Jaeger-Steigenberger v O'Neill [2011] NTSC 42

PARTIES:	JAMIE-LEE JAEGER-STEIGENBERGER v WAYNE O'NEILL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 9 OF 2011 (21034742)
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JUDGMENT OF:	MILDREN J
APPEAL FROM:	MR R WALLACE SM

CATCHWORDS:

CRIMINAL LAW – evidentiary provisions – elements of possession – burden of proof – circumstantial case – whether reasonable hypothesis consistent with innocence – appeal allowed

APPEAL AND NEW TRIAL – possession of unlawful drugs – appeal against conviction – circumstantial evidence – elements of offence of possession – whether reasonable hypothesis consistent with innocence – effect of s 40(c) of *Misuse of Drugs Act* – appeal allowed

WORDS AND PHRASES – "possession"

Criminal Code, s 1, s 31, s 31(2), s 32
Misuse of Drugs Act, s 3(1), s 9, s 9(1), s 9(2)(e), s 20, s 22, s 40, s 40(c), s 40(d), s 40(e)

Barca v The Queen (1975) 133 CLR 82; *M v The Queen* (1994) 181 CLR 487; applied

Carnesi v Hales (2000) 117 A Crim R 363; followed

*Tabe v The Queen (*2005) 225 CLR 418; referred to

REPRESENTATION:

Counsel:

Appellant:	I Rowbottom
Respondent:	P Usher

Solicitors:

Appellant:	Withnalls
Respondent:	Office of the Director of Public Prosecutions

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

Jaeger-Steigenberger v O'Neill [2011] NTSC 42
No JA 9 of 2011 (21034742)

BETWEEN:

JAMIE-LEE JAEGER-STEIGENBERGER
Appellant

AND:

WAYNE O'NEILL
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 15 June 2011)

[1] The appellant was charged with unlawfully possessing a traffickable quantity of cannabis, namely 295.27 grams, contrary to s 9(1) and s 9(2)(e) of the *Misuse of Drugs Act*. After a contested hearing, the learned Magistrate found the appellant guilty, upon that finding recorded a conviction, and placed the appellant on a bond to be of good behaviour for two years. The grounds of appeal are as follows:

1. The finding of guilt in respect to the charge was unsafe and unsatisfactory;

2. The learned Magistrate erred in applying s 40 of the *Misuse of Drugs Act*;

3. The learned Magistrate erred in reversing the onus of proof;

4. The learned Magistrate erred in failing to consider whether there was a reasonable hypothesis consistent with innocence bearing in mind the case was circumstantial.

[2] The evidence before the learned Magistrate consisted of agreed facts as well as oral evidence by police officers. The facts were that on 17 October 2010 the appellant was driving a Holden Monaro CV8 motor vehicle which was owned by her father, Mr James Steigenberger, along Gardens Road. The police had established a random breath testing station on Gardens Road approximately 200-300 metres from the Frontier Hotel. As the vehicle was approaching the random breath testing station, the appellant was directed into the station. There is no suggestion that the appellant's manner of driving was in any way unlawful.

[3] The random breath testing station was being operated by Acting Sergeant Casey and Senior Constable Gillis. When the vehicle stopped, Acting Sergeant Casey asked the appellant for her driver's licence. The appellant said that she did not have it on her but that she was on her way to go and get it. He then obtained the appellant's personal details. At this stage, he was standing next to the driver's door. The driver's window was open and he was slightly leaning over to speak to the driver. He noticed a quite powerful smell of cannabis; he then conducted a breath test and stepped away from the vehicle to do a licence check. Whilst this was happening, Senior

Constable Gillis was dealing with another driver. Whilst Acting Sergeant Casey was conducting the licence check, the appellant wound up the windows in the car, got out and locked the vehicle and whilst standing to the side of the road made what looked like a number of telephone calls on her mobile phone.

[4] The appellant had a learner's licence. There was no other passenger in the vehicle. After receiving information as to the status of her licence, Acting Sergeant Casey then had a conversation with the appellant. The appellant told him that the vehicle belonged to her father that she had come from the Frontier Hotel. Acting Sergeant Casey informed the appellant that he could smell cannabis in the vehicle and asked her if there were any drugs in the car. The appellant replied, "Not that I know of". He then informed the appellant he was going to search the vehicle. At some stage, a call was made to Darwin Police Station for assistance in relation to the search.

[5] Acting Sergeant Casey began to search the vehicle and whilst this was happening two other general duties police officers arrived, namely Constable Hansen and Constable O'Neill.

