IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.762/84

BETWEEN BARRY JAMES McINTOSH

Appellant

A N D POLICE

Respondent

Hearing: 18 December 1984

Counsel: P.H.B. Hall for Appellant
B.M. Stanaway for Respondent

Judgment: 19 December 1984

ORAL JUDGMENT OF HARDIE BOYS J

This is an appeal essentially against a sentence of six months' imprisonment imposed on a charge of cultivating cannabis. The appellant was also sentenced to one month's imprisonment concurrently on charges of possession of cannabis plant and possession of cannabis seed. Mr Hall very correctly took the position that if the appeal against the cultivation charge failed there was little to be said in relation to the other two, whereas if it succeeded those two really could not stand on their own.

The police visited a house occupied by the appellant at Waitahuna in October and found there nine seed planting trays of the normal commercial kind containing about 800 cannabis

seedlings ranging in height from 15 cm, about 6", down to 2 cm. The appellant maintained that the seeds from which these plants had been grown had been planted for his own use. Elaborating on that submission in this Court Mr Hall said he collected them by shaking out the seed heads of cannabis that he had been using himself and that he had sown them in these boxes not knowing how many would strike and intending in due course to thin out those he did not need for his own purposes and destroy them, and then plant out in a more suitable growing location those he did wish to retain. That explanation is by no means a novel one in cases of this kind but that of course is not reason in itself to reject it.

In R v Dutch [1981] 1 NZLR 304, the Court of Appeal indicated three general degrees of seriousness for the offence of cultivating cannabis. At the bottom end of the scale there is the category where the cannabis is grown purely for the personal use of the offender, whereas further up the scale are two categories where the cannabis was grown for commercial purposes, the seriousness of the offence depending on the scale of the operation undertaken. Generally, as the Court pointed out, a prison sentence is not appropriate for the first category but there are no hard and fast rules, because indeed the whole judgment purports to do no more than lay down guidelines and each case in the end must be determined on its own particular facts in relation to those guidelines.

The District Court Judge put the present case in the second category and it is really that conclusion that Mr Hall challenged on this appeal. The Judge accepted and it is correct that there was no evidence in this case of any of the

usual paraphernalia that go with the sophisticated cultivation of cannabis on a commercial scale. These appeared to be seedlings growing in boxes in the same way that one would grow any other kind of seedling for one's own domestic purposes. Indeed the only fact from which a commercial purpose could be inferred contrary to the appellant's denial is the number of seedlings that were being grown.

In the Dutch case there was some discussion of the equal seriousness of cultivation with possession for supply and in that discussion the Court was for obvious reasons concerned rather with the bulk of the plant material that was found than with the numbers of plants. But it would of course be unrealistic to think that numbers are not relevant, for each seedling has the capacity for growth to full maturity, and it would be odd if the degree of culpability depended entirely on the stage of cultivation at which the police discovered the operation. Of course the degree of culpability and the strength of the inferences to be drawn must depend in an appropriate case on the degree of growth which has taken place. Someone who has brought 800 plants to full maturity is in a rather different position from someone who has 800 seedlings.

Here we have 800 seedlings in nine trays and that is a very great number of cannabis plants. It is also significant I think that we have here an appellant who is no stranger to the drug scene. I am not looking at this from the point of view of weighing up the gravity of his previous offending but in order to emphasise that he is no callow innocent in this particular respect. He was before the Courts for possessing

heroin in 1977, and at the same time he was in possession of cannabis seed. Whether or not that was for the purpose of supply is beside the point in the context in which I am discussing that now. It was in 1982 before he was before the Court again and then he was charged with possession of cannabis plant and then in August 1984, just two months before the present offence was discovered, he was convicted of possessing cannabis. I think that what was found at this property has to be looked at in the light of the history of the man who was in charge of growing these plants, because I find it difficult to imagine that he would know so little about the drug of which he is such a user as to think that in order to grow enough for himself he would have to bring so many seedlings to this stage of growth. I think the Judge was entitled to draw the inference that this was a commercial operation, but even if that inference was not appropriate it was in my view cultivation on such a scale as to justify a custodial sentence, as the Court of Appeal recognised very clearly may be appropriate even in cases in the first of the categories discussed in the Dutch case. For after all these plants ought not to be grown at all and 800 having grown this far had the potential for a large crop and that is a fact that just cannot be disregarded.

Mr Stanaway very correctly pointed out that on appeal I am not entitled to substitute my views about sentencing for those of the District Court Judge. I have to be satisfied that the sentence imposed was inappropriate or manifestly excessive. In my view that has not been demonstrated, even if this case is to be regarded as in the first of the Dutch

categories, but I do add that I think the Judge was entitled to come to the conclusion which he clearly reached that it came into the second. Having reached the view that a custodial sentence was appropriate it cannot be argued successfully that six months was manifestly excessive and Mr Hall really did not attempt that.

In those circumstances in my view the appeal must be dismissed and it is dismissed accordingly.

Solicitors:

Wood, Hall & Co, CHRISTCHURCH, for Appellant
Crown Solicitor, CHRISTCHURCH, for Respondent.