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ORIGINAL

IN THE HIGH COURT OF AUSTRALIA **No. M134 of 2010**

MELBOURNE OFFICE

OF THE REGISTRY

APPEAL FROM THE SUPREME COURT OF VICTORIA, COURT OF APPEAL

10 BETWEEN

VERA MOMCILOVIC

Appellant

- and -

THE QUEEN

First Respondent

THE ATTORNEY GENERAL FOR THE STATE OF VICTORIA

20 Second Respondent

THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Third Respondent

FIRST RESPONDENT'S SUBMISSIONS

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PART 1: Certification of suitability for publication on Internet

1. The First Respondent certifies that this submission is in a form suitable for publication on the Internet.

Filed by: -		Date:	27 January 2011
Craig Hyland		Telephone:	(03) 9603 7666
Solicitor for Public Prosecutions		Direct:	(03) 9603 7439
565 Lonsdale Street		Facsimile:	(03) 9603 7460
Melbourne Vic 3000		Solicitor:	M. De La Fuente
DX 21 0290		Reference:	0600195

PART II: Statement of the issues that the appeal presents

2. This Appeal raises the following issues -

(a) Whether the provisions of the Drugs Poisons & Controlled Substances Act 1981 (Vic) ("the Act") were invalid in their application to the Appellant, having regard to s109 of the Constitution of the Commonwealth of Australia ("the Constitution") and the provisions of the Commonwealth Criminal Code ("the Code") which regulate serious drug offences;

10 (b) If not, whether s5 of the Act, interpreted without reference to the Charter of Human Rights and Responsibilities Act 2006 (Vic) ("the Charter"), casts a legal burden of proof on an accused;

(c) If it does, whether the Charter, and especially s32 thereof, requires, or purports to require, s5 of the Act to be re-interpreted as casting an evidential burden only on an accused;

(d) If so, whether s32 of the Charter thereby attempts to confer legislative power on the Courts and is therefore invalid in the light of the principles enunciated in *Kable v DPP* (1996) 189 CLR 51 ;

(e) Whether s36 of the Charter, which provides for Declarations of Inconsistent
20 Interpretation by the Supreme Court of Victoria, also attempts to confer legislative power on that Court and is therefore invalid in the light of the principles enunciated in *Kable v DPP* (1996) 189 CLR 51; and

(f) Whether the trial judge erred in not directing the jury that they needed to be satisfied that the Appellant knew of the drugs before they could convict her of trafficking based on possession for sale.

PART III: Notice of a Constitutional Matter under section 78B of the *Judiciary Act* 1903 (Cth)

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3. Notices have been given in compliance with section 78B of the Judiciary Act 1903 (Cth)

PART IV: Statement of any contested material facts, narrative of facts or chronology

4. The Respondent does not contest any matter set out in the Appellant's narrative of facts or chronology.

5. The evidence at trial is summarised in the judgment of the Court of Appeal at [4] and in Appendix 1.

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PART V: Statement of Applicable Constitutional Provisions, Statutes and Regulations

6. The relevant provisions are:

   (a) sections 51(xxix) , 80 & 109 of the Constitution;

   (b) sections 5.6, 12.2, 13.1, 13.2, 300.2, 300.4, 302.1 & 308.1 of the Code;

   (c) sections 7, 25(1), 32 & 36 of the Charter;

   (d) sections 5, 70, 71AC & 73(2) of the Act.

   (e) sections 4C(2) & 4G of the Crimes Act 1914(Cth)

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PART VI: Statement of Argument on behalf of the First Respondent

Introduction

Trafficking in a drug of dependence

7. The Appellant was charged with one count of trafficking in a drug of dependence contrary to section 71AC of the Act as follows:

30 "The Director of Public Prosecutions presents that Vera Momcilovic at Melbourne in the said State on the 14th day of January 2006 trafficked in a drug of dependence namely Methylamphetamine."

8. Section 71AC of the Act provides –

"A person who, without being authorised by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum)."

40 9. Section 70 of the Act relevantly provides –

"traffic in relation to a drug of dependence includes.....

