LOW PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND 27/12 C.A. 18/91

THE QUEEN

2586

v.

HOGG

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

Hearing: 9 December 1991

Counsel: M.R.D. Guest for Appellant
J.C. Pike for Crown

Judgment: 9 December 1991

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

The appellant was found guilty after a trial before a District Court Judge and jury in Tauranga of cultivating cannabis on or about 10 January 1990 at Te Puke. He was sentenced to imprisonment for five years. The appeal is against both conviction and sentence.

As to conviction there are two broad grounds: first, that the verdict of the jury was unreasonable or cannot be supported having regard to the evidence and, secondly, grounds relating to the summing up. With regard to the first we consider that it is not made out.

The Crown case, although circumstantial, was by no means a weak one.

The basic facts as disclosed by the evidence are that the accused was living on the adjacent farm and spent much of his time working on that farm. The cannabis cultivated was grown in a bush or scrub covered gully on his own farm. From time to time he worked on his own farm and he had abundant opportunities of observing what was happening there. To a 20 mm pipeline on his own farm and at a point some 200-300 metres from his pumping station there was connected at some stage after he bought the farm a 15 mm pipeline. It was of 1988 manufacture. This ran down the hill or the slope into the gully through bush and terminated in a tap from which various plots were evidently watered by hose. When the police detected the plots, or some of them, by helicopter and descended by being winched into the property, at least 12 plots were discovered, most of the plants being between one and one and a half metres high. The defence says that there were indeed more plots than that, some 17. Police evidence appears to show a total of 2296 plants said to have been pulled out by the police. That is the evidence of Police Constable Oakley, whereas the accused's own analysis of the police evidence produced a total of 1838 plants. Whatever the true figure, there was a very large amount in a considerable number of plots. It was a sophisticated operation fed by

this pipeline. The pipeline drew from the accused's own water supply as already indicated. It was in evidence that he had been complaining about loss of water and investigating various possibilities as to how that had occurred. The Crown suggests that in that way he was covering his tracks. The defence retorts that it was a perfectly legitimate concern on his part as to the activities of possibly children or neighbours or intruders. What is clear is that whoever cultivated the cannabis was engaged in an extensive and continual operation. There is strength in the Crown case that, as the Crown says, it seems simply implausible that the accused would not have known what was going on.

There are various other issues in the evidence: for example the Crown points to a shed containing aluminium foil insulating material and a kerosene heater which could have been used in drying the cannabis when the current crop or some of it became available. The defence replies that it was for drying opossum skins. There is a dispute about whether the accused could account for 400 metres of 15 mm piping bought by him from a supplier in the district, and in that connection whether some 15 mm piping of 1987 manufacture ultimately produced by him had indeed been on the property when the police first searched it. There is evidence about the purchases of sundry horticultural supplies by the accused in quantities apparently more suitable for cultivating

cannabis than for major agricultural operations. As against that there is some evidence from a neighbour and other witnesses called for the defence which, if accepted at its face value, is to some extent helpful to the accused. There is also evidence from a bulldozer driver, Fraser Wallace McLeod, who deposes that in December 1989 the accused had instructed him to clear the face of the gully where at least some of the cannabis plots were later discovered. That clearing work had not been carried out before the police discovery, but explanations were given for that. It was essentially a jury issue whether the explanations and the testimony of the witness as a whole were satisfactory.

We have not attempted to survey all the evidence. It is sufficient to observe that in the light of that summary it is obvious that there was abundant evidence on which a jury could have convicted. The defence case was that all this had happened without the knowledge of the accused and that the cannabis plants were not discernible from a distance, hidden as they were in the bush. It even seems to have been suggested that the cultivation work could have been done at night. The jury would have been entitled to regard that as rather far-fetched; nevertheless it was essentially a jury issue. Had the jury brought in their verdict on a summing up not open to objection, the first ground of

appeal could not possibly in our view have been maintained.

But when we turn to the summing up, there are problems. On the whole it displays a definite leaning towards the Crown case, although not to the extent that it can be suggested that the Judge had overborne the jury or failed to put the defence; but there is that overall tendency. The Judge did little to conceal his own view of the truth.

It is against this background that one has to look at the specific complaints that can be made and have been made by counsel, Mr Guest, of what was said. It should be mentioned that the accused himself put in an elaborate compilation of his personal submissions. We have derived little assistance from these 61 typed pages, but we have been significantly helped by the argument of counsel. In the result there are several disturbing aspects of the summing up.

