Grosvenor v The Queen [2014] NTCCA 5

PARTIES:	GROSVENOR, PAUL LESLIE v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 23 of 2013 (21234798)
DELIVERED:	11 MARCH 2014
HEARING DATES:	14 FEBRUARY 2014
JUDGMENT OF:	RILEY CJ, BLOKLAND and HILEY JJ
APPEAL FROM:	Kelly J and a Jury of 12

CATCHWORDS:

EVIDENCE –– admissions –– prior indication of intention to plead guilty –– indication of intention to plead guilty not an acknowledgement of guilt –– self-represented –– failure to discharge jury –– failure to provide specific jury direction –– appeal allowed –– retrial ordered.

MISCARRIAGE OF JUSTICE ––objective assessment of whether miscarriage of justice occurred –– error of law –– highly prejudicial material –– nature and effect of the error on the outcome of the trial –– appeal allowed –– retrial ordered – *Criminal Code 1983* (NT) s 411.

CRIMINAL LAW –– appeal –– continuing disclosure obligations –– telephone intercept material –– telephone intercept material that neither implicates nor exculpates appellant irrelevant.

EVIDENCE –– burden of proof –– possession of drugs –– lack of knowledge –– occupier or person that manages or controls a place where drugs are located –– rebuttable presumption of evidence of possession –– evidentiary

presumption not conclusive –– presumption discharged if jury satisfied person did not know or suspect presence of drugs –– relevant standard balance of probabilities –– jury direction necessary –– *Misuse of Drugs Act 1990* (NT) s 40.

EVIDENCE –– burden of proof –– possession of drugs –– knowledge or control of a dangerous drug –– jury directions necessary –– jury direction that burden of proof is beyond reasonable doubt that an accused knew of the presence of drugs and exercised requisite control over them.

Carnesi v Hales (2000) 117 A Crim R 363**;** *Jaeger-Steigenberger v O'Neill* [2011] NTSC 42, applied.

AK v Western Australia (2008) 232 CLR 438**;** *McPherson v R* (1981) 147 CLR 512; *Meissner v R* (1995) 184 CLR 132; *Tabe v The Queen* (2005) ALJR 1890**;** *Weiss v R* (2005) 224 CLR 438**;** *Wilson v Malogorski (No 2)* (2011) 30 NTLR 128**;** *Gassy v The Queen* (2008) 236 CLR 293, referred to.

Grey v R (2001) 184 ALR 593**,** distinguished.

Misuse of Drugs Act 1990 (NT) ss 9(1), 9(2)(a), 9(2)(e), 40, s40(c), 40(d), 40(e)
Criminal Code 1983 (NT) ss 32, 411
Police Administration Act 1978 (NT) s 120C

REPRESENTATION:

Counsel:

Appellant:	G Newton
Respondent:	P Usher

Solicitors:

Appellant:	Halfpennys Lawyers
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	A
Judgment ID Number:	Ril1403
Number of pages:	17

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

Grosvenor v The Queen [2014] NTCCA 5
No CA 23 of 2013 (21234798)

BETWEEN:

PAUL LESLIE GROSVENOR
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, BLOKLAND and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 11 MARCH 2014)

The Court

Introduction

[1] On 22 May 2013, at the conclusion of a jury trial, Paul Leslie Grosvenor (the appellant) was found guilty of two counts of aggravated possession of a dangerous drug.

[2] Both offences were alleged to have been committed on 18 September 2012. The particulars of count 1 were that the drug possessed was a Schedule 1 drug, namely lysergic acid. The circumstance of aggravation charged was

that the amount of the drug was 0.44 grams, a commercial quantity as defined by the *Misuse of Drugs Act 1990* (NT).[1]

[3] The particulars of count 2 were that the drug possessed was a Schedule 2 drug, namely methamphetamine. The circumstance of aggravation charged was that the amount of the drug was 7.1 grams, a trafficable quantity as defined by the *Misuse of Drugs Act 1990* (NT).[2]

[4] The appellant was not represented by counsel at trial.