(c) sell, exchange, agree to sell, offer for sale ***or have in possession for sale,*** a drug of dependence;" (emphasis added)

10. Section 5 of the Act provides –

"Without restricting the meaning of the word *possession*, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary."

11. Section 73(2) of the Act provides –

"Where a person has in his possession, without being authorized by or licensed under this Act or the regulations to do so, a drug of dependence in a quantity that is not less than the traffickable quantity applicable to that drug of dependence, the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence."

The Crown Case

12. On 14 January 2006, the Appellant owned and occupied apartment 1409 at Regency Towers, 265 Exhibition Street, Melbourne. She resided there with Velimir Markovski. On 14 January, two men, Sheen & Moir, were surveilled by police entering the building and being met by Markovski who escorted them to the 14th floor. These men were followed from the building by police who intercepted them and found them to be in possession of 28 grams of methylamphetamine. As a result, police executed a warrant at apartment 1409.

13. In the course of the search, the police found in the freezer compartment of the bar-sized fridge in the kitchen a plastic bag containing 64.6 grams of 50% pure methylamphetamine. In the crisper section of the fridge they found a plastic Tupperware container containing 20 smaller plastic bags containing various amounts of methylamphetamine from .9 grams to 98.6 grams, with purities ranging from 16% to 50% with a total weight of 394.2 grams. In the kitchen cupboard above the sink was a Moccona coffee jar containing 325.8 grams of a substance that included an indeterminate amount of methylamphetamine. In addition, within the unit they located two sets of electronic scales, a further bag of an undefined crystalline material, a smaller container of a white crystalline material described by Markovski in evidence as "artificial sugar" which was to add to the methylamphetamine, and another coffee jar containing a white powder. Also present in a drawer in the lounge room were a number of smaller plastic bags similar to those found in the crisper. Also located was a spatula. In a rubbish bin were remnants of plastic bags that matched those found in the possession of Sheen and Moir. In a walk-in robe off the master bedroom, in a shoe box on a shelf, they located the sum of $165,900 in cash.

14. The forensic evidence linked the items seized to Markovski; there was no forensic evidence linking any of the items to the Appellant.

15. The Appellant gave evidence denying knowledge of the drugs or of any drug trafficking engaged in by Markovski. The Appellant further denied knowledge of the cash found in the walk-in-robe. Markovksi gave evidence supporting the Appellant's evidence and absolved her from any involvement in the undoubted drug trafficking which had taken place in the apartment over a period of time.

16. The Crown relied on section 5 of the Act for deemed possession and on section 73(2) of the Act as prima facie evidence of trafficking, the trafficable quantity then applicable under that section being 6 grams.

17. The Appellant was convicted of trafficking in methylamphetamine.

Proposed Ground Three –Inconsistency under S109 of the Constitution

18. It is helpful to first consider the provisions regulating possession of methylamphetamine [1] under the Act & the Code before turning to the provisions in those instruments regulating the possession of methylamphetamine for sale.

Possession under the Act

19. Possession of methylamphetamine is conduct which is regulated by the Act[2]. Possession under the Act includes common law possession **and** deemed possession as defined in s5.

20. Under s5, and unless the accused satisfies the court to the contrary, possession of drugs is established simply by proving that:

- the accused occupied premises on which the drugs were present; or
- the accused used, enjoyed or controlled the drugs at any place whatsoever.

21. An intention to possess the drugs is not a prerequisite of deemed possession under s5.

22. In relation to the possession of methylamphetamine, therefore, the conduct regulated by the Act is extensive.

Possession under Part 9.1 of the Code

23. Possession of methamphetamine, which is the same substance as methylamphetamine, is also conduct that is regulated under Part 9.1 of the Code.[3] But there is no equivalent to s5 of the Act[4].

[1] The Code at s314.1 uses the term methamphetamine but that is the same substance as methylamphetamine, which is the term used in the Act at Part 3 of Schedule 11.
[2] See ss 5 & 73 of the Act
[3] Ss300.2 & 308.1
[4] There is an inclusive definition of possession at s300.2 of the Code.

