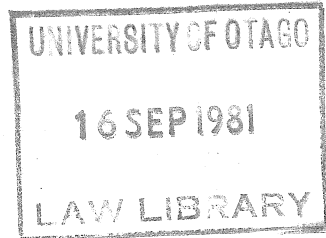


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IN THE COURT OF APPEAL OF NEW ZEALAND



C.A.14/81

THE QUEEN

v

EDWIN FRANCIS DUTCH

CORAM: Davison C.J.
McMullin J.
Mahon J.

Hearing: 13 July 1981

Counsel: R B Squire for Crown
G L Turkington for Respondent

Judgment: 7 August 1981

JUDGMENT OF THE COURT DELIVERED BY MAHON, J.

This is an application by the Solicitor-General under s.383 (2) of the Crimes Act 1961 for leave to appeal against sentence.

The respondent pleaded guilty in the District Court at Nelson to an information laid indictably under the Misuse of Drugs Act 1975. The information alleged cultivation

of a prohibited plant, namely cannabis, in breach of s.9(1) of that statute. Following his plea of guilty the respondent was committed to the High Court at Wellington for sentence, and on 13 February 1981 he was sentenced by that Court to imprisonment for 18 months. It is submitted by the Crown that such a sentence, having regard to all the circumstances, was manifestly inadequate.

The facts of the case were that on 22 January 1981 the Police, by using a helicopter, located a large plot of cannabis under cultivation on Takaka Hill in the Nelson district. The area was visited by detectives and it was found that the plantation, which was covered by three large wire-netting cages, was located upon land in bush country which is owned by the respondent. An examination of the site revealed that the cultivation of plants was aided by an irrigation system whereby a truck owned by the respondent, on which was a 3,000 litre water-tank, was used with a water pump to lead water into underground hoses leading to a smaller tank situated at the plantation. The scene was guarded by the Police and that evening the respondent was seen to get out of a car on the main road near the property, but despite the use of a Police tracking dog and a helicopter search the respondent could not be located.

On the following morning the respondent called at the Nelson Police Station and admitted cultivating the cannabis plants which the Police had found. He said there were no other persons involved. He said that he had purchased 150 metres of plastic piping which had been laid underground in

order to camouflage the water supply, and he admitted the use of his truck with the water-tank to supply water to the tank at the plantation site with the aid of a water pump. He explained that he had started carrying soil into the plantation area in about March 1980, and had placed on the site 195 twelve-gallon drums cut in half so as to commence the cultivation of cannabis. He said that he had germinated the cannabis seeds himself and had planted approximately 1,000 plants in the drums. The purpose of the wire-netting was to camouflage the plantation. The respondent said he intended to harvest the cannabis and then store it till mid-winter when cannabis prices were higher. He said he was hoping to receive between \$20,000 and \$40,000 for the harvest. He hoped to obtain more than 15 pounds of cannabis leaf in order to take to Auckland for the purpose of finding a market in that city. He explained that profits to be derived from the harvest were to be used to establish some beehives and a small factory in order to go into a productive business. On the same day the Police went to the plantation site and recovered 732 cannabis plants which were bushy and up to one and a half metres in height. The respondent admitted to two convictions for possession of cannabis and hashish in Nepal, but he has no previous convictions in New Zealand. He is 30 years of age.

It appeared that when the respondent appeared before the High Court for sentence his counsel explained that a yield of \$40,000 was not in fact feasible in view of the quantity of cannabis being grown, but it was admitted that the profit to be derived by the respondent would have been at least \$20,000 and this was conceded by the Crown. The learned Judge described

the cultivation as being a sophisticated enterprise carried out in a fairly remote area and in circumstances where the existence of the plantation was difficult to detect. He went on to say that it was an elaborate operation which had required considerable planning and preparation, and that at the time of apprehension the respondent had been about to put \$20,000 worth of cannabis leaf onto the New Zealand market. In addition to imposing a sentence of 18 months' imprisonment the learned Judge at a later date also made an order under s.32 of the Misuse of Drugs Act 1975 for the forfeiture of the motor truck and tank which were accepted as having a combined value of \$1,200.

