MELI BAVESI v STATE (HAA0027 of 2004)

HIGH COURT — APPELLATE JURISDICTION

WINTER J

6, 14 April 2004

Criminal law — appeals — appeal against conviction and sentence — possession of dangerous drugs — whether Appellant compelled to confess offence — whether Appellant's statement interview not true — whether magistrate erred in law in excluding evidence of Appellant's confession — whether sentence imposed wrong in principle, harsh and excessive.

This was an appeal by the Appellant against conviction of one charge of possession of dangerous drugs and sentence of 2 years' imprisonment.

On 7 November 2002, the police, pursuant to a search warrant, raided the house of Meli Bavesi (the Appellant) and found six parcels of dried leaves wrapped in a Fiji Times newspaper inside a black sports bag beside the Appellant's bed. The dried leaves were later identified as a scheduled dangerous drug known as cannabis sativa. As a result, the Appellant was arrested and interviewed. He was apprised of his constitutional rights and was offered assistance of counsel but he refused.

During the interview with the police, the Appellant confirmed that he allowed them to search his house; marijuana was found beside his bed; did not know who brought the marijuana to his house and did not know who owned the marijuana; that when the police arrived, he was surprised and asked his wife about the marijuana and his wife told him that it was her brother who brought it; and July was the last time he sold marijuana and stopped selling because he worried about his family. After the interview, when asked if he wished to correct his statement, if he was forced to answer and if the statement was true, the Appellant answered all the questions in the negative. He signed and certified the statement.

During his trial, the Appellant was unrepresented as his appointed lawyer did not represent him on that day. The police presented evidence based on the search and interview conducted. On the other hand, the Appellant gave evidence under oath that he was innocent as to the possession of marijuana and did not own them because it was his brother-in-law who owned them. During cross-examination the Appellant acknowledged that the drugs were found in his house; that he used to sell cannabis which came from his wife's village but claimed that he did not know who put the cannabis found in his bed.

The Appellant's grounds of appeal were: (a) that he was compelled to admit the commission of the offence; (b) the caution interview statement was false; (c) the learned magistrate erred in law and judgment in failing to exclude his confession as evidence; and (d) the only evidence against him was his confession.

Held — (1) The court rejects the grounds raised by the Appellant on (a) and (b) because there was no evidence to support these claims. On ground (c) there was no error in law in the judgment with respect to the exclusion of the evidence regarding his confession. The last ground is rejected based on the following reasons considered by the court as these facts and circumstances point to the Appellant's guilt: (a) the drugs were found in his bed inside his house after a proper search; (b) the drugs were found beside his bed in his bedroom; (c) he used to sell drugs and this was acknowledged by him; (d) the drugs were from his wife's village; (e) the fact that he was found to be untruthful by the learned magistrate.

(2) Based on the evidence, the cannabis appeared to have been packed and ready to be distributed. Moreover, the quantity of the cannabis found clearly showed that it was not for the Appellant's personal use and although selling it was not his immediate purpose at the time the same was found, they were set aside for the purpose of supply. Under these

circumstances the crime committed was a category 2 offence with a starting point of 3 years and the only mitigating circumstance was that the Appellant was a first offender. The sentence imposed by the learned magistrate was not harsh, excessive or wrong in principle

Appeals dismissed.

Cases referred to

Tomasi Drava v State [2003] FJHC 83, applied.

