Carnesi v Hales [2000] NTSC 98

PARTIES:	FRANCO CARNESI
	v
	PETER WILLIAM HALES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA67 OF 2000
DELIVERED:	15 DECEMBER 2000
HEARING DATES:	11 DECEMBER 2000
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	P. Elliott
Respondent:	T. Austin

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	ril0031
Number of pages:	13

ril0031

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

Carnesi v Hales [2000] NTSC 98
No. JA67 OF 2000

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:
FRANCO CARNESI
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 15 December 2000)

[1] On 19 August 1999 police executed a search warrant at 38 Annaburro Crescent Tiwi. When they arrived at the premises the father of the appellant was present and, shortly thereafter, the appellant arrived.

[2] During the search of a bedroom in the house the police located testosterone enanthate and stanozolol in a refrigerator and a commercial quantity of cannabis secreted under a bed. The appellant was subsequently charged

with possession of each of those items contrary to s 9 of the *Misuse of Drugs Act*.

[3] The matter proceeded before the Court of Summary Jurisdiction by way of a defended hearing at the conclusion of which the appellant was found guilty on those counts and was convicted. He was fined $350 in relation to the unlawful possession of testosterone enanthate, $350 in respect of the possession of stanozolol and he was sentenced to 12 months imprisonment, fully suspended, for possession of a commercial quantity of cannabis.

[4] The appellant has appealed to this Court against conviction and against the fines imposed in respect of the possession of testosterone enanthate and stanozolol. There is no appeal in respect of the sentence relating to possession of a commercial quantity of cannabis.

[5] The grounds of appeal against conviction are identified as follows:

> "1. The finding of guilt was against the weight of the evidence.
>
> 2. (Abandoned in the course of the hearing).
>
> 3. Having found that the drugs referred to in charges 1 and 3 were lawfully purchased and owned by others the Magistrate erred in law in finding that the defendant was in possession of them.
>
> 4. The Magistrate wrongly inferred that the defendant had to be aware of the drugs in counts 1 and 3 and by implication the drugs the subject of count 4.
>
> 5. The Magistrate erred in finding the evidence of the defendant did not satisfy the requirements of s 40(c) of the *Misuse of Drugs Act*."

6. The Magistrate erred in his interpretation of s 40(c) of the *Misuse of Drugs Act*."

Section 40(c) of the *Misuse of Drugs Act*

[6] There was a measure of agreement between the appellant and the respondent as to the correct interpretation of s 40(c) of the *Misuse of Drugs Act*. The complaint of the appellant was that his Worship did not appropriately apply that section at all times.

[7] Section 40 is in the following terms:

> "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;
>
> (c) proof that a dangerous drug 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 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 was in or on that place;
>
> (d) the operation of section 32 of the Criminal Code is excluded unless that person shows his or her honest and reasonable belief in the existence of a state of things material to the charge; and
>
> (e) the burden of proving an authorization to do an act or make an omission lies on the person."

[8] 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 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.

Testosterone Enanthate

[9] The appellant was convicted of unlawfully possessing a dangerous drug namely testosterone enanthate. Ms Austin who appeared on behalf of the Crown frankly conceded that the conviction could not stand upon a correct

interpretation of the relevant legislation, an interpretation that seems not to have been raised with the learned Magistrate.

[10] Under the *Misuse of Drugs Act* it is an offence to unlawfully possess a "dangerous drug". A dangerous drug is defined to mean a substance or thing specified in Schedule 1 or Schedule 2 of the Act. Reference to Schedule 2 reveals that testosterone enanthate is an anabolic steroid which is contained within the Schedule. However excluded from the category of anabolic steroids for the purposes of the Schedule are those which are "in products packaged for ovulation control or in quantities which can lawfully be prescribed in accordance with Schedule 4 of the *Poisons and Dangerous Drugs Act*." Reference to Schedule 4 of the *Poisons and Dangerous Drugs Act* reveals a list of poisons that "should, in the public interest, be restricted to medical, dental or veterinary prescription or supply". Schedule 4 includes testosterone as a poison that should be available only upon prescription but in so doing it excepts testosterone where it has been included in Schedule 6 of the Act.

[11] Reference to Schedule 6 of the Act identifies a list of poisons "that must be available to the public but are of a more hazardous or poisonous nature than those classified in Schedule 5". Under the heading testosterone is included the following:

> "(a) testosterone cyprionate, dipropionate, enanthate and Propionate in preparations labelled for treatment and prevention of pizzle (sheath) rot in wethers".

[12] Ms Austin took me to Exhibit 10 in the proceedings in the Court of Summary Jurisdiction and, in particular, to photograph 8. That photograph identifies what was seized by reference to the label as being a "prescription animal remedy" and as "liquid testosterone" which was "for the prevention and treatment of external ulceration and sheath rot in wethers".