The submission of the Crown that the sentence was manifestly inadequate was based upon the consideration of a number of cases in which sentences for cultivation of cannabis had been considered by this Court, and it was submitted that the sentence of 18 months' imprisonment was so far below the accepted level of sentence for this type of offence so as to justify the conclusion that the learned sentencing Judge went outside any proper exercise of his discretion.

In R v Smith (1980) 1 N.Z.L.R. 412 this Court considered an appeal by a person who had been sentenced for supplying cannabis, and for the purpose of establishing the pattern of sentencing in cannabis-dealing cases there was listed in the judgment the level of recent sentences approved by this Court in cases of trafficking in cannabis. We propose in this case to adopt a similar procedure, and to set out recent examples

of sentences for cultivation of cannabis which have reached this Court :

1. Beach (C A 177/77; Judgment 7 April 1978)

A small number of plants were cultivated in a wardrobe in the appellant's home. He was a secondary party to the offence. A sentence of Borstal training was upheld.

2. Edwards (C A 30/78; Judgment 16 August 1978)

The appellant participated in the very large-scale cultivation of plants involved in the case of McNab (see below). He did not play any dominant part in the enterprise and was not the initiator. A sentence of 5 years' imprisonment was for that reason reduced on appeal to 3½ years.

3. Collins (C A 65/78; Judgment 8 September 1978)

130 plants were being cultivated, and the appellant was not the principal party in the venture.

A sentence of 18 months' imprisonment was upheld.

4. McNab (C A 141/78; Judgment 1 May 1979)

This case involved the conversion of a wool-shed in a remote rural area into a hot-house which was lined with aluminium foil and there were installed heaters, fertilizers, fluorescent lights, an irrigation plant and the like. 1350 plants were found to be growing. This was an elaborate project which appeared to have

been designed to operate over an extensive period of time. A sentence of 5 years' imprisonment was upheld.

5. Skiadas and Vrettos (C A 103/79; Judgment 5 December 1979)

This was a plantation in a remote rural area.

There were discovered 489 growing plants and 83 seedlings. A sentence of 2½ years' imprisonment in each case was upheld.

6. Rodgers (C A 228/79; Judgment 6 March 1980).

The appellant had converted a basement in his house to a hot-house supplied with heating appliances and plant nutrients. 40 plants were found to be growing. This was not a commercial operation, but the plants were intended not only for use by the appellant but for supply to some of his friends. A fine of \$7,000 was upheld.

7. Rose and Finlayson (C A 83/80, C A 131/80; Judgment 10 October 1980).

Several cannabis plantations had been established by the appellants in a remote area of Northland. There was an irrigation system and the plants were fertilized and sprayed. The cultivation was described by the sentencing Judge as a "carefully planned horticultural operation". At least 1865 plants were involved. The sentencing Judge was told that the estimated value of the crop was to the order of \$250,000 whereas

it was agreed on appeal that the true estimated value was about \$85,000. Each of the appellants was treated as a first offender. The sentences appealed from were 4½ years in the case of Rose and 5 years in the case of Finlayson. Each sentence was reduced by 1 year by reason of the erroneous information given to the sentencing Judge as to the value of the cannabis involved. Accordingly the sentence passed on Rose was amended to 3½ years, and on Finlayson to 4 years.

8. Dunlop (C A 68/80; Judgment 21 November 1980).

114 plants were found growing in a disused fowl-house on the appellant's property. Appliances for heating and supply of water had been fitted. The appellant was not the originator of the scheme but had been a willing party to it. A sentence of 18 months' imprisonment was upheld.

9. Comer (C A 245/80; Judgment 3 June 1981).

This case involved two charges of cultivating cannabis on separate dates. The first charge involved 56 plants and about 300 cannabis seeds, and the second charge involved six plants in pots and about 100 seeds. This was an unusual case in that the appellant was the founder of a religion to which there were in due course attracted some 200 to 300 adherents in the Auckland area. It appeared that the appellant's church was founded upon conventional

Christian philosophy except that it advocated the use of psychogenic drugs - cannabis and LSD - as a means of enlightenment. The plants were grown by the appellant exclusively for dispensing to adherents of his church, and there was no profit motive.