Brown (unreported, CA 95/79, 15 October 1979); *Bryant* (unreported, CA 83/75, 17 October 1975); *Buxton* (unreported, CA 63/78, 7 December 1978); *Chapman* (unreported, CA 149/78, 26 April 1979); *Day and Van Deusen* (unreported, CA 19/76, 22/76, 4 June 1976); *Easton* (unreported, CA 173/79, 4 February 1980); *Freddy Nauluvula v State* [2002] FJHC 156; *Harris Ramswarup v State* (unreported, Cr Appeal No HAA0014/2001); *Hinckesman* (unreported, CA 35/76, 31 May 1976); *Johnson and Tito* (unreported, CA 196/78, 203/78, 8 June 1979); *Josateki Guivalu v State* [2003] FJHC 84; *Le Cheminant* (unreported, CA 60/79, 27 August 1979); *Leydon* (unreported, CA 136/79, 10 December 1979); *MacPherson v R* (1981) 147 CLR 512; 37 ALR 81; *Aramah v R* (1982) 76 Cr App Rep 190; *R v Cobley* (unreported, Mahoney JA, Badgery-Parker and McInerney JJ, NSWCCA, 7 July 1992); *R v Gidley* [1984] 3 NSWLR 168; *R v Lawson* (unreported, NSWCCA, 28 May 1990); *R v Smith* [1980] 1 NZLR 412; *R v Terewi* [1999] 3 NZLR 62; *R v Zorad* (1990) 19 NSWLR 91; *Reid* (unreported, CA 116/80, 19 June 1980); *Rohloff* (unreported, CA 89/79, 5 September 1979); *Shields* (unreported, CA 184/78, 3 July 1979); *Stevens* (unreported, CA 98/77, 4 October 1977); *Stott* (unreported, CA 98/78, 10 April 1979); *Stuart* (unreported, CA 84/75, 17 October 1975); *Woods* (unreported, CA 311/79, 29 May 1979), cited.

Appellant in person

D. Toganivalu for the State

Winter J. This is an appeal against conviction. The Appellant was convicted on 15 August 2003 on one charge of possession of dangerous drugs. He received 2 years' imprisonment.

Particulars of the offence

On 7 November 2002 the police raided the Appellant's home with a search warrant.

As a result of the search they found six parcels of dried leaves wrapped in a *Fiji Times* newspaper located inside a black sports bag beside the Appellant's bed in his bedroom.

The dried leaves were subsequently certified as cannabis sativa a scheduled dangerous drug.

The Appellant was arrested and processed, as part of the investigation he was interviewed. The English translation of the record of interview occurs between pp 23 and 25 of the magistrate's record.

The formalities of establishing the interview were satisfied. The Appellant elected to be interviewed in Fijian; was given his constitutional rights; was offered but declined the assistance of a lawyer and was prepared to discuss the matter with the police voluntarily.

At interview he confirmed he let the police search his house. That marijuana was found as earlier described. He then went on to concede:

> I want to say that I do not know who had brought the marijuana to my house, and also that I do not know who the owner is. When the police arrived I was surprised. When I asked my wife about the marijuana she stated that her brother had brought it. I also wish to state that the last time that I had sold marijuana was in July, I am not selling it as I am worried about my family.

After that admission the formalities of concluding the interview were completed. He was asked if there was anything he wished to correct. He did not have anything to correct. He was asked if he was forced to answer anything in the statement. He considered he was not. He was asked if the statement was true and he confirmed it was. He then signed and certified the statement.

At his trial the accused was unrepresented. It should however be noted that his appointed lawyer did not represent him on the day. The police gave evidence consistent with the search and interview.

The accused elected to give evidence on oath. His evidence in chief is contained in four lines. He essentially says he did not know anything about the drugs. They were not his. They belonged to his brother-in-law. The defence called no other witnesses.

In cross-examination the accused conceded that the drugs were found in his house in his bedroom. Further that he used to sell drugs. That the drugs (cannabis) were from his wife's village in Nadroga. That he used to sell in bulk and used to collect about $20 a parcel.

However, he claimed he did not know who put the drugs the police found in his room.

The grounds of appeal

That I was compelled to confess to the offence.

My caution interview statement is not true.

The learned magistrate erred in law and judgment when failing to exclude the evidence of my confession.

That the only evidence against me on this case is merely my confession which was obtained under the circumstances of drugs.

The appeal

The Appellant was warned of his rights to representation and legal assistance by legal aid. He waived his rights. He was assisted in the Fijian language by my clerk. He handed up helpful written submissions that relate to the Appellant's view that the sentence was harsh and excessive.

The submissions provide colloquial case comparison collected from newspaper reports of two decisions.

The first is that of Apakuki Mamada. This 35-year-old businessman had 15 previous convictions. He appeared and pleaded guilty. He was sentenced to 6 months' imprisonment. The second case was that of Amit Kumar 90 plants found with 23.9 grams of dried leaves. He had previous convictions and was gaoled for 21 months.

