IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 214/96

THE QUEEN

v

ALLEN-FANNING

Coram:	Gault J Tompkins J Robertson J
Hearing:	7 November 1996 at Auckland
Counsel:	D Reece for the Appellant S Moore and G De Graaff for the Crown
Judgment:	7 November 1996

JUDGMENT OF THE COURT DELIVERED BY ROBERTSON J

In the High Court at Auckland, Allen-Fanning, having entered pleas of guilty in the District Court to two counts of importing class B drugs into New Zealand, was on 6 February 1996, fined $1500 and Court costs $95.

The summary of facts (which was not in dispute) indicated that he had been apprehended at Auckland airport upon his arrival on 28 November 1995 having flown from London's Heathrow. He was found to have 1.2 grams of hashish in a

block and .6 grams of amphetamine. He told the Police that he had brought them into the country for his own use.

The appeal is mounted on the sole ground that there should have been a discharge under s 19 of the Criminal Justice Act. The applicable principles were discussed by this Court in ***Police v Roberts*** [1991] 1 NZLR 205. We are not persuaded that there is any validity in the appeal.

First it is an appeal against an exercise of discretion. The test was enunciated by this Court in ***Halligan v Police*** [1955] NZLR 1185. The primary issue is not whether we would necessarily have done likewise but whether the appellant can demonstrate that the exercise of discretion was wrong. Elias J demonstrated that she had considered all the relevant issues and made an appropriate and available decision thereon. She weighed the competing factors and struck a balance. Mr Reece spent substantial time referring to two other decisions of the High Court, ***R v McAllister*** (High Court, Wellington, S43/94, 2 June 1994, Greig J) and ***R v Buchmann*** (High Court, Auckland, S59/96, 17 April 1996, Williams J). The Crown referred to ***Carradus v Police*** (Supreme Court, Christchurch, M595/78, 8 February 1979, [1979] BCL 140, Roper J). References to other cases decided on their own particular facts are of little assistance on an appeal such as this.

Secondly, we are persuaded in any event that the circumstances required the entry of a conviction. The community is entitled to mark its abhorrence of drug

importation even if it is properly described as being at the lower end of the scale and for personal use and without any commercial connotation.

The principles enunciated by this Court in ***R v Black*** (CA 68/93, 17 June 1983) remain good law. It was open to the Judge to determine that the particular culpability could be dealt with other than by way of a term of imprisonment, but to have discharged without conviction would have sent entirely the wrong message to persons entering New Zealand who have an involvement with illicit drugs.

Thirdly, the fact that the appellant had come from outside of New Zealand and his conviction has consequences as a result, is not a reason why the Court should treat him differently. This Court in ***R v Ahlquist*** [1989] 2 NZLR 177, made that clear. It is difficult to imagine that a New Zealand resident within New Zealand charged as a first offender with two charges of possession of class B drug would have been discharged without conviction. They would probably have been dealt with by way of a monetary penalty. There is no good reason of principle why a foreigner, who has the aggravating factor of having imported the illicit substance into the country, should be in a better position.

This man was sentenced early in February. He filed his application to appeal in July. Leave to appeal out of time would therefore be necessary. The only ground advanced is that it had then come to his attention that there had been a hearing in the High Court at Auckland where a discharge had been granted. That hearing was in mid April. We reject the suggestion that the latter case was on its

facts "indistinguishable", but in and of itself that would not provide a basis for granting leave after that period of time.

There is nothing which brings this appellant within any of the criteria which he has to meet to justify this Court intervening.

Leave to appeal is accordingly refused.

Solicitors:

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