RODI v THE QUEEN (P24/2018)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2017] WASCA 81
Date of judgment:	21 April 2017
Date special leave granted:	20 April 2018

After a trial in the District Court of Western Australia before Eaton DCJ and a jury, the appellant was convicted of possessing a prohibited drug, namely cannabis, with intent to sell or supply it to another, contrary to s 6(1)(a) of the *Misuse of Drugs Act* 1981 (WA) ("the MD Act"). The circumstances of the offence were that on 14 April 2012 police officers executed a search warrant, pursuant to the MD Act, at the appellant's home. They located a total of 925 grams of cannabis. The appellant admitted that he was in possession of the cannabis. His case was that he had cultivated it for his personal use from two plants which were growing outside the house.

At the trial a prosecution witness, Detective Sergeant Coen, gave evidence that cannabis plants typically yield between 100 and 400g of cannabis head materials. He said that he would expect the yield from the two plants located at the rear of the appellant's house to be on the lower end of the 100g to 400g scale. Detective Coen had previously given evidence, in other unrelated criminal proceedings, that he had experienced a range of 300g to 600g of head material to be produced by naturally grown cannabis plants. That range was consistent with the appellant's account of having harvested the head material found in his house from two plants. The officer's earlier testimony was not disclosed to the appellant at the time of trial, and was unknown to the appellant and his lawyers at that time.

In his appeal to the Court of Appeal (Buss P, Newnes & Mitchell JJ (dissenting)), the appellant submitted, inter alia, that, as a result of this fresh or new evidence, a miscarriage of justice had occurred.

The majority of the Court, after evaluating the additional evidence in the context of the whole of the trial record including the manner in which the appellant's case was run at the trial, was satisfied that a miscarriage of justice had not occurred. Relevant factors included: the appellant bore the onus of establishing on the balance of probabilities that he did not intend to sell or supply to another any of the 925g of cannabis; the appellant did not call any opinion evidence from a botanist or other expert as to the quantity of cannabis head material usually derived from a non-hydroponic cannabis plant; defence counsel did not object to Detective Coen giving opinion evidence about typical cannabis yields on the ground that Detective Coen was not qualified as an expert on that topic; and he did not object to Detective Coen giving opinion evidence about typical cannabis yields on the ground of non-disclosure or late disclosure of his evidence on the topic. Further, defence counsel did not challenge in cross-examination Detective Coen's evidence-in-chief as to the quantity of cannabis head material usually derived from a non-hydroponic female cannabis plant.

The majority held that even if the additional evidence as to Detective Coen's previous opinion on typical cannabis yields had been available to the appellant at the trial, the evidence of his previous opinion would have been admissible solely as a prior inconsistent statement and therefore would not have been evidence as to the validity or accuracy of the previous opinion. It was plain that Detective Coen would not have accepted the correctness of his previous opinion. His explanation in evidence at the hearing of the appeal about when and why he changed his opinion on typical yields of cannabis head material per female plant was credible and cogent.

The majority was satisfied that, to the extent the additional evidence was properly characterised as fresh evidence, there was no significant possibility that, on the whole of the trial record and the additional evidence, a fact-finding tribunal, acting reasonably, would be satisfied that the appellant had established on the balance of probabilities that he did not intend to sell or supply to another any of the 925g of cannabis.

Mitchell JA (dissenting) held that the appellant could not have reasonably anticipated that the State would adduce Detective Coen’s yield evidence, which had not previously been disclosed, at trial. Because of the unusual way in which the issue emerged during the course of the trial, the appellant did not have any opportunity, by the exercise of reasonable diligence, to discover the different testimony which the police officer had given on previous occasions. That fresh evidence was at least capable of calling into question an important aspect of the State's evidence, which was potentially influential in the jury's assessment of the appellant's evidence. There was a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the evidence of the previous testimony about cannabis yields had been available at the appellant's trial. In these circumstances, a miscarriage of justice had been established and the appeal should have been allowed.

The grounds of appeal include:

- The Court of Criminal Appeal erred in finding that if the fresh evidence before the Court was before the jury (with the evidence adduced at the trial) there was no significant possibility that the appellant would have been acquitted.