EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT AT PORIRUA

CRI-2017-091-002703
CRI-2018-091-000457

[2018] NZDC 11745

NEW ZEALAND POLICE
Prosecutor

v

[JACK WALKER]
LENNOX APOLO PAUL BAKER
Defendants

Hearing: 9 May 2018
Submissions: 23 May and 6 June 2018

Appearances: R Russell for prosecutor
C Smith for the defendant [Walker]
D Ewen for the defendant Baker

Judgment: 13 June 2018

RESERVED JUDGMENT OF JUDGE SM HARROP AS TO VERDICTS

Introduction

[1] On 24 October 2017 [Constables 1 and 2] went to a house at [address deleted] in Cannons Creek to carry out a bail check. Mr Baker was on a 24 hour curfew at that address and staying in a shed at the rear of the property. [Mr Walker], occupied the house. On approaching the shed, [Constable 1] smelt the distinctive smell of cannabis and decided to undertake a search. He found Mr Baker in the shed together with a bong for smoking cannabis and a point bag containing about a gram of a substance which Mr Baker later admitted was cannabis. [Constable 1] also found in the shed a rubbish bag containing an empty 1kg bag of damiana which he said is a precursor

substance for the manufacture of synthetic cannabis. Mr Baker was wearing a satchel bag which was found to contain a package of what [Constable 1] believed was synthetic cannabis and $2,122 in cash. He also found a cellphone in the bag but when Mr Baker was requested to unlock the phone, he refused to do so. Despite being warned of his obligations under the Search and Surveillance Act 2012 to assist the officer and that he would be charged if he failed to open his phone, he maintained his refusal to do so.

[2] [Constable 1] found Mr [Walker] in the kitchen of the house. He seemed to be very heavily under the influence of a drug and was slurring his words and staggering. Mr [Walker] was seen holding a bong to his mouth, attempting to light it with a lighter.

[3] [Sergeant 1], who had been called to the scene by [Constable 1], found under the sink in the kitchen area a large pot containing a substantial amount of what he believed to be synthetic cannabis.

[4] On analysis ESR found that the plant material from the large pot, weighing 786.6gms, contained the synthetic cannabinoid 5F-ADB and that the plant material had been in contact with acetone. The plant material found in the package in Mr Baker's bag, weighing 33.7gms, was also found to contain 5F-ADB.

[5] As a result, Mr [Walker] and Mr Baker are jointly charged under the Psychoactive Substances Act 2013 ("the Act") with having in their possession a psychoactive substance which is not an approved product with the intent to sell or supply it and with manufacturing a psychoactive substance without a reasonable excuse and without a licence to manufacture. In addition, Mr Baker faces a further charge of possession a psychoactive substance that is not an approved product with intent to sell or supply it, and charges of possession of cannabis, possession of a bong for smoking cannabis and of failing without reasonable excuse to assist [Constable 1] exercising a search power when requested to do so under s 130(1) of the Search and Surveillance Act 2012.

[6] The defendants pleaded not guilty and the case came before me for a judge-alone trial at the Porirua District Court on 9 May 2018. There was extensive

prosecution evidence as to what was found on 24 October and what was done with seized exhibits. The defendants did not give or call evidence, as was their right.

[7] On 18 December 2017, Judge Johnston dismissed an application by Mr Baker for an order excluding all the evidence obtained by the police on their visit to the premises on 24 October 2017 on the basis that five days earlier, on 19 October 2017, on behalf of the occupier, Mr [Walker], Mr Ewen (who was however at trial, counsel for Mr Baker not Mr [Walker]) had written to the Commissioner of Police revoking the licence of any police officer to enter on to any part of the property at [address deleted], Porirua. The police took the view that this notice did not deprive them of the right to go on to the property for bail checks in respect of Mr Baker. Judge Johnston held in a detailed reserved judgment that the police were lawfully on the property conducting the bail check on 24 October 2017 and that the evidence obtained which led to the charges against both Mr Baker and Mr [Walker] was admissible. At the trial I was asked to revisit this ruling.

The Psychoactive Substances Act 2013 charges

[8] Self-evidently none of the five charges which the defendants face under the Act can be held proved unless there is evidence establishing beyond reasonable doubt that the substances found respectively in the large pot under the kitchen bench and in Mr Baker's satchel were psychoactive substances for the purposes of the Act. Mr Ewen, whose submissions Mr Smith adopted on this issue, submits there is no or insufficient evidence on this fundamental issue. For the police, Mr Russell submits that there is sufficient evidence of this.