24. To prove possession of methamphetamine under the Code, the prosecution must prove that the accused intended to possess the substance which was a proscribed drug and that the accused was reckless as to the nature of the substance[5].

Comparison of conduct regulated by the Act and the Code

25. Certainly, the Act purports to regulate conduct in relation to methylamphetamine which Part 9.1 of the Code also purports to regulate.

10 26. But the Act, by virtue of s5, goes further and also purports to regulate conduct which is wholly outside the sphere of conduct regulated by the Code.

27. Were this submission to be expressed diagramatically, one would have concentric circles. The inner circle would refer to conduct regulated by both the Act & the Code, based upon the common law concept of possession[6]. The field between the perimeters of the inner and outer circles would refer to conduct regulated solely by the Act pursuant to s5. Since there is no concurrent operation of the Act and the Code with respect to this field of conduct, there can be no direct inconsistency between the State and Commonwealth law which might enliven s109 of the Constitution.

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28. Nor can there be any indirect inconsistency as it is clear, having regard to the saving provision set out at s300.4 of the Code, that the Code does not purport to "cover the field." This fact is amplified in the 2nd Reading Speech[7] and Explanatory Memorandum[8] for the Law and Justice Legislation Amendment (Serious Drug Offences and other measures) Bill 2005 which inserted Part 9.1 of the Code.

Possession for Sale

29. Possession of methylamphetamine **for sale** is conduct which both the Act[9] and the
30 Code[10] also purport to regulate.

30. But, when one bears in mind the different approaches to possession under the Act and the Code, the conduct which is regulated is not co-extensive: the Act reaches considerably further than the Code.

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[5] See ss 4.1, 5.6, 300.2 (definition of possession) & 308.1 of the Code. In summary, possession is "a state of affairs" (see *He Kaw Teh v The Queen* (1984) 157 CLR 523 at p564 per Brennan J: see also Odgers *Principles of Federal Criminal Law* (2nd ed), LBC, 2010 at [4.1.260]) which means it falls within the Code's definition of "conduct" (s4.1(2)). Being conduct, it is a physical element (s4.1(1)) of the offence of possession of a controlled drug (s308.1). As no fault element is specified for this physical element, intention is the fault element by "default" (s5.6(1)). See also *Fang v The Queen* [2010] NSWCCA 254

[6] Within the inner circle, which is the field of concurrent operation, a real question arises in relation to inconsistency under s109 of the Constitution.

[7] Hon Phil Ruddock, MP, 26.5.2005 at [4] & [5] - " Our existing offences are mainly focused on preventing illicit drugs from crossing Australia's border. The new offences will also apply to drug dealings within Australia. To that extent they will operated alongside State and Territory offences to give more flexibility to law enforcement agencies. This approach will ensure there are no gaps between federal and state laws that can be exploited by drug cartels."

[8] At p2, the Explanatory Memorandum says "Overlapping State and Territory drug offences will also continue to operate alongside the offences in Part 9.1 of the Criminal Code."

[9] In the Act, see ss70 (definition of "traffick"),71, 71AA, 71AB, 71AC

[10] Division 302 of the Code

31. In this case, the prosecution alleged (or relied upon) possession under s5 which also enlivened s73(2)[11] of the Act.

32. The nett effect of these provisions was that the jury was entitled[12] to find that the Appellant's deemed possession of a quantity of methylamphetamine far in excess of a traffickable quantity was possession for sale.

33. The fact that she could not have been found guilty of possession for sale under the Code without proof of an intention to possess the methylamphetamine does not mean there is an inconsistency under s109 of the Constitution. All it means is that the State has chosen, as it is constitutionally entitled to do, to regulate conduct over and above conduct proscribed by the Commonwealth.

