Gualandi v Gokel [2001] NTSC 10

PARTIES:	GREGORY SEBASTIAN GUALANDI
	v
	NOEL JOHN GOKEL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA48 of 2000 (9924196)
DELIVERED:	1 March 2001
HEARING DATES:	29 January 2001
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL - APPEAL AGAINST CONVICTION – APPEAL AGAINST SENTENCE
Appeal from the Court of Summary Jurisdiction – appeal against conviction and sentence – suspended sentence – mistake of fact – schedule 1 drug – aggravating circumstances

Misuse of Drugs Act 1990 (NT), s 9(1) and (2), s 37 and s 40(d) and (e)
Misuse of Drugs Act 1981 (WA), s 4(1)
Criminal Code Act 1983 (NT), s 32
Justices Act 1928 (NT), s 177 (2) (c)

Dunn v The Queen (1986) 32 A Crim R 203, distinguished.

REPRESENTATION:

Counsel:

Appellant:	M Carter
Respondent:	G Dooley

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	tho200103JA
Number of pages:	19

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

Gualandi v Gokel [2001] NTSC 10
No. JA48 of 2001 (9924196)

BETWEEN:

GREGORY SEBASTIAN GUALANDI
Appellant

AND:

NOEL JOHN GOKEL
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 1 March 2001)

[1] This is an appeal by the appellant, Gregory Sebastian Gualandi, against a sentence imposed in the Court of Summary Jurisdiction on 24 July 2000 by the Chief Stipendiary Magistrate.

[2] On 24 July 2000, the appellant entered a plea of guilty to the following charge:

On 31 July 1999 at Darwin in the Northern Territory of Australia

1. unlawfully possessed a dangerous drug as specified in Schedule 1, namely cocaine

AND THAT the said unlawful possession involved the following circumstances of aggravation:

(i) that the said Gregory Gualandi was in possession of the dangerous drug in licensed premises

Contrary to Section 9(1) and 2(c)(ii) of the Misuse of Drugs Act 1990 (NT).

[3] The maximum penalty for this offence under the provision of the Misuse of Drugs Act is $5000 or imprisonment for 2 years.

[4] His Worship found this offence proved and convicted the appellant of this offence.

[5] The learned Chief Stipendiary Magistrate found that there were two circumstances of aggravation being:

(1) the appellant had a prior conviction for possess cannabis and that this matter constituted a second offence against the Act.

(2) the offence was committed in licensed premises.

[6] These two matters are both listed under the definition of “aggravating circumstance” in s 37 of the Misuse of Drugs Act.

[7] Accordingly, the Chief Stipendiary Magistrate concluded he was bound to consider the provisions of s 37(2) of the Misuse of Drugs Act which provides as follows:

"(2) In sentencing a person for an offence against this Act the court shall, in the case of an offence for which the maximum penalty provided by this Act (with or without a fine) is -

(a) 7 years imprisonment or more; or

(b) less than 7 years imprisonment but the offence is accompanied by an aggravating circumstance,

impose a sentence requiring the person to serve a term of actual imprisonment unless, having regard to the particular circumstances of the offence or the offender (including the age of the offender where the offender has not attained the age of 21 years) it is of the opinion that such a penalty should not be imposed."

[8] His Worship then concluded his sentencing remarks and imposed a sentence as follows (t/p 44):

"Because of the two circumstances of aggravation and because there is little in the way of specialty in the circumstances of the offence, which take this case out of the ordinary to justify not sending you to prison, and because there is no large body of evidence showing that you are otherwise, in every respect, of good character, and, indeed, you have prior convictions whereas your co-offender last week had a number – sorry, had a completely clear record of convictions of any kind.

Taking all of those matters into account, it seems to me that I must heed the direction given to the court by section 37 of the Misuse of Drugs Act. Therefore I find you guilty. You are convicted, and you are sentenced to 1 month imprisonment. I note that the minimum time is 28 days, or the time that the Act requires me to sentence a minimum is 28 days, but I consider all the circumstances, 1 month imprisonment to be proper and appropriate for the offence."

[9] The grounds of appeal are as follows:

"(1) That the sentence imposed was manifestly excessive in all the circumstances of the offence and the offender.

(2) That the learned Magistrate erred in law by failing or apparently failing to regard or alternatively failing properly to regard the effect of Section 32 of the Northern Territory

Criminal Code and/or Section 40(d) of the Northern Territory Misuse of Drugs Act.