[9] Unlike the Misuse of Drugs Act, the Act does not contain a list of relevant substances. Mr Russell noted in his submissions that this was because of the relative ease for manufacturers or suppliers slightly to alter chemical compounds. Section 2 of the Act says that "psychoactive substance" has the meaning given in s 9. This provides:

9 Meaning of psychoactive substance

> (1) In this Act, unless the context otherwise requires, **psychoactive substance** means a substance, mixture, preparation, article, device, or thing that is capable of inducing a psychoactive effect (by any means) in an individual who uses the psychoactive substance.
>
> (2) **Psychoactive substance** includes—
>
> (a) an approved product:
>
> (b) a substance, mixture, preparation, article, device, or thing that is, or that is of a kind that is, or belongs to a class that is, declared by the Governor-General by Order in Council made under section 99 to be a psychoactive substance for the purposes of this Act.
>
> (3) Despite subsections (1) and (2), **psychoactive substance** does not include—
>
> (a) a controlled drug specified or described in Schedule 1, 2, or 3 of the Misuse of Drugs Act 1975:
>
> (b) a precursor substance specified or described in Schedule 4 of the Misuse of Drugs Act 1975:
>
> (c) a medicine within the meaning of section 3 of the Medicines Act 1981 or a related product within the meaning of section 94 of that Act:
>
> (d) a herbal remedy (within the meaning of section 2(1) of the Medicines Act 1981):
>
> (e) a dietary supplement (within the meaning of regulation 2A of the Dietary Supplements Regulations 1985):
>
> (f) anything that is ordinarily used or represented for use as food or drink for human beings:
>
> (g) any alcohol, unless the alcohol contains a psychoactive substance as defined in subsection (1) or (2) that is not alcohol:
>
> (h) any tobacco product (within the meaning of section 2(1) of the Smoke-free Environments Act 1990), unless the tobacco product contains a psychoactive substance as defined in subsection (1) or (2) that is not tobacco:
>
> (i) a substance, mixture, preparation, article, device, or thing that is, or that is of a kind that is, or belongs to a class that is, declared by the Governor-General by Order in Council made under section 99 not to be a psychoactive substance for the purposes of this Act.

[10] As can be seen, from ss (2) and (3) respectively, some products are expressly included and some are expressly not included, but beyond that, the definition depends on the prosecution adducing evidence that the substance alleged to be a psychoactive substance is one which is capable of inducing a psychoactive effect by any means in a user.

[11] There is no suggestion in this case that 5F-ADB is either an approved product or one belonging to a class which has been the subject of a declaration by the Governor General under s 99 of the Act, nor is it excluded by ss (3). Accordingly, to succeed on any of the five charges laid under the Act, the prosecution had to provide evidence that 5F-ADB is capable of having the requisite effect.

[12] Although Mr Russell in his submissions asserted that it was not for the Psychoactive Substances Authority or the prosecution to prove that a substance was psychoactive, he has not referred to any provision of the Act having this effect in connection with a prosecution for an offence under the relevant provisions of the Act. There appears to be some confusion with the onus on a person seeking to persuade the Psychoactive Substances Regulatory Authority that a substance should be approved but this is a prosecution of charges laid under, respectively, s 26(1) and s (70)(1)(c) of the Act and in the absence of clear statutory direction otherwise the elements of these charges must be proved beyond reasonable doubt by the prosecution.

[13] These sections provide:

> **26 Offence relating to manufacture of psychoactive substance without licence**
>
> (1) A person must not, without reasonable excuse, manufacture a psychoactive substance without a licence to manufacture.
>
> (2) A person who contravenes subsection (1) commits an offence and is liable on conviction,—
>
> (a) in the case of an individual, to a term of imprisonment not exceeding 2 years:
>
> (b) in the case of a body corporate, to a fine not exceeding $500,000.
>
> **70 Offences relating to psychoactive substance that is not approved product**
>
> (1) A person commits an offence if the person, without reasonable excuse,—
>
> (a) sells or supplies a psychoactive substance that is not an approved product to any person; or
>
> (b) offers to sell or supply a psychoactive substance that is not an approved product to any person; or
>
> (c) possesses a psychoactive substance that is not an approved product with the intent to sell or supply the psychoactive substance to any person.

