IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 2/18
(CRN 552/17)

IN THE MATTER	of an appeal against conviction and sentence under sections 55(1) and 67(2) of the Judicature Act 1980-81
BETWEEN	**POLICE**
	Appellant
AND	**VILMA WACHTER**
	Respondent

Coram: Williams P
Barker JA
Paterson JA

Hearing date: 2 May 2018

Decision: 3 May 2018

Counsel: Ms K Bell & Ms A Herman for Appellant
Mr W Rasmussen for Respondent

ORAL DECISION OF THE COURT DELIVERED BY BARKER, JA

[09:31:16]

[1] This is an appeal by the Solicitor-General under s 55(1) of the Judicature Act 1980-81 ("the Act") against a sentence of a fine of $2000 and 18 months' probation including 9 months community service imposed on the Respondent by Potter J on 23 March 2018 for one count of cultivating cannabis.

[2] The Solicitor-General appeals on the grounds of inadequacy of sentence under s 67(2) of the Act.

[3] Dealing with first a submission that there is no jurisdiction made by Mr Rasmussen yesterday. The basis was that the wording of the section is such that it precludes an appeal by the Crown where a sentence has been imposed after an early plea of guilty and before a 'trial'. The section provides:

> "the Solicitor-General may appeal as of right against the adequacy of any sentence imposed by a Judge of the High Court, whether imposed after a trial or on an appeal from a Justice or Justice of the Peace under s 76."

[4] Mr Rasmussen submitted that there had been no 'trial' because the Respondent pleaded guilty at an early stage before any evidence was given pursuant to s 61 of the Criminal Procedure Act. He said that therefore there was not a 'trial' because there had been no evidence heard by the Judge nor a verdict given; neither was it an appeal from a Justice of the Peace.

[5] The Court cannot accept that argument. The section may well have been drafted with a little more felicity but it does say that the Solicitor-General may appeal against the adequacy of any sentence imposed by a Judge. It goes on to say whether the sentence was after a trial or an appearance before a Justice. That does not matter because the word 'any sentence' seems to cover the situation where a person pleads guilty either on arraignment or in the course of a trial, as quite often happens.

[6] In any event the word 'trial' in s 55(1) of the Act must mean the whole of the process for a offence which is required to be dealt with by a Judge rather than by a Justice of the Peace. If one looks at the Criminal Procedure Act, although there is no definition of the word 'trial' that word appears frequently in all sorts of situations. It can clearly be inferred that it refers to the whole process of an appearance of a defendant before a Judge on a charge such as the present.

[7] So, therefore, we conclude that the Court has jurisdiction. There is no logical reason for excluding sentences which have been the result of a early guilty plea and we find that there is no such jurisdictional barrier to our considering the appeal.

[8] The facts of this case were set out in the Sentencing Notes of Potter J and there is no real argument as to the facts.

[9] On 17 August 2017 the police executed a search warrant on the Respondent's husband at her family home in Arorangi. The building has four levels. The Respondent and her husband lived on one, and two of her sons each occupied another level: a second level consisted of community facilities such as kitchen and amenities.

[10] As a result of the search, the police found 50 cannabis plants on the balcony of the Respondent. They were inside 20 litre buckets, medium sized pots with potting mix, soil and manure etcetera.

[11] Police also found utensils, water hose, liquid spray etcetera – all items used for the cultivation of cannabis.

[12] The plants were fifty in number and ranged in height from 1 to 73 centimetres. The Police estimated that the plants had been planted six weeks to four months prior to the search.

[13] The Respondent did not make a statement to the police: she was subsequently charged with cultivation of those fifty plants. She is 54 years of age and has not previously appeared before any Court. She had pleaded guilty at an early stage of the proceeding.

[14] The Police also found additional cannabis plants at other levels of the home. Two of the sons of the Respondent were sentenced to non-custodial sentences in relation to these plants which were fewer in number to the plants that had been found.

[15] The Respondent's husband, who is not in the Cook Islands at the moment, is an American citizen who left for the United States and according to counsel has not returned. He went there allegedly for an eye operation.

[16] The sentencing guidance for the offence of cultivation of cannabis has been expressed by this Court and it so happened with the same membership of the Court as sitting on this occasion, on 30 November 2014 in the case of *Marsters*. The Court laid down guidelines for sentencing previous drug offences in the High Court had received what the Court considered rather too lenient sentences; little regard appeared to have been made to the very high maximum sentences in the Cook Islands which are considerably higher than they are in New Zealand.

[17] The Court has acknowledged in *Marsters* that the Court must faithfully heed the message sent by the Cook Islands Legislature stipulating the maximum sentences which for this offending is a term of imprisonment of 20 years. Even though counsel in *Marsters* suggested that this is rather a 'blunt instrument', the Court noted that regard had to be had to the economic and social costs of lengthy terms of imprisonment especially the impact on offenders families who could be left with minimal resources while a breadwinner was incarcerated.

[18] However that is a matter for the legislature and not for the Court which, following New Zealand precedent, said that little regard has, can be placed on the personal circumstances of offenders. We note here also that it is unfortunate that in a small economy such as the Cook Islands there are fewer avenues available for the rehabilitation of drug offenders.

