

16/00; [2000] VSCA 99

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v SULLIVAN

Winneke P, Batt and Buchanan JJ A

29, 30 May 2000

SENTENCING – DRUG TRAFFICKING IN CANNABIS – SUBSTANTIAL TRADE CARRIED ON OVER A CONSIDERABLE PERIOD OF TIME – OFFENDER RELEASED ON A COMMUNITY BASED ORDER – RELEVANCE OF GENERAL DETERRENCE IN RELATION TO TRAFFICKING – WHETHER CBO MANIFESTLY INADEQUATE.

S. pleaded guilty in the County Court to a number of charges including trafficking in a drug of dependence (Cannabis L) and possession of a drug of dependence (amphetamine). The evidence showed that the trade in which S. engaged was substantial and was carried on over a considerable period of time. On apprehension, S. possessed some 767 grams of cannabis and 2.5 grams of amphetamine. He made a profit of about \$500 per week and admitted that \$6000 in cash found in his bedroom together with other property were obtained from the proceeds of trafficking. On the plea, S's only prior convictions were for possession and use of cannabis for which he received small fines. S. said that he commenced to trade in the drug in order to meet debts and family commitments after he became unemployed. Since his apprehension, S. obtained casual employment and had undergone counselling to reduce his use of cannabis. On the trafficking charge, the judge released S. on a CBO to perform 100 hours of unpaid community work. The other charges attracted a 2-year good behaviour bond with a condition that S. continue to attend the drug counselling agency. Upon appeal by the DPP against the sentences imposed—

HELD: In respect of the sentence imposed on the trafficking charge, appeal allowed, the CBO order quashed and a sentence of 30 months' imprisonment with a minimum of 21 months imposed. In respect of the remaining charges, the good behaviour bond to remain except for the special condition.

Trafficking in cannabis is a serious offence. Leniency is not to be shown to a trafficker in marijuana on the basis that the drug is harmless. The legislation is predicated upon its being harmful. The principle of general deterrence is of special importance in relation to the crime of trafficking in drugs. Generally, trafficking on the scale of that found in the present case requires the imposition of an immediate custodial sentence, which will usually only be avoided by exceptional countervailing factors. The factors pointing towards leniency were not sufficient to neutralise the offence itself. The absence of significant prior convictions was of limited relevance to a trafficking offence. The sentence imposed by the judge manifested such inadequacy as to constitute error in principle.

WINNEKE P:

1. I will ask Mr Justice Buchanan to deliver the first judgment in this appeal.

BUCHANAN JA:

2. On 21 June 1999 the respondent was arraigned in the County Court and pleaded guilty to a count of trafficking in a drug of dependence, Cannabis L, and a count of possession of a drug of dependence, being amphetamine. A plea was commenced and adjourned. On 17 September 1999 the respondent pleaded guilty to four summary offences: using a drug of dependence (Cannabis L), using a drug of dependence (amphetamine), and two charges of possession of a prescribed weapon. The weapons were a stun-gun and a knuckle duster.

3. The penalty for the charge of trafficking was a maximum of 15 years' imprisonment or 1000 penalty units or both. The maximum penalty for possession and use of amphetamine was one year imprisonment or 30 penalty units or both. The maximum penalty for using cannabis was five penalty units. The maximum penalty for possession of a prohibited weapon was six months' imprisonment or 60 penalty units.

4. On 23 September 1999 the respondent was sentenced on count 1 to serve a community-based order over a two-year period and to perform 100 hours of unpaid community work. The respondent was convicted of all the remaining charges, but they were adjourned for two years upon the respondent entering into a good behaviour bond. The sentencing judge forfeited cash

and property purchased with the proceeds of the trafficking. He also imposed a pecuniary penalty order in the sum of \$18,900 pursuant to the provisions of the *Confiscation Act* 1997 representing the value of the profits of the trafficking enterprise.

5. The Director of Public Prosecutions has appealed to this Court pursuant to the provisions of s567A against the sentences imposed on the charges of trafficking in cannabis and possession of amphetamine on the ground that the sentences were manifestly inadequate in that the sentencing judge failed to accurately reflect the gravity of the offences, failed to have sufficient regard to general deterrence and gave too much weight to factors going to mitigation.

6. The offences came to light when police armed with a search warrant entered the respondent's house and found a number of packages of cannabis prepared for sale, amounting to some 767 grams, and 2.5 grams of amphetamine. The respondent freely admitted all the offences with which he was charged in a record of interview, and expressed contrition. He said that he had used cannabis "on and off for about twenty years" and that he currently smoked about 10 to 15 bongs a day. He stated that due to unemployment and financial pressures he resorted to selling cannabis from his house and he had done so for between 12 to 18 months. He stated that he would purchase about two pounds of cannabis a month at a price of \$8,000 and would break that down to small quantities, then sell about 8 ounces a week. He stated that after a slow start he built up the business. He was currently receiving between \$2000 and \$4000 a month and estimated that he made a profit of around \$500 a week. Those figures were accepted by the sentencing judge.

