

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

**CR NO's 461/2021
462/2021
469/2021**

POLICE

v

**RUTRIL MATAMARU ENOKA
TEPINE ERIPA TETAVA TAMA
CHELSIE MORGAN NAPA**

Hearing date: 13 April 2022 (via Zoom)

Appearances: Ms M Okotai for the Crown
Mr M Short for defendants

Sentence: 13 April 2022

SENTENCING NOTES OF HUGH WILLIAMS, CJ

[11:36:00]

[1] Rutril Matamaru Enoka, Tepine Eripa Tetava Tama and Chelsie Morgan Napa, you three are for sentence this morning, being the first three to be sentenced on charges arising out of Operation Kotaa.

[2] You, Mr Tama and Mr Enoka are both charged with conspiracy to supply cannabis where the maximum sentence is 10 years imprisonment. You, Ms Napa are charged with selling or offering to sell cannabis which has the same maximum sentence.

[3] The Police became concerned at the prevalence of cannabis in the Cook Islands community, both imported and locally grown, and the dealing which had become prevalent in Cook Islands' society.

[4] There is substantial money to be made in the cannabis industry, selling, and packaging and selling cannabis as "tinnies" or "bullets". They are about \$50 each, or about \$1,000 with 35 or 40 "tinnies" in an ounce.

[5] The charges against various accused arising out of this operation also include money laundering. It is necessary to keep that in mind as part of the background in relation to sentence. We are not just concerned with dealing in cannabis.

[6] The charges arising out of this operation are unusual in terms of cannabis dealing convictions because the police have no, or virtually no, evidence of actual sales being witnessed. What they do have is a very large number of text messages which, they say, are evidence of widespread and repetitive cannabis dealing.

[7] There have been schedules of those text messages provided in respect of each of you and they run to many pages and many transactions. No doubt when, whoever are the remaining defendants in this operation are tried, those text messages will be analysed exhaustively in Court, an expert will no doubt give evidence as to what the argot is said to mean, and the jury will be asked to take inferences from that evidence as to the dealing in cannabis. Also, alongside that evidence, is likely be a considerable amount of evidence concerning bank deposits, money transactions and the like.

[8] Those observations are pertinent because two of you have agreed, and have already provided some assistance, significant assistance to the police in the way of statements. Both of you have indicated that you are prepared to give evidence against whoever be the remaining defendants when the matter comes to trial.

[9] That is of significance in sentencing because, although the detail of your assistance is unknown, it is obvious that your evidence may well make it easier for the Crown to prove the charges against the remaining defendants, including the money laundering charge.

[10] The Crown submissions suggest – for the reasons I will elaborate later – that the starting point for sentencing for you Mr Enoke is about 4½ years in jail with an end point of 2½ - 3 years in jail though that assessment pre-dated the assistance you have given the authorities.

[11] In Mr Tama's case they suggest that the starting point of about 3 years imprisonment and an end point of about 2 years, again prior to the assistance being taken into account.

[12] And for Ms Napa, while the Crown suggests a starting point of 2 - 2½ years in jail, they ultimately support the Probation Service's recommendation for a lengthy period of probation. That matter will be the subject of later comment.

[13] The aggravating features in relation to all three of you are that you were, and are now acknowledged, participants in a scheme to import and sell cannabis or to source locally grown cannabis and sell it in the community. There was a significant degree of premeditation in the offending and in the operation and it involved a considerable amount of planning and organisation.

[14] There is a high degree, on the material so far available, of commerciality with what would appear to be considerable profit from the sale of the cannabis in its repackaged form throughout a network of dealers.

[15] There were multiple deals on the information so far available, usually with trading on a daily basis, over months or years, with thousands of transactions and thousands of dollars being generated with the cash being deposited in small amounts to lessen the chance of detection.

[16] Mr Enoke the Crown says was a middleman in terms of the authorities, which will be explained later, recruited other dealers into the network and at one stage deposited some \$17,000 in a day into another person's account.

