SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cunliffe* [2004] QCA 293
PARTIES:	**R** **v** **CUNLIFFE, Thomas Boyd** (appellant) **R** **v** **CUNLIFFE, Michelle Louise** (appellant)
FILE NO/S:	CA No 115 of 2004 CA No 116 of 2004 SC No 345 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2004
JUDGES:	McMurdo P, McPherson JA, Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeals against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – DEFENCE MATTERS – HONEST CLAIM OF RIGHT TO PROPERTY – whether appellants could rely on defence under s 22 (2) of Criminal Code for charge of possession of drugs
COUNSEL:	The appellants appeared on their own behalf B G Campbell for the respondent
SOLICITORS:	The appellants appeared on their own behalf Director of Public Prosecutions (Qld) for the respondent

[1] **McMURDO P:** The relevant facts and issues are set out in the reasons for judgment of McPherson JA and Mackenzie J so that I need repeat only those necessary to explain my own brief reasons for also dismissing the appeals.

[2] The Cunliffes each gave evidence that they believed they were doing nothing illegal in growing and using marijuana. The investigating police officers gave evidence that when they attended the Cunliffes' premises and found the marijuana, the Cunliffes reacted as if they were doing nothing wrong.

[3] That evidence did not raise a defence under s 22 *Criminal Code* which relevantly provides:

> "(1) Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.
>
> (2) But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.
>
> … ."

[4] In their submission on these appeals, the Cunliffes now claim that they were not ignorant of the law prohibiting their possession and growing of marijuana but they honestly believed they had a right to do so for their own purposes, despite the provisions of s 8, s 9 and s 10 *Drugs Misuse Act* 1986 (Qld) and Sch 2 of the *Drugs Misuse Regulation* 1987 (Qld); the learned primary judge erred in not leaving s 22(2) *Criminal Code* for the jury's consideration. That was not the evidence at trial and the learned primary judge rightly instructed the jury that on that evidence ignorance of the law did not excuse their possession and cultivation of marijuana (s 22(1) *Criminal Code*). That alone is sufficient reason to dismiss their appeals. Even had the Cunliffes given evidence consistent with the submissions they now make, that could not excuse them from criminal responsibility under s 22(2) *Criminal Code*: *Walden v Hensler*.[1] Misinterpretation of the law equates to ignorance of the law and is not an excuse: *Ostrowski v Palmer*[2] and see also *Olsen & Anor v The Grain Sorghum Marketing Board; ex parte Olsen & Anor*.[3]

[5] Having now been informed by this Court of the applicable law as determined by the High Court of Australia, the Cunliffes can no longer be under any such misapprehension. It seems from their submissions to this Court that they disagree with some provisions of the *Drugs Misuse Act* 1986 (Qld). It is trite to say that those who deliberately break a law, even one with which they earnestly disagree, must be prepared to face the legal consequences of their unlawful actions. We are all fortunate that the democratic processes of this State allow citizens who disagree with a law to engage in social debate and to lobby members of the legislature to effect the repeal or amendment of laws which they believe are inappropriate or unfair. In making that observation I am not expressing any views as to the merits of either side of the debate on such a complex and controversial issue but merely indicating that this, rather than the courts, would seem to be the most appropriate avenue open to the Cunliffes if they wish to continue with their claim that they should be entitled to possess and grow marijuana for their own purposes.

[6] The appeals against conviction should be dismissed.

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1. (1987) 163 CLR 561, Brennan J 574-575, Deane J 580-581, Dawson J 593-594.
2. (2004) 206 ALR 422, Gleeson CJ and Kirby J [2]-[4] and [11]-[12], McHugh J [53]-[59], Callinan and Heydon JJ [90].
3. [1962] Qd R 580.

[7] **McPHERSON JA:** Mr and Mrs Cunliffe live with their two children on a quarter of an acre of land at Springbrook in the Gold Coast hinterland. In his evidence Mr Cunliffe said their address was 8 Mimosa Road, Springbrook. Less prosaically, Mrs Cunliffe said their name for it was the Garden of Eden. There they grow kaffir lime, mandarins, mangoes, rosemary, lilly of the valley, sage, parsley, lavender, as well as other plants, and marijuana. As to the latter Mr Cunliffe said they smoked some of it, made tea with it, used it for cooking and sent the stems to the Nimbin Hemp Embassy to be made into bricks.

