

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

CR NO's 570/16 & 571/16

CROWN

v

JACOB BERG

Hearing: 25 November 2016

Counsel: Ms Koteka for the Crown
Mr W Rasmussen for the Defendant

Sentence: 25 November 2016

SENTENCING NOTES OF GRICE J

[FTR 10:27:01]

[1] Mr Berg, you appear for sentencing on one charge of cultivating a prohibited plant, namely a cannabis plant. That offence has a maximum penalty under s 9 of the Narcotics and Misuse of Drugs Act of 20 years imprisonment.

[2] You are also charged with possession of a utensil, namely a bong, under s 13(a) of the Narcotics and Misuse of Drugs Act. That charge carries an imprisonment term of a maximum 5 years and a fine up to \$5,000.

[3] The summary of facts indicate that the offences took place or the material was found on the 7th July when the Police were tipped off and went to your residence. They found eight cannabis plants in the backyard, a bong and a clear plastic bag holding four cannabis seeds in the house.

[4] To your credit you candidly admitted the bong was yours and that you used it for smoking cannabis. You also said you had no intention of selling the cannabis and that you have been cultivating cannabis for about 2 years for your personal use.

[5] In the pre-sentence report and in the submissions of Mr Rasmussen you elaborated on that and indicated that you had only cultivated it twice in the 2 years for your own use. Nevertheless any cultivation, any possession, any use of cannabis is not tolerated in the Cook Islands.

[6] You said you used cannabis for stress release and to escape reality. The use of cannabis is not sanctioned for any reason.

[7] You are apparently a talented musician and say you have been slowing changing some of your bad habits and I note you have moved from the residence where you were doing the cultivation and now living with other flatmates. Mr Rasmussen said that you are now having received a short sharp lesson had not consumed cannabis since then and you express remorse.

[8] The Court when in sentencing in the Cook Islands has adopted the principles of sentencing as set out in the New Zealand Sentencing Act. These relate to purposes which have been outlined by both counsel. These include having to hold you accountable for the offence and for harm done to the community, to promote a sense of responsibility for this conduct in you and others and to denounce the conduct as well as deterring others from committing the same and similar offences.

[9] Mr Rasmussen spent some time going through the various principles and emphasised the need to focus on rehabilitation and in fact the small amount for personal use was not the type of offending which was the very serious type for which deterrence was required.

[10] The Cook Islands Parliament did not agree with that approach. While this is for personal use, nevertheless the charge for cultivation itself has a maximum penalty of 20 years which is more significant longer than the New Zealand penalty for similar offending.

[11] The Court of Appeal in the Cook Islands in *Marsters*¹ adopted the categories of sentencing set out in the New Zealand Court of Appeal case *Terewi*². Category 1 involves growing a small number of plants for personal use without sale intended. In New Zealand the starting point for sentences in that category range from a fine to a short period of imprisonment.

[12] The Cook Islands Court of Appeal indicated that because of the more serious penalties attached to these drug offences in the Cook Islands, penalties would be more severe. In the lower Court the judge noted the substantial differences between the maximum sentences for cultivation than New Zealand, 7 years imprisonment was a maximum but in the Cook Islands it is 20 years imprisonment. He also pointed out that these offences were insidious, that in New Zealand wages are much higher than here and it is far more tempting to get easy profits from drug dealing therefore the incentives may be higher.

[13] Cannabis is becoming more prevalent in the Cook Islands and the sentences need to ensure that people are deterred from this type of offending. The Cook Islands Courts have indicated personal circumstances in the offender play little part in the sentencing for drug offenders.

[14] In *Marsters* the Court said that deterrence assumed a greater importance than personal circumstances due to the corrosive effects on the community. Your counsel Mr Rasmussen while accepting that, pointed out that the corrosive impact on the community was much, much less when it is for own use. Nevertheless growing for your own use is often a starting point. That approach was confirmed in *Cowan* where the Court confirmed that personal circumstances play little part in determining sentence. Nevertheless they do have some relevance.

[15] As your counsel pointed out, this offence should be treated as first offence. You have some earlier unrelated minor offending which I put to one side for this sentencing and treat you as a first offender.

¹ R v *Marsters* [2012] CKCA 1 (30 November 2012) Barker P, Williams J, Paterson J.

² R v *Terewi* [1993] 3 NZLR 62

[16] Your counsel also indicated that you entered an early guilty plea. You also candidly admitted the offence. He said you have attended counselling of your own volition and I have a report. I also have a report from the Rotaianga Mens Support Group confirming that you have attended a course or you have started attending a course and are showing a good start. One of the modules is alcohol and drug use. So that is a good start.

[17] You also produced references in support of your musical talent and work ethic from a mentor who was fulsome in his comments about your talents. He also says that he has seen improvements in you presumably since this offending. I also have a reference from your employer, a local manufacturer for whom you are a designer.

[18] Mr Berg you have risked all by committing this offence. In the case of *Murchie*³ the defendant had cultivated a large quantity of cannabis, about 64 plants, for personal use and he was sentenced to a fine of \$900 and a period of probation supervision of 12 months.

[19] In all the circumstances I am of the view that this case the starting point is a non-custodial sentence. The offending is less serious than in the *Murchie* decision. Mr Rasmussen also referred to a decision of *Corey Nicholas*⁴ but was unable to provide me with a copy, I put that to one side. While that case is recorded in the list of drug related sentencing attached to the pre-sentence report as being a case of cultivation and possession of a utensil where 18 months' probation was imposed with the first 12 months on community service however I do not have the details of the offence or offender. Nevertheless the *Murchie* decision is a case that is relevant to this sentencing.

[20] You also entered an early guilty plea which is also a significant factor in my view I intend to impose a reasonable period of probation in addition to a fine.

³ Police v Murchie CR 393/15 (7 March 2016) Potter J

⁴ Police v Corey Nicholas CR 505-510/11 (8 September 2011) Weston CJ

[21] I impose a fine of \$600 which is substantial given your level of income. You are also sentenced to a term of 18 months' probation with the first 12 months to be served on community service.

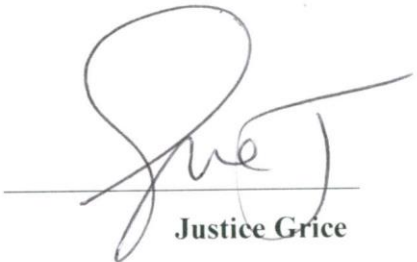
[22] The terms of the probation are:

- (a) to abstain from the consumption any involvement, direct or indirect, with prohibited drugs other than prescribed drugs;
- (b) to undertake any training or workshops directed by the probation service; and
- (c) not to leave the country without the approval of the High Court;

[23] I make an order for destruction of the cannabis material;

[24] Court costs are ordered of \$50 for each of the two informations as listed.

[25] I hope you take this to heart, you will not receive another chance.



Justice Grice