DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Smith* [2017] QDC 101
PARTIES:	**THE QUEEN** **V** **PAUL SMITH** **Defendant**
FILE NO:	101/17
DIVISION:	Criminal
PROCEEDING:	Appeal
DELIVERED ON:	1 February 2017
DELIVERED AT:	Brisbane JUDGE: Conner DCJ
ORDER:	Appeal dismissed
CATCHWORDS:	DRUGS – POSSESSION - possession of cannabis located in a motor vehicle parked in a garage in the defendant's home – motor vehicle not owned by the defendant – possession of a thing used for consumption of a dangerous drug being a water pipe – defendant found guilty of possession of cannabis located inside water pipe - whether defendant also guilty of possession of the water pipe *Drugs Misuse Act* 1986 s 9, s 10(2), s 129(1)(c) *Tabe v The Queen* [2005] HCA 59 – applied *R v Shipley* [2014] QSC 299 (1 December 2014) - considered

Judgment of His Honour, Conner DCJ:

Introduction

[1] The defendant was tried in the Magistrates Court on counts of possession of a dangerous drug, namely cannabis sativa and possession of a thing, namely a water pipe used in connection with smoking a dangerous drug under Part 2 of the *Drugs Misuse Act* 1986. Following a summary trial he was on 18 July 2016 convicted of both offences. Convictions were recorded and one fine of $800, in default seven day's imprisonment, was imposed, with twelve months allowed to pay.

[2] In a notice of appeal filed 4 August 2016 the appellant appealed against his conviction on both counts.

The prosecution case

[3] Two police officers were called in the prosecution case. They said that on the day in question they went to the defendant's home to execute a search warrant. Sergeant Alan Clark said that he entered the house and showed the defendant a copy of the search warrant. Both police officers said that they thought that they detected the smell of recent cannabis smoking on the defendant and his flatmate, Roger Victor, who had come out of his bedroom into the lounge room where the defendant was located. He said that both of them had red and bloodshot eyes. However, it must be noted that there is no other evidence apart from the observations of the police officers that either the defendant or his flatmate had been smoking cannabis and they both directly denied the allegation in evidence.

[4] The other officer, Constable Mark Turner, said that he began searching a motor vehicle located in a downstairs garage. He located a water pipe used for smoking cannabis inside the motor vehicle, in the foot well of the front passenger seat and located in a plastic bucket and covered loosely with a t-shirt. A metal cone that formed part of the water pipe was full of cannabis. Constable Turner said he saw that the water pipe contained smoke and that it was hot, leading him to the conclusion that it had been used very recently, although again there is no other evidence to confirm this. There was also a small bag containing a small amount of cannabis in the bucket. The police officer took the defendant down to show him what he had found. The defendant told the officer that the car belonged to a friend who had parked it there three days earlier and that he had no idea that the vehicle contained any drugs or pipes.

The defence case

[5] The defendant gave evidence and called evidence. He said that the items found in the vehicle be not his. He said that he was aware that some of his flatmates might occasionally smoke marijuana, mainly from suspicious smells he had noticed occasionally, but that he did not smoke at all and told them not to have illegal drugs in the house. He said that he had leased the house for eight years and always had two or three others who lived there and paid him rent. He said that the motor vehicle was owned by his friend, Patrick Dempsey, who had asked him if he could leave the car in his garage while he was away overseas for one week. Under cross-examination, the defendant admitted that he was aware that Mr. Dempsey had a conviction for possession of cannabis, but that he believed Mr. Dempsey when he had told him he had "given that up". He said that Mr. Dempsey had left the keys on a key hook in the kitchen after he parked the car in the garage. He said that Mr. Dempsey had locked the vehicle when he had placed it in the garage and that he, the defendant, had not had any reason to open the vehicle since it had been parked. He said that he left the keys on the key hook in the kitchen and that the keys had stayed there, to the best of his knowledge, for the duration of the vehicles presence in the garage. He also said that he and Mr. Victor were passengers in the car driven by Mr. Dempsey on the way from Mr. Dempsey's house to the defendant's house on the day that Mr. Dempsey had parked the car in the garage. Mr. Dempsey had said on the journey that he wanted the car started each day that he was away to prevent the battery from going flat. The defendant said that he had replied, "I can't drive, I don't even have a licence, so you will have to do that Roger." He said that he was aware that Mr. Victor had taken the keys a couple of times to start the car and to run it for a few minutes. When the prosecutor put it to him, he denied that he and his flatmate had been smoking cannabis using the pipe in the vehicle immediately before the police arrived.

