

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

CR NO'S 279/12, 105-114/12
122-124/12, 130-136/12
254/12, 293-296/12
560-561/12

CROWN

v

RICKY CARLSON

Hearing: 19 August 2013

Counsel: Messrs S McKenzie & M Henry for the Crown
Mr C Petero for the Defendant

Sentence: 29 August 2013

SENTENCING NOTES OF DOHERTY J

[FTR 10:14:07]

Sentencing Remarks relating to Ricky Carlson, Mere Upu King and Mark Franklin

[1] You three are now for sentence in relation to matters to which you pleaded guilty when you were arraigned for trial last week. I have had you called all together because you were facing trial jointly in the sense of being one trial.

[2] I want to make some general comments in relation to your offending collectively and I want these remarks to be appended to each of the individual sentencing notes that will be produced following your sentencing.

[3] You three are the product of a police operation known as Operation Eagle. It has received some notoriety in the Cook Islands and this is but one of several trials

that have been conducted or the outcomes of those trials. It was a significant operation conducted by the Cook Islands Police using undercover agents from the New Zealand Police force who were sworn in to the Cook Islands Police force. As a result of this significant operation several people were arrested and you are in that category. It has been called Operation Eagle because of the investigation but many of those who were apprehended had no relationship with each other. In this case there is a relationship between you Mr Franklin and you Ms King in relation to one of the charges.

[4] I have had the benefit of long and detailed submissions which have been filed in respect of each of you by the Crown and by your counsel. And I wanted to make these general remarks because in some sense there is a tenor in the submissions that is at odds with what is now the law in the Cook Islands.

[5] Recently in *R v Marsters & Tangaroa* which was an appeal against sentence of this Court. The Court of Appeal endorsed the approach of this Court in allocating bands or categories of offending for drug dealing. Where an offender or a particular offender fits into any category depends upon the scale or intensity of the offending such as the amounts involved, the amounts of money involved, value and frequency of dealing. The Court of Appeal upheld the categorisation that this Court had determined.

[6] First of all for dealing offences there was Category 1 and that related to small non-profit dealing and the range of sentence there was anything up to a short term of imprisonment.

[7] Category 2 was for offending where there was a small profit element of a commercial nature and the range there was from 2 years to 6 years imprisonment.

[8] Category 3 was reserved for large scale of sophisticated organisations where there is or was determined to be a range of 5 to 10 years imprisonment.

[9] Those of course are ranges which might depend upon the offending and some of the offending for which you have been charged has 20 years imprisonment as a maximum sentence.

[10] I also want to make a general comment about some of the submissions that have been made on consistency because one of the principles of sentencing is that there ought to be consistency. Where possible, like should be compared with like.

[11] In 2004 the passing of the Narcotic and Misuse of Drugs Act, Parliament set significant maximum penalties for drug offences in the Cook Islands and particularly for drug dealing. As I say in the *R v Marsters* the Court of Appeal endorsed the approach of this Court that parliament had intended the primary purpose of sentencing to be deterrence. And in relation to consistency in that aspect I want to read from the judgment of the Court of Appeal.

[12] Paragraph [44] said this:

“Previous sentencing for drug offences seems in some instances in the High Court [that’s this 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, as suggested by Mr Perese [who was counsel in the appeal], 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.”

Paragraph [45] said this:

In some of the sentences to which we were referred, too much regard seems to have been placed on the personal circumstances of offenders. Because drug-dealing is so corrosive in its impact on the community, with often an unknown number of persons affected detrimentally, the law for some time in the Cook Islands – certainly since this Court’s decision in *Mata* in 2000, has indicated that deterrence must assume greater importance in sentencing over personal circumstances in drug cases. For other types of offending which do not have as wide a community impact as drug-dealing, leniency based on personal circumstances can play a bigger part in the sentencing process.

Paragraph [47]:

In an ideal world where there were ample resources for criminal rehabilitation in a small economy, approaches such as those suggested by the New Zealand Law Commission and by counsel for the appellants might be possible and desirable. However, this Court has to operate within the existing legal structures where the legislation has sent a clear message about the distaste with which it views drug-dealing in this community.

[13] So those are the principles that this Court must operate under and when it comes to consistency, consistency in sentences thus ought to take its lead from the sentences upheld in the *R v Marsters & Tangaroa* and imposed subsequently to that decision. Your counsel have referred me to a number of decisions prior to that but those are some of the very decisions criticised and not taken forward by the Court of Appeal.

Ricky Carlson

[14] Ricky Carlson, you are now for sentence following your pleas of guilty to a number of drug related charges. These came out of Operation Eagle which was an undercover agent operation in the Cook Islands in 2010/2011.

[15] You have pleaded guilty to offering to supply methamphetamine a class A substance; that carries a maximum sentence of 20 years imprisonment.

[16] You have pleaded guilty to two charges of selling cannabis; each of those carries 10 years as a maximum.

[17] You have pleaded guilty to possessing cannabis for the purpose of supply; two charges there, again a maximum sentence of 10 years imprisonment on each.

[18] Twenty-two charges of offering to sell cannabis which bear also 10 years imprisonment as a maximum sentence. Finally one charge of conspiring to sell cannabis, again a 10 year maximum sentence.

[19] All of this offending was detected as having occurred between March and May 2011.