[17] Mr Tama, you were an active street dealer and again also responsible for making deposits of about \$5,500 into another person's account. In both cases, the Crown say that you continued to participate in this enterprise, even after the search

warrants were executed on your premises, but it does not seem that you have been additionally charged in relation to that.

[18] The Crown submits that the mitigating circumstances – those which reduce the sentence you would otherwise receive – are your early pleas, entered once full disclosure had been given; your youth and your lack of previous convictions. Both those matters will be the subject of comment later.

[19] I should say at once that the lack of previous convictions in respect of all three of you is not a mitigating factor in accordance with the principles, practice and the authorities on sentencing. Every person has a duty and an obligation to comply with the law and the fact that the person has not offended previously is no more than an expression of compliance with that duty. The fact that a person has been convicted and comes before the Court for sentence on the first occasion is no more than a lapse from that duty. It is not a factor to be taken into account in mitigation of sentence.

[20] What a lack of previous convictions is, in sentencing terms, an absence of an aggravating feature, namely previous convictions, often many previous convictions which are relevant to sentencing in aggravation of the sentence to be imposed. The absence of previous convictions is an absence of that aggravating feature, not a mitigating feature.

[21] The Crown also suggests that Mr Enoka is entitled to some further discount because of his youth. He is in his mid-twenties, he was involved in a sophisticated and widespread cannabis dealing operation and recruited others. I do not regard that as the actions of a person who is entitled to be regarded as a youth for the purposes of sentencing. That mitigating feature usually applies only to those in their teens or thereabouts.

[22] Mr Enoka, you are charged with conspiring with other named persons to sell or offer to sell cannabis between 21 March 2019 and 31 January 2021, a period of one year and nine months. You pleaded guilty to that on 17 December 2021.

[23] There have been delays in sentencing, but that is because of other circumstances, including of course the current pandemic.

[24] A search warrant was executed on your premises on 13 December 2019, and a considerable amount of drug paraphernalia was located, but no drugs.

[25] There was also a search warrant executed on your telephone company and it shows extensive dealing over the period covered in the charge: January 2019, 99 cases of supplying or offering to supply. March, 128. April, 77. May, 108. June, 65. July, 41. August, 14. September, 32. In October, 15. November, 28, and December 2019, some 30. 637 such transactions in a year and that is noted as being only a minimum and an example of the trading in which the Police say you were involved. It occurred nearly every day and it included your supplying from the Airport Fire Service where you are employed.

[26] The Probation Service urges leniency as does Mr Short on your behalf. It points out that you have two young children with your partner, you are the only earner in the household. Your partner urges that you not be incarcerated. Your mother is in dire straits for illness and you have been looking after her. The manager of the Rescue Fire Services urges you not be sent to jail and he speaks of your prowess in your job with them.

[27] You obviously have remorse, but you say that you got into the job because you were "broke" and it was an opportunity to earn "quick cash".

[28] The recommendation is for probation but, with respect to the Probation Service, recommendations for probation on the sentencing of drug dealers is wholly unrealistic.

[29] Mr Short has filed helpful submissions on your behalf including covering your assistance and saying that you are not a consumer of cannabis yourself, which rather heightens the greed with which motivated your entry into this offending.

[30] You have undertaken counselling and as a result have seem to have acquired some greater realisation of your foolishness saying it was greed that got you into this situation and that you now have a greater realisation in that regard.

[31] Mr Tama, you, too, are charged with conspiring with others to deal in cannabis between 21 March 2019 and 31 January 2020, a year and 10 months. You pleaded guilty on 17 December.2021.

[32] The text records also show considerable dealing on your part in February 2019, in March, in April, in May there were 50 offers to sell and six supplying; June, 40 supplies; more in July and virtually every month until December 2019. That is a total of over 300 transactions, and again this is said to be a minimum to be taken from the records. You too were involved in the banking, in the \$5,500 that I mentioned.

[33] The Probation Service again gives me helpful information concerning your background: the three children you have with your partner, the fact that you were adopted, you lost your job because of Covid, and again I am urged not to jail you.

