

Date: 20000627
Docket: CC991259
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Sentence
Mr. Justice Wong
June 27, 2000

REGINA

Against

WILLIAM EDWARD SMALL

Counsel for the Crown: J. Loo

Counsel for the Accused: J. Conroy, Q.C.

[1] **THE COURT:** William Edward Small you have pled guilty to a charge of producing Cannabis (marihuana), contrary to Section 7(1) of the *Controlled Drugs and Substances Act*. The maximum penalty for this offence is seven years imprisonment.

[2] On September 17, 1998, at 12:48 p.m., police officers executed a search warrant at a residence you were renting at Sechelt. Inside, they found 37 Cannabis (marihuana) plants

1½ to 3 feet in height, 193 clone plants 2 to 8 inches in height, and a bag of dried bud 85.5 grams in weight. Also, found was a Notice of Termination of Tenancy issued to you from the landlord and a card pertaining to the B.C. Compassion Club Society.

[3] Earlier, a police constable was investigating an unrelated motor vehicle accident which had occurred in the neighbourhood. He was checking for potential witnesses and knocked on the door of your residence. Upon hearing the voice "Come in," the police constable met a friend and visitor of yours, a cancer patient, in the kitchen. A strong smell of growing marihuana and audible sounds of running fans for ventilation were evident. Consequently, the police later returned with a drug search warrant.

[4] The plants found were not in a healthy condition and it appeared as if the grow operation was in the process of being dismantled.

[5] Evidence was led that you had lived at the residence for approximately a year and grew marihuana plants sold at a reduced price exclusively for the B.C. Compassion Club Society. The price was set at \$1,500 per pound - one-half of the usual illicit market price.

[6] The Compassion Club is a registered non-profit society which provides a variety of services to its approximate 1,100 registered members, including the sale of marihuana for medicinal purposes to those who qualify. Distribution of marihuana to members requires confirmation from a member's physician recommending it's use or satisfaction of equivalent criteria of required medical need established by the Club. The majority of members to whom marihuana is sold suffer from A.I.D.S., cancer or multiple sclerosis. They claim that their use of marihuana eased their pain and alleviated severe muscle spasms.

[7] Marihuana is not distributed by the Club for recreational use and there are rigid controls to ensure that distribution is restricted to members for medicinal use. The police are aware of the Club's existence and tolerate the distribution of marihuana to Club members provided they are also satisfied that the marihuana will not be redistributed for non-medical use.

[8] You were one of the club's 15 marihuana suppliers and you yourself use marihuana for medicinal purposes. The strain of marihuana supplied by the growers must be organically grown, pesticide free and suited for medicinal use.

[9] In contrast, strains grown for the illicit market are tended for fast cash growth with use of chemical fertilizers and pesticides which may result in allergic reactions to medicinal users.

[10] There is provision under Section 56 of the *Controlled Drugs and Substances Act* to legally possess marihuana under certain conditions if it is necessary for medicinal purposes and permission from the Federal Minister of Health is first obtained.

[11] Presently, there are 20 persons across Canada who have obtained Section 56 certificates. Three belong to the B.C. Compassion Club. Obtaining an exemption from prosecution under Section 56 is not a simple but a lengthy and time-consuming process. The more immediate problem for medicinal users of marihuana is not concern of criminal prosecution for possession of the drug but lack of clean marihuana supply.

[12] Police prosecution of growers cannot, and perhaps should not, distinguish in discretion between those who grow exclusively for the Compassion Club and those who grow for profit to supply recreational users.

[13] The Minister of Health has recognized the above problems and has recently put forward a protocol for obtaining a future

supply of appropriate strains of marihuana for clinical trials regarding therapeutic marihuana use. Understandably, government authorities must move cautiously in promoting and implementing these trials. Realistically, then no legal supply of marihuana for permissible medicinal use is likely to be available in the foreseeable future. For those who do require marihuana now for medicinal purposes their need is immediate and pressing.

[14] You are presently forty years of age, divorced with two teenaged children who live in Ontario. You have no prior criminal conviction. You were previously employed in a variety of occupations until retirement from business for health reasons. It was during this time that you discovered and used marihuana for medicinal purposes.

[15] You are currently a bluegrass professional musician, performing primarily in the United States and earn between \$1,500 to \$2,000 per month.

