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

CR NO'S 18/16, 480/16

POLICE

v

NAPOUA BENIONI

Date: 17 March 2017

Counsel: Ms A Herman for the Crown
Mr D McNair for the Defendant

SENTENCING NOTES OF HUGH WILLIAMS, CJ

[12:17:05]

[1] Napoua Benioni, you appear here today to face sentence on two charges of cultivating cannabis.

[2] On 7 March this year you pleaded guilty to one count of cultivating one cannabis plant between October 2015 and 11 January 2016. On that occasion the Police went to your house, found a cannabis plant in a pot outside the dwelling and when you arrived you accepted it was yours. It was about 90 centimetres high. There was 10.29 grams of cannabis and it was probably about six months old.

[3] The second conviction arises out of the defended trial before a Judge alone on 8 March 2017 when you were found guilty on a charge of cultivating two cannabis plants between 1April and 20 May 2016. On that occasion a search warrant was executed on your property. Two plants – about two months old – were found partially concealed and you defended the charge partly on the basis that there was no evidence of cultivation but more on the basis that you did not know anything about the plants as you and your partner were not then living at the property but it was a property to which you had access.

[4] On each of those charges, as I mentioned to Mr McNair, and the Crown has mentioned, you are facing a possible sentence of 20 years imprisonment.

[5] The Crown draws attention to a previous charge of possession of cannabis on which you were convicted in 2013 and sentenced to 12 months probation. You have other charges as well from 2014 including contempt of Court and theft.

[6] The aggravating features – those making the offending worse – are those previous convictions and the fact, in the Crown's submission, that you were cultivating in an ongoing role for about 8 months and the second time was despite your arrest on the earlier account.

[7] The mitigation is that there is your plea but it was late.

[8] Now both the Crown and Mr NcNair have referred me to the Court of Appeal decision in *Marsters*[1], a tariff case and I will come back to that in a moment.

[9] Mr McNair has done everything possible for you and urges me not to send you to jail. He points out that you have not been previously convicted of cultivation. There is no evidence against you which I accept, of any intent to sell and no evidence of drug paraphernalia and the like. He places particular emphasis on your family's circumstances with one very young child and another on the way and the fact that you are the sole support for your family from the job that you have held for some time.

[10] Once again, as with the other cases, I need to try and sentence you in a way which would increase your accountability that will denounce the conduct in which you were involved and try to deter others. That last factor is a particularly significant factor in the Cook Islands where Parliament has increased the sentence for cultivation to a very considerable jail term. And Prosecutors and others regularly draw the Court's attention to the prevalence of cannabis offending in this country.

[11] The main New Zealand authority on cannabis offences is a Court of Appeal decision in 1999 called *R v Terewi*[2]. That set out the categories of cannabis offending and your offending is clearly in Category 1 "the growing of a small number of cannabis plants

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[1] R v Marsters, CA 3/12, 30 November 2012
[2] R v Terewi, [1999] 3 NZLR 62

for personal use by the offender without sale to any other party occurring or being intended."

[12] In New Zealand the Court of Appeal said offending in this category is almost always dealt with by a fine or non-custodial sentence. But the maximum sentence in New Zealand is only a fraction of the maximum sentence here in the Cook Islands so while the categories in *Terewi* are accepted, the suggested starting point for offending is not. And that is the view that the Court of Appeal here adopted in *Marsters*. The Court of Appeal and other cases accepted the categorisation that was set out in *Terewi* but have said that given the very considerable maximum penalty and the prevalence of offending here, the comments about starting point are inappropriate and inaccurate for the Cook Islands.

[13] Other cases which have made the comment that a starting point of a jail term is normal should be regarded as normal in the Cook Islands now and include *Ngaervaiti*[3] where a 4 to 6 month jail term was reduced to 3 months and *Rakanui*[4] where there were four plants in the *Terewi* 1 category. It was regarded as an unusual case and probation was ordered. And *Ione*[5] were for ten plants, in an unusual case, again probation was imposed.

[14] In your case, first dealing with other matters, there will be the usual order for the destruction of the plants and I will order you to pay the ESR analysis fee of $1,687.50.

[15] Coming to the sentence itself, having regard to *Marsters*, this is, as I have said, *Terewi* category 1, and I have made the comment that although in *Terewi* itself, a non-custodial sentence was regarded as normal for category 1 offences, that is not to be regarded as normal here in the Cook Islands. Jail is to be regarded as the starting point for category 1 offences.

[16] Aggravating circumstances – those making your situation worse – are that there are two charges. They are only a few months apart, the second after your arrest on the first. Despite your partner's urging you to desist from growing cannabis you did it

[3] Police v Ngaervaiti, CR 929/12, Hugh Williams J, 22 March 2013
[4] Police v Rakanui, CR 851/12, Hugh Williams J, 15 March 2013
[5] R v Ioane, CR 656/16, Grice J, 25 November 2016

again. There were three plants involved and they were in each case more than just seedlings. There had been obvious attention to cultivation of the plants.

[17] And also making the matter worse is of course your previous conviction for possession of cannabis, not cultivation admittedly but still possession of cannabis.

[18] The sentence to be imposed on you has to be reduced for your plea to the earlier count – but it was very late – and the fact as Mr McNair said, there is no evidence of sale, no evidence that you were going to do anything with this cannabis other than use it yourself.

[19] I am also prepared to make some allowance for your family's circumstances but there are many cases which say personal circumstances have almost no part to play in sentencing for drug offences.

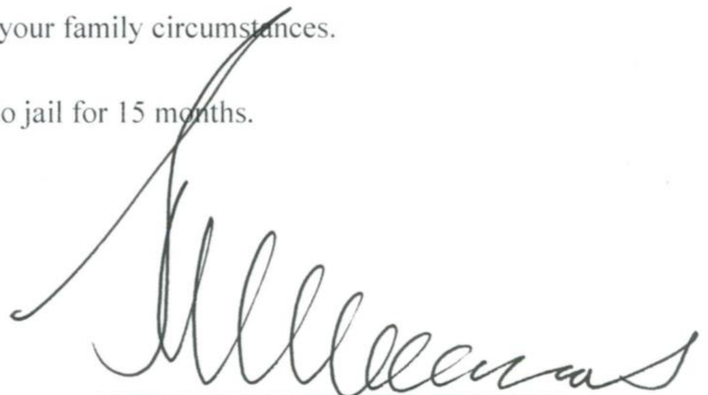
[20] So, adopting category 1 *Terewi* against the Cook Islands a maximum of 20 years, cultivation of one plant, the starting point should in my view be a year's jail.

[21] There is the previous conviction here but giving the mitigating circumstances as much part to play as I properly can, in my view the starting point for the January 2016 offence should be a year's jail, but reduced for those circumstances to 9 months jail.

[22] For the May 2016 offence committed – well, after you had been arrested for the January 2016 offence – in my view the appropriate jail term to impose on you is 15 months.

[23] I considered the question of imposing them cumulatively – one on top of the other – given the time difference between them, but consider that would be an incorrect approach given the totality principle and your family circumstances.

[24] So the ultimate result is that you will go to jail for 15 months.



Hugh Williams, CJ