Concurrent sentences of 9 months and 12 months' imprisonment respectively were upheld.

The in Amintel (supra)
~~A study of this list of sentences either~~
 sanctioned or imposed by this Court *afford* on charges of cultivating cannabis reveals the widely varying circumstances in which this particular offence may be committed. Unlike other Class 'C' drug offences provided for by the Misuse of Drugs Act, in which various types of cannabis trafficking are provided for, including supply to persons under or over the specified age of 18 years, s.9 of the statute merely defines the single offence of cultivation. ~~Trafficking in cannabis, under s.6,~~ attracts a maximum penalty on indictment of 8 years' imprisonment as provided for by the Misuse of Drugs Amendment Act 1978, whereas the latter statute made no alteration to the maximum penalty of 7 years' imprisonment provided for under s. 9 (2) in respect of conviction on indictment for the offence of cultivation. ~~It can be seen from these comparative~~
~~statutory penalties that~~ the Legislature has treated the cultivation of cannabis as approximating to the same level of culpability as having possession of cannabis for the purpose of supply, and in the case where a substantial crop of cannabis plants have been cultivated the sentences approved by this Court,

as illustrated by the tabulation just referred to, have been at the same general level as those referred to in R v. Smith (supra) where there had been possession for supply in a substantial quantity.

The Court said
~~We think~~ that in principle there can be no reason for different levels of sentence in a case of possession for supply, and a case where cannabis resulting in the same quantity is cultivated on a commercial basis, because the harvesting of a substantial crop of cannabis places in the hands of the offender a considerable quantity of cannabis leaf for the purpose of supply. As was rightly said by the sentencing Judge in this case, the sequel to successful and substantial cultivation is the ability to place on the market, at a large profit to the offender, considerable quantities of a prohibited drug.

It was said in R v Smith (p.415) that the level of cannabis-dealing sentences upheld in this country seemed broadly comparable to the United Kingdom level in that a fine is usually imposed upon the user or the very small trafficker, and that a "small-scale supplier of cannabis would expect about 2 to 3 years". The reason for reducing the sentence in Smith's case to 1 year's imprisonment was that he was not even a small-scale supplier. But in relation to the type of sentences approved by this Court and the examples listed in R v Smith, it is worth noting that in the case of Day and Van Deusen possession for supply of cannabis with a street value of about \$25,000 resulted in sentences of 4 years' imprisonment being upheld:

As for the sentences hitherto sanctioned or imposed by this Court on charges of cultivating cannabis, it might be said that in general the offence may be divided into two categories, namely, commercial and non-commercial cultivation. But in our opinion examples of commercial cultivation vary so widely in their circumstances, and particularly in the extent to which cultivation has been practised, that commercial cultivation should itself be treated as including two categories of offence depending upon whether the purpose of cultivation is to sell the produce for profit on a minor or major scale. *The Court observed that the* For this reason we think that the examples of *schedule F* cultivation sentences which we have previously given, illustrated three broad divisions of this class of offending;

1. At the lowest level of culpability are cases where the offender has cultivated a few plants on his own property exclusively for his own use. Sentences for cultivation to that extent have not been considered by this Court, as obviously they will normally be dealt with by a fine or some other form of non-custodial penalty in the District Courts. But there will be offences of a more serious kind in relation to non-commercial cultivation where terms of imprisonment or heavy fines will be appropriate. ~~Suitable examples are the cases of Rodgers and Beach already referred to.~~
2. The second class of offending involves cultivation for commercial purposes where there will be a large number of plants, running into scores or hundreds, very often growing

in a small prepared plot of ground in a remote region, and accompanied by the object of deriving a substantial profit from harvesting and sale. Such cases are normally of the type which involve small ventures engaged upon for the purpose of generating a substantial profit on one occasion only, and are illustrated by such cases as Collins, Dunlop and Skiadas where a sentence of imprisonment must be the ordinary result and where the severity of sentence will in general vary in accordance with the size of the crop under cultivation.

