IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR NO'S 246/11, 249/11 & 69/12

CROWN

v

MARK FRANKLIN

Hearing: 19 August 2013

Counsel: Messrs S McKenzie & M Henry for the Crown
Mr P Dale & Mr T Manarangi for the Defendant

Sentence: 29 August 2013

SENTENCING NOTES OF DOHERTY J

[FTR 10:14:07]

Sentencing Remarks relating to Ricky Carlson, Mere Upu King and Mark Franklin

[1] You three are now for sentence in relation to matters to which you pleaded guilty when you were arraigned for trial last week. I have had you called all together because you were facing trial jointly in the sense of being one trial.

[2] I want to make some general comments in relation to your offending collectively and I want these remarks to be appended to each of the individual sentencing notes that will be produced following your sentencing.

[3] You three are the product of a police operation known as Operation Eagle. It has received some notoriety in the Cook Islands and this is but one of several trials that have been conducted or the outcomes of those trials. It was a significant

operation conducted by the Cook Islands Police using undercover agents from the New Zealand Police force who were sworn in to the Cook Islands Police force. As a result of this significant operation several people were arrested and you are in that category. It has been called Operation Eagle because of the investigation but many of those who were apprehended had no relationship with each other. In this case there is a relationship between you Mr Franklin and you Ms King in relation to one of the charges.

[4] I have had the benefit of long and detailed submissions which have been filed in respect of each of you by the Crown and by your counsel. And I wanted to make these general remarks because in some sense there is a tenor in the submissions that is at odds with what is now the law in the Cook Islands.

[5] Recently in *R v Marsters & Tangaroa* which was an appeal against sentence of this Court. The Court of Appeal endorsed the approach of this Court in allocating bands or categories of offending for drug dealing. Where an offender or a particular offender fits into any category depends upon the scale or intensity of the offending such as the amounts involved, the amounts of money involved, value and frequency of dealing. The Court of Appeal upheld the categorisation that this Court had determined.

[6] First of all for dealing offences there was Category 1 and that related to small non-profit dealing and the range of sentence there was anything up to a short term of imprisonment.

[7] Category 2 was for offending where there was a small profit element of a commercial nature and the range there was from 2 years to 6 years imprisonment.

[8] Category 3 was reserved for large scale of sophisticated organisations where there is or was determined to be a range of 5 to 10 years imprisonment.

[9] Those of course are ranges which might depend upon the offending and some of the offending for which you have been charged has 20 years imprisonment as a maximum sentence.

[10] I also want to make a general comment about some of the submissions that have been made on consistency because one of the principles of sentencing is that there ought to be consistency. Where possible, like should be compared with like.

[11] In 2004 the passing of the Narcotic and Misuse of Drugs Act, Parliament set significant maximum penalties for drug offences in the Cook Islands and particularly for drug dealing. As I say in the *R v Marsters* the Court of Appeal endorsed the approach of this Court that parliament had intended the primary purpose of sentencing to be deterrence. And in relation to consistency in that aspect I want to read from the judgment of the Court of Appeal.

[12] Paragraph [44] said this:

> "Previous sentencing for drug offences seems in some instances in the High Court [that's this Court] to have been too lenient. In some cases, too little regard appears to have been paid to the very high maximum sentences. The Court must faithfully heed the message sent by the legislature by stipulating these maximum sentences. It may be regarded, as suggested by Mr Perese [who was counsel in the appeal], that legislating for heavy maximum sentences is rather a blunt instrument. Regard should be had to the economic and social costs of lengthy terms of imprisonment – especially the impact on offenders' families who could usually be left with minimal financial resources for years while the breadwinner was incarcerated. However, that is a matter for the legislature and not for this Court."

Paragraph [45] said this:

> In some of the sentences to which we were referred, too much regard seems to have been placed on the personal circumstances of offenders. Because drug-dealing is so corrosive in its impact on the community, with often an unknown number of persons affected detrimentally, the law for some time in the Cook Islands – certainly since this Court's decision in ***Mata*** in 2000, has indicated that deterrence must assume greater importance in sentencing over personal circumstances in drug cases. For other types of offending which do not have as wide a community impact as drug-dealing, leniency based on personal circumstances can play a bigger part in the sentencing process.

Paragraph [47]:

> In an ideal world where there were ample resources for criminal rehabilitation in a small economy, approaches such as those suggested by the New Zealand

> Law Commission and by counsel for the appellants might be possible and desirable. However, this Court has to operate within the existing legal structures where the legislation has sent a clear message about the distaste with which it views drug-dealing in this community.

[13] So those are the principles that this Court must operate under and when it comes to consistency, consistency in sentences thus ought to take its lead from the sentences upheld in the *R v Marsters & Tangaroa* and imposed subsequently to that decision. Your counsel have referred me to a number of decisions prior to that but those are some of the very decisions criticised and not taken forward by the Court of Appeal.

