CN 110 N2CR

IN THE HIGH COURT OF NEW ZEALAND 23/4
AUCKLAND REGISTRY

481

AP. 45/93

LOW PRIORITY

BETWEEN NEIL JOHN SHAW

Appellant

AND POLICE

Respondent

Hearing: 22 March 1993

Counsel: P.A. Williams Q.C. for appellant
Miss V.J. Shaw for respondent

Judgment: 22 March 1993

---

(ORAL) JUDGMENT OF BARKER J

---

This is an appeal against the sentence of 18 months' imprisonment imposed on the appellant at the District Court at Auckland on 24 February 1993.

The appellant pleaded guilty to a charge of cultivating cannabis plant and was sentenced to 18 months' imprisonment. On a charge of possession of cannabis plant for supply, he was sentenced to 3 months' imprisonment; terms to be concurrent. There is no appeal against that latter sentence.

On 8 September 1992, the Police searched a house occupied by the appellant at Turama Road, Royal Oak where they

found a large cannabis growing operation using a complicated hydroponic garden system. The appellant was operating in the basement area of his house - an area approximately 30 square metres. In the basement were located 28 established cannabis plants growing in hydroponics to a height of 1.4 metres. 37 cuttings and infant cannabis plants were located growing in a separate nursery area with its own hydroponic system. Also located in the nursery, was a 20 litre bucket filled with dry cannabis plant material. The whole basement area was fully insulated and set up with sophisticated lighting, heating and ventilation systems and automatic plant feeding equipment.

The Drug Squad claimed that the current market rate for a fully established cannabis plant was $1,000 making the resale value of the material, $28,000. The appellant, however, put its total value at $5,600.

The appellant admitted growing the plants for some 11 months and looking after them. He said that he had spent $1,500 in setting up the nursery; he hoped to sell cannabis in return for cash. The appellant is aged 35. He is a beneficiary as a result of a work accident. He had previous convictions, the most serious being in 1979 for conspiring to assist in escaping from lawful custody. He had no previous drug convictions.

The probation officer suggested the appellant apply to Higher Ground for a possible cure of his substance abuse problems. The learned District Court Judge, in my view quite rightly, did not follow that particular option. It seems that the suggested reference to Higher Ground was from the probation officer rather than being motivated by the appellant himself. There is no doubt that the appellant is greatly in need of treatment for substance abuse since he has a 20 year old history for LSD, cannabis, psychostimulant and alcohol abuse.

The District Court Judge accepted the estimates given by the Police of the value of the cannabis. He looked at the photographs and considered that the Police estimate was the more likely, based on the level of development of the plants. I doubt whether the actual value of the plants matters very much; it is quite clear, as the District Court Judge said, that this was an elaborate and sophisticated planting and that it was an ongoing venture for the sale of drugs.

The appellant claimed that the cannabis found in the plastic bin weighing some 690 grams was worthless, even though the appellant admitted that it was in his possession for the purpose of supply.

At the time of sentence, the appellant had been on remand in custody for some 4 months; this was in respect of Class A drug charges for which he has elected trial by

jury in this Court. The likelihood is that, had he been facing only this present charge, he would have been granted bail but that is a matter of some speculation. In any event, the District Court Judge did not take into acount the 4 months in custody because the appellant was, and still is, on remand in custody awaiting trial on more serious charges.

The District Court Judge considered that a sentence of imprisonment of 2-1/2 years' was merited. It seems from the sentencing notes that he had not been assisted with the references to the various authorities to which I was referred.

Mr Williams conducted a careful survey of the decisions of the Court of Appeal and of this Court on appeal from the District Court on the appropriate sentencing level for cultivating cannabis. The starting point is, of course, the Court of Appeal decision in **R v Dutch** [1981] 1 NZLR 304. Although the Courts have indicated that one should not be too rigid in categorisation, the offending in this case came within the second category of **Dutch** involving a small venture engaged upon for the purpose of generating a substantial profit.

A sentence of imprisonment must be the ordinary result of such conduct and the severity of sentence will in general vary in accordance with the size of the crop under cultivation; the Court did say that such cases involve

cannabis plants were found averaging in height 1-1/2 to 2 metres. All told there were 165 plants.

The appellant told the probation officer that he was cultivating the cannabis for his personal use with the intention of burying a "stash" which would last him for 5 years. He had one previous conviction for this type of offending. The Court considered that the exact classification under **R v Dutch** was not so important as the degree of cultivation. The Court was sceptical of the appellant's statement that he was growing enough for his own use to last him for 5 years. The Court noted the gravity of the offending rested on the fact that, if the cultivation had not been interrupted by the arrival of the police all of the plants might have matured, thereby increasing the quantity of cannabis in the area. A sentence of 18 months' imprisonment was upheld.

In **Mills v Police** [1988] 1 NZLR 742, again the appellant had pleaded guilty. The cannabis was grown in two plots and there was a total of 60 mature plants. The appellant was said to be the 'technical adviser' to his co-offender who had previous convictions. The cannabis there was said to be worth at least $30,000; there was 60 mature plants between 1-2 metres in height. When all the material was cut, it weighed 190 kilograms.

Hardie Boys J considered **R v Dutch** and some unreported cases. He considered that the 18 months imposed was

the generating of a substantial profit "on one occasion only". The District Court Judge here referred to the likelihood of an ongoing crop which must always be a possibility in every commercial operation. Certainly this particular operation and those in the cases to which I shall refer did not come into the third category of **Dutch** which is for cases where cultivation is on a very large scale, involving one thousand plants or more, often in a hot-house equipped with sophisticated cultivation aids.

Counsel for the respondent has also considered the cases and has offered an additional one to those provided by Mr Williams; counsel does acknowledge that the sentence imposed by the District Court Judge is somewhat out of line with those imposed in similar situations.

I do not propose to refer to all the cases to which counsel have made reference. There are two that are most helpful. In **R v Aldom** (6 November 1987, the appellant pleaded guilty to cultivating cannabis in the bush in Northland in what was described by the Police as a well-organised and professional operation of large-scale cultivation of cannabis. Behind his house, was a nursery area containing 75 cannabis seedlings. In a grass and bush area beside and in front of his house, were found 59 plants averaging one metre in height. On a gorse covered hill beside the driveway, 31 mature

within the range, though it might have been somewhat higher than he himself might have imposed at first instance.

In the present case, I have no doubt that the sentence of 2-1/2 years' was outside the range and was within the test of manifestly excessive. I consider the appropriate sentence would be the same as that in the **Mills** and **Aldom** cases. I bear in mind as an aggravating feature in this case that the appellant pleaded guilty to the offence of possession for supply for which a concurrent sentence of 3 months' imprisonment was imposed.

Accordingly, the appeal is allowed and instead of 2-1/2 years' imprisonment, a sentence of 18 months' imprisonment is imposed.

R.J. Barker J.

Solicitors: Crown Solicitor, Auckland, for respondent

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP. 45/93

BETWEEN NEIL JOHN SHAW

Appellant

AND POLICE

Respondent

---

(ORAL) JUDGMENT OF BARKER J

---