18/12

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.308/92

THE QUEEN

v.

2524

CHRISTOPHER KEVIN HARDING

C.A. 348/92

THE QUEEN

v.

SCOTT ROBERT MARTIN

Coram: Casey J (presiding)
McKay J
Thomas J

Hearing: 3 December 1992

Counsel: G J Burston and D Bolt for Crown
P H Surridge for Appellant

Judgment: 11 December 1992

JUDGMENT OF THE COURT DELIVERED BY CASEY J

These two applications for leave to appeal by the Solicitor-General heard together involve consideration of appropriate penalties for possession for supply and dealing in cannabis oil.

Harding pleaded guilty to a charge of possession of 50 capsules for supply, and 13.8gms of cannabis plant material. The capsules were found in a jar in his bathroom in June 1992 and the oil weighed 93gms and was valued at $3,500. His explanation

was that he had to sell the drugs to pay bills, and he admitted that $300 located at the address was the proceeds of the sale of cannabis oil. On 28 August 1992 he was sentenced in the High Court at Wellington to 9 months periodic detention.

Martin pleaded guilty to 4 counts of selling an undercover constable a total of 255 capsules of cannabis oil over a three week period in February 1992 for a total of $4,910. He also admitted selling him a bag of cannabis plant for $150. He was sentenced to 12 months periodic detention in the District Court at Auckland on 22 September 1992. The Judge convicted and discharged him on the cannabis plant offence.

For the Solicitor-General, Mr Burston submitted that these sentences were manifestly inadequate and substantially out of line with those for comparable offending, for which prison terms were the norm. In the absence of a settled sentencing pattern for offences involving cannabis oil he asked the Court to consider laying down guidelines for the assistance of Judges in the future. To this end he sought to have admitted affidavits giving information about the preparation, prevalence and effects of cannabis oil. From experience of the number of cases in which it features, the Court can accept that its use is becoming more common in New Zealand. As the facts in **R v Page (CA355/90; 17/4/91)** indicate, it can be produced without the need for specialised equipment or expertise. However, we were not prepared to accept the affidavits proffered by Mr Burston because of the lack of notice to the respondents, whose counsel were served with them only shortly before the hearing.

A similar complaint was made about his schedule of 22 sentences imposed for cannabis oil offences in the High Court and District Court in various centres between 6 September 1991 and 11 September 1992. Guilty pleas had been entered in all but three. He explained that these had been obtained over the past month and constituted as good a representative cross-sample as he could muster, and was not selective in any

way. This seems evident from a study of the schedule. Although respondents' counsel had no opportunity to check the cases or to advance similar statistics, we think it provides a helpful overview of current sentencing practice, in addition to the fuller reports of decisions on which counsel relied in argument. We do not propose to traverse them in detail. It is sufficient for us to say that prison sentences have almost invariably been imposed for dealing or possession for supply of other than small quantities of cannabis oil. Although some entries include convictions for manufacturing or other related offences, prison sentences have ranged from 2 years 6 months for 226 capsules (118.6gms) to 6 months for 15 foils (2.6gms).

In **R v Miller (CA231/92; 12/8/92)** involving the sale of 7 blocks of cannabis resin (3.61gms) for $200), we said :

> "Counsel found it difficult to refer us to any sentencing pattern involving such a small quantity of a class 'B' drug in a single transaction. From what they were able to put before us, it seems there is a range. In some Wellington High Court cases where there had been exceptional circumstances periodic detention was imposed, in others there were sentences of 12 months' imprisonment, but it must be said that those seem to have involved somewhat more serious circumstances than those present here."

Miller's counsel did not suggest that there should have been a non-custodial sentence. We said that for offences involving the sale of class 'B' drugs prison will be indicated unless there were exceptional circumstances, and in that case the term was reduced to six months.

Those comments reflect in general terms what had been said or implied in many of the cases to which we were referred. But the primary consideration in all these cases is deterrence, and with this in mind it has been made very clear over the years that the

personal circumstances of the offender are usually of little relevance when trafficking or possession for supply on any appreciable scale is involved.

Mr Burston referred us to the discussion in **R v Smith [1980] 1 NZLR 412** of sentencing patterns in cannabis-dealing cases. For comparison purposes he submitted that on the basis of examples given in that case, the supplier of one pound of cannabis might expect a sentence of a year's imprisonment. He was able to inform us that such a quantity would produce approximately 10gms of oil which would make approximately 20 caps, selling from $20 to $80 each, depending on quality and the state of the market. He felt this could suggest an approach to sentencing for offences involving cannabis oil by relating the penalties to those appropriate for the amount of cannabis necessary to produce it.

