R v Bradley [2009] NTSC 30

PARTIES:	THE QUEEN
	v
	BRADLEY, STEPHEN JOHN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SC 20901159
DELIVERED:	29 June 2009
HEARING DATE:	17 June 2009
DECISION OF:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – Supply and possession of drugs – Multiple counts on indictment – Application to quash indictment – Double jeopardy – Abuse of process – Double punishment – Application dismissed.

Criminal Code (NT) s 339; *Misuse of Drugs Act* (NT) ss 3, 5 and 9.

Pearce v The Queen (1998) 194 CLR 610; *R v Langdon* [2004] 11 VR 18, applied.

REPRESENTATION:

Counsel:

The Crown:	Dr N Rogers
The Defence:	R Goldflam

Solicitors:

The Crown:	Office of Director of Public Prosecutions
The Defence:	Northern Territory Legal Aid Commission

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v Bradley [2009] NTSC 30
No SC 20901159

BETWEEN:

THE QUEEN

AND:

STEPHEN JOHN BRADLEY

CORAM: SOUTHWOOD J

REASONS FOR DECISION

(Delivered 29 June 2009)

Introduction

[1] Stephen John Bradley, the offender, has made an application under s 339 of the *Criminal Code* (NT) to quash or partly quash the indictment the Director of Public Prosecutions has filed in the proceeding.

[2] The Director of Public Prosecutions has charged the offender with two counts on an indictment dated 15 June 2009. Count one on the indictment pleads that contrary to s 5(1) and (2)(b)(iii) of the *Misuse of Drugs Act* (NT), on 7 January 2009 in Alice Springs, the offender unlawfully supplied 908 grams of cannabis which is a commercial quantity of cannabis. Count two on the indictment pleads that contrary to s 9(1) and (2)(d) of the *Misuse of Drugs Act* (NT), on 8 January 2009 in Alice Springs, the offender

unlawfully possessed 913.1 grams of cannabis which is a commercial quantity of cannabis.

[3] In support of the two counts on the indictment the Crown relies on the following facts:

> The offender is a 49 year old male who resides at unit 4/85 Lydavale Drive, Alice Springs. At some time prior to 7 January 2009, he drove his motor vehicle to Adelaide. While in Adelaide he received 908 grams of cannabis on credit from an unknown source. He placed the cannabis, which was in two cryovac bags, under the backseat in his motor vehicle.
>
> On 7 January 2009, he drove back to Alice Springs. He arrived at his residence at night on 7 January 2009. The drive from Adelaide to Alice Springs took 15 hours. After he arrived at his residence he took the two cryovac bags of cannabis out of his motor vehicle, he placed the cannabis in his unit and he remained in possession of the cannabis.
>
> On Thursday 8 January 2009, a search warrant was executed by police at the offender's residence. During the course of the search, police officers located the following items: the two sealed cryovac bags of cannabis plant material each weighing 454 grams, which was the cannabis that the offender transported from Adelaide to his residence on 7 January 2009; one small clip seal bag of cannabis plant material weighing 0.9 grams; one plastic clip seal bag of cannabis plant material weighing 4.2 grams; three electronic scales; and a quantity of clip seal sandwich bags
>
> The offender was arrested and taken to the Alice Springs Police Station where he was interviewed by police. When asked where the two cryovac bags had come from he said he 'bought them in Adelaide' and 'brought them back [to Alice Springs] from Adelaide with me.' He told the police he had driven back from Adelaide the day before.
>
> When asked why he was in possession of the cryovac bags of cannabis the offender replied, 'To sell it and make some money.' When asked why he intended selling the cannabis the offender

replied, 'People asked me.' He told police if he had sold the 2 bags of cannabis he would have expected to make a profit of $3,600.

When asked about the 4.2 grams of cannabis plant material found in the sandwich bag on the bookshelf, the offender said it was probably 6 or 7 years old. When asked about the 0.9 grams of cannabis plant material in the small clip seal bag found in the bedroom, the offender said it had been given to him 18 months previously.

At the time of the offence cannabis plant material was a dangerous drug as specified in Schedule 2 of the *Misuse of Drugs Act* (NT).

