
JURISDICTION : DISTRICT COURT OF WESTERN AUSTRALIA
IN CRIMINAL

LOCATION : PERTH

CITATION : THE STATE OF WESTERN AUSTRALIA -v-
BOARDMAN [2019] WADC 131

CORAM : GOETZE DCJ

HEARD : 29 AUGUST 2019

DELIVERED : 30 AUGUST 2019

PUBLISHED : 4 SEPTEMBER 2019

FILE NO/S : IND 1471 of 2018

BETWEEN : THE STATE OF WESTERN AUSTRALIA

AND

ASHLEY CONRAD BOARDMAN

Catchwords:

Misuse of Drugs Act - Conviction relating to cannabis seeds - Serious drug offences - Consequential drug trafficking declaration

Legislation:

Misuse of Drugs Act 1981 (WA)

Result:

Offender declared to be a drug trafficker

Representation:

Counsel:

The State of Western Australia : Mr K Rosenthal
Accused : Mr E W Greaves

Solicitors:

The State of Western Australia : Office of the Director of Public
Prosecutions
Accused : Kingdom Legal Pty Ltd

Case(s) referred to in decision(s):

Nil

GOETZE DCJ:

1 On 19 August 2019, Ashley Conrad Boardman was arraigned on 12 offences as follows:

1. On counts 1 – 9, that he sold or supplied a prohibited plant, namely cannabis, to another.
2. On count 10, that he had in his possession a prohibited plant, namely cannabis, with intent to sell or supply it to another.
3. On count 11, that he offered to sell a prohibited plant, namely cannabis, to another.
4. On count 12, that he attempted to possess a prohibited plant, namely cannabis, with intent to sell or supply it to another.

2 On 26 August 2019, a jury found Mr Boardman found guilty on all 12 counts.

3 At sentencing on 29 August 2019, the prosecutor Mr K Rosenthal, sought to have Mr Boardman declared a drug trafficker pursuant to s 32A(1)(b)(ii) of the *Misuse of Drugs Act 1981* (WA) (the Act). This application was opposed. On 30 August 2019, I made the required declaration and indicated that I would later publish my reasons. These then, are my reasons.

Misuse of Drugs Act 1981 (WA)

4 By s 3(1) of the Act:

cannabis means plant of the genus *Cannabis* (by whatever name designated) or part of that plant;

prohibited plant means plant to which this Act applies by virtue of section 4, or part of that plant; and

5 By s 4 of the Act:

4. Drugs and plants to which Act applies

...

(2) Subject to subsection (3), the plants to which this Act applies are -

- (a) plants from which a drug of addiction may be obtained, derived or manufactured; and
- (b) whether or not they are also plants referred to in paragraph (a), the plants specified in Schedule II.

6 For the present purpose, sch II refers to certain prohibited plants,
including cannabis.

7 Each of the 12 charges brought against Mr Boardman alleged
a matter contrary to s 7(1) of the Act. That section, relevantly, provides
as follows:

7. Offences concerned with prohibited plants generally

- (1) A person commits a crime if the person -
 - (a) with intent to sell or supply a prohibited plant, or any prohibited drug obtainable from a prohibited plant, to another person, has in his or her possession or cultivates the prohibited plant; or
 - (b) sells or supplies, or offers to sell or supply, a prohibited plant to another person.

8 Section 32A(3) of the Act provides that a serious drug offence
means a crime under certain sections of the Act, including s 7(1).

9 The Act, relevantly, also provides for person such as
Mr Boardman, who has been convicted of a serious drug offence, to be
declared a drug trafficker, as follows:

32A. Drug trafficking

- (1) if a person is convicted of –
 - ...
 - (b) a serious drug offence in respect of –
 - (ii) prohibited plants in a number which is not less than the number specified in Schedule VIII in relation to the particular species or genus to which those prohibited plants belong;

...

the court convicting the person of the serious drug offence ...
referred to in paragraph (b) ...shall on the application of the
Director of Public Prosecutions ... declare the person to be
a drug trafficker.

- 10 Then, by sch VIII, the number of prohibited plants for the purpose of a drug trafficking declaration relating to the prohibited plant of cannabis is not less than 20 plants.

The prosecution and trial

- 11 The indictment in each of the 12 counts referred to a prohibited plant, namely cannabis. Each count involved cannabis seeds.

- 12 The scientific evidence identified each of the seeds as being the plant cannabis sativa. This was not disputed. The expert identified cannabis seed as a plant because it was a multicellular structure which could not be differentiated from cannabis such that:

If you cut it open there's a fully formed perfect very, very small but present plant inside that seed. So when you think of it as a taller structure that's just a matter of certain conditions and time that entity just gets bigger. So it's actually inside (ts 318).

...

And can a cannabis seed be considered a cannabis plant? – Yes, it is cannabis. It is a cannabis plant.

Now, the other definition in the *Misuse of Drugs Act* includes that a cannabis plant or part of a cannabis plant is a prohibited plant? ... Yes.

So what about that aspect – that part of the plant? – Yes you can consider a – a seed as – as part of a plant.