[8] Into this scene on 24 October 2002 intruded units of the Queensland Police armed with a search warrant. Present were Det Sgt O'Brien, Det Senr Sgt Gabriel, Det Sgt Farmer, and plain-clothes Senr Const Newman. Curiously the police in their evidence at the ensuing trial gave the address as 47 Mimosa Street, Springbrook; nevertheless the witnesses all seemed to be talking about the same place, meaning the Cunliffes' land and home. After gaining admittance there, the police found a number of harvested cannabis plants together with others that were still growing in pots or in a hydroponic system in a garden shed on the land.

[9] The cannabis plants and hydroponic equipment were seized and the Cunliffes were interviewed. Later they were charged with three counts of offences under part 2 of the *Drugs Misuse Act 1986*, for which they were subsequently tried and convicted in the Supreme Court before Mullins J and a jury. One of the offences was producing a dangerous drug in excess of 500 grams; another possessing a dangerous drug; and the third possessing things used in connection with producing it. They were each sentenced to perform 200 hours of community service. Against those convictions they now appeal.

[10] In their evidence at the trial Mr and Mrs Cunliffe each said that they honestly believed they were doing nothing wrong or illegal on their property, or in using the hydroponic system. Mrs Cunliffe said she knew there were different laws in different States, and she did not believe that marijuana was illegal. The appellants were represented by counsel at the trial. He said he had instructions to rely on s 24 of the Criminal Code (honest and reasonable belief as to the existence of a state of things) until Mullins J pointed out that the operation of s 24 of the Code was, by s 129(1)(d) of the Code excluded or, its application partly qualified, unless the person charged with having committed an offence under part 2 of the *Drugs Misuse Act*:

> "… shows an honest and reasonable belief in the existence of any state of things material to the charge."

[11] This part of the provision was plainly not applicable or "material" to the charges in any way. On the evidence given by the Cunliffes at their trial, each of them was asserting simply that they did not know it was illegal to grow or possess cannabis or to possess equipment for doing so. The application of s 24 of the Code was consequently excluded by s 129(1)(d) of the Act. In summing up, her Honour accordingly directed the jury that the Cunliffes' beliefs that he or she was not doing anything wrong or illegal were "completely irrelevant", and had nothing to do with the decision the jury had to make.

[12] Her Honour's directions on this aspect entirely accord with the very recent decision of the High Court in *Ostrowski v Palmer* (2004) 206 ALR 422. There Gleeson CJ and Kirby J said (at 426) that ss 22 and 24 must be read together. In

that, their Honours were addressing their remarks to the Criminal Code in Western Australia, where s 22 still appears in the form of a single section, and is not split up into separate numbered sub-sections as the corresponding section 22 now has been in Queensland. What their Honours were referring to was the provision in s 22(1), as it is now in the Queensland Code, which provides:

> "22(1) Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence."

McHugh J, who agreed that s 24 must be read with s 22 of the Code was specific in saying (206 ALR 422, 429) that s 24 must be read with "the relevant part" of s 22, which is the provision in Queensland contained in s 22(1). It is with that sub-section of s 22 that, consistently with the reasons in *Ostrowski v Palmer*, s 24 must be read in Queensland. The joint reasons of Callinan and Heydon JJ in that case are to similar effect (206 ALR 422, 443-444).

[13] The offences under part 2 of the *Drugs Misuse Act* of production and possession of cannabis, and of possession of the relevant equipment for that purpose, with which the Cunliffes were charged, do not make or declare knowledge of the law to be an element of any of those offences within the meaning of s 22(1). Nor was an honest and reasonable belief in the existence of any state of things "material", within the meaning of s 129(1)(d) of the *Drugs Misuse Act*, to those charges against the Cunliffes. While acknowledging that the expression "state of things" in s 24 is capable of comprehending a compound belief of mixed fact and law, McHugh J (206 ALR 422, 435) and Callinan and Heydon JJ (206 ALR 422, 444-446) denied the application of s 24 to the accused person in *Ostrowski v Palmer*, holding that the mistake or belief relied on there was one of law only, and not of mixed law and fact. The same is true here. The Cunliffes' evidence raised no mistake or belief as to any fact or state of things, but simply asserted that they did not know it was illegal to possess or produce cannabis.

