

BETWEEN

DEMPSEY

Appellant

A N D

POLICE

Respondent

Hearing : 5th September 1984

Counsel : R.J. Laybourn for Appellant
P.J. Morgan for Respondent

Judgment : 5th September 1984

(ORAL) JUDGMENT OF BARKER, J.

This is an appeal against a sentence of 5 months' imprisonment imposed on the appellant in the District Court at Hamilton on 18th July 1984 for two charges of selling a Class C controlled drug, namely, cannabis.

The appellant sold two consignments - one of 5.1 grammes and the other of 14.8 grammes - of cannabis to an undercover policeman. It is clear that he had access to a supply and the amount of money changing hands was \$130.

The appellant is aged 21. He has no steady employment. He has been serving his sentence and he did have some time in custody pending sentence in the District Court with the result that he has now served 2 months' imprisonment. His only previous convictions of any consequence was one in September 1983 for assaulting a constable and resisting the Police, for which he received 2 months' imprisonment. That sentence seems rather unusual in that one would have thought that, with an offender of his years for offences of that nature, a community based sentence should have been

tried first before the ultimate decision was made to sentence him to imprisonment for only a minor term. However, there appears to have been no appeal against that sentence.

Mr Laybourn correctly draws to my attention another case that dealt with this morning of Hapi v. Police where the appellant in that case successfully appealed against a sentence of imprisonment for selling cannabis and I replaced that sentence of 5 months' imprisonment with one of 9 months' Periodic Detention. However, the factual situation in that case is far different because there, the appellant was 19 and was a first offender. He had very good references from his employer; he had the prospect of employment and it seemed clear that there were persons in the community who were willing to support him and assist towards his rehabilitation. I there concluded that the community would be better served by a non-custodial sentence.

In this case, the appellant does not have the same prospects or support and rather than the offending being an isolated occurrence, there is the suggestion in the probation report that he is a regular cannabis smoker and he appears to have had great facility in obtaining supplies of the drug.

However, I think that, in the circumstances, I am able, now that he has served some 2 months in the aggregate, to vary the sentence. I agree with the District Court Judge that offending of this nature requires a stern sentence. To some extent the community has been satisfied by the term of imprisonment he has undergone. The probation report made a suggestion of community service which I think was completely unrealistic. However, the probation officer considered that probation would be beneficial and recommended it.

Mr Laybourn, on behalf of the appellant, waives medical examination; I think that I am able to vary the sentence because the man has spent 2 months in prison; it seems to me that insufficient regard in the past has been paid to a community based sentence for a man of 21 years of age for which a short prison sentence - or indeed any prison sentence - would have a

deleterious effect. As I pointed out in Hapi's case, the Court of Appeal has held that Periodic Detention is to be considered as a real alternative to imprisonment; in the circumstances of a lesser amount of drugs being involved, although I have my suspicions that the appellant was involved to a greater degree, I must nevertheless treat the facts only as they are disclosed.

I therefore quash the sentence of imprisonment; in its place, I substitute a sentence of 7 months' Periodic Detention. The appellant is to report to the Periodic Detention Centre, Myrtle St, Hamilton, at 6 p.m. on Friday 7th September 1984. He is to report in terms of the notice to be served on him by the Warden of the Periodic Detention Centre. In addition, he is placed on probation for a term of 1 year, 7 months with the special conditions:

- (a) That he lives and works as directed by the Probation Officer; and
- (b) That he does not associate with any persons that the Probation Officer may in writing direct.

The appeal is allowed and the sentence varied accordingly.

SOLICITORS:

Fistonich, Memara, Weir & Rennie, Hamilton, for Appellant.
Crown Solicitor, Hamilton, for Respondent.