IN THE COURT OF APPEAL [1993] QCA 223

SUPREME COURT OF QUEENSLAND

C.A. No. 106 of 1993

Brisbane

[Donnelly v. Rose]

ROBERT JOSEPH DONNELLY

v.

DANIEL PATRICK ROSE

(Appellant)

---

Fitzgerald P
Pincus J.A.
Davies J.A.

---

**Judgment delivered 16 June 1993**

Judgment of the Court

---

**APPEAL ALLOWED. PROBATION ORDER SET ASIDE**

---

**CATCHWORDS:** **CRIMINAL LAW - unlawful possession of a dangerous drug - 0.026 grams of heroin detected - analyst's report said insufficient sample to determine quantity of heroin - whether visibility to naked eye enough for conviction.**

Counsel: P. Callaghan for the Crown

J.F. Claire for the Appellant

Solicitors: Director of Prosecutions for the Crown.

Legal Aid Office for the Appellant.

Hearing Date: 3 June 1993

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

C.A. No. 106 of 1993

Brisbane

Before Fitzgerald P
Davies J.A.
Pincus J.A.

[Donnelly v. Rose]

ROBERT JOSEPH DONNELLY

v.

DANIEL PATRICK ROSE

(Appellant)

**JUDGMENT OF THE COURT**

**Judgment delivered 16 June 1993**

The appellant was charged with unlawfully having possession of a dangerous drug, namely heroin. There was found in his possession what was described by a police witness as a piece of aluminium foil which was in a plastic bag. It had a white powder in it which was sent to an analyst. The white powder proved to weigh 26 milligrams - i.e. 26 thousandths of a gram. The analyst's report said that there was heroin in the substance but that there was "insufficient sample...available for the quantity of heroin in the substance to be determined.". No-one said how much heroin would have had to be present to enable its quantity to be determined.

The appeal was based on a decision of the High Court in Williams (1978) 140 C.L.R. 591, which has been applied to charges of possession of morphine by the Court of Criminal Appeal in Warneminde (C.A. No. 89 of 1981) and by this Court to a charge under s. 9 of the Drugs Misuse Act 1986 in Bourke v. Reid (C.A. No. 356 of 1992).

There is room for argument as to what proposition Williams is authority for. One reading of it is that the prosecution need show only, in such a case as the present, that the amount of pure heroin in the mixture would, if extracted, be visible to the naked eye. Human vision, at least if undimmed by disease or age, can detect easily enough a very minute speck, e.g. of dust, on an appropriate surface. For the reasons given in Williams, it is not easy to accept that Parliament could have intended possession of such a speck to be an offence. But if visibility to the naked eye is the sole test, then the report the analyst made here was off the point; on that view, what he should have been asked to do was to give his opinion as to whether the proportion of heroin contained in the 26 milligram mixture was such that, if the heroin were extracted, it would or would not be visible to the naked eye. Presumably that could be done without precisely measuring the amount of heroin.

Another view of Williams is that the reference to visibility with the naked eye was not intended to be a

comprehensive statement of the relevant test, that passing the visibility test does not necessarily secure success for the prosecution. That is the view of the matter which we favour. It is our opinion that Williams should be read as requiring application of a "common sense and reality" test. If it appears that the amount of heroin found would, if extracted, not be visible to the naked eye, then no offence has been committed. But it does not follow that proof that a minute speck would then be visible results in a conviction. It is our opinion that for a prosecution of this kind to succeed it must be proved that there was "possession of such a quantity as makes it reasonable to say as a matter of common sense and reality that it is the prohibited plant or drug of which the person is presently in possession": (Williams at 600)

It is not absolutely clear to us what sort of evidence would, in a marginal case, prove that. Here, the prosecution proved no more than that the quantity of heroin was so small that the analyst could not determine the quantity of it. That evidence is plainly not enough, whatever the test, and the appeal must be allowed. There was no conviction recorded but a probation order was made and that should be set aside.