09/90

SUPREME COURT OF VICTORIA

PETRIE v WELLS

Gobbo J

2 February 1990

SENTENCING – CULTIVATING/POSSESSING/USING CANNABIS – SMALL QUANTITY FOR PERSONAL USE – MATURE AGE OFFENDER – NO PRIOR CONVICTIONS – PREVALENT OFFENCE IN DISTRICT – CONVICTION IMPOSED – WHETHER PROPER EXERCISE OF DISCRETION: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, SS72, 73, 75, 76.

P., a mother of 2 young children, was charged with cultivating, possessing and using cannabis contrary to the provisions of the *Drugs, Poisons and Controlled Substances Act* 1981 ('Act'). When police attended P.'s premises, they found one small plant and 1 gram of cannabis leaves which P. said were for her own use. Further, P. admitted to using cannabis by smoking it through a bong. At the hearing, P. pleaded guilty; no prior convictions were alleged. In imposing convictions, the magistrate compared P.'s mature age with young offenders and referred to the prevalence of the offending given that there were 15 persons before the court charged with similar offences. Upon Order nisi to review—

HELD: Order discharged.
The court, after considering the very wide criteria set out in s76 of the Act is obliged to grant a bond unless it considers that a conviction is appropriate. However, in the present case, it was open to the magistrate to impose a conviction to deter the offender and because of the prevalence of the offending. Accordingly, it could not be said that the magistrate's discretion miscarried.
[See also *Donnelly v Le Brun* MC 51/1989. Ed.]

GOBBO J: [*After setting out the nature of the charges and the facts, His Honour continued*] … **[4]** There were two main grounds of challenge to the magistrate's decision to decline to grant a bond. It was first said that the learned magistrate had failed to state his reasons, because no reasons in writing had been provided. This argument can immediately be disposed of. The material shows that the magistrate gave oral reasons. In my opinion there is no obligation in the statute to provide written reasons. S76(2) simply provides as follows:

> "where sub-section (1) applies to a person and the magistrates' court proceeds to a conviction, the court shall state its reasons for doing so."

As I have indicated that sub-section is sufficiently complied with if oral reasons are provided. The second ground of challenge was that the learned magistrate had misconstrued his discretion in that he had in effect said that he only gave bonds under s76 of the *Drugs, Poisons and Controlled Substances Act* to young first offenders. In reply it was submitted on behalf of the informant, the defendant in these proceedings, that as to the offences under s72 and s73 for cultivation and possession respectively, **[5]** the condition precedent in s76(1) had not been satisfied and it was therefore not open in the circumstances, for the Magistrate to grant a bond under that section. It was also argued as to all three offences that upon proper analysis of all the material the Magistrate had not erred in the exercise of his discretion, either by erroneously limiting his discretion or by taking extraneous matters into account. The relevant portions of s76(1) are as follows:

> "76(1) Where before a magistrates' court—
> (a) in relation to cannabis—
> (i) a person is charged with an offence under s72 and at a hearing the court is satisfied on the balance of probabilities that the offence was not committed by the person for any purpose relating to trafficking in cannabis;
> (ii) a person is charged with an offence under s73 and at the hearing the court is satisfied on the balance of probabilities that the offence was not committed by the person for any purpose relating to trafficking in cannabis;
> (iii) a person is charged with an offence under s75 the court, without proceeding to conviction,

> shall having regard to the character and antecedents of the person and to all the circumstances and the public interest, adjourn the further hearing to a time and place to be fixed (such time being not more than twelve months thereafter) and allow the person charged to go at large upon his entering into the recognizance mentioned in s80(1) of the *Magistrates (Summary Proceedings) Act* 1975, unless the court considers it appropriate to proceed to a conviction."

The first question in the present case is the operation of sub-paragraph (a)(i) and (ii). **[6]** The burden is on the defendant to satisfy the court that on the balance of probabilities, the offence in question was not committed for any purpose relating to trafficking in cannabis. This is clear from the judgment of the Full Bench in *R v Pantorno* [1988] VicRp 28; [1988] VR 195. On appeal to the High Court, that appeal being reported as *Pantorno v R* [1989] HCA 18; (1989) 166 CLR 466; 84 ALR 390; 38 A Crim R 258; 63 ALJR 317, it was held that in the circumstances there had been a denial of procedural fairness in that the defendant had not been given an adequate opportunity to address the specific matters contained in s73(1)(b) in that case. The particular circumstances were that there had in effect been a concession by the Crown in that case that there was not a traffickable quantity and that as the law then stood the Full Court decision in *R v Bridges* (1986) 20 ACR 271 had not yet been overruled by the Full Bench and was still the operative law at the time when the matter had come on before the County Court Judge.