[4] While the Director of Public Prosecutions acknowledges that on both 7 and 8 January 2009 the offender had the same two cryovac bags of cannabis in his possession, the Director of Public Prosecutions maintains the elements of each count on the indictment are different. The Director of Public Prosecutions case against the offender is that he is a drug dealer who engages in a variety of criminal conduct in order to deal in cannabis. While both counts involve criminal conduct which is preparatory to or in furtherance of the supply of the same cannabis to other people, the criminal conduct which is the subject of each count on the indictment is discrete criminal conduct. The criminal conduct which is the subject of count one on the indictment is transporting the two cryovac bags of cannabis from Adelaide in South Australia to Alice Springs in the Northern Territory for later sale to the offender's customers. The criminal conduct which is the subject of count two on the indictment is warehousing or storing the cannabis in the offender's residence for later sale to the offender's customers.

[5] On 23 June 2009, the offender pleaded guilty to count one on the indictment. The offender has not entered a plea to count two on the indictment. Instead, the offender has made the application under s 339 of the *Criminal Code* (NT). He has asked the Court to otherwise quash the indictment on the ground the prosecution of count two on the indictment is vexatious and harassing. The offender says to allow the Director of Public Prosecution to prosecute count two on the indictment would be an abuse of process. The offender argues that while count two remains on the indictment in its current form he is being placed in double jeopardy for the same criminal conduct and he is at risk of being doubly punished because the cannabis which is the subject of count two is substantially the same cannabis that is the subject of count one on the indictment. The offender never lost possession of the two cryovac bags of cannabis. The gravamen of the offender's criminal conduct is that he imported cannabis into the Northern Territory for the purpose of selling to his customers. Implicit in such conduct is the necessity to retain control of the cannabis until it is sold. The offender engaged in a single course of conduct so he could sell the cannabis to other people.

[6] The offender says that, under s 339 of the *Criminal Code* (NT), the Court should order the Director of Public Prosecutions to amend the indictment by confining count two on the indictment to the 5.1 grams of cannabis which was not in the two cryovac bags of cannabis which were transported to Alice Springs from Adelaide. The offender maintains that if the small amount of 5.1 grams of cannabis is put to one side, all of the elements of the second

count on the indictment are included in the first count on the indictment because the subject of both counts on the indictment is the control of the same 908 grams of cannabis which the offender transported to Alice Springs from Adelaide. The offender was arrested very soon after he arrived back in Alice Springs from Adelaide.

The issue

[7] The principal issue in the proceeding is: does the charging of both counts one and two on the indictment subject the offender to double jeopardy? In my opinion the indictment as currently pleaded does not subject the offender to double jeopardy. The indictment should not be quashed and count two should not be amended.

[8] While the possession of 908 grams of the same cannabis is common to both counts one and two on the indictment the same criminal conduct is not the subject of both counts. Different dates are specified in each count on the indictment and the criminal conduct engaged in by the offender is discreet and is confined to what occurred on separate days. A single series of events can give rise to different criminal offences to which different penalties attach[1]. The indictment as currently framed reflects all of the accused's criminal conduct and enables the imposition of punishment that will truly reflect the criminality of his conduct.

[1] *Pearce v The Queen* (1998) 194 CLR 610 per McHugh, Hayne and Callinan JJ at 615.

Sections 5 and 9 of the *Misuse of Drugs Act* (NT)

[9] Subsections 5(1) and (2)(b)(iii) of the *Misuse of Drugs Act* (NT) state:

> (1) A person who unlawfully supplies, or takes part in the supply of, a dangerous drug to another person, whether or not -
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> (a) that other person is in the Territory; and
>
> (b) where the dangerous drug is supplied to a person at a place outside the Territory, the supply of that dangerous drug to the person constitutes an offence in that place,
>
> is guilty of a crime.
>
> (2) A person guilty of a crime under subsection (1) is, subject to section 22, punishable on being found guilty by a penalty not exceeding:
>
> (a) …
>
> (b) Where the amount of the dangerous drug supplied is a commercial quantity -
>
> (i) …
>
> (iA) …
>
> (ii) …
>
> (iii) in any other case where the dangerous drug is a dangerous drug specified in Schedule 2 – imprisonment for 14 years.