We mention first that an important issue in the trial was whether the feeder pipe which had been coupled to the 20 mm pipeline was piping purchased by the accused. The accused himself claimed that the alkathene piping purchased by him from the supplier already mentioned could all be accounted for. Whether indeed it

could was a major issue, but in the course of the summing up the Judge said:

> The police went back when they had been to Farmlands [a supplier] and found that 400 metres of alkathene piping had been purchased by the accused and tackled him as to where it was. They of course knew where part of it was because they had discovered the smaller amount in the lead-in from the main supply to the plots.

If that is taken as an undoubted fact it is almost the end of the case so far as the accused is concerned. We cannot avoid the conclusion that in putting the case as he did in that way, albeit perhaps inadvertently, the Judge was pre-empting the verdict of the jury on one of the main issues in the case.

Secondly, he made several comments to the effect that aspects of the defence case had emerged at the eleventh hour. It is true that some of them had emerged somewhat belatedly, in particular not until after depositions, though that is not altogether an uncommon feature of criminal cases. When the Judge said as he did that 'The evidence of Mr McLeod I think is very important evidence in this trial ... That at the very eleventh hour...' he was, perhaps unwittingly, exaggerating. One of the two main parts of Mr McLeod's evidence, the part about being instructed to clear the face, had been contained in a brief of evidence made available to the Crown and another Judge on a s.347 application before the

trial. So it was certainly not at the very eleventh hour. The same is true of a somewhat similar observation made by the Judge about the alkathene piping.

Another matter criticised by the Judge as belated related to the claimed discovery by Mr McLeod of a further track coming into the back of the plots. It is correct that this matter was not mentioned in the brief. Apparently it was spoken of by Mr McLeod for the first time in his evidence at the trial. Yet, when he was cross-examined, the cross-examination was only short and no reference at all was made to that topic. In those circumstances it was somewhat severe of the Judge to make quite strong comments as he did about the belated nature of Mr McLeod's evidence on that point.

Then there was an extensive direction on lies. Much of it was in orthodox terms, but the Judge said at the end of it:

> The final matter about lies is that you have to be satisfied that the actual lies, if you find there have been such, add something to the Crown case. And then if a lie does not add anything to a case then it is of no consequence at all. Here that is not really the position because if you found that Mr Hogg was lying about his participation in these events that obviously would strengthen the Crown case against him.

The direction related to the accused's evidence, not to anything he had said out of Court. If the jury were

satisfied that in his evidence the accused was lying about his participation in these events, a verdict of guilty was inevitable. The reference to adding something to the Crown case would have been better omitted. Still, taking the observations on lies as a whole, we do not think that they could have done the defence any harm; it is just that the addition unnecessarily complicated the case.

Then there is a point of greater significance. The Crown case at the trial was conducted on the footing that the accused was the principal or at least a principal offender. It would be shutting one's eyes to obvious possibilities to ignore the fact that, if the accused was involved, there may well have been others participating with him. Nor did the Crown's case as we understand it exclude that possibility, but it does seem that at no stage did the Crown suggest that the accused was merely a secondary party assisting or encouraging others. The defence was not called upon to meet that allegation. Yet in summing up the Judge said that he had raised that possibility at the outset of the trial, a remark presumably referring to some general instruction given by him to the jury when the case began, and he gave a direction at some little length on the matter, concluding:

> ... I simply wanted to mention that even if you found that Mr Hogg was not the person who tilled the soil and spread

> the manure and watered the cannabis seedlings, but that he was a party to it in the event, of assisting or aiding by allowing his land to be used with his knowledge and by assisting in perhaps a less direct fashion then he indeed would be a party and thus would be incriminated with guilt also.

So far as the strict law goes there appears to be nothing wrong with that statement, although it is a truncated one, but the fact remains that it was putting a case to the jury on a basis not contended for by the Crown. We do not think that it was right for the Judge to take the initiative in the way that he did.

When we view those particular points in the light of the tenor of the summing up, we are driven to conclude that the trial must be labelled unsatisfactory and that in that sense there has been a miscarriage of justice. It will be obvious from what has been said earlier in this judgment that we are by no means expressing an opinion that on a proper summing up this accused cannot be convicted, but we think that he is entitled to a more balanced trial than in the event he received. Accordingly the appeal against conviction will be allowed, the conviction quashed, and there will be a direction for a new trial.

R B Cooke P.

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