V00939
Victoria Registry

Court of Appeal

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Toy
The Honourable Mr. Justice Legg
The Honourable Mr. Justice Taylor

July 17, 1989

Vancouver, B.C.

BETWEEN:

R E G I N A

APPELLANT

AND:

JAMES HAROLD ARTHUR LIEPH

RESPONDENT

C. Stolte, Esq. appearing for the (Crown) Appellant
S. Kelliher, Esq. appearing for the Respondent

TOY, J.A.: This is a Crown application for leave to appeal sentences. The accused was originally charged with a Miss George, with whom he has a common law relationship:

> That on the 4th day of August, 1988, at Sooke, in the Province of British Columbia, Count One: did unlawfully cultivate marihuana, and Count Two: unlawfully had in their possession cannabis (marihuana) for the purpose of trafficking.
>
> [The information was sworn on the 26th of September, 1988.]

Originally the accused elected trial by judge and jury on the 20th of October, 1988. However on February 1, 1989, the accused, James Harold Arthur Lieph, re-elected for trial by Provincial Court Judge sitting without a jury.

A stay of proceedings was entered against his co-accused, Miss George. He plead guilty to Count One, cultivating, and the lesser included offence of simple possession of marihuana contained in Count Two.

At the conclusion of the hearing the Provincial Court Judge granted the accused a conditional discharge on the cultivating count and prescribed conditions that the period of probation order be six months; that the accused keep the peace and be of good behaviour; and if so directed by a probation officer, to report to the probation officer as and when directed. On the second count of the lesser included offence of possession of marihuana, he granted an absolute discharge.

Crown Counsel, at the hearing before the Provincial Court Judge, who was not counsel before us, at the commencement of the proceedings described the circumstances:

> MISS McNEELY: Yes, Your Honour. On the 4th day of August, last year, in the afternoon, police officers attended at Mr. Lieph's residence on McMillan Road. They had a search warrant. Upon arriving there, they noticed Mr. Lieph walking

towards him (sic). They produced the search warrant and read it out to him. They then advised both Mr. Lieph and Ms. George that -- of their Rights pursuant to the Charter. At three-thirty in the afternoon, Mr. Lieph escorted the constables to the north end of his property where the officers found twenty marihuana plants hidden behind an eight-foot high fence. They found one marihuana plant in a greenhouse beside this fence. Police officers then searched Mr. Lieph's residence. They found nothing there.

There was a basement being constructed just next to his residence and, on close examination, they noticed a sound in the area of the east wall of the basement. Police officers gained access to this sealed-off basement area and found a room which contained high-intensity lights, timers, fans, transformers, a CO2 tank and literature about growing marihuana. The room was approximately six feet by forty-five feet in size, and along with the equipment, they found fifty-four marihuana plants with an average height of three feet.

So, in total, the police officers seized seventy-four plants which had an approximate weight of twenty-three pounds.

THE COURT: That is wet weight, of course?

MS. McNEELY: Yes that is.

Now, Your Honours, Mr. Lieph is thirty-seven years of age. He advised the police that his occupation was that of a machine operator. He has no prior criminal record.

Your Honour, as he's plead guilty to the simple possession offence, I'd be asking for forfeiture of the same equipment and I'd be asking for a fine on both counts.

Crown Counsel then gave to the Provincial Court Judge three authorities, one of which is a judgment known as *Regina v. James Brian Child* (3 April, 1987), Victoria V000366 (B.C.C.A.), wherein a fine of one day's imprisonment and $1,500 was imposed upon the accused, who was 41 years of age, had no record, and was in the process of growing 65 marihuana plants.

The Provincial Court Judge, having granted the two discharges that I have just alluded to, the Crown has launched appeals and seeks leave to appeal and an order setting aside the two discharges and requests that this Court impose a fine in the order of that which this Court ordered in the *Child* case.

Counsel for the accused made extensive representations on the circumstances of the offences, as well as the accused himself, at the conclusion of the sentencing proceeding, addressed the Court. In his opening remarks, counsel for the accused, represented as follows:

> Your Honour, I can say at the outset that this submission is not a common one; that the circumstances surrounding this man's possession and cultivation of the marihuana is anomalous.
>
> Mr. Lieph has never smoked marihuana. He tried once several years ago, about -- approximately four years ago, and could not smoke it. He cannot smoke cigarettes. He's never smoked a cigarette in his life.
>
> The reason that he has this marihuana in his possession is that he renders it down to an oil, combines it with coal tar or other oil bases, including Vaseline and some others that he's mentioned to me, and makes a topical cream from it. He uses that topical cream for a very severe affliction of psoriasis that he's had since 1984. He has that psoriasis on his legs and on his head. He tells me that he uses the marihuana oil in conjunction with alcohol for his scalp treatments.

