R v McCormick [2011] NTSC 23

PARTIES:	The Queen
	v
	McCormick, John Reece
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20923110
DELIVERED:	28 March 2011
HEARING DATES:	21 March 2011
JUDGMENT OF:	KELLY J

CATCHWORDS:

Misuse of Drugs Act, s 4, 11R

Filippetti (1978) 13 A Crim R 335; *Moors v Burke* (1919) 26 CLR 265 at 270-271; *R v GNN* (2000) 78 SASR 293.

REPRESENTATION:

Counsel:

Plaintiff:	P Usher
Defendant:	T Berkley

Solicitors:

Plaintiff:	Director of Public Prosecutions
Defendant:	Robert Welfare

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

R v McCormick [2011] NTSC 23
No. 20923110

BETWEEN:

THE QUEEN
Plaintiff

AND:

JOHN REECE MCCORMICK
Defendant

CORAM: KELLY J

REASONS FOR DECISION

(Delivered 28 March 2011)

[1] The accused has pleaded guilty to one count of unlawful possession of a commercial quantity of cannabis.

[2] In addition he has been charged with two counts of supplying cannabis, three counts of attempted supply of cannabis and five counts of possession of cannabis.

[3] The counts are inter-related. Count one alleges supply of a quantity of cannabis to Gregory Perry; count six alleges possession of the amount of the drug supplied to Perry. Count two alleges supply to Alan Watt; count seven alleges possession of the amount of the drug supplied to Watt.

[4] Count three alleges an attempted unlawful supply to Leon Chester of the amount of cannabis which was found on Mr McCormick's person when he was arrested and which is the subject of count eight (i.e. unlawful possession) to which Mr McCormick has pleaded guilty.

[5] Counts four and five allege attempted supply of cannabis to Jillaine Jones and Natalie Sinclair respectively. The quantities to be supplied are not specified. The Crown case is that Mr McCormick was planning to supply these individuals with cannabis taken from the containers (or one or more of the containers) which are the subject of counts nine, ten and eleven.

[6] Counts nine, ten and eleven charge Mr McCormick with possession of quantities of cannabis located in an ammunition box and two lengths of poly pipe found buried in the ground close to where Mr McCormick was arrested.

[7] The Crown case against Mr McCormick as opened by Mr Usher is that it would present evidence of telephone intercepts in which a person they say is Mr McCormick spoke to a number of other people including Gregory Perry, Alan Watt, Leon Chester, Jillaine Jones and Natalie Sinclair during which he arranged to meet those people at a place referred to in the telephone conversations as "the office" in order to supply them with cannabis. (References to cannabis in the phone conversations were said to be in code and evidence of the code is to be adduced.) The Crown also plans to adduce evidence of video surveillance of the accused in relation to the alleged supply of cannabis to Watt and Chester. It is said that the video evidence

would show Mr McCormick in the area of bush at Darwin River referred to by McCormick and others as “the office”. That surveillance is said to show Mr McCormick disappearing into the bush and coming back with cannabis.

[8] On the Crown case, Chester, Jones and Sinclair attended at “the office” following telephone conversations with Mr McCormick in which they arranged to buy drugs. Police arrested Mr McCormick at that place at Darwin River. Chester, Jones and Sinclair were also present in the area at the time. At the time he was arrested, Mr McCormick was in possession of an amount of cannabis which the Crown alleges he was intending to supply to Chester. He has pleaded guilty to possession of that quantity of cannabis.

[9] Police searched the area and, on the same day, located an ammunition box containing cannabis which is the subject of count nine. The following day they performed another search and found the two poly pipes nearby, both of which contained cannabis and which are the subject of counts ten and eleven.

[10] Mr Berkley for the defendant has made application to strike out counts three, four and five (the attempted supply charges) and counts nine, ten and eleven (the charges of possession of the cannabis found in the buried containers). The basis of the strike out application is a submission that, on the case as opened by the Crown, there is insufficient evidence from which a jury could find that Mr McCormick was in possession of the cannabis found in the buried containers and that the charges of attempted supply depend

upon a jury being satisfied that Mr McCormick was in possession of that cannabis.

[11] Mr Usher for the Crown said that the Crown will rely on the following circumstantial evidence to establish possession of the cannabis in the buried containers.

(a) The buried containers were found in close proximity to the place where Mr McCormick and the other three were arrested and Mr McCormick was found to be in possession of cannabis.

(b) The Crown will tender video surveillance evidence taken in the same area of Mr McCormick supplying cannabis to Watt and Perry. In that video surveillance evidence Mr McCormick is seen disappearing into the bush in the direction in which the buried containers were found and reappearing shortly thereafter with cannabis in bags.

(c) The telephone intercept evidence, the Crown alleges, establishes that Mr McCormick spoke on the telephone with Chester, Jones and Sinclair (the subjects of counts three, four and five) and arranged to meet them at "the office" – i.e. in the location where the buried cannabis was found.