[6] The Holden Monaro was a two-door sedan. There was not a lot of leg room in the passenger seats in the rear of the vehicle. Police located a clear or "sort of opaque" Décor plastic container on the rear passenger side foot well which contained eight plastic clip seal bags containing green plant material as well as fifty dollars in notes. Also located was a black Jim Beam soft

esky container in the passenger rear foot well on the driver's side. Inside were a number of plastic clip seal bags. The esky was placed on the roof of the vehicle and Constable Gillis counted that there were 10 plastic clip seal bags in all. Inside the bags was green plant material. It was not in dispute that the green plant material found inside the vehicle was cannabis which was later weighed a total of 295.27 grams.

[7] When the appellant had been pulled over at the random breath testing station it was shortly after 1:00 pm.

[8] There was no evidence that the appellant was searched or had any cannabis on her person.

[9] Constable Gillis gave evidence that as he approached the vehicle in order to start counting the bags, he could smell a strong odour of cannabis coming from the vehicle from about four metres away. However, by that time Acting Sergeant Casey had already pulled the Jim Beam bag out and had placed it on the roof. Constable Gillis agreed in cross examination that the opaque container had been opened before then.

[10] The evidence of Constable Hansen who assisted in the search of the vehicle was that as soon as he opened the door to the vehicle and put his head in, it "just reeked of cannabis, like yeah, strong, strong smell". But initially he had no idea of where the cannabis was in the vehicle.

[11] The appellant did not give evidence and no other evidence was called by either party.

[12] Subsequent analysis of the clip seal bags found within the vehicle identified a fingerprint of the appellant's father on one of the clip seal bags from the car.

The legislation

[13] Section 9(1) of the *Misuse of Drugs Act* provides that "a person who unlawfully possesses a dangerous drug is guilty of a crime". Section 9(2)(e) provides that where the dangerous drug is a Schedule 2 drug and the dangerous drug is not a commercial quantity but is a traffickable quantity, then subject to s 22 the crime is punishable on being found guilty by a penalty of $10,000 or imprisonment for two years.

[14] Section 22 is a provision which enables certain offences against s 9 to be tried summarily. It includes the particular case in question.

[15] Section 3(1) of the Act provides that in the Act "possession" in relation to a person, includes being subject to the person's control notwithstanding that the thing possessed is in the custody of another person.

[16] Section 3(1) defines "unlawful" to mean without authorisation, justification or excuse.

[17] Section 20 of the Act provides that the *Criminal Code*, with the necessary changes, should be read and construed with the Act.

[18] Section 40 of the Act provides some evidentiary provisions in respect of a charge against a person having committed an offence against the Act. In the first place, it is not necessary to particularise the dangerous drug in respect of which the offence is alleged to have been committed and a person is liable to found guilty as charged notwithstanding that the identity of the dangerous drug to which the charge relates is not proved, provided that the Court is satisfied that the thing to which the charge relates was at the material time a dangerous drug or precursor. Section 40(c) provides as follows:

> proof that a dangerous drug or precursor was at the material time in or on a place of which the person was:
>
> (i) the occupier; or
>
> (ii) concerned in the management or control,
>
> is evidence that the drug or precursor was then in the person's possession unless it is shown that the person then neither knew nor had reason to suspect that the drug or precursor was in or on that place;

[19] Section 40(d) reverses the onus of proof in relation to the defence of honest and reasonable mistake of fact.

[20] Section 3(1) defines “place” to include a vehicle which by definition includes any means of transport whatsoever by land, water or through the air.

[21] Clearly, the definition of possession is not intended to be an exhaustive definition of what is meant by the concept of possession. All it is intended to do is to include that which is subject to a person's control even if the thing possessed is in the custody of somebody else. The purpose of the definition seems to me to be directed to the situation where "A" gives the drugs to "B" in circumstances where, irrespective of whether or not "B" is aware of what the nature of what "B" has received so long as "A" stills exercises control over the item in question, the drugs are still in A's possession.

[22] In *Tabe v The Queen*,[1] Gleeson CJ said:

> Earl Jowitt said, in 1952, "the English law has never worked out a completely logical and exhaustive definition of 'possession'". Lord Diplock said that in ordinary usage, "one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control". The concept of "knowledge", however, is imprecise. This, no doubt, is why Aickin J spoke of "sufficient knowledge of the presence of the drug" in *Williams v R.* The answer to a question as to what constitutes "sufficient knowledge" for possession depends upon the purpose for which, and the context in which, the question is asked. If the context is a dispute as to whether, for the purposes of the law of larceny, one person was in possession of goods when another allegedly stole them, or whether a person has possession of valuable articles buried in or hidden on land owned by that person, the extent of sufficient knowledge may be different from that necessary to reach a conclusion that a person has contravened a law making it a criminal offence to possess an article or substance of a certain kind.