(2) Subsection (1) does not apply to a person who holds a licence to sell psychoactive substances that are not approved products that applies to the psychoactive substance.

(3) A person who commits an offence against subsection (1) is liable on conviction,—

(a) in the case of an individual, to a term of imprisonment not exceeding 2 years:

(b) in the case of a body corporate, to a fine not exceeding $500,000.

[14] On the face of s 26(1) the elements the prosecution must prove beyond reasonable doubt are:

(1) Manufacture of a psychoactive substance; and

(2) Doing so without reasonable excuse; and

(3) Doing so without a licence to manufacture.

[15] On the face of s 70(1)(c) the elements the prosecution must prove beyond reasonable doubt are:

(a) Possession of a psychoactive substance; and

(b) That it was possessed without reasonable excuse; and

(c) That it is not an approved product; and

(d) With intent to sell or supply that substance to a person.

[16] As I have mentioned and as Mr Ewen submitted, in order for the strong presumption that such elements must be established by the police to the very high criminal standard of beyond reasonable doubt not to apply, there needs to be a clear

statutory basis for it. Mr Ewen referred me to *Hansen v R*[1] where the Supreme Court said :

> [27] A legal presumption identifies who must prove the case. The presumption of innocence has this effect. It establishes that the burden of proof of guilt in criminal cases is carried by the prosecution. The common law rule that the prosecution must prove guilt even where an affirmative defence is put forward has not been in doubt since *Woolmington v Director of Public Prosecutions*. The only common law exception was insanity, an excuse which is extraneous to the offence charged and which has been treated as a special case. Viscount Sankey LC in *Woolmington* acknowledged that the general common law rule was subject to modification by statute. And statutory burdens of proof upon an accused have long featured in criminal enactments in New Zealand, as in other jurisdictions. From 1948, the "golden thread" of the common law has however been recognised as a human right, in international instruments to which New Zealand is a party. (footnotes omitted)

[17] I have no hesitation in accepting this submission. There are many examples of reversal of the onus in statutory provisions creating offences. Indeed, notably in the Act itself, sections 49(3) and (4) and 50(3) and (4) provide for a defendant to establish on that he or she had reasonable grounds to believe that the person to whom they sold approved products was aged 18 years or over.

[18] The charges under ss26 and 70 are serious, carrying maximum penalty of two years imprisonment and therefore a right to elect trial by jury. That makes it even more unlikely that Parliament intended a defendant to bear an onus of proof as to any element of those charges.

[19] There is simply no provision of which I am aware, and Mr Russell has certainly not referred me to one, in the Act which places any form of onus on a defendant to establish that the substance said to be psychoactive by the prosecution is in fact not such a substance, or indeed that there is any such onus on the defendants in relation to the elements of the charges they face. Although no submissions were directed to this, I accept that there may be a form of evidential, as opposed to persuasive, onus on a defendant in relation to the reasonable excuse element of both s26 and s70.

[20] I consider that the police must on each charge prove beyond reasonable doubt that, in this case, the synthetic cannabinoid 5F-ADB, is a psychoactive substance.

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[1] [2007] 3 NZLR 1

There was no evidence whatsoever adduced at trial to the effect that 5F-ADB is a substance capable to inducing a psychoactive effect in a user and, as I have already noted, it is not a substance included in the definition by virtue of s9(2).

[21] Mr Russell sought in his submissions to introduce material tending to suggest that 5F-ADB is such a substance but he was given leave to make submissions (on certain discrete legal issues) only as to whether the charges were made out on the evidence adduced in the police case which was closed at trial; it was not an opportunity to attempt to supplement that evidence.

[22] For example, in his submissions, Mr Russell referred to 5F-ADB as having been incriminated in various media articles in the death of users. That however, was not evidence placed before the Court as part of the prosecution case. Mr Russell did attach to his submissions a document listing substances considered by the Psychoactive Substances Regulatory Authority to have a psychoactive effect, which includes 5F-ADB but again this was not produced in evidence, nor was it supported by expert evidence which, ironically, the document expressly contemplates as being provided to the court.