[6] Two witnesses were called by the defendant. The first was the owner of the vehicle, Patrick Dempsey. He agreed with the evidence given by the defendant that he had left the car with the defendant for a one-week period and had left the instructions about starting the vehicle to

maintain the battery charge. He also denied any knowledge of the drugs or the pipe found in the vehicle and said that they were not his. He said he had no idea how they got there. He confirmed that he had locked the vehicle when he parked it and had placed the keys on a key hook in the kitchen. The second witness was Roger Victor, the flatmate of the defendant. He said that he had started the vehicle on two occasions using the keys left on the key hook. He also said he had no idea who owned the drugs and pipe found in the vehicle and that they were not his. He said that he did not notice the plastic bucket in the vehicle when he had started it because he had only sat in the driver's seat. Under cross-examination, he denied ever smoking cannabis, including immediately before the police arrived.

The police officers were questioned in cross-examination on their experience in drug matters and in particular in respect of their claimed ability to detect the smell of cannabis smoke. Sergeant Alan Clark said that he had been a police officer for 15 years and had been involved in at least 40 searches of houses suspected of containing drugs. He claimed that he had arrested at least three people while they were in the action of smoking cannabis cigarettes, although no other direct evidence was provided to confirm this claim. Constable Mark Turner said that he had been a police officer for only 3 months and this was the first time that he had executed a search warrant. He said that he knew what cannabis smelled like from attending music concerts before he was a police officer where he claimed he witnessed in close proximity others smoking cannabis cigarettes on several occasions.

Possession under the Drugs Misuse Act

[7] For ordinary purposes, in order to prove that a person was in possession of something, possession of which is an offence, it is necessary to show a mental element, in the form of knowledge of possession of the thing. There was no direct evidence in the present case of knowledge of the items found in the search, and the appellant denied any knowledge of them. However, the prosecution relied on s 129(1)(c) of the *Drugs Misuse Act* 1986, which provides:

> "Proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of, is conclusive evidence that the drug was then in the person's possession, unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place."

[8] The effect of this provision, where it applies, is that it is unnecessary for the prosecution to prove knowledge on the part of the person in question, since the person is taken to have had the drug in his possession unless he shows both the matters referred to in the paragraph. It is important to note that the provision only applies to 'a dangerous drug' and not to a thing used for consumption of a dangerous drug. In this case, the defendant has been charged with both possession of a dangerous drug and also possession of the water pipe. S 129(1)(c) only applies to reverse the onus of proof in respect of the charge of possession of the cannabis. In respect of the water pipe, actual possession must be proved.

[9] There is no doubt that the defendant was the occupier of the premises. He has rented the house via a residential lease agreement and lived in the house for eight years. The defendant confirmed in his own evidence that he manages the property in that he controls who lives in the home. In the present case the police evidence proved the drug was in a place, namely the vehicle parked in the garage of the house, of which the appellant was the occupier, so it was to

be taken to be in his possession unless he showed that he then neither knew nor had reason to suspect that the drug was in that place.

[10] The ordinary operation of this provision was confirmed by the High Court in *Tabe v The Queen* (2005) 79 ALJR 1890. That case was principally concerned with the application of what was then s 57(d) of the 1986 Act, which is now s 129(1)(d) of the Act (after a renumbering some years ago). The provision was examined in the context of a charge of attempting to possess a dangerous drug, but in the course of analysis of the operation of the legislation all members of the court made some reference to s 57(c), now s 129(1)(c) of the Act. S 129(1)(c) is the relevant provision in the case against the defendant in respect of the cannabis possession charge. Gleeson CJ said at [22]:

> "If an accused person is the occupier of a place (as defined), and a dangerous drug is found on the place, then that is conclusive evidence that the drug was in the person's possession, unless the person shows absence of knowledge or reason to suspect the presence of the drug."