You can consider a – a seed as – a part of a plant. It forms when pollen from a – so cannabis is a little bit unusual as well, because you have completely separate male and female plants. And when the pollen from a male plant falls into the flowers of a female plant, the pollen works it's way down and will then fertilise the ovals, which is what an egg is in a plant. And the DNA comes together and will start there multiplying cells and forming that seed. So it is part of that plant as well as in itself being a plant as well, because inside it there is a fully formed plant. (ts 320)

- 13 In cross-examination, the expert was asked:

Would it be right to say that each viable, and I do place some emphasis on that word, Cannabis sativa seed contains an embryonic or rudimentary root and leaf pair that under the right conditions will germinate and grow in [sic] a mature Cannabis sativa plant?---Yes (ts 335)

14 Counts 1 – 7 inclusive and count 9 on the indictment each involved sales of between 5 and 15 seeds and so they, together with count 11 which involved an offer to sell seeds, did not give rise to an application under s 32A. However, the number of seeds giving rise to this application on the three other counts were as follows:

1. Count 8 – sale of 20 seeds.
2. Count 10 – possession of 330 seeds with intent to sell or supply.
3. Count 12 – 205 attempted possession of seeds with intent to sell or supply.

15 It is sufficient to observe here that Mr Boardman was involved in a commercial enterprise for the sale of premium quality cannabis seeds from only the best breeders which, when cultivated, were expected to produce high levels of THC.

The prosecutor's submissions

16 Mr Rosenthal submitted that the reference to 'prohibited plants' in s 32A(1)(b)(ii) and sch VIII must carry the meaning of a 'prohibited plant' as contained in s 3(1).

17 The State's submission was therefore that, for the purpose of s 32A(1)(b)(ii), the cannabis seeds from counts 8, 10 and 12 should be considered to be prohibited plant or cannabis plant, or part of that plant, within the meanings of cannabis and prohibited plant as set out in s 3(1) and following s 4. Hence, the State submitted that, for the purpose of the drug trafficker declaration, it is immaterial whether seed is considered to be a plant or part of a cannabis plant.

The defence submissions

18 It was accepted by Mr E W Greaves, as counsel for Mr Boardman, that for the purpose of the prosecution on each of the 12 counts, a prohibited plant, namely cannabis, includes part of that plant namely, cannabis seed. However, Mr Greaves submitted that only 'a whole' plant can be considered to be a prohibited plant for the purpose of s 32A(1)(b)(ii) and sch VIII. He sought to exclude part of a plant from the meaning of prohibited plants. On his submission, a non-germinated seed is not a plant for drug trafficking purposes.

19 Mr Greaves pointed to an example of a single female cannabis plant with more than 20 seeds attached to it. Although fully formed and viable, the attached seeds and plant remain a single plant. He submitted that if the State's submission were to be accepted, such a plant with this many seeds could collectively produce a result of more than 20 plants for the purpose of the drug trafficker declaration, which would be an absurd result. Further, to detach the seeds from the plant in order to obtain more than 20 plants would also lead to an absurd result.

20 In practice however, the example postulated by Mr Greaves should not arise.

21 There is an important distinction between an offence against s 7(1) on the one hand and s 7(2) on the other hand. Section 7(1) incorporates the concepts of sale or supply of a prohibited plant, to which s 11 attaches a presumption of intent to sell or supply if there are more than 10 plants involved. Further, that presumption is rebuttable, such that the absurd results suggested by Mr Greaves can be avoided in an appropriate case. Section 32A is only directed at drug traffickers, as the heading to that section suggests.

22 When the evidence is limited to possession or cultivation of a single plant for personal use, such an offender would be convicted of an offence of simple possession or cultivation contrary to s 7(2), which is not a serious drug offence for the purpose of s 32(A).

Findings

23 There is a need for consistency between:

- (a) the meaning of 'cannabis' and 'prohibited plant' in s 3(1);
- (b) s 4(2) applying the Act to the plants specified in sch II, including cannabis;
- (c) s 7(1) specifying an offence; and
- (d) s 32A and sch VIII providing for the drug trafficking declaration following conviction under s 7(1).

- 24 In this case:
- (a) by s 3(1), cannabis means plant of the genus cannabis. It also means part of that plant of the genus cannabis. The seeds here were the plant cannabis sativa. Further, prohibited plant means plant to which the Act applies or part of that plant;
 - (b) by s 4(2) and sch II, the Act applies to cannabis;
 - (c) Mr Boardman was charged and convicted under s 7(1) in relation to the seeds of a prohibited plant, namely cannabis; and
 - (d) s 32A then provides for the drug trafficker declaration following conviction under s 7(1) on counts 8, 10 and 12, in each case being not less than 20 plants as specified in sch VIII.
- 25 If it had been intended that the terms 'cannabis' and 'prohibited plant' should carry a meaning in s 32A different from the meaning set out in s 3(1), s 4(2) read with sch II and as applied to s 7(1), then that could have been achieved by saying so in s 32A, given that it also provides at s 32A(3) for the meaning of certain other words for its own purpose.
- 26 The declaration should follow irrespective of whether the seeds were a plant or part of the plant of the genus cannabis.

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

JB
Associate to Judge Goetze

3 SEPTEMBER 2019