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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

W 31A

AP 156/98

BETWEEN

JUDSON

Appellant

AND

THE POLICE

Respondent

Hearing: 2 October 1998

Counsel: H E Juran for appellant
W Andrews for respondent

Judgment: 2 October 1998

ORAL JUDGMENT OF CARTWRIGHT J

Judson appeals against a conviction entered in the District Court, Otahuhu on 6 July 1998 in respect of charges laid pursuant to the Misuse of Drugs Act 1975 of cultivation of cannabis, s 9(1)(a), possession of cannabis seeds, s 7(1)(a)(ii)(a) and having possession of a pipe for the purposes of the commission of an offence against the Act, s 13(1)(a)(iii).

During the course of a summary hearing the learned District Court Judge conducted a voir dire to determine the admissibility of evidence obtained by the investigating police officer who had been called to the appellant's address in Pakuranga to investigate a complaint of aggravated robbery. It appears common ground that the appellant did not call the police but that he had been detained by the robbers and robbed of certain items, particularly cannabis which had been growing at his address and.

He left his home to have his handcuffs removed and on his return Detective Constable Harper and another police officer had already arrived at the scene. By the time the appellant returned the police officers had noted that there was some cannabis on the property, particularly in the rear of the garage. The police officers asked for permission to enter his home to conduct an investigation into the allegation of aggravated robbery. The appellant agreed and showed the officers around the property, during which time further cannabis was located. The police officers then asked the appellant to accompany them to the police station so that the aggravated robbery could be further investigated and informed him that it was proposed to search the property pursuant to s 18(2) of the Misuse of Drugs Act.

There is no challenge to the propriety of the warning given at that stage. Moreover, it is conceded that the appellant was given a caution and had explained to him his right to legal representation and his rights pursuant to the New Zealand Bill of Rights Act 1990. The appellant then returned

to the police station and underwent an interview concerning the charges that were then laid under the Misuse of Drugs Act.

The issue in the District Court was whether the warning pursuant to s 23 of the New Zealand Bill of Rights Act 1990 should properly have been given before the appellant and the police officers entered the appellant's home for the purposes of further investigating the aggravated robbery charge.

The learned District Court Judge found that as there was no intention of detaining the appellant at that stage and that the request to enter the house was primarily for the purpose of investigating the allegation of robbery, there had been no breach of the provisions of the New Zealand Bill of Rights Act.

The Judge went on to consider a further submission that even if the search that was conducted while the police officers went through the home in the course of investigating the complaint of aggravated robbery was illegal, nonetheless it was reasonable in the circumstances. The evidence was ruled admissible, the hearing proceeded, convictions were entered and the appellant was sentenced.

Counsel for the appellant submits that this is not so much an issue relating to the New Zealand Bill of Rights Act, but that at the point where the police intended to search the appellant's home in pursuance of their investigations of the robbery charge, they were already aware that there was cannabis growing at the property and should immediately have cautioned the appellant. Alternatively, if they intended to exercise their powers under the Misuse of Drugs Act and search the property for the purposes of investigating the presence of illicit drugs, then at the same point they ought to have cautioned and advised him of his rights under the New Zealand Bill of Rights Act. In the end result it is Mr Juren's

submission that the search of the property was done by consent for the purposes of investigating the robbery, but evidence relating to misuse of drugs was gathered illegally during the course of the search and that evidence should not be admitted. In his submission any search which culminated in obtaining evidence concerning any prosecution under the Misuse of Drugs Act must in these circumstances have been illegal.

Mr Juren submits further in reliance on *R v Wojcik* (1994) 11 CRNZ 463 (CA) that if a search is found not to have been lawful there is a prima facie presumption that it is unreasonable and extreme circumstances will be required to rebut that presumption.