Mark Franklin

[14] Mark Franklin, you are now for sentence. I must say at the outset I am indebted to the submissions of counsel, both lawyers and for the Crown in the depth of material to which I have been referred.

[15] You are for sentence on two charges of selling cannabis and one of offering to sell cannabis.

[16] The first related to an incident on the 23rd November 2010, this was some days after you had apparently received a diagnosis of a terminal illness.

[17] You were at a local night club; you had been playing in a band there. An undercover officer, who was engaged in what has been known in the Cook Islands as Operation Eagle, was there. He was known to you. You claim that he had befriended you, but whatever, and I think it is accepted that in his undercover role he was in a position of inserting himself in the local drug scene and seeing what resulted, it was clear that he had made overtures to you before about wanting cannabis. You say that that was, at some length and over a period of days before this, and I will come back to that. But whatever happened prior on that night you have accepted that you approached the constable and said that if he was still after some cannabis you could get it for him. It was sourced from another person in the night club, Ms King, and she has been dealt with on a joint charge.

[18] As a result you sold the undercover agent $100 worth of cannabis in two tinnie lots.

[19] Some months later on the 2nd April 2011 the undercover constable went to your home and sought cannabis. You said you were out of it, or your associate was out of it, but you could perhaps get some later. Later you called him on his phone and there was an arrangement for him to come back to your house and to pick it up.

[20] After the Operation Eagle was terminated many people had search warrants executed in relation to their phone records and you were in that category. One of the messages that was on your phone related to the third charge of offering to sell cannabis and that related to a message on the 7th March 2011 where you sent a text message making it clear you had cannabis to sell.

[21] This activity has been characterised by you and by your counsel as being something of a "not-for-profit" exercise. Certainly they say that you did not make any profit, you got nothing out of it. But inherent in the charge, of course, is the nature of commerciality. Someone got the profit out of it and you were involved in either helping them or having some cut yourself. I cannot sentence you on the latter because there is no evidence of exactly where the money went except that it got handed to you.

[22] This is a significant and substantial fall from grace because you have been a police officer of some thirty odd years experience in the highest echelons in the sense of investigative policing in New Zealand and later, from 2005, in the Cook Islands. And it is clear from all the information that I have read that you were and ought to have been held in high regard for, particularly your homicide investigation work. Your high level work was not just confined to that however.

[23] I have had the benefit of a Probation report. The Probation report writer goes through some of those aspects of your past life and mentions something else that has been highlighted by your counsel in particular and that is your issues of health, both as a result of your engagement in the high level policing work which resulted in stress-related illness and your ultimate disengagement with the New Zealand Police,

but also the diagnosis of throat cancer which was the terminal illness I referred to a little earlier.

[24] The report writer recommends that you, as a result of your remorse and your particular circumstances, be sentenced to something less than a sentence of imprisonment. He says that the offending has left you emotionally worried and vulnerable and I am sure that is the case. Curiously, it reports you as saying that what you did was not intentional. Well if that is the case it tends in my view to belie your expressions of remorse that you made also to the report writer. Having said that, you have made apologies both in written form to the New Zealand and Cook Islands Police and you have made a statement to me from the dock today which reiterates all of that.

[25] The Crown says that the aggravating features here are particularly the two sales which were some months apart and were therefore evidence of continuous conduct on your part. That you were, when approached for cannabis, prepared and did source from another supplier so as to satisfy the need for your customer, and that you are, or you were, previously a serving police officer.

[26] I want to deal with some of the issues and what I think are the salient issues that have been raised by your counsel. The first is that you became in low mood as a result of your serious work-related stress issues and then later the terminal illness diagnosis and it is accepted by you that you were a cannabis user long before your illness diagnosis, the terminal one. And, as counsel put it, you accepted drug relief for your stress issues that came from your job, some of them prescribed, some of them non-prescribed and that included your use of cannabis.

[27] I have read reports from psychologists and other medical people and the report relating to your disengagement from the New Zealand Police and whilst post-traumatic stress disorders or other disorders may have led to your cannabis use, there is no link from that to deciding whether you should sell or supply it. Similarly you may well have been of low mood following the diagnosis of your cancer but you told me directly from the dock that you knew what you were getting into and you made a comment which, something along the lines, when you were pressed by the

undercover police officer ‘oh I thought, what the hell, I’ll do it anyway, I’m not going to be around too much longer’. So that seems to me that you put your mind to exactly what you were doing. It may well have been that your expectations of life led you to transgress but it seems to me you had your full faculties when you did that.