(3) That the learned Magistrate erred in law by failing to give any or proper weight to the Appellant's belief, which the learned Magistrate purported to accept, that the dangerous drug in his possession was one specified in Schedule 2 of the Misuse of Drugs Act.

(4) That the learned Magistrate erred in give (sic) weight to a drug-related conviction and sentence imposed after the arising of the circumstances which formed the basis of the charge before him.

(5) That the learned Magistrate erred in giving weight or alternatively too much weight to the alleged lateness of the Appellant's indication that he proposed to plead guilty to possession of a dangerous drug.

(6) That the learned Magistrate misconceived the effect of Section 37(2) of the Misuse of Drugs Act in that he failed to give any or any proper effect to the decision of this Honourable Court in *Duthie v Smith* (1992) 83 NTR 21 especially at 27 and/or that he failed properly to apply that decision to the facts before him.

(7) The learned Magistrate failed to give any (sic) or any sufficient weight to principles of parity of sentence in relation to the Appellant's co-offender Tony Papandonakis, sentenced on 21 July 2000."

[10] The original Notice of Appeal stated the appeal was against sentence. At the conclusion of submissions made by Mr Carter, counsel for the appellant, and Mr Dooley, counsel for the respondent, Mr Carter sought to amend the Notice of Appeal to include an appeal against conviction and sought to correct the date as it appeared on the Notice of Appeal so that the Notice of Appeal would read:

> ". . . Hereby appeals to the Supreme Court of the Northern Territory of Australia against a certain conviction and sentence made on the 24th July, 2000 by the said Chief Stipendiary Magistrate . . . ."

[11] Mr Dooley indicated he had no objection to such an amendment and that he had canvassed this issue in his own submissions and had nothing further he wanted to submit on the issue. Mr Dooley had essentially submitted that the appellant had been correctly convicted and that the sentence was appropriate and within the Chief Stipendiary Magistrate's sentencing discretion.

[12] The facts as put by the prosecution and admitted on behalf of the appellant who was the defendant before the Court of Summary Jurisdiction were as follows (t/p 4):

> ". . . The facts of the matter are these that on Saturday, 31 July 1999, the defendant was at the MGM Grand Casino attending the gala ball. At about 10.20 pm, the defendant entered the first floor toilets within the casino holding a small plastic 'clipsil' bag – 'clip-seal bag' that should be – containing a white powdery substance, a schedule 1 substance, in fact.
>
> The defendant was in the company of two co-offenders, Tony Papandonakis and another man, Kerry O'Bryan whom Your Worship discharged this morning. The defendants actions were observed by casino security. MGM Grand security then entered the toilets where a disturbance ensued causing the white powder to be strewn about the floor. I pause to say the disturbance was not a struggle, it was just that the white powder was dropped from a rolled up note.
>
> HIS WORSHIP: From a rolled up?
>
> MR LEWIS: Currency note, a $10 note being held by Gualandi. The defendant and co-offender then departed the toilets and returned to the gala ball. The defendant was then apprehended by security staff at the ball and escorted to the holding room at the front entrance to the casino. There he was spoken to by police at the holding room where he was informed that he may be spoken to at a later date as regards that matter. He then left and returned to the ball.
>
> At 4.30 am on Saturday, 23 October 1999, the defendant was arrested by police at a place known as Uncle Sam's Takeaway, Smith Street, Darwin. The defendant was charged and later bailed. The white powder substance was collected and held as an exhibit. The

residue in the clip-seal bag was analysed by forensic – and identified as cocaine. At the time of the offence, the first floor toilets, which were part of a licensed premises comprising the casino – were licensed premises – they were not open to or being used by the public."

[13] These facts were admitted by counsel for the defendant in the Court of Summary Jurisdiction and on the basis of these facts the learned Chief Stipendiary Magistrate stated "I find the offence proved".

[14] There was then the following exchange between his Worship and Mr Cantrill who appeared for the defendant (t/p 6 – 7):

"Your Worship, my client has pleaded guilty. On my instructions, the initial basis of defending the matter was that he believed the substance at the time – at least he thought it was – I don't think I can put it quite as high as believed, but he bought something that he thought was amphetamine. This occurred on the night in question when he and the co-accused, who was dealt with on Friday, had been to the gala ball. They had both imbibed a substantial quantity of alcohol. My client had obtained apparently from somewhere a bag of what he thought was speed and they decided to go and use it.

