THE QUEEN v FALZON (M161/2017)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2017] VSCA 74

Date of judgment: 5 April 2017

Date special leave granted: 20 October 2017

On 17 December 2013, in the course of executing search warrants, police discovered cannabis plants growing at two properties in Mansfield Avenue, Sunshine North, and a property in Bryson Court, Sydenham. The two properties at Mansfield Avenue were owned by an associate of the respondent, and police surveillance from July 2013 disclosed the respondent's occasional attendance at the property. The Sydenham property had been purchased jointly by the respondent and a co-offender in early 2013.

Also on 17 December 2013, police executed a search warrant at the respondent's home in Kendall Street, Essendon. There were a number of items seized from the home, including $120,800 in cash. Over objection, the prosecution was permitted to lead evidence of the cash. The prosecutor relied on a line of cases that suggest that possession of cash may be probative of an allegation that possession of a drug is for the purposes of sale. The trial judge (Judge Smith) found the evidence was admissible in the same way as the finding of other indicia of trafficking is admissible because it was capable of having probative value when looked at alongside other evidence, including that of the organised and systematic cultivation of significant quantities of cannabis and the indicia of trafficking. His Honour did not consider that the probative value of such evidence was outweighed by the danger of unfair prejudice to the accused.

On 27 May 2016, a jury found the respondent guilty of cultivating a commercial quantity of cannabis at the Mansfield Avenue premises and trafficking cannabis at the Sydenham property, in a quantity less than a commercial quantity.

In his appeal to the Court of Appeal (Priest, Beach JJA, Whelan JA dissenting), the respondent submitted, inter alia, that a substantial miscarriage of justice occurred as a result of the admission of the evidence of the cash.

The majority of the Court noted that, ordinarily, it is the combination of the finding of a sum of cash in proximity to other incriminating articles which will go to support a guilty inference as to the origins of the cash or a person's reasons for its possession. In the present case, however, there was no attempt by the prosecution to show a relationship between the sum of cash found at the respondent's home and the trafficking at the Sunshine North or Sydenham premises. The finding of the cash was suspicious, but nothing more.

The majority considered that, insofar as the evidence of the possession of the cash was admitted on the basis that it was evidence of past trafficking, it was irrelevant and therefore inadmissible. The cultivation and trafficking of which the respondent was convicted related to Sunshine North and Sydenham respectively on one day. And with respect to the trafficking, the prosecution eschewed reliance on a *Giretti*

charge, or on a case that involved an allegation of an ongoing drug trafficking business. Thus, as a matter of logic, it was impossible to say that the evidence of cash at the respondent's home — from which it was not said that he conducted any ongoing illicit business — could have gone in proof of his having possession of cannabis for sale at Sunshine North or Sydenham on a single day in December 2013.

The majority concluded that if they were wrong in their primary conclusion, and the evidence might be seen to have some probative value, any such probative value was low, in circumstances where the risk of the misuse of the evidence was undoubtedly high. Thus, the probative value of the evidence was outweighed by the risk of unfair prejudice.

Whelan JA (dissenting) considered that the cash found at Kendall Street was one fact, properly to be considered by the jury together with the other evidence (the nature of the facilities, the quantities, the surveillance evidence, the other items found at Kendall Street, and what the respondent had said in his record of interview), in determining whether the respondent was, as at 17 December 2013, conducting a drug business. If they concluded he was, that rendered it more probable that his purpose in being in possession on 17 December was to sell, and it rebutted his assertion that his possession was for his own use.

The ground of appeal is:

- The Court of Appeal erred by concluding that a substantial miscarriage of justice occurred as a result of the learned trial judge having erred in admitting evidence at trial of $120,800.00 in cash that was found secreted at the respondent's home at Essendon.