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

CA NO. 4/18

IN THE MATTER	of an appeal against conviction and sentence under sections 55(1) and 67(2) of the Judicature Act 1980-81
BETWEEN	**AARON CHASE HUNT**
	Appellant
AND	**THE CROWN**
	Respondent

Coram: Williams P
Barker JA
White JA

Hearing date: 30 October 2018

Decision: 30 October 2018

Counsel: Ms K Bell & Ms A Herman for Appellant
Mr M Short for Respondent

ORAL DECISION OF THE COURT
DELIVERED BY BARKER, JA

[10:40:0]

[1] This is an appeal against sentence by Aaron Chase Hunt.

[2] On the 1st day of June 2018 he was sentenced to 15 months imprisonment on concurrent charges of possession of cannabis (which carries a maximum penalty of 2 years imprisonment) and possession of cannabis seeds (which carries a maximum penalty of 5 years imprisonment).

[3] The Chief Justice sentenced him to 15 months imprisonment concurrent on both charges.

[4] The background was that on the 17th day of August 2017 a search warrant was executed at the appellant's home; during the search the Police found one pill bottle containing 193 cannabis seeds and one container of dried cannabis leaves weighing .53grams.

[5] When questioned, the Appellant admitted possession of the cannabis materials he said that they had been found some one to two months previously and that his intention was to get rid of them. The cannabis materials had been found by his teenage stepdaughter and, as his explanation in evidence showed, he had taken possession of these. He had thought of going to the police or else destroying them but had not done so. He said in evidence that the reason of his inaction was that they were "going through a family situation as to how to deal with it and we didn't get around to it." He did not do anything about the cannabis seeds but there was no suggestion that he was intending to use them himself or to plant any cannabis plants with the seeds.

[6] The Appellant elected to plead not guilty and faced trial in the High Court of Rarotonga before the Chief Justice and a jury. The trial commenced on the 24th May 2018. He was represented by counsel other than Mr Short and at a very late stage of the trial after the Crown case had concluded and the defence witnesses had been heard, he changed his plea to guilty and changed lawyers. He says that he had received advice that he should have pleaded guilty at an early stage and that step would have been much more beneficial to him on sentencing, i.e. making an early plea instead of making a plea, literally at the dying stages of his trial.

[7] The Chief Justice, in his sentencing remarks noted that the Appellant's intention had been to get rid of the material and but he had not acted on that intention. He noted that the Probation report and material collected by the Appellant's counsel shows that he was a good provider for his wife and then one child. A second child was born after he had been imprisoned.

[8] He was the breadwinner of the family working as a builder. The Chief Justice viewed references from his employer who happens to be his father and also from the person for whom the current building project is being constructed. There are also a number of other community references from people of standing which speak of his good qualities, temperament and standing.

[9] The Chief Justice however, whilst taking these factors into account, decided that personal circumstances have little part to play in sentencing for drug offences. He noted that the guilty plea was at a late stage but considered that the number of seeds was a significantly aggravating factor.

[10] He mentioned a couple of other cases where non-custodial sentences had been given for possession of cannabis seeds but decided that he had to impose a sentence that would hold the Appellant accountable for the harm done to the community particularly from the increasing prevalence of cannabis offending in the Cook Islands. He mentioned the need for others to be deterred and their conduct to be denounced whilst acknowledging that this was his first offence and the current good regard in which the appellant is held by the community.

[11] The Chief Justice considered the significant aggravating factor was the number of seeds namely 193. He said:

> "you could have planted, or others, which is the important factor, could have planted a forest of cannabis with those seeds. And the result would have been a number of people appearing before the Court for offences against the Narcotics and Misuse of Drugs Act. That factor significantly worsens the offending coupled with the fact that you held onto this material for more than a month and did nothing whatever to destroy it, hand it in, get rid of it or even, given that you were concerned your stepdaughter might have been involved in cannabis, put it in a place where she was unable to get access to it".

[12] Whist acknowledging the effect on his wife and family of a jail sentence, the Chief Justice imposed a term of 15 month's imprisonment concurrent on the basis of a starting point of 18 months; there was a small discount for the late plea and the family circumstances, resulting in a sentence of 15 months.

[13] Shortly after the sentence had been pronounced the Appellant applied for bail which was considered by a Judge of the Court of Appeal in Auckland. But before the bail hearing happened the Appellant withdrew the application for bail. It was said by counsel that he did so on the basis of having regard to the seriousness of the offence; the appellant felt he should serve a term of imprisonment. It also was disclosed in that submission that he had been usefully deployed at the prison by helping other inmates imparting his skills in construction work.

[14] The appellant has therefore served his imprisonment for almost 5 months. Counsel emphasised there was no suggestion of the appellant ever intending to use the cannabis seeds or the cannabis material for himself and his intention was to confront the stepdaughter who actually found the seeds and who has not been charged with any offence.