Now, your Worship, he's not disputing that the residue found in the bag was, in fact, cocaine. It may well be that somebody had pulled a fast one on him or tried to at the time, but, your Worship, notwithstanding that, my instructions are to enter a plea of guilty to the charge and I ask your Worship to take into account on the basis that, at least, at the time he didn't think the matter was as serious as quite obviously it is and quite obviously the court must regard it.

He was very intoxicated - - -

HIS WORSHIP: Can I accept the plea on the basis that he – you tell me he didn't knowingly have cocaine?

MR CANTRILL: In my submission, yes, your Worship. The offence, if I understand it correctly, is possessing a dangerous drug, and there's no question that he unlawfully possessed a dangerous drug, that that drug was a schedule 1 – amphetamine, of course, is a schedule 2 drug, but, in my submission, that's a particular rather than the charge itself.

HIS WORSHIP: It's not a regulatory offence though, is it?

MR CANTRILL: No, your Worship, I don't believe it is, however, if I'm correct – and I believe there's some authority I should have brought with me, your Worship, not in this territory as I understand it but in other parts of Australia that in the circumstances, it's a matter for mitigation rather than for defence, and it's put on the basis of mitigation, your Worship, not on the basis of it being a defence to the charge.

HIS WORSHIP: So he have the necessary guilty intend to have a drug and it was - - -

MR CANTRILL: A drug, yes, your Worship.

HIS WORSHIP: Not necessarily this particular drug is what you say?

MR CANTRILL: It's put on that basis.

HIS WORSHIP: All right. Well, is that sufficient for the plea of guilty, is it?

MR CANTRILL: In my submission, yes, your Worship.

HIS WORSHIP: Mr Lewis might be able to help me on that, yes."

[15] There followed considerable discussion on other issues and subsequently at t/p 21 Mr Cantrill took his Worship to the provisions of s 32 of the Criminal Code Act 1983 (NT) which states:

"32. MISTAKE OF FACT

A person who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of things had been such as he believed to exist."

and to s 40(d) and (e) of the Misuse of Drugs Act which states as follows:

40. **Evidentiary**

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

(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."

[16] During the course of his submission Mr Cantrill stated (t/p 21):

> "So, in other words, he doesn't escape criminal liability by saying, 'Well I thought it was amphetamine, not cocaine'. But if the court accepts that, then he would be liable as if it had been amphetamine and not cocaine."

[17] Mr Cantrill pointed out that amphetamine was not a Schedule 1 drug but a Schedule 2 drug and carried a maximum penalty under the provisions of s 9(1) and (2)(f)(ii) of the Misuse of Drugs Act of a fine of $2000. Mr Cantrill also made reference to a statement which had been made by the defendant to the police in which he had said he purchased what he thought was speed, that this statement had been provided to the court by the prosecutor and submitted that it would be difficult for the prosecution to rebut any suggestion that the defendant did make that he believed it was speed. Mr Cantrill further submitted (t/p 22 - 23):

> "This raises an interesting question, your Worship, so far as the question of penalty is concerned, and bearing in mind what section 32 is, that his criminal responsibility is no greater than if the facts were as he believed them to be, what is the appropriate penalty? I submit your Worship there should be parity of sentence this morning. The difficulty of that, your Worship, is that if the court accepts that,

> we're getting close to the maximum penalty for use of amphetamine, which would be covered by section 9(2)(f)(ii), where there's a maximum penalty of a $2000 fine because amphetamine after all is a schedule 2 drug, not a schedule 1 drug."

[18] Mr Cantrill further submitted that the description of the actual drug was a particular of the offence but the crime remained the same being possession of a dangerous drug and again drew to the court's attention the distinction in penalty between a Schedule 1 drug and a Schedule 2 drug and that cocaine is a Schedule 1 drug and amphetamine a Schedule 2 drug.

[19] Mr Lewis appearing for the prosecution then indicated that the Crown were not prepared to accept the statement from the Bar Table that the defendant had an honest and reasonable belief that the drug he possessed was amphetamine.