[13] In view of that information it is clear that any possession of the testosterone enanthate which was seized from the premises of the appellant was not unlawful. It is lawfully available without prescription. The evidence accepted by his Worship was that the brothers of the appellant had purchased it over the counter. The appeal in relation to that count must succeed.

Stanozolol

[14] Stanozolol is an anabolic steroid identified in Schedule 2 of the *Misuse of Drugs Act* as a dangerous drug. Again it is subject to the exception that applies to "products packaged for ovulation control or in quantities which can lawfully be prescribed in accordance with Schedule 4 of the *Poisons and Dangerous Drugs Act*."

[15] Reference to Schedule 4 of the *Poisons and Dangerous Drugs Act* reveals that stanozolol is a poison "that should, in the public interest, be restricted to medical, dental or veterinary prescription or supply". There is no exception of the kind applicable to testosterone enanthate in relation to stanozolol. It follows that stanozolol is only available on prescription.

[16] In relation to the possession of stanozolol the learned Magistrate found that the drug had been lawfully obtained. He had before him evidence from the two brothers of the appellant, the combined effect of which was that they engaged in hunting pigs and for that purpose used dogs which sometimes became injured. Their evidence, which was accepted by his Worship, was that they obtained the anabolic steroids (in particular stanozolol) upon prescription from a veterinarian.

[17] The further effect of their evidence, which was also accepted by his Worship, was that it was through them that the steroids came to be on the premises. His Worship was not able to find that either of the brothers had physical custody or physical control of the steroids in the sense contemplated by s 40(c) of the *Misuse of Drugs Act*. However the evidence accepted by his Worship indicated that the steroids were on the premises because "from time to time, or on occasions, they (ie the brothers) attended the subject premises to treat the dogs." It follows from that evidence that the prescription drugs were at the premises for the purposes of the two brothers and were used by them at that location on occasion. The fact that the steroids were stored in a refrigerator that may have been used by the appellant does not mean that the drugs were in his possession. The situation is not dissimilar from that which applies in the normal family home where one person within a family may have a need for prescription medicines which are stored in a common location such as the family refrigerator. It cannot be the intention of the legislature that other members of the family

commit an offence because the prescription medicine, which is a "dangerous drug" as defined but lawfully obtained by one member of the family, is kept in the communal refrigerator. So it is with the prescription drug stanozolol in this case. The drug was lawfully obtained by the brothers and kept in a refrigerator for use by the brothers. The fact that the appellant had access to that refrigerator and, indeed, the refrigerator was in a room in which he sometimes slept does not mean that the drugs were in his possession.

[18] Although s 40(c) of the *Misuse of Drugs Act* provides that it "is evidence" that the drug was in the person's possession if the place in which it was found was a place in relation to which the person was the occupier or concerned in its management or control that does not necessarily lead to a conclusion that the drug was in his possession. It is only some evidence that this was the case.

[19] In the present case the appellant sought to demonstrate that he neither knew nor had reason to suspect that the drug was in that place and, in this regard, his evidence was not accepted by his Worship. That non acceptance does not lead to a finding of guilt of possession but rather leads to the position that, for the purposes of the proceedings, there was evidence that the drug was in the possession of the appellant. That evidence then had to be considered in light of all of the available evidence including the claims by the brothers that the drugs were placed where they were by them. There was no evidence that the appellant exercised any control over the drugs or has custody of them and his Worship made no finding to that effect.

[20] In his reasons for decision the learned Magistrate made the following observations:

> "So at the end of the day, the Court has to be reasonably satisfied on the balance of probabilities that the defendant neither knew, nor had reason to suspect the drug was in or on that place. I don't believe that the evidence called in the defence case is sufficiently cogent for the Court to reach that state of reasonable satisfaction. The Court has difficulties, real difficulties in accepting the defendant's evidence because of the discrepancy that I've mentioned. Furthermore, the Court is of the view that it defies belief that he wasn't aware of the steroids and it defies belief that he simply has not known about, or has suspected the existence of the steroids, cannabis and the electronic scales and the clipseal bags.
>
> So at the end of the day, again predicated upon the Court's view that the onus is on the defendant, the Court is not reasonably satisfied that the defendant neither knew nor had reason to suspect the drugs were in or on that place."

[21] His Worship then went on to exclude the operation of s 42 of the *Misuse of Drugs Act* and, without further discussion, declared that he was satisfied that the offences had been proved. In so doing his Worship treated the product of the application of s 40(c) of the *Misuse of Drugs Act* as conclusive evidence that the dangerous drug was in the possession of the appellant. He did not consider that evidence in light of the whole of the evidence in the case including the evidence that he accepted from the brothers of the appellant. To proceed in that way was in error.