As a result of these submissions it became clear that the Appellant's primary concern was the sentence he received. The Appellant's appeal papers requested only an appeal against conviction.

However, the State had anticipated an appeal against conviction and sentence. As they were not prejudiced in any way I granted leave and extended the appeal to cover both conviction and sentence.

The Appellant was asked about his appeal against conviction. He said he would rest his case on the points of appeal filed in his original application.

The State filed helpful written submissions in advance of the appeal. They address the issue of the admissibility of the statement but did not address the issue of the duty of a presiding magistrate to consider admissibility issues for an

unrepresented accused. Counsel submitted the matter was so clear-cut that there was nothing in the evidence that could properly challenge the admissibility of the confessional statement.

As for the term of imprisonment the State referred to four cases:

Freddy Nauluvula v State [2002] FJHC 156 — 640.1 grams — pleaded guilty 5 years' imprisonment.

Josateki Guivalu v State [2003] FJHC 84 — 750 grams — pleaded guilty three-and-a-half years' imprisonment.

Harris Ramswarup v State (unreported, Cr App No HAA0014/2001) — 524.6 grams — pleaded guilty two-and-a-half years' imprisonment.

Tomasi Drava v State [2003] FJHC 83 (*Tomasi Drava*) — 205.3 grams — pleaded guilty one-and-a-half years' imprisonment.

I was advised by counsel that there are as yet no tariff decisions in respect of cannabis offending.

It was submitted that the 2-year sentence passed by the learned magistrate was not harsh and excessive. The maximum sentence for possession of marijuana not in excess of 500 grams is 3 years' imprisonment. Counsel pointed to the referenced appeal cases and submitted that a 2-year sentence was within the general range of acceptability.

The magistrate's decision

The hearing took place on 20 June 2003. The decision was reserved with the judgment to be delivered on 31 July 2003. The accused was bailed to that date but failed to appear. When arrested on 8 August 2003 he was remanded in custody. Made a further appearance on 11 August, was re-granted bail. The decision was delivered on 15 August with sentence following conviction.

The learned magistrate gave a considered decision. In my view it is careful and well crafted. He correctly identifies and weighs the relevant issues of whether or not this Appellant "possessed" the cannabis.

The learned magistrate had the benefit of hearing the evidence and observing the accused. He made findings of credibility. He did not find the Appellant to be a truthful witness. He therefore rejected the claim that the Appellant did not know how the drugs got into the bag beside his bed in his bedroom. There is nothing in the trial record to indicate that at any time the Appellant wished to challenge the admissibility of his confessional statement. There is nothing in the method or manner of obtaining that statement that would alert any judicial officer for the need to be specifically cautious about that admission.

Conviction appeal

The role of a trial judge in proceedings where parties are unrepresented has been the subject of much consideration particularly when the unrepresented party is the defendant in criminal proceedings (see *MacPherson v R* (1981) 147 CLR 512; 37 ALR 81 (*MacPherson*); *R v Zorad* (1990) 19 NSWLR 91; *R v Gidley* [1984] 3 NSWLR 168; *R v Lawson* (unreported, NSWCCA, 28 May 1990); *R v Cobley* (unreported, Mahoney JA, Badgery-Parker and McInerney JJ, NSWCCA, 7 July 1992).

In *MacPherson* confession evidence was lead against an unrepresented accused where there were real issues as to the voluntary nature of that confession. The High Court ruled that the trial judge should have held a voir dire to determine whether the confession was voluntary even though no voir dire was requested.

The court was of the view that there was enough prejudicial evidence to require that inquiry. The judge's duty to an unrepresented party arises from an overall responsibility to ensure that proceedings are fair. However, the obligation on a trial judge to ensure that every accused has a fair trial is simply to provide the unpresented with such information and advise concerning their rights as is necessary to put them in a position where they can make an effective choice about whether they should exercise their rights or not. In my view that obligation does not arise in respect of confessional statements unless there is some evidential basis to make that a real issue in the trial.

