IN THE COURT OF APPEAL [1994] QCA 259

SUPREME COURT OF QUEENSLAND

C.A. No. 33 of 1994.

Brisbane

[R v. Nardozzi]

THE QUEEN

v.

ROBERT SERGIO NARDOZZI

(Applicant)

The Chief Justice
Pincus J.A.
McPherson J.A.

Separate reasons for judgment of each member of the Court. The Chief Justice and McPherson J.A. concurring as to the order to be made, Pincus J.A. dissenting.

Judgment delivered 13/07/1994.

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE DISMISSED.

CATCHWORDS:EVIDENCE - onus of proof - applicant convicted of possession of heroin in excess of the quantity specified in Third Schedule of *Drugs Misuse Act* 1986, and possession of cannabis sativa - trial judge found that possession was for a commercial purpose - trial judge found there was a prima facie case of existence of a commercial element, based on the quantities of the drugs involved - implication applicant had onus to rebut prima facie case - whether prosecution had onus of proving, beyond reasonable doubt, the existence of a commercial element in the possession of the drugs.

Drugs Misuse Act 1986 s. 9(b), (c).
Anderson (1993) 67 A.Crim.R. 582.
J(Jnr) (1989) 41 A.Crim.R. 466.

Counsel:Mr W Cuthbert for the applicant.
Mr T Winn for the respondent.

Solicitors:Michael Robinson for the applicant.
Director of Prosecutions for the respondent.

Date of Hearing:21/04/1994.

REASONS FOR JUDGMENT - THE CHIEF JUSTICE

Judgment delivered 13/07/1994

Pincus J.A. has prepared reasons which make reference to the facts and the relevant statutory provisions in this matter. This summary will reduce the extent of the references which would otherwise be necessary in these reasons.

In contradistinction to the South Australian legislation which was considered in Anderson v. The Queen (1993) 67 A.L.J.R. 911, the relevant Queensland provision with which we are particularly concerned, s.9 of the Drugs Misuse Act 1986 dealing with unlawful possession, contains no reference to "commercial purpose". Nevertheless, the sentencing judge in this case concerned himself with that concept and he clearly regarded the possibility of its being present as a critical factor in deciding on the appropriate sentence to be imposed. When his approach is closely examined it should be concluded that he was not in error.

Anderson (supra) required the court to resolve an issue involving onus of proof where a degree of tension existed between two possibly applicable legislative provisions. One of them, s.32(6) of the Controlled Substances Act 1984 (S.A.) provided that the maximum prescribed penalty was to be reduced in a case where the court was "satisfied" that the offender had "produced the cannabis solely for his own smoking or consumption" and the other provision, s.45(a) of the same Act provided for a penalty called an "expiation fee" to be payable when the offence arose out of cannabis cultivation that did not involve "cultivation ... for commercial purposes".

In Anderson in the High Court, the majority decided that the way in which the court below had balanced the operation of the two provisions referred to and determined their effect on the onus issue which was relevant in that case, resulted in the adoption of an erroneous approach. No similar problem arises here so that in these respects Anderson does not have any direct application to the Queensland legislation and the facts of this case.

The major sentence imposed on the applicant was for the heroin possession, it being a term of five years imprisonment with a recommendation for consideration for parole after eighteen months. In the discussion which follows the principal references can conveniently be made to the heroin offence although similar considerations apply to the cannabis offence.

The prescribed maximum term in the case of the heroin offence, with the circumstance of aggravation which was present (possession of a quantity in excess of that specified in the Third

Schedule, viz. two grams), was twenty five years imprisonment unless the applicant satisfied the judge that at the time of offending he was a drug dependent person in which case the maximum was reduced to twenty years.

The judge, in sentencing, pronounced himself satisfied by the applicant that he was a drug dependent person so no further problem arises in respect of that matter. Also, no debate was raised on the Crown contentions that the block of heroin which was discovered in the applicant's possession was 67.4 per cent pure and the calculated weight of heroin within the block was over six grams.

The submissions of the applicant on appeal were that the judge misapplied the relevant onus when he concluded that there was a "commercial element" in the appellant's possession of both of the drugs and, also, that he was in error in the standard of proof which he applied in so concluding. The contention was that the correct standard to apply in determining the relevant facts following the guilty plea was proof beyond reasonable doubt.