[14] On the appeal before us, however, they have now sought to rely on s 22(2) of the Code which, following the statement in s 22(1) that ignorance of the law affords no excuse, proceeds:

> "(2) But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud."

There are compelling reasons why this provision had and has no application in the circumstances of the case presented at trial against the Cunliffes. One is that at the trial it was not sought to raise or rely on it. Her Honour was therefore under no obligation to direct the jury on that issue unless it was, at the very least, fairly raised on the evidence before her. The Cunliffes gave no evidence that raised or would have raised s 22(2) to the level of requiring the prosecution to exclude its application or operation. They asserted no "right" in the exercise of which they claimed to possess, plant or cultivate cannabis. It is true that, when called upon in the matter of sentence, Thomas Cunliffe protested that he should not be sentenced because he believed "my common law right is that I can do things in my own backyard if they do not harm or affect other people". By then, however, the trial was over and, for what it matters, his evidence at the trial contained no assertion to

that or any similar effect. I say "for what it matters", because as her Honour pointed out, Mr Cunliffe's common law rights as owner have been displaced by the provisions of the *Drugs Misuse Act* prohibiting possession and production of cannabis.

[15] However, on appeal Mr Cunliffe said that their counsel at the trial had failed to carry out their instructions, which were to rely on s 22(2). Invited to formulate the claim of right under that provision, he said it was an honest claim of a right to use the cannabis plants as he or they saw fit for their own purposes. Considered in that form, I am nevertheless persuaded that s 22(2) can have had no application to the facts of this case, and that the trial judge was not and would not have been required in law to put it before the jury for their consideration.

[16] Expressly or by implication, s 22(2) applies only to offences "relating to property". The expression "relating to" is no doubt capable in many contexts of a very wide meaning; but, in the context of s 22(2), none of the offences with which the Cunliffes were charged depended in any way on there being "property" in any things that were in issue. Section 8 of the *Drugs Misuse Act*, which creates a crime of production of a dangerous drug like cannabis, does not incorporate as one of its elements that the person doing so must own or have any "property" in the cannabis produced. The section prohibits an activity, namely production, which is independent of ownership of the plant or product produced, or of the land on which it is cultivated. The activity is and remains prohibited even if the land or the plant in question belongs to another, as in fact is quite often the case in prosecutions under the section. It makes no difference who owns the plant that is being cultivated or produced. The same is true of s 9, which prohibits possession of a dangerous drug. Commission of the offence does not require proof that the drug produced is the property of the offender, but only of the fact of its being in the accused's possession at the time alleged. So also with s 10(1) making it a crime to have anything in possession for use in connection with either of the other two offences, such as the hydroponic equipment in this case. It would not matter whether or not the Cunliffes owned it, or that someone else did.

[17] It is evident from what I have said that I regard the words "as for an offence relating to property" as limiting the availability of s 22(2) to offences which in some way "relate to" property in the sense of being or affecting proprietary rights in something. To the contrary, the Cunliffes point to the definition of "property" in s 1 of the Code, which comprehends a wide range of objects or things, including "(d) a plant"; but this is not the sense in which the expression "relating to property" is used in that portion of s 22(2) of the Code. In *Walden v Hensler* (1987) 163 CLR 561, the appellant's conviction under s 54(1) of the *Fauna Conservation Act 1974* for "keeping" a wild plains turkey or bustard chick was affirmed in the High Court by a majority consisting of Brennan, Deane and Dawson JJ (Toohey and Gaudron JJ dissenting), even though the appellant there claimed to be exercising a traditional right as an Aboriginal to do so for the purpose of food or "bush tucker". Brennan J considered (163 CLR 561-575) that reliance on s 22(2) failed. His Honour preferred what he designated as the "narrower" interpretation of s 22(2) under which it applied "only to offences in which the causing of another to part with property or the infringing of another's rights over or in respect of property is an element". On that footing, because s 54(1) of the *Fauna Act* did not create an offence in which either of those ingredients was an element, s 22(2) had no application to it. It was not, within s 22(2), an offence relating to property.