[1] (2005) 225 CLR 418 at 423 [7].

[23] Callinan and Heydon JJ said in the same case:[2]

> It can be accepted, on the basis of the statements in this Court in *Williams* and *He Kaw Teh*, that the concept of "possession" in the criminal law, in the absence of statutory indications to the contrary, involves as an element, awareness, or at least constructive knowledge, in the sense that there would be an awareness, but for an abstention from inquiry, or the suspension of other human tendencies such as suspicion and ordinary curiosity, of the thing possessed.
>
> The questions in this case therefore are whether there are legislative indications to the contrary, and the extent of knowledge, if any, of an aider, procurer or counsellor of a principal offender, that must be established to sustain a conviction of the former.

[24] However, mere knowledge of the existence of a drug is not in itself sufficient to prove the offence. If "A" brings into my home a box containing drugs, I am not necessarily in possession of the box or its contents even if I knew what is inside the box. A criminal offence requires proof of the relevant state of mind as well as the relevant, voluntary, actus reas. The actus reas may be proved if there is evidence that I had control of the box. As to the state of mind, s 31 of the *Criminal Code* requires proof of either an intention in respect of an act, omission or event or foresight of the act, omission or event "as a possible consequence of his conduct".

[25] Section 1 of the *Criminal Code* defines "act" to mean "the deed alleged to have been done by him" and "event" to mean the "result of an act or omission".

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[2] at 459 [143]-[144].

[26] Therefore it seems to me that what would need to be proved in relation to an offence against s 9 is first, that the accused had control of the drug; secondly that she either intended to have control of the drug or foresaw the possibility that a possible consequence of her conduct, in this case of driving the motor vehicle, was that she had control of the drug and if so that, in the circumstances, including the chance that she had control of the drug and "its nature", an "ordinary person similarly circumstanced and having such foresight would [not] have proceeded with that conduct".[3]

[27] Obviously, if a person is in fact in control of a drug without that person's knowledge, there can be no proof of an intent to control the drug and in some cases at least, proof of control may also be lacking. On the other hand, if the circumstances are such that an inference can be drawn that the person foresaw the possibility that what the person had control of might be a dangerous drug, the Crown could rely upon proof of foresight, the dangerous drug in this case being the "event". So in a case like the present, if the Crown is able to show that the appellant knew of the presence of drugs and knew that the drugs were in her control and made no effort to dissociate herself from the control of the drugs, an inference could be drawn that she intended to exercise control over the drugs. Alternatively, if the Crown could show that the appellant knew of the presence of something in the car and which was under her control and she foresaw the possibility that what was under her control might be an illegal substance, she would have the

[3] See s 31(2).

relevant foresight and then it would be necessary to consider the application of s 31(2), namely as to whether in the circumstances an ordinary person similarly circumstanced and having that foresight would have proceeded with the conduct of driving the vehicle containing the drugs. Of course, also there would have to be proof that what was in the packages were dangerous drugs.

[28] Turning to s 40(c) of the Act, proof that the dangerous drug was in the car (because it is a "place" as defined) of which the appellant was "the occupier" (because she was the driver of the car or because she was "concerned in the management or control of the place", i.e. the car) is evidence that the drug was then in the appellant's possession "unless it is shown that the appellant then neither knew nor had reason to suspect that the drug or precursor was in or on that place", being the car.

[29] Section 40 does not provide specifically that the burden of proving a lack of knowledge is on the accused as, for example, s 40(e) does in relation to authorisation. Compare also s 40(d) in relation to the operation of s 32 of the *Criminal Code* where the burden of proof is clearly upon the accused.

[30] In *Carnesi v Hales*,[4] Riley J as he was then said:[5]

> Section 40(c) differs from similar provisions in other jurisdictions in that it provides that the fact that the person was an occupier or concerned in the management or control of a place where a drug was located "is evidence" that the drug was in the possession of the

[4] (2000) 117 A Crim R 363.
[5] at 365 [8].

> person. In other jurisdictions expressions such as "is conclusive evidence" that the drug was then in the person's possession or that the substance "shall be deemed to be in the possession of the person" appear. In this jurisdiction the effect of s 40(c) is that a finding that the drug was in a place occupied by the person or a place in relation to which the person was concerned in the management or control provides some evidence of possession but does not make that evidence conclusive. Section 40(c) of the Act is an evidentiary provision. It raises a presumption that in the prescribed circumstances there is evidence that the drug was then in the person's possession. The presumption, if not rebutted in the manner described in the section, amounts to an item of evidence which must be considered along with all of the other relevant evidence in the case when determining whether the drug was unlawfully in the possession of the person.

