[2000] QCA 100

COURT OF APPEAL

DAVIES JA
McPHERSON JA
MOYNIHAN J

CA No 4 of 2000
CA No 10 of 2000

THE QUEEN

v.

THELMA LOBWEIN and
CARL RICHARD STATHAM Applicants

BRISBANE

..DATE 29/03/2000

JUDGMENT

DAVIES JA: Both applicants pleaded guilty and were sentenced in the Supreme Court on 15 December last year.

Statham pleaded guilty to one count of trafficking in cannabis between 1 January 1997 and 9 April 1999, one of production of cannabis between 1 July 1996 and 9 April 1999, one of possession of cannabis and one of possession of equipment used in connection with its production. He was sentenced to seven years imprisonment on the trafficking count with a recommendation that he be eligible for parole after serving two and a half years of that term. No further penalty was imposed in respect of the other counts.

Lobwein pleaded guilty of possession of cannabis with a circumstance of aggravation. She was sentenced to 18 months imprisonment suspended after three. The applicants were, at the relevant time, living in a de facto relationship.

Statham is 50 years of age having been born on 7 September 1949. He has no previous convictions for similar offences. However, he has a previous conviction in 1990 for assault occasioning bodily harm and one in 1998 for common assault. Neither of these was apparently serious enough to justify a gaol term. However, in November 1993 he was sentenced to 12 months imprisonment on three counts of indecent dealing with a girl under 14 and two of indecent dealing with a girl under 16 years of age.

At the time of his apprehension Statham was carrying on business at two separate locations of hydroponic growing of cannabis. That's harvesting, packaging and sale to a supplier in Brisbane.

Both operations were very sophisticated producing high quality crops in locations which were difficult to detect.

The first of these locations was a house in which the two applicants lived. Statham had sealed off five rooms of this house installing in them expensive growing equipment which included moveable lights and air conditioning. The latter to improve the flowering of the plants at appropriate times. He had diverted power from the mains system to avoid detection by excessive usage. He commenced the cultivation of cannabis at this location in July 1996. He was in full scale production and had generated sufficient cannabis to commence trafficking by January 1997. He sold the head or bud of the plant to a supplier in Brisbane for $3,000 a pound, a pound being about point 45 of a kilogram.

When police searched the premises at the end of this period they found over 56 kilograms of leaf and tip material, nearly half of it bagged in 900 gram bags, a large quantity of seeds graded in various qualities, 260 plants at various stages of growth and the equipment to which I have already referred.

The second location more recently established was at a farm house at Westbrook. There similar equipment was found and 112 plants were under cultivation. On an assets betterment basis more than $130,000 was identified as unexplained expenditure presumably profit from the sale of the cannabis.
The applicant co-operated with the police and pleaded guilty to an ex officio indictment. Importantly, however, he did not identify the supplier who must himself have been a major trafficker who

purchased his cannabis. The applicant was not himself a user a cannabis, the motive for the business being solely greed.

For the applicant it was submitted that it was erroneous that a sophisticated operation of production elevated the culpability that attached to trafficking and that it was erroneous to confuse sophistication with size and volume of production. To only a limited extent are those submissions correct. Moreover, the peculiar circumstances of the applicant's business make it difficult to compare it with other circumstances in which sentences have been imposed for production and trafficking. It hardly needs mention that although the sentence was imposed for trafficking it took into account the extent and sophistication of the production.

The production itself was unusual in the way in which it was concealed and because of the sophisticated equipment, its quality. The difficulty of the applicant's detection and apprehension was made harder by his choice to sell to one bulk supplier. So the sophistication of the operation was relevant to the extent of care and planning which went into the operation, the quality of the product produced and the extent to which it increased the applicant's chances of avoiding detection.

After referring to some cases which he submitted were analogous Mr Boe for the applicant submitted in his written outline that an appropriate sentence for production alone would have been two and a half to three years and for trafficking alone would have been three to five years. He then submitted that a term of four years

with a recommendation after 18 months for mitigating matters would have been appropriate.

The cases which he relied on for his submissions with respect to production were Wittwer, CA 241/95; Cook & Ors, CA Nos 231, 242, 243, 250 of 1996; and Woods, CA 182/98. For his submission on trafficking he relied on McFadden,
CA 132/94 and Douglas, CA 110/94. On the other hand the respondent relied on Bercolli, CA 96/96, which had been referred to the learned sentencing Judge. That case involved a count of trafficking between April 1994 and April 1995.

Notwithstanding a plea of guilty at an early stage and the absence of any prior convictions a sentence of six years imprisonment with a recommendation after two years was held by this Court to be not manifestly excessive although as
Mr Boe pointed out today it was said in this Court that it was a very high sentence.

Comparison with that case indicates that the number of plants, the amount of money involved and the period of trafficking in that case were all substantially less than half that involved here. The reasons in that case also analysed a number of previous decisions including McFadden relied on by Mr Boe.

In my view, that case tends to show that the sentence imposed here was not manifestly excessive and having regard to the circumstances to which I have referred I do not think it was. I would therefore refuse Statham's application.

The position of the other applicant is quite different. Her offence arises solely from her remaining, living with the applicant and not going to the police in effect for a period of 12 months knowing that he was carrying on this business and failing to report it.

The applicant is Filipino of 37 years of age who came to Australia in 1984 to marry an Australian. That marriage ended and she entered into a relationship with Statham in 1993.

She has no financial or social support in Australia other than Statham and she has no prior convictions. After discovering Statham's activities she asked him to stop. She's never been involved in them in any way. She co-operated with the police and pleaded guilty to an ex officio indictment.

Having regard to the circumstances which I have mentioned, in particular the applicant's financial and social dependence on Statham, and her attempt to persuade him to cease his illegal activities I do not think that her offence justified the imposition of a term of imprisonment of 18 months. I would therefore grant the application and allow her appeal to the extent only of varying it by substituting for the term of 18 months' imprisonment a term of six months' imprisonment.

McPHERSON JA: I agree.

MOYNIHAN J: So do I.

DAVIES JA: They are the orders of the Court.