[34] You in fact were recruited by, it seems probable, the major alleged offender and thereafter dealt on a very regular basis, on a “one-for-five” basis namely that you were given a cannabis “tinnie” for every five sales you managed to make and you were making between \$250 – \$1,000 a week through small dealings. Your method of dealing, of course, created an incentive for you to sell as much as you possibly could.

[35] The recommendation again is for probation and whilst that is understandably compassionate, it is unhelpful in drug sentencing where jail is virtually inevitable.

[36] Again Mr Short has filed helpful submissions and enlarged on those today, particularly drawing attention to the difficult economic circumstances being experienced in the Cook Islands over the Covid pandemic period and stressing what he described as a widespread lack of realisation, especially amongst the young, of the gravity and effect of dealing in drugs.

[37] In your case Mr Tama, you have had long periods of unemployment. You have volunteered to be part of the community response to the Covid pandemic. You too have undertaken counselling. You are remorseful. There are significant testimonials supporting your position. Again you, too, are entitled to recognition of your cooperation with the police and your early plea.

[38] Ms Napa, you are in a somewhat different position. You are charged with selling or offering to sell cannabis between 1 June - 17 August 2021, a charge which also carries a maximum of 10 years.

[39] Yours, however, is a representative charge and just today I received a schedule of some 16 pages of text messages which show that, even though you were selling cannabis only for a period of about three months, you were certainly very active in the market during that period.

[40] On 22 September 2021 a search warrant was executed on your premises and a "bong" was discovered, some seeds and utensils for the cooking of cannabis. The search warrant also covered your telco which disclosed text messages of selling or offering to sell many times, again on a daily basis, so that whilst your offending was relatively short in time it was fairly intensive in terms of its frequency.

[41] The Probation Service again gives me helpful background concerning your upbringing, mainly with your grandparents, but it records that you have been very reticent concerning your personal life and gave the Service only brief details.

[42] You said you offended to make some extra cash. That was clearly your motivation: simply to make money. The recommendation again is for probation with conditions.

[43] The Crown submits that, as I have mentioned, the starting point should be 2 - 2½ years imprisonment and they suggest a discount from that of up to 50%, but partly that is because of your lack of previous convictions and I have dealt with that.

[44] The Crown suggests you were part of a sophisticated operation with on-selling many times over the period that you were in the operation. They regard you as a low level street dealer, but you were certainly a frequent street dealer.

[45] And Mr Short again has filed full submissions and updated those this morning.

[46] In terms of the Narcotics and Misuse of Drugs Act 2004, I am obliged to consider whether fines would be adequate punishment in this case. Clearly they are not and that requirement can be put to one side.

[47] In terms of the principles of sentencing, this was serious offending involving offences against a statutory provision giving 10 years' maximum imprisonment as a possibility.

[48] There was the aggravating fact that certainly the offending included a significant degree of premeditation and organisation in all your cases. The sentence should try to promote a sense of accountability or responsibility for what you have done and of course to denounce your conduct and try to deter others.

[49] As the Crown submits, the major case which governs sentencing in drug matters are the decisions of this Court and of the Court of Appeal in *R v. Marsters and Tangaroa*¹. The facts are quite different but the decisions are helpful in terms of the sentencing levels to be imposed.

[50] Because of the way the Court of Appeal approached the matter it is useful to start with Justice Doherty's decision, where he commented²:

“The scourge of drugs in any society and its impact are well known. Not just the impacts on users, the wasted lives of addicts and the impact on their immediate families, but also on the wider society as, with dealing in drugs and the money it involves, generally comes other crime. Crime to finance the habit and crime to enforce drug debts or even between drug factions. Things such as those are likely to have significant impacts on an island society.”

[51] He then dealt with the differences in maximum penalties between New Zealand and the Cook Islands with the Cook Islands maxima generally being higher than those in New Zealand.

[52] He then passed to a consideration of the leading New Zealand cases involving sentencing in drug matters and commented³:

¹ *R v. Marsters and Tangaroa* [2012] CKCA 1, CA 3/2012 (30 November 2012).

² *Police v. Marsters, Matapo, Tangaroa* [2012] CKHC 24 (20 July 2012), at [19].

