

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

CR NO: 136/16

CROWN

v

KAHIKI RICK TAUA TEHAAMATAI

Date: 17 March 2017

Counsel: Ms C Evans and Ms T Koteka for the Crown
Mr N George for the Defendant

SENTENCING NOTES OF HUGH WILLIAMS, CJ

[9:30:38]

- [1] Kahiki Rick Taua Tehaamatai, you are for sentencing today on one charge of possessing a utensil, a bong, contrary to the Narcotics and Misuse of Drugs Act. A charge to which you pleaded guilty partway through the jury trial last week.
- [2] I will tell you at the outset that you are not going to jail as the result of that plea. I regard the circumstances of your offence as exceptional and the sentence I intend to impose on you will be no precedent or guidance for future cases.
- [3] The facts of the matter are that early on the morning of 19 February 2016 the Police approached your vehicle which was parked at an intersection. There was a conflict of evidence at the trial as to whether it was parked the wrong way around but that is immaterial.
- [4] They asked you to step out of the vehicle whilst they took you to the hospital for a blood sample because of the suspicion that you were driving over the limit. Whilst getting out of the vehicle you reached across, grabbed the bong which was on the seat and threw it into the neighbouring hedge.

- [5] The defences advanced on your behalf related partly to whether you had ever been in possession of the utensil and secondly to whether the bong was used by you for tobacco smoking and not for cannabis use.
- [6] The second defence was misconceived as I will say shortly but the plea brings you here facing technically a maximum sentence of 5 years in jail or a \$5,000 fine.
- [7] You do have a previous history of drug offending. On 2 February 2015, you were found in possession of a utensil and in possession of cannabis. You were charged with those offences (and also charged with possession to supply but that was withdrawn) and on 29 May 2015, you were sentenced to 12 months Probation plus fine and Court costs.
- [8] The Probation Service has provided a particularly helpful report in this case detailing your Tahitian birth, your upbringing which they described as “erratic and unstructured” and the difficulties you had in our family background particularly stemming from the divorce of your parents when you were very young, and you being brought up by your grandparents here in Rarotonga.
- [9] You have had a peripatetic history not just in Tahiti and here but you have spent a lot of time in Europe, a lot of time in America, you have been to 17 different educational institutions including the American University in Paris and you are fluent, they say, in six or more languages.
- [10] During your upbringing however you were subject to sexual and physical abuse by relatives on a number of occasions and at the age of 14 you contracted a disfiguring disease in relation to your legs. You have been through a number of major car accidents but probably the significant feature of your background is that you obtained a master degree in music from The American Music Institution in Paris and you have been a professional musician here in Rarotonga since at least 2012.
- [11] At about the same stage you occupied a three storey property here which you and your partner rent out from time to time which brings you some income. And about the same time your partner of six years joined you here in Rarotonga.
- [12] At the age of 18, you were prescribed medical cannabis for pain and psychological distress and used it for a number of years. But one of the significant factors today is

that when you were convicted in 2015 on the previous cannabis charges you say you gave up the use of cannabis. So the sentence on that occasion brought about its punitive and rehabilitative aims namely to deter you from continuing to involve yourself in cannabis. Since then you have used this bong for smoking tobacco as you described in your evidence.

- [13] In addition it is clear that you are either the main musician in Rarotonga or certainly one of the major musicians in Rarotonga. You and your partner run a guitar manufacturing industry offering repair services as well. You have involved yourself to a considerable degree in tuition in music and involved yourself also in a highly successful concert with Tereora College last year teaching young people music. You perform all over the Cook Islands. Indeed, you perform all over the world.
- [14] To the Probation report were attached two documents by your partner and yourself describing the effect on you both of the long wait between the date of the offence and your finding yourself in Court. It is a telling description of what Shakespeare criticised as the “law’s delays” and it is clear the long wait has penalised you and your partner to a considerable degree.
- [15] There have also been furnished are some testimonials from local people involved in the music industry and a local lawyer. So the personal circumstances stand very much in your favour but, that said, personal circumstances have very little part to play in drug sentencing simply because the whole aim of the Narcotics and Misuse of Drug regime is to penalise those who break the law irrespective of whether they are “good” people or “bad” people.
- [16] The Crown’s submissions emphasize the principles of sentencing. The fact that I have to hold you accountable for the harm done and try and promote a sense of responsibility in you. The remarks I have made about your giving up cannabis since the 2015 conviction showed that it has had its desired effect. I need to denounce what you have done and deter others, although as I have said in my view this charge forms no precedent.
- [17] Ms Koteka very properly draws attention to the aggravating features including the previous conviction. She says the plea is worth little and personal circumstances are also worth little in sentencing.