In this case the Appellant did not challenge the confessional statement in any way. There is nothing in the police officer's evidence that was remarkable. There was clear evidence that this statement was properly taken and voluntarily made.

In making this analysis of these issues raised by the Appellant I am extending him the courtesy of expanding his argument to consider his rights in the widest possible context.

However even adopting that approach I completely reject all of the five grounds earlier summarised in this decision. For the sake of completeness I find:

(1) There is no evidence to support that the Appellant was compelled to confess the offence.

(2) There is no evidence that would support an attack on the truthfulness of the statement.

(3) Indeed in large measure the Appellant's statement to the police was consistent with his evidence at trial.

(4) I find that there is no error in law in the judgment over the exclusion of the evidence in the confession. There is no obligation on the magistrate to even consider that issue as it was not a real issue in trial.

(5) I completely reject the final ground that the only evidence against the Appellant was his confession.

In my view the evidence outside of the confession would of itself alone have enabled a proper conviction. The drugs were found in his home as a result of a proper search. The drugs were located in a bag beside his bed in a bedroom. This was his bedroom. He acknowledged in evidence that he used to sell drugs. That the drugs were from his wife's village. All of these matters point to guilt. In addition the learned magistrate who had the benefit of hearing the evidence found the Appellant untruthful. I cannot find any reason to disagree.

For these reasons I dismiss the appeal conviction.

Sentence appeal

D A Thomas in his "*Principles of Sentencing*" at p 183 talks of the culpability of drug offenders in this way:

> For the purposes of assessing culpability offenders are divided into categories according to whether they are users or suppliers and according to the nature of the substance involved.

A most useful summary of sentencing principle for dangerous drugs cases is contained in the judgment of my sister Shameem J: *Tomasi Drava*. I will not repeat but adopt the expressions of principle detailed by her Honour at p 4 of the judgment particularly concerning the imposition of minimum mandatory terms by decree. That issue is now settled.

The decree sets sentencing trigger points based on the amount of illicit drugs possessed. I find a focus on the quantity of the drug in the offender's possession unhelpful. Assessing culpability based on whether offenders are "users" or

"suppliers" is a blunt tool. In my view the proper focus is the degree of involvement the offender might have in any commercial aspect of his drug possession.

In *R v Smith* [1980] 1 NZLR 412 (*Smith*) the New Zealand Court of Appeal, reviewed the level of cannabis drug sentences upheld in that country and found it broadly comparable to the United Kingdom level. In *Aramah v R* (1982) 76 Cr App Rep 190 it was said that supplying a number of small sellers — "wholesaling" — comes to the top of the bracket, "small scale" suppliers could expect 2 to 3 years' imprisonment. At the other end is the retailer of a small amount to a consumer.

This analysis produces the result that where there is no commercial motive — for example when cannabis is supplied at a party — the offence might well be serious enough to only justify a short custodial sentence that might be suspended.

Any comparison with the New Zealand sentencing tariffs must bear in mind the maximum penalties and statutory presumptions of possession for supply (for cannabis 28 grams). You are deemed to have the drug in your possession for supply if its weight exceeds the stated minimum. However, in reality no distinction is drawn between cases where a conviction is the result of an established intention to supply or sell and where the statutory presumption applies. In Fiji the intention might be readily gauged from the surrounding circumstances of the possession, that is:

(1) the amount of the drug;
(2) packaging — plastic/paper foil;
(3) acknowledgments of dealings;
(4) convenient bundles of cash, frequently in the denominations of the trade; and
(5) preparation for sale or distribution

are all useful enquiries in that regard.

In *Smith* the New Zealand Court of Appeal took the opportunity to list its previous decisions concerning class B and C drugs. Although a decision of the 80s *Smith* is still considered good law.

At p 414 of the decision the President of the Court of Appeal (as he then was) Lord Cooke said: *"The pattern of sentencing in cannabis-dealing cases is shown by the following examples of cases which have reached this court. To bring out the distinction in levels we include some examples of sentences concerning class B drugs"*.

The president then went on to list some decisions.

Stuart (unreported, CA 84/75, 17 October 1975) Possession for supply of 218 grams of cannabis plant material; Appellant, a student teacher aged 21 and a first offender, apprehended packeting into marketable lots. Sentence of 18 months' imprisonment upheld but described as "no light one".

