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

CR NO's 18/16, 480/16

POLICE

v

NAPOUA BENIONI

Date: 8 March 2017

Counsel: Messrs A Mills & A Herman for the Crown
Mr D McNair for the Defendant

DECISION OF HUGH WILLIAMS, CJ

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[1] The accused, Napoua Benioni, is charged with one count that between 1 April and 20 May 2016 at Tupapa, not being licensed or otherwise permitted, he cultivated two prohibited plants namely cannabis. He has elected to be tried by a judge alone rather than by jury and this judgment is a finding on that charge.

[2] It is necessary to remind myself that of the onus of proof in this case being on the Crown throughout and the burden of proof namely that the charge must be proved beyond reasonable doubt. It is also necessary to recall to mind that Mr Benioni is entitled to the presumption of innocence and acquittal unless the proof on the overall evidence achieves that high standard. As is well-known to Courts the standard of proof is that, at the end of the case, the trier of fact must be sure of the accused's guilt before a verdict of guilty can be brought in.

[3] As is commonplace in the matters of this sort, a number of the elements of the offence are not challenged. There is no doubt that the material obtained by the police from two plants when they executed a search warrant on 20 May 2016 at Tupapa was cannabis. It appeared to

be such to the highly experienced Detective Sergeant George and his suspicions were confirmed on analysis by ESR in New Zealand. It is not under challenge that Mr Benioni is not a licensed person for the growing of cannabis or is otherwise permitted.

[4] The dates are not in doubt. The termination period charged is the date of execution of the search warrant at Tupapa. The commencement date of the period is chosen largely to cover the period of planting and growing of the cannabis found by the police.

[5] An issue that has been challenged is whether there is sufficient evidence of cultivation of the plants within the definitions of s 2 of the Narcotics and Misuse of Drugs Act 2004. "Cultivate" under that definition includes, as far as is relevant to this matter, "planting, sowing, scattering the seed, growing, nurturing, tending or harvesting".

[6] Photographs had been produced to supplement the oral evidence of the police officers and evidence has been given of the time taken for plants to reach the stage of growth shown in the photographs. It is clear from the photographs and the evidence that some person planted the seeds of cannabis in these two containers in the sense of sowing them into the soil in the containers. It takes several weeks, according to the evidence, for cannabis seed to germinate and sprout – about four weeks according to Detective Sergeant George. The plants have grown to the point where they were each about 30 centimetres high. Again, according to the evidence, that takes about six weeks. Of significance, Detective Sergeant George says that in the early stages of germination and growth cannabis requires to be watered thrice daily. These two plants are clearly healthy. The evidence suggests they are not wilted. So it is clear they must have been watered recently before being discovered by the police. They are in containers that are weed-free so some person must have attended to them in that sense.

[7] The only conclusion realistically open on the evidence and the photographs is that the two plants had been cultivated within the definition in the Narcotics and Misuse of Drugs Act. That aspect of proof is therefore made out.

[8] There was some difference of description as to whether the plants were found at Tupapa or at Avana, Ngatangiia. However that difference of expression is of no importance given that all the evidence, both from the Prosecution and the Defence, was focussed on the property shown in the photographs.

[9] The main element and the principal ground on which the charge is defended is as to who has cultivated the cannabis plants shown in the photographs or, to put it more accurately, in terms of onus and standard of proof whether the Crown has proved beyond reasonable doubt that it was Mr Benioni who cultivated the plants.

[10] In that regard, there being no direct evidence on the point, the case is one of circumstantial evidence and it is necessary to remind oneself of the well-worn metaphor that circumstantial evidence can be, if anything, more compelling than direct evidence on occasions and the strands of the rope and not the links in the chain analogy which is to be kept in line.

[11] In looking at the circumstantial evidence what must first be recorded and borne in mind, is that Mr Benioni gave evidence and denied that he knew anything about the cannabis plants shown in the photographs. He bolstered that comment by saying that after he was charged with cultivating cannabis in January 2016, an aspect to which it will be necessary to revert, his partner told him to stop growing cannabis and he acceded to that request and did not grow or cultivate cannabis in the period after that point.

[12] The first of the views contrary to that however is that Mr Benioni accepted that for a number of years up until about January 2016 he had lived at the property shown in the photographs, being the property where the police executed a search warrant on 11 January 2016 and a second on 20 May.

[13] It is noted that Mr Benioni was not the sole occupant of the property in January 2016. He was living there with his partner, Ms Anderson, and it may be that others were also living there given that it seems the property has both a house and a caravan on it. However it is accepted that was his residence up until January 2016.

[14] Secondly, proof of the elements of the offence do not require proof of residence at a particular property. They require proof of access to a particular property or tract of land but living at the property is not required to be proved. That is important in this case given that it seems that during the period after the execution of the 11 January search warrant and up to and beyond the execution of the 20 May search warrant, Mr Benioni and Ms Anderson had either shifted their residence to Ms Anderson's grandmother (called in the evidence "Ms Carroll's") or were in the process of doing so.

