(f)(ii), s 40(a), s 40(b) and s 40(d); *Criminal Code 1983 (NT)*, s 32.

REPRESENTATION:

Counsel:

Appellant:	W. J. Karczewski
Respondent:	M. Carter

Solicitors:

Appellant:	Office of Director of Public Prosecutions
Respondent:	Withnall Maley & Co.

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gokel v Gualandi [2001] NTCA 6
No. AP2 of 2001

BETWEEN:

NOEL JOHN GOKEL
Appellant

AND:

GREGORY SEBASTIAN GUALANDI
Respondent

CORAM: MARTIN CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 24 August 2001)

MARTIN CJ:

[1] I agree with the judgment of Riley J and have nothing further to add.

MILDREN J:

[2] I agree with the judgment of Riley J and have nothing further to add.

RILEY J:

[3] On 24 July 2000 the respondent entered a plea of guilty to having unlawfully possessed a dangerous drug specified in Schedule 1 of the *Misuse of Drugs Act* namely cocaine. He also admitted the circumstance of aggravation that

he was in possession of the dangerous drug on licensed premises. The offences were contrary to s 9(1) and s 9(2)(c)(ii) of the *Misuse of Drugs Act.*

[4] The circumstances of the offending were that on Saturday 31 July 1999 the respondent was at the MGM Grand Casino. At about 10.20pm he entered the first floor toilets holding a small clipseal bag containing a white powdery substance. He was in the company of two co-offenders. Whilst they were in the toilets security personnel from the Casino entered the toilets and apprehended the respondent. The white powder substance was collected and held as an exhibit and was subsequently analysed and identified as being cocaine. Cocaine is a dangerous drug referred to in Schedule 1 of the *Misuse of Drugs Act.*

[5] When the matter came before the Court of Summary Jurisdiction on 24 July 2000 and after the plea had been entered the Court was informed that whilst the respondent believed he had in his possession a dangerous drug he believed that the drug was amphetamine a drug referred to in Schedule 2 of the *Misuse of Drugs Act.* The respondent was called to give evidence to that effect. It seems that evidence was given in order to discharge the reverse onus provided for in s 40(d) of the Act. The evidence was accepted by the learned Chief Magistrate.

[6] In response to a question from the Court as to whether or not the plea of guilty to an offence against s 9(1) and s 9(2)(c)(ii) of the *Misuse of Drugs Act* ought to have been accepted in those circumstances, counsel for the

respondent submitted that the offence was constituted by the unlawful possession of a dangerous drug and the identity of that drug was "a particular rather than the charge itself". His Worship accepted the plea and sentenced the respondent to imprisonment for a period of one month. In sentencing the respondent his Worship indicated that he did so on the basis that, although the respondent accepted that he was in possession of cocaine, "at the time of the event, you thought it was speed". He observed that this "to some extent, mitigates in your favour as the appropriate sentence to be passed".

[7] The respondent appealed to the Supreme Court on grounds relating to the severity of the sentence. At the hearing of the appeal the notice of appeal was amended to include an appeal against conviction. That appeal was upheld and the conviction quashed. In so doing the learned Judge held:

> "[38] In view of the findings by the learned Chief Stipendiary Magistrate that he accepted the appellant had an honest and reasonable belief the drug he possessed was a Schedule 2 drug, namely amphetamine, I have concluded that there was an error in recording a conviction for the more serious offence of possess a Schedule 1 drug.
>
> [39] In the circumstances of this particular case and with the distinctions in penalty that are provided under the *Misuse of Drugs Act*, the actual drug, being the dangerous drug unlawfully possessed, namely cocaine, is an essential element of the charge and not just a particular of the charges.
>
> [40] The Crown have failed to prove that the appellant unlawfully possessed cocaine in view of the finding by the learned Chief Stipendiary Magistrate that he accepted the appellant had an honest and reasonable belief it was amphetamine."

[8] The Crown now appeals from that decision. The principal ground of appeal is:

> "The learned Judge erred in treating the belief of the Respondent as to the actual identity of the dangerous drug as relevant to the question of conviction."

[9] Section 9 of the *Misuse of Drugs Act* is in the following terms:

> "(1) A person who unlawfully possesses a dangerous drug is guilty of a crime.
>
> (2) A person guilty of a crime under subsection (1) is, subject to section 22, punishable on being found guilty by a penalty not exceeding:
>
> (a) Where the dangerous drug is a dangerous drug specified in Schedule 1 and the amount of the dangerous drug is a commercial quantity - imprisonment for 25 years.
>
> (b) Where the dangerous drug is a dangerous drug specified in Schedule 1 and the amount of the dangerous drug is not a commercial quantity but is a traffickable quantity -
>
> (i) if the person is in possession of it in a public place - imprisonment for 14 years; and
>
> (ii) in any other case - imprisonment for 7 years.
>
> (c) Where the dangerous drug is a dangerous drug specified in Schedule 1 and the amount of the dangerous drug is neither a commercial quantity nor a traffickable quantity -
>
> (i) if the person is in possession of it in a public place - $10,000 or imprisonment for 5 years; or
>
> (ii) in any other case - $5,000 or imprisonment for 2 years.
>
> (d) Where the dangerous drug is a dangerous drug specified in Schedule 2 and the amount of the dangerous drug is a commercial quantity - imprisonment for 14 years.