For the Crown, Ms Andrews submits that there was no illegality surrounding the search of the house property. The police had been called to investigate a serious offence, namely aggravated robbery, were invited into the house during which their observations disclosed the apparent presence of illegal drugs. At the point at which the investigating police officers concluded there might be sufficient to investigate further drug offences relating to the appellant, he was properly warned and advised of his rights. On being invited to return to the police station following that advice he agreed to do so. In her submission there were reasonable and probable grounds to arrest only at that point. Only then was there sufficient suspicion of an offence having been committed. Prior to that time I infer from her submission that it was not open to the police to rely on any right to search under the Misuse of Drugs Act.

That must be set against the fact that the police were already aware before the appellant had even returned to the home that there was cannabis growing at the property. Nonetheless, as counsel for the Crown has submitted that in itself does not give rise to suspicion falling automatically on the appellant. Further investigations such as ownership

of the property, whether other persons lived in it or not, would also have to be made. It is Ms Andrews' over all submission that the search of the property was not illegal in any sense, but even if it were the overall circumstances favour a finding that there was no unfairness in relation to the procedures adopted by the police.

In support of her submission Ms Andrews refers to **R v Grayson & Taylor** [1997] 1 NZLR 399 which involved an admittedly illegal search of an orchard which did not involve entry into a building. Information gathered in the course of that illegal search gave rise to the issue of a search warrant and following that search charges were laid against the two accused. The Court of Appeal found that the original search had been no more than an observation and the infringement was not of such seriousness as to be unreasonable. It had not therefore been a breach of the New Zealand Bill of Rights Act.

In elaborating, the Court discussed at some length the significance of requiring consent or authorisation to search property because of the invasion of property rights and the intrusion on privacy, saying that any search is a significant invasion of individual freedom. How significant it is will depend on the circumstances. The Court observed further that the Bill of Rights Act is not a technical document and has to be applied in our society in a realistic way. Ms Andrews also submitted that **R v Dodgson** 2 HRNZ 300 has relevance. The Court of Appeal said:

Most searches are wholly or partly carried out visually but such visual observations are not necessarily a search. Certainly not every such observation, in so far as it could be described as a search, attracts the need for statutory authority, or a search warrant. That would make policing intolerable, and would not be "a sensible and practical reconciliation between personal rights, individual freedom and dignity, on the one hand, and community rights, the investigation and prevention of crime, on the other. ... In any borderline situation such as the present the answer must be a matter of fact and degree, to be decided having regard to all of the circumstances.

There is some degree of relevance to the present instance in those comments. While Mr Juran no longer submits that s 23 should have been invoked before entering the house, nonetheless there is the overriding issue of fairness so far as the entire procedures are concerned.

This was a search conducted for the primary purpose of investigating a serious crime of aggravated robbery. I am satisfied that the District Court Judge approached the matter in the correct manner, namely that the primary object of the police officer was to investigate that allegation. It was only during the course of the investigation in regard to the allegation that the offending material, namely the drugs, were found on the premises. At that point the accused was not under arrest or detention and the learned Judge determined that the appropriate warnings were given to him at the appropriate time.

In circumstances such as these, it is necessary to balance the competing priorities. There is no suggestion that the police deliberately and unfairly took advantage of the situation in which the appellant found himself. They correctly asked his permission to enter his house and that permission was given at a time when the appellant must have known and indeed had already disclosed that the subject matter of the robbery was illegal drugs. It is clear that the focus of attention was on the offence which had been committed against the appellant and only when further material came to light during the course of the search did the police make a decision to investigate charges under the Misuse of Drugs Act.

In my view there is no area where the learned Judge has improperly exercised his discretion in admitting the evidence. He has correctly isolated the central issue and applied the correct legal principles. Essentially, this was a matter within his discretion after balancing and weighing the competing factors relating to the fairness of the search. It is clear from his careful ruling that he has done just that.

I can find no area where I consider that it would be in the interests of justice to interfere with the ruling that he has made and for those reasons I dismiss the appeal.

Alkan Singh