[20] The offering to sell cannabis which relates to primarily your text messages and phone operation all occurred within a six week period.

[21] It is very clear that you were heavily involved in the retail supply of cannabis. You provided to your customers a whole range of prices depending upon amounts to suit the buyers' needs. You admitted to the Police that you ran what is known as a 'dial-ups' in the particular area. That is, you took phone calls or text messages for cannabis orders and then you did deliveries to the customers.

[22] It is clear also from the offer to supply a class A drug, methamphetamine, that you had access to harder drugs and you were prepared to obtain that for at least one customer. Exactly who you were either working for or getting your cannabis and other drugs from is not yet apparent.

[23] This is the first time that you have been involved in drug matters which have brought you before the Court but you do have some previous history before these Courts some of which have resulted in small sentences of imprisonment. Mainly it has been relating to dishonesty or your inability to comply with Court ordered sentences.

[24] I have had the benefit of a Probation report. Understandably the Probation report writer will be aware of the decisions of the Courts that I have referred to earlier. But what that report does do when it is taken in conjunction with the references that people have written, and the letters that you have written to me, and the statement that you now made to me today, is show that you are a person who is now worthwhile and likely to be a contributor to this and any other community that you find yourself in.

[25] You have the support of your parents although you are somewhat estranged from them from time to time.

[26] What has happened since your apprehension and when you were awaiting trial is that you have got yourself in a position of "growing up". I think that is accepted by the Crown that at the time of your drug dealing you were obviously a

relatively naive and vulnerable young man and perhaps you were taken advantage of by others. I am not sure of that and I do not have any evidence of it but it would not be too wild a guess, I would think. But against that, this is significant offending and you have recognised that in what you told me today. Your counsel has recognised that and he and the Crown have referred me to the *Marsters & Tangaroa* case and the categories of offending and penalties or ranges of penalties that I have already referred to.

[27] Your counsel accepts that a significant sentence of imprisonment will be the result of this and although you were making a plea for mercy I think you know that as well. It is exactly what you have told me in one of your letters. And to your credit you recognise you have got to get this behind you, you have got to take what you are going to get, and then hopefully re-emerge as a contributor to the society. That is what Mr Petero has emphasised on your behalf, your major turnaround since your apprehension both in your business, your artistic endeavours, you are held in some regard as a tattoo artist and that, perhaps, this has all been a catalyst for a significant change in you.

[28] There are significant aggravating features here. You were dealing not just in cannabis but appeared to deal in methamphetamine. You were, as I said, running the whole gamut of what could be available in the cannabis market – packages to suit the buyer's purse, \$20, \$30, \$40 and \$50, depending upon their needs. You were running around and going to them. You were seeking customers as it happened on one occasion with the undercover officer. You were repaying debts that you owed by providing cannabis rather than cash. There were significant numbers of transactions or attempted transactions over a relatively short period.

[29] So all of these things, given the frequency and the intensity of your offending over that three months period, puts you in that category I described before in the *Marsters* case as Category 2 and that has a range of sentence of up to 6 years.

[30] Your counsel accepts that it is in that sort of range and perhaps up to 5 ½ years. That is what the Crown thinks, somewhere between 5 and 6. When I sit back and look at it and then make some comparisons with what happened in the *Marsters*

& *Tangaroa* case in the initial sentencing. I think the starting point for the cannabis related matters is 4 ½ years imprisonment.

[31] I agree, as does your Counsel and the Crown, that there ought to be an uplift from that in relation to the other category of offending, the offer to supply, and your Parliament has said that 20 years is the maximum for that. So I think an uplift of about 12 months which would mean a starting point of 5 ½ years imprisonment for you.

[32] You must get some credits. The Courts have said, and I just read out to you from the Court of Appeal judgment, that personal circumstances count little in drug dealing offending and I think that is correct from the point of view of the category of sentence. That is really what I think the Court of Appeal was aiming at, to say that previous cases had said that because of people's personal circumstances they should not go to jail. The Court of Appeal has now said that is not correct. But, in my view, personal circumstances can be taken into account in setting the level of the sentence in whatever category is determined.

[33] So I think that I agree with the Crown about your vulnerability, your naivety and your now better view on life and contribution to both yourself and society means you should have a credit for that, and it will be 6 months from the starting point.

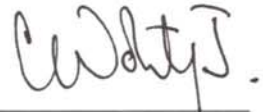
[34] You are also eligible for a credit for your late guilty plea. The earlier people plead to their misdemeanours the greater the credit they get. Usually it starts at about 25 percent for an early plea. In this case, and another cases, I have imposed or allowed a smaller credit but one which is larger than it happens in lots of jurisdictions. Even though this was late and before trial your plea, and that of others, meant that considerable expense to the state was not needed – one, in a lengthy trial and, two, in bringing the witnesses that were needed from overseas to this jurisdiction to give evidence. So in your case I think a credit of 7 months is an appropriate one.

[35] That means that the end point is 4 years and 5 months imprisonment.

[36] Under the legislation I have to take into account whether or not I should impose a fine as well or instead of, that, in view of my comments, would be entirely and appropriate.

[37] I hope that you can get this behind you and come back and get back into what you now see as the best thing for you in your business and life opportunity.

[38] Stand down.

A handwritten signature in black ink, appearing to read "Colin Doherty J.", written above a horizontal line.

Colin Doherty J