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

CR NO'S 250/11 & 287/11

CROWN

v

MERE UPU KING

Hearing: 19 August 2013

Counsel: Messrs S McKenzie & M Henry for the Crown
Mr C Petero 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.

Mere Upu King

[14] You are for sentence on two drug related matters; the first was on the 23rd November 2010 where you together with one Mr Franklin sold $100 worth of cannabis to an undercover agent in a local bar. This was part of Operation Eagle. It appears from the notes that I have that Mr Franklin orchestrated with you to produce that cannabis which was ultimately sold.

[15] Some months later on the 3rd May 2011 you admitted to supplying a small amount of cannabis to your sister. You, through your counsel, term that as "sharing". Sharing is supplying from the point of view of the law and it is an offence. Your sister has been fined and ordered to undergo community service for possessing that small amount of cannabis.

[16] You are a person who has not been before the Courts before and I have had the benefit of a Probation report and summarised you seem to be described thus of humble character, good capability, a hard worker and you have an honesty and maturity. You have taken initiative and taken counselling with your employer who is a qualified psychologist.

[17] The Probation Service recommend probation, supervision and community service.

[18] Well with respect the Probation writer does not seem to know what the higher Courts have said about drug dealing and do not make any mistake, you are in that category.

[19] And you will have heard me refer earlier to the *R v Marsters & Tangaroa* which is a case of the Court of Appeal and I assess as best I can, bearing in mind that you were in the business of providing cannabis to those that wanted it from time to time and there was more than one event, that you are in the Category 1 of the *Marsters* case. And I also think that because of the commercial nature of it you sold it for money or you gave it away, we are dealing with someone towards the higher end of that category and that means a sentence of imprisonment is the starting point because you have to be personally accountable and your conduct denounced but there needs to be a deterrent sent to those others who might want to think this behaviour is acceptable in the Cook Islands.

[20] So I think the starting point is imprisonment. I have assessed it at 12 months and you will get a credit for your guilty plea and for your previous good record, those are matters that I have taken into account with others. You do appear to be a person who is of good worth in the community and you have not come to notice before. For that you will receive a credit of 3 months from the 12 months imprisonment and I will reduce by a further 2 months to reflect your guilty plea which came at a late stage but did save the state. I suspect it came however after Mr Franklin was prepared if he had to be on oath to give evidence against you.

[21] So that means you will serve a maximum sentence of 7 months imprisonment.

[22] I note that from the consistency point of view that the starting points were similar to those of *Tangaroa & Matapo* in other recent sentencings. Thank you.

CWDohertyJ.

Colin Doherty J