IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION) **CR NO. 438/18**

POLICE

v

AROA MAEA

Date: 20 September 2018

Counsel: Mesdames K Bell & J Epati for the Crown
Mr M Short for the Defendant

SENTENCING NOTES OF THE HONOURABLE JUSTICE PATRICK KEANE

[10:05:0]

[1] Aroa Maea, you appear for sentence for importing the class C controlled drug, cannabis, from Australia on 22 November 2017, without being licenced or otherwise permitted to do so.

[2] On 9 November 2017 a package from Australia, addressed to you in Aitutaki, was examined by a customs officer at the mail centre in Rarotonga. It contained two shampoo or conditioner bottles, which contained 71.9 grams of dried cannabis.

[3] It was decided to release the package to you through the post, in the ordinary way, and then to execute a search warrant at your home after you had collected it. On 21 November 2017 you uplifted it from Bluesky, Aitutaki. I gather that a warrant was executed at your home. You denied knowing that the bottles contained cannabis.

[4] On 23 November 2017 a search warrant was executed on Bluesky to retrieve data and texts from your cell phone.

[5] Between 21 July – 21 November 2017 you were found to have had a series of coded text exchanges with a person not identified, which the police interpreted as concerning the importation of drugs in shampoo and conditioner bottles. The intercepted package may thus have been one of a series.

[6] These exchanges culminated in a series, beginning on 4 November 2017, anticipating that final intercepted package, and ending in a number on 21 November 2017 itself in one of which, summarising the others. You said you had been 'busted'.

[7] I understand that these exchanges may have influenced you to accept responsibility for your offence; the Crown accepts at the first reasonable opportunity.

Probation report

[8] Your presentence report is very complete and sympathetic. As it says, you have never before appeared for or been convicted of any offence and, this appearance apart, you have lived a full and responsible life on Aitutaki as a member of the community.

[9] At the time of your offence you were a tourism officer. You were also the sole breadwinner for your family. You have three children, the youngest aged 8 and a grandchild aged 3. Your husband will now have to shoulder that responsibility.

[10] You feel, your report says, a great sense of shame and remorse and you have isolated yourself within your community out of that sense of shame. Unfortunately, also, it may be that you and your family have received a level of harassment.

[11] You explained that you became dependent on cannabis at a time when you suffered chronic pelvic pain and the only antidote to that was morphine by prescription. You saw this as a more benign way of coping with your condition.

[12] Your report is not supplemented by a medical report unfortunately. The report writer did contact a doctor at the hospital who confirmed your own account that 2016 you had been there to see if you could receive help.

[13] Your report also says that you are valued for your work as a tourism officer but sometimes your health prevented you from working. To that extent, there is a level of support for your statement that you do suffer the pain that led to your offending.

[14] Your report does suggest that this may not have been an isolated offence. That it may have been one of a series and that you have had a habit to finance.

[15] That apart, your report recognises that for offending of this kind, in the Cook Islands a sentence of imprisonment is the presumptive sentence. No other sentence is recommended.

Sentencing principles

[16] The maximum sentence for your offence is imprisonment under the Narcotics and Misuse of Drugs Act 2004, and stands at 10 years. And two Cook Islands statutes govern what sentence within that maximum your particular offence warrants: the Criminal Procedure Act 1980-81 and the Criminal Justice Act 1967.

[17] In sentencing you, I am assisted also by the Sentencing Act 2002 (NZ), I must impose on you a sentence which denounces and deters you, holds you accountable for the harm you have done – and there is community wide harm to this form of offending –, induces you to accept responsibility, as to which there is no issue, and assists you in your rehabilitation.

[18] I must take into account, equally, the gravity of your offence, and its seriousness, and take into account as well what is known as the effect of this form of offending on the community if on no particular person.

[19] In *R v Marsters* (2012) CKCA, [42]-[45], the Court of Appeal confirmed that the Narcotics and Misuse of Drugs Act 2004 condemns emphatically importing, cultivating and dealing in cannabis. Those offences attract, in some instances, higher maxima than those in New Zealand.

[20] On sentence, the Court said, those higher maxima must be reflected in the sentences imposed. Personal circumstances, as it said earlier in *R v Mata*, must give way to the principle of general and personal deterrence.

[21] The Court endorsed the two categories into which importers of cannabis were divided in the New Zealand case, *R v Ho* (2005) CRI 2005-092-000567, with starting points to reflect the higher maxima in the Cook Islands.