[23] Mr Russell mentioned the judgment of Moore J in *Mihinui and Enoka v Police.*[2] This is instructive to read because in that case the District Court Judge found that synthetic cannabinoids known as JWH-078 and JWH-200 were psychoactive substances based on expert evidence from Dr Jessamine, a registered medical practitioner who had been seconded to the team at the Ministry of Health charged with developing the Regulatory Scheme to support the legislation allowing the sale of psychoactive substances in New Zealand. Dr Jessamine confirmed at the District Court trial that the substances fitted the description of a psychoactive substance under the Act because they were capable of producing a psychoactive effect as defined in the Act.

[24] The absence of any such evidence brought by the police in this case is glaring.

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[2] [2015] NZHC 1127

[25] There was no application after the close of the police case for further evidence to be adduced pursuant to s 98 of the Evidence Act nor any suggestion that I ought to take judicial notice of any scientific evidence about the effects of 5F-ADB under s 128(2) of the Evidence Act. Nor was there any attempt to seek to have admitted reliable published scientific documents under s 129 of the Evidence Act.

[26] In summary, there was simply no evidence adduced by the prosecutor that 5F-ADB is a substance falling within the definition in the Act. It follows that each of the five charges laid under the Psychoactive Substances Act must be dismissed.

[27] Even if I had concluded that 5F-ADB was proved on the evidence to be a psychoactive substance, all the charges under the Act would still have had to be dismissed.

[28] As to the s 26 charges there was no evidence provided by the prosecution that the defendants did not have a reasonable excuse to manufacture that substance, unlikely though it seems that they had one. Nor was there any evidence that the defendants did not have a licence to manufacture it, unlikely though it seems that they had such a licence. The onus is on the police to prove the absence of both a reasonable excuse and a licence to manufacture and there was no evidence provided on these issues at all.

[29] As to the s 70 charges, there was no evidence provided by the prosecution that 5F-ADB is not an approved product, nor was the possibility of the defendants having a reasonable excuse for possessing it excluded.

[30] Mr Ewen also submitted that the police had not proved that the plant material contained sufficient 5F-ADB to create a psychoactive effect. The ESR evidence only went as far as establishing its presence, not its presence in sufficient quantity to have the necessary effect. I accept that such evidence was absent.

[31] It is not necessary to my decision on these charges to determine this question and the issue is best left for further submissions and determination in a future case where it is in primary focus. Ordinarily in a prosecution of this kind, as is obviously

required by the definition, there would have to be evidence that the substance is capable of producing a psychoactive effect in a user. But, because these substances no doubt vary in their effects, by inference there would likely also need to be evidence there was a sufficient quantity of the particular psychoactive substance present to have been capable of producing such an effect in any user, if used alone or, arguably, in combination with other substances. Depending on the toxicity and known effects of the substance in question, the evidence might be that even a trace quantity would be sufficient to be capable of having the requisite effect. The definition of "psychoactive effect" in s8 appears to set a low bar as all it requires is an effect on a user's mind, either at the time of use or subsequently. Proof that it did have any such effect on a particular person is clearly not required by the s9 definition; the possibility it might have such an effect on any user is sufficient as the qualifier "capable" indicates.

[32] For all these reasons the five charges laid under the Psychoactive Substances Act 2013, two against Mr [Walker] and three against Mr Baker, are each dismissed.

The remaining charges faced by Mr Baker

[33] As noted earlier, Mr Baker also faces charges of possession of a small amount of cannabis, possession of a bong for smoking cannabis and of failing without reasonable excuse to assist [Constable 1] to unlock his cellphone when requested to do so under s 130(1) of the Search and Surveillance Act 2012.

[34] Leaving aside the question of the admissibility of the evidence supporting these charges, there can be no doubt that they are each established beyond reasonable doubt on the evidence. Indeed, Mr Ewen did not suggest otherwise. There is no doubt that Mr Baker was in possession of the small amount of cannabis in the point bag, as he readily admitted when interviewed by [Constable 1]. He also readily admitted using the bong for the proscribed purpose shortly before the constable arrived. Also, there is no doubt that Mr Baker refused to unlock his cellphone, despite being requested to do so and warned of the consequences of failing to do so.