[11] Callinan and Heydon JJ, in a joint judgment, noted at [145] that it reversed the onus of proof, and said at [146] that the effect of the first part of the paragraph was to make a person in possession of the drug as a result of being concerned in the management or control of a place where the drug is located, subject to the person concerned being able to show that he or she neither knew nor had reason to suspect that the drug was in that place.

[12] One issue which was not dealt with in *Tabe*, however, is the question of whether the provision applies in circumstances where the drugs would be seen to be, on ordinary principles, in the possession of someone else at the relevant time. This issue was considered in two decisions of the Court of Appeal in 1995. In *Lawler v Prideaux* [1995] 1 Qd. R. 186 the appellant was charged with possession of a dangerous drug in circumstances where the drug was at the relevant time held in the hand of someone else who was inside the premises occupied, managed or controlled by the appellant. As it happened the appellant knew that the drug was there. The principal judgment was delivered by Cullinane J, who held that for the application of the provision, the relevant place was not the premises but the person of the individual holding the drug. In these circumstances, if there was a place within another place, then the person in possession of the place was the person in control of the first place, not the person in control of the second place, where they differed. This was said to be consistent with the legislative intention because the purpose of the provision was to effect "a statutory possession of drugs in an occupier of or a person concerned in the control and management of premises. It should not, in my view, be construed as doing so where some other person is in actual possession of such drugs."

[13] Macrossan CJ agreed, adding at p 187 the comment that "it should be accepted as sufficiently clear that the intended operation of s 57(c) of the *Drugs Misuse Act* is confined to cases where there is no immediate relationship of physical possession demonstrated by a person in proximity to the item, that is where there is no immediate obvious possessor, and the legislature has thought it necessary or desirable to attribute possession to someone."

[14] The second decision was *Symes v Lawler* [1995] 1 Qd. R. 226, where the facts were similar; the appellant was an occupier of premises, in which there was another person who had quantities of dangerous drugs in a pouch which he threw from a window while police were

attempting to force entry. Fitzgerald P and Cullinane J in a joint judgment said at p 228 that it was a misreading and misapplication of the provision to treat it as creating a presumption of possession against an accused by demonstrating that, although the immediate place which the drug is in or on is not occupied, managed or controlled by the accused, that place is itself in or on a larger place which the accused did occupy, manager or control. In that case the relevant place was the person of the individual who threw the pouch out the window. Similarly, in *Jenvey v Cook* (1997) 94 A Crim R 392 [1997] QCA 207, the drug was in that part of a bedroom used particularly by another person who was also an occupier of the premises and physically present, and it was held that that other person was in actual physical possession so that the provision did not apply.

[15] It seems to me that one effect of those decisions is that a place which is occupied by or within the management or control of a person does not include another place within that first place which is not occupied by or in the management or control of that person. Commonly that will extend to a situation where an individual has in his immediate physical possession something within premises occupied by another, but the definition of "place" is wider than that. By s 4, the term "place" includes a vehicle. In the present case, it was argued on behalf of the defendant that the vehicle was a place that was not under the occupation of the defendant nor was it under his management or control, being there only for a one week period and still, it was argued, under the management and control of the owner of the vehicle, or alternatively, under the control and occupation of Mr. Victor, who had gotten in the vehicle to start it on two occasions. The defendant's case was that the owner was still effectively in control of the vehicle as he could at any time order the removal of the vehicle and control its whereabouts. It was argued that the defendant had not exercised or displayed any intention to occupy, manage or control the vehicle.

[16] I think it is clear that in most circumstances if a vehicle in the occupation of A is parked in an internal garage in premises in the occupation of B, the interior of the vehicle is not regarded as a place in the occupation of B, and if a drug was found in the interior of the vehicle then s 129(1)(c) would apply in relation to A, not in relation to B. In the same way, if a person C, other than the person A in occupation, management or control of the vehicle, is within the vehicle, then anything which is within the occupation, management or control of C is in a place, for the purposes of this provision, in relation to C and not in relation to A. However, in the present case that is not the situation. The defendant is clearly in control of the vehicle, he controls the premises where it is located and he controls whether or not the vehicle can be parked in the garage. In the absence of the owner, the defendant is the occupier. There is no occupation or control by any other person to displace the defendant's control.