[15] It seems clear that their leaving the property shown in the photographs however was not complete in a number of respects. The first of those is that when the police executed the search warrant on 20 May, they searched not just the land surrounding the house but searched the house itself and found a number of belongings personal to Mr Benioni and Ms Anderson still in the dwelling.

[16] Next, it seems clear, on admission by Mr Benioni, that wherever the couple's principal residence was during the period covered in the later charge they regularly visited the property shown in the photographs at Tupapa. There was a difference in the evidence as to whether the visits were daily, weekly or at some frequency in between but it was admitted that both of them regularly went back to the Tupapa property, probably more frequently in Mr Benioni's case than Ms Anderson's as she was then in the later stages of pregnancy.

[17] It is also important to bear in mind that there was no evidence that other persons were residing in the Tupapa property during the period covered by the charge being considered.

[18] The next strand in the rope to consider the matter on, is that Mr Benioni amongst his occupations is and was a landscaper and apparently one of some skill. He admitted that during the period leading up to the execution of the 20 May search warrant he had planted vegetables and other crops at the Tupapa property shown in the photographs and had cared for them during that period. Certainly from the photographs it appears that the crops had been well-cared for and tended up to the time the photographs were taken on the day of execution of the search warrant. In addition, Mr Benioni cut the grass at the property and the lawn shown in the photographs, again, appears to be well-tended and cared for.

[19] The containers in which the two cannabis plants were found were placed, perhaps secreted – though that may be too strong a word – behind a structure on the property and sitting on grass that is there. Mr Benioni accepted that he had cut that grass together with the rest of the lawn a few days before the search warrant was executed but he asserts there were no containers present when he cut the lawn and that he knew nothing of their presence when the police were there. The suggestion was that some third parties might, in the interval between the lawn mowing and 20 May, have placed the containers there without Mr Benioni's knowledge.

[20] It is of importance in considering the circumstances and the credibility of that explanation to note a number of things. First, if the containers were placed there by a third party it could only have been done and coincidentally in the few days between the lawn mowing and 20 May. That seems a very narrow window of opportunity. Secondly, the evidence was that the containers were heavy and not readily movable. They were sufficiently heavy for Detective Sergeant George to leave their seizure and removal to the police station to younger police officers. That, too, is an indication against the suggestion that the containers have been placed on the property in the few days between the lawn mowing and the search warrant execution.

[21] The main aspect of the defence however is that it seems inherently unlikely that third party cannabis growers would place what to them were valuable plants on somebody else's property without the property occupier knowing anything about it. The explanation lacks credibility. Cannabis growers do not give away their cannabis readily. If a third party wished to place their cannabis where they could get at it, and others could not, it is inherently unlikely that they would do so on private property. So the suggestion that the cannabis in question appeared as a result of third party action on the property to which Mr Benioni regularly resorted is in itself inherently unlikely.

[22] The final issue in considering the circumstantial evidence is the evidence which was allowed to be adduced during the trial of a previous conviction.

[23] At the beginning of the trial Mr Benioni pleaded guilty to a count that between 1 October 2015 and 11 January 2016 at the property in Tupapa he cultivated a prohibited plant namely a single cannabis plant. The conviction and the summary of facts were admitted in evidence.

[24] That material is of assistance in contributing to the proof a number of matters.

[25] The first of those is that Mr Benioni knew how to cultivate cannabis, had access to seeds and cultivated the prohibited plant. All that is similar to what is alleged against him in the charge under consideration.

[26] It is also germane that the prohibited plant that he was cultivating in January was cannabis, no other narcotic. It is also relevant to note that the cultivation in the earlier count took place on the same smallish property as that under consideration in the 20 May count. And it is relevant also to take into the assessment that the same method of cultivation of the cannabis was used, namely cultivation not in ground but in a separate container. So the same growing method was utilised in the earlier case as in the later.

[27] When all those several strands are considered there is one which points in the direction of innocence while the remainder point in the direction of guilt.

[28] The one, of course, that points in the direction of innocence is Mr Benioni's denial of knowing anything about the two cannabis plants found on 20 May coupled with what has been held to be a highly improbably explanation for the appearance of the plants on the property to which he had access but entirely without his knowledge.

[29] Pointing in the direction of guilt are the various strands just reviewed – the accepted residence, the regular visits, the admission of cultivation of other material, the caring for the property and the unlikely explanation that the cannabis appeared there as a result of actions by third parties.

[30] The conclusion is that, whilst giving due weight to Mr Benioni's sworn denial of his involvement with the cannabis at the property on 20 May, the Crown has carried the evidence to the point where the Court is sure of Mr Benioni's guilt and he will be therefore found guilty on the charge he faces.

Hugh Williams, CJ