

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

CR NO 35/13

CROWN

v

EXHAM GEORGE

Hearing: 28 November 2013
Counsel: Mr Manavaroa for the Crown
Mr Petero for the Defendant
Sentence: 28 November 2013

SENTENCING NOTES OF GRICE J

[1] [15.22.55]

[1] Mr George, you appear once again in the dock for sentencing. Today you are appearing for sentence on a number of charges to which you have pleaded guilty. First a charge of possession of cannabis under s 71A and 72B of the Narcotics and Misuse of Drugs Act. This offence carries a maximum term of 2 years imprisonment and/or \$5000 maximum fine.

[2] That offence occurred on 31st January 2013 and you also face two driving charges which occurred some months after that offence but I will deal with the cannabis matter first.

[3] The charge arose out of a search warrant of your house and the Police found five small bags of cannabis with a total cannabis of 8.69 grams. You said you were

going to sell it or try and sell it and apparently you traded your phone for the cannabis.

[4] The Court of Appeal as I have heard from Crown counsel and accepted by Mr Petero has made it clear that drug offending will not be tolerated in the Cook Islands. The community wants to rid the islands of all levels of player in the drug industry here. Messages must be sent out about the fact that penalties will be severe in drug cases. As the Crown pointed out, for people selling drugs in the Cook Islands the relative profits are higher than in New Zealand where the wages are higher. Therefore any incentives to grow and sell cannabis have to be countered by approaching these offences seriously.

[5] I repeat the comments of Hugh Williams J in the decision of *Upu* and he said “there is an increasing concern in this community at the prevalence of cannabis and cannabis offending and in view of that fact it would appear the responsible position for the Court to take is to reflect those increasing community concerns to an extent at least and impose stiffer penalties for cannabis offending.” That approach has been reiterated more recently by the Court of Appeal.

[6] The Court of Appeal in the decision of *R v Marsters* (CA 30/11/12) referred me to by the Crown approved the approach of sentencing categories for cannabis offences, based on the New Zealand case of *R v Terewi*. The first category, Category 1, is cannabis grown for your own use in small quantities. In New Zealand that would be a fine or a non-custodial sentence but if you are going to sell it imprisonment may be the result for serious cases. In Category 2, small scale cultivation for cannabis sale attracts 2 to 4 years imprisonment and Category 3 deals with larger scale commercial growing which has a start point of 4 years. These categories are not strictly separate and they run into each other.

[7] In this case while the amount was small you intended to sell it. In New Zealand the penalties are lower for this type of offence than in the Cook Islands. So in New Zealand the maximum penalty for the offence with which you are charged would be 3 months imprisonment, here it is 2 years. So those sentences need to be adjusted.

[8] The starting point in this case where you did intend to sell a small amount could be at the lower end of the second category but actually in the upper end of the first category although not very serious in terms of sale. So a term of imprisonment is appropriate.

[9] The aggravating factors in this case are the intention to sell, which I have already factored in, but other than that there was no evidence of any commercial dealing or that you were involved in any commercial operation. There were no amounts of cash or any other indications of a commercial operation.

[10] The mitigation factors which have been urged on me by your counsel on your behalf include the fact that you made an early guilty plea which the Crown has accepted will lead to a discount of your sentence; of your present youth (you were 21 years of age when you committed this offence and now you are only 22); that you help your grandmother and she relies on you to supplement the income; that at least over the last few months you have been showing promise under the influence of your mother's partner who was in Court today to support you; and you did not try to blame anyone else – you squarely took the blame for the offence and have expressed remorse.

[11] Concerning the driving offences: you have recently been seriously injured in an accident which resulted in those charges of course. You suffered broken limbs and serious internal injuries. As I understand it that now does not stand in the way of sentencing.

[12] The Court of Appeal last week dealt with a matter which was an appeal on some cannabis charges which related to sale of cannabis but at the lower end. The Court of Appeal in that decision, (*Franklin v R*, CA 9/13, 10/13, 22/11/18) personal circumstances noted counsel's submission there at paragraph [28] "In counsel's submission giving 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."

