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

CR NO'S 367/17, 163/18

POLICE

v

NOAH DAVEY

Date: 23 May 2018

Counsel: Ms A Herman for the Crown
Mr N George for the Defendant

SENTENCING NOTES OF HUGH WILLIAMS, CJ

[9:15.0]

[1] Noah Davey, at the age of 20 you appear here for sentence having pleaded guilty to having, on 13 July 2017, a utensil for the smoking of cannabis, colloquially known as a "bong", and to cultivating cannabis. You pleaded guilty to both those charges on 22 March this year on the basis that the Crown would not seek a jail sentence for you. I will have something to say about that shortly.

[2] These are serious offences in that the maximum penalty in the Cook Islands for cultivating cannabis is imprisonment for 20 years and that for possession of a utensil is imprisonment for 5 years.

[3] You, in my view, are fortunate that the Crown and the Probation Service recommend a sentence short of a term of imprisonment, especially because it appears that in December 2014 you were jailed for 14 months on a charge of being party to a burglary.

[4] It appears that the pleas of guilty were entered following discussions between the Crown and Mr George for counsel for you and with the involvement of Justice Potter

in some fashion at the callover on 22 March 2018. Her notes of the callover simply record the Crown's indication it would not be pursuing a custodial sentence despite the notification of the 2014 conviction and that "on that basis guilty pleas were entered to both charges".

[5] If the Cook Islands are to adopt the practice of what is called in some jurisdictions plea bargaining and sentence indications it needs to be done overtly and deliberately because in jurisdictions where it has been adopted, whilst it has certainly played a substantial part in clearing the lists and freeing the Courts from trying cases to which there is really no legal defence, it has created other significant complications.

[6] Any discussion on the adoption of plea bargaining and sentence indication has to be, as I said, a deliberate one because it needs to avoid any suggestion that it is not perfectly proper part of criminal procedure that negotiations and discussions take place between prosecutors and defence counsel with a view to resolving the issues, either leading to a plea of guilty or to some other accommodation relating to the case. But plea bargaining and sentence indications can be fraught with difficulties because, if there is to be a sentence indication, the process inevitably involves a Judge and unless that Judge happens to be the sentencing Judge there is always a possibility that the process will be derailed because the sentencing Judge takes the view that the indication given by a fellow Judge is inappropriate as the outcome for the case.

[7] Plea bargaining and sentence indication have, as I said, some merits but they risk also being an unfair process. They are unfair to the defence because it can lead to defendants entering pleas of guilty to charges when they may in fact have a defence, even perhaps tenuous, in order simply to get rid of the prosecution hanging over their heads.

[8] The process can also be unfair to the prosecution because it can result in the prosecution lowering the charge the accused faces in order to clear the lists and avoid a trial.

[9] It is also unfair to the accused because, as I have said, the Judge may not accept what probation, defence and, here, the prosecution all suggest is the appropriate sentence. And if the sentencing Judge does not accept the agreed outcome the process has to be begin again, the accused has to be given the election, has to be given the chance to

withdraw the pleas, everything has to go back to the beginning. So it can be clumsy. It can be a useful process, but it needs to be properly managed and it needs to be managed within agreed guidelines otherwise it can result in unfairness a all round.

[10] Now you are facing sentencing on charges of possessing a utensil and in cultivating cannabis. And the recommendation from the Probation Service, supported by the prosecution and by the defence, is that the outcome should be that you are admitted to probation for 18 months with the first 9 months served on community service and with certain other conditions.

[11] While 18 months probation has been a relatively common outcome for offending such as yours in the past, analysis of the sentences imposed over the past decade or so for these offences show a gradual stiffening of the sentences which should be appropriately imposed in a particular case.

[12] In part that results from regular calls from prosecutors notifying the Court of the increasing prevalence of drug, especially cannabis, offending in the Cook Islands and submissions that sentences should be less lenient than has been the case in the past.

[13] In part the increasing sentences for cannabis and other drug offending is the result of a decision of the Court of Appeal in *R v Marsters*[1]. *Marsters* was a case which is vastly different from this so the facts need not concern us today, but the Court of Appeal did note[2]:

> "that the scourge of drugs in any society and its impacts are well known. Not just the impact on users, the wasted lives of addicts and the impact on their immediate families but also on the wider society. Whilst it is useful to draw on New Zealand precedent for drug offending there are distinctions between the two jurisdictions. The Cook Islands and the New Zealand Parliament have treated Class C drugs" – cannabis – "differently with regard to maximum sentences. For example, for cultivation the New Zealand penalty is 7 years imprisonment but in the Cook Islands it is 20 years. Consequently there should not be a lighter approach to sentencing in the Cook Islands when one considers a significant differences in maximum sentences."

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

[2] at [20]

[14] And the Court noted that cannabis offending is becoming more prevalent in the Cook Islands and that they had been given a list of 27 sentencings for cannabis offences as part of their decision. On this occasion I have been given a schedule also including 27 cannabis offending showing the gradual stiffening of sentences.

[15] In *Marsters* the Court of Appeal referred to *R v Terewi*[3], the leading New Zealand decision on cannabis offending, and noted that they had approved that decision in a case called *Mata v R* (CA 2/2000).