[5] In broad terms, the Crown case was that the appellant was the sole occupant of an Isuzu truck that had been seen by police officers who were conducting a police operation, monitoring a house in Palmerston. The Isuzu truck was observed to attend the house and leave shortly after. Police stopped the truck after it had left the premises. A drug detection dog was utilized by police to search the truck. The dog showed interest in a small cardboard box that, on the Crown case, was located at the rear of the cabin on the middle seat. A police officer conducting the search lifted the small cardboard box out of the back of the cab of the truck and removed a cloth that was on top of it. Commenting on the relevant area within the truck, the officer said: "It was pretty messy in the rear of the truck where his guns and bits of pieces of material – yeah, so yes, I did remove the box".

[1] Count 1 was charged contrary to s 9(1) & (2)(a) of the *Misuse of Drugs Act 1990* (NT). A commercial quantity is 0.10 grams.
[2] Count 2 was charged contrary to s 9(1) & (2)(e) of the *Misuse of Drugs Act 1990* (NT). A trafficable quantity is 2 grams.

[6] Photographs were taken of the box and its contents after their removal from the truck; neither was photographed *in situ*. Inside the cardboard box, a small clear container containing methylamphetamine was found. A "Kenwood" box was also inside the cardboard box and contained an ice pipe and LSD tabs. Later testing showed the presence of the appellant's DNA on the stem and mouthpiece of the pipe. Two sets of digital scales, a mobile phone, a torch lighter and a knife were also found in the box. Photographs of the items found in the search and tendered at trial were received by this Court during the hearing of the appeal.

[7] The police officer who conducted the search and exhibited the items gave evidence at trial as to how methamphetamine is consumed and how it is typically smoked through a pipe.

[8] Aside from finding the drugs in the appellant's truck, the Crown led evidence that the truck was registered to the appellant's business. The appellant made no admissions to police. By agreement between the parties, the jury was informed that none of the items found by police, other than the pipe, had been tested for DNA, and that police had been unable to obtain fingerprint evidence.

[9] The appellant gave evidence denying knowledge of the drugs. He told the Court that he went to a house in Palmerston in relation to a job for "Waste Solutions", who he said were known, at the time of the trial, by the name "Toxfree Solutions". He said he was apprehended by police just outside of

his work place on Mander Road after attending at the house. He said his reason for attending the house was to prepare for excavation and earth works prior to a landscaper commencing work in the front yard.

[10] The appellant told the Court he had previously "dabbled" in certain drugs, acknowledging the evidence, referring to his DNA, of his previous drug use on the pipe. After experiencing certain personal difficulties, he said he "cleaned [his] act up"; that he was also elected to Bees Creek School Council at the beginning of the year and that "[he] hasn't touched anything since". He told the jury he did not know of the drugs in his truck and said there was no evidence that he had touched the drugs. He referred to the pipe being in a separate box. In cross examination he indicated other persons had used his truck.

[11] A judge of this Court granted leave to appeal and an extension of time in respect of four grounds of appeal.

[12] We will deal with those grounds first.

Ground 1: The admission of evidence of an earlier indication to the Court by the appellant that he would plead guilty to one count.

[13] It is common ground that on 15 April 2013, the appellant indicated, at first through his former counsel, to the Master of the Supreme Court that he would be pleading not guilty to count 2 and guilty to count 1. After giving that indication, the appellant's counsel obtained leave to withdraw from the

record. In a subsequent exchange with the Master on the same day the appellant, then unrepresented, stated "I'm going guilty on one charge, but not the other". It was further clarified that the appellant meant he was pleading guilty to count 1. No pleas were formally taken at that time.

[14] At the commencement of the trial on 25 May 2013, and prior to the empanelment of the jury, the trial judge told the appellant it was understood he was pleading guilty to the first count on the indictment and not guilty to the second count. When asked if that was correct the appellant answered: "Your Honour, I've only just recently had some information and read up on it and meaning of possession and stuff and I will no doubt be pleading not guilty to all charges". The appellant then formally entered pleas of not guilty to both counts.

[15] During the course of the appellant's evidence, counsel for the Crown cross-examined the appellant about his statement to the Master that he was "going guilty on one charge and not the other". The appellant agreed that he had said those words to the Master; he agreed that he meant he was disputing the methamphetamine charge, not the LSD charge; and he agreed that he was informing the court at that time that he was guilty of the LSD charge.

[16] It is clear from the closing address of counsel for the Crown that the Crown sought to persuade the jury that the statement made by the appellant to the Master during the pre-trial mention provided a reason for the jury to critically assess the appellant's credit and to consider the indication as an

admission to count 1. Counsel for the Crown told the jury: "You should be highly sceptical of anything the accused says to you in relation to this case in circumstances where he has previously, just back in April of this year, said to this Court that he's guilty of at least one of the charges". The trial judge did not instruct the jury on the use that could be made of the previous indication.

