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IN THE SUPREME COURT OF NEW ZEALAND
HAMILTON DISTRICT
HAMILTON REGISTRY

G.R. 80/72

BETWEEN JOHN MARTIN CLIFTON FIRTH
Appellant

NO 1x

A N D POLICE DEPARTMENT
Respondent

Hearing: 19th May, 1972.

Counsel: Tompkins for Appellant.
Almao for Respondent.

Judgment: 23rd May, 1972.

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ORAL JUDGMENT OF HENRY, J.

This appeal concerns two sentences on pleas of guilty to two charges under the Narcotics Act, 1965, being, first of all, in possession of a prohibited drug, namely, cannabis, and, secondly, cultivating a prohibited plant, namely, cannabis. The sentence in respect of the first charge was one month's imprisonment, and in respect of the second six months' imprisonment, those terms being concurrent. Appellant was jointly charged with his wife, who was fined. The facts according to the police summary which was before the Court below, are as follows:

On 31st October, 1971, defendant planted approximately 22 cannabis seedlings in a plot at the Native Bush Reserve at Mount Pirongia. Between that date and the 16th April, 1972, defendant made frequent visits to the plot to tend the plants. On April 16th last both defendants drove to the plot and uplifte all of the plants and returned in their car towards Hamilton. At Dinsdale the defendant's car was stopped by the Police and searched. The 22 cannabis plants were found and seized. The defendant John Firth said he was growing the plants for his ow personal use. The defendant Judith Firth said that she was aware of the plot prior to going to Te Pahu that day and she

was aware that her husband was intending to gather the plants. Then there is a short mention of personal circumstances: "The defendant John Firth is a married man aged 24 years. He "is employed as a factory manager and has not previously "appeared". Further information shows that he was recently married, has his own home, and I just refer shortly to the last paragraph of the Probation Officer's report where he says this:

> " At the age of twenty four years Firth is well established in the business world and as far as can be ascertained, has led a well ordered life in all other respects. In my opinion there is little scope or need for probationary supervision. "

Of course the latter remark is unquestionable, there is no question about that.

Now Appellant frankly stated that he was well aware of the unlawful nature of his acts. I am informed, and accept, that the quantity was small and that it was enough to make approximately thirty cigarettes. The two charges arise from the one episode in that, as stated already, he had earlier grown the plants and had taken them into his possession when the police intervened. The Narcotics Act of 1965 is aimed at suppressing the importation, exportation, manufacture, sale, distribution, use and possession of narcotics. What constitutes a narcotic substance is defined in the first schedule. What constitutes a prohibited plant is defined in the Act and it includes plants of the genus cannabis as well as the "opium poppy" (I use a well known term there to give a more general description of it) and other well known drug producing plants. Now the first schedule which defines a narcotic substance contains all known narcotic substances. It is proper to say that cannabis is one of the mildest listed - perhaps it is the least harmful - and does not come under (to use a common term that is in vogue to-day) what is called "hard drugs". Some authorities, who agree that the use of cannabis is harmful and should be prohibited, do not agree that it is a narcotic drug. However, no such argument

was put forward in this case, no argument that the drug ought not to be included in the Act, although, quite rightly, its place as a dangerous or potentially dangerous substance requiring control was accepted by Counsel for the Appellant. This is important in considering the range of penalties provided.

The relevant section is Section 5, and at the expense of repeating what I have already said, it covers under the general head of "dealing" those matters which have just been listed, namely, the importation, exportation, production, manufacture, distribution, selling, supplying or administering of narcotics. Sub-section (1)(d) of Section 5 also includes possession, but only where such possession is for the purposes of sale or other dealing with a second or more persons. For this wide range of narcotics and association with them punishment is provided as follows:-

> "Sub-section (2) Every person who contravenes sub-section (1) of this section commits an offence against this Act and is liable on conviction on indictment to imprisonment for a term not exceeding fourteen years. "

For all other offences against the Act the penalty is imprisonment not exceeding three months or a fine not exceeding $400, or both.

By sub-section (3) of Section 5 it is provided in respect of all offences, with one exception which I needs must touch upon, that the Judge or Magistrate shall impose a sentence of imprisonment on that person unless, having regard to the particular circumstances of the offence or of the offender, he is of the opinion that the offender should not be imprisoned. The exception is the cultivation of any prohibited plant. Such a direction does not apply unless the cultivation is so circumstanced that it indicates an intention to deal with and so involve others in any narcotic set out in sub-section (1)(d). Thus the direction to imprison does not apply to the conviction now under appeal. I am speaking, of course, of the conviction

