SUPREME COURT OF QUEENSLAND

CITATION:	*R v P* [2016] QSC 50
PARTIES:	**THE QUEEN** (respondent) **v** **P** (applicant)
FILE NO:	Indictment 596 of 2015
DIVISION:	Trial Division
PROCEEDING:	Section 590AA application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	14 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	16 December 2015 and 26 February 2016
JUDGE:	Applegarth J
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – PRIMA FACIE CASE TO ANSWER – NO CASE TO ANSWER APPLICATION – where applicant charged with possession of dangerous drugs – where police search of unoccupied vehicle found substantial quantity of drugs – where applicant had previously occupied vehicle – where applicant detained in close proximity to vehicle – where applicant's behaviour and other evidence supported the inference that he knew of drugs in vehicle – where application required a view of the evidence and inferences most favourable to the prosecution – whether the evidence and inferences, so viewed, capable of supporting a conviction – whether there is a case to answer *Drugs Misuse Act* 1986 (Qld), s 129(1)(c) *Case Stated by DPP (No 2 of 1993)* (1993) 70 A Crim R 323, discussed *Doney v The Queen* (1990) 171 CLR 207, cited *R v P & Anor* [2016] QSC 49, cited *R v Sutton* [1986] 2 Qd R 72, cited
COUNSEL:	A Boe for the applicant R A Swanwick for the respondent Crown

SOLICITORS: Boe Williams Anderson for the applicant
Director of Public Prosecutions (Qld) for the respondent

[1] P and N are jointly charged that on 11 July 2014 they had unlawful possession of:

(a) cocaine in excess of 2.0 grams (Count 2);

(b) methylamphetamine in excess of 2.0 grams (Count 3); and

(c) heroin in excess of 2.0 grams (Count 4).

Large quantities of each drug were found by police in a van parked in the front yard of P's residence. He was standing in the front yard when police arrived. His nervous glances at the van aroused police suspicions about drugs being in the van.

[2] P separately applies for a stay of Counts 2, 3 and 4 of the indictment, insofar as they relate to him, on the ground that there is no case for him to answer. The application is made, regardless of the outcome of the evidentiary applications made by him and N. That application is the subject of a separate ruling by me.[1]

[3] The basis of the no case submission is that the available evidence is not sufficient to sustain a conviction against the applicant on Counts 2, 3 and 4 because it cannot prove an essential element of the offence. He submits that the evidence is insufficient to establish his actual or constructive possession of the drugs that were in the van. The prosecution case is a circumstantial one, and therefore to be convicted his guilt must be the only reasonable inference that can be drawn in the circumstances.

[4] The respondent submits that on an application of the present kind, the Crown case must be taken at its highest for the purpose of analysis of the evidence. On this basis, the respondent submits that there is ample evidence to convict the applicant on the charges.

Background

[5] It is unnecessary to repeat the background facts which are contained in my judgment dealing with the application to exclude the evidence obtained as a result of the search of the van. They should be taken as incorporated into these reasons. It is necessary to refer to some additional facts.

[6] Criminal intelligence associated the applicant with a substantial trade in drugs and linked him to the property at 28 Firth Street, Richlands, which was suspected of being used as a "safe house" to store and pack drugs. This information indicated that certain criminals were planning to conduct a robbery or home invasion of 28 Firth Street.

[7] Ample evidence indicates that 28 Firth Street was used as a place at which drugs were packaged and cash was counted. When police searched those premises after 2.30 pm on

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1 *R v P & Anor* [2016] QSC 49.

11 July 2014 they found some quantities of drugs, some money, a money counting machine, a cryovac machine, heat sealed plastic and, importantly for present purposes, some bags which contained drugs and what appeared to be peppercorns. The Crown case is that peppercorn is a very unusual item in the drug world. Extract from a peppercorn, piperine, was found in some of the drugs found in the van at 62 Jordan Street, Richlands. The Crown also alleges that some of the plastic bags found in the van were sealed by the heat sealer at Firth Street. In short, there is a link between the drugs found at P's address at 28 Firth Street and the drugs found in the van.

[8] The applicant's driver's licence, which was found during the police search at 28 Firth Street, recorded his address as 62 Jordan Street, Richlands.

