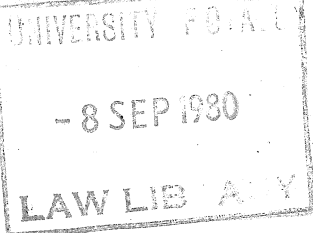


IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 40/80



THE QUEEN

v.

RONALD PAUL SMITH

Coram: Woodhouse J. (presiding)
Cooke J.
O'Regan J.

Hearing: 14 July 1980

Counsel: D.D. Rishworth for Smith
C.J. McGuire for Crown

Judgment: 23 July 1980

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

The appellant was charged summarily in the Magistrate's Court at Dunedin with supplying cannabis on 27 October 1979 to a person under the age of 18 years and with possession of cannabis on the same day. The charges related to a sale of two bullets of cannabis plant material to a girl aged 16 and to six more bullets found when the police searched his flat later that day. He pleaded guilty and was remanded on bail but absconded with an associate to the North Island. At Te Kaha on the East Coast they cultivated cannabis. In consequence the appellant was charged indictably at Gisborne with cultivating cannabis and there was also a charge of possession of cannabis for supply. After depositions had been taken he pleaded guilty to the cultivation charge and was committed to the Supreme Court for sentence. He was also committed for sentence on the charge of supplying in Dunedin. No doubt that was done because of the other

matters pending against him in the Supreme Court. On the Gisborne charge of possession for supply he stood trial in the Supreme Court and was acquitted.

On 29 February 1980 in the Supreme Court he received an effective total sentence of four years' imprisonment, being four years on the Dunedin supplying charge and one year, to be served concurrently, on the Gisborne cultivation charge. The latter sentence was the same as that passed on his associate, who faced a similar charge. The appellant seeks leave to appeal against the four year sentence only.

A police summary of facts relating to the Dunedin matters stated that on the afternoon of 27 October the police were informed that a named girl aged 16 had purchased two bullets of cannabis from an address in Dunedin. As a result of inquiries they visited the defendant's address. He admitted he had sold the girl two bullets at a total cost of \$32. He said that he had bought them for \$30 from a local hotel. A search of his room was made and six bullets and \$50 in cash were found in a drawer. He admitted that the cannabis was his - 'for his own use, or for sale to other people'. There is a note '40 grams approximately'. The information regarding the cannabis found in his possession at Dunedin refers confusingly to various provisions of both s.7 and s.6 of the Misuse of Drugs Act 1975, so it is not clear whether possession only or possession for supply or sale was intended to be charged. In the event he was merely convicted and discharged on that information.

On sentencing at Gisborne, counsel for the defendant apparently told the Judge that, according to his instructions, the defendant had been introduced to the girl at a hotel 'that evening'; that in those surroundings the defendant thought she was older than 16; that he also thought she was no stranger to drugs; that she asked him if he could supply her with some cannabis; and that he did sell the two bullets to her as stated in the police summary. In this Court counsel for the appellant repeated these instructions and told us that he thought that five or six reefers could have been made from each bullet. Counsel for the Crown retailed to us instructions giving a rather different version of what happened, but this was not before the Judge, nor verified in any way, and counsel for the appellant was in no position to comment on it. We could not properly act on it. In any event it included no suggestion that the appellant rather than the girl had instigated the sale.

The defendant pleaded guilty and the Judge was not asked to hear evidence on the apparent age of the girl. He was fully entitled to sentence on the basis that the defendant had been willing to supply a girl under 18. On the other hand it would not be right to assume that the defendant was willing to sell to a young person not previously initiated to cannabis. Nor did the Judge go as far as that in his brief remarks on sentencing. He described the offence as a very serious one indeed and said:

I don't mind in the least, Smith, how it came about that this sale took place, the stark fact is that you are so immoral, and so unprincipled, that you were prepared to sell drugs to a 16 year old girl, a dirty trade, in which you chose, even if asked, to engage, and one for which you must serve a considerable period of imprisonment.

While any such supply by a man to a girl of 16 has to be viewed seriously, we cannot agree that this particular offence was of such gravity as to call for a sentence of four years.