Some confusion was introduced into the proceedings below because of the applicant's counsel's reference to the possibility by his submissions and through evidence of overcoming any inference of commercial involvement, but this statement was made by him only after the judge had already observed, in the course of the prosecutor's submissions, that the quantity of the drugs and the form they were in left the inference open that there was a commercial element present. The judge was informed of the explanations which had been offered by the applicant to the police and he had the advantage of seeing the applicant and hearing evidence from him when he was called below. The Crown made its position clear, namely, that a custodial sentence was called for if it was a commercial enterprise that the applicant was involved in, and also that a custodial sentence was otherwise warranted because of the quantity of drug possessed even if it was for the applicant's personal use. It may be observed that there is an additional element of potential public mischief involved in the possession of large quantities of dangerous drugs and it might be thought that the Act recognises this by providing for more severe maximum penalties in such cases.

When the record of proceedings below is considered the judge's process of reasoning is made sufficiently explicit, and, in my opinion, it should be concluded that, reserving the necessity to say something about standard of proof, no error has occurred.

From the remarks the judge made when passing sentence, it appears that he considered that the quantities of the drug which were involved were themselves sufficient to indicate a prima facie case of the presence of a commercial element. He then expressed himself as giving attention to other matters including the applicant's explanations which might be thought to provide some contrary indication and, having informed the applicant that "the difficulty in your case is in deciding whether or not there was indeed a commercial element in the possession", he added, "Having listened carefully to you I have come to the conclusion that the Crown has satisfied me that there was a commercial element in your possession."

Taking into account the quantities and the form in which the drugs were packaged, the judge announced that he did not believe the applicant's excuses. In the case of the heroin he said he found that the excess of the quantity over the limit prescribed in the Third Schedule, was something which assisted the conclusion that a commercial element was present.

I consider that this approach discloses no error and, in particular, that there was no reason why, in coming to a conclusion that a commercial element was established, the judge was not entitled to take into account the excess of the quantity of the drug over the Third Schedule limit, as well as its quantity in absolute terms, together with the other relevant circumstances.

Subsequently, before announcing the sentences which he imposed, the judge did state, quite accurately, that counsel for the applicant had asked that a suspended sentence be imposed "if the inference of commerciality was overcome by him". But he said that this had not been overcome. The judge's relevant conclusion had already been stated at the stage before he added his reference to the submissions of the applicant's counsel and no reversal of the onus lying on the Crown was involved in those conclusions which he had already expressed. The onus did undoubtedly lie on the Crown in respect of the relevant contested issue: see e.g. Anderson's case (supra) at 919 second Col. C-D and notwithstanding the mild confusion added by the judge's late reference to the submission of the applicant's counsel, I consider that he did not fail to apply this principle. I do not

believe that the remark pointed to an operative error in the course of reasoning followed. Furthermore, the reference which the applicant's counsel did no more, in context, than indicate that, confronted by the force of the circumstances which had been established by the Crown (that is the quantity and form of the drugs) he realistically accepted that, in the absence of some further features to which he could cause attention to be directed, the issue was likely to be determined against him.

It has already been mentioned that there is no statutory element of "commerciality" in the offence established by s.9 of the Queensland Act. Nevertheless, it is a circumstance bearing upon the seriousness with which, for the purposes of penalty, the offence should be treated if such an element is present: cf. Anderson at 915 second Col. D. The expression, "commercial element", is a suitable one to describe certain circumstances of seriousness: the coming into possession with an intention to involve others, to supply for a consideration and make a profit.

The standard of proof was not expressly referred to below. In this State it has heretofore been taken to be on the balance of probabilities for any additional relevant circumstances which are not elements of the offence covered by the guilty plea, but the standard should be taken as reflecting the seriousness with which the issue should be determined: see e.g. J (Jnr) (1989) 41 A.Crim.R 466 where reference is made to this matter and to the test in Briginshaw v. Briginshaw (1938) 60 C.L.R. 336. The sentencing judge here appears to have approached his task of fact finding with appropriate regard to the seriousness of the issues under consideration.

There is one particular reference in the judgment of the majority in Anderson which, if considered in isolation might, with respect, be misunderstood. At 919, second Col. D-E their Honours say:

"It is common ground, and rightly so, that the standard of proof which rests upon the Crown in such a case in South Australia is the ordinary criminal standard, namely beyond reasonable doubt."