[17] In this Court the respondent submitted that the appellant's explanation for his change of position from his indication of an intention to plead guilty on 15 April 2013 to the entry of pleas of not guilty to both counts provided a sufficient basis to permit cross-examination on the point. It was argued that the appellant's explanation indicated that he believed there was a technical legal flaw in the case against him, and that this contrasted significantly with his assertion in evidence that he had no knowledge of the drugs in his vehicle, and would like to know why someone else would have left drugs in his vehicle.

[18] In our opinion, given the circumstances of the earlier indication of a plea of guilty to one count and the later entry of not guilty pleas to both counts, coupled with the explanation given by the appellant for the change, counsel for the Crown should have at least applied to the trial judge for a *voir dire* on the subject, or should have made submissions on the appropriateness of revealing the prior indication, in the absence of the jury before any cross-examination in relation to it took place. The revelation of the previous indication was prejudicial. No plea had been formally entered prior to the

not guilty pleas taken at trial. The appellant was unrepresented for part of the proceedings before the Master and for the whole of the trial. In our opinion, it could not be assumed that the elements of possession, either the physical requirements of control or the mental element of knowledge, would be known by a lay person.

[19] Although *McPherson v R*[3] concerned the question of voluntariness and the lack of opportunity by an unrepresented person to challenge the admissibility of a confession, similar underlying principles of fairness apply in the circumstances of this case. Although he had previously had the assistance of counsel the appellant gave the relevant indication to the Master at a time when he was no longer represented and thus did not enjoy the usual procedural safeguards. The appellant's position at that time may be contrasted with an unrepresented person formally entering a guilty plea. The usual practice when an unrepresented person enters a plea of guilty is that the judge explains the elements of the charge, what is meant by a plea of guilty and, if considered appropriate, the consequences of entering the plea. In cases of pleas of guilty when full procedural safeguards have been applied, an accused may still apply to have the plea set aside if it be shown the plea was entered for reasons other than a clear acknowledgement of guilt.

[3] (1981) 147 CLR 512.

[20] In this case, the previous indication of an intention to plead guilty to one count cannot clearly be said to constitute an acknowledgement of guilt. This is particularly so given the appellant's retraction of his position and his reason given to the Court for his change in position, notwithstanding this was not eloquently expressed. Even when a plea is formally entered, it has been recognised that pleas can be entered for a variety of reasons, other than a belief in guilt.[4] In our opinion sufficient doubt attended the question of whether the statement made by the appellant to the Master could be regarded as a genuine admission of guilt, and without further exploration it should not have been a legitimate subject for cross-examination. The introduction of the evidence, albeit in cross-examination, of a prior indication of guilt in the circumstances was highly prejudicial. The ambiguity surrounding the previous indication reduced the probative value that an admission might have in other circumstances. We allow the appeal on this ground.

Ground 2: The trial judge erred in failing to discharge the jury after the evidence adduced by the Crown Prosecutor of an earlier indication by the appellant to the Court of a plea of guilty in relation to one of the counts

[21] Ground 2 raises the same issues as ground 1. It is unnecessary to repeat that discussion. It is likely that had the appellant been represented, an application would have been made to discharge the jury, or to request the

[4] *Meissner v R* (1995) 184 CLR 132 at 157 per Dawson J.

trial judge to give the jury a specific direction about how they should treat that evidence. We allow ground 2 on the same basis.

[22] We have considered whether, despite finding error, this Court should dismiss the appeal pursuant to s 411 of the *Criminal Code 1983* (NT). We acknowledge this was a strong Crown case. In determining whether to apply the *proviso*, this Court must undertake an objective assessment of whether a miscarriage of justice has occurred.[5] Given grounds 1 and 2 concern the wrongful admission of highly prejudicial material, it is inappropriate to focus primarily on whether we would conclude from the evidence properly admitted that the appellant was guilty. Such an approach has been said to pay insufficient regard to the error of law.[6] It is necessary to consider the nature of the error and the possible effect that the error may have had on the outcome of the trial.[7] As already discussed, this was highly prejudicial evidence in the context of a strong circumstantial Crown case. Not only was this evidence likely to affect the jury's consideration of count 1, it may well have affected the assessment of the appellant's credibility generally, including in relation to his denial of his possession of the drugs the subject of count 2. Notwithstanding the strength of the Crown case, the nature of the error and the effect it may have had on the outcome of the trial, in our opinion constitutes a miscarriage of justice. The appeal will therefore be allowed and a re-trial ordered.