³ At [33].

“... I think there should be some adjustments however to take into account the Cook Islands circumstances. I think the category 1 or the primary offending or the mastermind should be in the range of 5 to 9 years imprisonment. Category 2, key players, 3 to 6 years imprisonment.”

[53] He then turned to selling and supply and there he deals with *R v. Terewi*⁴, which categorised selling or supply – largely the equivalent for sentencing purposes – into Category 1 which results in a fine or a short term of imprisonment; Category 2, two to four years imprisonment; or Category 3, the most serious class with the starting point of four years imprisonment, and noted that in *Mata v. R*⁵ the Cook Islands Court of Appeal adopted the *Terewi* classification.

[54] He then reached the view⁶:

“I think that the categories in *Terewi* ought to be slightly adjusted to reflect the Cook Islands situation and again the adjustment should be upwards, not downwards.

Category 1, for a small non-profit, a fine through to a short term of imprisonment. Category 2, a range between 2 and 6 years imprisonment. Category 3, 5 to 10 years. You will see there is some overlap that is taken in to account in particular circumstances.”

and he makes the point⁷ that personal circumstances count for nothing or very little, although he did make an allowance in the case of the three he was sentencing.

[55] That decision was endorsed by the Court of Appeal on the unsuccessful appeal against sentence. The Court agreed that personal circumstances had very limited influence on the sentence and endorsed Justice Doherty’s categorisation and starting points⁸ and then⁹ followed Justice Doherty’s sentencing levels.

Napa

[56] Coming from that to sentencing and noting that this is before any allowance is made for the assistance that you Messrs Enoka and Tama have given the police,

⁴ [1993] 3 NZLR 62.

⁵ CA 2/2000.

⁶ At [43] and [44].

⁷ At [57].

⁸ At [27]-[28].

⁹ At [42]-[46].

looking first at Ms Napa's position, you are a street dealer, over three months in smaller amounts but on a very numerous basis. In my view you are at the bottom of category 1 or the beginning of category 2 in terms of the authorities I have just reviewed, which would indicate that a starting point for you of about 2 - 2½ years imprisonment would be appropriate.

[57] I agree with the Crown and Mr Short that you are entitled to a significant discount for your plea at what can be regarded as the earliest realistic opportunity, which would bring the sentence down to 1 year 4 months or thereabouts.

[58] But in terms of *Giovanni & Marsters* it is possible to contemplate not sending you to jail. This could be regarded as a lenient sentence but in your personal circumstances it is a result which is at least available and fulfils the requirement of imposing the least restrictive sentence.

[59] So whilst I have given serious consideration to imposing a short-ish term of imprisonment on you, of the order of a year or a little more, ultimately I am prepared to accept the Probation and Crown recommendations that you should be admitted to probation for 2 years with the first 9 months of that being on community service.

[60] The conditions are:

- (a) that you abstain from illicit drugs – well that is your obligation anyway as a citizen;
- (b) that you undertake such counselling or workshops as may be directed; and
- (c) that you not leave the Cook Islands without the approval of the High Court.

Enoka and Tama

[61] As far as you Mr Enoka are concerned, and again emphasising that this is before any allowance for your assistance:

- (a) you were involved in dealing which is, in terms of the authorities, the equivalent of cultivation or selling;
- (b) you were a middleman which puts you above the street level dealing and you also were a dealer in your own business;
- (c) you recruited others into this network and thus no doubt enabled it to spread through the community;
- (d) as I have mentioned there were hundreds of transactions which were part of the allegations against you and were probably only a small proportion of the transactions in which you were involved;
- (e) it was a commercial operation in which you made significant profit; and
- (f) this was a sophisticated operation and, for the Cook Islands, on a very large scale.

[62] In terms of *Giovanni & Marsters*, you are at the top of the category 2 or the lower part of category 3 which suggests a starting point in your case of about 5 years imprisonment, roughly equivalent to the Crown's suggestion.

[63] You are certainly entitled to reduction in that of about a third for your early plea which would mean that the appropriate sentence for you before your assistance is taken into account would be about 3 years, 4 months or 3½ years in jail.

