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IN THE COURT OF APPEAL OF NEW ZEALAND CA.182/88

350 — Appeal — Cannabis cultivation — 18 months' imprisonment — W admitted cultivation of only 440 of 816 plants found — District Court Judge's conclusion W responsible for cultivation of all the plants not shown to be wrong — Leave dismissed and sentence sustained — *R v Waling* (Court of Appeal, 26 July 1988 (CA182/88) Casey and Bisson JJ. Judgment of the Court delivered by

THE QUEEN

V

ROY WALING

Coram	McMullin J (presiding) Casey J Bisson J
Hearing	26 July 1988
Counsel	F.P. Hogan for appellant J.C. Pike for Crown
Judgment	26 July 1988

ORAL JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

On 14 December 1987 a police party looking for cannabis plants and plantations on the Coromandel Peninsula arrived by helicopter at a property at Papa-Aroha, north of Coromandel township, owned by the applicant Roy Waling. In the vicinity of the house occupied by him and his wife they saw some plantations of cannabis plants. The police then interviewed Mr Waling who denied any involvement in the cultivation of the plants which were at various stages of growth and in several plots. Subsequently Mr Waling was charged indictably with cultivating cannabis at Papa-Aroha. Depositions on that charge were taken in the District Court at Thames and Mr Waling was committed for trial to the

District Court at Hamilton. However, before that trial took place he made a written request in the prescribed statutory form intimating that he wished to plead guilty to the charge. At the same time he made it clear that the plea of guilty was to be entered on the basis that he accepted cultivation of some only of the plants in the various plots but not all of them. His admission went to the extent of accepting cultivation of 440 of the plants. He did not accept that he had been responsible for the cultivation of a further 376 plants contained in plots, not on his property but in the near vicinity of it.

In accordance with accepted practice and following upon the determination of this Court in R v. Bryant [1980] 1 NZLR 264, an endeavour was then made to establish the degree of Mr Waling's involvement in the total cultivation and on 20 June 1988 a District Court Judge sitting at Hamilton heard evidence from Detective McDowall, who was one of the police officers who visited the property on 14 December 1987. The Court also heard evidence from Mr Waling himself. The evidence of the detective, if accepted, would have established that Mr Waling had been responsible for the cultivation of all the plants, a total of 816, and not merely the 440 to which he admitted. In his evidence Detective McDowall described the various sites on which the plants were under cultivation, their ages and degree of cultivation and he gave evidence as to the link up between the various plots by means of tracks through the surrounding

scrub. Mr Waling gave evidence denying his involvement and, indeed, knowledge of the cultivation of the other plots.

At the end of the evidence the Judge delivered a judgment setting out the findings of fact which he made after hearing the evidence of the detective and Mr Waling. He found it established beyond reasonable doubt that Mr Waling had been involved in the cultivation of not merely the 440 plants but the other 376 plants as well, making for a total of 816 plants. In his judgment he gave reasons for reaching that conclusion. These included the linkage of the various plots by way of tracks which could be reached from Mr Waling's house, the standard of cultivation of the plants, the fact that the soil was well worked and that the plants had been watered. He concluded that the only practicable approach to the cannabis plantations was by means of the tracks from Mr Waling's house or over what was known as the water track which was a track which led from the house to a water supply which provided water for the residence. He noted, too, that Mr Waling's nearest neighbour lived about half a mile away. He referred to the fact that when Mr Waling had first been approached by the police on 14 December he denied knowledge of any of the plants at all and he took that into account when assessing Mr Waling's credibility on the evidence which he gave.

In the result he said that the evidence led him to the inevitable conclusion that whoever cultivated the plants,

including the disputed plants, lived nearby and he observed that one individual who did live nearby and who was growing cannabis was Mr Waling himself. He thought that that was more than a coincidence; that it was a very strong pointer to the fact that nursery plants found by the detective were not the only plants grown in the nursery area. He concluded "I quite frankly am satisfied, and satisfied beyond reasonable doubt, that the cultivator of the plants in the plantation areas on the tracks off the bulldozed track or firebreak was the accused. And I so find."