The probation report shows that the appellant is 24. He has a record of minor offences including two for possession of cannabis. As well as being an habitual smoker of cannabis he has had an alcohol problem, which is reflected in some of his other convictions. These facts can have no great influence on the proper sentence in such a case as this; the nature of the offence and the general pattern of sentencing are much more important.

Under the Narcotics Act 1965, s.5, selling or supplying cannabis was punishable by the same maximum penalty as selling or supplying other narcotics, namely 14 years' imprisonment. The Misuse of Drugs Act 1975 introduced a classification of controlled drugs into three categories and made supplying a class C drug to a person under 18 an

offence for which the maximum penalty on conviction on indictment is eight years' imprisonment. Cannabis plant is in that category. Selling (i.e. not merely supplying) a class C controlled drug to a person of or over 18 was made subject to a similar maximum penalty on indictment. But on summary conviction for these offences the maximum in a Magistrate's Court was laid down as imprisonment for one year or a fine not exceeding \$1000 or both.

No change in those 1975 maxima was made when the penalties for dealing in class A and class B drugs were increased by the Misuse of Drugs Amendment Act 1978. And the legislation makes other distinctions between the classes of drugs. Parliament and the Courts have treated dealing in class C drugs as serious enough but in general significantly less serious than dealing in harder drugs.

The present was a case of a fairly small retail sale. The appellant's statement that he made a profit of only \$2 has not been disputed. He had no previous convictions for dealing and there were no indications that he was dealing in more than a small way. Apart from the age of the girl it was one of the lesser cases of its kind. But we agree with the Judge that her age made a custodial sentence clearly appropriate.

The pattern of sentencing in cannabis-dealing cases is shown by the following examples of cases which have reached this Court. To bring out the distinction in levels we include some examples of sentences concerning class B drugs.

✓ Stuart (C.A. 84/75; judgment 17 October 1975)

Possession for supply of 218 grams of cannabis plant material; appellant, a student teacher aged 21 and a first offender, apprehended packeting into marketable lots. Sentence of 18 months' imprisonment upheld but described as 'no light one'.

✓ Bryant (C.A. 83/75; judgment 17 October 1975)

Possession of more than one pound of cannabis for supply. Defendant aged 27, with previous convictions for possession of cannabis, had been a junior university lecturer. Two and a half years' imprisonment reduced to 18 months.

✓ Hinckesman (C.A. 35/76; judgment 31 May 1976)

Possession for sale of 381 buddha sticks, street value about \$3500. Previous sentence of four years' imprisonment for supplying heroin. Sentence of three years' imprisonment upheld.

✓ Day and Van Deusen (C.A. 19/76, 22/76; judgment 4 June 1976)

Possession for supply of 1650 buddha sticks, street value about \$25,000, by appellants closely connected with the importation. Sentences of four years' imprisonment upheld.

✓ Stevens (C.A. 98/77; judgment 4 October 1977)

Possession of about 532 grams of cannabis for supply. Joint enterprise by four men. Appellant had previous conviction for supplying cannabis. Other adult offenders sentenced to six months' imprisonment. Sentence on appellant of two

years reduced to 12 months as too much weight given to previous conviction.

✓ Buxton (C.A. 63/78; judgment 7 December 1978)

Cannabis for supply to persons over 18; 52 deals, street value \$1250, profit of \$3 per deal. Previous conviction for supplying cannabis, when fined and sentenced to periodic detention. A co-offender in present offence had been sentenced to 10 months' imprisonment. Sentence of three years' imprisonment on this appellant reduced to two years on ground that disparity with co-offender's sentence too great.

✓ Stott (C.A. 98/78; judgment 10 April 1979)

Possession for supply of cannabis resin - a class B drug; block of 232 grams. Appellant aged 24, previous drug convictions but not for dealing. Effective sentence of three years' imprisonment upheld.

✓ Chapman (C.A. 149/78; judgment 26 April 1979)

Effective term of two years three months on two counts of selling cannabis and one of offering to sell heroin; transactions with undercover constable involving only \$145 in all. Tragic personal history of drug involvement. Sentence upheld.

