Date: 20050105
File No. 45431-1
Registry: Richmond

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Reasons for Judgment
Before the Honourable Judge E.J. McKinnon
January 5, 2005

REGINA

v

MARY JEAN DUNSDON

Counsel for the Federal Crown — G. Sair

Counsel for the Defence — S. Rauch

[1] **THE COURT:** I will give my decision now on this matter, which is on Information number 45431. The accused is charged that she unlawfully trafficked in a controlled substance, to wit: cannabis resin, contrary to s. 5(1) of the *Controlled Drugs and Substances Act* on the 7th and 11th of August 2001.

[2] The facts as I find them following the trial are as follows: The accused was seen by undercover RCMP officers on both the dates walking along Wreck Beach calling out that she

had "crazy cookies" for sale. She had a tin full of cookies with her and was selling them to various people at the beach.

[3] She told the officers that the cookies "don't just pack a punch, they throw one." When asked what was in them she said, "They're cannabis cookies," and that she had made them herself. The officers paid her $10 for two cookies on both days and she was then arrested and charged accordingly.

[4] Samples of the cookies were sent for analysis. The Certificates of Analyst identify on their face a substance in the cookies as being cannabis resin.

[5] Mr. Lam, who is employed at the Drug Analytical Service Lab and who did the analysis in this case and prepared the Certificates of Analyst, was called to testify at trial. He testified that he conducted several tests on the samples provided and found cannabinoids present in the samples. The presence of cannabinoids alone would not tell Mr. Lam whether or not cannabis resin or cannabis marihuana was present or the source of the cannabinoids found in the samples because the chemical analysis methods he used apparently cannot differentiate between cannabis resin and cannabis marihuana when the sample is one taken from something like these cookies, which are made up of ground-up substances. Nor was

Mr. Lam able to determine the amount of cannabis resin or cannabis marihuana in the samples provided.

[6] He agreed in cross-examination that a trace amount of cannabinoids such as these could be present in a sample if finely ground up nonviable hempseed or even mature cannabis stalks were used to make the cookies. He attempted to identify certain botanical features such as leaves, et cetera, in the samples, but he could not. No botanical features were visible on either a macro or micro scale, that is to the naked eye or by microscope.

[7] Mr. Lam testified that he is bound by the Cannabis Identification Guidelines which set out standard operating procedures. The Guidelines prohibit the identification of samples as containing cannabis marihuana in the absence of detection of visible botanical features in them. If such botanical features cannot be seen by eye or by microscope, the substance in the sample must be identified as cannabis resin in circumstances such as these.

[8] This is what Mr. Lam did: He identified the substances he detected in the samples as cannabis resin due to the presence of cannabinoids and his inability to see any botanical features in the samples, and he completed the Certificates of Analyst accordingly.

[9] Given Mr. Lam's evidence about his methodology, counsel for the accused submitted that the Crown failed to prove beyond a reasonable doubt that the accused was trafficking in cannabis resin as charged. The Crown responded that there is no evidence contrary to Mr. Lam's analysis, that his analysis conforms to the Certificates of Analyst and that the certificates correspond to an item listed in Schedule 2 of the CDSA.

[10] If all I had before me were the certificates and there was no other evidence, the Crown's argument may have prevailed. However, in my view Mr. Lam's *viva voce* evidence that he reached the conclusion that the samples contained cannabis resin rather than cannabis marihuana simply because the standard operating procedures in the Cannabis Identification Guidelines prohibit the identification of cannabis marihuana unless botanical features such as leaf can be seen in the sample under analysis, means that the cookies may have contained any of the following items alone or in combination: cannabis marihuana, cannabis resin, hempseed or mature cannabis stalks.

[11] The Crown submits in the alternative that the word "resin" in the charge is mere surplusage and that the Court should amend the Information to conform with the evidence and

find that the cookies contained "cannabis" and that the accused unlawfully trafficked in cannabis simpliciter.

[12] Counsel for the accused responds by pointing out the significant differences in the CDSA and the schedules thereto in the ways in which cannabis resin and cannabis marihuana are treated. He points out that the words resin and marihuana are not surplusage in his view, but material to the charge and to the offence alleged against the accused.

[13] The CDSA, it's schedules and the Criminal Code provide for different processes for prosecuting and sentencing offences involving cannabis resin versus cannabis marihuana. In my view, to simply say that the words "resin" and "marihuana" in relation to cannabis are surplusage in an Information and in a charge would seem to ignore the significant differences in how the two are to be treated at law.

[14] I have considered the drug cases to which I have been referred by counsel and which were helpful to some degree, but most were decided under the *Narcotic Control Act*, the predecessor to the CDSA.

[15] In ***R. v. Morozuk*** (1986) 1 S.C.R. 31, for example, the appellant was charged under the NCA and convicted with

possession of a narcotic, that is cannabis marihuana, for the purpose of trafficking, but the Certificates of Analyst indicated the substance was actually cannabis resin. The question on appeal was whether each of the listed derivatives and preparations in the schedule to the NCA constituted a distinct offence. If so, the Information could not be amended to conform to the evidence and the appellant should have been acquitted, the Crown having proved a different offence than that with which he had been charged.

[16] The Court referred to its earlier decision in ***R. v. Elliott*** (1978) 2 S.C.R. 393, which had decided the same issue in relation to offences alleged under the *Food and Drugs Act*. The Court said that the gravamen of the offence under the NCA is the possession of a narcotic for the purpose of trafficking and that the possession of anything listed in the schedule is possession of a narcotic.