I believe that their Honours were here merely stating the law which the South Australian judges had in this respect applied and I believe that their Honours did so in the course of deciding whether in a separate aspect the South Australian judges had adopted a particular approach which could be seen to be erroneous. I do not consider that in their reference to standard of proof in the

context of fact finding for the purpose of sentencing, they were intending to lay down a proposition of general application in other jurisdictions. The references in the footnote 29 at that page seems to confirm this and see also the reasons of the two minority judges at 914 first Col. Until an authoritative determination to the contrary is made, the law applicable in Queensland on this matter should be taken to be as expressed in J (Jnr) (supra).

No error has been shown in the approach taken by the sentencing judge and no excessiveness in the level of penalty imposed has been demonstrated.

The application should be dismissed.

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 13 July 1994.

This is an application for leave to appeal against sentence. The applicant was convicted in respect of two drug offences, each conviction producing a sentence of imprisonment. The first conviction was of the offence of possession of a dangerous drug, namely heroin, in excess of the quantity specified in the Third Schedule of the *Drugs Misuse Act 1986* and the second of possession of a dangerous drug, namely cannabis sativa; the penalties were 5 years imprisonment with a recommendation for parole after 18 months, and 3 years imprisonment, respectively.

The point, and the only point, taken on behalf of the applicant is that the learned primary judge misdirected himself as to the onus of proof, in the course of arriving at a finding that there was a commercial element in the applicant's possession, in relation to both offences. In the context of the present case, the point taken seems rather a technical one; but it is of some general importance.

It is necessary to discuss the relevant legislation and certain decisions said to bear upon the question; but it appears to me convenient first to consider whether the primary judge did in truth

depart from the course which, according to the applicant's argument, he was obliged to follow. It was argued that his Honour should have placed upon the prosecution the onus of proving, beyond reasonable doubt, the existence of the commercial element which was found to exist.

The possession the subject of the first conviction was of a substantial quantity of heroin in a block of 67.4% purity; the weight of the block was 9.017 grams and of the heroin in it 6.077 grams. The cannabis sativa the subject of the second conviction was found in various places in the applicant's house, but it is necessary to mention only one such finding, that of 12 snaplock bags containing cannabis sativa in weights ranging from 9.4 grams to 25.3 grams. The judge's reasons for sentencing included the following passages:

"The quantities of the cannabis sativa and the quantities of the heroin are such that a prima facie case of a commercial element in both these drugs is raised and once one has a commercial element, particularly with heroin, any dealing with heroin normally attracts a custodial sentence.

...

Now, the difficulty in your case is in deciding whether or not there was indeed a commercial element in the possession of both the cannabis sativa and the heroin.

...

There is no doubt that you had the wherewithal to buy these drugs, the money you say you used was obtained legitimately, but having listened carefully to you I have come to the conclusion that the Crown has satisfied me that there was a commercial element in your possession of both the cannabis sativa and the heroin.

...

I have found the quantities and the packaging of the cannabis sativa and your excuses, more particularly your having four bags in early August or mid-August 1993 put aside for Christmas, as one which I cannot believe. Furthermore, the sheer quantity of the heroin, bearing in mind, particularly, the quantity prescribed in the Third Schedule of the Drugs Misuse Act, is such that I believe there was a commercial element in that.

...

Mr Feeney, for the record, did ask me to impose a suspended sentence if the inference of commerciality was overcome by him.

That has not been overcome and at the end of the day, in respect of the charge of possession of heroin with the circumstance of aggravation, I sentence you to imprisonment with hard labour for five years." (emphasis added)

The question is whether on reading these passages together, in their context, it can be seen that the learned primary judge merely undertook the task of determining whether the Crown had

proved beyond reasonable doubt the existence of a commercial element, or followed a different mode of reasoning. In my opinion his Honour began with the presumption that the quantities of cannabis sativa and heroin were such as to raise a prima facie case of the existence of a commercial element; further, as to the quantity of heroin, his Honour acted on the view that the fact that it exceeded that prescribed in the Third Schedule of the relevant statute assisted towards the conclusion which he reached. In the end, his Honour was satisfied of the existence of that element, but he reached that state of satisfaction by use of the presumption I have mentioned. In arriving at this conclusion, I have been assisted particularly by the implication which appears to me to exist in the last passage quoted from his Honour's reasons: that it was necessary for the applicant, in order to succeed on this issue, to rebut the presumption arising from the quantities found in his possession. Mr Cuthbert, for the applicant, argued that we should take into account in favour of the applicant the fact that his counsel below addressed the judge without evoking adverse comment, on the basis that there was some onus upon the applicant to satisfy the court that "this was a own-use rather than a commercial situation". It seems to me clear that counsel for the applicant below did put the matter before the court in that way, but I do not regard that as being of central importance.

