10/76

HIGH COURT OF AUSTRALIA

BULL & OTHERS v R

McTiernan, Gibbs, Stephen, Mason and Murphy JJ

15, 18 August 1975 — 7 ALR 524; (1976) 50 ALJR 2

SENTENCING – ACCUSED FOUND GUILTY OF SERIOUS DRUG IMPORTATION OFFENCES – 31,000G OF CANNABIS INVOLVED – APPROPRIATE SENTENCE: *CUSTOMS ACT* 1901-1973, SS231(1), 233B(1)(a).

Under s231(1) of the *Customs Act* 1901-1973 (Cth) it is an offence for any persons to the number of two or more to assemble for the purpose of preventing the seizure of prohibited imports, with penalties provided by s235 in the case of prohibited imports of the nature of narcotic goods, and under s233B(1)(a) it is an offence for any person to have in his possession on board any ship without any reasonable excuse (proof of which is to lie upon him) prohibited imports that are narcotic goods, likewise with the penalties provided by s235.

The first, second and third applicants, Bull, Plithakis and Conn were involved with the fourth applicant, Corns, the master of the British vessel, *The Mariana*, in an enterprise for bringing into Australia a large quantity of cannabis, picked up in Bali, Indonesia, and which was a prohibited import of the nature of narcotic goods under the *Customs Act* 1901-1973 (Cth). On approaching the coast of the Northern Territory, the vessel was subjected to surveillance, whereupon the cannabis, contained in suitcases, was thrown overboard. The vessel was intercepted by customs officers, and some of the contents of the suitcases, amounting to 31,000 grams of cannabis, recovered from the sea.

On their trial before the Supreme Court of the Northern Territory, the applicants were found guilty on a number of charges for offences against certain provisions of the *Customs Act* 1901-1973 (Cth) including charges for offences against ss231(1)(c) and 233B(1)(a) of the Act, the subject-matter being the amount of 31,000 grams of cannabis.

The applicant Conn was also found guilty of an offence under s233B(1)(a) in respect to 14.8 grams of cannabis resin found upon his person. According to the material before the Supreme Court, there was no evidence that Conn took part in the initial plans for the enterprise, the position being that he joined the ship at Bali because he needed a passage back to Australia, nor was there any evidence that he had been engaged in Bali in procuring the cannabis, or that he in any other way acted in Bali to assist in the scheme.

The trial judge stated a case for the High Court under s72(3) of the *Judiciary Act* 1903-1969 (Cth) for the purpose of determining certain questions of law bearing upon the validity of the convictions, with the consequence that the High Court by a majority set aside the verdicts of guilty other than those for offences against ss231(1)(c) and 233B(1)(a) of the Act, and remitted the matter to the Supreme Court (the High Court's decision is reported in 48 ALJR 232). Sentences were then imposed upon the applicants as follows:-
Bull, imprisonment with hard labour for five years two months for both offences, to be served concurrently, with non-parole period of two years six months; Plithakis, imprisonment with hard labour for five years eight months for both offences, to be served concurrently, with a non-parole period of three years; Conn, imprisonment with hard labour for five years two months for the two offences as to the 31,000 grams of cannabis and for six months for the offence as to the 14.8 grams of cannabis resin, to be served concurrently with a non-parole period of two years six months as to the two offences concerning the 31,000 grams of cannabis; and Corns, imprisonment with hard labour for four years two months for both offences, to be served concurrently, with a non-parole period of two years. The applicants applied to the High Court for leave to appeal against the sentences on the ground of their severity.

HELD: (1) that leave to appeal against the sentences imposed on the applicants Bull, Plithakis and Corns should not be granted as no reason had been shown for interfering therewith;

(2) but that (per Gibbs, Stephen and Mason JJ, McTiernan and Murphy JJ, dissenting) on the evidence before the Supreme Court it was an error of fact to regard the applicant Conn as equally involved in the enterprise with Bull and Plithakis and the sentences imposed on him in regard to the 31,000 grams of cannabis should be reduced to imprisonment with hard labour for three years two months, to be served concurrently, with a non-parole period of one year.

Per Gibbs J (with the concurrence of Stephen and Mason JJ): The offences committed by the applicants Bull, Plithakis and Corns were serious and premeditated and involved a very large quantity of the prohibited import, cannabis, and it was impossible to say that the sentences were excessive or that the trial judge fell into any error, or failed to consider any relevant circumstance, in fixing either the sentences themselves or the minimum terms to be served before the applicants became eligible for parole.