It appears from the representations that were made in this Court and a transcript of the proceedings in the Court below, that the accused was injured in an explosion in 1984 which caused extensive burns to his legs, arms and scalp, and that psoriasis

subsequently developed in the burned areas of his legs and scalp. Medical treatment for his psoriasis was ineffective in reducing the terrible itching symptoms. Medications that he was administered for this problem were producing, so he thought, detrimental side effects. So he acquired a great deal of medical literature and by reading, learning, and experimenting he found that he could reduce marihuana plants to an oil, mix it with creamy substances which he applied to the itching areas of his body with the result of relief. Apparently, so the accused says, the oil produced from the marihuana plants retards the growth of the underlying skin layers which unretarded produce the unpleasant symptoms psoriasis. The accused, through his counsel represented, that he was unaware that oil of marihuana could be obtained by prescription.

The offender is now 37 years of age. The accused, since completing grade 11 and before that, had been a hard working and contributing member of the community. He has followed many pursuits and has skills in many occupations. Only recently has he been on Unemployment Insurance due to a back injury. He has a stable relationship with Miss George. There are three young children of that union and two children from a prior marriage for whom the accused is paying monthly support payments. Additionally, there were tendered testimonial letters written by members of the community in which the accused lives.

At the conclusion of counsel's representations, which were extensive, the accused addressed the Court and explained his

unpleasant psoriasis symptoms and his personal research into his solution to the problem. At the conclusion of his dissertation to the sentencing judge, he said in part:

> And I plead guilty to this because I am guilty of having -- grown the illicit drug in my house, but I don't know what else to do.

Additionally, the accused with the concurrence of the trial judge, showed the apparently open wounds on his legs from the psoriasis condition that existed even at that time.

Upon this application for leave to appeal, Crown Counsel's submissions are five in number. Firstly, he quoted from the representations made by Crown Counsel after the accused's counsel had made his submissions. She said, in part:

> Well, I have sympathy for Mr. Lieph's predicament as far as his physical well-being is concerned. I'm quite frankly very sceptical of the claims he is making with respect to the marihuana treatment.

And at p. 13 she said in part:

> And as I say, if -- in my submission, if there was some truth to this, then surely more people than just Mr. Lieph would've heard about it because, I suppose, as time passes, these things are discovered and, certainly, marihuana has been around for ages and ages, as has psoriasis, in my submission. The two would've been found to work in conjunction long ago, rather than just in the past several years and in Mr. Lieph's experience.

Before us Crown Counsel, who was not counsel below, shared those sentiments and submitted to us that he was very very

sceptical of this treatment that the accused relied upon before the sentencing judge.

He submitted secondly, that Mr. Lieph's ramblings were unsupported by medical evidence.

Next Crown Counsel referred us to the authorities and submitted that there were no similar authorities in this Court. He referred us to the *Child* case, to which I have already alluded, and said that that was the closest there was and that there was no case in this Court where discharges had either been ordered or upheld.

He also referred to a judgment of his Honour Judge Singh in *Regina v. Gyula Julius Szalontai* (24 November, 1987), XO18348 (N.W.C.C.), wherein Judge Singh had rejected an explanation for the accused's possession of marihuana and said at p.2:

> I can summarize his (the accused) testimony, as I said previously, was an actment of a comic opera before me. I totally reject this fanciful and bizarre explanation. I am satisfied that the laboratory was set up purely and simply for a commercial enterprise.

That case is, of course, distinguishable as the findings of fact made by His Honour Judge Singh are, in that case, substantially different from what was concluded by the trial judge in this case.

Fourthly, Counsel for the Crown argued that the

representations to the trial judge were not under oath, either the words of defence counsel or the accused. That the accused had come to Court on counsel's representations and his representations alone.

Fifthly, and finally, Crown Counsel submitted that the sentencing judge had leapt or jumped to a conclusion in favour of the accused too quickly in the absence of evidence.