The question then arises whether his Honour's approach to the burden of proof was legally correct. The charges were brought under s. 9 of the *Drugs Misuse Act* 1986 ("the Act"), relevant parts of which read as follows:

"**Possessing dangerous drugs.** A person who unlawfully has possession of a dangerous drug is guilty of a crime.

Penalty:

...

(b)If the dangerous drug is a thing specified in the First Schedule and the quantity of the thing is of or exceeds the quantity specified in the Third Schedule but is less than the quantity specified in the Fourth Schedule in respect of that thing and the person convicted -

(i)satisfies the judge constituting the court before which he is convicted that when he committed the offence he was a drug dependent person, imprisonment for 20 years;

(ii)does not so satisfy the judge constituting the court before which he is convicted, imprisonment for 25 years...

(c)If the dangerous drug is a thing specified in the Second Schedule and the quantity of the

> thing is of or exceeds the quantity specified in the Third Schedule in respect of that thing, imprisonment for 20 years."

The things specified in the First Schedule include heroin, but not cannabis sativa, which is in the Second Schedule.

We were referred to the decision of the Court of Criminal Appeal in Brown (C.A. No. 104 of 1991, 30 August 1991, unreported) in which the Court made some remarks relevant to the present problem. That case concerned a sentence of imprisonment imposed in respect of two counts of possession of a dangerous drug, namely cannabis sativa, the quantity involved being alleged to exceed that specified in the Third Schedule - i.e. the matter fell within para. (c) of s. 9 of the Act. The question arose whether the sentence imposed was justifiable, it being one which was described as "being within the range of sentences as if the applicant had been regarded by the learned sentencing judge as having the quantity of marijuana for a commercial purpose" - per Derrington J at p. 2. His Honour pointed out that the court could find that the quantity of drugs, although "in excess of the specified quantity making it a traffickable quantity was still possessed by the accused person for his own use". In upholding the judge's assumed conclusion his Honour referred to:

> "...the quantity of material which was in possession of the applicant and which in effect has the statutory presumption of being in his possession for the purpose of trafficking was indeed held by him for that purpose".

Dowsett J, after referring to provisions of the Act, remarked:

> "It is relatively clear that the intention underlying this structure is to relieve the Crown from the obligation of showing that an accused person was in possession for commercial purposes, it being accepted that the appropriate punishment in those circumstances is greater than is the case where possession is for personal use".

Dowsett J held in effect that while it was open to the defence to seek to show that the purpose was not a commercial one, notwithstanding that the quantity in possession exceeded the Third Schedule amount, it was not necessary to prove that the purpose was a commercial one in order to make the appropriate penalty one in the higher range. On that view, a finding or concession that the amount of the drug exceeds the quantity specified in the Third Schedule justifies sentencing on the basis that

the purpose of possession was commercial, since the Crown does not have to prove that; but if the defence wishes, it may attempt to prove that even an amount larger than that set out in the Third Schedule is not held for commercial purposes. It appears to me, then, that if the approach just analysed is correct no proper exception can be taken to the method by which the judge arrived at his conclusion, in the case before us. Indeed, on that view his Honour proceeded on a basis too favourable to the applicant in that he regarded the ultimate onus, with respect to commercial purpose, as being on the Crown. I should add that the view of Dowsett J may well gain some support from the remarks which Derrington J made, quoted above.

The principal reason advanced by Mr Cuthbert against the legitimacy of the reasoning of the primary judge was that, so he argued, it is inconsistent with that of the High Court in a South Australian case, Anderson (1993) 67 A. Crim. R. 582. But before coming to that, two points should be noted. One is that para. (c) of s. 9 of the Act, dealt with in Brown, does not itself make any even implicit reference to the question of commercial purpose or otherwise; it simply has the effect that if the drug is of a certain type and its quantity exceeds that specified, a sentence of imprisonment for 20 years may be imposed. The second is that in a speech introducing the Bill which became the Act, the Minister explained that the amounts in the Third Schedule were "consistent with those contained in the *Customs Act* of the Commonwealth"; he also remarked:

"...possessing drugs in a quantity equal to or in excess of this weight renders the offender liable to a greater punishment".