---

[5] *Weiss v R* (2005) 224 CLR 300 at [39] – [45].
[6] *AK v Western Australia* (2008) 232 CLR 438, per Gummow and Hayne JJ at [42].
[7] *Gassy v The Queen* (2008) 236 CLR 293,397 per Gummow and Hayne JJ at [34].

Ground 3: The failure of the prosecution to disclose telephone intercept material

[23] Prior to the empanelment of the jury, the prosecutor referred the Court to a previous mention of the case and previous submissions about whether the Crown would be seeking to put forward telephone intercept material. Counsel identified an earlier indication given to the Court that there would be no further material of that kind. No telephone intercept material was provided to the appellant. This Court has not been provided with any of the material.

[24] The respondent accepts the Crown has a continuing obligation to make full disclosure of matters that are relevant or possibly relevant to an issue, whether the telephone intercept material is inculpatory or exculpatory. The respondent accepts its disclosure obligation extends to material that possibly raises a new issue not otherwise apparent from the evidence, or that provides a lead to new relevant evidence.[8]

[25] As far as we can discern the nature of the material in question and its possible relevance and use it would not appear to be as significant and relevant as that involved in *Grey v R*[9], an authority relied on by the appellant. In *Grey v R*, the prosecution had failed to disclose the contents of a letter of comfort provided to the principal prosecution witness who was himself being sentenced for relevant charges. The non-disclosure resulted in

[8] Director of Public Prosecution Guidelines (NT), Item 8.
[9] (2001) 184 ALR 593.

a demonstrable disadvantage to the appellant in that case, given the issues that were in dispute.

[26] In terms of whether disclosure has been fair, the particular issues that emerge in the trial in question must be considered. There is no assertion that the Crown failed to disclose any potentially exculpatory material to the appellant. To attempt to assess the probative value of undisclosed generalised intercept material that neither implicates nor exculpates the appellant, would amount to pure speculation. No issue has been identified that would lead us to conclude that general intercept material could have been relevant to, or of assistance to, the appellant.

[27] This ground is dismissed.

[28] Leave to appeal and to extend time was refused in relation to the remaining parts of ground 3 and were not pressed during the re-hearing of the application. We confirm leave to appeal and to extend time is refused in respect of the remaining parts of ground 3.

Ground 11: The learned trial judge erred in summing up in relation to section 40 of the *Misuse of Drugs Act 1990* (NT).

[29] It is common ground that the evidentiary provisions of s 40 of the *Misuse of Drugs Act 1990* (NT) applied. Section 40(c) provides:

> 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.

[30] It has previously been observed that s 40(c) of the *Misuse of Drugs Act 1990* (NT) does not provide specifically that the burden of proving a lack of knowledge is on the accused, as for example is the case with s 40(e), in relation to authorisation and s 40(d), in relation to the operation of s 32 of the *Criminal Code 1983* (NT).[10] In *Carnesi v Hales*[11], Riley J, explained the operation of s 40(c):[12]

> 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.

[10] *Carnesi v Hales* (2000) 117 A Crim R 363; *Jaeger-Steigenberger v O'Neill* [2011] NTSC 42.
[11] (2000) 117 A Crim R 363.
[12] At 365 [8].

[31] Similarly, in *Jaeger-Steigenberger v O'Neill*[13], Mildren J concluded that 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.

[32] If the appellant had satisfied the jury that he neither knew nor suspected the drugs were in his truck, the s 40(c) presumption would be discharged and the aid it may provide to the prosecution in proof of possession would not apply. The standard applicable to an accused person attempting to satisfy the jury that he or she did not know or suspect the presence of drugs is on the balance of probabilities.[14] In directions to the jury on this point, the trial judge used the expression "unless the evidence shows, to your satisfaction" and did not direct the jury that "satisfaction" in this context meant on the "balance of probabilities". On behalf of the appellant it was argued there was a real risk that the jury would have erroneously concluded that the appellant bore the burden of establishing beyond reasonable doubt that he neither knew of nor had reason to suspect the presence of the drugs.