(d) The packaging of the drugs in the buried containers was identical to the bags located on Mr McCormick's person (i.e. the subject of count eight to which he pleaded guilty) and on Mr Watt the day before.

(e) The Crown says Police will give evidence that the area in which the buried containers were found showed evidence of recent disturbance and scuff marks.

(f) The Crown will call evidence from Mr Watt who will say that he telephoned a person and meet that person at "the office" where he was supplied with the drugs. The Crown case is that this person is Mr McCormick. However, the statement supplied to Police by Mr Watt does not name him.

[12] Defence counsel submits that this evidence does not establish any link between the cannabis which was buried and Mr McCormick.

[13] Mr Berkley relied on *Moors v Burke*[1] for the proposition that:

> "…when a person is in such a relation to a thing that, (1) so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and (2) so far as regards other persons, the thing is under the protection of his person or presence, or in or on a house or land occupied by him, or in some receptacle belonging to him and under his control, he is in physical possession of the thing".

[14] He relied on *Moors v Burke* and also *Filippetti*[2] for the proposition that for a person to be in possession of a dangerous drug that person must have exclusive physical control of it, albeit conceding that this might be exclusive physical control jointly with another or others.

[1] (1919) 26 CLR 265 at 270-271.
[2] (1978) 13 A Crim R 335.

[15] Mr Berkley's submission is that, on Mr Usher's opening, there was no relevant evidence to satisfy that test. Regarding all of the evidence as opened by the Crown, Mr Berkley submitted that all of the evidence as opened by the Crown cannot, as a matter of law, rule out the possibility that the cannabis in the buried containers belonged to someone other than Mr McCormick, or rather was in the control of someone other than Mr McCormick given that the buried containers were found on Crown land.

[16] I do not accept that submission, and on 21 March 2011 I dismissed the application by the defence to strike out counts 3, 4, 5, 9, 10 and 11 on the indictment for reasons which I would publish at a later date. These are those reasons.

[17] The Crown case against Mr McCormick on each of counts 3, 4, 5, 9, 10 and 11 is a circumstantial one and, as is often said in relation to circumstantial evidence, an inference can be drawn from a combination of factors which, when viewed as a whole, persuade a jury that the inference should be drawn. The factors to be considered are like strands in a cable. It may be that no conclusion can be drawn by looking at each fact separately, but when the facts are looked at together in light of all the circumstances of the case, rather like a cable with stands bound together – a jury may be satisfied that an inference can properly be drawn from those facts.

[18] In my view, if the evidence falls out as foreshadowed in the Crown opening, and is accepted by the jury, that evidence is capable of establishing that Mr

McCormick telephoned Mr Watt and arranged to meet him at the area in which the containers of cannabis were buried; that he did meet Mr Watt in that area; that he then disappeared into the bush in the direction of the buried containers and reappeared shortly thereafter with cannabis identical packaging to the cannabis in the containers; and that he then supplied Mr Watt with that cannabis. That evidence (if it is adduced as foreshadowed and is accepted) is also capable of establishing that Mr McCormick also spoke by telephone to the people the subject of counts three, four and five and arranged to meet those people in the same area; that those three people arrived in that area on that day while Mr McCormick was present there; and that on that day, too, Mr McCormick disappeared into the bush in the area where the containers were found and returned shortly thereafter with bags of cannabis in identical packaging to that in the containers.

[19] In my view if the jury accepts all of that evidence it would be open to the jury to infer that the cannabis in the buried containers was in the possession and under the control of Mr McCormick and to be satisfied of that beyond reasonable doubt. I therefore dismissed the defence's application to strike out counts 3, 4, 5, 9, 10 and 11. (Count 3 does not, in any case depend upon the jury finding that the accused was in possession of the cannabis the subject of counts 9, 10 and 11 as the cannabis which the accused is alleged to have attempted to supply to Chester is the cannabis found on his person at the time of his arrest.)

[20] On 22 March 2011, Mr Berkley for the defence renewed the application to strike out those paragraphs and raised further argument. This time it was contended that, because the buried cannabis was on Crown land, to which any member of the public had as much right (and power) to enter as Mr McCormick, then, as a matter of law, Mr McCormick could not be found to have exclusive possession of that cannabis, even if it were to be established that he had purchased it and buried it there, and therefore, as a matter of law, he could not be found guilty of possessing it.