And with reference to cl. 9, which became s. 9, he said:

"Again the penalties are dependant on the type and amount of drug".

The Minister's speech did not explicitly link the statements of quantity with any issue of purpose: see the Queensland Parliamentary Debates, Vol. 301 at p. 3477.

The question of the application of the law as expounded in Anderson to the Queensland Statute is complicated by the circumstance that the South Australian provisions there considered are significantly different from ours. But the basic structure of the immediately relevant provisions is much the same and I have come to the conclusion that it would be inconsistent with Anderson to

apply, under our Act, the principle that possession of a Third Schedule quantity, or possession of a large quantity, of a drug creates a presumption that the possession was for a commercial purpose, throwing the onus on the convicted person to prove otherwise.

For the sake of brevity I propose to explain the effects of the South Australian provisions summarily, rather than to set them out in full; their text, so far as relevant, is to be found in the High Court's reasons. The charge was one of producing cannabis contrary to s. 32(1)(a) of the *Controlled Substances Act* 1984 (S.A.) (which I shall call "the South Australian Act"). Section 32 makes it an offence knowingly to produce certain substances and subs. 5 makes the penalty dependent upon quantity; so far, the scheme is the same as that in para. (c) of s. 9 of our Act and, subject to one reservation, the same as that in para. (b). It will be recalled that of these paragraphs (c) relates, so far as relevant to the present case, to cannabis sativa and (b) to heroin. The reservation is that our s. 9(b) makes the penalty, where the quantity is in a certain range, dependent upon whether the person convicted satisfies the judge that "when he committed the offence he was a drug dependent person". No corresponding provision fell to be considered in the High Court case and the closest analogy is to be found in s. 32(6) of the South Australian Act:

> "Where a person is found guilty of an offence of producing cannabis but the court is satisfied that he produced the cannabis solely for his own smoking or consumption, the person shall be liable only to a penalty not exceeding five hundred dollars".

Comparing s. 9(b) of our Act with s. 32(6) of the South Australian Act it will be seen that, if either conveys any implication that the matter on which the court is to be satisfied is equivalent to the criterion of commercial purpose, it is the latter; the South Australian Act directs attention to the question of whether the production was solely for own use, whereas our comparable provision is concerned merely with the characteristics of the convicted person.

In the High Court case the majority held that:

> "...a commercial purpose on the part of the appellant would constitute a circumstance of aggravation to which considerable importance would necessarily be attached in the determination of the appropriate sentence". (588)

There the primary judge found beyond reasonable doubt that the cultivation was for commercial purposes. The principal judgment in the High Court says:

"Necessarily, that finding established the purpose of commercial supply to others as an important circumstance of aggravation to be taken into account in the determination of the appropriate sentence".

As to the question of onus, the majority accepted that in South Australia the onus is upon the Crown to prove the allegation of commercial purpose and to prove it beyond reasonable doubt (594). In this context the judges' reference to the law in South Australia is plainly to the standard of proof, namely, beyond reasonable doubt. The standard of proof is further discussed below.

A complication in applying Anderson is that there a question of commercial purpose had a two-fold relevance; this aspect is referred to particularly at pp. 588 et seq. of the majority judgment. Apart from constituting a circumstance of aggravation, it was given a special significance in relation to the concept of "simple cannabis offence", dealt with in s. 45a of the South Australian Act. It seems clear that the High Court's conclusion that commercial purpose would constitute a circumstance of aggravation, quite apart from s. 45a, and its conclusion that the onus in that respect lay on the Crown, were not based upon anything in s. 45a and it appears to me unnecessary to discuss the operation of that provision, as explained by the High Court.

The last point to notice about the High Court case, and an important one, is that there the quantity of cannabis was in the higher bracket dealt with in s. 32(5) of the South Australian Act and that it involved 3.5 kg. of "dried useable material" which would have been worth at least $20,000.00 on the illicit market. Yet one finds no suggestion in the reasons that that circumstance affected the onus of proof or created a presumption against the appellant; the majority emphasised that the onus was correctly treated by the trial judge as one lying on the Crown. Of course, the quantity may be so large as to leave no room for doubt, as a practical matter, about commercial purpose; but that was not so here.