[16] From 1994 to 1995 you also served a one-year term as a director of the Canadian Red Cross. You also have an established record for previous voluntary community service.

[17] Ms. Hilary Black, a founding member of the Compassion Club confirmed your connection with the society and referred

to the hundreds of hours you have donated in various ways to its operations. An example was the grow operation which you undertook in Sechelt. The Club financed the grow equipment and alterations to the house which you rented. Seventy-five hundred dollars was advanced. The marihuana supplied, valued at \$1,500 per pound, was then set off against the amount advanced. Thereafter it was intended that future crops would be supplied exclusively to the Compassion Club at one-half the illicit market price. The Club in turn would supply its members the marihuana at a considerably reduced price.

[18] Reference letters from responsible members of the community have been supplied on your behalf at this sentence hearing as have a number of letters of support from medicinal users for the Compassion Club and its suppliers.

[19] I am satisfied that your motives for the commission of this offence were humane and altruistic to fulfil what you believed was a pressing need to assist others who needed marihuana for medicinal purposes.

[20] The Crown, in part, has recognized this and has not pressed for a jail term but has asked, for deterrent reasons, a substantial fine. The defence has asked for a discharge either on an absolute or conditional basis. Defence counsel reminded the Court that a criminal conviction would likely

hinder your future entry into the United States for employment purposes.

[21] To qualify for a conditional or absolute discharge which would not leave you with a criminal conviction record, the Court must be satisfied that such a discharge would be both in your best interest and not contrary to the public interest.

[22] I have no difficulty in concluding that because of your exemplary background, no prior criminal convictions, and your altruistic motive in committing this offence, a discharge would clearly be in your best interest. But would it also not be contrary to the public interest?

[23] Recently, the British Columbia Court of Appeal in the companion cases of *R. v. Malmo-Levine* and *R. v. Caine* 2000 B.C.C.A. 335 held that provisions in the Narcotic Control Act prohibiting the possession of Cannabis (marihuana) for personal use was not contrary to Section 7 of the *Charter of Rights and Freedoms* regarding fundamental justice. The Court held that deprivation of a person's liberty by the present penal provision in the *Act* is in accordance with the right of the State to deal with social harm. Although the evidence showed that the risk of harm posed by Cannabis (marihuana) use is not large, the Charter only requires a "reasonable

apprehension of harm" by the legislators that is not insignificant or trivial.

[24] Whether the prohibition provision of the *Narcotic Control Act* (now the *Controlled Drugs and Substances Act*) concerning possession of Cannabis (marihuana) strikes the right balance for individual Canadians as to their right of freedom over the integrity of their person to be subordinate to the interest of the State for minimizing the potential harm to health, safety and personal development of the user and to society as a whole associated with the use of Cannabis (marihuana) was found by the Court to be admittedly close, but the Court also concluded that in social policy matters, there should be judicial deference to Parliament.

[25] The *Malmo-Levine* and *Caine* cases will likely go to the Supreme Court of Canada to set future parameters of the criminal law to suppress perceived social evil.

[26] In light of the Minister of Health's recently announced proposal to set up a protocol for clinical trials to test the medicinal benefits of marihuana use, and a recognition that a suitable supply of marihuana to supply medicinal users may also be necessary, I think there will likely be future moves by Parliament to eventually permit controlled medical use of marihuana. Bearing that in mind, I think it will not be

contrary to the public interest presently to consider a discharge in this case.

[27] A complicating factor however is that on February 15, 1999, you were involved again in a similar marihuana grow operation for the Compassion Club by way of assisting the main grower.

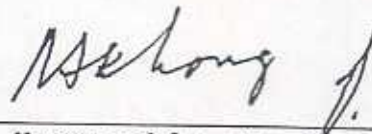
[28] You pled guilty to a charge of cultivation before Judge McGee of the Provincial Court on March 10, 2000. Judge McGee imposed a financial fine for deterrent purposes because although he recognized your altruistic motives, the operation was illegal and for some profit.

[29] Judge McGee is an experienced criminal court judge. I initially considered that conviction to be problematic for sentencing purposes here because a discharge granted by me at this time may be moot as to its benefit. However, 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.

[30] 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.

[31] The disposition of this Court is therefore an absolute discharge.

A handwritten signature in cursive script, appearing to read 'Wong J.', written in dark ink.

The Honourable Mr. Justice Wong