COURT FILE NO 03-CR-00002

ONTARIO

SUPERIOR COURT OF JUSTICE
(Southwest Region)

B E T W E E N

HER MAJESTY THE QUEEN

Appellant

-and-

J.P (A Young Person)

Respondent

-and-

CRIMINAL LAWYERS= ASSOCIATION

Intervener

HEARD February 21, 2003, March 11, 2003

Reasons for Judgment

Steven Rogin

[1] J.P. (A young person) was charged that on or about the 12th day of April
2002 at the Town of Kingsville in the Southwest Region, unlawfully,

Count 1

Did-have in his possession under 30 grams of a controlled substance to wit cannabis marihuana contrary to s. 4(1) of the Controlled Drugs & Substances Act,

and further, Count 2

That J.P. on or about the 12 April 2002 at the Town of Kingsville in the said Region did while subject to a disposition made pursuant to paragraph 20(1)(j) of the Young Offenders Act to wit: a Probation Order issued in the Youth Court, Windsor, Ontario on the 18th day of March, 2002 by Judge M. Rawlins did wilfully fail to comply with that Order to wit: The said young person shall abstain absolutely from the consumption of illegal substances as defined in the Controlled Drugs and Substances Act, contrary to Section 26 of the Young Offenders Act.

And further Count 3

Not applicable to this Appeal

[2] J.P. made application to Phillips J. to declare that s. 4(1) of the Controlled Drugs and Substances Act, no longer prohibits simple possession of marihuana, and as a consequence thereof, Count 1 and 2 of the information did not disclose offences known to law.

[3] In reasons released on January 2/03, Phillips J accepted the respondent=s arguments. Phillips J. framed the issue as follows:

AThe Applicant's submission distilled to its core, is that the Court of Appeal in Parker, having determined that s. 4(1) of the Act (as it applied to the possession of marihuana) was constitutionally invalid, and having suspended that finding for 12 months, had left Parliament with no choice but to amend or re-enact it (prior to lapse of the suspension) if Parliament were to preserve the prohibition on marihuana possession. As it turns out, Parliament did neither instead Regulations were enacted. In my view, that is entirely within Parliament's prerogative (i.e. Parliament could choose to do nothing and allow another mechanism, namely approval of a regulation by order-in council, to remedy the defect), provided that there is a correction addressing the underlying faults found in Parker. In this instance, it appears that Parliament acquiesced in the choice of the remedy, allowing enactment (clearly sanctioned by it) of a set of comprehensive regulations. Through this expedient, statutory amendment or re-enactment of the impugned section was avoided.@

[4] He then ultimately decided the issue in favour of the respondent as follows:

AWhile Regulations were enacted, but the legislation was not amended, the "gap in the regulatory scheme" (to use the language of Rosenberg J.A. in Parker) was not addressed. In my view, the establishment by Parliament of suitable guidelines in legislation fettering administrative discretion was requisite, but lacking. This is simply not the sort of matter that Parliament can legitimately delegate to the federal cabinet, a Crown minister or administrative agency. Regulations, crafted to provide the solution (even were these fashioned to create sufficient standards governing exemptions) cannot be found to remedy the defects determined by the Parker dicta. Therefore, since a statutory framework with guiding principles was not enacted within the period of the suspension of the declaration of invalidity, it follows in my view that the declaration is now effectively in place.

In light of that analysis the young person=s application must succeed.@

[5] The Crown appeals to this court from this ruling. The Crown complains that notwithstanding that J.P.=s original application was not a charter application, the learned trial judge embarked on a charter analysis to come to his conclusion. The Crown=s agent was therefore unprepared for this argument and in any event the charter analysis of Phillips J. was incorrect. In point of fact, J.P.=s counsel prepared a factum for Phillips J., which is contained at paragraphs 33 to 50 of the appeal

book. While this factum referred to R. v. Parker (2000), 146 C.C.C. (3d) 193, para. 20 of the factum specifically states that J.P. did not challenge the constitutionality of the regulations which Phillips J. found not to contain an offence.