[20] Following upon instructions from his client, Mr Cantrill called his client, the defendant Gregory Sebastian Gualandi to give evidence. On this issue Mr Gualandi gave evidence as follows (t/p 27):

> "And you've pleaded guilty to a charge that on 31 July 1999, you were in possession of a dangerous drug in circumstances of aggravation in that they were – you were on licensed premises. Do you understand that?---That's right, yes.
>
> Now, so far as that was concerned, what was the drug? What did you believe you had in your possession?---I believe what I had was amphetamine, speed.
>
> How did you come to that belief?---Well the person I got it from said it was speed. I've never – that's what I thought it was. That's why I paid $80 – oh, $70 actually.
>
> And you've - - -

HIS WORSHIP: Sorry, I didn't hear the - - -?---I paid $70 for it. I'd say – I thought cocaine would be a lot more expensive."

and (t/p 28 - 29):

"What was it that caused you to believe that what you were buying, or what you were getting, I should say, from your friend, was amphetamine?---Well, that's what I asked for and they told me that's what it was. So that was my belief.

Did you have any cause at all to believe that you were getting anything other than amphetamine?---No."

[21] Mr Gualandi was then cross examined by the prosecutor and gave evidence as follows (t/p 32 – 34):

"All right. And he gave you the bag that you took to the toilet?---Yes.

That fellow, Papandonakis, he had a bag too, didn't he?---Yes.

Did he score from the same man?---I'm not sure.

Well, you either know or you don't know?---No, I don't know.

And when you got this bag, did you pay the man any money?---Yes, I did.

And how did you pay him? What sort of money did you pay him?---Credit.

Mm?---Cash, of course. $70.

How much? How much money?---I believe it was $70. It varied from $50 to $80.

All right. And when you paid that money to him, what did you – you say you thought you were getting amphetamine did you?

And did you mention this to the fellow when you were discussing it with him? Did you say, 'Have you got any speed?' or 'Have you got some' - - -?---Yes, speed.

You said that?---Yes.

And he sold you cocaine?

You don't deny that, do you? He sold you cocaine?---Well, I'm not sure, I thought it was speed.

Well, do you deny that the analysis has produced a result of cocaine? ---Well, of course, I can't deny the analysis.

No?---It was.

And so you think he made a big mistake in selling you cocaine of that quantity for $70?---I believed to – to get speed. Now, I'm not sure if he had, you know – he's pissed, or two different lots or something like that, and maybe slipped me the wrong one. Or maybe it was speed. I'm not sure.

All right?---I believed it to be speed.

Anyway, it turned out to be cocaine didn't it?

You don't deny that, do you?---Well, I'm not – it's on the paper here.

Well, never mind what's on the paper - - -?---Or it could have been mind, it could have been Tony's.

You're now giving evidence on oath, which is different. You don't deny that what you were sold was cocaine, or do you?---I thought it was speed.

Yes, you thought it was speed, so you say. But you don't now deny that it was cocaine do you?

You're not saying that what was testing was anything but cocaine now are you? You're prepared to accept that?---Well, it's on the test, it must have been yes. What ever was on the floor - - -

All right. Well, you got some cocaine. How much does cocaine cost you in the – I should put that more neutrally; do you know the price of cocaine on the street in Darwin around that time?---No.

Well, forgive me if I'm wrong about this, but I thought you said it was far more expensive than - - -?---Well, that's my belief, but I'm not exactly sure of how much. You asked me how much.

Yes, that's right I did ask you how much. But you say you don't know but you know it's more - - -?---I believe it to be more.

Is it substantially more?---I believe it to be around a few hundred dollars.

> Well – so you handed over your $70. What did you do with that cocaine then?---Well, I - - -
>
> Did you encourage others to come up to the lavatory and try some?---No. There was, I suppose, a communal decision.
>
> You decided it all together, didn't you? To go upstairs and to snort some of what you now say you thought was amphetamine?---I think we were all going to the toilet at the same time – happened to be there together, and then it was too packed, we went upstairs. We both – we had some bags each and that's how it happened, it wasn't a planned thing.
>
> Yes. See, what I'm suggesting to you is that on that night you – full knowing that you were seeing this man, you were going to buy some cocaine and you set about buying cocaine. You had cocaine in mind. That's what I suggest to you. Is that true?---No."

[22] Later in cross examination Mr Gualandi answered "I honestly believed it was amphetamine, which I bought" and subsequently (t/p 38) agreed with a question in cross examination that as far as he was concerned, he was engaging in the taking of amphetamines and not taking cocaine, as is alleged against him.