[9] A reasonable inference is that the van was used to transport drugs that had been at 28 Firth Street and which had been the intended subject of a home invasion and robbery at that address. The applicant used the van that afternoon. It was driven to a Caltex service station at Richlands at 2.06 pm on 11 July 2014. For the purpose of this application, the applicant acknowledges that it is open to infer that he is the male person depicted on CCTV footage at the Caltex station that afternoon and that the van depicted in this footage is the Hi-Ace van that was located at 62 Jordan Street later that afternoon. The CCTV footage shows a man buying food. After the applicant was arrested and searched on the evening of 11 July 2014, police located in his pocket a receipt from the service station for the purchase of two bottles of still water, two bottles of Lipton iced tea and various packets of chips.

[10] A lawful search of the van found packets of chips of this description. The search also found on the front seat a Lipton iced tea bottle, with DNA evidence connecting N to that bottle. Police also found in the rear of the van the other bottles, and DNA evidence connects P to one of the Mount Franklin water bottles.

[11] The inference to be drawn from this evidence is that N and P were each in the van after 2.06 pm before the van travelled to 62 Jordan Street where it was parked, some time after 3.45 pm.

[12] Two police officers had observed 62 Jordan Street until around 3.45 pm that day. During their observations they saw an Audi and a Honda car parked there. They did not see the Hi-Ace van or either of the defendants. When officers Campbell and Webster attended the same premises, probably at around 5 pm, the van was parked in the front yard, and P and N were also in the front yard. This evidence provides additional support for the inference that P and N travelled to Jordan Street in the van and parked it there, sometime after the officers left at 3.45 pm.

[13] When Officers Campbell and Webster approached P and N, N was in possession of the key to the van, suggesting that he had driven the van. He admitted owning it.

[14] The applicant submits that particular regard should be had to the time difference between his possession of the van at 2.06 pm and the time when police first interacted with him and N at Jordan Street. His possession of the van earlier in the afternoon is submitted to not engage the evidentiary presumption in s 129(1)(c) of the *Drugs Misuse Act* 1986

(Qld)[2] at a later time. He submits that he was neither the occupier of the van nor was he "concerned in the management or control" of the van at the time that the drugs were located in it. Emphasis is also placed upon the fact that his connection with the foodstuffs and drinks that were found in the van does not establish any connection with drugs that were concealed in the van. Reliance is also placed upon the fact that the drugs were not located in a position which would have been obvious to a person driving the vehicle.

[15] According to the applicant, the matters pointed to by the respondent are insufficient, either taken separately or together, to show his possession or custody, or even awareness, of the drugs which were found in the van sometime after 5 pm.[3] Each of the matters pointed to by the respondent as indicative of guilt are said to be capable of a competing inference consistent with innocence on the counts which are charged. For example, various possibilities exist about the circumstances under which the applicant arrived at Jordan Street. One hypothesis is that he travelled there in his Audi vehicle and was inside the house when police observed it.

[16] As detailed in my reasons on the separate application to exclude evidence, the applicant and N were approached by Officers Webster and Campbell. They were both very nervous and evasive in answering questions. The applicant was reluctant to tell Webster his name and kept glancing in the direction of the van. He started walking backwards. The prosecution relies upon his and N's suspicious and evasive behaviour.

[17] The applicant's submissions advance the theory or hypothesis that he may have been nervous because he was aware of the police search of Firth Street and knew of the drugs that were there, or that he may have been nervous because he was aware that drugs were in the van. The fact that he knew drugs were in the van does not mean that he was in possession of them. They may have been in N's possession.

[18] The applicant's submissions address the peppercorn evidence on the basis that this evidence simply connects drug activity at Firth Street with the drugs located in the van and is insufficient to make him responsible for the drugs located in the van. One possibility is that while the drugs had a common origin, the drugs in the van were never in his possession or had passed out of his possession following their sale to N or to someone else.

[19] The respondent cites *R v Sutton*[4] as authority for the proposition that in an application of this kind the prosecution case must be taken at its highest for the purpose of analysis of the evidence. The same case is relied upon for a number of propositions which are not in contest about the principles which apply to a submission of no case to answer.

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[2] Section 129(1)(c) provides that "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.

[3] Some of the evidence referred to the search occurring at 4 pm, but the evidence tends to suggest that Officers Webster and Campbell went to Jordan Street at around 5 pm.

[4] [1986] 2 Qd R 72.