(e) Where the dangerous drug is a dangerous drug specified in Schedule 2 and the dangerous drug is not a commercial quantity but is a traffickable quantity - $10,000 or imprisonment for 5 years.

(f) Where the dangerous drug is a dangerous drug specified in Schedule 2 and the amount of the dangerous drug is neither a commercial quantity nor a traffickable quantity -

(i) if the person is in possession of it in a public place - $5,000 or imprisonment for 2 years; or

(ii) in any other case - $2,000."

[10] In my opinion the offence of unlawful possession of a dangerous drug is created by s 9(1) of the *Misuse of Drugs Act*. That is clear from the terms of the section. Provided that the item unlawfully possessed is identified as "a dangerous drug" the offence is established. The precise identity of the drug is not an element of the offence. In the usual case the identity of the drug may be pleaded as a particular of the offence but it is not an element of the offence.

[11] Support for this proposition is to be found in s 40(a) and s 40(b) of the Act which provide:

"In respect of a charge against a person of having committed an offence against this Act -

(a) it is not necessary to particularize the dangerous drug in respect of which the offence is alleged to have been committed;

(b) that person is liable to be found guilty as charged notwithstanding that the identity of the dangerous drug to which the charge relates is not proved to the satisfaction of the court that hears the charge if the court is satisfied that

> the thing to which the charge relates was at the material time a dangerous drug."

[12] The penalty applicable to an offence of unlawful possession of a dangerous drug will vary depending upon the circumstances of the offence. In the event that a person unlawfully possesses a dangerous drug the base penalty is provided for in s 9(2)(f)(ii) of the Act. Any alleged circumstance which is intended to lead to an increase in that penalty is a "circumstance of aggravation" as defined in the *Criminal* Code and must be pleaded as such. Circumstances of aggravation and the penalties that apply are to be found in s 9(2) of the Act. The applicable penalty will vary depending upon the circumstances eg whether the dangerous drug is a Schedule 1 or Schedule 2 drug and whether it is alleged to be of a traffickable quantity or a commercial quantity.

[13] The respondent in these proceedings admitted the necessary elements of the offence of unlawfully possessing a dangerous drug when he pleaded guilty to that charge on 24 July 2000. The fact that he thought he was in possession of one dangerous drug (amphetamine) but was in fact in possession of another dangerous drug (cocaine) does not affect the conclusion that he was guilty of unlawfully possessing a dangerous drug contrary to s 9(1) of the *Misuse of Drugs Act*. The fact that he thought he was in possession of a Schedule 2 drug when in fact he was in possession of a Schedule 1 drug is not relevant to his conviction however it may be relevant to the appropriate penalty to be applied. In *Chaplin* (1991) 58

A Crim R 194 the Court of Criminal Appeal in Western Australia accepted that, in that case where the appellant believed that the drug in relation to which he had possession was amphetamine, but in fact it turned out to be Ephedrine, "he should be sentenced on the basis that his culpability was the same as if he had in fact been in possession of amphetamine". The Court observed that this would not necessarily be so in every case where an accused was mistaken about the identity of the drug in his possession however the proposition was accepted for the purposes of that particular case.

[14] This interpretation of s 9(1) of the *Misuse of Drugs Act* is consistent with that found in other jurisdictions with similar legislative provisions. In *R v Clare* [1994] 2 Qd R 619 the Court of Appeal considered the relevant provisions of the *Drugs Misuse Act* 1986 (Qld). In that case the appellant had been handed packets of white powder which were subsequently discovered by police. He gave evidence that he agreed to take the packets from the Gold Coast to Sydney believing they contained a perfume base. They in fact contained heroin. Fitzgerald P conducted a review of the relevant authorities and concluded (at 638):

> "The principal practical difference between the wide and narrow views lies in the effect which the respective views have upon the onus of proof, particularly having regard to the evidentiary provisions in s 57 of the *Drugs Misuse Act*. In these circumstances it might be legitimate to interpret the Act, which is a penal statute, in the manner which is most favourable to an accused person; that is to say, to determine that possession requires proof of knowledge not only of the existence of the thing or substance but of its nature and even its quality. On the other hand, the clear tenor of the evidentiary

> provisions in s 57 of the Act is to reverse the onus to oblige an accused person who is proved to knowingly have the custody or control of a thing or substance which is a dangerous drug to prove that his or her "possession" is innocent. The narrow view therefore gives better effect to the legislative intent.
>
> Not without some hesitation, I have concluded that this is the correct approach and that, subject to s23 of the Code, all that the prosecution needs to show to establish possession is that an accused person has and knows that he or she has a thing or substance which is in fact a dangerous drug."