McTIERNAN J: I dissent, so far as the case of Conn is concerned. He, on the evidence, was equally guilty with the other accused persons by his participation in the acts constituting the offences of which they all were found guilty, although he may not have participated to the same extent in the initial circumstances. Conn was convicted of being in possession, on a ship, of about 31,000 grams of Cannabis, and also assembling to prevent its seizure. In addition he was convicted of possession of a small amount of Cannabis resin. He was sentenced to five years two months' imprisonment with a non-parole period of two years six months. The offences are created respectively by ss233B(1)(a) and 231(1)(c) of the *Customs Act* 1901-1973 (Cth). Section 235 of the *Customs Act* provides for a maximum penalty of $4,000 for each of the offences outlined above.

I am of the opinion that the evidence does not disclose any reason to interfere with the sentence imposed by the learned primary judge on Conn.

GIBBS J: Having considered the arguments submitted on behalf of the applicants Bull, Plithakis and Corns, I am of opinion that leave to appeal against their respective sentences should not be granted. Their offences were serious and premeditated and involved a very large quantity of the prohibited import, and it is impossible to say that the sentences imposed were excessive or that the learned judge fell into any error, or failed to consider any relevant circumstances, in fixing either the sentences themselves or the minimum terms to be served before the prisoners become eligible or parole.

It need only be added that if the actions of Bull and Plithakis on 5th February 1974, when a fire broke out at the Fanny Bay prison, call for the exercise of the prerogative of mercy, it is still open to the executive to exercise that prerogative.

However, as to Conn, the learned judge said, 'So far as the offence itself is concerned, I see no reason to differentiate between Bull, Plithakis and Conn, who seem to me to be equally involved in the enterprise. Corns I think came into the matter late, and was a tool, albeit a willing tool, of the other three.' Later in his reasons, his Honour said: 'I treat Bull, Plithakis and Conn in the same way, except that I make allowance for the differing times in custody, and for the fact that this is the third offence for Plithakis.'

The circumstances leading up to the commission of the offences as established before the trial judge, were that Bull and Plithakis persuaded Corns for reward to make available his trawler to sail from Darwin to Bali and to return to return to Australia with a smuggled cargo of marijuana. However, there is no evidence that Conn took part in the initial plans. According to the material before the Court, he joined the ship at Bali because he needed a passage back to Australia. There is no evidence that he had been engaged in Bali in procuring the drug, or that he in any other way acted there to assist the enterprise. His guilt is not in question, but on the evidence it was an error of fact to regard him as involved in the enterprise with Bull and Plithakis. This error led the learned judge to impose on Conn a heavier sentence than he would otherwise have done.

I would therefore reduce Conn's sentences on each of the first two counts to one of imprisonment with hard labour for three years and two months, and would order that he not be eligible for parole for a period of one year. The sentence will of course be concurrent and date from the date on which the learned judge ordered that they should take effect.

STEPHEN J: I agree with all that has been said by my brother Gibbs.

MASON J: I also agree with all that my brother Gibbs has said.

MURPHY J: With regard to Bull, Plithakis and Corns, I agree that nothing in the trial judge's approach warrants any interference with the sentences he imposed. The sentences are not light. Marijuana is not a drug with particularly dangerous properties (as referred to in art. 11, par. (5) of the *Single Convention on Narcotic Drugs*), and this was conceded by the Crown. However, this set of offences involved the possession of a large quantity of prohibited imports in breach of the *Customs Act* 1901-1973 (Cth), in circumstances which clearly point to large scale trafficking in drugs. Such cases must be distinguished from the everyday cases of possession or use of a small quantity of marijuana where, if any penalty is imposed, a small fine would generally be appropriate.

With regard to Conn, I agree with McTiernan J that, if the preceding circumstances are left aside and attention is paid only to the offence on which the persons were actually convicted, there seems to be an equal degree of complicity by all four men in the major offence. While the surrounding circumstances are important, it is important also not to approach the case and deal with those convicted on the basis of offences they were either acquitted of or not charged with.

I am not satisfied that the trial judge made such an error in sentencing Conn that the granting of leave and interference with the sentence would be warranted. I would therefore join with McTiernan J in not interfering with any of the sentences which have been imposed. In relation to the incident in Fanny Bay, I agree with the observations on the exercise of the prerogative of mercy.

APPEARANCES: LC Gruzman QC and BC Oslington, counsel for the applicants Bull and Plithakis. PJ Moss, for the applicant Conn. FJ Ryan for the applicant Corns. JM Foord for the respondent.