on cultivation. In sentencing Appellant the learned Magistrate twice made reference to the maximum sentence of fourteen years and drew attention to the fact that it had earlier also been mentioned by the learned Magistrate when the plea was taken. There appears, therefore, to be three references to the maximum sentence, two of those appearing in a short judgment when sentence was imposed. A maximum sentence has no relevance except for the worst type of offence. No authority is needed for that. The reference to fourteen years' imprisonment was preceded by a statement that Appellant had acted deliberately, knowing fully the penalty. This information was said to come from the police summary and the Probation Officer's report. I cannot find anything to support the claim that the Appellant knew the penalty. It is plain, of course, he acted - if one may put it that way - deliberately knowing that he was breaking the law, but the reference to the penalty, so it seems to me, which is a matter that has taken quite a large part in the sentencing here, has nothing to support it. The two paragraphs which can be the only source of any statement like that appear on page 3 of the Probation Officer's report. He says this:

> " However he admitted that he was well aware of the unlawful nature of his own actions in growing the plant. "

And then later on:-

> " Unlike many users of this particular narcotic, Firth did not attempt to argue about the inclusion of this particular drug in the provisions of the Act. He was, he says, well aware of the unlawful nature of his actions. "

It is impossible to ascertain what penalty was there referred to by the learned Magistrate, and it was at least unfortunate that it was coupled with a reference to fourteen years' imprisonment. When the term of six months was discussed, I am assured by Counsel that reference was made to Section 43 (a) of the Criminal Justice Amendment Act of 1967. This provides for restrictions on imprisonment for terms of less than six

months. Its terms do not appear to have been referred to on sentence, although the minimum prescribed by Section 43 (a) appears to be in fact the sentence which was imposed. So, to the extent that that piece of legislation may have been in the mind of the learned Magistrate, it was not examined in the light of its terms.

The learned Magistrate then went on and ended his remarks by stating with good behaviour the term of imprisonment can be substantially reduced. This, it appears, refers to Section 31 of the Penal Institutions Act of 1954. Under that Act the Minister - which means the Minister of Justice - may grant remission up to one-quarter of any sentence for good conduct and industry. There is clear authority that such a remission, which must be earned and may not apply, cannot be taken into account in fixing a period of imprisonment and is entirely irrelevant to the fixing of the term of imprisonment. The good sense and justice of this is readily seen if adverted to.

What I have already stated seems to me to be good ground for reviewing afresh the penalties imposed. Insufficient consideration was given to the question of whether or not some form of punishment other than terms of imprisonment of six months and one month ought to be imposed. The statute was read as if it necessarily required a term of imprisonment because it set out a high maximum or at least it seemed to be implied that imprisonment must usually follow. But the scope of the degree of moral turpitude covered by Section 5 was, in my judgment, overlooked. The comparative dangers and effects of various substances prohibited was also not sufficiently adverted to. This was a small quantity for personal use and probably the least harmful of the controlled substances. Appellant grew it instead of doing what is normally done - purchasing it from those persons who are usually called "pushers" or from someone who happened to get a supply from a "pusher". If he had bought a

similar quantity the only offence he would have committed, of course, would have been one of possession, and that carries a maximum of three months. Nevertheless cultivation is an additional and quite an important and serious offence and must be taken into account in fixing a penalty in this case.

This was a first offender whose character was good. He is young and about to take his place in an established business of a substantial nature. He appears to be and has been entirely responsible except for these offences. In saying that I do not overlook his admission of some earlier use of this substance. In my judgment, in the circumstances of this case, a monetary penalty will be a sufficient punishment and should effectively deter Appellant. The case is not one in which an example should be set to deter others. There is no evidence that a penalty as a deterrent to others is appropriate for this case in the sense that an example should be made of these particular offences and of this particular offender. That, after all, is one of the objects of a deterrent penalty. It is not suggested that cultivation of the drug is prevalent and ought to be met with severe penalties, unless, of course, it is for the supply to others - which is not this case. The Legislature makes it quite plain that the serious aspect of cultivation is when it is for the purpose of supplying or dealing with others. I am satisfied, therefore, that Appellant has brought his case within Section 121 (3) of the Summary Proceedings Act, 1957.

The sentence of six months and one month's imprisonment will be quashed. Appellant will be fined in the sum of $500 for the offence of cultivating a prohibited plant. Appellant will be convicted and discharged in respect of the charge of possession. I have in respect of that taken into account that matter when fixing the earlier penalty. He will pay costs of the prosecution in the sum of $25, together with such disbursements as may have been incurred in either court in both proceedings, such

disbursements to be fixed by the Registrar. I allow two months for payment.

Appeal allowed accordingly and terms of imprisonment are quashed and fines in terms of what I have stated substituted therefor.

Solicitors:

Stace, Hammond, Grace & B ishop, Hamilton, for Appellant.

Crown Solicitor, Hamilton, for Respondent.