



Life in crime

David Rhodes discusses the application of new police guidelines following the reclassification of cannabis as a class C drug

"JUST A SPLIFF, MAN!" ANY JUDGMENT BY the Divisional Court (Queen's Bench) which begins with these words must merit further reading. Indeed, the operation of the policy of the Metropolitan Police on policing cannabis misuse caused considerable disagreement amongst their lordships in *R (Mondelly) v Commissioner of Police for the Metropolis* [2006] EWHC 2370 (Admin).

Mr Mondelly was seeking judicial review of the decision to caution him for simple possession of cannabis. On any view, he had been unlucky. Police officers investigating a burglary had gone to Mondelly's home address by mistake. When they entered, they found a 'spliff' and a small amount of cannabis. He was arrested for allowing his premises to be used for the smoking of cannabis. He was handcuffed and taken to the police station and detained for a number of hours. In interview, he admitted possession of cannabis for his own personal use, adding that he had few friends and so no one ever visited his home to smoke cannabis with him. The police conceded there was insufficient evidence to charge him with the offence for which he had been arrested. Instead he was cautioned for possession of cannabis.

On 24 January 2004, a year before Mondelly's arrest, cannabis was downgraded from a class B to a class C drug. On the same day, s 3 of the Criminal Justice Act 2003 amended the list of "arrestable offences" to include simple possession of cannabis. Also on that day, the Metropolitan Police Service issued Notice 3/2004, a policy on the 'Policing of Cannabis as a Class C Drug' which complimented national guidance by the Association of Chief Police Officers (ACPO). In essence, that policy seeks to ensure that the least amount of policing time was spent dealing with this offence when it should be targeted at drugs supply and class A drugs.

The heart of the new policy is that, where a police officer finds a person in possession of cannabis which is clearly for personal use and not for supply to others, that person should not be arrested unless there are aggravating

features (such as: smoking in public view; near schools; repeat offender; causing fear of public disorder). The bottom line is that there is now a presumption against arrest.

None of the aggravating features applied in Mondelly's case. He was smoking alone in the privacy of his own home. But for the mistake, and properly applying the policy, he would not have been arrested at all. In seeking judicial review of the caution, the applicant argued that the new policy on arrests must flow into the decision to administer cautions; that issuing the caution was a refusal to apply this new policy and that the discretion to administer the caution was limited because, in the absence of a good reason for doing so, it was unlawful to refuse to apply the policy. It was also argued that it was *Wednesbury* unreasonable to caution him where the circumstances known at the time would not have even warranted his arrest.

Moses LJ, giving the majority judgment, dismissed the application and expressed the reluctance of the courts to intervene in the operational policy of the police, save where the policy was clear and settled and the breach itself had been established. His Lordship said that in this case the policy was derived from a number of different documents and that he could find no clear or settled policy not to arrest or prosecute for simple possession. Moreover, the policy did not state explicitly that there should be no cautions. This was fatal to the claimant's case. Moses LJ concluded that if the applicant's case was right, then by promulgation of Notice 3/2004, the Metropolitan Police Commissioner had rendered it unlawful for any police officer to arrest or caution anyone for possession of cannabis, absent the aggravating features. This, he said, was a startling proposition, particularly when Parliament conferred a power of arrest on police constables for that offence on the very same day that cannabis was reclassified. It was simply not lawful for the police, by way of an executive policy, to change the will of Parliament or the definition of an offence by importing those aggravating features.

The interesting part of the judgment, however, came in the dissenting opinion of Mr Justice Walker, who conceded: "When I began to read the papers in this case, my instinctive reaction was that the court should not interfere with police discretion to administer cautions... and to ask, how can Mr Mondelly possibly complain of what appears to be an act of mercy by the police?" On reflection, however, Walker J decided that the policy was clear and settled and must apply to cautions and that he would have allowed the application because the caution clearly contravened that policy without good reason.

Walker J said there had been an injustice that must be remedied. The officers who arrested Mondelly were mistaken to think that he was guilty of anything other than simple possession. If that was all he had been guilty of, the policy stated that he should not have been arrested. Thus a caution had been administered in circumstances where, but for that mistake, he would never have been arrested and no action would have been taken. Yet that decision to caution had consequences for Mondelly. He was handcuffed and detained at a police station and now had a criminal record that would count against him in the future.

His Lordship made the point that if Mondelly had been prosecuted rather than cautioned, then he would have had a remedy in seeking to stay the proceedings as an abuse of process. He said: "In the absence of any rational reason for not applying the policy, there would have been strong grounds to urge a stay." In those circumstances, cautioning involves "a strong risk of injustice to the citizen... It is difficult to see why, merely because the police decided to caution rather than to prosecute, the citizen should have any less protection from the courts".

One can almost hear the slow drawl of pot-smokers everywhere protesting: "Abuse of process, man!"

David Rhodes is a barrister practising from Doughty Street Chambers