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

CR: 255/11, 273-277/11
279/11, 285/11
83-104/11, 559/12

POLICE

v

SCOTT ARLANDER

Hearing Commenced: 8 April 2013

Appearances: Messrs S McKenzie & C King for the Crown
Mr N George & Mr R Samuel for the Defendant

Date: 11 April 2013

**DECISION ON APPLICATIONS UNDER S 111 OF CRIMINAL PROCEDURES ACT
BY THE HON. JUSTICE COLIN DOHERTY**

[FTR 11:24:44]

[1] At the end of the Crown case the defence makes a number of applications pursuant to s 111 of the Criminal Procedure Act 1980-81. It is common ground that the test to be applied is the same that applied pursuant to applications under s 337 of the Crimes Act 1961, the New Zealand legislation.

[2] There have been a number of decisions in relation to this section and principles and in a recent judgment also of this Court in relation to an earlier arising from Operation Eagle I set out the principles which I adopted as being appropriate for applications under s 90 of the Criminal Procedure Act 1980-81 and for ease of reference and because of the timing implications of this decision I refer to the principles set out in that judgment; *Police v Marsters & Ors* (20 July 2012).

[3] The test is whether or not a jury properly instructed could convict an accused or in this case defendant.

[4] There was a submission from defence counsel that corroboration was required in the circumstances. No one has properly prepared any argument for that but I am firmly of the view that there is no statutory provision for the necessity for corroboration in this case nor is there one at common law. I was referred to a judgment of Nicholson J in the *Q v George & Ors*, a judgment on 24 February 2010 which related to corroboration of an accomplice and the issue about the necessity to warn a jury that accomplice evidence ought to be corroborated. At this stage at least there is no need in this case for such a warning to go to the jury but of course there may be as the trial proceeds.

[5] I take each of the particular charges in the order argued by Mr George for the defendant.

[6] The first related to CRN 89/12 which is an allegation of possession of LSD a Class A controlled drug. The Crown relies upon a series of text messages on the 5th and 6th June 2010. The Crown says that those text messages are corroborated by evidence of an undercover agent or police officer who in a conversation which was recorded has an admission by the defendant that he has taken LSD in the past. The text messages have been interpreted and collated by a New Zealand police officer who is accepted as an expert in this field. The text messages on the 5th and 6th June do not refer specifically to LSD. Nor do the text messages refer to any coded words for LSD. It should be noted that in the course of his evidence the expert produced a glossary of coded drug terms and that glossary did not include any of the words that might indicate LSD in these text messages. The closest that comes is a text saying, "sweet will get one off you, we're going halves". And later the next day a text from the defendant to the other party, "we dropped one each".

[7] The expert's evidence was that to drop or dropping means consuming LSD. The expert could not of course discount that this may well be a reference to another type of tablet and in fact there was one specifically referred to him which was Nirvana, as I remember the evidence, a drug which is a controlled drug in New Zealand but not in the Cook Islands.

[8] It seems to me there is some force in counsel's argument. This is not a case where the prosecution could put a coded label on what was being discussed and it seems to me that a properly instructed jury could not convict on this charge. It would be mere speculation or supposition and there is no sufficient evidence upon which to found the charge. I take into account the submission of the Crown that in the context of the whole of this case there are number of text messages which are relied upon for other charges and I note that they are all relied upon in relation to the supply or offer to supply of cannabis and not LSD. In my view that charge should be dismissed.

[9] The second related to cultivation of cannabis under CRN 273/11. The Crown relies upon an admission by the defendant to an undercover police officer that he had a couple grows of cannabis or cannabis plantations in the Cooks. The submission was that this admission on its own where there had been conversation with the parties having been drinking, meant that it was insufficient to go to a jury. However, the undercover police officer was untroubled in his cross-examination and his evidence was firm. The Crown also point to the possible corroborative evidence of root hormone found at the defendant's home together with some crystals which apparently enhance the growing process. Those are clearly matters for a jury. In my view, a jury could come to the conclusion that there was cultivation on these occasions by the defendant. It is of course entirely a matter for them and we have not heard from the defendant. The application in respect of that charge is dismissed.

[10] The next was CRN 275/11 which was a charge of importing LSD. Again the Crown relies upon a conversation between the accused and an undercover officer. Again this on its face is a statement against interest and is purely a jury matter. It may well depend upon how the jury finds the evidence of the undercover officer and whether or not it is accepted but at this stage at least there is sufficient evidence to go to the jury and the application in respect of that charge is dismissed.

[11] In similar vein is CRN 274/11. This is a charge of importation of cannabis (a Class C controlled drug) into the Cook Islands. And again, there is evidence to which I was referred, coming from a conversation between the undercover police officer and the defendant about how there was an arrangement where every two weeks drugs are brought into the Cook Islands. It was alleged by the police officer that the defendant said that it

came in by the airport where the defendant and others had a man on the inside who worked for Customs and another man who worked for them as well. What the jury make of that of course is entirely a matter for them but prima facie it is a statement by the accused that he regularly brought in on a two week basis, maybe with others, maybe not, a Class C controlled drug. That application is also dismissed.

