Conroy & company

MEDICAL MARIJUANA

Citation: R. v. Small
2001 BCCA 91

Date: 20010209
Docket: CA026992
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

WILLIAM SMALL

APPELLANT

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

J. Conroy, Q.C. — Counsel for the Appellant

C. Stolte — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
January 25, 2001

Place and Date of Judgment: Vancouver, British Columbia
February 9, 2001

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The appellant Mr. Small pled guilty in Provincial Court to a charge of production of a controlled substance, namely, cannabis, contrary to s. 7(1) of the ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19, (the "***Act***"). He was sentenced to a fine of $3,000 plus 12 months' probation, during which he was required to keep the peace and be of good behaviour and to report to the Court as and when directed.

[2] The unusual feature about the appellant's case is the sentencing judge's finding that he had been growing the marihuana in order to sell it to the British Columbia Compassion Club Society at the rate of $1,500 per pound - obviously substantially less than its value in the illicit market, which would have been approximately $100,000 if all 31.75 pounds had been sold "at the pound level". The sentencing judge described the purposes and activities of the Compassion Club:

> The Compassion Club is a registered non-profit organization which provides a variety of services to its approximate 700 registered members, including the sale of marihuana for medicinal purposes to those who qualify. Of these, 80 percent have a letter from their doctor recommending its use and the balance must meet certain criteria established by the Club. The majority of members to whom marihuana is sold suffer from AIDS, cancer or multiple sclerosis.
> The accused is one of 15 marihuana suppliers, and he himself uses it for medicinal purposes. The strains of marihuana grown are suited to medical use. It is perhaps worth noting that there is provision under s. 56 of the ***Controlled Drugs and Substances Act*** to legally possess marihuana under certain conditions if it is necessary for medical purposes and exemption from the Minister of Health is first obtained.

The sentencing judge noted that the appellant, who was 40 years old, had no criminal record and is a professional musician, has donated many hundreds of hours to furthering the work of the Compassion Club.

[3] The Crown sought a jail term of four months but was agreeable to its being served as a conditional sentence. The defence submitted that jail time would not be appropriate and sought an absolute or conditional discharge. The sentencing judge concluded that granting a discharge in this case, "where the accused stood to make a considerable profit, would be contrary to the public interest." On the other hand, he did not find a jail term to be warranted and stated that "To the extent the accused is sincere and genuine in wanting to help others he is to be commended and his motivation is a matter to be considered in mitigation." Nevertheless, the Court ruled:

> The principal concern is deterrence, and having regard to all the circumstances I am satisfied a fine and probation is the appropriate disposition. Given the accused's financial circumstances the fine will be $3,000 and the term of probation will be for 12 months.

[4] On appeal, Mr. Conroy for the appellant argues that the court below placed undue emphasis on cases involving commercial grow operations and on the fact Mr. Small might have earned a small profit from his operation; and that the Court failed to place sufficient emphasis on the appellant's compassionate motives. As well, Mr. Conroy notes that since the sentencing judge's decision, there have been new developments in the law that strengthen the argument against any sentence other than a conditional or absolute discharge. Most notably, the Ontario Court of Appeal has ruled, in ***R. v. Parker*** (2000) 146 C.C.C. (3d) 193, that the discretion given to the Minister of Health by s. 56 of the ***Act*** to grant exemptions to persons in need of marihuana for therapeutic purposes, did not meet constitutional standards. The Court found that the present scheme infringed the rights of the accused, a man who suffered a severe form of epilepsy, to liberty and security of the person under s. 7 of the ***Canadian Charter of Rights and Freedoms***. In the result, the Court declared the prohibition in s. 4 of the ***Act*** against the possession of marihuana to be invalid, but suspended its declaration for a period of 12 months from the date of release of its Reasons, July 31, 2000.

[5] At the legislative level, the Minister of Health, Mr. Rock, responded in September 2000 to the Ontario ruling by announcing his Department's intention to "develop a new regulatory approach for the use of marihuana for medical purposes", expected to be in place by July 31, 2001. The Minister stated that a five-year contract has been issued to a Saskatoon company to establish "a Canadian source of quality, standarized, affordable, research-grade marihuana." Mr. Rock anticipated that the first quantity of marihuana would be available for distribution within one year of the contract award.

[6] Until that occurs, Mr. Conroy pointed out, there is a legislative lacuna in that although the Minister may still grant certificates of exemption under the ***Act*** permitting patients to possess marihuana for medicinal purposes, there is no legal source from which such persons can obtain the drug, and conversely there is no person who may legally sell the drug to such persons without infringing the ***Act***. That is the lacuna which the Compassion Club, and Mr. Small, have attempted to fill by growing impurity-free cannabis and making it available at low cost to persons who have either certificates of exemption from the Minister or appropriate letters from their doctors.