[13] I do take those circumstances into account slightly more than if it was a commercial operation where the Court said that personal circumstances weigh for little as counsel submitted.

[14] You have been before the Court before – not on drug offences but quite recently before the Court, and we can see a spiralling down of your lifestyle as the offending grows.

[15] You have previously appeared on charges of receiving and theft in October 2010 when you were sentenced to 12 months probation; (theft as a party). Then before the end of that term you pleaded guilty to a burglary charge and were imprisoned for three months. I accept they are unrelated to the present charges but nevertheless show a serious trend.

[16] Counsel, Mr Petero, squarely faced this issue that despite your youth you already have gained a reasonable criminal record. You are unemployed at present and you expect to be jailed for these offences, there is no option.

[17] I accept the Crown's submissions and those of Mr Petero, that the starting point here is 6 months imprisonment. Off that I will take a third for the early plea, leaving 4 months. And your youth in particular and other mitigating factors that I have listed, including the fact that it is your first drug offence, weigh in the balance and I will take off one month for the mitigation factors.

[18] So on this charge you are sentenced to a term of 4 months imprisonment, less one for mitigation:

- (a) a total of 3 months imprisonment; plus
- (b) 12 months on probation with the special conditions outlined by the Probation Service:
 - (i) that you abstain from purchasing alcohol
 - (ii) that you do not enter licensed premises

- (iii) that you undertake appropriate alcohol and drug rehabilitation and training as directed by the Probation Service.

[19] And I make an Order for the destruction of the cannabis material.

[20] Now I turn to the two other charges. First, the charge of dangerous driving which carries with it a maximum term of imprisonment not exceeding 12 months or a fine not exceeding \$1000 or both, as well as disqualification up to a term of 3 years. And secondly, the blood alcohol charge which carries with it a maximum term of imprisonment of 12 months, a fine of \$1000 or both, plus a mandatory disqualification period of a minimum of 12 months.

[21] The circumstances leading to these offences appear to be that you got totally drunk, your level was three times the limit, you got on your motorbike, drove down the road speeding and sped into the back of a van. You suffered serious injuries as I mentioned, it is only luck that it was the back of a van that you went into and not some innocent motorist or pedestrian on the road. That was very lucky for you.

[22] These are separate offences that, as I said, occurred some five months after the cannabis offence on 25th May 2013, so are unrelated and a different nature to the other offence. They are dealt with today so you can get rid of all of these charges and offences and when you have served your sentence you can hopefully get on and make something of your life.

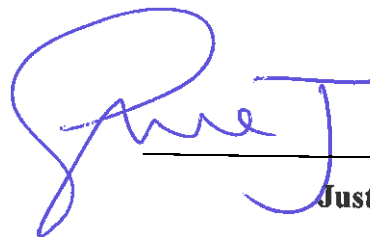
[23] You are clearly not in a position to pay a fine or any reparation, I understand there was some damage to the van. Any sentence in the circumstances other than imprisonment is really not appropriate. This is a serious blood alcohol offence, serious in both the level of alcohol and what happened.

[24] Looking at matters in the round, I consider a further period of imprisonment of one month on each of those charges. Those periods of imprisonment are to be served concurrently but that one month concurrent term to be served cumulatively on the imprisonment for cannabis.

[25] On each of the driving charges you are sentenced to:

- (a) A term of imprisonment for one month to be served concurrently (and cumulatively on the three months term of imprisonment already imposed); together with
- (b) a term of disqualification from holding or applying for a drivers licence for a period of 12 months.

[26] I note that Probation went out of its way to get prepared to deal with all the charges today rather than just the cannabis charges. No written report was prepared by Mr Petero had a discussion with the Probation Service and a further discussion with you, had indicated there was no objections to proceeding on that basis without a written report.



Justice Grice