[12] The next matter was under CRN 589/12 which is an allegation of a conspiracy to import a controlled drug namely ecstasy and that alleges a conspiracy between the 5th November 2010 and the 7th April 2011. The submission was that there was never a concluded agreement to enter into this activity. The submission was that the evidence shows that matter kept changing and shifting and agreement was never concluded. In particular the defence argued that whenever there was conversation and it is conversations that are primarily relied upon by the Crown, they were prefaced by an enquiry of the undercover police officer of the defendant along the lines, "are you still interested in doing the deal?" That, Mr George says, shows there was never a concluded arrangement. But the evidence that could go to the jury from the undercover agent was clear. He was firmly of the view there was an agreement and in his evidence he talked about the fact that the agreement was of 150 pills to come in; there would be a dry run of 20 pills so that there was not too much risk. There was agreement as to when there was not too much risk. There was agreement as to when it was going to be and what the cost of the pills to the defendant were to be and discussions about sale price in Rarotonga and conclusion about the fee that be paid to the courier.

[13] All these are matters which might well form the basis of a conviction in the mind of a jury but that remains to be seen. My task is to decide whether there is sufficient to go to a jury who properly instructed could convict and in my view there is. That application is dismissed.

[14] The next relates to the possession of a bong alleged to be in the possession of the defendant for the purpose of smoking cannabis, that is, CRN 277/11. The bong was found during a search of the home premises of the defendant. It appeared to the person who conducted the search and found the bong that there were three people living there and it is clear that that was the defendant, his partner and perhaps one other person. The bong was found in a common area, namely the laundry. There is probably not much

doubt that there was a instrument or a utensil for the purpose of smoking cannabis but that too is a matter for the jury. The question is whether or not the evidence that is available is sufficient to go to them in relation to the defendant.

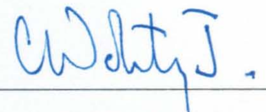
[15] Possession of course need not be exclusive in these circumstances. There is also other evidence where in a taped telephone conversation the defendant told an undercover officer that his partner is not happy about the use of drugs but she does let him smoke but she is not into drugs herself. He also, in his DVD interview with the police after arrest, made an admission that he does smoke cannabis and that he had done so very recently. It seems to me that if all those matters go to a jury properly instructed they could reasonably convict. They may not but that is a matter for them.

[16] The remaining applications are all in respect of charges of offering to supply cannabis. These are under informations 83/12, 84/12, 91/12 and 94/12. These, like the possession of LSD charge, are dependent upon the interpretation of text messages which were obtained under search warrant by the police. From some 14,000 text messages there has been a schedule by the expert I referred to earlier which has been presented in evidence and upon which the prosecution rely. In short, they allegedly refer to cannabis and the defendant being in a position to offer quantities of cannabis to those who are enquiring of him by text. The prosecution evidence is dependent upon to a large extent on the expert's opinion as to the meaning of certain words. He was tested in cross-examination as to whether or not he could exclude specific words relating to exactly what they said, for example the word "fish". But his evidence is that in the context of these exchanges taken as a whole it is clear, in his opinion at least, that the references are not to the actual meanings of the words but to cannabis. A properly instructed jury will be told that an expert is entitled to give opinion evidence. Generally, of course, evidence must be confined to facts but experts are allowed to give their opinion. A jury will be told that an expert's opinion is not fallible; and just as they can accept or reject the evidence of any other witness so they can of an expert and determine matters for themselves. And that is the direction will be given here.

[17] And in respect of them all, except information 94/12 which I will come to, it seems to me that the jury may well be asked to make its own interpretation and what it makes of those text messages is a matter for them.

[18] I think CRN 94/12 though is in a different category. In his two tranches of text messages, the first being on the 11th and 12th August 2010, the first of them is a text from a cellphone to that of the defendant which says, "you holdin bro?" The answer is, "yep". And on the 12th August there is a text message, "holdin?" And an answer, "yep", the same term from the same phone numbers. And again on the 10th September, nearly one month later, on the same phone to the defendant's phone, "bro are you holdin?" "Yep" "Where you at?" "Home till 8 then Rehab" And then a text, "chur", I'm not sure what that means. But it seems to me that even in context that if one was to accept that "holdin" meant "do you have drugs", I doubt that this is and could be construed as any offer. It may be an indication of possession but certainly not of offering to supply. Nor can it be said what is being held; that is, what drugs. It may well be that also the Crown says that everything taken together in sequence gives an indication. But as the expert told me that in each one of these text exchanges upon which the individual charges are founded, there is a separate customer. I do not think a properly instructed jury could come to a proper decision to convict in relation to CRN 94/12 for those reasons, I doubt it is an offer and there is not proper indication of what drug it might be if it was one. So information 94/12 is discharged.

[19] So in relation then to this judgment, all charges will go forward to the jury other than those in CRN 89/12 and 94/12 and from those charges the defendant is discharged.



Colin Doherty, J