

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

**CR NOS 210-211/2020
233-234/2020**

POLICE

v

TEINA SIMIONA ATAERA JNR

Date: 12 July 2021 (via Zoom)
Counsel: Ms Maxwell-Scott & Ms William for Police
Mr George for Defendant
Sentence: 12 July 2021

**SENTENCING NOTES
OF THE HONOURABLE JUSTICE PATRICK KEANE (via ZOOM)**

[12:07:20]

[1] Teina Ataera, you appear for sentence for four offences on Friday, 17 April 2020: possession of cannabis for supply, possession of cannabis and a bong, and obstruction. I found you culpable of these offences at trial.

[2] Towards 2pm that Friday, the police tactical unit executed a search warrant at your home at Vaimaanga, Titikaveka. You arrived home as the police were about to start. You told your partner to leave with the children in the car in which you had just arrived. You obstructed the police when they wished to search the car.

[3] In the car boot the police discovered two lengths of PVC pipe containing packages of dried cannabis. In your porch roof they found a pizza box containing raw cannabis leaves. In the bathroom wall a small Powerade bottle with an attached hose for smoking cannabis. The

total weight of the cannabis discovered was 794.89 grams. It had an estimated street value of \$10-15,000.

[4] After you were arrested and taken to the police station you declined to make a statement and you were taken into custody. You were later bailed on the basis that you had a defence to the principal charge: that the cannabis had come into your possession on or about 17 April 2020 without you either knowing or consenting.

[5] Three men gave affidavits to support your application. They claimed they had discovered the cannabis on Wednesday, 15 April 2020, while out climbing. They had not known what to do about it. They decided you would know. One left it at your home that evening when you and your wife happened to be out. Your wife gave an affidavit that she found it towards noon on Friday 17 April, some two hours before the search.

[6] After trial, in a reserved decision, I found you in possession of the cannabis discovered in the boot. I held that, because of the quantity found, you were to be presumed to possess it for supply, unless you could displace that to the civil standard. I held the evidence you gave at trial irreconcilable with that of your partner and the young men. I held you to be fixed with the presumption.

[7] I found also that the cannabis and the bong were in your possession and that you did set out to obstruct the police when they wished to search your car. You knew full well what they would find.

Pre-sentence report

[8] According to your pre-sentence report you are aged 38, you have been in a relationship with your partner for the past 12 years. You have four children – three, I understand, aged under 5. You and they depend on benefit grants (and, I am told, on help from your partner's father in New Zealand).

[9] You said, when interviewed, that you had been in bad health for five years and unable to obtain work. Your partner said that you have arthritis, diabetes and liver and kidney disease. She is concerned about your ability to serve a prison sentence.

[10] The difficulty is, as your report says, is that this is your second appearance for cannabis offending, and it is more serious than your first. In July 2018 Doherty J imprisoned you for 12 months for possession of cannabis and seeds.

[11] Your presentence report says that you have not responded to sentences imposed on you, you are in all likelihood dependent on cannabis, and you do not accept responsibility for your present offending. It recommends a deterrent sentence of imprisonment.

Sentencing principles

[12] In sentencing you I take into account, as I am obliged to, the purposes and principles of sentencing set out in the Sentencing Act 2002 (NZ), which apply in the Cook Islands.

[13] I must hold you accountable for the harm your offending does to the community. I must promote in you, to the extent I can, some sense of responsibility for your offending and the harm it does. I must denounce and deter such offending and, to the extent I can, assist you to rehabilitate and reintegrate.

[14] In the sentence I impose on you I must take into account the gravity and seriousness of your offending. I must be consistent with the sentences imposed in like cases. I must impose the least restrictive sentence feasible.

[15] One highly material sentencing principle in your case is this: I must take into account any circumstance making the sentence, otherwise appropriate for you, disproportionately severe. That goes to the significance of your health issue.

Prosecution submission

[16] According to the prosecution your principal offence, possession of cannabis for supply, has two aggravating features, the first of which is that it was on a commercial scale. The cannabis discovered in your car boot was packaged for retail sale and had a value of \$10-15,000. The quantity is significant in itself. 794.89g is some 28 times the amount giving rise to the supply presumption.