34. The fact that a State, in regulating similar subject matter, goes further than the Commonwealth, does not necessarily mean it "impairs, alters or detracts from"[13] the operation of a Commonwealth law, especially where the purpose of the Commonwealth law is plainly to supplement rather than supplant State laws[14]. In *McWaters v Day*[15] the Court was concerned with two regulatory schemes in relation to drink driving. The State had chosen to regulate, inter alia, driving a motor vehicle whilst under the influence of alcohol. The Commonwealth had chosen to regulate, inter alia, the driving of vehicles by service personnel on service land *whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle*. The fact that the State scheme was more far reaching in the conduct which it proscribed did not mean there was an inconsistency between the two regulatory schemes which triggered s109 of the Constitution.

35. *McWaters v Day* was distinguished in *Dickson v The Queen*[16] at [29]. The present case can be distinguished from *Dickson* on the same basis. Paraphrasing *Dickson* at [29], it is difficult to construe sections 302.4 (trafficking simplicter) and 308.1(possession simpliciter) of the Code as conferring liberty on persons to be in occupation of premises on which drugs are present or to use, enjoy or be in control of drugs.

36. At [45] of the Appellant's submissions, it is contended that "the Victorian provisions render criminal conduct not caught by, *and indeed deliberately excluded from the conduct* rendered criminal by s302.4." (emphasis added). In support of the claim of "deliberate exclusion", reference is made in footnote 41 of the Appellant's submissions to the discussion at p43 in Chapter 6 of the Report of the Model Criminal Code Officers Committee (1998) ("the MCCOC Report"). But, as is obvious from that discussion headed "No presumption of possession", the authors of the MCCOC Report expressly rejected the inclusion of a deeming provision in the Model Criminal Code comparable to s5 of the Act because, inter alia, the Model Criminal Code did not

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[11] Clarke & Johnstone [1986] VR 643: R v Tragear (2003) 9 VR 107

[12] See submissions in relation to Ground 2

[13] See *Victoria v Commonwealth* (1937) 58 CLR 618 at 630

[14] That supplementing, not supplanting State law is the purpose of Part 9.1 of the Code is manifest from s300.4 of the Code and the Second Reading Speech and Explanatory Memorandum for the Law and Justice Legislation Amendment (Serious Drug Offences and other measures) Bill 2005 which, when enacted, inserted Part 9.1 into the Code.

[15] (1989) 168 CLR 289

[16] (2010) 84 ALJR 635: (2010) 270 ALR 1: [2010] HCA 30

include an offence of possession of a controlled drug. However, Parliament, when it inserted Part 9.1 into the Code, departed from the Model Criminal Code and inserted an offence of possession of a controlled drug. Given this disjunct between the MCCOC Report and the provisions inserted by Parliament into the Code, it is drawing a long bow for the Appellant to claim that that the absence of a provision comparable to s5 of the Act is a "deliberate exclusion" by the legislature.

37. The First Respondent also adopts the submissions of the Second Respondent in relation to Ground Three. It might also be said that the distinction between "the second type of direct inconsistency" and "indirect inconsistency" is such a fine one that it gives credence to the Second Respondent's submission that the intent of the Commonwealth Parliament as manifested in s300.4 of the Code is a relevant consideration in determining whether there is in fact direct inconsistency of the second type between the relevant provisions of the Act and the Code.

Ground One – s5 of the Act - Reverse Legal or Evidential Burden of Proof

38. The law in Victoria as to sections 5 and 73(2) of the Act was decided in *R v Clarke and Johnstone*[17] and has been followed in many hundreds, possibly thousands of cases, since that time. The reverse burden established by section 5 of the Act has come before the High Court incidentally on a number of special leave applications and no special leave has ever been granted.[18]

39. The Appellant at trial conceded that the directions of the trial judge accorded with established authority and took no exception thereto.[19]

40. The Court of Appeal correctly declined to depart from established authority.[20]

41. The question therefore arises whether the Charter, assuming for the purposes of argument that it is constitutionally valid, converted a reverse legal burden of proof into a reverse evidential burden of proof.