[23] The learned Chief Stipendiary Magistrate proceeded to give reasons for the sentence he imposed on the defendant. During the course of these reasons, his Worship dealt with the evidence given by the defendant concerning his belief that the drug he possessed was amphetamine. His Worship stated (t/p 41 – 42):

> "Now, I need also to acknowledge the submission that you held an honest and reasonable belief that the drug you had in your possession at the time was something other than cocaine, although you now accept that it was in fact cocaine. The onus of proving that rests on you, although I note in passing, I don't think it's subsection (e) at 40 that provides that, but generally speaking, the terms of subsection (d) is that you must show, unless that person shows his honest and

> reasonable belief, so that the onus rests on you to show that, and as the Criminal Code says, you've only got to do that in the balance of probabilities.
>
> Given that that's the only evidence before me in relation to that circumstance, other than what some might regard as an unlikely event that someone would supply you with cocaine when you asked for speed when some people may hold it that is so unlikely as to be unworthy of belief. But in the event, I know of no sufficient factors to make me, in this case, find that conclusion other than vague evidence that cocaine is more expensive than speed. And so I am prepared to proceed to sentence you on the basis that although you now acknowledge to have been in possession of cocaine, at the time of the event, you thought it was speed."

[24] There is no dispute between counsel for the appellant and the respondent that this was a clear finding by the learned stipendiary magistrate that the defendant had satisfied him on the balance of probabilities that the defendant had an honest and reasonable belief the dangerous drug in his possession was amphetamine which is a Schedule 2 drug and not cocaine which is a Schedule 1 drug.

[25] Accordingly, it must follow that the offence which the Crown ultimately proved was an offence that the defendant unlawfully possessed a dangerous drug as specified in Schedule 2, namely amphetamine (also known as speed). The aggravating circumstance of possession of such dangerous drug in licensed premises was not in dispute.

[26] The offence of possess a dangerous drug as specified in Schedule 2 namely amphetamine with the circumstance of aggravation being on licensed premises is an offence which under s 9(1) and (2)(f)(ii) of the Misuse of Drugs Act carries a maximum penalty of $2000 fine.

[27] Counsel for the appellant and the respondent were in agreement that where the court convicts a person under the Misuse of Drugs Act for an offence which provides for a maximum penalty of a fine, the provisions of s 37(2) of the Misuse of Drugs Act does not fall for consideration by the court as a court cannot impose a gaol sentence in respect of an offence which carries a maximum penalty of a fine and does not provide for penalty by imprisonment.

[28] Counsel for the respondent submitted that there was no error on the part of the learned Chief Stipendiary Magistrate who dealt with the matter in the way in which he was asked to by counsel for defence and that was to treat the honest and reasonable belief by the defendant that the dangerous drug he possessed was amphetamine as a matter in mitigation of the offence to which he had pleaded guilty.

[29] From a total reading of the sentencing remarks it would appear the appellant was convicted of the offence of being unlawfully in possession of a dangerous drug specified in Schedule 1; namely cocaine, his Worship stated at the outset of giving his Reasons for Sentence (t/p 41):

> "You have pleaded guilty today to the specific charge that you were unlawfully in possession of a dangerous drug specified in schedule 1; namely cocaine and that there was a circumstance of aggravation; namely that you were on licensed premises at the time.
>
> Now, as I have indicated to your counsel, or to counsel generally during discussion, your giving of evidence has led me to have some confusion as to where – why and where those drugs came from, but your plea has not change[d] as the result of that confusion in evidence, and so I must take it that the charge still is, and I must deal

with it still as a charge appropriate to the particular circumstances; namely that you were on the night, in fact, in possession of cocaine."

[30] The case before this Court is distinguishable from the decision in *Dunn v The Queen* (1986) 32 A Crim R 203 on which counsel for the respondent places reliance for his submission that the appellant was correctly convicted of unlawfully possess a dangerous drug as specified in Schedule 1, namely cocaine. In the matter of *Dunn* (supra) the majority in the Court of Appeal found that whether this drug was cocaine or amphetamine did not go to the essence of the charge because both of them are prohibited drugs within the definition of prohibited drug under the Misuse of Drugs Act 1981 (WA). Pidgeon J at 211 states:

> ". . . He did have physical possession of what was in fact a white powder being cocaine. He states that he did not know it was cocaine. He knew however that the white powder was a prohibited drug of some description. Cocaine and amphetamine are both drugs of addiction referred to in s 4 of the Misuse of Drugs Act. They achieve this classification by being contained in the Eighth Schedule to the Poisons Act 1964 (WA): definition in s 3 of the Misuse of Drugs Act. Cocaine is also specified in Sch 1 of the Misuse of Drugs Act. The offence is being in possession of a prohibited drug. Any substance that answers s 4 is in that category. Knowledge that the white powder answers s 4 in some way would, I consider, be sufficient to show that one knew that one was in possession of a prohibited drug. It would not, I consider, be necessary to show that the applicant had particular knowledge of what the drug was or how it came within the ambit of the section. I consider therefore that the necessary requirements to establish possession have been established."