✓ Woods (C.A. 311/79; judgment 29 May 1979)

Two sales of cannabis plant to undercover officer, totalling 150 bullets, price \$1285. Appellant aged 24. Sentence of

18 months upheld, described as 'perhaps near the limit of the range of penalties for this particular offence and quantity'.

✓ Johnson and Tito (C.A. 196/78, 203/78; judgment 8 June 1979)

Apprehended when travelling on 'Northerner' with substantial quantity of cannabis grown by one of appellants. 'An organised foray into the lower half of the North Island for the purpose of disposing of it.' Sentences of 18 months upheld.

✓ Shields (C.A. 184/78; judgment 3 July 1979)

Possession of 3.47 pounds of cannabis plant, found in house of man aged 36, first offender. Statutory presumption relied on by Crown; little direct evidence of dealing. Sentence of two years upheld.

✓ Le Cheminant (C.A. 60/79; judgment 27 August 1979)

Supply of class B drugs, cannabis oil and resin. Four years upheld.

Rohloff (89/79; judgment 5 September 1979)

Sale to undercover constable of two lots of cannabis leaf for total of \$20; previous conviction and imprisonment for possessing cannabis for supply. Sentence of 15 months upheld but described as severe.

✓ Brown (C.A. 95/79; judgment 15 October 1979)

Cannabis for supply; 'just sufficient to bring into force

the statutory presumption'. Previous convictions for possession. Effective sentence of six months upheld, fine quashed.

Leydon (C.A. 136/79; judgment 10 December 1979)

Possessing class B drug, cannabis resin, for supply and attempting to supply it. Aged 28, about to supply young woman aged 23; total resin 6.96 grams. Previous convictions for possessing oil and leaf for supply ; then treated leniently by periodic detention. Sentence of two and a half years upheld, though described as severe; weight placed on previous conviction and present climate of legislative and judicial opinion.

Easton (C.A. 173/79; judgment 4 February 1980)

Possession of two grams of heroin and 206 grams of cannabis for supply. For first offence sentenced to three months' imprisonment and fined \$500; for second 18 months concurrent. Fine cancelled (Judge misinformed as to resources). Cannabis sentence reduced to one year. No previous convictions; heroin addict after taking the drug to relieve pain following accident; 'totality' principle.

Reid (C.A. 116/80; judgment 19 June 1980)

Possession for supply of 119 grams of cannabis found in various places in appellant's house. Previous conviction for possession. Sentence of six months' imprisonment upheld.

2 In Smith (supra) our Court of Appeal commented that

The level of cannabis-dealing sentences upheld in this country seems broadly comparable to the United Kingdom level. An article in (1979) 129 N.L.J. 899, which collects a number of sentences, mentions that in Magistrates' Courts a fine is nowadays usually imposed on the user or very small trafficker; that 'a small scale supplier of cannabis would expect about two to three years'; and that students in possession of substantial amounts of cannabis and permitting premises to be used for dealing with cannabis will probably receive an immediate prison sentence, probably one or two years, though suspension might be possible. We also understand effective sentences in New South Wales to be comparable.

It is clear from the list that the four-year sentence in this case is out of accord with the general trend of sentences for dealing in cannabis plant on the comparatively small scale revealed by the police summary. And, as to dealing, the appellant is entitled to be treated as a first offender. Against that is the serious fact of a sale to a girl under 18.

Without fuller information about the facts we would not be justified in regarding this offence in an altogether different light from the local assessment made when the charge was laid summarily. If dealt with in a Magistrate's Court (now a District Court) it would have attracted a maximum sentence of one year and a maximum fine of \$1000.

This is a case in which a fine would serve no purpose. The appellant's attitude to the drugs legislation is underlined, however, by his subsequent actions and should not be ignored. What has to be decided is the appropriate total sentence for the offences in Dunedin and Te Kaha; he cultivated 68 plants at Te Kaha while the Dunedin charges against him were pending.

Weighing these factors we think that the sentence for the supplying in Dunedin should be one year's imprisonment, cumulative on the one year imposed for cultivating, making a total effective sentence of two years. Leave to appeal is granted and the sentence amended accordingly.

R B Cooke J.

Solicitors:

D.D. Rishworth for Appellant

Crown Law Office, Wellington, for Crown