[10] Section 3 of the *Misuse of Drugs Act* (NT) states:

> ***supply*** means -

(a) give, distribute, sell, administer, transport or supply, whether or not for fee, reward or consideration or in expectation of fee, reward or consideration;

(b) offering to do an act referred to in paragraph (a); or

(c) doing or offering to do an act preparatory to, in furtherance of, or for the purpose of, an act referred to in paragraph (a),

and includes barter and exchange.

[11] Subsections 9(1) and (2)(d) of the *Misuse of Drugs Act* (NT) state:

(1) A person who unlawfully possesses a dangerous drug is guilty of a crime.

(2) A person guilty of a crime under subsection (1) is, subject to section 22, punishable on being found guilty by a penalty not exceeding:

(a) ….

(b) ….

(c) ….

(d) Where the dangerous drug is a dangerous drug specified in Schedule 2 and the amount of the dangerous drug is a commercial quantity – imprisonment for 14 years.

(e) ….

(f) ….

[12] The elements of count one on the indictment are:

1. On 7 January 2009 the offender voluntarily transported 908 grams of cannabis to Alice Springs by placing the two cryovac bags of cannabis in his motor vehicle and driving his motor vehicle from Adelaide to Alice Springs.

2. The offender intended to transport the cannabis from Adelaide to Alice Springs in his motor vehicle.

3. The offender transported the cannabis from Adelaide to Alice Springs for the purpose of selling the cannabis to his customers in the Northern Territory.

[13] The elements of count 2 on the indictment are:

1. On 8 January 2009 the offender had 913.1 grams of cannabis under his control.

2. The offender knew that he had 913.1 grams of cannabis under his control.

3. The offender was not authorised to possess the 913.1 grams of cannabis; nor was there any lawful excuse or justification for the offender possessing the 913.1 grams of cannabis.

The law

[14] In order to determine whether an offender is being subject to double jeopardy it is necessary to consider whether each offence pleaded on an indictment has elements which are not part of the other offence. Double jeopardy does not arise where each offence contains an element that the other does not[2]. The second offence must not be totally subsumed in the first offence and a different verdict in relation to the second offence must not bring into question the verdict in relation to the first offence.

[2] *Pearce v The Queen* (1998) 194 CLR 610 per McHugh, Hayne and Callinan JJ at 615 to 620.

[15] In order to determine whether an offender is being unjustly vexed or harassed by the number of counts pleaded on an indictment in relation to a single course of conduct the following principles must be born in mind: several different offences may be committed in the course of a single series of events or a single course of conduct; an offender can be punished only for the offence charged, not some other offence; the decision about what charges should be laid and prosecuted is for the prosecution; and charges will usually be framed in a way that reflects the criminal conduct of the accused[3]. Prosecuting authorities should not multiply charges unnecessarily.

[16] It is the commonality of particular factual elements to different counts on an indictment which may lead to double punishment[4]. Where a number of counts have been charged on an indictment in relation to a single series of events or a single course of conduct, double punishment may be avoided by ensuring that an offender is not punished twice for elements that are common to all of the counts on the indictment. If the Court first imposes a sentence for count one on the indictment dated 15 June 2009, then double punishment may be avoided by determining whether there are any remnants of the criminal conduct in count two which have not been taken into account in the sentence imposed for count one and by confining the sentence which is to be imposed for count two to the remnant criminal conduct.

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[3] *Pearce v The Queen* (1998) 194 CLR 610 per McHugh, Hayne and Callinan JJ at pars [26], [29] to [32].
[4] *R v Langdon* [2004] 11 VR 18 per Gillard AJA at par 115.

Conclusion

[17] In the present case the offender is not being subject to double jeopardy as a result of the pleading of the two counts on the indictment. There are elements of both count one and count two that are not common to the other count on the indictment. Count one on the indictment does not involve possession of the cannabis on 8 January 2009, knowledge of the possession of the cannabis on 8 January 2009 or the possession of the additional 5.1 grams of cannabis. Count two on the indictment does not involve: the transport of the Cannabis to Alice Springs; the intention to transport the cannabis to Alice Springs; or the possession of the cannabis on 7 January 2009. Neither offence is wholly included in the other.

[18] Further the pleading of both counts on the indictment is not an abuse of process. The charges are framed in a way that reflects the criminal conduct of the accused.

[19] In the circumstances, the offender's application under s 339 of the *Criminal Code* (NT) is dismissed.