It was held by the High Court in *Pantorno's* case that though the County Court judge was not bound by the Crown's concession he was still bound to raise the matter with the parties, if he intended to depart from the common assumption on which the hearing had proceeded. That had not occurred and therefore it was held that there had been a lack of procedural fairness. **[7]** At the same time there needs to be noted the following remarks in the judgment of Mason CJ and Brennan J in the High Court at 473:

> "We would not hold that there is some general duty resting on either the County Court or the Full Court to warn a convicted person or his Counsel of the onus imposed by s73(1)(b) merely because no attempt is made to discharge it."

In the present case the particular factors that led to a finding of procedural unfairness in *Pantorno's* case do not exist. The decision in *R v Pantorno* in the present case plainly casts the obligation as to mitigation on the defendant, in accordance with the words of the sub-section I have set out above. In addition, there was no reference to trafficking in the introductory remarks by the prosecution. There was, however, a statement that the amount was a small one and that it was for her own use. It may be argued that this was a concession that the purpose was other than for trafficking.

There is some ambiguity about this matter. Taking the material literally, the magistrate did not appear to turn his mind to the condition precedent for a s76(1) bond at all. I am reluctant to uphold this point in the particular facts of this case. In the event I do not however have to reach a final decision of this argument because of my findings hereafter on the main argument. The interpretation of the relevant portion of s76(1) commencing with the words "the court, without proceeding to conviction, shall having regard to the **[8]** character and antecedents of the person and to all the circumstances and the public interest" and ending with the words "unless the court considers it appropriate to proceed to a conviction" is a matter of some real difficulty.

I was referred in the arguments of counsel which were commendably brief and clear to the contents of the Parliamentary Debates, but I have to confess that these Debates would, if taken literally, have increased the ambiguity rather than have solved them. In fairness to the Parliamentarians involved they themselves indicated that the matter was a somewhat confused one. Much emphasis was placed understandably, on the word "shall". But at the same time the provision does not limit the magistrate's ultimate discretion when it uses the words "unless the court considers it appropriate to proceed to a conviction". It would appear that the legislature was seeking to create a different approach in these cases that fall within s76 to the usual case where a bond is considered. It might be said that in the ordinary case the court is obliged to impose a conviction unless in the particular circumstances it believes that a bond is appropriate. But here, the process was intended be that the court, after considering the matters listed, was obliged to grant a bond unless it considered that a conviction was appropriate.

[9] The criteria listed are very wide and almost unlimited, so it is difficult to contemplate

what further matters might be taken up when considering what was appropriate. In my view it was open to the magistrate, after considering all the criteria listed to conclude that a conviction was ultimately appropriate, either because a conviction was necessary to deter the offender, because of the prevalence of the offence or both. In my view the material here, though it is not free of ambiguity and some conflict, should, taken as a whole, be read as supporting the interpretation of the magistrate's reasons that I have set out above.

On the material there is no reason why I should proceed upon any basis other than that the Magistrate did consider the matters that had been put in the plea before him. It is not necessary that he, in the course of his reasons, reiterate and recite all the matters that had been canvassed before him. In his reasons he referred in particular to the matter of prevalence and to this particular offender and to her mature age, in comparison with young offenders. In my view the remarks that were made in the context of what occurred are open to the interpretation that the Magistrate decided to proceed to a conviction because it was necessary to deter the offender and because of the prevalence of the offence. It is true that there was a reference to young people as I have already indicated. It would, in **[10]** my opinion have been a reviewable error if the Magistrate had proceeded on the basis that he only gave bonds under s76(1) to young people. I am not satisfied that this was the position taken up by the Magistrate and the material, in my opinion, supports a different statement of reasons and does not demonstrate that he took extraneous matters into consideration or erroneously limited the area of his discretion.

There was a further argument put, that it was not open to the learned Magistrate to rely upon any notion of the prevalence of the offence in the absence of more material than appears to be indicated in the affidavit. This is a reference to the fact that he said that there were some 15 offenders before the court on that day charged with that offence. In my view it is not possible to proceed upon the assumption that the Magistrate did not have any knowledge of the prevalence of the offence drawn from his experience as a Magistrate whether sitting at the precise court or in the general district in which he was sitting as a Magistrate. Moreover it does not appear whether these cases were heard before or after the case which is the subject of these proceedings.

I would have thought that even if the Magistrate could not draw on any experience at all, as a Magistrate, and that this was the first occasion when he was dealing **[11]** with these matters it might properly have been open to him if he had had a sufficient volume of cases to draw out of the material that emerged in those cases a sufficient impression as to the prevalence of the offence in the district.

I should not make the assumption, in the absence of some affirmative evidence, that the magistrate had not either had general prior experience sufficient to found his view or that he had not heard some or most of these cases referred to in the material. For all of those reasons it follows that the order nisi should be discharged. I am not sure whether it is the practice to make reasons available to the magistrate but it seems to me desirable that magistrates should generally be at least informed of the result of proceedings, even if it does not mean that the matter had to be remitted to them. That course should be undertaken.

APPEARANCES: For the applicant Petrie: Mr N Hanos, counsel. McCulloch & Peters, solicitors. For the respondent Wells: Mr D Maguire, counsel. Victorian Government Solicitor.