[18] Deane J thought that the expression "offence relating to property" in s 22(2) should not be narrowly construed (163 CLR 561, 580); but his Honour went on to conclude that the appellant's "keeping" of the turkey chicks was not an act done by the appellant "in the exercise of an honest claim of right" under s 22(2). He said (at 580-581) that:

> "An honest belief of a special entitlement to do the act with respect to property, such as a belief of ownership, will only constitute a defence under s 22 of the Code if that entitlement would, if well founded, preclude what was done from constituting breach of the relevant criminal law which an accused is presumed to know ... In other words, it is not to the point to establish an honest belief of a special relationship with property which, even if it existed, would not constitute an answer to the offence charged."

Again, at 583, his Honour said:

> "… the general words of s 54(1) are such as to make the taking or keeping of prescribed fauna by a person an offence regardless of whether the person is exercising what would, if the criminal law creating the offence had not been enacted, have been rights of ownership or traditional rights of hunting with respect to the fauna. That being so, a genuine claim of ownership or hunting rights with respect to that fauna no more constitutes the basis of a defence of claim of right than does a genuine belief by a drug trafficker of ownership of the drugs in which he deals."

There is, of course, nothing here to suggest in any way that the Cunliffes are or were engaged in drug trafficking; but his Honour's remarks are illustrative of the principle he was propounding.

[19] Dawson J, who was the third of those in the majority, concluded his reasons on the question of conviction with the statement that s 22(2) of the Code was inapplicable because s 54 of the *Fauna Act* imposed:

> "a prohibition against the keeping of fauna which is of general application irrespective of any proprietary or lesser right in the fauna and so affords no scope for the exercise of any claim of right … There can be no mistaken belief in any legal entitlement going to intent. Ignorance of the prohibition itself is mere ignorance of the law and affords no excuse."

[20] For my part, I would with respect, if free to do so, prefer the analysis of Brennan J. For reasons I have given, none of the offences here of producing or of possessing cannabis or things used in connection with it involves interference with the property rights of others so as to constitute "an offence relating to property" within the meaning of s 22(2) of the Code, or attract the exemption from criminal responsibility which it confers. Equally, if one adopts the approach adopted by Deane J or by Dawson J, the outcome remains the same. The Cunliffes' (or, at any rate, Mr Cuncliffe's) honest belief, as it may be assumed to be, of an entitlement as owner to grow or do what he wished in his own back yard would not prevent his acts of production or possession from constituting a breach of the provisions of ss 8, 9 or 10 of the *Drugs Misuse Act*, and do not constitute an answer to the offences charged under those sections. His more recently formulated right to use cannabis plants as he sees fit is not within the ambit of s 22(2) of the Code because far from

recognising any such rights, ss 8, 9 and 10 of the Act affirmatively prescribe and penalise it. The offences created by those provisions are of general application and apply independently of any question of ownership or any lesser proprietary right in the cannabis plants or in the land on which they are cultivated or the equipment used to produce them. They do not admit of the exercise of any right to use cannabis plants to which an honest claim under s 22(2) of the Code is capable of being asserted.

[21] In my opinion in the circumstances disclosed by the evidence s 22(2) of the Code conferred no immunity on the appellants against the charges laid against them under ss 8, 9 and 10 of the *Drugs Misuse Act*. The appeals against conviction must be dismissed.

[22] **MACKENZIE J**: The appellants were convicted, after a short trial, of producing a dangerous drug exceeding 500g, possession of a dangerous drug and possession of things used in connection with drug offences. The drug involved was cannabis sativa. The appeal is based on the proposition that the learned trial judge should have left to the jury a defence under s 22(2) of the *Criminal Code*.

[23] According to the submissions on behalf of the appellants, they did not claim ignorance of the law at any time during the trial. The belief asserted was one that they were doing nothing wrong. It was said it stemmed from an honest claim of right to the cannabis plant based on a process of interpretation of the *Criminal Code* and the *Drugs Misuse Act* 1986.

