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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.240/84

841

BETWEEN: GOLLAN
of Otorohanga, Farmer

Appellant

A N D: THE POLICE

Respondent

Offence: (1) cultivation of Cannabis
(2) permitting premises to be used
(3) possession of cannabis
(4) possession of cannabis seeds

Dealt With: 14 June 1984 At: Hamilton By: Green DCJ

Sentence: Possession charges - 12 months Imprisonment
Other charges - 3 months Imprisonment on each

Appeal Hearing: 18 July 1984

Oral Judgment: 18 July 1984

Counsel: M J Quirke for appellant
R G Douch for respondent

Decision: APPEAL ALLOWED - Periodic Detention 9 months
Fined total $1000.00

(ORAL) JUDGMENT OF GALLEN, J.

The appellant was convicted on a number of charges relating to the cultivation and possession of cannabis leaf and seeds. In his sentencing notes, it appears clear that the learned District Court Judge, following an analysis of sentences considered appropriate in the Court of Appeal decision of R v Dutch, placed the appellant into the second category - that is, where there is an element of commercial enterprise. It seems clear that he did so because of his view that the appellant had become involved in the particular venture because he had been previously

convicted on quite unrelated charges and indeed, to find some way of recouping his fiannces because of the fines which had been imposed on that occasion. I think it was also a factor taken into account by the learned District Court Judge that a substantial quantity of seeds had been retained. He was also concerned over the retention of some plants, when the bulk of the material grown was destroyed.

I am now informed - and this information was not available to the learned District Court Judge - that the appellant's finances were not such as to require assistance from this type of enterprise and that it would have been difficult, or impossible, for him to have inserted the proceeds into his account. I am also informed that far from there having been 4 plants retained after the balance were destroyed, there was in fact only one.

When one looks at the classification of offences which appears in Dutch's case, it is clear that the first class is reserved for those persons who have been endeavouring to obtain this material for their own purposes. But it is, of course, left open to include in that class cases which are exceedingly serious and which, for that reason, may require heavier penalties than are normally contemplated. The second class involves cultivation for commercial purposes. I note that the Court of Appeal, in categorizing that class, refers to the number of plants and effectively indicates that these will normally run into scores or hundreds. In this case, the number of plants was very small.

On the material available to me, I think it more likely than not that the offence would have been categorized in the first category if the learned District

Court Judge had had available to him the same material. I am also concerned that the number of plants would not normally have been sufficient to suggest a commercial purpose, nor is there any real suggestion of supply other than the assumption, based on the previous financial penalties imposed. Reference was made to the decision in R v Comer, but I accept Mr Quirke's submission that that was clearly a case involving supply. It also involved 56 plants.

In this case I am left with a residual concern over the number of seeds and the reason why they should have been retained, and I am also left, as the learned District Court Judge was, with some concern over the retention of any of the material. I take into account that the original charge of supply was not proceeded with.

I note the various factors relating to the family situation of the appellant. The decision in Dutch itself makes it clear that personal circumstances will not of themselves be sufficient to result in a lesser penalty, and I make the observation that when one expresses concern for family one is also entitled to take into account concern for the families of other people who may get involved in the distribution of this material if it is commercially supplied. Nevertheless, having regard to all those matters, and having regard to the fact that I believe, on the information now before the Court, it would have been more appropriate to deal with this matter in the first category than the second, I am prepared to allow the appeal and to vary the sentence.

There is one further matter to which I should refer. The Probation report available to the learned District Court Judge indicated that Periodic Detention was not available. I am informed that it is available, and this is a factor which further influences me.

In respect of the most serious charge, the appellant will be sentenced to 9 months non-residential Periodic Detention. He is to report to the Periodic Detention Centre at Myrtle Street, Hamilton, on Friday the 20th July at 6:00 p.m.

I note what Mr Douch fairly said in respect of the "premises" charge. Since a conviction has already been entered I propose, there, to simply discharge the appellant.

On the remaining two charges, the possession of cannabis leaf and cannabis seeds, about which I have some concern, the appellant will be fined $500.00 on each charge.

Solicitors:

M J Quirke Esq., P O Box 2325, Rotorua, for appellant
Crown Solicitor, Hamilton, for respondent