[35] The sole issue put forward by Mr Ewen in defence of these three charges is by way of renewed challenge to the admissibility of the evidence supporting them. As I

have already noted at [7], Judge Johnston found the evidence admissible in a reserved judgment dated 18 December 2017, in respect of which there has been no pre-trial appeal. Of course if the charges are held proved and he is convicted, Mr Baker will have the right to appeal against those convictions on this or any other relevant basis.

[36] As trial judge, I am able to revisit admissibility rulings made before trial, if the evidence at trial discloses a material change in circumstances justifying a different admissibility decision to that made prior to the trial.[3] The question here is therefore whether there is a material difference between the evidence considered by Judge Johnston and the evidence presented before me. Mr Ewen submitted there were material differences, albeit without identifying them. Mr Russell submitted there were none.

[37] Judge Johnston found that the bail check visit by [Sergeant 1] on 21 October 2017 was authorised by Mr [Walker] as were future bail checks on Mr Baker. Judge Johnston noted that at that 21 October bail check, [Sergeant 1] had spoken directly with Mr [Walker] who did not ask him to leave or seek to invoke the 19 October Notice by way of Mr Ewen's letter. Rather, he informed police that Mr Baker was in the shed at the back of the property where he was staying and to "check him there in future". Judge Johnston found that the police had authority to be at the bail address on 21 October and to check on Mr Baker's compliance with bail conditions on that and future occasions. His Honour therefore found that at the subsequent bail check on 24 October, [Constable 1] proceeded directly to the shed at the back of the property in accordance with the authority given by Mr [Walker] only three days earlier.

[38] The evidence before me from [Constable 1] was that on 24 October he was acting on the advice of [Senior Sergeant 1] that bail checks could still be done. Indeed, [Senior Sergeant 1's] evidence was admitted by consent at the trial and that appended the email of 19 October which he sent to all relevant police officers in the Kapiti-Mana area. He also said in evidence that when Mr [Walker] was detained, he at no time asked the officer to leave.

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[3] See *M v R* [2015] NZCA 413 at [10] and [15] and *R v FSE* [2016] NZHC 144

[39] In cross-examination [Constable 1] confirmed that he was acting pursuant to [Senior Sergeant 1's] advice that he had the right to go on to the property to do bail checks and that he had been aware that the police had been given a letter saying they had no right to do so.

[40] [Sergeant 1] confirmed, as he had in his formal statement provided to Judge Johnston, that prior to 24 October, he had conducted a bail check at the address and spoken to the occupant (Mr [Walker]), who had directed him to the shed at the back of the property because that was where Mr Baker was staying and that was where he could find him in future. In cross-examination, [Sergeant 1] accepted he had not asked Mr [Walker]'s permission to enter the property on 21 October because he was there to do a bail check and he made it clear to Mr [Walker] that he had the authority to be on the property for that purpose.

[41] I do not consider that the evidence I heard was materially different from that which Judge Johnston considered. In essence it was the same: there was authority obtained by [Sergeant 1] on 21 October from Mr [Walker] both for that and subsequent bail checks and it was pursuant to that authority that [Constable 1] went straight to the back of the property, to the shed, when checking Mr Baker's compliance with bail conditions on 24 October.

[42] I therefore see no basis on which I can properly revisit Judge Johnston's ruling as to admissibility.

[43] It follows that each of the three remaining charges is proved beyond reasonable doubt and I convict Mr Baker accordingly.

Sentencing

[44] As trial judge I would normally attend to sentencing Mr Baker on the charges which I have found proved after the trial. Mr Baker has the right to insist on that if he wishes. However, they are relatively minor and are also of a type where sentencing could readily be carried out by any judge based on the relevant summary of facts. The facts supporting them are straightforward and were not contested at trial. I am also

aware from having dealt with bail issues involving Mr Baker since the 9 May trial that he is awaiting sentence on quite a number of other charges to which he has pleaded guilty. I therefore suggest that sentencing on all charges on which Mr Baker has been convicted be arranged by the Registrar in consultation with Mr Ewen as to a convenient date and that this be arranged before the judge who is first available to do this.

Result

[45] I dismiss each of the five charges laid against the defendants (two against Mr [Walker], three against Mr Baker) under the Psychoactive Substances Act 2013 but find proved the other three charges faced by Mr Baker under Misuse of Drugs Act 1975 and the Search and Surveillance Act 2012.

Judge S M Harrop
District Court Judge