IN THE HIGH COURT OF NEW ZEALAND 10/12
TIMARU REGISTRY A.P. No.79/93

2255

BETWEEN MCMURTRIE

Appellant

NOT RECOMMENDED

A N D POLICE

Respondent

Hearing: 30 November 1993

Counsel: M.J. de Buyzer for the Appellant
C.A. O'Connor for the Respondent

Judgment: 30 November 1993

ORAL JUDGMENT OF TIPPING, J.

This appeal against sentence by McMurtrie has raised in essence two points. The first relates to an order which the Judge made which is said to have been made without jurisdiction. The other point relates to the size of the fine.

The Appellant was convicted on his plea of guilty on a charge of cultivating cannabis. There were 19 seedlings ranging in height from two to six centimetres. Mr O'Connor for the Crown indicates that the Police's view is that the ultimate crop would have averaged 225 grams per plant, thus making a total of 4.275 kilograms. That may well be so, but of course at this stage the cultivation was in its infancy and the Court has generally taken a less stern view the earlier the cultivation has come to light. There may be

some degree of illogicality in that but it is certainly the pattern which has developed. That is not to say that the Court cannot take into account the capacity of the seedlings to produce a substantial amount of useable cannabis later.

I will deal with the jurisdictional point first. It relates to what purports to be an order made by His Honour in the Court below expressed in these terms: "Order destruction of cannabis seedlings and glasshouse and equipment therein". Mr de Buyzer has pointed out that the apparent jurisdiction for the making of such an order is s.32 of the Misuse of Drugs act 1975. Subsection (1) provides:-

> "Every person convicted of an offence against this Act shall, in addition to any penalty imposed pursuant to this Act, forfeit to Her Majesty, by virtue of such conviction, all articles, if any, in respect of which the offence was committed and in the possession of such person."

The first point to note is that this is a provision for automatic forfeiture. It is not a subsection which gives the Court power to order forfeiture. Subsection (2) provides that articles forfeited under the provisions of ss.(1) of this section shall be sold, destroyed, or otherwise disposed of as the Minister directs. The Minister for present purposes is the Minister of Health. Clearly therefore the Court has no power expressly to order destruction. The decision as to what is to happen to the forfeited articles is vested in the Minister not in the Court. For that reason alone the order made by the learned Judge cannot stand. For all one knows the Minister, on behalf of Her Majesty, might decide that the glasshouse and equipment should be sold rather than destroyed. That may seem unlikely but the simple point is that the decision is not for the Court; it is for the Minister.

A further point of difficulty, if His Honour was minded to order forfeiture, that being an unnecessary step because the forfeiture, if it applies, is automatic, is whether the glasshouse can be properly described as an

article. Mr O'Connor has mentioned to me the case of Attorney-General v. May 2 C.R.N.Z. 75 and The Queen v. Cuthbertson [1980] 2 All E.R. 401 H.L. as being cases that may assist in this context. Strictly speaking I do not have jurisdiction under an appeal to rule as to whether or not these things, I use that word advisedly, are articles. I would express the tentative view that they may well not be. That is expressed without prejudice if the Minister on behalf of Her Majesty wishes to press the point. I also express some hesitation as to whether the glasshouse and the equipment therein, if they are articles, are articles in respect of which the offence was committed. That may well be so but it is certainly not crystal clear.

Mr de Buyzer had a second limb to this argument, namely that the articles were not in the possession of his client on the basis that the glasshouse was constructed on land in the name of another person. Again that is a point of potential difficulty as to whether the glasshouse had become a fixture. It would not be appropriate on this appeal to give a final ruling on that point either. All that can be said is that if the Minister of Health is so attracted to this glasshouse that she wishes to pursue the matter she won't necessarily have an easy path.

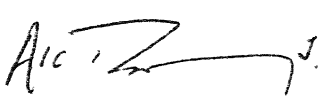
That said, the order made by the Judge cannot possibly stand in terms of the section. It is not suggested by the Crown that there is any other jurisdictional basis for it and the order for destruction of the seedlings, glasshouse and equipment therein is quashed, either on the basis that it is completely unnecessary or on the basis that it was made without jurisdiction.

I turn now to the question of the size of the fine, namely a fine of $1,000.00. The principal thrust of the submissions in this respect has been that the fine is substantially out of line with fines in comparable cases in the District Court at Oamaru. Mr de Buyzer has filed a schedule which I have perused. Prima facie there is some force in what Mr de Buyzer has submitted. However, one of the difficulties that often applies when

schedules are handed up is that unless one knows in some detail what were the circumstances of the particular cases and, materially for this case, the financial circumstances of the people concerned, one is not able to make any final or ultimate comparison.

Here I know absolutely nothing from the submissions made on behalf of this Appellant about his financial circumstances. Whether the Judge knew more is not for me to say. While acknowledging that the fine does seem to be significantly higher than fines in other cases of a comparative kind, I do not know enough about the financial circumstances of the other people, or indeed the financial circumstances of this Appellant, to be able to say whether there is such a disparity as to lead to a clear impression that something has gone wrong with the administration of justice; that being the ultimate test.

In any event for a case involving 19, albeit relatively small, seedlings I do not consider that a fine at the level of $1,000.00 to be of itself manifestly excessive. There was, as the Crown said, the potential for quite a substantial crop. Cultivating cannabis is quite a serious offence in itself. Of course the penalty here was a fine and nothing worse and to that extent the Appellant has been treated reasonably leniently bearing in mind the fact that he has no previous convictions for this sort of thing and has been out of trouble generally for a long time. I do not propose to allow the appeal against the fine for those reasons and because I think to do so might well send a signal into the community that cultivating cannabis, even on a relatively modest scale, is a trivial sort offence. It is not. The appeal is dismissed.



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