[64] With you Mr Tama, you are not as high in the hierarchy as Mr Enoka. You are not a middleman but you were a recruiter, you were a very active dealer involved in hundreds of transactions over a lengthy period, and you did it for greed: you were doing it on the "one-for-five" basis.

[65] In terms of the authorities you would be in category 2 but certainly not towards the top of that which would suggest in your case a starting point of about 4 years imprisonment.

[66] You are entitled to a third off for your plea and other mitigating circumstances which, again prior to assistance, would result in a jail term for you of about 2 years 9 months.

[67] Both of you were essential to the operation of this large scale profitable scheme.

[68] Turning from that to the question of assistance, it is agreed that the New Zealand authorities in this area need to be modified for the Cook Islands in the sense that there is only one prison; it is a small community; what has happened to date concerning this matter had been widely publicised; everybody knows about it and so there is not the same need for secrecy and disguising identities in dealing with the question of assistance which there might be in a larger community such as New Zealand.

[69] The Crown has helpfully provided the passage from *Adams on Criminal Law*¹⁰ dealing with cooperation with the authorities. It begins with a useful compendium of the types of cooperation which can affect sentencing, but in this case you have both cooperated with the police and it seems provided significant statements concerning the matters involved with this operation.

[70] Assistance to the authorities usually falls into two aspects. One is the provision of information, particularly information which the authorities might not have been able to get without that cooperation, and secondly, preparedness to give evidence which can involve risk to the person who does so.

[71] If both limbs of that assistance are present it is the New Zealand practice to give up to 60% discount from the sentence that would have been imposed before that assistance was taken into account. That is demonstrated by two cases, *R v. Hadfield*¹¹ and *FF v. R*¹².

¹⁰ SA 8.12.

¹¹ CA 337/06 [2006] NZCA 524 (14 December 2006).

¹² CA 383/2016 [2017] NZCA 294 (10 July 2017).

[72] In *Hadfield* the NZ Court of Appeal discussed the point at which the discount should be available. Without going into details it is clear that the sentencing Court should allow the appropriate percentage discount up to the maximum on the understanding that if the particular person being sentenced does not fulfil the assistance previously proffered, then the Crown can seek leave to appeal to the Court of Appeal out of time in order to have the sentence increased.

[73] In both your cases it seems you have given lengthy statements to the police, no doubt containing helpful information, and that those statements may be on oath which provides a spur for you to comply with them.

[74] You have both said that you are prepared to give evidence at the trial of the remaining alleged offenders in connection with Operation Kotaa.

[75] So, in terms of *Hadfield* and *FF*, you are entitled to the maximum discount but if you do not come up to brief in giving evidence when the trial comes on for hearing then it may be that the Crown might seek to review the sentence imposed on you.

[76] I consider that the authorities collected in *Adams on Criminal Law*, in particular *Hadfield* and *FF*, and the New Zealand regime for sentencing those who have provided assistance to the authorities, should be applied in the Cook Islands.

[77] More particularly as far as you two are concerned, as noted at the outset of these remarks, the evidence concerning the alleged offenders, particularly the person alleged to be the main offender, would seem at the moment to be largely confined to inferences to be taken by the jury from the analysis of the text messages and the banking transactions.

[78] If you two give evidence against the main offenders then, as observed previously, it may make it easier for the Crown to prosecute them successfully. On that basis, it seems that it would be appropriate to allow you the maximum of 60% discount on the sentence you would otherwise be ordered to serve.

[79] So in your case Mr Enoka, the 3 year 4 months sentence means when the assistance is taken into account that you are entitled to a discount of about two years

on that sentence. The final result as far as you are concerned therefore is that you will go to jail for 1 year 4 months for your part in this operation.

[80] In your case Mr Tama, applying the discount of 60% to a sentence of 2 years 9 months, means that you are entitled to about 1 year 8 months off the sentence and therefore the final result for you is that you are imprisoned for one year for your participation in this matter.

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

Hugh Williams, CJ