- [18] But also I need to consider jail as a starting point as the Court of Appeal said in *Marsters*¹ that jail is a realistic if not inevitable possibility for offending such as this. That is shown by cases such as *John*² and *Taripo*³. I do not regard jail as being the appropriate sentence in your case.
- [19] I said that this in my view is an exceptional case and that the defence may have been misconceived. I need to be a little technical for a moment.
- [20] You were charged under the Narcotics and Misuse of Drugs Act of having in your possession a utensil “for the purpose of the commission of an offence against the Act”.
- [21] During the trial in discussion between Mr George and myself, I said that to breach the Act the utensil had to be capable of being used for the commission of an offence. It need not be its exclusive use.
- [22] A New Zealand commentary where the offence is essentially the same says⁴, utensil must be read in the context of its application to ‘an offence against this Act’, so it would include utensils connected with diverse activities such as use and cultivation. An ordinary belt used as a tourniquet could therefore be within the meaning of utensil. This is where the belt could be used for the injection of heroin. But “it is the accused’s purpose that is relevant. Purpose is future purpose, past use will be relevant in so far as supports an inference of future purpose.”
- [23] So your purpose in having the bong was relevant to the commission of the offence, but the fact that utensil could be used for more than the one activity of smoking tobacco and used for smoking cannabis means your plea was correctly entered. But it may be that the plea would have been entered much earlier if a deeper appreciation of the law had been the case.
- [24] So that is why I say this is I think an exceptional case which should not apply to other cases. The offence covers utensils which can be used for an offence against the Act and it covers use of the utensil for other purposes. If it applied solely to the accused’s

¹ R v Marsters, CA 3/12, 30 November 2012

² Police v John, CR 260/13, 26 July 2013

³ Police v Taripo, CR 385/12, 22 June 2012

⁴ Adams on Criminal Law, 1992 Ed, paras [], 13 May 2006, p 9-33

use of a utensil for smoking tobacco or whatever it might be, it would be simple for people apprehended by the Police to evade conviction by simply saying "I am only using the bong for smoking tobacco." It is the capability of the utensil being used for the commission of an offence against the Narcotics and Misuse of Drugs Act which is crucial.

[25] As I have said the starting point has to be looking at the jail term. And the question always is whether the other circumstances reduce the appropriate penalty to probation or a fine or something less than incarceration.

[26] Here it is correct as Ms Koteka says that the aggravating features include the previous convictions but as I have mentioned the previous convictions seem to have achieved the aim. One of the aims of sentencing is to deter you from involvement in cannabis over the last two years.

[27] Your plea was late but probably based on a mistaken view of the law and although personal circumstances play very little part, in your case they are unusually favourable and I am prepared to allow them to influence me in selecting the correct penalty.

[28] So in my view the appropriate sentence to impose is a further term of Probation of 18 months. I do not intend to order that you do any part of that on Community Service because that may well interrupt and interfere with your capacity to teach music and to earn a living.

[29] It is appropriate that you pay a fine. It would seem from your activities that you may have the capacity to meet a fine and I will impose a fine of \$1,000 to be paid in such instalments that the Probation Service directs.

[30] And I make an Order of course to destruction of the utensil.

[31] You can stand down.

A handwritten signature in black ink, appearing to read 'Hugh Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