HIGH PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND 30/8 C.A. 97/91

LESLIE HUGH GRAY

1599

v.

POLICE

Coram: Cooke P.
Hardie Boys J.
Holland J.

Hearing: 28 August 1991

Counsel: D.J.D. Sayes and M.B. Dodds for Appellant
Lowell P. Goddard Q.C for Crown

Judgment: 28 August 1991

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal on a question of law under s.144 of the Summary Proceedings Act 1957, leave having been granted in the High Court to appeal to this Court. In a summary prosecution in the Whangarei District Court the defendant was charged with having in his possession a Class C controlled drug, namely cannabis plant. Some 90 grams of the plant were found in his houseboat when the police searched it under a warrant properly obtained from the District Court. The District Court Judge who heard the charge nevertheless dismissed it on the ground that, as he put it:

> This is an unusual case with special facts applicable to this defendant. He has for some years maintained a consistent articulate and intelligent debate on the effectiveness of the Misuse of Drugs Act as it applies to the drug marijuana. That his home should be searched as a result of the admission that he made in the course of one such debate is in my view an abuse of the processes of the Court in that it strikes at the basis of honest debate and freedom of speech. In matters of this sort the Courts must not shrink from the task of protecting the greater principle even though it means that a person breaking the law by possessing cannabis should be acquitted.

From that decision the informant appealed to the High Court, where the case was heard by Henry J. By a judgment delivered on 7 February 1991 the Judge allowed the appeal, holding in short that the doctrine of unfairness or abuse of process did not apply. This Court entirely agrees with the conclusion of the High Court Judge. We regard the present appeal as without substance or merit.

As appears from the passage just read from the District Court Judge's reasons, the contention of unfairness or abuse of process has been based on a link between the discovery of the cannabis in the houseboat and a public admission made by the defendant. That admission came about in this way. For a number of years the defendant has been a prominent campaigner for the decriminalisation of cannabis. It seems that the Minister of Police initiated a form of public debate as to whether or not the law should be changed. The defendant was invited to take part in a television programme, called Holmes or The Holmes Show, relating on

this occasion to that issue. Apart from the interrogator in the programme, the other participant was a former head of the Auckland drug squad. Very soon after the programme began the interrogator asked each of the participants whether he smoked cannabis. The defendant replied 'Yes thank you Paul, I enjoy it.' Next day, on the basis of that admission a police sergeant applied for and obtained the search warrant.

For the appellant Mr Sayes in this Court has put the case on the ground, as he did in the Courts below, that the principles of freedom of speech and of public debate are at stake. He contends that the public interest in the conviction of guilty persons is at times outweighed by other and higher public interests - which, in fairly exceptional cases, is true. This, he argues, is such a case. With that we are unable to agree.

In the first place, the right of the defendant to speak freely and to participate in a public debate on an issue of public importance has been in no way curtailed or interfered with by this prosecution. He was free to speak as he did in the television programme. The prosecution has not been brought, and probably could not successfully have been brought, on the vague admission of cannabis smoking, without any reference to date or quantity, made by the defendant in answer to the question. There is no suggestion, as counsel for the appellant has acknowledged, that in any way either the

Minister or any other representative of the Crown had expressly or impliedly promised or suggested that some form of immunity from prosecution would attach to a public admission of a habit of cannabis smoking if such an admission happened to be made in the course of a debate about whether the law should be changed. In any event, as already mentioned, it is not the admission on which the prosecution is founded.

In the second place, while there certainly is a link between the admission and the discovery of the cannabis, since the warrant was obtained as a result of the admission, we consider that the action of the police in applying for the warrant is not reasonably capable of being seen as leading to an unfair obtaining of evidence or to any abuse of process. On the contrary, as Miss Goddard has pointed out for the Crown today, it could well have been seen to be remiss of the law enforcement agency to stand aside and ignore such a public pronouncement as that which the defendant let himself make. Had they failed to take any steps, notwithstanding that a prominent campaigner for decriminalisation had announced in effect that he was flouting the law, then there would have been a decided risk that a general public understanding could be encouraged that the cannabis law could safely be disregarded. That would be subversive of the rule of law. It is nothing to do with the issue whether or not the law should be changed, upon which Mr Gray and those

of like mind are fully entitled in our democracy to urge their views.

We accept the argument for the appellant to the extent that it is urged that this Court should not confine the unfairness or abuse of process principle to a closed and narrowly limited category of cases. No doubt it is a somewhat versatile principle and every kind of situation in which it might appropriately be applied cannot be foreseen. Still it gives an exceptional jurisdiction, never to be invoked without strong reason. In this case, for the reasons that we have given, we are satisfied that the principle is not reasonably capable of being applied.

Before parting with the case, we comment that it is possible that the defendant was taken by surprise by the direct question at the very beginning of the interview. Given time for reflection, he might not have spoken as he did. It may be that he had no notice that any such question would be put. Those matters are speculative. We mention them only because, if there is a conviction, penalty remains to be considered by the District Court Judge and it is at least arguable that the background to the discovery of the cannabis could be seen as having some bearing on penalty. In saying that, we are not in any way purporting to fetter the District Court Judge or even to indicate what view we ourselves

would take in the matter of penalty. It is merely something that he will be entitled to consider.

The appeal is dismissed. The order for remission of the case to the District Court, made in the High Court, therefore stands.

Solicitors:
Law North Partners, Kaikohe, for Appellant
Crown Law Office, Wellington, for Crown