[16] In *Marsters* the Court of Appeal accepted the classifications of cannabis offending for the purpose of the Cook Islands noting that Category 1 – which is the category your offending is in – is growing a small number of plants for the offender's personal use without any sale to a third party being intended. A fine or a non-custodial sentence is appropriate.

[17] In *Marsters* in the High Court it was held that for Category 1 the appropriate sentence in the Cook Islands is a fine to a short term of imprisonment. But, while approving that analysis, the Court of Appeal in *Marsters* also said[4],

> "previous sentencing for drug offences seems in some instances in the High 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 ... 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.
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> In some of the sentences too much regard seems to have been placed on the personal circumstances of offenders."

But they say personal circumstances can only play some part in offending at the lower level.

[18] Following *Marsters* – because, of course, this Court is bound to follow the Court of Appeal's decision – in *Benioni*[5] it was said[6] – this was a cultivation case:

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[3] *R v Terewi*, [1999] 3 NZLR 62

[4] at [44] and [45]

> "in New Zealand the Court of Appeal said offending in this category is almost always dealt with by a fine or non-custodial sentence. But the maximum sentence in New Zealand is only a fraction of the maximum sentence here in the Cook Islands so while the categories in *Terewi* are accepted, the suggested starting point for offending is not. And that is the view that the Court of Appeal adopted in *Marsters*. The Court of Appeal and other cases accepted the categorisation set out in *Terewi* but had said that given the very considerable maximum penalty and the prevalence of offending here, the comments about starting point are inappropriate and inaccurate for the Cook Islands. Other cases have made the comment that a starting point of a jail term as normal should be regarded in the Cook Islands now."

And a jail term followed in that case.

[19] Now Mr Davey all of that may seem somewhat removed from your case but it is necessary to repeat those requirements in order to emphasise the fact that Cook Islands cannabis cultivators should know the default position on conviction is that they will go to jail. It is only if the circumstances of the case, including perhaps the personal circumstances, are sufficiently strong that a jail term will be avoided. *Marsters* should be a standard part of the submissions by the Crown on any cannabis cultivation case.

[20] Now coming back to your case, as I have said, because of the accommodation reached between the defence and the prosecution, the recommendation is that you be admitted to probation and that is a recommendation which is supported by the Probation Service.

[21] For reasons I am about to elaborate on, I am prepared to accept that recommendation in this case so you will not go to jail. But nonetheless you should regard yourself as very fortunate in that respect.

[22] It is the case that the utensil in this instance was a pretty amateurish affair of doubtful efficacy and it is the case, according to the summary of facts, that the cannabis plant you were cultivating was found about 40 metres away. That would have posed obvious difficulties for the Crown in proving the charge of cultivation against you.

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[5] *Police v Benioni*, CRs 18/16 & 480/16, 17 March 2017

[6] at [12]

But nonetheless you have pleaded guilty to possession of the utensil and of cultivation against the background where you have already served a term of imprisonment for offending despite the fact that it was in a completely different category.

[23] In your personal circumstances you have – as so many brought before the Court have – a rather deprived background where you had little contact with your father and were brought up by your great grandmother. You have had little education and have limited reading and writing skills. Fortunately you have been taken under the wing of your employer who has given you work and looked after you in a very thoroughly laudable way since you have been here on Rarotonga.

[24] The Crown suggest that you are a first offender – well you are in the drug field but you are not a first offender overall. You are entitled, as both Mr George and Ms Herman have stressed, to a discount for your early plea and particularly in this case, having regard to the fact that conviction may have been a little difficult for the prosecution to obtain. And the fact that there is only one plant involved in this matter.

[25] I need to try and fashion a sentence which will hold you accountable for the gravity of the offending and as I have said you are charged with an offence where the maximum is 20 years in jail, so it is very serious. I have to try and instil in you some accountability for the harm done in this case to the country by the prevalence of cannabis and promote a sense of responsibility in you and, of course, to denounce the conduct, again because of the increasing prevalence of cannabis in this community.

[26] So, as I have said, you are very lucky. You are particularly fortunate in the way in which your employer has taken you under his wing and looked after you.

[27] It is unfortunate that in the Cook Islands, when one considers the range of sentencing options, there is nothing between fines, probation, community service and the like and jail. It might be possible by innovative use of the power to order an offender to come up for sentence if called upon to impose what would effectively be a type of home detention but if an accused person is to be subjected to curfew orders, temperance orders and movement restrictions they should be sanctioned by the legislature expressly and not achieved by a manipulation of the terms that can be imposed in relation to another sentence.

[28] In your case, fining you would be pointless and I am not going to direct you to pay the $50 Court costs; your financial position is parlous enough in any circumstances.

[29] There will be the usual order for forfeiture of the bong and the plant and their destruction.

[30] I sentence you to 18 months probation and direct that the first 9 months be on community service.

[31] Probation suggests that a condition of their supervision should be that you undertake any training or workshop that they direct. If it is possible I would suggest to Probation that they try to enrol you in a course which would mean that your reading and writing skills are improved. That will increase your chances of success in the community and in not coming back here again.

[32] So that is the sentence of the Court, you may stand down.

Hugh Williams, CJ