[21] Mr Berkley relied for that submission on the same cases, *Moors v Burke* and also *Filippetti*. In *Moors v Burke*, Moors (a customs officer) was charged with having in his "actual possession" certain personal property suspected of having been stolen. The property was found in a locker which Moors used, and to which Moors and at least one other customs officer had access as of right. There was evidence that Moors had placed at least some of the property in the locker on a day before it was found by the informant. Moors was convicted and appealed on the ground that the property was not in his "actual possession". The appeal was successful. The High Court held that the property placed in the locker had ceased to be in Moors' "actual possession" because the locker was not a "receptacle belonging to him" or "under his control" and he did not have the exclusive means of opening it and obtaining the contents. Mr Berkely relied, in particular on the following passages, on p 274:

> "'Having actual possession' means, in this enactment, simply having at the time, in actual fact and without the necessity of taking any further step, the complete present, personal, physical control of the property to the exclusion of others not acting in concert with the accused, and whether he has that control by having the property in his present manual custody, or by having it where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes. …
>
> "But it does not include the case of a person who has put the property out of his present manual custody and deposited it in a place where any other person other than him has an equal right or power of getting it, and so may prevent the other from having manual custody in the future."

[22] This result depended to a large degree on the term "actual possession" and the object of the legislation in question, said to be "to provide for the immediate arrest *flagrente delicto* of suspected persons in possession of or conveying in some way personal property said to have been stolen."[3] In this context, the Court noted the absence of any power in the legislation to enter premises or seize property apart from on the accused person.[4]

[23] This should be contrasted with the *Misuse of Drugs Act* which contains extensive powers of search and seizure of "drug premises"[5] and the following wide definition of "possession"[6]:

> ***"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"

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3 *Moors v Burke* at 273. This is quoted from a case on an earlier version of the legislation, but it appears from the discussion on pages 273 to 274 that the legislation in force at the time was seen to have the same general object.

4 *ibid*

5 *Misuse of Drugs Act* s 11R

6 *Misuse of Drugs Act* s 4

[24] In any event, even if the concept of "possession" were found to be the same in the legislation considered in *Moors v Burke* and the *Misuse of Drugs Act,* it seems to me that a person who has taken pains to construct an underground hiding place and carefully camouflage the entrance to it, could not be said to have "deposited it in a place where any other person other than him has an equal right or power of getting it". Speaking of property generally, if the person who hid the property owned it, no-one else would have an equal right to it; and the fact that it was carefully hidden means that no-one else would have an equal power of getting it. Such property, it seems to me would effectively be in the control of the person who hid it there (and any others acting in concert with him).

[25] The defence also relied on *Filippetti.* In that case the accused was a resident in a house with five other people. A large quantity of cannabis was found concealed under the cushion of a chair in the lounge room of the house in which another resident of the house was sitting. He was convicted of deemed supply of cannabis on the basis of possession of an amount in excess of the prescribed amount. His appeal against conviction was allowed on the ground that the evidence of access to and use of the premises by a large number of people other than the accused meant that the Crown had not adduced enough evidence to negate possession on the part of another occupant of the house.

[26] Defence counsel relied on *Filippetti* as authority for the proposition that if drugs (or as a matter of logic, other property) was located on property to

which a large number of people had equal right of access, then that property could not, as a matter of law, be said to be in the "exclusive possession" of any one of those people.

[27] In my view, *Filippetti* is not authority for any such proposition. The real basis of the decision in *Filippetti* is set out on p 338:

> "The finding of the buddah sticks in the chair in this lounge room where all six occupants of the house apparently had free access, and so far as the evidence goes in fact made equally free use, would not readily establish that there was exclusive control of these buddah sticks in any one of these occupants unless there was some evidence to accompany the finding of the buddah sticks." *[emphasis added]*

[28] In other words, basis for allowing the appeal was not that, as a matter of law, a person cannot be said to "possess" property which is placed on property to which other people have free access; rather the problem was that, given those factual circumstances, the Crown did not have sufficient evidence that it was the accused, and not one of the other occupants of the house who possessed the buddah sticks.

[29] Part of the direction given to the jury in *R v GNN*[7], and approved by the Court of appeal, was in the following terms:

> "Thirdly, it must be proved that the substance was in the possession of the accused in each case. A person has possession of an object if he or

[7] (2000) 78 SASR 293. The appeal in *GNN* was allowed on other grounds, namely that although the legal concepts (including the concept of possession) were adequately identified and explained, the directions of the trial judge did not give the jury what they needed in applying those concepts to the facts of the case.

she knowingly has physical custody or control of it. Control includes the power to dispose of the object. The person may have the object in his or her immediate possession; for example, as you might say, you have a watch that you are wearing or handbag or purse you are carrying in your immediate possession now. Alternatively, a person may have it in a place where, although they don't have immediate possession, they would say they have the exclusive right or power to place their hands on it; for example, you may say that whilst you don't have immediate control of the television at home or your household belongings, you can still properly claim you have it in your exclusive right or power to place your hands, if you like, on the furniture. It is yours."

[30] I therefore dismiss the renewed application to strike out counts 3, 4, 5, 9, 10 and 11 on the alternative ground.