Unfortunately, the decision in Anderson, which had not been reported when the learned

primary judge dealt with this matter, was not cited to his Honour. In my opinion the decision under appeal is vitiated by the circumstance that the judge did not simply consider whether the Crown had proved the circumstance of aggravation relied on, namely, that the possession was for a commercial purpose, but assumed that the quantity involved (apparently, both as to the heroin and as to the cannabis) created a presumption against the appellant dependent in part, as to the heroin, on the fact that the amount exceeded that set out in the Third Schedule. The course his Honour took may well be supported by Brown, discussed above, but cannot now be upheld, because it is inconsistent with Anderson, the facts and legislation considered in which are not distinguishable.

In J (Jnr) (1989) 41 A. Crim.R. 466, Ryan J with whom Connolly J agreed, followed Welsh [1983] 1 Qd.R. 592 in holding that facts relevant to sentence other than details of the offence may be accepted or rejected as a matter of probability, although "a trial judge would necessarily be guided or influenced in his acceptance or rejection of particular facts by having regard to the significance of their bearing upon the increasing or reducing of what might be considered an average or normal sentence" (477). Thomas J took a rather similar view, but emphasised that "some facts relevant to the sentencing process must be proved beyond reasonable doubt" (469). Thomas J pointed out that those facts were defined in Welsh as being "the commission of or details of the offence" (470).

In the present case it was the onus, not the standard of proof, which was in issue, but since (in my opinion) the matter must go back for re-hearing it is necessary to decide whether in determining the issue of commercial purpose the court must apply the standard laid down in Anderson - i.e. proof by the Crown beyond reasonable doubt. There Brennan and Dawson JJ did not find it necessary to determine what was the appropriate standard of proof, but the majority held that:

> "...the standard of proof which rests upon the Crown in such a case in South Australia is the ordinary criminal standard, namely, beyond reasonable doubt".

The majority drew attention to contrary views, including those in Welsh and in J(Jnr). It is not clear

to me that the High Court intended to overrule those Queensland decisions, although one may reasonably inquire why the law in South Australia on the point should differ from that in Queensland. In my opinion, reached with some uncertainty, the proper course is to continue to apply the law as stated by Ryan J in J(Jnr). The result is that the standard of proof of commercial purpose is one of probability, but with the important reservation that the significance of a finding of commercial purpose, so far as sentence is concerned, is such that a high degree of satisfaction would have to be attained before the court would act on the basis that there was a commercial purpose.

Some discussion of the power to make the order proposed is necessary. Under s. 671B of the Criminal Code, this Court may, in relation to the proceedings of the Court, exercise any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters. Such powers include the powers under O.70 of the Rules of the Supreme Court which apply in the case of civil appeals. Thus this Court, under the combined operation of s.671B and O.70, may (quite apart from s. 669 of the Code) order a new trial, either on the whole matter or on any particular question: see O.70, rr. 12, 25. The NSW equivalent of S.671B was briefly considered in Burns (1920) 20 SR(NSW) 351, where it was held that the section did not apply so as to enable the Court of Criminal Appeal to amend the indictment upon which the appellant had been convicted, to cover the case actually made out by the evidence adduced at the trial. Nothing in that decision appears to throw doubt on the existence of the power to order a new trial.

I would grant the application for leave to appeal, allow the appeal, set aside the sentences imposed below and direct that the matter be re-heard by a judge, on the question of sentence only.

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered the Thirteenth day of July 1994

I agree with the reasons of the Chief Justice.

I consider that in reaching the conclusion that the applicant's possession of drugs was for a commercial purpose, the learned sentencing Judge did not reverse the onus of proof. In particular, the block of heroin (9.017 grams) was a large quantity judged by any standard, and it was 67.4% pure. In the case of an amount of that order and value, there is an immediate and compelling inference that the applicant had a commercial purpose, such as a resale, in mind. Indeed, it is not easy to think of other purposes that would be served by having such a large and expensive amount in one's possession.

The suggestion was that the applicant bought in bulk in order to obtain a lower price. Even if that is not a commercial purpose, it is plain that, having seen and heard him giving evidence, the Judge did not accept that version of the matter. He said that the Crown had satisfied him that there was a commercial element in the possession of both the cannabis and the heroin. I do not think that his Honour reached that conclusion by wrongly applying any supposed presumption of fact or law, but rather that he did so by drawing proper inferences from the amount - "the sheer quantity" as he described it - of the drugs involved.

I would dismiss the application.