

R v Zagar & McCormick [2010] NTSC 47

PARTIES: THE QUEEN

v

STEPHEN ZAGAR

AND

JOHN REECE MCCORMICK

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 20923349 & 20923110

DELIVERED: 4 OCTOBER 2010

HEARING DATES: 13 SEPTEMBER 2010

JUDGMENT OF: MILDREN J

CATCHWORDS:

CRIMINAL LAW – application for separate trials – whether evidence supports joint trials – no direct evidence linking the two accused – application granted

Criminal Code, s 303, s 308(1), s 308(2)

Misuse of Drugs Act, s 5

Police Administration Act, s 140

Tripodi v The Queen (1961) 104 CLR 1; followed

REPRESENTATION:

Counsel:

Plaintiff:	P Usher
First Defendant:	M Shaw QC and P Maley
Second Defendant:	T Berkley and R Jacob

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
First Defendant:	Peter Maley
Second Defendant:	Robert Welfare

Judgment category classification:	B
Number of pages:	8

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

R v Zagar & McCormick [2010] NTSC 47
No 20923349 & 20923110

BETWEEN:

THE QUEEN
Plaintiff

AND:

STEPHEN ZAGAR
First Defendant

AND

JOHN REECE MCCORMICK
Second Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 4 October 2010)

- [1] The accused, Stephen Zagar, is charged with being in possession of property on 13 July 2009, namely \$75,900 in cash, obtained directly or indirectly from the commission of an offence against s 5 of the *Misuse of Drugs Act*, knowing or believing the property to have been so obtained. He is also charged on count 2 with the unlawful supply of a dangerous drug to John Reece McCormick between 10 June and 13 July 2009, with the circumstance of aggravation that the amount of the dangerous drug supplied was a commercial quantity, namely 10.145 kg.

[2] The accused, McCormick, faces 11 counts all on the same indictment. Counts 1 charges unlawful supply of cannabis between 10 June and 13 July 2009 to one Perry. Count 2 charges an unlawful supply of a commercial quantity of cannabis to one Watt. Counts 3, 4 and 5 are counts of attempting to supply cannabis to three other individuals on 10 July 2009. Counts 6, 7, 8, 9, 10 and 11 are all charges of aggravated unlawful possession of cannabis between 10 June and 13 July 2009.

[3] The general rule is that, except as otherwise expressly provided an indictment must charge one offence against one person.¹ To this rule, the Code makes a number of exceptions. The accused are not jointly charged. The Crown relies on s 308(2) of the *Criminal Code* which provides:

Any number of persons charged with committing different or separate offences arising substantially out of the same facts or out of closely related facts so that a substantial part of the facts is relevant to all the charges may be charged in the same indictment and tried together.

[4] The Crown case is that the accused, Zagar, provided two boxes, which the Crown says contained the cannabis, to a person called Collins who was employed as a truck driver. In the course of his employment, Collins drives to all parts of Australia, but one of his regular journeys is between Darwin and Adelaide. Collins' evidence is that he was an acquaintance of Zagar's. He is unsure of the date, but he recalls speaking to the accused when he was in Dublin, a small town just out of Adelaide, over the telephone. They later

¹ *Criminal Code*, s 303.

met up in the early afternoon at a truck stop. The accused, Zagar, arrived in a utility. There were two boxes on the tray thereof, which had some invoices stuck to them. The boxes were about knee high and about as wide as they were high and would have weighed about 20 lbs each. The accused asked Collins to deliver the boxes to the accused, McCormick, who Collins also knew. He agreed to take the boxes for him and he placed them inside the cabin of the truck. The boxes did not have any odour. He intended to drive to Darwin and give the accused, McCormick, a phone call when he arrived.

- [5] Collins left Adelaide the following day. When he was in the vicinity of Adelaide River, he made a phone call as a result of which he arranged to meet a friend of McCormick's at the corner of the Cox Peninsula Road and the Stuart Highway. When he arrived at that location, he stopped the truck, got out of the truck, removed the boxes from the cabin, and handed them to a male person. This person placed the boxes in the rear of his car.
- [6] According to Collins, he had on one previous occasion also delivered similar boxes to McCormick which he claims were given to him by the accused, Zagar. Precise dates and occasions are unclear.
- [7] Police intercepts were made of some telephone conversations between Zagar and McCormick on 27 June 2009 and 7 July 2009. There is nothing in any of these conversations to indicate any discussion about the supply of cannabis.

[8] A police intercept between McCormick and person called Perry, resulted in the arrest of Perry and the finding of 481.1g of cannabis in his possession. In relation to that matter, McCormick is charged with the unlawful supply of the cannabis to Perry (count 1) and the unlawful possession of the 481.1g of cannabis (count 6). After Perry's arrest there were numerous other telephone intercepts involving McCormick and other persons. On 9 July, it is alleged that McCormick supplied a person by the name of Watt with 1359.3g of cannabis. Watt was alleged to be under direct surveillance by police. This activity is the subject of counts 2 and 7 on the indictment against McCormick.