7. The respondent admitted that the \$6,000 in cash located by the police in his bedroom was the proceeds of selling cannabis. He also admitted that other property, such as certain sports memorabilia, a stereo and electrical equipment, was obtained from the proceeds of trafficking.

8. The respondent admitted to being in possession of three foils of amphetamine for his personal use and stated that he exchanged them for one quarter of an ounce of cannabis, which was worth \$100. He said that he used amphetamine about six times a year by injecting it intravenously, and the last time was a fortnight earlier.

9. The respondent admitted to being in possession of a prescribed weapon, being the stun-gun, which he had had for six months for "protection". He said that he did not know where the knuckle duster had come from.

10. The respondent is now 35 years old. His only prior convictions were for possession and use of cannabis, for which he received small fines. The respondent left school at the end of Year 9 and worked variously as a motor-cycle salesman, a machinist, a welder, a laboratory assistant, a storeman, a gardener, in a factory manufacturing cricket bats and, finally, producing statues. Before he was sentenced, he was last employed in May 1997.

11. The respondent was married to a woman by whom he had three children. The marriage ended in 1994. One of the children suffered brain damage soon after birth. The respondent's former wife in a letter to the Court spoke of the respondent's devotion to his children and the fact that he met their educational and medical expenses as well as paying maintenance.

12. The respondent commenced to trade in the drug in order to meet debts and family commitments after he became unemployed.

13. After his arrest on these charges, the respondent was released on bail. He registered with two employment agencies and obtained casual work. He was also treated by Taskforce Community Agency Inc., a drug and alcohol counselling and prevention service. A counsellor employed by the Agency reported to the Court that the respondent had significantly reduced his use of cannabis. The sentencing judge made it a specific condition of the good behaviour bond that the respondent continue to attend the Agency.

14. Trafficking in cannabis is a serious offence. Its gravity is reflected in the maximum penalty which Parliament has assigned to it. As the Full Court said in *R v Pastras* (1993) 65 A Crim R 584 at 590:

"Those who have experience in the administration of the criminal justice system know that the prolonged use of marijuana can cause great harm, particularly to psychologically vulnerable individuals."

Leniency is not to be shown to a trafficker in marijuana on the basis that the drug is harmless. The legislation is predicated upon it being harmful.

15. The trade in which the respondent engaged was substantial and it was carried on over a considerable period of time. It does not appear to have been a trade limited to a closed circle. Rather, the respondent carried on a general retail business supplying all comers.

16. The principle of general deterrence is of special importance in relation to the crime of trafficking in drugs. Generally trafficking on the scale of that found here requires the imposition of an immediate custodial sentence, which will usually only be avoided by exceptional countervailing factors.

17. In the present case I do not consider that the factors pointing towards leniency were sufficient to neutralize the offence itself. The absence of significant prior convictions is of limited relevance to a trafficking offence, and the cooperation of the respondent with the police is to be considered in the light of the incriminating circumstances in which he was apprehended.

18. In my opinion the sentence imposed on the respondent does manifest such inadequacy as to constitute error in principle. See *Everett v R* [1994] HCA 49; [1994] 181 CLR 295 at 300; (1994) 124 ALR 529; (1994) 68 ALJR 875; 74 A Crim R 241, per Brennan, Deane, Dawson and Gaudron JJ; *R v Clarke* [1996] VICSC 30; [1996] 2 VR 520 at 522; [1996] 2 VR 520; (1996) 85 A Crim R 114, per Charles JA.

19. I am speaking of the sentence imposed on the charge of trafficking. I do not regard the sentence imposed for possession of a small quantity of amphetamine as outside the range available to the sentencing judge.

20. In re-sentencing the respondent, I am mindful of the element of double jeopardy involved in twice standing for sentence, and the fact that the respondent has been at liberty since he was first sentenced. Accordingly, I propose a sentence which is less than that which I consider should have been imposed at first instance.

21. I would propose re-sentencing the respondent to a term of two-and-a-half years' imprisonment. Having regard to the length of time that has elapsed since he was first sentenced, his conduct since then in completing the community-based order, and his efforts to obtain employment, I consider it appropriate to suspend the bulk of the sentence.

22. Accordingly, I would propose that 21 months of the sentence be suspended for a period of two-and-a-half years.

WINNEKE P: I agree.

BATT JA: I also agree.

APPEARANCES: For the appellant DPP: Mr CG Hillman, counsel. PC Wood, Solicitor for Public Prosecutions. For the respondent Sullivan: Mr D Dann, counsel. Galbally & O'Bryan, solicitors.