51/89

SUPREME COURT OF VICTORIA

DONNELLY v LE BRUN

McGarvie J

3, 4 May 1989

SENTENCING – POSSESSING/USING DRUG OF DEPENDENCE – CANNABIS – MORE THAN A SMALL QUANTITY – WHETHER WEIGHT OF DRUG A RELEVANT FACTOR – WHETHER ADJOURNED BOND PRECLUDED WHERE MORE THAN A SMALL QUANTITY OF CANNABIS INVOLVED: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, SS73(1), 76.

1. Section 76 of the *Drugs, Poisons and Controlled Substances Act* 1981 empowers a court to adjourn the further hearing of certain offences involving cannabis without proceeding to a conviction. However, whilst the quantity of the drug may be a relevant consideration, a court may nevertheless exercise its discretion notwithstanding that an offence relates to more than a small quantity of cannabis.

2. Where a magistrate convicted a first offender of cultivating, possessing and using cannabis, giving the reason that the weight of the drug was more than a small quantity (50 grams), it was open to conclude that the magistrate had erroneously considered that the exercise of discretion was thereby precluded.

McGARVIE J: **[1]** There is before me an order to review the decision of the Magistrates' Court at Heidelberg on 20 September 1988, convicting and imposing fines upon the applicant for offences against the *Drugs, Poisons and Controlled Substances Act* 1981. The applicant pleaded guilty to three offences: using, cultivating and having possession of cannabis, a drug of dependence. The police prosecutor read out a summary of the circumstances and stated that no prior convictions were alleged against the applicant. Mr Lethbridge, who appeared for the applicant, made a plea upon sentence.

The learned Magistrate said that he was satisfied the cannabis was for the applicant's own use and that the offences were not committed for any purposes related to trafficking. Mr Lethbridge submitted that the appropriate course was to adjourn the further hearing under section 76 of the Act, without proceeding to convictions. The Magistrate on inquiry was informed by the Prosecutor that the weight of cannabis involved in the offences was 94.7 grams. The Magistrate ordered that the applicant be convicted of each of the offences and fined him a total of $500.

Mr Lethbridge asked the Magistrate for his reasons for not applying section 76(1) of the Act. Under section 76(2) the Magistrate was obliged to state his reasons. The Magistrate replied that the weight of cannabis involved was more than the small quantity.

The ground of the order to review is that the learned **[2]** Magistrate erred in his view that section 76(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 did not apply to offences where the quantity of cannabis concerned exceeded this small quantity.

Before me, Mr Clelland appeared for the applicant and Mr Turley for the respondent. There is no difference as to the construction of the legislation in the submissions of counsel. The difference is as to whether in the circumstances the words used by the Magistrate indicated that he made the error asserted in the ground stated in the order.

Section 76 provides that when a person charged before a Magistrates' Court with any of the offences charged against the applicant, has not previously been convicted of specified drug offences or dealt with under section 76, and the court is satisfied that the person is guilty of the offence charged, the court has a discretion, having regard to a number of stated considerations, to adjourn the further hearing for not more than 12 months without proceeding to conviction.

It is not a precondition for the exercise of that discretion as it is for example to the imposition under section 73(1)(a) of the lower penalty there specified, that the offence was committed in relation to what is defined as a small quantity of cannabis. A small quantity of cannabis is defined as 50 grams.

Counsel presented their arguments to me precisely. Mr Clelland submitted that the Magistrate, by referring to "the small quantity" was erroneously treating himself as **[3]** having no discretion under the section if the offences related to more than the small quantity defined in the Act. Mr Turley pointed out that there was before the Magistrate material to show an extensive cultivation of cannabis; that the applicant had in one respect been untruthful with police; that he had not been particularly helpful to the police in their investigations and that a substantial quantity, almost 95 grams, of cannabis was involved.

[4] Mr Turley emphasised that the Magistrate is directed by the section, in the exercise of the Magistrate's discretion to take into account all the circumstances and the public interest. It is submitted that one of the relevant circumstances was the quantity involved and that the Magistrate, in his reference to the weight of cannabis, was doing no more than referring to the order of magnitude of the cannabis to which the offences related. Mr Turley submitted that what the Magistrate said was open to the interpretation that the factor which tipped the balance in the exercise of his discretion was the fact that the quantity was over the defined small quantity. Mr Turley referred me to authorities for the proposition that I should assume that the discretion to be exercised by the Magistrate under the section was correctly exercised in accordance with law until the contrary is shown. I accept that proposition.

This case is fairly close to the line. But the applicant has satisfied me that in the circumstances, by using the words which he did, the Magistrate indicated that he had made an error of law. With regard to these offences, the fact that the quantity of cannabis was more than the statutory concept of a small quantity was of itself not a matter of significance. The difference between one of the offences of the type charged involving 49 grams and one involving 51 grams would be of no practical significance in the exercise of discretion under section 76, although the former is not and the latter is more than the defined small quantity.

[5] I accept Mr Turley's submission that the quantity involved is a relevant consideration. I assume for present purposes that it would have been open to the Magistrate in considering the importance he should attach to the quantity of cannabis, in the exercise of his discretion, to have regard, at least in respect of one of the offences, to the fact that it was far in excess of the quantity which the legislature treated as the dividing line between the lower penalty under paragraph (a) and the higher penalty under paragraph (b) of section 73(1).

I consider that the proper interpretation to be placed upon the words of the Magistrate is that he considered the fact that more than the small quantity was involved to be of itself significant. Those words indicate that he was approaching the exercise of his power under section 76, as it would be proper to approach the exercise of power under section 73(1)(a) and (b).

It follows that he should be taken as erroneously treating himself as having no power to exercise the discretion under section 76 because the quantity of cannabis exceeded 50 grams. The ground is made out and the decision of the Magistrates' Court should be set aside. I will hear submissions from counsel as to the order which I make.

APPEARANCES: For the applicant Donnelly: Mr N Clelland, counsel. Slades, solicitors. For the respondent Le Brun: Mr I Turley, counsel. Victorian Government Solicitor.