[24] Reference was made to the definition of "property" in s 1 of the *Criminal Code*, which includes "plant". This, it was said, allows s 22 to operate in relation to the cannabis sativa plant and the coca leaf, even though s 22 would not apply to the other drugs in Sch 2 which were derivatives or compounds. Why that limitation should be made, given the opening words of the definition of "property", is not apparent, but it is not necessary to pursue that question further. It was submitted that cannabis sativa derived its special status, along with coca leaf, because they were plants "in their natural form".

[25] It was submitted that citizens' honest claims of right to cannabis sativa "as it is a natural and renewable food fibre and medicinal resource" should be acknowledged. In the grounds of appeal there is also an assertion that cannabis is a "natural resource used by our forefathers including the founding fathers of Australia". The appellant led no evidence at trial in support of that historical interpretation, unlike the appellant in *Walden v Hensler* (1987) 163 CLR 561, where there was an evidentiary foundation, including the evidence of an anthropologist, (590), for advancing a claim of right to keep bustards, based partly on aboriginal traditional custom notwithstanding that they were protected fauna.

[26] In my view, there is no basis in the evidence upon which a defence under s 22 of the Code was sufficiently raised notwithstanding these submissions. The only evidence extracted from the police officers in cross-examination was their assent to leading questions that the appellants "reacted as though they were doing nothing wrong with the growing of (the cannabis sativa) plants" and that they weren't "doing anything wrong at all". Nor was there any assertion of a claim of right in the tape recording made during the search and tendered at trial.

[27] In the female appellant's evidence-in-chief she said that she honestly believed she was "doing nothing wrong, nothing illegal". In cross-examination she was asked:

> "You say that you had no idea whatsoever that marijuana was illegal? – I don't know there's differing laws from State to State. I don't believe that it was illegal I don't believe."

She then made some comments about inconsistency in society's approach to substance use. The Crown Prosecutor asked:

> "… would you agree that that passage denotes or demonstrates that you knew that marijuana was an illegal substance? - No.
>
> ……
>
> You knew it was a drug obviously? -Obviously yes, yes, like caffeine or tobacco or many other drugs in our society, yes."

She then said that she did not believe that the police had the right to take the confiscated items away she said:

> "I didn't believe in my heart they had the right to come into my home and do that. We were doing nothing wrong."

[28] In the male appellant's evidence, he was asked in examination-in-chief the following:

> "On the day the police came to your premises … did you believe you were doing anything illegal on your property? - No
>
> As of that date did you believe it was illegal to have apparatus that was found in the shed? - No."

No evidence was adduced in cross-examination bearing on any assertion of an honest claim of right.

[29] As the case stood at the end of the evidence, it was in reality no more than a generalised claim to immunity from generally applicable restraints placed on conduct by a statute. That was not sufficient to constitute a claim of right within the meaning of s 22 (*Walden v Hensler* at 581, 592, 602, 602-603).

[30] However, since one complaint by the appellants is that their instructions as to their defence were not carried out, it is desirable to characterise what that defence would have been in terms of legal concepts. Essentially, as it was formulated by Mr Cunliffe, it was a claim to a liberty to grow cannabis plants on his own land and to use them as he saw fit. That echoes what he said after the allocutus was administered. In reality it is no more than an expression of fundamental disagreement with the operation of a law by which Parliament has imposed a general prohibition on the unauthorised production of, use of and dealing in the plant. In that form, there was no basis upon which a defence under s 22(2) was raised.

[31] In *Ostrowski v Palmer* (2004) 206 ALR 422, which was concerned with a claim that the respondent had been misinformed by an official about the application of a prohibitory law to a place where he wished to fish for lobsters, the claim was held not to activate s 24 because the belief was not one in a state of things as defined in s 24, but was a case of ignorance of the law falling within s 22. Callinan and Hayne JJ

said the following at p 444, which is equally applicable to the kind of claim made in this case:

> "A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it …."

[32] The appeal of each appellant should therefore be dismissed.