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

CR NO. 5/2022

POLICE

v

GRAY RONALD PITOMAKI TURIA

Hearing: 2 February 2024 (via Zoom)

Counsel: Ms J Crawford for Crown
Ms M Tangimama for Defendant

Sentence: 2 February 2024

SENTENCING NOTES OF THE HON. JUSTICE GRICE

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[1] Mr Turia, following a Judge alone trial, you were convicted on 19 December 2023 on one representative charge of offering to supply a Class C Controlled Drug, namely cannabis, between 5 February 2021 and 15 December 2021 at Aitutaki.

[2] Particulars were that on nine occasions on various dates offers to supply were alleged to have been made. I found seven of those particulars were made out. Three of those occasions were where you had offered to supply cannabis directly to the person inquiring, and four were instances where you offered to supply but the offer was made by you as an intermediary; that is, to put the parties to the buying and selling in contact with each other.

[3] The particulars which I found were made out and upon which I was satisfied beyond reasonable doubt were:

(a) 25 April 2021, an offer to supply directly;

(b) 7 May 2021, an offer to supply directly;

(c) 14 May 2021, an offer to supply as an intermediary;

(d) 16 September 2021, an offer to supply as an intermediary;

(e) 29 November 2021, an offer to supply as an intermediary;

(f) 10 December 2021, an offer to supply directly; and

(g) 15 December 2021, an offer to supply as an intermediary.

[4] Mr Turia, you were charged as part of a larger drug operation on Aitutaki known as, "Operation Tavake". It is accepted by the Crown that you were a minor participant, there is no allegation of any commerciality in your offers to supply, and your role was largely as an intermediary passing on information to friends and acquaintances as to where cannabis could be sourced.

[5] In relation to the allegation on 10 December 2021, you admitted providing cannabis to a friend was in a wheelchair or paralyzed and could not source it himself. In the incident on 5 April 2021, you offered to share cannabis with someone.

[6] The purposes and principles of sentencing are set out in the New Zealand Sentencing Act 2002, and have been adopted in the Cook Islands.

[7] In this case the Crown submits the relevant purposes would be to hold the offender accountable for the harm done by the offending, to promote in the offender a sense of responsibility for, and acknowledgement of that harm, to denounce and deter, and to assist rehabilitation and reintegration. The principles also require the taking into account of the gravity of the offending, the seriousness of the offending, the

desirability of consistency in sentencing, and the imposition of the least restrictive sentence available in the circumstances.

[8] As the Crown points out, the sentencing methodology adopted by the Court of Appeal in *R v Kamana*[1] applies: that is to calculate the starting point, incorporating all the aggravating and mitigating features of the offending; then, secondly, to incorporate all the aggravating and mitigating factors personal to the offender, together with any guilty plea discount, which should be calculated as a total percentage to the starting point, and come to an end sentence.

[9] The Crown pointed to a number of relevant authorities. The recent decision of the Court of Appeal in *R v Schofield*[2] is of particular assistance. That case involved another defendant who was apprehended as a result of Operation Tavake. The Court of Appeal confirmed new sentencing categories for the offering of supply of cannabis offending as follows.

(a) The first category, the bottom level of seriousness, an act of supply isolated and motivated by a friendship or some other non-commercial purpose, and where no money changes hands.

(b) Category 2, midlevel of sentencing or seriousness, supply taking place on more than one occasion and for which payment was made but not for a profit.

(c) Thirdly, the highest level of seriousness, sales for a profit with culpability being ultimately determined by the extent and quantity of the dealing.

[10] The maximum term of imprisonment for the offence is two years. In *R v Schofield* the Court of Appeal determined that a sentence of seven months' imprisonment was appropriate in relation to offending, which it described as a small time dealing operation selling cannabis for profit. The full discount was given in that

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1 *R v Kamana* CA 504/2022, 28 June 2022.
2 *R v Schofield* CA 1533/23, 17 November 2023.

case for a guilty plea, as well as a discount for 12.5% for personal circumstances and good character. This was considered reasonable by the Court of Appeal. Mr Schofield had no previous drug convictions and the personal circumstances, as set out in the sentencing notes, refer to Mr Schofield's stable relationship, having five children, and being a partner in a family business. These factors were referred to in the High Court decision of Doherty J.

