RM.

SET 3.

IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR 134/83

BETWEEN DAVID PETER KNIFE

Appellant

A N D THE POLICE

Respondent

Hearing: 9 February 1984

Counsel: I.G. Mill for Appellant
G.D. Pearson for Respondent

Oral Judgment: 10 February 1984

ORAL JUDGMENT OF ROPER J.

This is an appeal against conviction and sentence on charges of having cannabis plant in possession for sale or supply, having cannabis resin in possession for the same purposes and having seeds of a prohibited plant, namely a plant of the genus cannabis, in possession; the latter charge being laid pursuant to s.13 of the Misuse of Drugs Act. The Appellant was sentenced to six months' imprisonment on each charge, the terms to be concurrent.

There are a number of problems in this appeal and the first point to be made, and both counsel accept this, is that the learned Trial Judge had no jurisdiction to decide the cannabis resin charge which relates to a Class B drug and I therefore order that that matter be referred back to the District Court for rehearing according to law.

The next problem is that the cannabis seed charge was brought under the wrong section. It is accepted by counsel that it should have been brought under s.7 which provides for a maximum penalty of three months. The result is that one of the six month terms was made without jurisdiction and one in excess of jurisdiction. I do not see that any prejudice can result by amending the cannabis seed charge and I therefore amend the charge to one of being in possession of a controlled drug, namely cannabis seeds,

contrary to s.7 of the Misuse of Drugs Act.

The facts of the case are not really in dispute. On Thursday, 1st September last, the Drug Squad executed a search warrant on a flat at 5A Albert Street, Timaru, which at that time was occupied by four young men, the Appellant, one Middleton, Burnard and Trainor. Only Trainor and Middleton were at home when the police arrived In a chest of drawers containing property belonging to the Appellant the police found 180 grams of cannabis plant, 1000 seeds and something over 5 grams of resin. When interviewed all occupants of the flat denied all knowledge of the drugs and seeds. In the course of the inquiry Detective Fink told the Appellant that the drugs must belo to someone in the flat, which was a reasonable comment, and that he would give the Appellant an opportunity to speak to his flat-mates and decide whether all or one of them were responsible for the possession of the drugs, and that whatever action they took would result in either charges of possession for supply or just simple possession of the cannabis. Further in his evidence Detective Fink said that he had told the Appellant that he should speak t his flat-mates, find out who the drugs belonged to and for all or any one of them to contact him the next day. Depending on what information he received would depend whether the charge was one of simple possession or possession for supply. No admission was forthcoming from any of the occupants of the flat and all four were then charged with possession for supply. Middleton, whose case was heard with that against the Appellant, was found not guilty, Burnard and Trainor elected trial by jury but have been discharged pursuant to s.347 of the Crimes Act on the cannabis plant and seed charges and it is probable that the charge against them in relation to the cannabis will be stayed. That leaves the Appellant.

On this appeal the finding that he was in possession has not been challenged, which is a realistic approach having regard for where the drugs were found. The sole issue is whether on the evidence adduced the Trial Judge should have found that the Appellant had

not met the onus on him of rebutting the statutory presump tion which arose because of the amount of cannabis involve that he had the plant material in possession for sale or supply. The Appellant did not give evidence but that was not fatal to his cause. It is really a matter of conside ing all the available evidence to see whether on balance it is shown that the Appellant did not have the plant material in possession for sale or supply.

On this issue Mr Mill made these points: firstl that there was no evidence of actual supply by the Appella and I might say that that is a very common circumstance where the presumption is relied upon. Secondly, there was no evidence of other drugs being found anywhere in the flat. Thirdly, there was no property found associate with sale or supply such as supplies of bags, scales, large sums of money or evidence of frequent visitors to the flat. Fourthly, and what I think is really his main point, was that the evidence should have been considered in the light of the police attitude to the nature of the charge that would be laid. Mr Mill suggested that that gave tacit support for a submission that the prosecution accepted there was no supply taking place. I am afraid I cannot accept that the matters raised by Mr Mill establi on balance that the Appellant's possession was not for sal or supply. The police attitude to the case was certainly an unusual one but I can see some justification for reduc- ing the charge if the cannabis had indeed been the joint property of the four occupants and they were cannabis user

The appeal against conviction is therefore dismissed.

The question of sentence poses a problem in that the learned Trial Judge saw fit to impose an overall sentence of six months' imprisonment on three charges, one concerning a Class B drug. The question is is it appropriate at this point when we are really dealing only with the one charge, because the sentence on the cannabis seeds cannot exceed three months, to leave the sentence at six months. This is the Appellant's third

conviction for drug offences, he having been convicted in 1981 and 1983 for possession of cannabis.

Having regard for the unusual circumstances of the case and the errors that arose in the course of it, and the suspicion that he was not alone in this venture, I think it would be appropriate that the sentence of imprisonment be reduced.

The appeal is allowed to the extent that the sentence of imprisonment is reduced to one of three months on both the possession and seed charges.

Solicitors:

Clark & Mill, Timaru, for Appellant
Crown Solicitor, Timaru, for Respondent