

DISTRICT COURT OF NEW SOUTH WALES

JUDGMENT DATE: Friday, 11 March 2005

JUDGMENT OF: Judge Black QC

COURT JURISDICTION: District Court at Lismore

COUNSEL: Mr Clive Steirn SC

SOLICITORS: Steve Bolt, Bolt Findlay of Lismore

IN THE DISTRICT COURT OF NEW SOUTH WALES, LISMORE

Friday, 11 March 2005

Phillip ('Rusty') HARRIS

v

Director of Public Prosecutions

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1. On 23 June 2004 the appellant was convicted at the Lismore Local Court on a charge that on 9 March 2001 at Byron Bay, he had in his possession a prohibited drug, namely cannabis, sixty-three grams. He has appealed to this court against that conviction and as far as the charge is concerned, it emerged on analysis of the evidence that that charge appeared to cover two alleged offences, namely, a quantity found in a jacket pocket and a quantity found in the appellant's car. Accordingly, the Crown elected to pursue the matter before me in respect of the amount found in the jacket pocket, namely, twenty six point one grams, and the matter has so proceeded on this appeal.
2. The facts which emerge from the transcript were that on 9 March 2001, the appellant was sitting at the table in Jonson Street, Byron Bay, together with some friends including in particular, a Mr Samuel. Various officers and in particular, Constable Bolton, came along the street and Constable Bolton was in charge of a Labrador dog called Thor who had been trained to detect unlawful drugs principally by smell and then to indicate the source of the smell by sitting beside the person or place concerned. As a result of the activities of the dog Thor, to which I will return in a moment, the appellant was arrested, searched and twenty-six point one grams were found in a pocket of his jacket. Now this appeal has centred round whether or not the police were entitled to arrest and search him and that involves a detailed consideration of the activities of the dog.
3. On behalf of the appellant, it is said that the dog assaulted him by, the expression I use is "nuzzling him in the groin", in the way described in the appellant's evidence. The appellant alleged this had happened and so did Mr Samuels. Constable Bolton said that it did not happen but she did agree that the dog's head went under the table at which the appellant was seated.

4. In his ruling upon the matter, the magistrate in the court below said this at p 50 of the transcript, line 50;

“Is it possible that the dog Thor physically came into contact with Mr Harris? I believe that it is. I’ve got two people who tell me that it happened. Constable Bolton said that some police dogs come into contact with people. Mr Harris has given evidence that it did. Constable Bolton said that it did not. I think it’s quite possible that the dog came into contact with Mr Harris”,

and then he goes on to consider another aspect. There was some discussion and argument about the meaning of that finding and I expressed the view that as far as I was concerned, that meant either that the magistrate had found on the balance of probabilities that there was the physical contact in the groin described by the appellant or, to put it another way, that he was not satisfied that it had not happened. In the light of that, and the record before me will show, it was acknowledged that that was a conclusion I could make on the evidence and Mr Steirn, on behalf of the appellant, indicated that he would not call a further witness to give an account of this and for his part, the Crown indicated that it was not in those circumstances particularly helpful to recall Constable Bolton.

5. In the light of all that, I find that the dog Thor did physically come into contact with the appellant in the area of his groin as he describes. Secondly, I find that the dog Thor did physically come into contact with the appellant’s jacket in which the cannabis was subsequently found. That fact was not the subject of any dispute, it was clearly acknowledged by Constable Bolton in her evidence at p 2, lines 45 to 55 where she described that happening and I express that finding for completeness.
6. The next area to come to is that covered by the case of *Darby v Director of Public Prosecutions* NSWCA (2004) at 431. Now, before that matter went to the Court of Appeal, it had been in front of Mr Justice O’Keefe and that decision had been reported in NSWSC (2002) at 1157 and it must be emphasised that that decision of his Honour O’Keefe J was the law as it stood before the magistrate who dealt with this issue.
7. The Court of Appeal significantly altered the effect of the judgment at first instance. There is extensive discussion of the various legal principles including a long and detailed judgment by Giles J and less detailed in the law, but more to do with the facts in the particular case of *Darby* by Ipp J and the third member of the Court of Appeal agreed with Ipp J. I do not think it is necessary for me to go into detailed extracts from *Darby* save to say that with some trepidation in the light of the latest pronouncements from the High Court of Australia and in the light of other observations in other cases to which I have recently had to refer in this court, I still find considerable assistance from what appears in para 80 of Giles J’s judgment quoting Lord Justice Gough in the case of *Collins v Wilcock* going back, it seems to me, to some fairly fundamental truths as to the common law and I relied on that in reaching my conclusions.

8. I make that clear so that if subsequently some court says we should not pay any attention to what Blackstone says about the common law, or these particular observations about the common law relating to battery, then it will be known that for this judgment, I have relied on that particular passage. So if I am shown to be in error, so be it. That Court of Appeal decision, as I say, substantially changed the issues that had emerged at first instance. The magistrate who dealt with this issue was not to know that and I have little doubt that had the magistrate had the benefit of the Court of Appeal decision, and the arguments presented by Mr Steirn who I am fortunate to have before me in this matter and who was also senior counsel in the matter of Darby, then the conclusion in the court below may have been different, but who is to know? I mention that to show that it is no criticism of the magistrate because the law has changed since he dealt with it.
9. The further facts that I think it is necessary to find are first of all that this dog Thor was a trained police dog and I further find that it would be quite wrong for me and indeed not open to me to find that its actions were in any way accidental, for the reasons I have given. I then go on to make a further observation; as I have said, prior to the dog sitting down beside the appellant it had, as I find, nuzzled the appellant in his groin and it had touched his jacket. On the evidence in the transcript, and there is no other evidence enlarging on this, I am not satisfied that the suspicion formed by the police officer, in particular, Officer Bolton, was formed before the dog sat down beside the appellant.
10. Therefore, in the light of what the Court of Appeal have said in *Darby*, I am unable to be satisfied on the material before me in this appeal, that the police had a reasonable suspicion entitling them to arrest and search the appellant. I have little doubt on the material before me that the police genuinely believed they were entitled to do so and in the light of *Darby v Director of Public Prosecutions* at first instance, arguably it can be said that they were justified in forming that view at that time. They were not to know what the Court of Appeal was going to say in 2004. But having reached that conclusion, it is then for me to consider the applicability of s 138 of the *Evidence Act*. It is necessary for me to read out the wording of that Act because, while I am not going so far as to say the evidence was obtained illegally, I am not satisfied that it was obtained properly and therefore, it comes within the definition of improperly obtained evidence. That section sets out that a court can nevertheless admit improperly obtained evidence if it thinks proper to do so bearing in mind in particular, but not exclusively, the considerations set out in subs (3). Now it is fair to say that the probative value of the evidence is all important because without it, there is no case, and that goes for subs (b) as well. Then I have to consider the nature of the relevant offence. It is very important that I should make this clear; in no way does this court condone the possession of unlawful drugs, be they cannabis or any other form of drug. I have to go on and consider the various matters set out in (d), (e) and (f). I do not think (g) or (h) are of particular relevance and I have borne all those things in mind, and I do not think it will help to go into degrees of judgment about how improper it was or the degree of impropriety or the other side of the balancing exercise. What I say about it all is this; I do not believe that the social stability of the area, or indeed or any wider area, will be unduly threatened if on the particular facts in this case, I decline to exercise my discretion in favour of admitting the evidence.
11. In the result, the appeal is allowed and the conviction is quashed.