IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO'S 9/13 & 10/13

BETWEEN **MARK FRANKLIN**
First Appellant

MERE UPU KING
Second Appellant

AND **THE CROWN**
Respondent

Coram: Barker P
David Williams JA
Paterson JA

Hearing: 18 November 2013

Judgment: 22 November 2013

Counsel: P J Dale & A Manarangi for Appellants
S J McKenzie & M Henry for Respondent

JUDGMENT OF THE COURT

Introduction

[1] The First Appellant, Mark Franklin, appeals against a sentence of 12 months imprisonment, concurrent on all charges, imposed by Doherty J in the High Court on 29 August 2013. He had pleaded guilty at the start of his trial to two counts of selling cannabis and one count of offering to sell cannabis. The maximum penalty for both offences under Section 6 (1)(e) and 3(b) of the Narcotics and Misuse of Drugs Act 2004 ("the Act") is 10 years imprisonment. The first offence occurred on 23 November 2010 and the last on 30 April 2011.

[2] The Second Appellant, Mere Upu King, had at the same time pleaded guilty to one count of supplying cannabis (for which the maximum penalty is two years imprisonment and/or a fine not exceeding $5000) and to one count of selling cannabis. She received a sentence of 7 months imprisonment, concurrent on both charges.

[3] Both appellants now appeal against their sentences claiming that they were manifestly excessive.

[4] The convictions and sentencing of both appellants arose out of 'Operation Eagle' which was a combined drug operation of the Cook Islands and New Zealand Police forces involving an undercover Police agent. There have been several trials in the High Court as a result of this Operation which revealed several instances of cannabis-related offending. Doherty J presided over all of these trials and sentenced others besides these two appellants. This Court heard an appeal against sentences imposed by him as a result of 'Operation Eagle'. Its judgment given on 30 November 2012, *R v Marsters & Tangaroa* (CA 3/12).

Relevant Facts

[5] The First Appellant had had 30 years' experience in investigative policing in New Zealand. He had been held in high regard for his work – particularly in relation to difficult and stressful homicide enquiries. He took early retirement from the New Zealand Police on the grounds of stress. His application was supported by clinical psychological evidence. He came to the Cook Islands in 2005 when he also gave good service in the local Police force until late 2010.

[6] In October 2010, he was diagnosed with throat cancer. He returned to New Zealand for extensive treatment which, not surprisingly, left him very weak and depressed.

[7] On 23 November 2010, the First Appellant approached the undercover officer in a bar and asked him if he wanted some cannabis. The undercover officer said he wanted two 'tinnies' The First Appellant asked for and received $100; he spoke to his associate, (the Second Appellant) left the bar with her and returned with the requested cannabis. The First Appellant assured the undercover officer that he was receiving good quality New Zealand cannabis.

[8] On 2 April 2011, after a telephone request, the First Appellant arranged for the undercover officer to pick up two cannabis packages from him at his home. Again the price was $50 each.

[9] The charge of offering to sell cannabis arose after a search of the First Appellant's telephone text messages revealed that the First Appellant and the Second Appellant had replied to an enquirer that they were at a café where he could get cannabis from the Second Appellant. The First Appellant made an arrangement to meet the enquirer who later texted the First Appellant to the effect that it had been 'a good smoke' and that they had got a 'few joints' out of it.

[10] The Second Appellant supplied the cannabis to the First Appellant on 23 November 2010 which he sold to the undercover agent. She admitted to the Police that she had supplied cannabis to her sister the night before and that she had purchased cannabis for a number of years from the First Appellant.

[11] Like the First Appellant, the Second Appellant had no previous convictions. She is 57 years of age and was employed in a café and also had another job. She produced references which attested to her humble character, hard work and honesty.

[12] These two appellants were, together with one Ricky Carlson, sentenced at the same time since they had all been jointly charged in one trial. Their pleas of guilty came after the jury had been empanelled. Carlson has not appealed. Both appellants accepted the Police summary of facts from which the above summary of their offending is extracted.

[13] At the outset of his sentencing remarks, Doherty J referred to this Court's decision in *R v Marsters & Tangaroa* which endorsed his approach in the High Court of placing drug offending into categories. Whether an offender fits into a particular category depends on the scale and intensity of the offending. Matters such as the amounts involved, both of cannabis and of money, and the value and frequency of the dealing are relevant.

[14] The Judge categorised both appellants as coming within Category 1 which relates to small, non-profit dealing and where the range of sentences was anything up to a short term of imprisonment. We consider that he was right thus to categorise these appellants. There was no evidence in either case of a profit having been made from the supply of cannabis.

[15] The Judge pointed out that the Parliament of the Cook Islands had emphasised deterrence as the primary purpose of drug sentencing because of the very high maximum

sentences it had specified. He noted that this Court had considered that some previous sentencing decisions of the High Court had been rather too lenient and had placed too much regard to the personal circumstances of the offender. The Judge emphasised the need for consistency in sentencing and pointed out that the number of decisions referred to by counsel had occurred prior to this Court's decision.

[16] Dealing first with the First Appellant, Doherty J noted that his first offending occurred shortly after he had received his diagnosis of a terminal illness and that the undercover officer had made overtures to him about wanting cannabis over a period of some days prior to the offending. It seemed to the Judge that the undercover officer had inserted himself into the local drug scene. The second and third offences took place some months later.

[17] Both before the sentencing judge and before this Court, counsel for the appellants characterised the offending as being not for profit. Doherty J said that whilst the appellants made no profit there was inherent commerciality and that somebody must have made a profit.

