

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 105/2022
[2023] NZSC 25**

BETWEEN TE ATA PATRICIA MESMAN
 Applicant

AND THE KING
 Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: A J Bailey and R J T George for Applicant
 I S Auld for Respondent

Judgment: 23 March 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Ms Mesman pleaded guilty in the District Court to attempting to possess methamphetamine for supply. She was sentenced to 12 months intensive supervision with rehabilitation related conditions.¹ Despite her plea, she appealed (unsuccessfully) against conviction to the Court of Appeal and now seeks leave to appeal to this Court.²

[2] The applicant argued in the Court of Appeal (and proposes to do the same in this Court) that it is not possible to attempt possession. The question raised is therefore whether attempted possession of methamphetamine for supply is an offence known to New Zealand law.

¹ *R v Mesman* [2022] NZDC 10275 (Judge J A Farish).

² *Mesman v R* [2022] NZCA 418 (Cooper P, Mallon and Wylie JJ) [CA judgment].

Factual background

[3] Ms Mesman rented a motel unit and engaged a courier company to deliver a package to that unit. The package contained 7.2 grams of methamphetamine. It was intercepted by the police following a tip-off from the courier company. Ms Mesman said to the police executing a search warrant on the unit that she had bought the methamphetamine from a friend and intended to use some of it and on-sell the remainder.

Relevant provisions

[4] Section 6 of the Misuse of Drugs Act 1975 makes it an offence to have methamphetamine in one's possession for the purpose of supply. Section 72 of the Crimes Act 1961 deals with attempts generally and relevantly provides:

- (1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his or her object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

...

- (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

[5] The applicant argues that possession is a status not an act or omission; and a status cannot be attempted. The applicant relies on the 1975 decision of Mahon J in *R v Grant*.³ In *R v Willoughby*, decided five years later, Speight J took the opposite view.⁴

[6] In Ms Mesman's appeal, the Court of Appeal held *Grant* was wrongly decided, and that *Willoughby* is correct.⁵ The Court reasoned as follows:⁶

[22] Parliament, in the Misuse of Drugs Act, has made it an offence for a person to have any controlled drug in his or her possession for any one or more of a number of proscribed purposes. Having a drug in one's possession

³ See *R v Grant* [1975] 2 NZLR 165 (SC) at 168–169.

⁴ *R v Willoughby* [1980] 1 NZLR 66 (SC) at 68.

⁵ CA judgment, above n 2, at [21].

⁶ Footnotes omitted.

for a proscribed purpose is a state of affairs. It is also an offence. A person who intends to bring about this state of affairs and commit this offence, and to that end does or omits an act for the purpose of accomplishing this object, also commits an offence under s 72 of the Crimes Act. The section criminalises attempts to commit any offence, whether under the Crimes Act or any other enactment. The plain wording of s 72 makes it an offence to attempt to possess a controlled drug if the person who makes the attempt:

- (a) intends to take or assume possession of the drug for one or more of the purposes proscribed by s 6(1)(f) of the Misuse of Drugs Act; and
- (b) undertakes or omits an act to accomplish this purpose or those purposes, provided the act done or omitted was sufficient in law to amount to an attempt (s 72(2) and (3)).

[23] The statutory provisions are clear on their face and it is not necessary to strain their interpretation to reach this view. Some commentators have suggested that it is better English usage to allege an attempt to procure rather than an attempt to have possession. Indeed, s 25(2)(b) of the Misuse of Drugs Act refers to attempts to procure a controlled drug. Statutes however have never been a safe haven for the grammarian and the interpretation we prefer does no violence to the legislative provisions. Rather, the conclusion we have reached is consistent with the overarching purpose of the Misuse of Drugs Act — namely to prevent the misuse of drugs, to classify controlled drugs based on the risk of harm each drug poses to individuals or to society by its misuse, and to criminalise various drug-related activities including the manufacture, supply, sale and administration of controlled drugs. We agree with Speight J that unless there is an offence of attempted possession of a controlled drug for the purpose of supply, there would be a gap in the Act.

[7] The Court acknowledged that s 7(1) of the Misuse of Drugs Act makes it an offence to “procure any controlled drug” and s 25(2) refers to attempts to do so (for oneself).⁷ As the Court noted: “[t]he actus reus involved in attempted procurement and attempted possession for supply is however the same. It is the mens rea that differs.”⁸

Assessment

[8] We accept that the application raises a potential question of general or public importance, but we are not satisfied that there are sufficient prospects of success to warrant the grant of leave. It follows that we do not see any risk of miscarriage of justice if leave is not granted.⁹

⁷ At [24].

⁸ At [24].

⁹ Senior Courts Act 2016, s 74.

[9] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent