IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M 330/84

BETWEEN JOSEPH BRIAN MARTIN

Appellant

AND POLICE

Respondent

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Hearing: 3 October 1984

Counsel: Mr Tennet for appellant
Mr Morgan for respondent

Judgment: 3 October 1984

ORAL JUDGMENT OF HILLYER J

This is an appeal against a decision given in the District Court at Hamilton on 15 August 1984. District Court Judge Green imposed sentences of one years imprisonment on each of two charges. The first charge was of selling a class C controlled drug, the second charge was of unlawfully having a pistol, namely a 38 calibre Smith & Wesson Special in his possession.

The facts were that on 18 April 1984 a special duties constable travelled to Paeroa with one Michael Sydney Goodhew in the constable's car. The constable had arranged to purchase cannabis from Mr Goodhew. After a short time in Paeroa a meeting was arranged and the appellant met Mr Goodhew and the constable. The appellant passed a plastic bag to Mr Goodhew containing 1 lb of good quality cannabis. The constable handed $2500 to Mr Goodhew in payment for the cannabis. A subsequent search of appellant's home on 5 June 1984 revealed the firearm which was taken possession of by the police. The appellant said, and he was supported in this by Mr Goodhew, that he had been asked by Mr Goodhew to store the cannabis for him, and he did so as a favour to him.

He was asked by Mr Goodhew to take it out to him on the night in question, and he did so. He passed it over. He realised it would possibly be the subject of a sale, but had no more connection with the sale than that. He was given the sum of $500 for doing so.

He submitted testimonials as to his good character and said that the pistol was one which he used for hunting and that there was no connection between the drug offence and the ownership of the pistol.

Mr Tennet for the appellant agreed that appellant had pleaded guilty to sale and not to supply. He pointed out that the penalty was the same in each case, and he said that the plea of guilty to the charge of selling was justified because appellant was a party to the sale by Mr Goodhew, and was therefore guilty as a party to the sale.

The learned District Court Judge in his remarks on sentencing expressed very grave reservations about the suggestion that appellant was merely the storer of the cannabis, although counsel tells me that he offered to put appellant into the witness box and call evidence to establish this fact. The District Court Judge declined that invitation.

The District Court Judge was under the impression, and said so, that the maximum penalty to which appellant was liable on the selling of cannabis was one year. Mr Tennet pointed to subsection 6(3) of the Misuse of Drugs Act 1975. That provides as follows :

> "Notwithstanding anything in s.7 of the Summary Proceedings Act 1957, where any person is summarily convicted of an offence against this section relating to a Class C controlled drug, the District Court may sentence him to imprisonment for a term not exceeding 1 year or to a fine not exceeding $1,000."

Mr Tennet therefore submitted that appellant had been summarily convicted, and that the maximum penalty was the period of one years imprisonment, as indeed the learned District Court Judge appeared to consider was the case.

Mr Morgan for the respondent however, submitted that the District Court Judge was under a misapprehension in that respect and that the maximum penalty was three years. He pointed to the provisions of the Summary Proceedings Act under Part 2 of which the procedure where a defendant is proceeded against summarily is set out, and under part 5 of the Act where the proceedings where the defendant is proceeded against indictably are set out. It is clear that the information in this case was in form 2 in the second schedule to the Act, in that it is headed "Information where defendant is proceeded against indictably" and the fact that pursuant to S.153(a) the defendant elected to plead guilty before the preliminary hearing does not take the proceedings out of part 5 of the Act, Mr Morgan said. The hearing was still pursuant to part 5. The conviction was pursuant to part 5 and the maximum penalty therefore was not restricted by S.6(3) of the Misuse of Drugs Act to a term of one year.

In my view the argument put forward by Mr Morgan is correct. The Summary Proceedings Act provides for two types of proceeding one a summary proceeding and the other an indictable proceeding. It may seem a little strange that if the police choose to proceed in a summary fashion the maximum penalty would be a period of one year, and if the police choose to proceed indictably, that is to say under part 5 of the Act, the maximum penalty would be three years. Safeguards are built in however, in that if the District Court Judge is of the view that a matter has been proceeded under part 2 when it should have been proceeded under part 5, he can decline jurisdiction and send the offender on a plea of guilty to the High Court for sentence where the maximum penaltyfor an offence of this nature would be eight years.

I do not therefore accept Mr Tennet's submission that the learned District Court Judge imposed the maximum penalty that he could in this case. It is however, clear that the Judge imposed what he thought was the maximum penalty.

Mr Tennet went on to draw attention to what he referred to as the disparity between the sentence that was imposed upon Mr Goodhew and that imposed upon the appellant. There were against Mr Goodhew four charges of selling cannabis and he received a total sentence of 18 months. That was made up of 12 months for an offence at Raglan, and 6 months imprisonment for the other three offences. Those 6 month periods were to be concurrent with each other, but to be cumulative on the first 12 months. Since the offence for which the appellant has been charged was one in which he was associated with Mr Goodhew on one of the offences for which Mr Goodhew received a 6 months sentence, Mr Tennet compared the penalty imposed on appellant of 12 months on that offence, with the 6 months imposed on Mr Goodhew for the offence to which appellant was a party.