[22] Category 1 offenders – the instigators, masterminds, prime movers and controllers – attract starting points here in the range 5-9 years imprisonment. Category 2 lesser offenders, essential to the enterprise, attract starting points in the range 3-6 years imprisonment.

[23] In *R v Blake*, CR 106-107/13, Weston CJ took a four year starting point for the importation of 507 grams of cannabis, the amount apparently found in the defendant's possession, which also involved the separate offence of possession for supply. 507 grams, Weston CJ said, is 'a very large amount of cannabis'.

[24] In that case, as in yours, there was an issue why the offending had taken place. The offender, it appears, and as Weston CJ accepted, relied on cannabis for pain relief and although the Chief Justice took a four year starting point, in the discounts that he gave his ultimate discount, 6 months, was on account of the issue of pain.

[25] In *Police v Wachter* however, a decision of the Court of Appeal given on 3 May 2018, the Court reaffirmed the principle stated in *Marsters* and before that, *Mata,* that the principle of general and specific deterrence is paramount on sentence for drug offending and personal circumstances even including pain relief are of second order. As the Court said, at paragraph [22], they can have little effect on the Court, more especially when there is no medical report.

[26] In that case, which involved cultivation on a significant scale, the sentencing Judge had imposed a community sentence. On the Appeal the Court of Appeal substituted a term of 6 months imprisonment.

[27] That case is important then for this point. A sentence within the community will only be entertained in the most exceptional circumstances and none have been identified in any case of which I am aware. The ordinary principle is that a sentence of imprisonment must be imposed.

[28] These cases, *Marsters* in particular, concerned offending which was on a significantly larger scale than yours. The only analogous case to yours, which the Crown has identified, is *R v Valu* [2013] CKHC 71, where Grice J took an 18 month starting point for possession for supply of 79.22 grams of cannabis.

[29] Importation and possession for supply attract the same maximum penalty, 10 years, but, as the Crown says, the tariff cases set higher starting points for importation. That said, the cases are still comparable in a broadly factual way.

[30] Your offending may not have been isolated, but just as clearly the offence in *Valu* was not an isolated offence. There were related offences, possession of instruments and the like, which demonstrated that to be so.

Crown and defence submissions

[31] The Crown contends for a sentence of imprisonment and submits that there are two features aggravating your offence. The cannabis intercepted, 71.9 grams, is well above the presumption for supply. And the text traffic could suggest you intended to supply at least one other person, whether or not for reward.

[32] The Crown contends, given question whether you were indeed a supplier, and the amount of cannabis anticipated, that you lie in *Ho* category two and attract a starting point between 3 to 6 years imprisonment, subject to any starting point taken in any more closely comparable case, which is why I was supplied with *Valu.*

[33] The Crown accepts that you are entitled to a full discount on account of your early plea, 33%, and to the benefit also of your otherwise good character and the absence of any previous conviction.

[34] Your counsel contends that if it were at all possible you should be sentenced to a community based sentence, essentially for reasons, which I have canvassed in the presentence report.

[35] Your counsel emphasises, essentially, as I have already outlined, first the full and complete and responsible part you have played as a community member in Aitutaki and secondly, the chronic pain that led you to offend.

[36] He also emphasises that you co-operated fully with the police when first arrested and that you entered a plea, as the Crown accepts, at the earliest opportunity. Finally, he emphasises, as your report itself says, your great remorse and the effect that this offence has had on you, your family and the community.

Conclusion

[37] I am obliged as a matter of law to impose on you a sentence of imprisonment. The importation of cannabis into the Cook Islands is a serious offence in itself. The quantity of cannabis on this occasion was in excess of the supply presumption. This appears not to have been an isolated event.

[38] At the same time, I accept you are not to be equated with those who import for profit. There is nothing commercial about your offence. I accept, even although there is no medical report, that chronic pain was the significant cause of your offending. It does not excuse your offending, as you know, but it does explain it.

[39] In sentencing you, I must take a starting point, having regard to those in category 2, but fixed more exactly having regard to the most closely comparable case; and as I have said I regard *Valu* as most nearly in point. I take a starting point for your offence, not within the category 2 starting range, but 18 months imprisonment.

[40] From that, I allow you a full credit for your early plea, six months as happened in *Valu.* I also allow you a discount for your absence of previous convictions and your prior good character and to give you such recognition as I am

able within the law for the reason why you offended in the first place. Accordingly, I give you a further discount of 6 months.

[41] The effect is that I am obliged to sentence you to imprisonment for 6 months. There will be an order for destruction of the package.

Patrick Keane, J