[9] On 10 July, the police allege that there was an attempt by McCormick to supply 1804.8g of cannabis to a person called Chester. The Crown alleges that this supply was under surveillance by police. The circumstances surrounding that attempted supply are the subject of counts 3 and 8 on the indictment against McCormick. Following that, a search was conducted in the Darwin River area nearby to where Chester was arrested as a result of which 615.6g of cannabis was found buried in an ammunition box. Subsequently, police located as a result of further searches, 1359.3g of cannabis in some polythene piping and a further 4525.6g also in polythene piping in the Darwin River area close by. It is alleged that this cannabis was in the possession of McCormick.

[10] So far as the accused, Zagar, is concerned, the Crown case is that he arrived in Darwin on 16 July 2009. On 18 July, he was apprehended at the Darwin

airport and found in possession of \$75,900 in cash. The Crown alleges that this cash is the proceeds of the sale of cannabis by McCormick. The accused, Zagar, was subjected to an electronic record of interview in which he denied any knowledge of the cannabis and said that the money was to be used in order to purchase a boat. The Crown claims that the accused's excuse for being in possession on the money is a lie indicative of a consciousness of guilt.

- [11] The Crown says that in order to prove count 2 against the accused, Zagar, the Crown intends to rely upon the evidence of the supplies to Perry, Watt and others and to the total amount of the cannabis located in the polythene pipes and the ammunition box.
- [12] Counsel for the accused, Zagar, objected to the charges against Zagar being joined in the same indictment as the charges against McCormick. Clearly, the case against Zagar is at best a circumstantial case. However, as Mrs Shaw QC pointed out in her submissions, the difficulty is that there is no evidence linking whatever was in the boxes delivered by Collins to the cannabis located in the ammunition box or the polythene piping or supplied by McCormick to others. The boxes were not located by police. There is no forensic or other evidence linking the accused, Zagar, to any of the cannabis.
- [13] Mr Usher submitted that the evidence relating to the supply of the cannabis by McCormick and the finding of the cannabis in the various locations at

Darwin River was the evidence which the Crown intended to reply upon in order to prove the possession charge against Zagar. To arrive at the allegation that the unlawful supply to McCormick involved the circumstance of aggravation that the amount of the dangerous drug supplied was a commercial quantity, namely 10.145kg, the Crown case is that the total amount of cannabis found or supplied to others came to that figure.

[14] However, as Mrs Shaw QC pointed out, the evidence as to the finding of the cannabis and the supply by McCormick to others and the attempted supplies to others is not admissible against Zagar, despite Mr Usher's submission to the contrary. There is no allegation of a conspiracy; the evidence is not similar facts evidence; they are not even jointly charged. There is no evidence linking Zagar to the cannabis.

[15] At the end of the submissions, I ruled that the Crown was not entitled to charge Zagar on the same indictment with McCormick and I ordered that the charges be severed. I said that I would provide full reasons at a later time. These are those reasons.

[16] In my opinion, because the evidence against McCormick is inadmissible as against Zagar, there are very few facts which are the same facts or closely related facts relevant to all of the charges which would entitle the Crown to bring the charges against Zagar in the same indictment against McCormick, pursuant to s 308(2) of the *Criminal Code*.

[17] As was pointed out by the High Court in *Tripodi v The Queen*:²

But when a substantive crime, not a conspiracy, is charged in the indictment it is the ingredients of the substantive crime that must be proved, not combination for a common purpose. When the case for the prosecution is that in the commission of the crime a number of men acted in preconcert, reasonable evidence of the preconcert must be adduced before evidence of acts or words of one of the parties in furtherance of the common purpose which constitutes or forms an element of the crime becomes admissible against the other or others, that is to say of course, unless some other ground for admitting the evidence exists in the given case.

[18] In this case, there is no evidence of common purpose alleged; nor are the accused charged with conspiracy. I am unable to see how on any view of the evidence, the evidence against McCormick is admissible against Zagar, except some relatively innocuous telephone calls between the two men.

[19] There is no evidence as to where the money came from which was found in Zagar's possession at the airport. There is no evidence that the police had Zagar under surveillance during the period of time that he was in Darwin and no evidence that he met up with McCormick. Where the money came from is entirely speculative. The Crown case that the accused lied to the police as to how he was in possession of the money is tenuous, to say the least. In any event, this is evidence which can be led directly against Zagar and has got nothing to do with the charges against McCormick. Plainly, the record of interview with Zagar is not admissible against McCormick.

² (1961) 104 CLR 1 at 6-7.

[20] For the sake of completeness, I note that the charges against the accused, Zagar, are different from the charges which McCormick is facing and therefore do not fall within s 308(1) of the Code. No reliance is placed upon that section anyway.

[21] If I am wrong in my conclusion that most of the evidence against McCormick is not admissible against Zagar, I would in the exercise of my discretion order that there be separate trials, principally for the reason that the case against Zagar is weak and there is a danger that Zagar might be convicted by association. There is also a danger that the jury might infer that the money was the result of sales of cannabis by McCormick which are not the subject of charges against either accused. There is no evidence linking the money found in Zagar's possession with the cannabis allegedly sold by McCormick. Most of the evidence to be led at this trial which will last several days relates to McCormick. There is very little evidence against Zagar. I note that Mrs Shaw QC intends to challenge the admissibility of the record of interview at trial on the basis that there was a deliberate failure by the police to comply with the provisions of s 140 of the *Police Administration Act*. It is not necessary for me to rule on that matter.
