11/06; [2006] VSCA 54

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v WEITERING

Buchanan, Vincent and Eames JJ A

14 March 2006

CRIMINAL LAW – CULTIVATION OF CANNABIS – 62 PLANTS WEIGHING 30.88 KGS SEIZED – "25.0KG OR 100 PLANTS" – MEANING OF – WHETHER COMMERCIAL QUANTITY ESTABLISHED EITHER BY WEIGHT OR NUMBER OF PLANTS: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, S70.

The term "commercial quantity" is defined in the *Drugs, Poisons and Controlled Substances Act* 1981 ('Act') as the quantity of a drug of dependence specified in the Act as "25.0kg or 100 plants". The words are plain and unambiguous. A commercial quantity of cannabis is either 25 kilograms or 100 plants.

BUCHANAN JA:

1. On 21 June 2002 police executing a search warrant at the applicant's house found a number of cannabis plants in a shed divided into two rooms. Each room contained a complex hydroponic system consisting of lights, timers, ventilators and reticulated watering equipment. One room contained 24 almost mature plants. Another room contained 38 semi-mature plants. The electricity meter had been bypassed. The plants, excluding their roots, weighed 30.88 kilograms.

2. The applicant was arraigned in the County Court on a presentment containing one count of cultivating a commercial quantity of cannabis, one count of trafficking in cannabis and one count of theft of electricity. The applicant pleaded guilty to the count of theft and not guilty to the counts of trafficking and cultivation. After a trial the jury acquitted the applicant on the charge of trafficking and returned a verdict of guilty on the count of cultivation. A plea was made on behalf of the applicant. A total effective sentence of six months' imprisonment was imposed, which was wholly suspended for a period of two years.

3. The applicant now seeks leave to appeal against his conviction on the count of cultivation. The sole issue raised by the application is whether the cannabis in the applicant's possession amounted to a commercial quantity.

4. Section 72A of the *Drugs, Poisons and Controlled Substances Act* 1981 ("the Act") provides in a convoluted fashion that cultivation of "a narcotic plant in a quantity of a drug of dependence, being a narcotic plant, that is not less than a commercial quantity applicable to that narcotic plant" is an offence for which the maximum penalty is 25 years' imprisonment. Cultivation of less than a commercial quantity attracts lesser maximum penalties. Cannabis is a narcotic plant (s70 of the Act) and a drug of dependence (s4). The term "commercial quantity" is defined as the quantity of a drug of dependence specified in a column in a schedule to the Act "opposite to the name of that drug of dependence" (s70). The quantity opposite Cannabis L in the appropriate column in the schedule is "25.0 kg or 100 plants". "Cannabis" is defined as "any fresh or dried parts of a plant of the genus Cannabis L".

5. Until the enactment of Act No. 48 of 1997 a commercial quantity of cannabis was defined only by reference to a weight of 100 kilograms. The amendment reduced the weight criterion and introduced the alternative criterion of a number of plants. Before the amendment, when a crop was discovered by the police, it was uprooted and weighed. In many cases there were disputes as to the parts of the plants which should be weighed.

6. In the present case the number of plants was less than 100, but their weight exceeded 25 kilograms. It was submitted on behalf of the applicant that a commercial quantity of cannabis the subject matter of a charge of cultivation is 100 plants. The weight of the plants is irrelevant. A commercial quantity of cannabis the subject matter of a charge of trafficking, on the other hand, was said to be 25 kilograms and the number of plants in a trafficker's possession is irrelevant.

7. In my opinion the applicant's construction of the definition of "commercial quantity" should be rejected. The words appearing in s70 and the schedule are plain and unambiguous. A commercial quantity of cannabis is either 25 kilograms or 100 plants. The applicant's construction requires the addition of words, so that "25.0 kg or 100 plants" becomes "25.0 kg or in the event of cultivation 100 plants" or perhaps "25.0 kg in the event that the plants have been harvested or 100 plants".

8. I can see no warrant for such a strained construction, for I think it inapt to meet the mischief at which the Act is aimed. That mischief is the production of a large quantity of the drug cannabis. The legislature sought to apply the maximum penalty of 25 years' imprisonment to a large quantity produced either by efficient agronomy or by large scale planting.

9. Counsel for the applicant contended that his interpretation derived support from the repeated use of the word "plant" and the use of the word "quantity" not "weight" in the expression "narcotic plant in a quantity of a drug of dependence" in s72A of the Act. The use of the word "plant" is simply explained by the context of cultivation, and the use of the word "quantity" could have no effect upon the interpretation of the expression "commercial quantity". Counsel also made much of the fact that the weight of plants increases as they grow. In my view the introduction of the criterion of the number of plants was intended to mitigate the effect of the date of apprehension of an offender by providing an alternative standard.

10. For the foregoing reasons I am of the opinion that the cannabis in the applicant's possession did constitute a commercial quantity within the meaning of the Act. I would refuse the application for leave to appeal.

VINCENT JA: 11. I agree.

EAMES JA: 12. I also agree.

BUCHANAN JA: 13. The order of the Court will be that the application for leave to appeal against conviction is refused.

APPEARANCES: For the Crown: Mr JD McArdle, QC, counsel. Mr S Carisbrooke, Acting Solicitor for Public Prosecutions. For the applicant Weitering: Mr R Melasecca with Mr D Varrasso, counsel. Rob Melasecca, solicitor.