[18] He noted the significant and substantial fall from grace of the First Appellant and the high regard in which he had been held within the New Zealand and later the Cook Islands Police forces. He referred to a probation report which discussed issues of health and the stress-related illness from which he had suffered: The report writer referred to the remorse of the First Appellant which supplemented with written apologies to both New Zealand and the Cook Islands Police and in a statement made from the dock.

[19] The Judge noted the aggravating features of the instances of offending being months apart and that when approached for cannabis, the First Appellant was able to source from another supplier and satisfy the customer. Due to both the stress-related and terminal illnesses, the Judge accepted that the First Appellant had been a cannabis user long before his diagnosis for cancer, referring to reports, psychological and medical reports. When approached by an undercover police officer (whom he suspected was an undercover officer) the First Appellant thought that he would do what he asked anyway since he "was not going to be around much longer".

[20] The Judge rejected as a mitigating factor any suggestion of entrapment by the undercover officer although he acknowledged English authority to the effect that in

some circumstances undercover operators preying on persons to persuade them to offend can sometimes be taken into account in mitigation of penalty.

[21] The Judge dealt with an alleged claim of collegiality based on the First Appellant's suggestion that he had been a kindred spirit with the undercover officer whose cover was that he had been a New Zealand Police officer suspended because of an investigation of drug dealing. The undercover officer brought him alcohol and fish but, nevertheless, the First Appellant acquiesced in his entreaties to break the law. The Judge noted as disturbing, the fact that the First Appellant had used cannabis on two occasions whilst in the employ of both the New Zealand and Cook Islands Police and had been observed doing so. Yet no action had been taken against him.

[22] Whilst accepting as genuine the First Appellant's apology for the opprobrium that might be attributed to both Police forces because of his illegal activities, the Judge felt that he had to assess culpability in terms of other sentences. He referred to the sentence he had recently imposed on one *Arlander* for three sales of cannabis worth $200 where the Judge's starting point was 21 months imprisonment. He considered this to be the appropriate starting point for the First Appellant's sentence.

[23] The Judge rejected any uplift in sentence because the First Appellant had been a Police officer; there had been no allegation that he had used his position to promote the offending. He gave credit for the late guilty plea and for his cooperation with the Police in respect of the Second Appellant.

[24] The Judge made some allowance for the position of vulnerability that the First Appellant was in at the time of the first offence because of the news of his terminal illness. Because of his exemplary record, the outstanding service in the Police and his cooperation he took 6 months from the 21 months starting point and another 3 months for his ultimate guilty plea, hence the sentence of 12 months imprisonment.

[25] Dealing with the Second Appellant, Mere Upu King, the Judge acknowledged that this appellant was a first offender. She had a good probation report which recommended probation, a suggestion he rejected because of the precedent laid down by this Court in *R v Marsters & Tangaroa*. He considered that this appellant too was also a Category 1 of the *Marsters* case but placed her offending towards the higher end because her conduct required denunciation. His starting point was 12 months imprisonment.

[26] He allowed 3 months off for her past good record and a further 2 months to reflect the guilty plea which brought a sentence of 7 months imprisonment.

[27] In his comprehensive and helpful submissions, Mr Dale submitted that insufficient regard had been given by the sentencing Judge the personal circumstances of both appellants. As the matter of principle, these were highly relevant factors. Both appellants in his submission came within the lower, not the higher end, of Category 1 indicated by this Court in *Marsters & Tangaroa* which derived those principles from the New Zealand Court of Appeal decision in *R v Terewi* (1999) 3 NZLR 62.

[28] In counsel's submission, given a low weight to personal circumstances should be confined to serious offending where there is a true element of commerciality which was not present here in either case. He also submitted that entrapment in these circumstances should give rise to some mitigation although there had been no contested facts hearing. The submission was based on the fact that the undercover policeman had gone to some lengths to cultivate a friendship with the First Appellant, to whom he had been very generous with gifts of liquor and fish. Counsel submitted that the First Appellant had not been holding himself out as a supplier; he only agreed to assist the undercover officer because the latter had created an element of friendship, had shared background difficulties and arguably had created a need to return favours in return for his gifts of food and alcohol.

[29] This Court considers that entrapment is not a mitigating factor in this case particularly when the First Appellant had said to the sentencing Judge that, from his experience as an investigating police officer, he had recognised the undercover officer for what he was but, nonetheless, proceeded to proceed with the cannabis transactions.

[30] Taking into account all the exceptional personal circumstances of the First Appellant the Court takes the view that the starting point of 21 months was too high in his case, 18 months is more appropriate taking into account all the factors. Although this Court can interfere with a sentence only if it has been shown to be manifestly excessive, when short sentences are under review the gap between the appropriate sentence and what is excessive can be relatively small. The discounts that the Judge made for personal circumstances were appropriate in this case.

[31] Accordingly, the Court reduces the sentence imposed on the First Appellant to 9 months imprisonment, concurrent on each charge.

[32] The Second Appellant's personal circumstances were not of the same unusual order as those of the First Appellant. She was supplying cannabis and seen to have a source of supply because it was from her that the First Appellant obtained the cannabis to sell to the undercover officer on the occasion of the first offence.

[33] However, we think that the overall sentence was excessive for this woman in her late 50's with no previous convictions who is held in high regard in the community. The Court concludes the appropriate sentence to be one of 5 months imprisonment.

[34] The Court repeats the principles laid out in *R v Marsters & Tangaroa* which was concerned with much more serious offending. Offenders who indulge in the sale of cannabis must normally expect imprisonment.

[35] The appeals against sentence are allowed. The First Appellant's sentence is reduced to 9 months imprisonment. The Second Appellant's sentence is reduced to 5 months imprisonment. In both cases, the sentence is concurrent on all charges.

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Sir Ian Barker
President

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David Williams JA

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Barry Paterson JA