Bryant (unreported, CA 83/75, 17 October 1975) Possession of more than one pound of cannabis for supply. Defendant aged 27, with previous convictions for possession of cannabis, had been a junior university lecturer. Two-and-a-half years' imprisonment reduced to 18 months.

Hinckesman (unreported, CA 35/76, 31 May 1976) Possession for sale of 381 buddha sticks, street value about $3500. Previous sentence of 4 years' imprisonment for supplying heroin. Sentence of 3 years' imprisonment upheld.

Day and Van Deusen (unreported, CA 19/76, 22/76, 4 June 1976) Possession for supply of 1650 buddha sticks, street value about $25,000, by Appellants closely connected with the importation. Sentence of 4 years' imprisonment upheld.

Stevens (unreported, CA 98/77, 4 October 1977): Possession of about 532 grams of cannabis for supply. Joint enterprise by four men. Appellant had previous conviction for supplying cannabis. Other adult offenders sentenced to 6 months' imprisonment. Sentence on Appellant of 2 years reduced to 12 months as too much weight given to previous conviction.

Buxton (unreported, CA 63/78, 7 December 1978) Cannabis for supply to persons over 18; 52 deals, street value $1250, profit of $3 per deal. Previous conviction for supplying cannabis, when fined and sentenced to periodic detention. A co-offender in present offence had been sentenced to 10 months' imprisonment. Sentence of 3 years' imprisonment on this Appellant reduced to 2 years on ground that disparity with co-offender's sentence too great.

Stott (unreported, CA 98/78, 10 April 1979) Possession for supply of cannabis resin — a class B drug; block of 232 grams. Appellant aged 24, previous drug convictions but not for dealing. Effective sentence of 3 years' imprisonment upheld.

Chapman (unreported, CA 149/78, 26 April 1979) Effective term of 2 years 3 months on two counts of selling cannabis and one of offering to sell heroin; transactions with undercover constable involving only $145 in all. Tragic personal history of drug involvement. Sentence upheld.

Woods (unreported, CA 311/79, 29 May 1979) Two sales of cannabis plant to undercover officer, totalling 150 bullets, price $1285. Appellant aged 24. Sentence of 18 months upheld, described as "perhaps near the limit of the range of penalties for this particular offence and quantity".

Johnson and Tito (unreported, CA 196/78, 203/78, 8 June 1979) Apprehended when travelling on "Northerner" with substantial quantity of cannabis grown by one of the Appellants. "An organised foray into the lower half of the North Island for the purpose of disposing of it." Sentences of 18 months upheld.

Shields (unreported, CA 184/78, 3 July 1979) Possession of 3.47 pounds of cannabis plant, found in house of man aged 36, first offender. Statutory presumption relied on by Crown; little direct evidence of dealing. Sentence of 2 years upheld.

Le Cheminant (unreported, CA 60/79, 27 August 1979) Supply of class B drugs. Cannabis oil and resin. Four years upheld.

Rohloff (unreported, CA 89/79, 5 September 1979) Sale to undercover constable of two lots of cannabis leaf for total of $20; previous conviction and imprisonment for possessing cannabis for supply. Sentence of 15 months upheld but described as severe.

Brown (unreported, CA 95/79, 15 October 1979) Cannabis for supply; "just sufficient to bring into force the statutory presumption". Previous convictions for possession. Effective sentence of 6 months upheld, fine quashed.

Leydon (unreported, CA 136/79, 10 December 1979) Possessing class B drug, cannabis resin, for supply and attempting to supply it. Aged 28, about to supply young woman aged 23; total resin 6.96 grams. Previous convictions for possessing oil and leaf for supply; then treated leniently by periodic detention. Sentence of two-and-a-half years upheld, though described as severe; weight placed on previous conviction and present climate of legislative and judicial opinion.

Easton (unreported, CA 173/79, 4 February 1980) Possession of 2 grams of heroin and 206 grams of cannabis for supply. For first offence sentenced to 3 months' imprisonment and fined $500; for second 18 months concurrent. Fine cancelled (judge misinformed as to resources). Cannabis sentence reduced to 1 year. No previous convictions; heroin addict after taking the drug to relieve pain following accident; "totality" principle.