3. The third and most serious class of offence of cultivating cannabis is represented by cases where the cultivation is on a very large scale normally involving 1,000 plants or more. This measure of cultivation is sometimes effected by converting a large building into a hot-house equipped with sophisticated cultivation aids of the type used in McNab's case, and where such installations may appear to disclose either intent or ability to use the established system of cultivation as a continuing operation. But cultivation on a similarly large scale may also be achieved by outdoor plantations in remote areas, as in the case of Rose and Finlayson, ^{The Court saw} and we see no difference in the methods employed where the expected harvest is estimated to realize financial returns of \$50,000, \$100,000 or more. In the case of McNab, ^{1 May 1979 (CA 141/78)} who by contrast with his associate Edwards was a principal party to the venture, a sentence of 5 years' imprisonment was upheld by this Court as opposed to a maximum sentence of 7 years,

it being considered that although the case was in the most serious category there must be, in accordance with settled principles, a necessary reduction from the maximum penalty so as to allow for cases of re-offending and other special circumstances.

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In separating the general offence of cultivating cannabis into these three classes, which we have stated in ascending order of culpability, we have taken care to describe them as general classes or divisions of offending, for the border-line between each class may in specific cases be indistinct and sometimes incapable of exact demarcation. But we consider that in most cases of this nature with which the Courts will be concerned in relation to the appropriate sentences, it will be possible to say that a specific offence falls clearly within one class or another. The particular class of offending should involve, more particularly in cases of commercial cultivation, a recognized level of sentencing which has been regarded as appropriate by this Court - as demonstrated by the decisions which we have cited. That approximate level of sentence should be the starting point of the task of the High Court in determining the right sentence to impose. But it is hardly necessary to say that the normal level of sentence may rightly be exceeded if such factors exist as a previous drug-trafficking conviction, or an excessively large number of plants under cultivation, just as the normal level of sentence may rightly be reduced if the planting of the cannabis, even for profit, involves a small number of plants or if there are

genuine mitigating factors such as being a secondary party, voluntarily confessing guilt, and the like. But in this connection we must refer to what we said in R v Rodgers (C A 113/80; 24 September 1980 - unreported) about drug-trafficking or dealing. In such cases very little allowance can be made for the personal circumstances of the offender, and we consider that the same rule must apply to a conviction for cultivation of cannabis where the offence was committed for financial gain.

We now turn to the facts of the present case. The respondent began to cultivate on his own land in a remote location 1,000 cannabis plants, of which 732 either approaching or at maturity were still growing when located and removed by the Police. We have described the disguised but effective irrigation methods which were employed, and the way in which the plantation was skilfully camouflaged. The purpose of the respondent was to reap a harvest which would produce to him a profit of at least \$20,000. The respondent was the sole initiator of the project. He came to the Police and confessed his crime before they approached him, but they had already discovered the growing plants and the obvious inference is that he knew that his offence had been detected. We are prepared to accept that this was to be a single venture designed to produce moneys which might thereafter be lawfully employed in farming operations upon the land owned by the respondent.

In these circumstances, the respondent thus falls clearly enough within the second class of offending to which we have referred. The general level of sentence approved by this Court for this class of offence, as shown by

the relevant cases cited, is between 2 and 4 years' imprisonment where the offender is shown to be the initiator of or a principal party to the venture. Here, the respondent had 732 plants ready for harvest and, as we have said, was the sole proprietor of the illegal enterprise. He is therefore plainly in the upper level of this second class of offending. In our view we must therefore accept the submission of Mr Squire for the Crown that the sentence of 18 months was manifestly inadequate, and we consider that the appropriate sentence was 3 years' imprisonment.

The application by the Crown for leave to appeal is accordingly granted, the appeal is allowed, the sentence of 18 months' imprisonment imposed by the High Court is set aside, and we substitute a sentence of imprisonment for a period of 3 years.

Mr. Lushan J.

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Solicitor for Respondent:

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