[17] The second aggravating feature, the prosecution submits, is that retail drug offending has a very adverse effect on the health of the community in a variety of ways, even although there is no obvious immediate victim.

[18] The prosecution submits that your offence lies towards the upper end of category two, *R v. Marsters* [2012] CKCA 1 (a tariff decision relating to cannabis cultivation, which applies equally to dealing, *R v. Gray* [2008] NZCA 224, deriving as it does from the New Zealand tariff decision *R v. Terewi*).

[19] Category two *Marsters* requires a starting point in the range 2-6 years imprisonment for offending on a small commercial scale; and the Crown relies on *Police v. Wichman* [2018] CKHC 26, where the cannabis held for supply, packaged for sale, weighed 419.77g. A three-year starting point was taken. The ultimate sentence imposed was one year, six months.

[20] In your case, as the prosecution says, the quantity of cannabis in issue is close to twice that in *Wichman* and you have a previous similar, but less serious, conviction and show no evident remorse. For your principal offence, therefore, the prosecution contends for a starting point of four years.

[21] The prosecution also contends for two uplifts, 3-6 months for your previous aggravating conviction and a further 3 months for obstruction, submitting that a sentence of 4 to 4.5 years would be proportionate in totality.

Defence submission

[22] Your counsel, in his careful submission, says that you accept without question my decision finding you culpable of this offending. But he does wish me to revisit the possibility that you did find yourself in possession of cannabis belonging to somebody else; and that you have not disclosed who it was out of fear.

[23] Secondly, he submits you are not a obvious drug dealer. There is no evidence you made sales. There is no evidence you made gains. Your circumstances are very modest. You rely on benefits and on your partner's father. Related to that – and this his third point – he asks me

to take into account the equivalent hardship your partner and young children will suffer while you are in custody.

[24] Finally, he especially emphasises your adverse state of health. He has supplied me with three medical certificates, all given this year, the third of which dated 9 July 2021 contains a very helpful summary.

[25] You suffer from chronic pain syndrome (including generalised body and joint pain), gout, fibromyalgia, osteoarthritis to elbow and hands, and hypertension. The pain you suffer to your muscles, fibres and joints compromises to some degree your wellbeing and mobility.

[26] You also have a history of gastrointestinal bleeding from use of diclofenac tablets (in May and September 2013 and November 2015), cushingoid syndrome (secondary to long term steroid tablets) and renal impairment.

[27] On 8 July 2021 you were admitted briefly to the hospital medical ward and discharged with an updated general prescription. (Your current medications are listed and are consistent obviously enough with your conditions.)

[28] Your adverse stated of health, your counsel submits, in itself and standing alone, calls for the shortest possible sentence of imprisonment, 12 months, reduced by 3 months for time served on remand).

Conclusions

[29] As I said in my decision finding you guilty of possessing cannabis for supply on Friday, 17 July, and your related offences, the cannabis packaged for sale in the two PVC pipes in the boot of your car was nothing less than a dealer's cache.

[30] That cache, as the prosecution submits, was of a small commercial scale, lying for sentence within category 2, *Marsters*. It warrants a sentence of imprisonment with a starting point in the range 2-6 years. The prosecution is right also, I consider, taking into account *Wichman*, to contend for a 4 year starting point.

[31] As a matter of totality, I consider that a starting point of that order fully meets the gravity of your offending, taking into account your aggravating previous conviction, and the obstruction which was not the most serious order. I decline to impose any uplift.

[32] The prosecution is right, finally, I consider, when it submits there is nothing to mitigate your offending, aggravated in those two ways as it is. I am conscious, however, of your state of health.

[33] You are capable of serving a sentence of imprisonment, but your bad health may make that significantly harder for you than for others. In short, the sentence otherwise appropriate for your offending, 4 years imprisonment, would to my mind be disproportionately severe. I therefore reduce it by 9 months. And by a further 3 months to take account of your time in custody.

[34] I sentence you for your principal offence, possession of cannabis for supply, to imprisonment for 3 years. I impose concurrent sentences of 3 months' imprisonment for your three lesser offences.



Patrick Keane, J