[22] Having determined that the appellant had not satisfied him that he "neither knew nor had reason to suspect that the drug was in or on that place" his Worship should then have proceeded to consider whether the prosecution

had established the offence of unlawful possession beyond reasonable doubt. In so doing it was necessary to take into account the evidence of possession provided by the operation of s 40(c) of the *Misuse of Drugs Act* along with all of the other evidence in the proceedings and determine whether the appellant "unlawfully possessed" that drug. The standard of proof required in that process was proof beyond reasonable doubt. For the reasons I have identified above there must be a reasonable doubt whether the appellant did unlawfully possess the drug and he was entitled to be acquitted.

The Cannabis

[23] In searching the room in which the refrigerator was located the police located a trafficable quantity of cannabis. That cannabis can be seen in various photographs contained in Exhibit P10. It was located under a bed in that room. The evidence was that the appellant slept in the room on occasions.

[24] His Worship found that the evidence the appellant gave in relation to his use and occupation of the room was unsatisfactory. His Worship thought that the evidence of the appellant, which he regarded as being at odds with the information obtained from the record of interview, as to which was the primary room occupied by the appellant and which was the spare room may have been an attempt by the appellant "to put himself as far as possible away from the room within which the incriminating evidence was found."

[25] His Worship also found it difficult to accept that the appellant was not aware of the presence of some electronic scales and some clipseal bags in the room. Those items are shown on a shelf within the room in photographs contained in Exhibit P10. His Worship concluded that:

> "It just defies belief that he simply has not known about, or has suspected the existence of the steroids, the cannabis and the electronic scales and the clipseal bags."

[26] The learned Magistrate accepted the evidence of the two brothers of the appellant, part of which was that they had nothing to do with the cannabis.

[27] As with the steroids his Worship determined that the appellant had not satisfied him that he "neither knew nor had reason to suspect the drugs were in or on that place". Again his Worship should then have proceeded to consider whether the prosecution had established the offence of unlawful possession of cannabis beyond reasonable doubt. Rather than doing so he treated the failure of the appellant to satisfy him under s 40(c) of the *Misuse of Drugs Act* as conclusive evidence that the cannabis was in the possession of the appellant. As has been observed above it is only some evidence of possession. It is not conclusive. His Worship failed to proceed to consider that evidence in light of the whole of the evidence in the case and then to determine whether the Crown case had been established beyond reasonable doubt. This was in error.

[28] In relation to the cannabis there was no evidence as to when it was placed in the position in which police found it. It is known that the appellant was not

at home when the police arrived to search the premises. The appellant remained in the company of police from the moment of his arrival until the cannabis was located.

[29] The evidence was that others had access to the room in which the cannabis was located. Put another way there was no evidence that the appellant exclusively used the room. His Worship found that the two brothers had access to the room. Other residents of the house included the appellant's mother, father and sister. Whilst his Worship accepted that the brothers had nothing to do with the placement of the cannabis in the location in which it was found there were other possibilities than the appellant for it having been placed there. Included amongst those were the family members of the appellant. His Worship did not consider whether his general acceptance of the evidence of the brothers was sufficient to exclude their involvement in the cannabis being present in that location beyond reasonable doubt. Whilst his Worship did not accept that the appellant had discharged the onus imposed upon him by s 40(c) of the *Misuse of Drugs Act* of establishing, on the balance of probabilities, that he neither knew nor had reason to suspect that the drug was in the place at which it was located, it does not follow that his Worship could then conclude beyond reasonable doubt that the appellant was in possession of the cannabis. His Worship did not find that the appellant lied and he expressly acknowledged that to be the case. In the circumstances of this matter the finding that the appellant had not discharged an onus imposed upon him under s 40(c) of the *Misuse of Drugs*

Act cannot, without more, be converted into a finding of guilt beyond reasonable doubt. Others may have been in possession of the cannabis to the exclusion of the appellant. His Worship did not proceed to consider whether in light of all the evidence he could be satisfied beyond reasonable doubt that the appellant knew or had reason to suspect that the cannabis was present at that location. He did not consider whether the appellant had physical control or custody of the cannabis.

[30] Although the operation of s 40(c) of the *Misuse of Drugs Act* meant that there was evidence that the cannabis was in the possession of the appellant, a consideration of the whole of the evidence must have led to a reasonable doubt whether the appellant did unlawfully possess the drug. That being so he was entitled to be acquitted. His Worship did not consider this question and the appeal ought to be allowed.

[31] The appeals against conviction are allowed. The convictions and the orders of his Worship are set aside.

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