[19] The appellant in this case had said that she was taking cannabis for medicinal reasons since she is said to have been suffering from arthritis. There was no medical evidence given to the Court. There is no exemption for cultivation of cannabis for medical use in this country, nor is there in few other countries. There is a tendency to decriminalise medical or small use of cannabis particularly in some states in the United States. However that is not the situation in the Cook Islands and this Court must accept the maximum penalties set by the Cook Islands legislature as a guide when it imposes sentences in this case.

[20] As was noted in *Marsters*, some Judges in the High Court prior to the *Marsters* decision had seemed to disregard the high level of imprisonment set by the Cook Islands legislation. And in the cases collected for the Court by the probation officer there were fewer such cases after *Marsters*. One which has to be noted is the decision of the same sentencing Judge as in this case, that is *Police v Murchie*, decision of 27 March 2016 where an offender who had 64 cannabis plants was sentenced to a fine and probation instead of imprisonment. In her Sentencing Notes the Judge did not refer to *Marsters* but to New Zealand Court of Appeal decisions.

[21] But to a point of differentiation is that, in that case, there was evidence that the defendant had been attending counselling; the probation report said that he was drug free and was very positive about his involvement in the community. The probation report in that case caused the Judge to pause, just as the probation report in this case that offered some reason for

pausing. The probation officer said that although the Respondent was cooperative the probation officer got the feeling at times that she withheld information and was not so forthcoming: that her apologies to the Court appeared to be based more on awareness that what she did was unlawful resulting in her being caught. The "timely" departure of her husband at a time when she would need him most appeared to the Probation Officer to be somewhat suspicious. We share that feeling of unease but since the statements are no more than speculation or suspicion the Court can take no regard of them.

[22] Nevertheless, personal circumstances of this Respondent or any other respondent facing cannabis cultivation charges can have little effect on the Court. We note that there are no medical reports or evidence as to the Respondent's condition and as to why she feels obliged to take cannabis.

[23] In her sentencing remarks Potter J did refer to the *Marsters* decision. She referred to the fact that personal circumstances play little part in a sentencing and said:

> "I have thought long and hard about the sentence I should impose upon you Mrs Wachter. I have to say at the age of 54 years I am reluctant to send you to prison. But it is quite a stretch for me to keep you out of prison given the maximum sentence of 20 years that applies to this offending and the repeated warnings from the Court that a jail sentence will follow this type of offending.
>
> Nevertheless, in all the circumstances and taking into account your early guilty plea, your cooperation with the police and the fact at the age of 54 you come to the Court as a first offender, I do not intend to impose a custodial sentence."

[24] This Court considers that the Judge did not take sufficient account of the precedent, which was binding on her of the *Marsters* case, and placed too much emphasis on the personal circumstances of the offender. The offending is certainly at the top end of category 1 if one accepts the New Zealand classification.

[25] The principles on an appeal of this nature are, first, that the sentence being appealed must be clearly excessive. It does not matter if it were just more lenient in what the Court itself might have imposed had it been dealing with the offender. The second principle is that if such an appeal is allowed, a term at the lower end of the sentencing range is usually applied.

[26] We feel no joy in imprisoning a person of 54 years who has had no previous convictions, but not to do so in this case would negate all that was said in the *Marsters* case which clearly explains the law of the Cook Islands. Until such time as the legislature changes the maximum penalties, *Marsters* has to be good law in the Cook Islands.

[27] Such high penalties are not necessarily uniformly regarded as appropriate throughout the world but we have a duty to uphold Cook Islands law despite a more lenient approach in New Zealand. We must note that 20 years maximum penalty is stated, no doubt because the Legislature in the Cook Islands saw the scourge of drug addiction moving into these islands. Despite the high penalty being a bit of a 'blunt instrument' a high maximum penalty is nevertheless an indication to the population that drug dealing and drug cultivation cannot be tolerated and will be punished by imprisonment.

[28] So applying the most lenient sentence as is possible for us, instead of the 18 months which might otherwise have been imposed, we impose a sentence of 6 months imprisonment plus a year's probation.

[29] We do reduce the period from 18 months to 6 months, not just because of the early plea of guilty but in deference to Potter J's lenient approach both to the present Respondent and in the *Murchie* case. But the sentence imposed was clearly inadequate and we would be failing in our duty if we did not allow this appeal.

[30] So the substituted sentence is 6 months imprisonment together with probation for one year on terms, ie. those which were applied by Potter J, namely that the Respondent is:

a) to abstain from the consumption of or any involvement direct or indirect with prohibited drugs other than prescribed drugs;

b) to undertake any training or workshop counselling as directed by the Probation Service;

c) not to leave the country without the approval of the High Court.

[31] The orders made by the Judge for the destruction of property and cannabis and materials still stand but we will not impose any requirement to pay costs.

[32] So unfortunately we have to allow this appeal. We do so with reluctance but in accordance with our duty under the Cook Islands law which we are sworn to uphold, we must do so.

Barker JA