KALBASI v THE STATE OF WESTERN AUSTRALIA (P21/2017)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia
[2016] WASCA 144

Date of judgment: 17 August 2016

Date special leave granted: 12 May 2017

The appellant was convicted of one count of attempting to possess a prohibited drug with intent to sell or supply it to another, contrary to s 6(1)(a) and s 33(1) of the *Misuse of Drugs Act* 1981(WA) ("the MDA"). The charge related to 4.891 kg of 84% pure methylamphetamine in two padlocked tool cases inside a cardboard box ("the box") which was in the possession of a freight company in Sydney for consignment to Perth. On 12 November 2010 New South Wales Police searched the box. Police brought the box to Perth and on 15 November 2010 rock salt was substituted for the methylamphetamine and a listening device was placed in the box.

Matthew Lothian collected the box from the Perth premises of the freight company on 16 November 2010 and carried it into his house in Spearwood at about 3.16pm on that day. At about 3.20pm, the appellant arrived at Lothian's house. He left the house 37 minutes later. The State case was that during that period the appellant was in possession of the whole of the drug substitute, believing it to be the methylamphetamine removed by police.

The evidence established the following. The only people in Lothian's house during the 37 minutes were the appellant, Lothian and Lothian's girlfriend. After the appellant entered Lothian's house, the cardboard box was opened; the padlocks were cut from the tool cases; the 10 packages of intended drugs were removed from the tool cases; the outer wrapping of the 10 packages containing the intended drugs was removed and placed in the kitchen sink; nine packages of intended drugs were placed in the kitchen cupboard; a plastic bag containing one package of intended drugs was placed in a beer carton; a dish containing MSM (a cutting agent commonly added to methylamphetamine) was on the stove; on the kitchen bench were three bowls, two pairs of disposable gloves, three digital scales, a lighter, and a box of disposable gloves; bolt cutters were found in the kitchen; at around 3.40 pm the appellant asked Lothian for a pipe; and about four minutes after the appellant asked for the pipe, he said to Lothian 'Don't move' and 'I'll come back'. The appellant's DNA was on one of the two pairs of disposable gloves found on the kitchen bench. The State case was that the appellant and Lothian were in the process of adding MSM to some of what they thought was methylamphetamine when the appellant sampled the substance and discovered it was not what he was expecting.

On the appellant's appeal to the Court of Appeal (McLure P, Mazza and Mitchell JJA) the respondent conceded that the trial judge erred in directing the jury that s 11 of the *MDA* applied to the offence. Pursuant to s 11, if a person has 2 gm or more of a prohibited drug in his possession, he is deemed to have it with intent to sell or supply it to another. However it does not apply to offences of attempt to possess.

The respondent submitted, however, that the proviso in s 30(4) of the *Criminal Appeals Act* 2004 (WA) should be applied because, although there was a misapprehension as to the applicability of s 11 of the MDA to the charge, the appellant's intention was not a live factual issue at trial. The respondent contended that the case concerned whether or not it had proved beyond reasonable doubt that the appellant possessed, in the sense that he controlled, the whole of the 4.981 kg of what was thought to be methylamphetamine. If the appellant possessed such a large and valuable quantity of methylamphetamine, it was implausible that he would do so other than for the purpose of selling or supplying it to another.

The appellant submitted that, for two reasons, the error in ground 1 was a 'process' error of such a nature that the application of the proviso is excluded. First, the jury returned a verdict of guilty without having considered whether the particular crime with which the appellant was charged was committed by him. Second, the removal of the element of intention from the jury's consideration was analogous to a failure to leave a defence to a jury. Further, the appellant submitted that the Court could not be satisfied beyond reasonable doubt of the appellant's guilt.

In rejecting the appellant's submission that the defence case was fought on the basis that the appellant possessed a small amount of methylamphetamine merely to sample it, the Court noted that the opening and closing addresses of counsel and the trial judge's summing up revealed that the case was about whether the State had proved beyond reasonable doubt that the appellant possessed, in the sense of control, the entire contents of the cardboard box. If the defence case was that the appellant possessed a small portion merely for the purpose of sampling it one would have expected it to have been put fairly and squarely to the jury and that the trial judge would have been asked to direct the jury along those lines.

The Court was satisfied beyond reasonable doubt that the appellant exercised control over the entire 4.981 kg of 'methylamphetamine' and not over some much smaller quantity consistent with a mere sample. Given the quantity and value of the drug, their Honours found it was inconceivable that the appellant would possess it without an intention to sell or supply it to another. Having considered the entire trial record, the Court was satisfied beyond reasonable doubt of the appellant's guilt of the crime with which he was charged. They were persuaded that, notwithstanding the error in ground 1, there had been no substantial miscarriage of justice, and the proviso should be applied.

The proposed grounds of appeal are:

- Having upheld the appellant's first ground of appeal, the Court of Appeal erred in finding that there was no substantial miscarriage of justice and in applying the proviso in s 30(4) of the *Criminal Appeals Act* 2004 (WA) to the appellant's conviction appeal.