[6] Whether I agree or disagree with the reasoning of Phillips J is immaterial. He was entitled to analogize to the charter in coming to his conclusions. See the reasons of Carthy J. in R. v. Campbell and Shirose (1997), 115 C.C.C. (3d) 310 at 331:

AIf the proceeding were started today the appellants might frame this as a charter issue. The fact that they did not do so does not prevent me from analogizing to the charter and applying the thinking which has been applied to it in reaching out for the singular goal of presuming the integrity of the administration of justice.@

[7] The Crown=s next position was that Phillips J. misinterpreted the combined effect of the Parker and its companion case R. v. Clay (2000), 146 C.C.C. (3d) 276, in failing to appreciate the Aextent of the inconsistency@ and therefore failed to read in a medical exemption to the declaration of invalidity by Rosenberg J. in Parker. There is no such medical exemption in the declaration of invalidity in R. v. Parker. The Crown=s position in the Court of Appeal in Parker was contrary to the position advanced in this appeal. In Parker at para. 198, the Crown=s position was that if the Court of Appeal found a violation of s. 7 of the Charter, the only available remedy was to strike down s. 4(1) of the Controlled Drugs and Substances Act (as it related to marihuana) and suspend the finding of invalidity for a sufficient period of time to allow Parliament to craft a satisfactory medical exemption. This is the exact remedy that Rosenberg J. formulated at para. 210 in Parker after discussing it at paragraphs 206 and 207. In fact, he set aside the part of Sheppard J.=s original judgment, reading in a medical exemption.

[8] Finally, the Crown argued that Phillips J. erred in finding that s. 2(2) of the Interpretation Act applied to deem the marihuana prohibition Arepealed@ by the declaration of invalidity. More will be said on this point later.

[9] I agree with the disposition of Phillips J. in his judgment of January 2/03 and would dismiss the Crown=s appeal for the following reasons:

(1) On July 31, 2000, Rosenberg J. in R. v. Parker, severed marihuana from s. 4 of the Controlled Drugs and Substances Act and declared it invalid. Section 4 as it relates to substances other than marihuana remains in full force and effect.

(2) The declaration of invalidity was suspended for a period of 12 months from July 31, 2000. Mr. Parker was granted an exemption from the marihuana provision in s 4 during the period of suspended invalidity

(3) As of July 31/01, s. 4 of the Controlled Drugs and Substances Act as it related to marihuana was invalid. Section 4 includes the penalty section. See Kemp v. Rath (1996), 141 D.L.R. (4th) 25 at pg. 34 and 35:

AA statute which is of no force or effect confers no rights. In the absence of a direction to the contrary, a declaration that a law is of no force or effect, invalidates the law from the time when the Charter (here s. 15) came into force or the legislation was enacted, which ever is later. Professor Hogg in Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992) states at pp. 1241-1242 (emphasis added): A judicial decision that a law is unconstitutional is retroactive in the sense that it involves the nullification of the law from the outset. Indeed, any judicial decision must be retroactive in order to apply to the facts before the court, since those facts must have already occurred. That a court makes a new law when in overrules prior doctrine or even when it decides an unprecedented case is not open to doubt; but a court does not make new law in the same way as a legislated body, that is, for the future only@.

(4) Parliament=s response to the Ontario Court of Appeal decision in Parker was to enact the Medical Marihuana Access Regulations, published in the Canada Gazette on June 14/01, to come into force on July 30/01. Justice Phillips recognized at para. 39 of his judgment, that the regulations have the force of law, which was conceded by the respondent both in this court and before Justice Phillips.

(5) However, Parliament at no time re-enacted s. 4 of the Controlled Drugs and Substances Act, as it relates to marihuana. Accordingly, notwithstanding the enactment of the Medical Marihuana Access Regulations which allow possession of marihuana under certain circumstances, in no place in those regulations is there a prohibition against simple possession of marihuana.

[10] In addition, since s. 4 of the Controlled Drugs and Substances Act has not been re-enacted, as it relates to marihuana, there is no penalty in the act for simple possession of marihuana even if it had been prohibited by the Medical Marihuana Access Regulations. It is to be noted, that there are no penalty sections set out in the Medical Marihuana Access Regulations.

[11] The question then arises whether by permitting possession only under certain circumstances in the Medical Marihuana Access Regulations, can they, by implication, proscribe possession except under those terms?

[12] In R. v. Hauser (1979), 46 C.C.C. (2d) 481, the Supreme Court of Canada held that the former Narcotic Control Act was legislation enacted under the general, Federal residual power. This is notwithstanding the racial overtones with respect to opium and the fact

that marihuana is technically not a narcotic. Hauser in effect said, that marihuana is a narcotic if Parliament said it was.

