IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M No. 148/84

BETWEEN _____ CHRISTENSEN

Appellant

A N D POLICE

Respondent

Hearing: 23 November 1984

Counsel: E.R. Fairbrother for appellant
G.A. Rea for respondent

Judgment: 26 November 1984

Reasons for Judgment:

~~JUDGMENT AND~~ REASONS FOR JUDGMENT OF SAVAGE J.

Christensen was convicted in the District Court at Napier on 29 October 1984 on one charge of cultivating cannabis and one charge of theft. He had pleaded guilty. He was sentenced to one year's imprisonment on each charge. He has appealed against the sentence on the ground that it is clearly excessive for a number of reasons to which I shall refer shortly.

I was unable to give judgment at the conclusion of the hearing as I wished to read more carefully the probation report. I reserved my decision. On Monday, 26 November,

having considered the matter further, I allowed the appeal but because I had started on that day a three day civil trial I indicated I would put my reasons in writing later. I now do so.

The circumstances were, in respect of the cannabis cultivation charge, that the Police found in a bedroom of the house at which the appellant lived six cannabis plants in pot plant holders. They were from two to eight centimetres in height. The appellant said he was not a user himself but had decided to grow the plants. The circumstances of the theft charge were that the police found a radio cassette combination unit, valued at about $850, in a motor car and their enquiries led them to the appellant. He told the Police he had stolen it from a garage about a year previously. It follows that the theft took place in the middle to latter part of last year but precisely when is not known because the owner of the unit has never been located.

The learned Chief District Court Judge, who imposed the sentence, obviously thought that the appellant was growing the cannabis for sale. I think that is apparent from his remarks on sentence. That conclusion is not, I think, justified by the Police summary of the facts but there is an observation of the probation officer in his report to the effect that the appellant admitted having grown them for sale. It must, however, be remembered that there were only six plants. At the same time I note that counsel must have made some ill-advised submission that this offence was not as serious an offence as it used to be, a proposition which the judge correctly

rejected. In respect of the theft charge the judge commented that the discovery of the stolen property by the Police in October in his view took away any merit from the argument that the actual theft had been committed long ago. This observation must have been in response to some submission of counsel and since another counsel appeared for the appellant in the District Court it is not clear quite what the submission was.

Mr Fairbrother prefaced his submissions by reminding the Court of the appellant's age. He is only 19 years old but he has had a number of previous convictions. He was sentenced to corrective training in June last year and that was followed in October by five months imprisonment. This is, however, his first conviction for a drug offence. In respect of the cannabis cultivation charge Mr Fairbrother submitted it was not really in the growing for commercial gain class, and he relied on the judgment of the Court of Appeal in R v Dutch [1981] 1 NZLR 304 and in particular upon the Court's comments, to be found at p 307, in relation to the first of the three broad categories of this class of offending. The appropriate penalty, he submitted, should have been a non-custodial one. Mr Fairbrother's point in respect of the theft charge was that had the offence been dealt with at the time it was committed, or reasonably promptly thereafter, it would have been included, on the totality principle, with those offences which had led to the sentence of corrective training in June or the five months imprisonment in October. I note that the probation officer said this about the theft charge:

> "The other charge relates to a theft which occurred over one year ago and was part of the series of offences for which Christensen was sentenced to youth imprisonment in October 1983."

Clearly he considered the cannabis charge the major matter for the Court so far as the sentence was concerned.

Mr Rea, for the respondent, with some hesitation but quite firmly, informed the Court that his submissions in effect were in accord with Mr Fairbrother's submissions. I think Mr Rea's approach a very proper one in the sense that he has not just automatically supported the sentence because it was the sentence imposed, but has carefully considered the issues with the detachment that is appropriate for those representing the Crown. I think, too, that both he and Mr Fairbrother are correct in their submissions relating to the theft charge. I think it clear that had the charge been dealt with last year when it was committed it would not have resulted in any heavier sentence than the corrective training or imprisonment that was imposed. I do not think the position could have been properly explained to the learned judge at the time this sentence was imposed; at all events I do not think a year's imprisonment at this stage is appropriate on that charge.

The position in relation to the cannabis charge, however, is a little different. I do not accept counsel's view that in terms of R v Dutch the only appropriate sentence was a non-custodial one. Here the position may not have been, and indeed clearly was not, a commercial cultivation case but on

the other hand it was not just cultivation for the appellant's own use. It went beyond that but it was not a case that would have warranted a year's imprisonment. I think the learned Chief Judge must have placed rather more weight on the probation officer's statement than is justified. I was advised by Mr Fairbrother that the appellant disputed the statement in the report that he had grown the plants for sale when they had reached maturity but Mr Fairbrother was not in a position to say whether the statement had been challenged before the Chief Judge. I assume it was not, because had it been I do not doubt the Chief Judge would have mentioned it in his remarks on sentence. However, it seems to me that in considering the circumstances surrounding an offence or its gravity the evidence given, or the Police summary, should ordinarily be accepted.

In the circumstances I think that a year's imprisonment is clearly excessive, particularly when one bears in mind that this is, as I have already noted, the appellant's first conviction for any drug offence. Mr Rea suggested that since the appellant has been in prison for a month it would in the circumstances be a sufficient punishment. It is to be noted that he will be on probation in any event until the end of January, he having been sentenced to 12 months' probation following the five months' imprisonment, and the probation officer considers further probation at this stage would not serve any useful purpose. I do not think that substituting a term of periodic detention for the imprisonment would now be

desirable. I accept Mr Rea's submission that in the circumstances the period already served in prison is a sufficient punishment.

The appeal is allowed and the sentence of one year's imprisonment is reduced to such a term as will allow the appellant's immediate release.

Solicitors for appellant: Fairbrother & Lloyd (Napier)

Solicitor for respondent: Crown Solicitor (Napier)