[15] The situation caused by the very strong penalties under the Narcotics and Misuse of Drugs Act ("the Act") was discussed by this Court as recently as 3 May 2018 in a Crown Sentence Appeal, *Police v. Vilma Wachter.* There, the Appellant had been sentenced to a fine and Probation with community service for a count of cultivating cannabis. Fifty cannabis plants had been found on the Respondent's balcony inside 20 litre buckets, medium size pots with mixed soil and manure. In addition, Police found items used for the cultivation of cannabis and fifty plants which ranged in height from 1 to 73cm. The Respondent there made no statement to the Police. She too had not previously appeared but she had pleaded guilty at an early stage unlike this Appellant. Another *Wachter* family member had been charged and sentenced to non-custodial sentences in relation to seeds fewer in number than those found in the possession of that Appellant.

[16] The Probation Officer noted in *Wachter* that whilst feeling that the Respondent was co-operative, she may have withheld information it was a matter for comment that her husband had left the Cook Islands at a time when she would appear most to need him, which fact the Probation Officer found suspicious. The Court shared this feeling of unease but could take no regard of it since it was merely speculative. However, there was no such matter raised in the case of the present Appellant.

[17] The Court in *Wachter* made comments about the level of drug sentencing in the Cook Islands which, in recent years had shown that some High Court Judges were not paying sufficient regard to the heavy penalties in the legislation which the Court is bound to uphold.

[18] At paragraph [24] of *Wachter* it was said that the Judge did not there take sufficient account of the precedent finding in the case of *R v. Marsters* (a decision of this Court in 2012). The Court went on to say that there was no joy in imprisoning a woman of 54 years with no previous convictions but that to do so in this case "would negate all that was said in the Marsters case which clearly explains the law of the Cook Islands. Until such time as the legislature changes the maximum penalties, Marsters has to be good law in the Cook Islands.

Such high penalties are not necessarily uniformly regarded as appropriate throughout the world but we have a duty to uphold Cook Islands law despite all lenient approach in New Zealand. You must note that the 20 years maximum penalty stated no doubt because the legislature in the Cook Islands saw the scourge of drug addiction moving into the islands. Despite the high penalty being a bit of a blunt instrument, the high maximum penalty is nevertheless an indication to the population that drug dealing and drug cultivation cannot be tolerated and will be punished by imprisonment."

[19] The industry of Mr Short, counsel for the Appellant has shown a number of cases in which possession of cannabis seeds – in some cases more numerous than those found in the possession of the Appellant – has resulted in either fines and or probation, certainly in non-custodial sentences. We think that the case of *Wachter* was in some ways more serious because there was open cultivation whereas in the present case there is no evidence that anything sinister was to be done with the seeds. We do consider that personal circumstances of offenders can sometimes be very moving and can rather underscore the statement that disregard of personal circumstances by the imposition of heavy penalties can be a bit of blunt instrument. However, we have to do what the legislature indicates.

[20] Some of the cases cited by Mr Short go back well before the decision of this Court given earlier this year. In one case mentioned by Mr Short, *Police v. Fraser 2012,* the then Chief Justice discharged without conviction somebody charged with possession of 671 cannabis seeds. In *Police v. Tereora,* the late Justice Nicholson imposed a fine to somebody who had in possession of 219 seeds. The other persons charged in the *Wacther* situation, were sentenced to non-custodial sentences. One of them had 134 seeds in his possession and there were additional drug-related offences.

[21] So the Court assumes that although required to take personal circumstances not much into account, it is not surprising that there would be a sense of injustice in a person who finds those who have been detected with more cannabis seeds in their possession than he, may have escaped imprisonment whereas he did not.

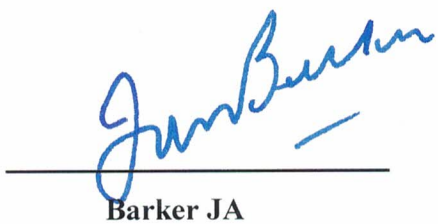
[22] The case seems to be one of foolishness rather than criminality. We are in no position to comment on whether the appellant was right to change lawyers; his guilty plea cannot give him a huge amount of credit but we do take into account his good conduct in prison and his

personal circumstances in that he has a dependant wife and two young children and they are also responsible for the wife's daughter who is the Appellants stepdaughter.

[23] All in all we consider that the Chief Justice's penalty was excessive and that the Appeal should be allowed. We note his concern about the number of seeds, but there was nothing in the evidence that the appellant gave at the trial which in any way indicated that the Appellant was intent on making use of the seeds "by planting a forest". The Chief Justice noted that that factor worsens the offence, coupled with the fact that held on to the material for more than a month and did nothing whatever to destroy it and didn't get rid of it or even given that you were concerned your stepdaughter might have been involved with the cannabis, put it in a place where she wasn't able to get access to it.

[24] As we have pointed out, there have been other cases involving a greater number of seeds which have not attracted imprisonment. Whilst we affirm the views expressed in *Police v. Wachter* only 6 months ago, we nevertheless consider that the appropriate penalty here would be a term of imprisonment of 6 months – this would satisfy the indication given to the Court of the high type of penalty but will take sufficient account of the circumstances of the Appellant's good character, first offence and all the other matters in his favour which appear on the papers.

[25] On both charges, instead of the sentence of 15 months imprisonment, we enter a sentence of 6 months imprisonment.



Barker JA