21/6

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY T.3/84

No Special Consideration

662

R E G I N A

V

A HUNTER

Hearing : 12th June 1984

Counsel : D.J. McDonald for Crown
E.P. Leary for Accused

Judgment : 12th June 1984

(ORAL) JUDGMENT OF BARKER, J.

There are two applications before the Court. First, for an order pursuant to Section 340(2) of the Crimes Act 1961 that the accused be tried separately on counts of (i) possession of cannabis for supply (under Section 6(1)(f) and (2) of the Misuse of Drugs Act 1975) and (ii) unlawful possession of a pistol (under Section 7A(1) and (2) of the Arms Act 1958). The motion also seeks an order under Section 322(8) of the Crimes Act 1961 that the accused, in respect of those two charges, be tried before a District Court Judge and jury in the District Court at Rotorua rather than before a Judge and jury in this Court.

The appellant was charged with two offences mentioned plus a further more serious charge of possession of LSD for supply under Section 6(1)(p) and (2)(a) of the Misuse of Drugs Act 1975.

After considering statements produced under Section 173A of the Summary Proceedings Act 1957, Justices of the Peace in the District Court at Taupo committed the accused for trial in this Court at Rotorua on all three counts.

This case provides yet another example of the confusion commonly experienced in the District Court, particularly by Justices of the Peace, at committal hearings. Such confusion is understandable when the Justices are faced, as they were in this case, with having found that a prima facie case was disclosed by depositions or statements against an accused person on both a count which is purely within the jurisdiction of this Court and on counts which would normally require committal for trial to a District Court Judge and jury.

Ever since the legislation which gave District Courts jurisdiction in jury trials for criminal matters was introduced, various Judges in this Court, including myself, have stated on a number of occasions that a simple amendment should be made to the legislation: such an amendment would make it clear that, in situations such as the present, the Justices of the Peace or District Court Judge, at the point of committal for trial, should commit the accused for trial in the High Court on all counts, leaving it either to the Crown or the accused to move for severance of the District Court counts from the High Court counts as Mr Leary is doing now.

I understand that some Crown counsel have made similar representations for a simple amendment, but such representations have not yet borne fruit. The difficulty arises from the mandatory

language of Section 168A of the Summary Proceedings Act 1957.

From my experience in Auckland, I consider the only way of ensuring no jurisdictional problems in these situations is for the accused to be committed for trial to the High Court on counts which are within the High Court jurisdiction, and to the District Court for counts which are within the District Court jurisdiction. I can say from experience at the criminal callover in Auckland that this is the practice in the District Courts in the Auckland region; at callover in this Court, one frequently deals with applications from the Crown under Section 28J of the District Courts Act 1947 for transfer to the High Court of the counts on which an accused was committed for trial in the District Court, with the object of having only one trial, and that in this Court.

Frequently, where the alleged offences arise out of the same transaction, an order is made under Section 28J of the District Courts Act without opposition from counsel for the accused. I have mentioned these matters because, in my view, this accused should have been committed to this Court for trial in respect of the charge of possession of LSD for supply, and to the District Court for trial in respect of the other charges. Since this did not happen, the proper way to treat this application is as if it were an application by the Crown under Section 28J for a joint trial of all 3 counts in this Court.

That section is very wide in its terms and permits the Judge to order trial in this Court; it states no criteria on which

the Court should operate.

Mr Leary submitted that the LSD for supply charge should be dealt with separately from the other two for the following reasons.

First, the evidence against the accused on that charge includes evidence of intercepted communications which includes a discussion between the accused and a man called Bellini over the acquisition of both LSD tablets and pistols. Under Section 26 of the Misuse of Drugs Amendment Act 1978, the intercepted evidence can only be used in respect of the LSD charge; therefore, all reference to the acquisition of pistols would have to be deleted from the transcript and edited in the course of playing the tapes which the jury would have to hear. Mr Leary admits that it might be possible to make the deletion from the transcript and to edit the tapes, but states that it is by no means certain that the tape, after the editing, would be intelligible to the jury.

Secondly, counsel submits that, as a matter of law, it is undesirable to join against a defendant in the same indictment, a charge of drug dealing and a charge of some other offence, if the evidence of intercepted communications to be given on the drug dealing charge, includes references which could suggest guilt on the other charge. In this submission, he has the support of the Court of Appeal in R v. Wall, (1983) N.Z.L.R. 238, 241.

Thirdly, there is the danger of the jury being confused, in counsel's submission, by the differing defences suggested on the two drug dealing charges. So far as the LSD charge is concerned, the defence will apparently be that the accused admits possession but that he will undertake the burden of proving, on the balance of probabilities, that he did not have the LSD for the purposes of supply. So far as the cannabis charge is concerned, however, the defence is that he did not have possession. It is submitted that the jury, despite a firm direction, could be confused on this matter.

Mr Leary is prepared to make the following admissions and concessions if an order for severance is made:

(a) The transcripts of the tape-recordings are admitted by consent by the accused subject to a minor argument as to admissibility of tapes that do not relate to the accused;

(b) DSIR certificates will be admitted by consent;

(c) A number of minor background witnesses will have their evidence adduced by having it read to the jury.

With these admissions, the sitting time will clearly be reduced.

I should have thought that, standing alone, the third reason advanced by Mr Leary would not justify a severance. However, I consider that the onus in this case for saying that all three counts should be tried together in this Court, rests with the Crown; in my opinion, this onus has not been discharged.

I think that the most compelling reason for severance of the LSD charge is that the evidence on the tapes is not admissible other than on the LSD charge; the Court of Appeal has indicated that it is not desirable for evidence of that sort which might implicate the accused on another matter, to be adduced with evidence on the drug dealing charge. For that reason, I am prepared to direct that an indictment be presented against the accused in this Court only in respect of the charge of possession of LSD for supply.

The question now remains as to what should be done with the other charges. I think that the inherent jurisdiction of this Court, which permits it to do justice in all cases, together with the specific power under Section 322(8) of the Crimes Act 1961, justifies me in ordering that the accused be committed for trial in the District Court at Rotorua on the other two charges; i.e. the charge of possession of arms and possession of cannabis for supply.

The accused is therefore remanded on bail on existing conditions to appear for trial in the District Court on those two matters on Monday, 23rd July 1984.

So far as the trial in this Court is concerned on the LSD charge, he is remanded to appear on existing conditions of bail on Monday, 9th July 1984.

Whether of course bail for the District Court trial continues will depend on the result of the trial on 9th July.

That will be a matter for the Judge in this Court.

R.D. Barker. J.

N.B. The dates shown in this transcript of my oral judgment are the correct ones. The ones mentioned orally were not.

SOLICITORS:

E.P. Leary, Esq., Auckland, for Accused.

Crown Solicitor, Rotorua, for Crown.