[31] Thus, the evidentiary presumption is only a piece of evidence, which if not rebutted, may, but not necessarily must, lead to an inference of guilt. Whether the inference is able to be drawn beyond reasonable doubt depends upon the whole of the circumstances.

The findings of the learned Magistrate

[32] The learned Magistrate found that the appellant was in possession of the cannabis because of the combination of two factors. First, he found that the evidence of the police officers that the smell of cannabis in the car was very strong, so strong that an ordinary person would have noticed the smell. He said that "my view of the modern world is just about everybody recognises the smell of cannabis". Consequently, it seemed to him to be "fanciful that any person would not recognise that smell of cannabis and conclude that ought to be or must be, very likely is some dope somewhere in this car" (sic). His Honour then referred to the evidentiary provision in s 40(c) of the *Misuse of Drugs Act*, which he said did not conclude the matter and that on

his interpretation of the evidence it "simply must be that the [appellant] had a knowledge or suspicion that the drug was in the car because of the powerfulness of the smell. And there is no evidence or explanation in front of me to suggest any other conclusion from the evidence".

[33] His Honour considered the possibility that the appellant did not notice the smell for various reasons such as that she may have had a defective sense of smell or it may be that the car constantly reeked of the smell or for some other reason she did not notice it or if she did notice the smell it was not a smell which alerted her to the possibility of a dangerous drug being in the car. In relation to those possibilities, his Honour said:

> That none of those explanations have been put before me and they are all fancies on my part and none of them made, none of them purely imaginary, all of them just about plausible, but no evidentiary support for any of them.

[34] His Honour considered the evidence concerning the location of the cannabis. He was not prepared to infer that the appellant might have seen the esky or the other container in the vehicle given their location in the car. In effect, they were hidden from view from a person entering the car from the driver's side in order to get into the car. His Honour also said that there was no reason for him to believe that the appellant was in any sense the owner of the cannabis and that there was reason to believe that her father, the owner of the motor vehicle, "might well be concerned in the ownership of the cannabis since one of his fingerprints was found on one of the clip seal bags". But his Honour said, "there is nothing to suggest that the defendant

is the owner or concerned or interested in the ownership of this cannabis. The charge of course is not one of ownership, its one of possession". The other piece of evidence which his Honour considered was the evidence that the appellant had told the police in answer to the question as to whether there was any cannabis in the car, "Not that I know of", which his Honour said was "perhaps a little bit of a cause for wondering, then again not an answer that suggests any particularly guilty knowledge".

Ground 1 – The finding of guilt in respect of the charge was unsafe and unsatisfactory

[35] The test to be applied as set out in *M v The Queen*[6] is that:

> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.

[36] Their Honours went on to say:[7]

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.

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6 (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.
7 at 494.

[37] In this case, the evidence itself was not contentious. The question is whether in all of the circumstances the learned Magistrate ought to have had a reasonable doubt.

[38] Plainly, on the evidence, there was evidence to raise an inference that the cannabis was not put there by the appellant. It was the appellant's father's car and the appellant's father's fingerprint was found on one of the packages. There was no evidence that the father had given the cannabis to the appellant either to mind it or to act as a courier or as a personal gift. The evidence therefore raised the distinct possibility that the cannabis was still in the possession of the appellant's father notwithstanding he had lent the car to the appellant.

[39] Apart from s 40(c) of the Act, there was no direct evidence that the appellant had any actual knowledge of the drugs in the car. The case against the appellant was a circumstantial one. In those circumstances, the learned Magistrate could not return a verdict of guilty unless the circumstances were such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused. To enable the learned Magistrate to be satisfied beyond reasonable doubt of the guilt of the accused it was necessary not only that her guilt should be a rational inference, but that it should be the only rational inference that the circumstances would enable him to draw. An inference to be rational must rest upon something more then mere conjecture. The bare possibility of innocence does not prevent the Magistrate from finding the appellant guilty if the inference of guilt is the

only inference open to a reasonable magistrate upon a consideration of all of the facts in evidence.[8]

[40] However, as was said by Gibbs, Stephen and Mason JJ in *Barca v The Queen*:[9]

> … although a jury cannot be asked to engage in groundless speculation it is not incumbent on the defence either to establish that some inference other than that of guilt should reasonably be drawn from the evidence or to prove particular facts that would tend to support such an inference. If the jury think that the evidence as a whole is susceptible of a reasonable explanation other than that the accused committed the crime charged the accused is entitled to be acquitted.