[33] It was incumbent upon the trial judge to ensure the jury understood that the onus on the appellant was the civil onus and was to be distinguished from the onus that remains with the Crown. In our opinion, it would have been

[13] [2011] NTSC 42.
[14] *Wilson v Malogorski (No 2)* (2011) 30 NTLR 128 at [60].

preferable for the trial judge to have explained the meaning of "satisfaction" in terms of the lesser onus on the appellant.

[34] In order to prove that the appellant had possession of the dangerous drugs the Crown had to establish the appellant had custody or control of the dangerous drugs with knowledge on his part that the drugs were in his custody or under his control.[15] Had the trial judge directed the jury in terms of "knowledge" as an element of possession that was required to be proven by the Crown, in this particular case, the omission to explain the civil onus may not have amounted to a miscarriage of justice. However, neither the summing up nor the Aide Memoir clarified that matter.

[35] Both the summing up and the written Aide Memoir emphasized repeatedly that the Crown must prove possession beyond reasonable doubt. "Knowledge" was referred to only in respect of the onus within s 40(c). The undisputed fact that the appellant was concerned in the management of the vehicle that was apprehended was a fact that, either alone or together with other evidence, could form the basis of an inference capable of proof of possession. The evidential value of the appellant's management of the vehicle in which the drugs were found was not reliant on s 40(c).

[36] If the appellant had discharged the onus, by persuading the jury on the balance of probabilities that he did not know of the presence of the drugs, he was entitled to be acquitted. However, even if the appellant did not

[15] *Tabe v The Queen* (2005) 79 ALJR 1890 at [7], [57], [97]-[103] and [143].

persuade the jury of his lack of knowledge of the drugs, the Crown was still required to prove beyond reasonable doubt that the appellant knew of the presence of the drugs and had exercised the requisite control over them to constitute possession.

[37] It was not made clear to the jury that, when considering all of the facts, it could not be satisfied of possession unless knowledge of the presence of the drugs had been proven beyond reasonable doubt. We allow this ground of appeal.

The Remaining Grounds

[38] Application to reconsider the refusal by a judge to grant leave to appeal or to grant an extension of time was made in respect of grounds 4, 6, 8, 9 and 10.

[39] Ground 6 alleges that a miscarriage of justice occurred as a result of the prosecution leading evidence of the circumstances of the appellant being stopped in his truck, including references to the surveillance operation being conducted at the house the appellant visited before being apprehended.

[40] It was argued that in circumstances where there was no challenge to the validity of the search warrant or any exclusion based on s 120C of the *Police Administration Act 1978* (NT), evidence of the surveillance was irrelevant and prejudicial. In our opinion, in this particular case, the evidence was admissible to permit the Crown to attempt to negate

possibilities of other persons having access to the appellant's vehicle immediately before his apprehension. The evidence had probative value far outweighing any prejudicial effect. Similarly, the reference to guns being found with other material in that truck was not prejudicial in the context of discussing what was found in the search. We confirm the application for an extension of time and leave to appeal is dismissed.

[41] Ground 8 was not pressed and the application is dismissed.

[42] Ground 9 complains that the trial miscarried as a result of statements made by the prosecutor in his closing address. It was submitted it was not appropriate for the prosecutor to comment that the police witnesses did not have any special interest in the appellant or the outcome of his case. It was open to the prosecutor to submit to the jury for their consideration that the police officers were acting in a professional capacity. It was a matter for the members of the jury whether they accepted that submission. In any event, this was not a case that was likely to be determined on the conduct of police. The statement of the prosecutor did not invite any inference that the appellant was interested in the outcome of his case and had a motive to be less than frank.

[43] Complaint is also made in relation to the comment by the prosecutor that there is a good reason for the presumption in s 40 *Misuse of Drugs Act 1990* (NT) being part of the law in the Northern Territory. In the context of this trial, this was an innocuous comment. The trial judge instructed the jury

that the Crown submissions were not evidence. In the context of this particular case this comment could not be said to enhance the Crown case.

[44] Ground 10 alleges error in failing to discharge the jury as a result of the prosecutor's statements dealt with under ground 9. Grounds 9 and 10 are without merit. Accordingly, we confirm leave to appeal and to extend time is refused in relation to both grounds.

Orders

[45] The appeal is allowed. A re-trial is ordered.

++++++++++++++++++++++++