1912

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

2917

A.P. 35/90

BETWEEN JAMES MICHAEL JONES

Appellant

AND POLICE

Respondent

Hearing: 10 December 1990

Counsel: Miss M. Dyhrberg for Appellant
P.J. Smith for Respondent

Judgment: 10 December 1990

(ORAL) JUDGMENT OF BARKER J

The appellant pleaded guilty in the District Court at Kaitaia to charges of cultivation of cannabis and possession of cannabis for supply. On 20 June 1990, he was sentenced in that Court to 18 months' imprisonment. He appealed against sentence to this Court; on 9 August 1990, after hearing counsel assigned on legal aid, Thorp J, in an oral decision, dismissed the appeal.

The application now before the Court by the appellant is for (a) an extension of time to appeal against sentence; (b) the rehearing of sentencing ab initio; (c) leave to call evidence on the facts; and (d) remitting the matter to the District Court.

The appellant claims that the solicitor appearing for him in the District Court did not properly take his instructions and did not make proper submissions to the sentencing District Court Judge. In particular, the appellant claims that there were only 180 cannabis plants found in his possession instead

of 333 as the police had alleged. He also claims that the value of the cannabis found in his possession was about half the $15,000 alleged by the prosecution. He claims these matters were witheld from the District Court Judge by his then counsel.

In his affidavit, the appellant alleges, what on the face of it seems somewhat unusual conduct on the part of the solicitor concerned. The appellant also makes complaints against the counsel who was assigned to him on legal aid in this Court. He says in particular that this counsel failed to get in touch with him. It is clear that the appellant's wife communicated with counsel and supplied him with a lengthy letter, including references. However, in that letter there is no mention of this dispute about the number of cannabis plants or the value of the cannabis.

Neither of the lawyers involved has as yet had an opportunity of filing affidavits in reply and a waiver of privilege has only just been given in respect of the solicitor in the District Court. Mr Smith has yet to receive one in respect of counsel instructed on legal aid in this Court.

If this Court had been in a position to consider the application on its merits, it would have had to have considered affidavits in response from both the lawyers and also from the police officers concerned. I am advised by counsel for the respondent that the prosecution would not accept the appellant's statements as to the amount of cannabis or its value. However, before parting with the allegations I comment that the task of counsel assigned on legal aid on a sentence appeal would be normally to rely on the record as it came from the District Court and see whether on the papers (i.e. the summary of facts, probation report and sentencing notes) there could be a successful appeal against sentence. Counsel would normally be governed by the well-known requirements of the Summary Proceedings Act 1957 ('the Act') that only in exceptional cases will this Court on appeal hear further evidence. However, I do not decide those matters concerning the conduct of counsel, because the important point is whether I have jurisdiction to consider a rehearing of an appeal dealt with on its merits. I do not think I have.

I would normally have required this matter to have been heard by Thorp J since his judgment was being called into question. I have had a telephone conference with him. He does not think it necessary for him to consider the matter and he is quite happy for me to. He agrees with the view that I took before referring to authority, that I have no jurisdiction to deal with the matter.

The authority which I discovered myself, without any reference from counsel, is Sherlock v Police (1958) NZLR 526. F.B. Adams J considered that there was no right to file successive notices of appeal, referring to the Court of Appeal decision in R v Neiling [1944] NZLR 426. There the Court of Appeal determined an appeal on the merits and held that it had no jurisdiction to entertain a second appeal. The judgment shows that emphasis was laid on the fact that the first appeal had been dealt with on the merits. When an appeal had been so heard and dealt with there was no jurisdiction to entertain a further appeal.

Adams J in the Sherlock case referred to Grierson v The King (1938) 60 C.L.R. 431 where the High Court of Australia held that the Court of Criminal Appeal of New South Wales had no jurisdiction to reopen an appeal which had been heard upon the merits and finally determined.

Adams J's decision then went on to consider in the situation where an appeal had been abandoned the practice of the English Court of Appeal to allow the notice to be withdrawn and the appeal reopened. He considered from the decisions of the Court of Criminal Appeal in England that it is usual to allow reopening of an appeal only where there has been an abandonment of an earlier appeal, although technicalities should not be 'pressed too far'. Where leave is sought to reopen an abandoned appeal there must be special reasons to justify such a course.

However, it seems from the Australian decision and R v Neiling that once an appeal has been determined on the merits, then there is no jurisdiction to entertain a second appeal.

A similar attitude to abandoned appeals is to be found in the decision of the Court of Appeal in R v Pellikan (1959) NZLR 1319 dealing with abandoned appeals which could be reinstated

It happened that I followed Pellikan in a summary proceedings appeal in this Registry in Sproule v Police (18 November 1983, M.51/83). There a summary appeal had been dismissed for want of prosecution; a month later an application was made for an order reinstating it. I allowed that application on the basis of Pellikan's case.

Accordingly, it seems to me that there is no jurisdiction for me to entertain this application. It seems to me that the only course available to the appellant, if still unsatisfied, is to file an application in the District Court for a rehearing under S.75 of the Act. In that case, of course, the prosecution will have to be given an opportunity to reply, in respect of the allegations against the solicitors and those about the quantity and value of the cannabis.

I wonder whether, in view of the well-known tariff judgments in R v Dutch, there is much point in the appellant going through this particular exercise. It is the size of a cannabis growing operation that is important. It is often a matter of chance whether the enforcement authorities arrive at a time when the cannabis is in full bloom or when cultivation has just commenced. It seems on the face of it that this was a reasonably large cannabis growing operation. Both the Judges concerned acknowledged the necessity for a sentence of a deterrent nature, particularly when cannabis growing was fairly rife in the areas concerned. However, that is a matter on which the appellant will have to make a decision; the only course available to him is a rehearing in the District Court.

The applications are refused.

R.D. Barker J.

Solicitors: M. Dyhrberg, Auckland, for Appellant
Crown Solicitor, Whangarei, for Respondent