[11] At a 12 month start point the High Court Judge noted this was at the very lower end of the available range of imprisonment which he said, in that case, was 12 to 15 months. A credit of one-third was given for the guilty plea and a one month discount for personal circumstances being unusual family circumstances, not outlined in any detail, were given. A term of seven (7) months' imprisonment was imposed.

[12] The Crown in this case points out that all the other offenders in the Operation who were apprehended have received sentences of imprisonment. They all pleaded guilty.

[13] Mr Turia, you were the least culpable of any of the offenders. There were no sales of cannabis, nor apparently any benefit to you as a result of your offers to supply. You are a cannabis user yourself and you seem to have been driven by wanting to help your friends and acquaintances. However, despite this going to the gravity of the offending it does not affect the fact that your actions assisted the main offenders who were supplying the drugs.

[14] The Crown pointed to *R v Iaone*[3], a decision of Doherty J. The Judge noted that Mr Ione, who was also apprehended in Operation Tavake, was a lower end offender. It is not clear whether his offers were for sale, but the tenor of the Judge's comments indicate that there was some commerciality in that offending. The Defendant there pleaded guilty. A starting point of ten (10) months was taken, which included an uplift for firearms charges.

[3] *R v Iaone* CA 49, 58/2022. 28 September 2023.

[15] Mr Iaone had a 2016 conviction for cultivating cannabis. The final sentencing, taking into account the full guilty plea discount, was seven (7) months' imprisonment.

[16] In this case the Crown submits that a start point and end point for sentence should be six (6) months imprisonment. It points to aggravating factors in the offending being premeditation and planning, noting that all drug offending involves a level of premeditation and planning, sophistication, and commerciality. It says that there were seven occasions of offers to supply over 11 months and that drug codes were used in the text messages.

[17] The Crown accepts there was little to no sophistication nor commerciality involved here. Despite money being exchanged, there is no evidence to suggest you made a profit from your involvement nor from sharing your own cannabis with others.

[18] The Crown points to the fact that you had the role of an intermediary by putting associates in touch with dealers or otherwise assisting in deals. You also shared your own cannabis with others on occasions. The Crown accepts that, despite you being charged as a result of the Police investigation in Operation Tavake, you were not involved in the wider drug operation.

[19] The Crown submits there are no mitigation features in the offending. It says the offending falls within in the lower end of Category 2 and upper end of Category 1 of *R v Schofield*.

[20] Your counsel, Ms Tangimama, adopts the Probation Service recommendation of 18 months' probation/supervision, with the first six months to be on community service. Ms Tangimama submits the offending involved no hint of commerciality, and you were just helping out friends.

[21] It appeared from the evidence that you had not realised that you were offering to supply in a criminal sense, when you passed on information to friends and others as to where cannabis could be found. However, as is the usual rule, it is no defence not to know the law. I note that explanation does not apply where you actually offered to supply friends and did so directly, such as the case of your disabled friend.

[22] Ms Tangimama referred to a number of older authorities, including *Wachter*[4], in which Potter J did not impose imprisonment for charges of possession of cannabis, possession of a utensil, and possession of 134 cannabis seeds; but fined the defendant $900 and imposed 12 months' probation, the first six months on community service. In that case the maximum penalties were very substantial, involving 20 years' and five (5) years' imprisonment. In the case of *George Tua Nicholls*[5], I considered the position of the defendant in an Operation known as Operation Eagle, where the defendant had entered a guilty charge of selling a Class C Controlled Drug, namely cannabis. In that case I imposed a sentence of 12 months' probation and three (3) months on community service. That was a charge which carried a maximum term of imprisonment of ten (10) years. In *R v Estall*[6], Isaac J. sentenced the defendant on three charges of selling a Class C drug, which carried a maximum penalty of ten (10) years' imprisonment. Three charges of a possession of a Class C drug, the maximum period of ten (10) years, and one charge of possession of a utensil, namely a bong, which carries a maximum penalty of five (5) years and $5000 fine. In that case Isaac J sentenced the defendant to 18 months' probation, 12 months' community service and a fine of $500 despite the seriousness of the charge, which carried a term in total of 25 years' imprisonment.