[28] While I am on that, counsel has said that it ought to be a mitigating factor that there was an undercover officer in use here and that you were entrapped. Now I do not need to go into the legal issues about entrapment here but your counsel has referred me to some authorities, English authorities which say that the pressure that is brought to bear by undercover officers in these operations can be taken into account in mitigation of penalty.

[29] It seems to me that in your case the only issue relating to entrapment was one of persistence of the undercover police officer. And you told me that you accepted that you made an assessment when you were actually in the process of dealing with this person. You made an assessment in your own mind and contemplated whether this was an undercover sting and you decided that ‘what the hell anyway, if it was. It seems to me that in your circumstances to elevate the persistence of the undercover officer to entrapment to a person of your knowledge and experience of one of New Zealand’s top investigative police officers, it seems hardly likely. It is also belied by the fact of the other charge of offering to sell.

[30] And the same thing goes for the issue of collegiality. Counsel has made some play of the fact that you were kindred spirits with the undercover officer, part of whose cover was that he was a New Zealand Police officer but was suspended because he was under investigation for drug dealing himself. It seems to me that to think that you would break one the inviolable rules of a working lifetime as a police officer to deal in cannabis because this guy was one of yours makes it even worse. It implies that you might have thought, “well because we are cops, this is okay”, or even because this man, as the papers show me, is alleged to have brought you fish and alcohol to sweeten you up then you must acquiesce in his entreaties to you to break the law.

[31] Just whilst I am on that, it seems to be accepted that you used cannabis on two occasions whilst in the employ of the New Zealand and the Cook Islands Police and you were observed doing so. And the information I have this activity was seemingly condoned by your superiors or at least no action was taken. That seems to be accepted by everyone and it is disturbing to me sitting here and, I am sure, likely to be disturbing to the communities of both New Zealand and the Cook Islands that admitted offending within the Police force was apparently not actioned.

[32] Counsel has, as I have said, highlighted the issue that this was a not-for-profit exercise and has submitted to me that this was really in the sharing category. He accepted, as he must, that sharing is, in this context, supplying and not condoned and is an offence under the law. You are making it available for the use of another regardless of profit.

[33] He talked also about consistency and much of Mr Dale and Mr Manarangi's written submissions to me, which I have commended, relate to or report me to a number of matters in this Court where sentences are not in accordance with the *R v Marsters* have been imposed. And I have already made comment about the fact that *Marsters* is now what must govern this Court.

[34] This is a significant fall from grace where a person of your abilities and your standing in two separate national police forces and I am sure you regret it. I am sure that you are remorseful in the sense that it has impacted upon you but I accept your genuine apology for the opprobrium that might be attributed to both of those forces because of your activity.

[35] In accordance with the *R v Marsters & Tangaroa* case I have to assess your culpability. I also have to assess it in the terms of other sentences that have been imposed since. And I think that this is in the top end of Category 1 and that means a starting point of that as somewhere between a discharge without conviction and 2 years imprisonment.

[36] Earlier this week, or maybe it was last week now, I sentenced Mr Arlander for three sales of cannabis worth $200. In his situation for the culpability of his

offending which was similar to this in its intensity, I started at 21 months imprisonment. I think that is the appropriate starting point today for you.

[37] The Crown has asked for an uplift because you are a former Police officer. Those are not the Crown's actual terms but they have said it is an aggravating event, and it is an aggravating event extraneous to the actual transactions. This is not a breach of trust of the special relationship between the Police and the community because you were not a serving police officer at the time but it is still a significant factor of disappointment to the community I am sure. And there is no allegation by the Crown that you used your position or your former position to promote this offending. So I do not intend to have any uplift at all in relation to that.

[38] In mitigation, there is your late guilty plea and you will get a credit for that. You have saved the government of the Cook Islands and the time of this Court for your plea. It came at a late situation but there will be a credit.

[39] You have also cooperated with the Police in respect of Ms King. It is accepted that your willingness to give evidence in relation to the transaction which you and she were involved was a factor in her change in her plea.

[40] You have made your personal apologies to the communities and to the police.

[41] There is also the factor of your personal circumstances prior to this. I think there ought to be some allowance in your sentence and position of vulnerability at about the time, not because of the undercover agent but because of the news that you have had and the stress that you have been through. That, together with your previous exemplary record and outstanding service to police organisations – both New Zealand and in the Cook Islands – and with your cooperation with the Police for those other matters that I have mentioned, mean there should be a significant credit from the 21 months, of 6 months.

[42] That means the 21 months comes down to 15 months. You will also receive a 3 month credit for your ultimate guilty plea.

[43] You are therefore sentenced concurrently on each of the charges to 12 months imprisonment. Thank you

[44] I made final suppression orders in relation to the names and details of the undercover officers in Operation Eagle, those were final orders and they are still in existence.

C Doherty J.

Colin Doherty J