[17] The Court went on to conclude that having chosen to particularize the Information the Crown should have sought to amend the Information to conform with the evidence under s. 529 of the Code or the trial judge should have done so on his or her own motion, but neither having done so and there being no prejudice shown to the accused, the Court saw fit to do so

itself pursuant to s. 613(1)(b)(i) and s. 613(3) of the Code and went on to dismiss the appeal.

[18] In ***R. v. Saunders*** (1990) 1 S.C.R. 1020, another *Narcotic Control Act* case, the respondents had been charged with conspiracy to import heroin, but the evidence had proved it was cocaine. They were convicted at trial and the B.C. Court of Appeal set aside their convictions on appeal and ordered a new trial.

[19] The Supreme Court of Canada found that the Crown, again having particularized the offence, was obliged to prove that offence. An amendment, they found, would have been both prejudicial and unfair to the accused because it would fundamentally change the nature of the offence and at paragraph 6 said:

> Where the Crown is uncertain as to the particular drug which was the subject of the conspiracy it may properly decline to give particulars of the drug.

[20] In this case, the Crown chose to particularize the charge in the Information and unlike in Morozuk and Saunders the evidence in the certificate conforms with the particularization. The real question before me is whether or not that evidence should be accepted. If not, should the Information be amended such that the accused would stand

charged with trafficking in a controlled substance, to wit: cannabis *simpliciter*.

[21] The Crown has not alleged the accused trafficked in cannabis in excess of three kilos, which is the maximum amount for both cannabis resin and cannabis marihuana in Schedule VII to the CDSA. Thus, she faces the possibility of being found guilty of an indictable offence and sentenced to a maximum prison term of five years less a day in accordance with s. 54(a) of the CDSA. If the amount of either substance had been alleged or found to be greater than three kilos, she would have faced possible life imprisonment, if convicted.

[22] I note that Schedule VIII of the CDSA, which relates to simple possession offences of cannabis marihuana and cannabis resin, significantly differentiates between the two in relation to this amount and weight. It seems clear that the CDSA treats cannabis resin and cannabis marihuana differently and that they are not simply interchangeable substances in terms of legal process or penalty.

[23] Counsel for the accused argues that if the counts in the Information are amended to allege cannabis *simpliciter*, then Schedule VII and VII would have no application, nor would s. 54 of the CDSA. Because the amount of cannabis is unknown in this case, he submits s. 51 and 3 would apply, meaning that

the maximum possible penalty facing the accused, if convicted, is life imprisonment, not five years less a day.

[24] Further, the accused would have had the right to elect to be tried in Supreme Court either by judge and jury or by judge alone. Instead she proceeded under the impression, given the way the Information was worded, that the Provincial Court had absolute jurisdiction over the offence alleged. And she, thus, may have suffered a breach of her s. 11(f) right to a jury trial under the Charter, if the Information were to be amended as urged by the Crown.

[25] If I were to accede to this argument to amend the Information, counsel for the accused submits that the remedy required, should a remedy be required, would be to grant a mistrial due to the deprivation of the accused's right to elect her mode of trial and the prejudice resulting from her being misled as to the penalty she faced, if convicted.

[26] Here, in my view, the evidence of Mr. Lam goes beyond his completing the Certificates of Analyst indicating that his analysis of the samples provided showed they were cannabis resin. His evidence here includes his *viva voce* evidence as to why and how he came to that conclusion and the certificates have to be understood in light of that evidence.

[27] In ***R. v. Oliver*** (1981) 2 S.C.R. 240, the Court held that evidence with regard to the procedures followed by the analyst from whence he drew his conclusion and which could leave a trier of fact with a reasonable doubt as to the analyst's conclusions had he testified as an expert, may, in fact, constitute evidence to the contrary. In this case Mr. Lam, himself, testified and he, himself, testified about the procedures he followed and how he came to reach his conclusion as set out on the certificates.

[28] Insofar as I understand his evidence, which is particular to this case, the samples contained cannabinoids that may have come from cannabis resin, cannabis marihuana, nonviable hempseed or mature cannabis stalks, none of which in these particular circumstances could be identified physically because the material was ground up in the cookies.

[29] Nonviable cannabis seed and mature cannabis stalks are specifically excluded from Schedule 2 of the CDSA and, according to Mr. Lam, chemical analysis that he conducted does not allow the identification of the source from whence the cannabinoids might originate.

[30] If the cookies did contain a substance listed in Schedule II to the CDSA, I would have a reasonable doubt at to whether that substance was cannabis resin or cannabis marihuana, given

that Mr. Lam's conclusion was seemingly based not on science, but made by default, he being bound under the standard operating procedures in the Cannabis Identification Guidelines, namely, that if he could not see any botanical features in the sample, it must, therefore, be cannabis resin and not cannabis marihuana.

[31] Amending the Information to cannabis *simpliciter* because of this uncertainty and the doubt with which I would be left would, in my view, result in the necessity of granting a mistrial because of the resulting prejudice to the accused and the violation of her s. 11(f) Charter right to elect a jury trial, if she so wished, as well as the prejudice resulting from greater jeopardy in which she stood, if convicted.

[32] However, in my view it is not necessary to make that amendment or to then declare a mistrial in this instance because here I am left in doubt as to whether the cookies, "crazy" or not, even contained a prohibited substance listed in Schedule II to the CDSA. It is possible, according to Mr. Lam, that these cookies contained nonviable hempseed or mature cannabis stalk, neither included in Schedule II, but specifically excluded and neither being prohibited substances under the CDSA.

[33] I thus am left with a reasonable doubt that the samples contained any prohibited substance under the CDSA. And I, therefore, acquit the accused of those charges in the Information on that basis alone.

(JUDGMENT CONCLUDED)