[15] In the same case Davies JA said (645):

> "I do not think that the element of knowledge, which undoubtedly exists in that concept in its ordinary meaning, extends beyond knowledge, by the accused, of the existence and presence within his physical control of the object; it does not extend to knowledge of the nature of that object. There is nothing in the construction of the *Drugs Misuse Act* which would suggest that "possession" is being used in other than its ordinary meaning.
>
> In the present case, therefore, the learned trial judge should have directed the jury that it was sufficient that the accused knew he had in his physical control a quantity of white powder (which of course he admitted) and that it was then for the accused, pursuant to s 24 of the *Criminal Code* as modified by s 57(d) of the *Drugs Misuse Act*, to show that he honestly and reasonably believed that it was perfume base."

Section 57(d) of the *Drugs Misuse Act (Qld)* is the equivalent of s 40(d) of the *Misuse of Drugs Act* (NT).

[16] In Western Australia the Court of Criminal Appeal considered a similar problem in the matter of *Dunn* (1986) 32 A Crim R 203. In that case the appellant was convicted of possession of a prohibited drug with intent to supply. He gave evidence that he had arranged to receive a supply of

amphetamine but subsequent analysis showed that he was provided with cocaine. There was some disagreement between the members of the Court as to whether or not the appellant could in law be convicted of the offence of possession of a prohibited drug with intent to supply. However the members of the Court were in agreement that unlawful possession was established. Burt CJ said (at 205):

> "It can now be taken to be established that the idea of "possession" connotes knowledge of the thing possessed: see *He Kaw Teh* (1985) 157 CLR 523 … Whether in a case such as this when the offence is being in possession of a prohibited drug it is necessary to establish that the accused knew not only that the thing in his possession was a prohibited drug but also that he knew or believed that it was the kind of drug mentioned in the charge was a question specifically kept open by Gibbs CJ in *He Kaw Teh* (at 537-538). I have read the Canadian cases referred to by the Chief Justice and agree with the conclusions reached by the British Columbia Court of Appeal in *Blondin* [1971] 2 CCC (2d) 118 that under a statute such as the *Misuse of Drugs Act* which creates an offence of being in possession of a prohibited drug it is sufficient that the Crown establishes that the accused had in his possession a prohibited drug and that he knew or believed that the thing which he had in his possession was a prohibited drug. It is not necessary to establish that he knew that it was a prohibited drug of the kind charged. And in this case, as it turned out, the drug was cocaine and hence I think that the admitted facts established that the appellant was in possession of a prohibited drug, to wit cocaine, and to that extent he was rightly convicted."

[17] Pidgeon J expressed similar views at 211. Olney J dissented as to whether, in the circumstances, the appellant could be convicted of possessing a prohibited drug "with intent to sell or supply it to another". He thought that the use of the pronoun "it" in the relevant section "puts beyond doubt that the intention must relate to the prohibited drug of which the accused person has possession". However on the issue of unlawful possession his Honour

concluded that "the material facts established guilt of the simple offence of possession of a prohibited drug namely cocaine."

[18] It is not necessary to choose between the differing approaches adopted in the Queensland and Western Australian Courts for the purposes of the matter at hand. In the present case the respondent admitted that he was unlawfully in possession of a dangerous drug and the elements of an offence against s 9(1) of the Act were thereby established. It was not open to the respondent to utilise s 40(d) of the *Misuse of Drugs Act* in order to obtain the benefit of the operation of s 32 of the *Criminal Code* in the circumstances of this matter. The respondent established (as the learned Chief Magistrate found) that he held an honest and reasonable but mistaken belief as to the identity of the dangerous drug in his possession but he is not assisted by that finding because s 32 simply provides that he is "not criminally responsible for (his act) to any greater extent than if the real state of things had been such as he believed to exist" ie the situation remains that he believed he was in possession of a dangerous drug. The mistaken belief was not relevant to the finding of guilt but it may be relevant to the appropriate sentence. The Court may sentence as if the culpability of the respondent be treated as if he had in fact been in possession of the dangerous drug he thought he possessed rather than the more serious Schedule 1 drug; see *Chaplin* (supra at 198). That exercise is not dependant upon the existence or any application of s 40(d) of the *Misuse of Drugs Act.*

[19] In the circumstances the appeal must be allowed. I would make the following orders:

(i) the order of Thomas J quashing the conviction be set aside;

(ii) the order of the Chief Magistrate convicting the respondent of the offence set out in the information be restored; and,

(iii) the matter be remitted to Thomas J to determine the appeal upon the grounds set out in the notice of appeal filed in the Supreme Court in accordance with the judgment of this Court.

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