[41] The case of *Barca v The Queen* is a good illustration of the way in which a court is to view the evidence to see if there is a reasonable possibility of innocence which has not been excluded by the Crown. In that case, the appellant had been convicted of the murder of his sister's husband. The appellant was a migrant from Calabria and there was evidence of a custom to vindicate the honour of a woman by murdering the man who had dishonoured her and to do so in such a manner as to leave "a sign of honour" upon the murdered man. There was evidence that such a sign has been left on the deceased's body and that the deceased had been accused by his wife of actions which might be regarded as dishonourable. The Crown case was that the accused had killed the deceased to vindicate the honour of the deceased's wife who was his sister. There was also evidence that under the

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[8] See *Barca v The Queen* (1975) 133 CLR 82 at 104 per Gibbs, Stephen and Mason JJ.
[9] (1975) 133 CLR 82 at 105.

Calabrian custom the first responsibility to vindicate the honour of woman rests on the woman's father. The accused made a very brief statement from the dock to the effect that he did not see the deceased on the day of his death nor did he kill him or take any part in his killing and that he personally does not follow this Calabrian custom.

[42] There was evidence during the trial that the sister's father had shot and killed the appellant's sister's first husband, that he had been incensed at the deceased's conduct and had threatened the deceased with dire physical consequences. There was no evidence that the father was anywhere in the vicinity of where the deceased was found or that the appellant's father had fired the shots that killed the deceased. As the Court noted, it was not proved that the father had committed the murder, although there was some circumstantial evidence pointing to his possible involvement. Therefore, the Court held that it should have been left to the jury to consider whether the suggested hypothesis that the father had committed the murder was reasonable and consistent with the evidence, since unless they rejected that hypothesis they could not have been satisfied of the guilt of the appellant.[10]

[43] The fundamental question in this case is whether in all of the circumstances there ought to have been a reasonable doubt as to whether the appellant knew that there were drugs in the car. As the learned Magistrate found it was quite reasonable to infer that the drugs might well have belonged to the appellant's father. He may have been the person who placed the drugs in the

[10] See pg 106.

car and he may have done so entirely without the appellant's knowledge. The circumstances suggested that the appellant had only been in the car for a very short time, perhaps only a minute or two. Notwithstanding that it was open, in my view, for the Magistrate to find that most people would have noticed the strong smell of the cannabis as noted by the police officers, that does not necessarily mean that the appellant knew that there was cannabis in the car because, as the learned Magistrate rightly pointed out, she may not have noticed the smell for a number of different reasons. If her father were an habitual smoker of cannabis, it might not have occurred to her that there was anything strange about smelling cannabis even if she was aware of what cannabis smelt like. In my opinion, whilst an inference could be drawn that she must have noticed the smell and that an ordinary person would know what cannabis smells like, there is also the possibility that she did not notice it, or if she did, that either she was not familiar with the smell of cannabis, or that she was so familiar with the smell that it did not cause her to think that there might be cannabis in the car. Of course, there is the evidentiary presumption, but that is only a piece of evidence which must be considered along with all of the other evidence.

[44] In my opinion there ought to have been a reasonable doubt as to whether the appellant intended to exercise control over the drugs in the car or foresaw the possibility that there may be drugs in the car and the learned Magistrate ought to have found her not guilty.

[45] There is another factor in this case which is disturbing. At the time of the sentencing hearing, the learned Magistrate said:

> It's certainly not her car. Her answer to police that as far as she knew there wasn't any drugs and it seems probably an honest answer in the circumstances, particularly if she was conscious, although not perhaps thinking of it, but somebody who does have something to do with the car came and there's cannabis in it and also she's vaguely conscience of the smell which the police remarked on so strongly. But it has happened before. As Mr Rowbottom says, as soon as she hands over the car she'll be handing over possession of the cannabis, even is she is hardly aware of its presence or only suspicious of its presence and not really aware at all but lacking an explanation. So she's only in possession by force of law as it were.

[46] All of this suggests to me that the learned Magistrate did in fact have a reasonable doubt as to her innocence notwithstanding his earlier finding of guilt.

[47] Finally, I should say that I do not agree that there needed to be evidence that the appellant had a defective sense of smell or was in fact unaware of the smell of cannabis, etc. These were reasonable possibilities based on the evidence as a whole given, especially, as there was a distinct possibility that the possession still remained with the appellant's father (as the definition of possession makes clear) and there was no evidence from which an inference could be drawn that her father intended to give her possession of the drugs.

Conclusion

[48] For these reasons the appeal must be allowed and the conviction quashed and a verdict of not guilty entered.