[20] Authorities which post-date *Sutton* including *Doney v The Queen*,[5] merit reference, particularly authorities about the test that applies to a no case to answer submission in the context of circumstantial evidence. The judgment of the Court of Criminal Appeal of South Australia in *Case Stated by DPP (No 2 of 1993)*,[6] which was not cited to me, illuminates that topic.

[21] The relevant principles were stated by King CJ, who considered earlier authority including the High Court's decision in *Doney*. The relevant principle is that all of the evidence of primary fact is considered at its strongest from the point of view of the case of the prosecution. The further assumption is made that all inferences most favourable to the prosecution which are reasonably open, are drawn. The ultimate question is whether the evidence and those inferences are *capable* of producing in the mind of a reasonable person satisfaction, beyond reasonable doubt, of the guilt of the accused.

[22] As King CJ observed,[7] the judge considering a submission of no case does not choose between inferences that are reasonably open to the jury. He or she must decide "upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to a prosecution."[8] King CJ restated the principles in summary form as follows:

> "If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."[9]

[23] The facts of that case were quite different to the facts of this case. The judge failed to apply the correct test. He should have assumed that the jury would draw inferences as to intermediate facts most favourable to the prosecution. In that case the evidence, even without reference to the fingerprint evidence, was capable of leading a reasonable jury to conclude that the accused individuals were acting jointly to control the drugs that were in their joint possession and to exclude any hypothesis consistent with innocence.

[24] According to these principles, it is not my function to choose between inferences that are reasonably open to the jury on an application of this kind. I must take a view of the evidence and the inferences which are open which is most favourable to the prosecution. The question for me is whether that evidence and those inferences, if accepted, are capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt

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5 (1990) 171 CLR 207.
6 (1993) 70 A Crim R 323.
7 Ibid at 326.
8 Ibid.
9 Ibid at 327.

and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable. If so, there is a case to answer.

[25] N's possession of the key suggests that he took over the driving of the van at some stage. The fact that the applicant was driving the van at 2.06 pm does not mean that he remained the driver, and did not become a passenger when N took over the driving. An inference favourable to the prosecution is that the applicant became the passenger and was well aware of the drugs that were in the passenger side's footwell. However, even if the applicant remained the driver, he may have known that drugs were in that location. When he was interviewed by police, his conduct suggested he knew that there were drugs in the van. One inference is that he knew the drugs were there and that they were in the sole possession of N. However, that inference is capable of being displaced by an inference, favourable to the prosecution, that the drugs were under his control, and therefore in his possession. The evidence is capable of supporting the reasonable inference that the drugs were in the joint custody or control of the applicant and N.

[26] Absent any evidence that the applicant was at 62 Jordan Street prior to the arrival of the van, an available inference, supported by his earlier presence and control of the van, is that he and N arrived there together in the van. The fact that N admitted owning the van is of no real consequence. Ownership of the van is one thing. Occupation and control of it is another. Possession of its contents is another still. It is sufficient that the applicant had control over the drugs in the van, either alone or jointly with others.

[27] In a case of this kind one is not concerned simply with possible innocent hypotheses in respect of intermediate facts. Separate pieces of evidence and intermediate facts must be considered and analysed. However, the facts must be considered together. Ultimately, a jury will need to be persuaded that the applicant's guilt is the only rational inference in the circumstances. It will be instructed about the prosecution's task of excluding hypotheses that are consistent with innocence. The fact that, at trial, the prosecution may be unable to persuade the jury to exclude an innocent inference in respect of one intermediate fact does not deprive the prosecution of a case.

[28] Presently, I am not concerned with such an exercise. Instead, I am required to deal with the application on the basis that the jury will consider all of the evidence at its strongest from the point of view of the case for the prosecution and draw all inferences most favourable to the prosecution which are reasonably open. On that basis, I consider that the evidence, so viewed, is capable of proving the element of possession beyond reasonable doubt. On the view of the evidence most favourable to the prosecution, the applicant knew there were drugs in the van, was in control (or at least joint control) of the van and its contents and was, at least, in joint possession of the drugs with N. If a view of the evidence most favourable to the Crown is adopted, then it is *capable* of excluding the hypothesis that he was not in possession of the drugs as unreasonable. There is a case to answer. The application to stay Counts 2, 3 and 4 against the applicant on the basis that there is no case to answer is dismissed.