[31] The appellant in the matter of *Dunn* (supra) had entered a plea of guilty to a charge that he possessed a prohibited drug with intent to supply to another person, this drug being cocaine. The appellant had stated to police that he

believed the prohibited drug he possessed was amphetamine, a subsequent analysis showed it to be cocaine. The appellant entered a plea of guilty to a charge that he had in his possession a quantity of cocaine with intent to sell or supply it to another. He did this on legal advice he received at the time to the effect that it made no difference whether he was in possession of cocaine or amphetamine. The appellant maintained the court should not have accepted his plea of guilty. Burt CJ at 206:

> "I think the Crown is right about that.
>
> If it is held that an accused person:
>
> (1) is in possession of a substance;
>
> (2) it being and he knowing or believing it to be a prohibited drug;
>
> (3) with the intention of supplying it that is to say the substance which he has in his possession to another;
>
> then the offence is complete.
>
> It is not to the point that the accused thought or believed the drug was of a different kind and that had he known the truth he would not have passed it on to others.
>
> For these reasons I would grant the application for an extension of time in which to seek leave to appeal against his conviction and I would grant that leave but I would dismiss the appeal."

[32] The penalty provisions under s 34 of the Misuse of Drugs Act 1981 (WA) read with the provision of s 4(1) makes no distinction in terms of penalty between cocaine and amphetamine.

[33] However, under the Misuse of Drugs Act 1990 (NT) there is a very big distinction between possession of cocaine and possession of amphetamine,

the former carrying a maximum penalty of $5000 or 2 years imprisonment and the latter a maximum penalty of a fine only, being a maximum of $2000 - Misuse of Drugs Act 1990 (NT) s 9(1), s 9(2)(c)(ii) and s 9(1), s 9(2)(f)(ii).

[34] I consider that the more pertinent comment relevant to the case before this Court was made by Olney J who was the dissenting Judge in the matter of *Dunn* (supra). Olney J at 209:

> "It seems to me clear enough that s 6(1)(a) requires that the drug which the accused person must have an intention to sell or supply to another is the drug which he has in his possession. If par (a) had been couched in terms such as 'with intent to sell or supply a prohibited drug to another, …' there may be some basis upon which to argue that an offence is committed upon proof of possession of one prohibited drug and an intention to supply another but the use of the pronoun 'it' in par (a) puts beyond doubt that the intention must relate to the prohibited drug of which the accused person has possession.
>
> Unless constrained by judicial authority compelling a contrary view (and none has been cited) it appears to me to be logically absurd to say that a person with an admitted intention to supply amphetamine also has an intention to supply cocaine if unknown to him the drug which he has possession of turns out to be cocaine and not amphetamine. The material facts so far as the Crown case is concerned are that the applicant thought that he had received amphetamine and that it was his intention to supply amphetamine to his brother and to friends. It was no part of the material facts put to the court on behalf of the Crown that the applicant had an intention to supply cocaine."

[35] Olney J indicated he would have allowed the appeal against conviction.

[36] In the matter which is on appeal before this Court, I consider there was an error in proceeding to conviction to the charge on indictment when evidence

had been accepted which meant a conviction for this offence could not be supported. This error may have been avoided if immediately following the plea of guilty and the recital of the Crown facts, counsel for the defendant had advised the learned Chief Stipendiary Magistrate that there was an issue between the parties namely that the defendant had an honest and reasonable belief the dangerous drug was amphetamine. The defendant could then have given evidence on the plea of guilty and the learned Chief Stipendiary Magistrate made the findings of fact on which he found the offence proved. In this case the unlawful possession of amphetamine was a lesser offence than that with which the appellant had been charged. The learned Chief Stipendiary Magistrate could have then proceeded to sentence the appellant on the offence that had been proved against the appellant as distinct from the offence with which he had been charged.

[37] The recording of a conviction and the sentence imposed by the learned Chief Stipendiary Magistrate are quoted in paragraph 7 of these reasons for judgment.

[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.

[41] Accordingly, I would quash the conviction.

[42] At the request of the parties, this matter was adjourned to 9.00 am on 8 March 2001 for further submissions.

———————————————