42. There can be no doubt that the Victorian Parliament made a deliberate decision not to alter the reverse onus of proof established by section 5 of the Act upon the promulgation of the Charter. By the Statute Law Amendment (*Charter of Human Rights and Responsibilities)* Act 2009, the Parliament chose to convert the reverse legal onus of proof into a reverse evidentiary onus of proof in seven statutes; it made no attempt to alter the nature of the reverse onus cast by section 5 of the Act[21].

43. Further, the enactment of the Statute Law Amendment (*Charter of Human Rights and Responsibilities)* Act 2009, demonstrates that the Parliament of Victoria did not proceed on the basis that section 32(1) of the Charter introduced a new and innovative

[17] [1986] VR 643; *R. v. Tragear* (2003) 9 VR 107.
[18] See *Apostolides v. The Queen* No. M38 of 1989 (14 March 1990); *Tran v. The Queen* No. M35 of 2007 (3 August 2007).
[19] *R v Momcilovic (2010) 265 ALJR 751;*(2010) VSCA 50 at [13]
[20] Ibid at [16]
[21] Nor was any attempt made to alter s145 of the Firearms Act 1996 (Vic) which casts a reverse legal onus of proof on an accused to disprove possession of a firearm where the accused occupied premises on which the firearm was found.

method of statutory interpretation analogous to the jurisprudence evolving around the *Human Rights Act* 1998 (U.K.).

44. Save for the reservations raised in the Second Respondent's Notice of Contentions, with which the First Respondent agrees[22], the First Respondent supports the interpretive approach adopted by the Court of Appeal. On this approach, s32 of the Charter does not purport to confer legislative power on the Courts and there is no transgression of the principles enunciated in *Kable v DPP* (1996) 189 CLR 51.

10 45. As regards the making of a Declaration of Inconsistent Interpretation under s36 of the Charter, this does no more than ensure that Parliament's attention is drawn to a conclusion reached by the Court in the exercise of its legitimate function of statutory interpretation and so does not involve the conferral of any legislative power on the Court contrary to the *Kable* principle: as to what legislative action (if any) is taken once a Declaration is made, that remains solely the province of Parliament. The First Respondent adopts the submissions of the Second Respondent in this regard.

Ground Two – Non direction

20 46. Because of the application of ss5 & 73(2) of the Act, the trial judge was right not to direct the jury that the prosecution needed to prove that the Appellant had actual knowledge of the drugs before they could find that she possessed them for sale.

47. There was no dispute that the drugs were on premises occupied by the appellant. Consequently, s5 deemed her to be in possession of the drugs, unless she satisfied the court to the contrary.

48. The methylamphetamine found in the fridge alone weighed 458.8g (mixed), well in excess of the traffickable quantity for methylamphetamine at the time, namely 6g
30 (mixed)[23].

49. S73(2) provides that "possession" of not less than a traffickable quantity of drugs is prima facie evidence of trafficking[24]. "Possession" in s73(2) includes possession as defined by s5.[25] Trafficking includes "possession for sale" pursuant to s70(1).

50. Hence, there was prima facie evidence that the appellant possessed drugs for sale.

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[22] The First Respondent adopts the submissions of the Second Respondent in this regard.

[23] A traffickable quantity of methylamphetamine has since been reduced to 3g – see Part 3 of Schedule 11 of the Act.

[24] In the drugs legislation of other jurisdictions, there is no comparable provision to s73(2). At Commonwealth level (s302.5 of the Commonwealth Criminal Code 2005) and in the A.C.T (s604 of the Criminal Code 2002), NSW (s29 of the Drug Misuse & Trafficking Act 1985), SA (s32(5) of the Controlled Substances Act 1984), Tasmania (s12(2) of the Misuse of Drugs Act 2001) and WA (s11 of the Misuse of Drugs Act 1981) a person in possession of a prescribed quantity of drugs is presumed, unless the contrary is proved, to possess the drugs for supply: see also The Laws of Australia, Thomson Reuters at [10.6.670]

[25] *R v Tragear* (2003) 9 VR 107 at [39] per Callaway JA with whom Batt JA agreed. See also *R v Clarke & Johnstone* [1986] VR 643 at 660. See Explanatory Memorandum for Clause 5 of the Drugs, Poisons and Controlled Substances Bill 1981

51. "Prima facie evidence" of trafficking amounts to more than just some evidence of trafficking. It is evidence which entitles a jury to find that the element of trafficking is proven in the absence of evidence to the contrary[26].