Counsel for the accused in this Court, on the other hand, in his submission referred to and relied upon the sentencing judge's findings to which I will later refer, and read in its entirety the unsworn statement made by the accused, which I have previously summarized.

Lastly, he referred to a fairly recent Provincial Court Judge's directions where discharges were granted. Those cases are of no assistance in the unique circumstances of this case.

The maximum penalties pursuant to s.6(2) of the *Narcotic Control Act*, R.S.C., 1970, c.N-1 for cultivating, and s.3(2) for simple possession are both seven years. There is no mandatory minimum penalty for either offence.

The Provincial Court Judge granted the conditional and absolute discharges pursuant to s.736(1) of the *Criminal Code of Canada*, which reads in these words:

> 736. (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or for life, the court before which he appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order.

Insofar as this particular case is concerned, the operative words are "it is considered to be in the best interests of the accused and not contrary to the public interest". The learned trial judge in his decision said:

> Well, I do not think I have to adjourn to consider this. It is certainly a very unique situation and I might say, Mr. Lieph, that I do believe your story. I do believe your condition which you have displayed here. And I also believe you when you have told your counsel and here you told the Court, that you have used this for your sole purpose and this is to correct this psoriasis condition which you displayed here.
>
> It is against the law, as you know, to cultivate marihuana, and it is against the law to be in possession of marihuana, of course, which you have pleaded guilty to. However, the purpose of the law is where the main purpose of the use of marihuana is for the so-called pleasure one derives from it, the euphoria which is produced, and that is something which you are not seeking. You are seeking something entirely different, and that is its medicinal values, and I agree with you that it apparently has some medical values, both used in terminal cancer patient with chemotherapy and also with your own experience with psoriasis, which I must say, I am impressed with, and I would certainly hope that you would share that with the medical profession, which I think you said you are going to do so.
>
> I cannot see any use in giving you a

> criminal record. You have an exemplary record to this point in time. You have no previous convictions. You have been an active community member. You have been a contributing member of your community, and you have certainly added to your community. You have not taken away from your community. And I think that certainly supports your credibility as you have described here, the attempts you have made to correct this psoriatic condition.
>
> Therefore, I do not feel it is against the public interest to allow you not to have a criminal record, as a result of your cultivating marihuana and being in possession of this marihuana, primarily for the purpose which stated that is was for your own use, medicinally, and I accept that.

In reply, Counsel for the Crown submitted that before granting discharges in the case at bar, the Court ought to have given the Crown an opportunity to have an adjournment if it wanted to refute the representations made by the accused and his counsel. In my judgment, there was no such duty or obligation on the sentencing judge.

The thrust of the accused's counsel's submission in support of the discharges was unique. Had Counsel for the Crown at that time sought an adjournment to seek instructions or to call medical or scientific evidence to challenge the defence's representations which raised these unusual and totally unpredictable circumstances, I am confident that the Provincial Court Judge would have or should have acceded to such a request. However, the record discloses no such request and as I have said, I am not disposed to impose any such obligation on the sentencing Judge.

Notwithstanding the expressed scepticism of Counsel for the Crown in this Court, and in the Court below, the representation of counsel and the unsworn statement of the accused formed an appropriate basis for the conclusions that the sentencing judge reached. There was no evidence to the contrary and accordingly, the sentencing judge was entitled to come to the conclusions that he did. In doing so, I am not satisfied that he fell into error in an appreciation of the facts or in his application of the provisions of s.736(1) of the Code.

Under the circumstances, I would grant the Crown's application for leave to appeal. However I would dismiss the sentence appeals for generally the reasons expressed by the sentencing judge.

LEGG, J.A.: I agree with that disposition. As my brother has pointed out, this case turns on its unique facts and he has outlined those very fully. I merely wish to add that the trial judge held that it was not against the public interest to grant a conditional discharge or an absolute discharge. No argument has been presented by the Crown against that disposition in the Court below and therefore, I add to what my brother has said by simply stating that the trial judge exercised his discretion on grounds that were not challenged before him.

TAYLOR, J.A.: I agree with what has been said by both my brothers.

TOY, J.A.: The Crown's application for leave to appeal sentences is granted but the appeals are dismissed.

S.M.T. J.A.

H.P.L. J.A.

127