IN THE COURT OF APPEAL OF NEW ZEALAND 15/5 CA.73/92

NOT RECOMMENDED

THE QUEEN

V

697

FRITZ ERNEST TRABER

Coram: Richardson J
Jeffries J
Thorp J

Hearing: 13 May 1992

Counsel: T Sutcliffe for appellant
J C Pike for Crown

Judgment: 13 May 1992

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

This appeal is against concurrent sentences of three years imprisonment imposed on Fritz Ernest Traber in the District Court at New Plymouth on charges of manufacturing cannabis oil and possession of cannabis oil for supply to which he had pleaded guilty on indictment.

On a search under warrant of a house at Waitara police found a capsule of cannabis oil wrapped in tinfoil in a drawer of a dresser beside Traber's bed. Under the house they found an open stainless steel bowl containing 103 grams of cannabis oil. When spoken to Traber admitted that the capsule was his and was for his own use. Initially he denied all knowledge of the bowl of cannabis oil, but when questioned

further admitted that it was his stating that he had manufactured it and would either smoke it or give it away to cannabis using friends.

The deposition evidence was that cannabis oil was generally supplied in capsules holding from .5 to .8 grams of oil and that while the retail price could vary widely the current price in Taranaki was of the order of $35 to $45 per capsule. On that basis the retail value of the cannabis oil in Traber's possession was $4,000 or more.

Traber was 23 years old at the time of the offending. He had been unemployed for two years. He told the probation officer that he had become a regular user of cannabis and would like to address his problem. This was the third time he had been before the Court for drug offending. The first was in 1985 when he was fined for possession of cannabis; the second and much more relevant for sentencing purposes was in August 1990 when he was sentenced to periodic detention for possessing cannabis and cannabis seeds. The cannabis involved weighed over 50 grams and the seeds were almost 2,000 in number. Traber had only just finished serving that sentence of periodic detention when the present matter arose.

The sentencing Judge considered that for Class B offending of the present kind a deterrent sentence was required. The Judge considered that there were no particular aggravating or mitigating factors of importance in relation to the offence itself, but the quantity involved of over 100 grams was significant. He noted that it was in Traber's favour that there was no evidence of actual sales and no evidence of apparent financial gain in the past, and that Traber continued to deny having made any sales. The Judge, referring to the previous sentences, noted that he had not been subjected to any custodial sentences and although the plea of guilty was entered at a late point he accepted the reasons for that and gave credit for the fact of a guilty plea. Finally in

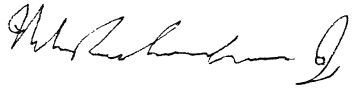
relation to the quantity involved, he accepted that Traber was a user and had friends who were users.

Mr Sutcliffe for the appellant submitted that the sentence was manifestly excessive having regard to sentences passed in respect of similar offending in Taranaki since December 1990. However the necessary starting point in terms of comparable sentences is in sentencing decisions in this Court, and ***R v. Page*** (CA.355/90, judgment 17 April 1991) is fairly closely in point. In that case the appellant was boiling up cannabis plant material to produce cannabis oil when the mixture ignited causing him serious burns necessitating hospitalisation for several weeks and plastic surgery. There the motive for the admitted manufacture was to sell the oil to pay off a debt. The sentence of one year ten months imprisonment, effectively two years imprisonment, was upheld. The Court concluded that leaving aside any special factors relating to Page, the nearly completed manufacture of such a quantity of oil for profit would justify a sentence in the range of 2½ to three years imprisonment. Mitigating factors on sentencing in that case were the absence of previous and relevant convictions, the physical injuries suffered by Page as a result of his criminal activities, and his plea of guilty. Nevertheless the Court concluded that far from the sentence finally reached by the sentencing Judge being manifestly excessive, it could see no ground for criticism of it. We should add that the New Plymouth cases to which we were referred involving sentences varying between six months and two years imprisonment all had distinguishing features, and in particular the quantities of the drugs involved were only a fraction of the 103 grams which Traber admitted manufacturing.

We have considered carefully everything that Mr Sutcliffe has said in support of the appeal. As he emphasised, there is no evidence that Traber was engaged as a dealer in a commercial enterprise, and he pleaded guilty on indictment having, perhaps understandably for a layman, not initially accepted that supply to cannabis using friends

came within the offence of possession for supply. But the quantity of 103 grams of cannabis oil manufactured in March and still in his possession in July was very substantial, and as in ***Page*** clearly put the case into the middle range of manufacturing cases. While it was not, and was not approached on sentence as involving, commercially motivated dealing, it was still substantial and serious offending by an offender with previous cannabis offences. In this regard it is a matter of concern that the manufacturing took place so soon after his last previous conviction and sentence for drug offending.

Three years imprisonment for this offending by this offender must be characterised as a severe sentence and at the upper end of the sentencing level available to the sentencing Judge, but we cannot properly conclude that it was a manifestly excessive sentence. The appeal is accordingly dismissed.



Solicitors:

Till Henderson King, New Plymouth, for appellant
Crown Law Office, Wellington