

**LOW
PRIORITY**THE QUEEN

v

ROGER BERKLEY MORTON

LR 167

Coram: McMullin J
Bisson J
Henry J

Hearing: 14 May 1987

Counsel: Mr R B Squire for Crown
Mr J E Boyack for Appellant

Judgment: 14 May 1987

ORAL JUDGMENT OF THE COURT DELIVERED BY BISSON J

The applicant pleaded guilty to a joint charge with one Stacey of the cultivation of cannabis. He was discharged under s.347 of the Crimes Act 1961 on a charge of possession of cannabis for the purpose of supply. He was sentenced in the District Court at Auckland to 18 months imprisonment. His co-offender, who also pleaded guilty to the joint charge of cultivation of cannabis and to possession of cannabis for the purpose of supply was sentenced on the totality of that offending to three years imprisonment.

The facts of the case are that on the 2nd of May 1986 the police were called to the property of the applicant at 125 Hall Avenue, Mangere, where intruders were acting suspiciously. The police found they were taking possession of

cannabis plants at this property and were in the course of removing them from the property in a vehicle. The applicant and the co-offender were present at the address when the police arrived. This property of the applicant covers an area of approximately three acres and comprises a dwelling, outbuilding, two large glass houses which were then being used to grow tomatoes. Part of the land in question was being used originally by Stacey for market gardening but he had moved into the cultivation of cannabis with the assistance of the applicant in the particular ways to which reference will shortly be made.

The police carried out a full search of the property and located a large number of cannabis plants growing there, varying in height from 450mm (18 inches) to 3m (ten feet). There was also found in the attic of the house a drying or storage area for cannabis plant material. A total of 17 cleensaks full of dried cannabis was found stored in this area and a further amount of approximately one and a half to two cleensaks of plant material was found spread out on newspaper for drying from the heat absorbed through the roof. This was in the attic of the house occupied by the applicant.

A further vehicle in addition to that being used by the intruders which was fully laden with cannabis plants was also located on the property. This was a vehicle owned by Stacey and it was also fully laden with freshly cut cannabis plants.

All of the plants and dried material located at this address were loaded onto a truck for weighing and analysis and according to an agreed statement of facts, the weight which would have resulted from the drying of the fresh leaves and heads was estimated after processing at 52 kg of useable plant material. Stacey contended that the resulting product possessed for supply to others would have fetched \$40,000 to \$50,000. The police estimated the amount of useable and saleable cannabis plant material would have amounted to 52 kg and at \$1,000 per pound gives a return for sale of \$114,400.

The Judge on sentencing said,

"There can be no dispute that the plantation flourished to something like 540-odd plants, at the time of the police arrival, in five different allotments;"

He then went on to describe those allotments and the quantity which was found drying in the applicant's home and further referring to quantities and values he said,

"Viewed in any light this was, or developed into, a large scale cannabis operation whereby in the fullness of time you would have filtered through into the market, and thus into the hands of various members of the community, a quite massive quantity of cannabis at almost a small fortune reward to you."

He was referring at that stage to Stacey.

When questioned by the police, the applicant said that sometime around the middle of 1985 Stacey asked him if he could grow cannabis on his property. He admitted he had agreed to let him and said that around October 1985 Stacey

had planted cannabis plants on the property and that he had given him advice on what to do, when to water them, what sprays to use. It should be mentioned that the applicant had a Diploma in Horticultural Science. He said to the police that he let Stacey plant cannabis on the property, that he expected some cash in return, either that or help around his place with the growing of tomatoes. He said that at some stage Stacey had harvested some plants and he had allowed Stacey to store the plant material in the ceiling of his house.

The view taken of these facts so far as the applicant is concerned was expressed by the Judge on sentencing in this way,

"I accept you were not the instigator of the offending, but you were a vital part or ingredient in the growing of the cannabis in that you made available and kept available that without which there could be no plantation - rich, fertile soil. On your own admission, you gave advice as to the type of sprays to use, when to water, as well as, of course, providing the attic for the purpose of a drying kiln."

Mr Boyack's main thrust in support of the appeal was that the Judge had wrongly attributed to the applicant a profit motive in his part in the cultivation of cannabis. Mr Boyack advanced four reasons why the applicant did not have a profit motive.

