(51)

1972 S. H. No. 01066

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION — CROWN SIDE

BETWEEN:

HER MAJESTY THE QUEEN by
Her Attorney General of
Canada

Respondent

- and -

DAVID LAURIE JORDAN

Appellant

[Oral Opinion]

McKINNON, C.J.N.S.:

The appellant, aged 19, was convicted at Kentville, Nova Scotia, on September 11, 1972, by His Honour Judge C. T. LeBrun on two separate charges of trafficking in hashish contrary to section 4 (1) of the Narcotic Control Act. He was sentenced to a term of twelve months imprisonment to be followed by a two-year period of probation on the first charge and a concurrent term of eighteen months imprisonment on the second charge.

The convictions arose out of sales of hashish to Cst. Joseph Arsenault of the Royal Canadian Mounted Police on June 29th and 30th, 1972.

This is an appeal against sentence and leave to appeal is granted.

The grounds of appeal are:

"(1) THAT the Learned Trial Magistrate erred in passing a sentence containing a provision for both incarceration and recognizance.

(2) THAT the sentence passed upon me by the Learned Trial Magistrate was excessive and too onerous considering:-

(a) My age;

(b) The circumstances leading to the commission of the offence;

(c) The effect the conviction will have upon any opportunity to practice my profession as a cook.

(d) That I have had no previous conviction.

(3) THAT the Learned Trial Magistrate failed to consider that I was persuaded to commit the offence by a member of the Royal Canadian Mounted Police, namely, Constable Joseph Andrew Arsenault.

(4) THAT the penalty is oppressive and excessive having regard to the sentence passed by this Honourable Courts, for similar offences."

The record shows that the sentence imposed by the trial Judge, following conviction on the first offence, was as follows:

"After hearing submissions on penalty from counsel, His Honour Judge C. T. LeBrun imposed a sentence of 12 months on the accused to be served in the Halifax County Correction Centre to be followed by a period of probation for 2 years with the condition that he absolutely refrain from the use or consumption or dealing with in any manner in narcotics or drugs unless it is prescribed by a regular practicing doctor."

Ground No. (1) should be dismissed because subsection (1) (b) of section 663 of the Criminal Code, as amended, provides for the imposition of both imprisonment and probation as follows:

"663. (1) (b) in addition to fining the accused or sentencing him to imprisonment, whether in default of

payment of a fine or otherwise, for a term not exceeding two years, direct that the accused comply with the conditions prescribed in a probation order."

Regarding ground No.(2), in Regina v. McNicol, (1969), 3 C.C.C. 56, one of the cases following by this Court in Regina v. Hemsworth, (1971), 2 C.C.C. 301, Monnin, J.A., of the Manitoba Court of Appeal, is quoted as follows, at p. 58:

"It thus appears that the Magistrate was solely concerned with the accused's chances of bettering his education without regard to the seriousness of the offence and the effect of trafficking in drugs on society as a whole. In other words, he placed all emphasis on the individual and his immediate future and little or none on the requirements of organized society in the face of a serious drug problem."

at p. 64:

"Many of the above cases dealt with possession of marijuana and not with trafficking. Whatever was said in these various judgments with respect to possession applies with greater force to cases of trafficking. It has always been considered and accepted that trafficking is the more serious of the two offences because it involves commercialization by sale and a corruption of non-users and ease of acquisition of drugs by steady users. Of the two offences, trafficking involves a larger degree of moral turpitude since it preys on the passions and the cravings of persons who have lost the ability to resist consumption of the drug (whether it be 'hard' or 'soft' drug). Parliament itself, by the variation in sentences which may be imposed, namely, life imprisonment in the case of trafficking and a maximum of seven years in the matter of possession, has clearly indicated which one it considers the more serious of the two.

. . .

Consequently we must indicate to the Courts and to the profession as a whole that possession and trafficking in marijuana are serious offences which must be dealt with adequately by our Courts, especially at a time when there is an unfortunate rash of this type of crime. From the above reported judgments of the Courts of Ontario and British Columbia it will be seen that those jurisdictions have found – too late for their own satisfaction – that this is not a matter to be dealt with leniently."

We agree with the remarks of Monnin, J.A., and dismiss this ground of appeal.

With reference to ground No. (3), the learned trial Judge, who heard the evidence below, could find nothing improper about the conduct of Cst. Arsenault. Further, this Court has reviewed similar evidence in other cases where drugs were sold to policemen under similar circumstances and found that the actions of the officers in seeking to purchase drugs were not improper. It is also noted that the learned trial Judge made a finding of credibility in favour of Cst. Arsenault when his evidence was in conflict with that of the accused, and this Court should not interfere with this finding. We do not find merit in this ground.

With regard to ground No. (4), in the very recent case of Regina v. Doherty, (1973), 9 C.C.C. (2d) 115, at pp. 116, 117, Gale, Chief Justice of Ontario, stated as follows:

". . . in the case being considered, the Judge stated as follows:

'I have reviewed the cases stated to me by counsel and I find that there are no guide lines set as to what constitutes exceptional circumstances. This duty has been left to the sentencing judge.'

If by that statement the trial Judge was indicating that in his opinion this Court should set exhaustive guide lines of sentencing for trial Judges, I simply decline to accept his invitation. In my view it would not only be unwise, but dangerous to attempt any such exercise. Each case must be considered in the light of its own circumstances . . .".

In the case at bar, the evidence discloses that the appellant apparently had been carrying on a systemized operation in the sale of marijuana.

It should also be noted that what has been said with regard to the sentence imposed for the first offence applies equally to the penalty imposed for the second offence on which the appellant had been charged and sentenced to eighteen months to run concurrently with the sentence for the first offence.

Having considered all of the evidence and having heard the submissions of counsel, it is the unanimous opinion of the Court that the learned trial Judge did not follow any wrong principle in imposing sentence and did not err in considering a second offence in sentencing the appellant.

Accordingly, the appeal should be dismissed and the sentences confirmed.

DATED at Halifax, Nova Scotia, this 2nd day of February, A. D., 1973.

Members of Appeal Division

McKinnon, C.J.N.S.

Coffin, J.A.

Cooper, J.A.

Counsel

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