[13] Coupled therefore, with the penal section in the Controlled Drugs and Substances Act (before Parker), including imprisonment for simple possession, it cannot be doubted that the Controlled Drugs and Substances Act is a penal statute. Penal statutes must be strictly construed. Doubts must be resolved in favour of the accused. See R. v. Pare, [1987] 2 S.C.R. 618 at pg. 630.

[14] In R. v. Macintosh, [1995] 1 S.C.R. 686, Lamer C.J. as he then was, said the following, which is reproduced from para. 38 of the Quick Law Edition:

AAs stated above, the overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons. Moreover, in choosing between two possible interpretations, a compelling consideration must be to give effect to the interpretation most consistent with the terms of the provision. As Dickson J. noted in Marcotte, supra, when freedom is at stake, clarity and certainty are of fundamental importance. He continued, at p. 115:

If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

Under s. 19 of the Criminal Code, ignorance of the law is no excuse to criminal liability. Our criminal justice system presumes that everyone knows the law. Yet we can hardly sustain such a presumption if courts adopt interpretations of penal provisions which rely on the reading-in of words which do not appear on the face of the provisions. How can a citizen possibly know the law in such a circumstance?

The Criminal Code is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the Criminal Code requires an interpretive approach which is sensitive to liberty interests.

Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law.@

[15] It follows from these reasons, that neither Count 1 nor Count 2 contains an offence known to law. See Otis J. in R. v. Barrow (2000), 147 C.C.C. (3d) 310 at pg. 319 & 320 (Quebec Court of Appeal).

AAs a result, I consider that the charge has no basis in Canadian criminal law because there is neither an offence nor a penalty for it in Canadian law. The authors J. Fortin and L. Viau, in Traité de droit pénal général (Montreal: Les Éditions Thémis, 1982), explain the

principle of the need for a legal basis in the following terms, at p. 24:

The existence of a law is a prerequisite to a charge. In this sense, the rule of law is more restrictive in Canada with the coming into force of the 1955 Criminal Code than it was before and than it still is in England. In Canada, the act or conduct which is not prohibited by the Law is a permitted act. The text of law is the sole basis for punishment of an act.

In Frey v. Fedoruk, [1950] S.C.R. 517, 97 C.C.C. 1, Cartwright J. expressed the soundness of the principle of the necessity of a law at page 530:

I think it safer to hold that no one shall be convicted of a crime unless the offence with which he is charged is recognized as such i the provisions of the Criminal Code, or can be established by the authority of some reported case as an offence known to the law. I think that if any course of conduct is now to be declared criminal, which has not up to the present been so regarded, such declaration should be made by Parliament and not by the Courts.

However, if one were to find, notwithstanding the preceding demonstration, that there still remains some difficulty on whether or not Catha edulis Forsk is regulated as a new drug under the Food and Drug Regulations, I consider that the appellant must be given the benefit of this doubt. Notwithstanding the relaxation of the rule of construction that penal statutes must be restrictively interpreted, it remains that the supplemental nature or role of this rule still allows for recourse to it to resolve difficulties which remain at the end of an attempted neutral construction. (P.-A. Côté, op. cit., p. 605; R. v. Hasselwander, [1993] 2 S.C.R. 398, 81 C.C.C. (3d) 471; R. v. Johnston (1977), 37 C.R.N.S. 234, 34 C.C.C. (2d) 325 (N.W.T.C.A.), affirmed by [1978] 2 S.C.R. 391, 9 C.C.C. (2d) 479; R. v. Philips Electronics Ltd. (1980), 116 D.L.R. (3d) 298, 55 C.C.C. (2d) 312 (Ont. C.A.), affirmed by [1981] 2 S.C.R. 264, 62 C.C.C. (2d) 384n; R. v. Leroux, [1974] C.A. 151 (Que. C.A.), and R. v. Nittolo, [1978] C.A. 146 (Que. C.A.).)@

[16] The Crown Appeal from the judgment of Phillips J. is dismissed

[17] In these reasons I have treated Count 1 and Count 2 of the information
charging J.P. in the same fashion. However, since a probation order may, in appropriate circumstances, prohibit things which are ordinarily legal (for example possession or consumption of alcohol, possession of a cell phone) it is only because of the wording in Count 2 charging the breach of probation by Aconsumption of an illegal substance@ that the reasons apply to that Count. If that Count had charged J.P. with Abreach of probation by possession of marihuana@ I would not have found Count 2 to contain an offence not known to law.

18] Judgment accordingly

ASteven Rogin@ Justice

Released May 16, 2003