First, that the applicant took no part in protecting the crop when it was invaded by intruders. Secondly, that the co-offender Stacey was using one acre of the applicant's land for market gardening so that any recompense by Stacey for use of the land could be for a legitimate purpose.

Thirdly, with reference to the passage in the applicant's statement and included in the agreed statement of facts that he, the applicant, expected some cash in return for letting Stacey use his land, that must be qualified by the words which immediately followed, "either that or Barry would help me round my place with growing tomatoes". And fourthly that there was no evidence of any agreement or discussion of any financial benefit to the applicant from the sale of cannabis. For these reasons, Mr Boyack submitted that the Judge was wrong in finding a financial involvement on the part of the applicant.

The applicant gave evidence on sentencing, that is, in addition to the agreed statement of facts before the Court and the Judge referred to the applicant's evidence in these words,

"You have professed to have no knowledge as to the number of plants in the plantation, of the stages of maturity, the height to which they had grown. You have confirmed this on oath when giving evidence in this Court.

I regret I must record that having had the opportunity of observing and judging your responses in evidence, I simply do not believe you.

Likewise, your contention that you were not to receive any of the profits of the sale of the cannabis. I do not believe this. I do not accept that you in your situation were prepared to risk your all merely for the sake of accommodating your friend Stacey.

I will accept that there may have been no firm or fixed arrangement as to the shares because neither of you knew what profit would evolve."

That is a finding of credibility. We are in no position to take a different view but it does not appear to us that the Judge sentenced on the basis that the applicant was a partner in a cultivation of cannabis for financial gain.

At a later stage on sentencing, although rejecting Mr Boyack's submission that the applicant personally had no profit motive, the Judge said,

"You have pleaded guilty to the joint cultivation with Stacey, and even if it were a fact that Stacey was the only partner with profit motive, as you were a party in the venture which had financial gain as its object you became tainted with that object through him."

We entirely agree with that approach. The applicant must accept that the cultivation was for profit even if he was not personally to share to any appreciable extent in that profit.

Mr Boyack went on to submit that the Judge had not given sufficient weight to personal characteristics of the applicant which would indicate he did not have a materialistic approach to life, on the contrary, he was generous in his care for others and was greatly influenced as Dr Culpan said by his need for Stacey's companionship to bring a bit of colour into his life.

In the end, we are satisfied the Judge did not treat the applicant as having a financial part in the enterprise. He summarised his view as follows,

"In summary, therefore, though your physical participation in the venture was relatively minor or insignificant, you were a vital and integral part of the whole venture. Without you and what you had to offer, Stacey could not have conducted the operation."

"I proceed in sentencing you on the basis that you were a willing party and an essential partner in the cannabis cultivation on a large scale in the rather brazen manner I have already observed in dealing with your co-offender.

It was your land, your water, your irrigation, your sprays, and when required, your expertise."

If the Judge had, in the end, held that the applicant had a money motive, the sentence would, in our view, have been a substantially longer term of imprisonment.

Finally, Mr Boyack stressed that in the absence of the offence being committed for financial gain this was an exceptional case in which the court could have regard to the personal circumstances of the applicant and extend to him the mercy of the court. However, in our view the Judge went as far as he possibly could in that direction. He said,

"...though little regard can be had to personal circumstances of the offender, some regard may be given to the same in deciding the severity of the sentence."

He then listed the very matters which Mr Boyack has stressed in favour of the applicant, namely his frank acknowledgment of guilt, he was 58 years of age with a hitherto impeccable character, his actual involvement had been minor, that he was not the instigator but passively acquiesced and that he had elderly parents who depended greatly on him. In passing a sentence of 18 months imprisonment the Judge said,

"I consider the ends of justice can be met by my dealing with you with some degree of compassion."

This is a case which was fully and carefully considered by the court when passing sentence. Mr Boyack in this court has been assiduous in his argument on behalf of the applicant but we are not satisfied that the sentence was manifestly excessive or inappropriate in all the circumstances. The application for leave is refused.

Ch. Brown J.

Solicitors

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