[23] However, I accept the Crown's submission that most of these cases were delivered before *Masters* and related cases where the Court of Appeal emphasised the need to reflect the view of the Cook Islands Parliament as to the seriousness of the cannabis offending in sentencing.

[24] Ms Tangimama, in relation to your personal circumstances, notes that your children are presently between 17 years and 5 years of age. You support your wife and your six children. Ms Tangimama produced letters of support from Harena Kiikoro, your wife, Blondie Gray; and Junior Vareka and Regina Potini.

[25] Your offending is at the higher end of Category 1, in my view. An important factor in an assessment in this case is the lack of commerciality involved in that category. While your lack of awareness that your intermediary assistance was criminal

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[4] *Wachter*.[2018] CKHC 8
[5] *George Tua Nicholls* [2011] 21
[6] *R v Estall,* [2012] CKHC 55

does not mitigate the offending; it does illustrate the naivety and lack of sophistication or intention to break the law on your part. I do not consider the incidents are numerous, and appear to be random offers often precipitated by the inquiries of others.

[26] The Crown submits the relevant purposes of sentencing; in particular, are to hold the offender accountable, to promote a sense of responsibility, and to denounce and deter offending of this nature. I agree with that; but, in addition, there must be consideration of assisting rehabilitation and reintegration. The principles of sentencing require taking into account the gravity of the offending and its seriousness; and, as the Crown has emphasised, there is a need for consistency. At the same time, the imposition of the least restrictive sentence available in the circumstances is appropriate.

[27] In this case I have concluded that by a close margin imprisonment is not appropriate. The Crown have accepted the offending is at the lower scale, and there are no signs of any commerciality – which were factors particularly mentioned in relation to the other defendants in Operation Tavake.

[28] It compares to the more serious offending in *R v Schofield*, which involved commerciality and profit. I also bear in mind that the maximum term of imprisonment for the offence is two years, and while the cases in Ms Tangimama's submission are probably now not directly relevant, given the Court of Appeal directions in *R v Marsters,*[7] they were in relation to crimes with significantly higher maximum terms of imprisonment.

[29] An important factor is the total lack of commerciality. In general terms, you were very naïve. I consider that in view of the degree of criminality involved in this offending and given the maximum period of imprisonment is two years, a non-custodial sentence is appropriate and is the least restrictive sentence available in the circumstances.

[30] This is reinforced here given the personal factors which should be taken into account to some extent. The personal circumstances are supported by the references,

[7] *R v Marsters* [2012] CKCA 1 (30 November 2012)

which supply a basis for a good character factor. In addition, you have no previous convictions. You are a good father and provider, and you presently have employment on Aitutaki.

[31] The Probation Report provides me with the information and background that you were a good student at school, and the Report suggests you could have gone further in education had there been the family funding to do so.

[32] The Crown have referred to *R v Schofield* as authority for the fact that a discount is not appropriate for lack of previous convictions. However, the Court of Appeal did not say a discount for personal circumstances was never to be given in drug offending; rather, it quoted New Zealand authority to the effect that it was not necessarily to be taken into account. And, of course, in *R v Schofield* personal circumstances were taken into account.

[33] In this case I consider a discount for good character is appropriate. You are, of course, not entitled to a guilty plea discount as you did not plead guilty. However, your family obligations are relevant here. The New Zealand Courts have recognised the severe consequences on children on imprisonment of their parents; I refer to *R v Hughes*.[8] That is a factor that I must consider as well as the support you provide to your wife and six children.

[34] Sentencing is not a mathematical exercise; at the same time it must be carried out on a principled basis and take into account the principles and purposes of sentencing. This includes consideration of parity, as the Crown has submitted. However, at the end of the day, it requires standing back and considering the sentence as a whole in the circumstances.

[35] In this case, taking into account the principles, the seriousness of the offending, and the personal factors, I consider a significant term of probation is appropriate. Denunciation, deterrence and accountability, in my view, are met by that sentence, which is the least restrictive penalty in the circumstances.

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[8] *R v Hughes* [2023] NZHC 2956.

[36] Mr Turia, you may stand. I sentence you to two years' probation supervision, the first six months to be served on community service, with the additional conditions imposed:

(a) Not to consume or purchase illicit drugs;

(b) To attend any workshop or counselling directed by Probation Services; and

(c) Not to leave the Cook Islands without the approval of the High Court.