[7] There was also evidence to the effect that, at least in Vancouver, the police are essentially 'turning a blind eye' to the activities of the Compassion Club as long as they remain satisfied that the drug is being sold strictly for medicinal purposes. A spokesperson for the Police Department is quoted as saying that ". . . if the Club abides by certain rules and regulations, they are not a priority for us. We are very much aware of the organization and what is going on there."

[8] Mr. Conroy referred us to ***R. v. Fallofield*** (1973) 13 C.C.C. (2d) 450, where this court reviewed a large number of cases dealing with discharges and suggested the following general principles:

> (1) The section [then s. 662.1; now see s. 730(1) of the ***Criminal Code***] may be used in respect of *any* offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.

> (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
> (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
> (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
> (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
> (7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.
> (8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases. [at 454-5; emphasis added.]

[9] The sentencing judge in the case at bar was particularly concerned with the fourth consideration, i.e., whether the grant of a discharge would be contrary to the public interest. He decided it would be, and that the principal concern in this case was deterrence. After noting Mr. Small's laudable motivation, he observed:

> The fact remains this was an illegal operation for profit. While there is no indication of it in this particular case, marihuana grow operations can attract organized crime and often lead to damage to houses which the owners believe to be legally occupied.

[10] In this court, the Crown took the position that although Mr. Small had not realized a profit in fact (due to his arrest before the crop was harvested) the grow operation in question here would have been large enough to give him a substantial annual income, assuming three crops per year and a price of $1,500 per pound. In any event, Mr. Stolte argued, the fine and probation order made by the sentencing

judge do not approach the usual range for commercial grow operations and on the whole constitute a fit sentence.

[11] The Crown also pointed out that this was not the appellant's first arrest for production of marihuana: he was tried by Wong J. in June 2000 on a similar charge laid in September 1998, to which he pleaded guilty. By the time Mr. Small came up for sentencing on that charge, he had been sentenced in the case at bar. Wong J. granted an absolute discharge, reasoning as follows:

> . . . I have been told by your counsel, Mr. Conroy, that Judge McGee's sentence has been appealed to the Court of Appeal for consideration as to its appropriateness.
> On reflection, I think I should approach this sentence on the basis of what would have been appropriate if you had pled guilty and been sentenced immediately after the commission of this offence. The Court of Appeal can then consider Judge McGee's sentence in light of what I have imposed here today.
> The disposition of this Court is therefore an absolute discharge.

(***R. v. Tan*** (1974) 22 C.C.C. (2d) 184, a decision of this court, stands for the proposition that in deciding whether to grant a discharge, a court may consider the fact that the accused received a discharge on a previous occasion.)

[12] The previous discharge leads one to the fifth conclusion referred to by the Court of Appeal in ***Fallofield***, *supra*, and in my view militates against the granting of an absolute discharge. The fact is that Mr. Small, albeit for reasons of compassion, has taken a calculated risk and already received one absolute discharge. There is no evidence to suggest that he regrets breaking the law as it now stands - on the contrary, there was evidence that he was "unapologetic" and intended to "continue to set up grow operations on the Sunshine Coast and elsewhere." Although the Ontario Court of Appeal has ruled that the prohibition against the possession of marihuana for medicinal purposes infringes the ***Charter***, the coming into effect of that declaration was postponed for reasons relating to the Court's perception of the public interest. The government through the Minister of Health has indicated that it requires time in which to ensure a legal supply for medical patients, and to enact appropriate laws that will guard against the obvious abuses that could result from limited legalization. That time has not yet passed and the new system has not yet been put into place. In the meantime, the law remains in effect.

[13] In these circumstances, I cannot agree with Mr. Conroy that an absolute discharge would not be contrary to the public interest. Thus although I agree that the decision in ***Parker*** (which was not available to the sentencing judge) affects the question of appropriate sentence and that the sentencing judge gave undue weight to the potential for profit that Mr. Small stood to make from his activities, I would substitute a conditional discharge for a period of 12 months for the fine and probation order previously imposed. The 12 months would commence as of the date of the sentencing below. As required by s. 732.1(2) of the ***Criminal Code***, the discharge would be conditional upon the appellant's keeping the peace and being of good behaviour during the 12-month period, appearing before the Court when required, notifying the Court or his probation officer in advance of any change of name or address, and of any change of occupation or employment.

[14] I would therefore grant leave to appeal, allow the appeal, set aside the sentence appealed from, and substitute a conditional discharge as aforesaid.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Huddart"

I AGREE:

"The Honourable Mr. Justice Low"