Reid (unreported, CA 116/80, 19 June 1980) Possession for supply of 119 grams of cannabis found in various places in Appellant's house. Previous conviction for possession. Sentence of 6 months' imprisonment upheld.

In the New Zealand *Smith* case sentences range from 4 years' imprisonment for supply of cannabis with a street value of $25,000.00 by offenders closely connected with its importation to sentences of 6 months' imprisonment where the quantity of cannabis was just sufficient to bring into force the New Zealand statutory assumption that it was possessed for the purposes of supply (over 28 grams). The medium sentence for possession of cannabis for supply was 20 months' imprisonment.

If the focus remains the same that is the degree of involvement or preparation for commercial gain than the Fiji and New Zealand cases sit comfortably together. The decree "trigger points" must be kept in mind. However, it will after logically following that the amount of drug attributed to the offender's use will coincide with the degree of involvement which will coincide with the maximum available range of penalty. The more you've got, the more you get is perhaps another way of establishing at the sentencing principles at play.

In line with another New Zealand decision *R v Terewi* [1999] 3 NZLR 62 (CA, Blanchard, Anderson and Robertson JJ). I now return to the issue of categorisation of these offences. This type of offending can be divided into categories with the ultimate concern being the offender's degree of involvement in the drug supply process. The three broad categories might be:

> *Category 1* — The growing of a small number of cannabis plants for personal use by an offender or possession of small amount of cannabis coupled with "technical" supply of the drug to others on a non-commercial basis. First offender a short prison term, perhaps served in the community. Sentencing point 1–2 years.
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> *Category 2* — Small scale cultivation of cannabis plants or possession for a commercial purpose with the object of deriving profit, circumstantial evidence of sale even on small scale commercial basis. The starting point for sentencing should generally be between 2 to 4 years. However, where sales are limited and infrequent and lowest starting point might be justified.
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> *Category 3* — Reserved for the most serious classes of offending involving large scale commercial growing or possession of large amounts of drug usually with a considerable degree of sophistication, large numbers of sales, circumstantial or direct evidence of commercial involvement the starting point would generally be 5–6 years.

I emphasise that these indications relate to starting points before aggravating features (like previous drug offending) or mitigating features (like early guilty pleas) are applied. In addition there will of course have to be a focus on the quantities of drugs involved and their relationship to the third schedule of the decree, not forgetting *Pickering* and the disproportionality test.

In my view it is time to recognise that the true culpability of these offenders lies in their degree of involvement and profit from this offending. There is no logical reason why possession of cannabis for the purposes of supply should be treated any more leniently than offences involving actual sale or trafficking. If the intention is to make money out of supply the inevitable consequence is lengthy terms of imprisonment.

When set in this context the quantities of drugs found in an offender's possession simply delineate a proper context within which inquiry might be made about the degree of involvement of the offender. In this way appropriately stern sentences can be reserved for those who would possess the drug for the purpose of supply. Addressing that specific evil will send a clear message that supply for commercial gain even on a casual basis will inevitably involve lengthy sentences of imprisonment.

Decision

The offending material was found conveniently packaged ready for distribution. It is clear from the amount of cannabis found it was not for the Appellant's personal use. Although the other trappings of commercialism were not found there was the admission in evidence that the Appellant had on an earlier occasion sold cannabis. In my view although he might not have had an immediate intention to make money from the packages under his bed they were put aside for the purpose of supply. In those circumstances this is a category two offence deserving of a sentence of imprisonment with a starting point of 3 years. There can be no credit given for an early guilty plea. The mitigating features are primarily that the Appellant was a first offender. Although bearing in mind his admission in evidence of earlier sales that in itself simply reflects that this might have been the first time he had been caught rather than the first time he offended.

For these reasons I see no cause to interfere with the learned magistrate's sentencing decision, it was not harsh, excessive or wrong in principle. The appeal against sentence is dismissed.

Conclusion

The appeal against conviction and sentence are dismissed.

Appeals dismissed.