

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

CR NO'S 258 & 286/11

POLICE

v

WICHMAN, VICTOR

Hearing: 16 December 2011
Counsel: Ms Henry for the Crown
Mr George for the Defendant
Sentence: 16 December 2011

SENTENCING NOTES OF GRICE J

[1] Mr Wichman you are facing and you have pleaded guilty to two charges. First that on the 24th November 2010 at Rarotonga you sold a class C controlled drug namely cannabis plant. That is a charge under s 6(1)(e) and (3)(b) of the Narcotics and Misuse of Drugs Act for which there is a maximum period of imprisonment of ten years. The second charge to which you have pleaded guilty is a charge of cultivating a prohibited plant namely cannabis and that is an offence under s 9(1) and (2) of the Narcotics and Misuse of Drugs Act for which the maximum term of imprisonment is twenty years. They are very serious offences.

[2] Ms Henry for the Crown read the summary. The outline was that sometime between January and December 2010 you obtained some seeds, that you germinated these seeds at home, and managed to grow two cannabis plants into maturity. Once the plants were fully grown you harvested cannabis leaf and buds from the plants by cutting them off using scissors and the harvested plant material was then dried for several days. When the cannabis was dry you sorted the cut cannabis leaf and bud into individual lots or tin-foiled packages often referred to as 'tinnies' which you offered for sale. Then on the 22nd November there was a transaction in which an undercover policeman spoke to you about the cannabis on sale and you subsequently sold him some cannabis on the 24th November. You arranged to meet the undercover agent at the playground in Avarua by the markets and that is where the transaction took place. You told the agent to come to your car, when the constable got into the vehicle, you reached into the car and pulled out two cannabis tinnies. You handed them to the undercover policeman and in exchange he gave you \$100 as payment for the cannabis, then you left. And I am informed that the amount of cannabis involved in the tinnies was very small, about 9 grams.

[3] The Crown has reviewed the issues relating to sentencing in the Cook Islands. Court set out the principles of sentencing which incorporates deterrence, accountability for harm done, protection for the community, and denunciation of the offending conduct.

[4] In addition the Crown says that cannabis offending in the Cook Islands has been on the increase. I have been referred to the case of the *Police v Tina Upu* (CR 248/2011) where Justice Hugh Williams indicated that in relation to a possession case that the previous approach to sentencing on cannabis offences should now be stiffer to reflect the community concern. In that case he suggested that a starting point of a month in jail for each hundred grams of cannabis in possession might be a rule of thumb but not a hard and fast rule and each case should be looked at in its entirety. In that case he started out with a short term of imprisonment of perhaps a month and reached taking into account a number of factors, a fine of \$750, and probation of 12 months with 6 months by way of community service. In particular there was a guilty plea in that case which was recognised.

[5] The Crown also referred me to the New Zealand Court of Appeal decision in *R v Terewi* (CA 113/99) which dealt with offending against the Misuse of Drugs Act 1975. This includes offences equivalent to those under that we are dealing with under the Narcotics and Misuse of Drugs Act in the Cook Islands. In that case the Court of Appeal divided cannabis cultivation into three broad categories. First, growing for personal use. Any sale or its supply to others on a non-commercial basis. In this case the penalty would be invariably be a fine or other non-custodial sentence, although in more serious cases or persistent offending, period of detention or even a short prison term. In Category 2, cases of small scale cultivation for a commercial purpose, the starting point is generally between two and four years but where sales are infrequent and of limited extent a lower starting point may be justified. In category 3, the most serious class which is large scale commercial growing, the starting point is generally four years.

[6] I have also considered the points raised by your counsel Mr George. And his first point is that cases such as *Terewi* should not be rigidly opposed in the Cook Islands because the Cook Islands is a different jurisdiction, there are different issues, and in any event the New Zealand drug problem is worse than the Cook Islands. I am not entirely sure that I would accept that without evidence but nonetheless I get the thrust of the submission. He submitted that you weren't a serious user, that you sold but then stopped, that the sale was of only two tinnies of 1 gram each, that there was an early guilty plea, no previous convictions, and that you had a very supportive probation report.