[17] I have had the opportunity of reading the recent decision of the Supreme Court in *R v Shipley* [2014] QSC 299 delivered on 10 December 2014. That case involved a discussion of the application of s 129(1)(c) in respect of passengers in a motor vehicle where concealed drugs were found. I distinguish the findings in that case on the basis of that the facts are different here, in that the vehicle is located on premises controlled by the defendant.

[18] I should add that it did not matter for the purposes of the application of s 129(1)(c) who the true owner of the drugs was. One person can easily be in possession of property owned by another, and it is no defence to a charge of being in possession of dangerous drugs that the drugs are actually the property of someone else. If drugs the property of someone else are found in circumstances which activate s 129(1)(c), the occupier of the premises is taken to be in

possession of them so as to have committed the relevant offence unless the occupier discharges the onus placed upon him by the concluding words of that provision.

[19] It follows in my opinion that s 129(1)(c) did properly apply in the present case, so that the defendant was liable to be convicted of the offence of possession of the cannabis subject to his failure of establishing on the balance of probabilities the defence in the section that he had an absence of knowledge or reason to suspect the presence of the drug. If this seems an unjust consequence to the appellant in the circumstances of this case, the explanation is that given in the joint judgment in Callinan and Heydon JJ in *Tabe (supra)* at [150]:

> "The consequences for accused persons are heavy ones, but as Wilson J pointed out, they flow from a legislative response to what is seen as a very serious crime, hard to prevent and difficult to prosecute."

[20] The substantial issue at the trial in the court below was whether the defendant had succeeded in discharging the onus of proving, on the balance of probabilities, that he either did not know or have reason to believe that the vehicle contained the drugs. Essentially he was unsuccessful in doing so, and I see no reason to change that finding. The motor vehicle was parked in premises occupied and managed (and in some respects also controlled) by the defendant. In the absence of some occupation, management or control of the motor vehicle by some other person, the defendant cannot escape a finding of guilt unless he can satisfy the relevant excuses of either a lack of knowledge or a lack of suspicion. The police evidence was that they suspected that the defendant and his flatmate had recently consumed cannabis and that the water pipe found in the vehicle had been used. The defendant admitted in his own evidence that he was aware that cannabis was sometimes smoked in the house and that the owner of the vehicle had been convicted of drug possession. I am not satisfied that he would not have held at least a suspicion that the drugs may be in the vehicle.

[21] In respect of the charge of possession of the water pipe, although there was no direct evidence that the defendant was in possession of the pipe, he was found guilty of possession of the cannabis, including the cannabis found already loaded into the metal cone. It seems completely illogical to me to find a person guilty of possession of a substance found in a container, in this case the metal cone which was part of the water pipe, but then to say that the person is not also guilty of possession of the container. For that reason I find no reason to overturn the finding of guilt for either possession of the drug or possession of the water pipe.

Conclusion

[22] It follows that in relation to the conviction of possession of the dangerous drug, and possession of the water pipe, the matters argued on behalf of the defendant have not been made out, and the appeal is dismissed.

Scroll down for the grounds of appeal….

The grounds of the appeal are as follows:

1. The prosecution case relied upon the application of s 129(1)(c) of the *Drugs Misuse Act 1986*. On the evidence received by the court, it was not open to conclude that the place where the drugs were found, being the motor vehicle, was occupied by or under the management or control of the defendant and therefore s 129(1)(c) of the *Drugs Misuse Act 1986* did not apply. In the absence of the application of s 129(1)(c) of the *Drugs Misuse Act 1986* the defendant cannot be found guilty of the offences based upon the evidence received by the court. Alternatively, the court should have been satisfied that the defendant neither knew nor had reason to suspect that the drug was in or on the relevant place, wherever that place was held to be.

2. The judge erred in finding the defendant guilty of possession of the water pipe on the basis that some of the cannabis was contained in the water pipe. There was no evidence to conclude that the water pipe was in the possession of the defendant.

Order sought: The Appeal should be allowed, convictions quashed, and verdict of acquittal entered on both counts.