On 1 July Mr Waling came before the same Judge for sentence. In his remarks on sentence the Judge referred to the degree of Mr Waling's involvement in the cultivation. He had been asked in the circumstances of the case to extend mercy to him because of certain personal problems with which he was involved. The Judge said that he regretted that he could not regard Mr Waling's case as one in which mercy was appropriate. He said that the reason for this was that there were many more plants involved than Mr Waling admitted, and that a considerable number of these were well tended and cared for and growing in a very healthy way. From this he inferred that Mr Waling had been involved in a major commercial growing. He then imposed a sentence of 18 months imprisonment which took account of Mr Waling's degree of involvement in the cultivation.

Mr Waling now applies for leave to appeal against that

sentence. On his behalf Mr Hogan has made two main points. First, he submits that it was not proven to the requisite standard of proof that Mr Waling cultivated the disputed cannabis, that is the 376 plants over and above those which he admitted cultivating; secondly, if that submission were accepted then the penalty of 18 months imprisonment imposed on Mr Waling should be reduced.

It is unnecessary for us to embark upon any philosophical examination of what an applicant in circumstances such as these is required to prove on appeal from a finding by a single Judge. But we can, having heard Mr Hogan urge upon us with great forcefulness and tenacity every consideration which could possibly be taken into account, say that we not only think that the District Court Judge has not been shown to be wrong in the conclusion he reached, but also think that on the evidence he was entirely right to conclude that Mr Waling's involvement extended to the disputed plants; that is to say that he was involved in the cultivation of at least 816 plants in the several plantations found by the police.

Mr Hogan conceded that if we reached that conclusion then he could not contend that the sentence of 18 months imprisonment was wrong. He recognised that it was only if he could persuade us that the District Court Judge was incorrect in the factual conclusion which he reached that the appeal against sentence could be sustained. We have

already indicated our view upon that matter and, having regard to the clarity of the judgment under appeal, we do not think it is necessary to comment further upon it. But we are indebted to Mr Hogan for his submissions, as indeed his client should be, and for the tenacity with which he has pursued this appeal.

It appears that the sentencing Judge was asked to extend some mercy to Mr Waling having regard to his personal circumstances and his prompt plea of guilty and his remorse. This is another one of those sad cases where a person in middle age and, to some extent, for altruistic motives has been induced to enter upon cannabis cultivation for commercial gain. But we are bound to observe that even if one accepts his claim that he embarked on the growing of cannabis seedlings in the hope of making some money to send his wife on a trip to England to visit her aged parents, the means which he chose for raising that money were entirely wrong and plainly unlawful. The extent to which personal circumstances may be taken into account has been the subject of a number of judgments in this Court. We need say no more than that, in the light of the prevalence of this kind of offending and the need to stamp it out by sentences of imprisonment, personal circumstances cannot loom very large in the consideration of the Court.

Mr Hogan mentioned that Mr Waling has for some time been suffering fromn a disability which is said to be caused by

the poisoning from spray and that he has been receiving treatment from Dr M.H. Tizard of Auckland for it. He has apparently embarked upon a course of treatment which will not end until 10 September. So far he has taken only three of the treatments involved but from what Mr Hogan told us Mr Waling, his wife and indeed Mr Hogan himself think that the treatment has brought about a marked improvement in his condition. We are hopeful that the treatment can be continued. However, we are unable to give any practical effect to that hope other than to observe that s.27 of the Penal Institutions Act 1954 makes provison for the removal of any inmate from a penal institution for medical treatment. It should be possible to invoke that provision here.

As already stated, we are of the view that the Judge was not wrong in deciding that Mr Waling's involvement was much greater than he admitted; that it was, in fact, as great as the police alleged; and that his degree of involvement was such as to warrant the sentence of 18 months imprisonment imposed. For these reasons the application for leave to appeal must be dismissed and the sentence of imprisonment sustained. We do, however, draw the attention of the Secretary of Justice to the desirability of continuing the treatment for Mr Waling in prison. Mr Pike on behalf of the Crown has undertaken to bring such to his notice.

The application for leave to appeal is dismissed.

Solicitors

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