[7] The report reflects or attaches a number of references, one from the Minister of Foreign Affairs and Immigration dated 16th December 2011, saying that you come from a good and highly respected family and is his pleasure to provide a personal reference and wish him well. It is not entirely clear whether the Minister was aware of the reason for the reference. The second letter of reference is from Ray Solomon of Raro Signs saying that you work there and you have been found to be dedicated, hardworking, and diligent in all aspects of work and have become a great asset to the company. And finally from Karla Eggleton who has known you all her life and she also says that she can recommend your character, integrity, and principles, and she does not take putting her name to this reference lightly. As part of the general

background I take into account the fact that you are a good employee, you are of generally good character, and in you are in employment earning \$250 per week.

[8] While I am required to consider the sentencing, I take into account the sentencing principles that the Crown has outlined. I am required to pass a sentence that punishes you for this offence and also deters others from similar offending. The offence is to be denounced, but the sentence must reflect the gravity and seriousness of it and hold you accountable for it.

[9] As I have outlined, cannabis offences particularly cultivation and sale are to be treated more seriously now. I must take into account the fact of your background in the circumstances, cooperation with the police, a very early guilty plea, the fact that you are in employment and good references, and impose the least restrictive sentence that is appropriate in the circumstances, and also consider whether there is an option which would contribute wholly or partly to rehabilitation.

[10] In the *Terewi* decision, the Court of Appeal suggested that this type of offence which is very small scale cultivation for commercial purpose for the object of deriving a profit, has a starting point for sentencing generally between two and four years imprisonment.

[11] Your counsel has urged that this was a one-off and I should take that into account. Nevertheless it seems clear that my starting point must be a period of imprisonment. This was not a large scale operation or even a medium scale operation. Court seems to have been a very small scale operation, nevertheless it was cultivating cannabis for the purposes of sale. The number of plants involved seems to be two which is a very small number.

[12] The Court of Appeal recognised that there is no exact demarcation between the cases in *Terewi* and the serious end of one might merge into the lighter end of another category.

[13] I also take into account Mr George's comments that this is the Cook Islands. While I do not have any evidence before me, the facilities and options for sentencing

are very much more limited than in New Zealand. The amounts received in this case were not huge in the transactions, in the present case it was \$100. Although you apparently did tell the undercover agent that you had heaps for sale and would sell to anyone.

[14] I must as a starting point start with a term of imprisonment. So I am starting with a term of imprisonment of four months. From that I deduct the early guilty plea, taking the term down to 80 days or 2.6 months. So off that balance of 80 days I would take a further 50 days for mitigating circumstances, first appearance, stable home, you have a job, and good references.

[15] That would leave a period of approximately 30 days or a month left of which you served already two weeks. So having reached that situation of two weeks, this is not a scientific approach, I can do the calculations but at the end of the day I must stand back and look at the totality of the offence. In terms of the ones we have heard this morning, is one is at the more serious end, but in the circumstances in bringing to bear that the fact that the Cook Islands is different from New Zealand, the totality of the situation appears to be that instead of imprisonment, the prisoner should serve a term of probation. In that respect I note that the suggestion by both Ms Henry and Mr George was 12 months probation with 6 months of that as community service.

[16] I also feel it appropriate to impose a fine in this case and I impose a fine of \$300.00, Court costs of \$30, and an Order for destruction of the material.

MATTER RECALLED

Mr Wichman, I sentence you on the cultivating of the prohibited plant namely cannabis to:

- (i) 12 months probation, 6 months community service,
- (ii) \$500.00 fine,
- (iii) \$30 Court costs, and

(iv) an Order for destruction of the material.

[17] On the charge of selling a class C controlled drug I sentence you to:

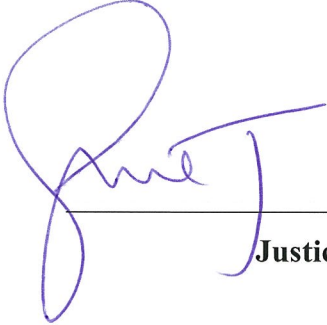
(i) 12 months probation, 6 months community service,

(ii) \$300.00 fine,

(iii) Court costs of \$30,

[18] The probation term to be served concurrently with the term already imposed, with a further fine of \$300 on that charge.

[19] There are just the two charges.



Justice Grice