52. *Clarke & Johnstone*[27] supports the above analysis. That too was a case where the accused claimed ignorance of the relevant drug (cannabis). The court at p660 said that the trial judge's direction that the prosecution had to prove that the accused actually knew of the cannabis was "too favourable" to the accused, given the operation of ss5 and 73(2): the court said that proof of actual knowledge of the cannabis was only necessary for liability based on aiding and abetting.

53. The appellant's submission, however, denies that a jury would be entitled to convict of trafficking in circumstances where ss5 & 73(2) apply and there is an absence of "evidence to the contrary." Acceptance of the appellant's submission would rob ss5 and 73(2) of their efficacy in trafficking cases.

54. The appellant relies on obiter dicta by Callaway JA in *R v Tragear*[28] at [43] to [44] to the effect that it is necessary in a trafficking case for the prosecution to prove that an accused actually knew of the drugs, even where ss5 & 73(2) apply. No reference was made by Callaway JA to the observation in *Clarke & Johnstone* that such a direction would be "too favourable" to an accused[29]. In *R v Georgiou*[30] at [51], Robson AJA, with whom Neave and Redlich JJA agreed, adopted Callaway JA's views without reference to the contrary view expressed in *Clarke & Johnstone*. However, Robson AJA held that it was not necessary for the trial judge in *Georgiou* to direct the jury that the prosecution had to prove that the accused had actual knowledge of the drugs because lack of knowledge was not a live issue.

55. The Court of Appeal in the present case at [164] to [168] did not question the correctness of Callaway JA's obiter dicta in *Tragear* but relied on *Georgiou* to justify its conclusion that it was not necessary for the trial judge to direct the jury that the prosecution had to prove actual knowledge by the accused. However, the above analysis provides additional support for the Court of Appeal's conclusion that such a direction was not necessary.

56. As in *Clarke & Johnstone*[31], there was no dispute in this trial that whoever was in possession of the drugs was in possession for sale. It was not merely a case where a traffickable quantity was found and there was an absence of "evidence to the contrary": here, in addition to an amount of drugs far in excess of the traffickable quantity, there were cutting agents, deal bags, two sets of electronic scales and $165,900 in cash in a shoebox.

57. In all these circumstances, it was sufficient for the trial judge to tell the jury that possession of a traffickable quantity did not oblige them to convict the appellant of

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[26] *R v Tran* [2007] VSCA 19 at [49]-[50] per Redlich JA with whom Nettle and Neave JJA agreed
[27] [1986] VR 643
[28] (2003) 9 VR 107
[29] At [42], Callaway JA did refer to pp659-660 of Clarke & Johnstone – see footnote 30 – but in relation to a different point.
[30] [2009] VSCA 57
[31] At p660

trafficking[32], that they had to consider her possession of a traffickable quantity in the light of all the other evidence in the case[33] and that the onus of proof at all times rested on the prosecution to prove possession for sale beyond a reasonable doubt[34].

Dated: January 27th January 2011

GAVIN SILBERT

C. W. Beale

10 **GAVIN J C SILBERT S.C.**
Chief Crown Prosecutor
State of Victoria

Senior Counsel for the Respondent

Tel: 9603 2541
Fax: 9603 7892

CHRISTOPHER W BEALE
Crown Prosecutor
State of Victoria

Junior Counsel for the Respondent

Tel: 9603 7886
Fax: 9603 7892

20

BRETT SONNET

BRETT L SONNET
Crown Prosecutor
State of Victoria

Junior Counsel for the Respondent
Tel: 9603 7566
30 **Fax: 9603 7892**

[32] See Charge at T204.2 & T204.20
[33] See Charge at T204.8-9 & T204.26-27
[34] See Charge at T202.31 to T203.7, T204.5-8, T205.5-21