That, however, in my view is not an accurate comparison. The learned District Court Judge clearly decided that the total penalty to be imposed on Mr Goodhew was 18 months, and it may well be that the significance of the 6 month period for this particular offence was not important to him. What he was doing was imposing a total period of 18 months.

I do not therefore accept Mr Tennet's submission which he supported by reference to the Court of Appeal case of R v Stewart 61/82 Judgment 21 May 1982, was a valid one. I think however, that there is more merit in Mr Tennet's submission that if the District Court Judge was not prepared to accept the version of the facts put forward on behalf of the appellant, he was not entitled to reject that without giving the appellant the opportunity of calling evidence to establish it. See R v Bryant (1980) 1 NZLR.264.

I accept the submission made by Mr Tennet that in this particular case on the charge of selling, the part played by the appellant was a relatively minor one. The arrangement to sell was made by Mr Goodhew and it was his cannabis. Certainly the appellant pleaded guilty to selling, but on the basis that he was assisting Mr Goodhew in the sale and was therefore a party to the sale. I note also that although appellant many years ago had some offences, the last of those was in 1970. The offences were relatively minor and he should have been treated as a first offender for the purposes of this offence. The appellant clearly is a man of good character. He is respected in his local community, and in my view the penalty of one years imprisonment imposed upon him on the cannabis charge was manifestly excessive.

Equally, I am of the view that the term of imprisonment of one year, imposed on the charge of keeping a pistol was excessive. It was an extremely foolish thing to do, and the dangers of possessing and keeping firearms of that nature are obvious. Nevertheless, in my view again, a period of imprisonment of one year is also excessive in that case.

I gave consideration to the imposition of a lengthy term of periodic detention, but since appellant lives at Paeroa, the difficulties of serving such a term would be substantial. I note the probation officer's report which with some reservations suggested that a monetary penalty with a period of probation might have the desired effect. I note with some hardship the appellant would be able to pay a monetary penalty, and I think it proper that the penalty should be one that would impose some hardship on him.

He will therefore be fined the sum of $3000 on the charge of selling cannabis. I fix that figure because of the very substantial amount of cannabis that was involved, and

the fact that to some extent the appellant committed the offence for gain. He did receive the sum of $50 on his admission, from Mr Goodhew. Again the possession of the pistol as I have said, is a serious matter, and on that charge I propose to impose a monetary penalty. He will be fined the sum of $1000 on the charge of possessing a pistol. In addition he will be placed on probation for a period of 18 months. He will live and work where the probation officer directs. He will avoid association with Mr Goodhew.

To that extent the appeal is allowed.

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P.G. Hillyer J

Solicitors:

Mr Tennet for appellant
Crown Law office for respondent

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SELLING CONTROLLED DRUG — PENALTY IN DISTRICT COURT

Martin v Police, High Court, Hamilton. 3 October 1984. (M. 330/84). Hillyer J.

This was an appeal against sentences of 1 year's imprisonment imposed in respect of two charges of selling a class C controlled drug and unlawful possession of a firearm.

The appellant claimed that his possession of 1 lb of cannabis had been to do a favour for an associate who had paid him $500 to "store" the cannabis. The pistol, he claimed, was used for hunting and was unrelated to the drug offence.

In sentencing the appellant the District Court Judge had acted upon the impression that the maximum penalty for selling cannabis was one year's imprisonment by virtue of s.6(3) Misuse of Drugs Act 1975 which states:

> "Notwithstanding anything in s.7 of the Summary Proceedings Act 1957, where any person is summarily convicted on an offence against this section, relating to a class C controlled drug, the District Court may sentence him to imprisonment for a term not exceeding 1 year or to a fine not exceeding $1,000".

Section 7 prescribes a maximum penalty of 3 years or a fine not exceeding $4,000 in respect of a person summarily convicted for an indictable offence.

However, this interpretation of the penalty provisions was disputed by counsel for the respondent who argued that since the information was in

Form 2 in the second schedule to the Summary Proceedings Act, the form appropriate to proceedings on indictment, the fact that the defendant had pleaded guilty before the preliminary hearing, in terms of s.153(a) Summary Proceedings Act, did not take the proceedings out of part 5 of the Act. Part 5 governs the procedure in respect of the preliminary hearing of indictable offences. Accordingly, it was argued the conviction was pursuant to part 5 and the maximum penalty was not restricted to the 1 year term available by s.6(3) Misuse of Drugs Act.

The Court held that this view of the law was correct and that since the appellant had pleaded guilty before the preliminary hearing to the sale charges laid as an indictable offence, the maximum penalty which the District Court Judge could have imposed was 3 year's imprisonment.

However, as the Judge had rejected the appellant's version of facts relating to the sale of cannabis without allowing him the opportunity of calling evidence to establish it and in view of the appellant's relatively minor role in the sale and his otherwise good character, the Court held that sentence of 1 year's imprisonment was manifestly excessive. A fine of $3,000 was substituted for the imprisonment term on the cannabis charge, and a fine of $1,000 in respect of the firearms charge. In addition the appellant was released on 18 months' probation with special conditions relating to residence and associates.