This may provide a useful perspective, and it must also be borne in mind that the active constituent of the drug in this form is highly concentrated, earning its place under part B of the Misuse of Drugs Act with a maximum of 14 years' imprisonment for supplying or possession for supply. Furthermore, cannabis oil, whether in capsules, foil or straws, is readily handled and transferred, and we have already referred to the comparative ease of manufacture. All these considerations justify the consistent view of the Courts that imprisonment is normally indicated for such offending. This was recognised by the Judge in sentencing Harding, when he remarked that the sale of class 'B' drugs where there are no exceptional circumstances almost inevitably leads to a prison sentence. A similar recognition is implicit in the remarks of the District Court Judge who dealt with Martin.

Both of them relied on a decision of this Court in **R v Chamberlain, Chant and Sinclair (CA372/91; 12/12/91)** as leaving the way open to a non-custodial sentence because of the offender's circumstances. But that case was one decided very much on its own special facts. Chamberlain had been sentenced to an effective term of

12 months' imprisonment for three sales of 100 capsules each totalling $8,800 to an undercover constable. The Solicitor-General's appeal was dismissed on the grounds that it was not shown clearly enough to be inadequate. Chant, who made two sales of cannabis oil for a total of $1,960 was sentenced to 9 months periodic detention and fined $750. Sinclair sold 59 capsules in two sales for $2,065 and received a prison sentence of 9 months, reduced from the 12 months thought appropriate, for co-operation with the police.

These people were caught in an undercover operation, and sentences passed on other offenders in the same exercise were also considered on the appeal. After noting the limited information available, this Court observed that the overall variations in sentencing led to the conclusion that there was insufficient to warrant interference with the Chamberlain and Chant sentences; and on that basis Sinclair's 9 months' required review to bring it into line. It was reduced to 6 months' periodic detention with 12 months' supervision, taking into account the month she had already served in prison. The Court was plainly concerned about the disparity in sentences passed by different Judges on offenders caught in the same operation. On the last page of the judgment it said :

> "We should emphasise that having regard to the limited basis on which we have been obliged to consider these appeals, these sentences are not to be taken as setting any benchmarks for class B offending. That can be done in an appropriate case where adequate information is tendered for that purpose."

In the present applications Mr Burston has made up the deficiency by tendering information about the offences and the background and previous convictions of the offenders in the schedule he has provided. We do not think it necessary to refer to it beyond the general comments made earlier in this judgment: they make it clear that having regard to the scale of offending in each of these cases, imprisonment was clearly

called for. There was nothing out of the ordinary or unusual about the circumstances of the offenders to warrant the non-custodial sentences imposed.

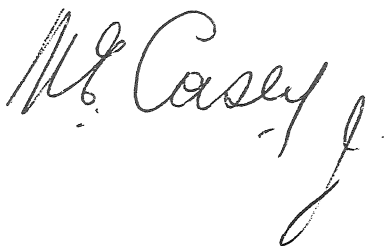
Harding was 41 with some physical disabilities and was unemployed. He had a de facto wife and in their care was her 16-year old son and 13-year old foster son. He explained he became involved in selling drugs to relieve his financial situation. He had been sentenced on 26 June 1991 to 5 months periodic detention for possession cannabis for supply, receiving a "final warning" in relation to imprisonment. He had no other history of drug offending. Those circumstances could not justify a departure from the norm of imprisonment.

Martin was one month short of his 20th birthday at the time of offending and had no previous convictions. He described himself as a fairly regular user of cannabis. He was unemployed, and had strong support from his mother, girlfriend and family friends. One can well understand the Judge's reluctance to send a young man of this age, of otherwise good character, to prison. But again, this background is not unusual; regrettably, many young people resort to drug trafficking to maintain their own habit, as appears to have been the case with Martin, who claimed that he had made no financial gain from the $5,000 he received, taking his compensation in drugs. We find it hard to believe that claim, but the sentencing Judge was prepared to give him the benefit of the doubt.

Mr Burston suggested a prison sentence of 12 months in each case would be appropriate. In Martin's case particularly, having regard to the scale of supply over such a short time, coupled with the inference that he had a ready source, we think a higher sentence could well have been warranted. Similarly with Harding, who frankly admitted he was in it for the money, and had ignored the warning about prison at the time of his previous conviction. Bearing in mind that this is a Crown appeal, however, we would not be disposed to go beyond the prison terms suggested by Mr Burston,

which effectively take into account the fact that both respondents have served some weeks of their periodic detention and have been in the community since sentencing.

The applications for leave to appeal are granted and the appeals are allowed. In each case the sentence of periodic detention is quashed and a sentence of 1 years' imprisonment imposed.



Solicitors: Crown Solicitor, Wellington (Harding)
Crown Solicitor, Auckland (Martin)