

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

CRI 2008-088-4116

THE QUEEN

v

THOMAS STEPHEN HEREMAIA

Hearing: 25 March 2009

Appearances: M B Smith and D Coleman for the Crown
K Johnson for the prisoner

Judgment: 25 March 2009

SENTENCING NOTES OF STEVENS J

Solicitors/Counsel:
Crown Solicitor, PO Box 146, Whangarei 0140
K Johnson, PO Box 4520, Kamo, Whangarei 0141

[1] Thomas Stephen Heremaia, you appear for sentence today having pleaded guilty to two counts of selling the Class C controlled drug cannabis. The charges are brought under s 6(1) and (2) of the Misuse of Drugs Act 1975 and the maximum penalty that I could impose is eight years' imprisonment. So these offences are serious.

[2] For the purpose of your sentencing today, I have been greatly assisted by helpful written submissions from your counsel Mr Johnson as amplified in his submissions today, and thorough written submissions on behalf of the Crown. There is also an updated pre-sentence report, called an addendum report, dated 17 March 2009, in which the writer refers to some possible conditions were the Court minded to impose a sentence of home detention.

Background facts

[3] You sold cannabis to a Police Officer in the course of Operation Shenzie. The Police Officer was operating undercover as "Tony" and he purchased drugs from you at your home in Whangarei on 2 July 2008 and again on 7 August 2008. On each occasion he bought two tinnies from you for the sum of \$40.00. When spoken to by the Police you admitted to regularly selling cannabis but you said that it was your sister's operation.

Personal circumstances

[4] You are a single man aged 46 years. You have children but are not in contact with them. At some time in the 1990s you received a brain injury and as a result you have certain impairments, including difficulty of recall. You receive an invalid's benefit and until recently you lived with your sister and father at a Housing New Zealand address.

[5] You openly discussed your longstanding cannabis use with the probation officer, but you say that you do not use alcohol. You are an open advocate for cannabis use as, sadly, are other members of your family. So it is really important

that you and your family put your association with cannabis behind you. The probation officer has assessed you at being medium risk of re-offending. You say that you are unwilling to cease your cannabis use so you refuse to receive counselling for your addiction.

[6] This is disappointing because if you would agree to counselling, it might help you and you should, during your sentence of home detention, if that is what I impose, take up any opportunity that is offered to you for treatment and/or counselling.

[7] The probation officer has stated that you have multiple ongoing health, financial and rehabilitative needs, which are not being met currently. Therefore, if you are sentenced to a non-custodial sentence the probation officer has recommended a special condition that you attend the Northland Branch of the Brain Injury Association for assessment and assistance.

[8] You have consented to home detention. Your probation officer has investigated three addresses, two of which were not suitable. But your sister who lives at 127 Smeatons Drive, and who is present here in Court, has agreed that her home might be used as your residence. May I say how fortunate you are that this can occur, because if there was not a suitable residence you would be off to prison today.

Prior convictions

[9] You do have a substantial criminal record and you have four previous convictions for possession of cannabis in May 2008, 2001, 1986 and 1982. For three of these you were fined and for the fourth you were convicted and discharged. These convictions confirm a pattern of drug abuse, particularly in relation to cannabis.

Submissions of counsel

[10] The Crown has submitted with reference to the case of *R v Terewi* [1999] 3 NZLR 62 that I should take a starting point of two to four years' imprisonment.

That is because your offending falls within band 2 of that case. The suggestion is that I could impose a final sentence of over one year imprisonment. Your counsel accepts that this case falls within band 2 of *Terewi* and therefore would accept that imprisonment is virtually inevitable. However, on your behalf Mr Johnson has sought a sentence of home detention.

Purposes and principles of sentencing

[11] The Sentencing Act 2002 requires that I keep in mind a number of purposes and principles when deciding on the appropriate sentence. In your case, I have regard to the following purposes of sentencing: the need to hold you accountable for the harm done to the victim, that is the people you sell the cannabis to and who use it, and to the community for your offending; the need to promote in you a sense of responsibility for and acknowledgement of that harm; the need to denounce your conduct; and the need to deter you and others like you from committing the same or similar offences. But I must also do what I can to assist you in your rehabilitation and reintegration.

[12] In terms of the principles of sentencing, I need to take into account the gravity of your offending including the degree of culpability. I need to be aware of the seriousness of this type of offence in relation to other offences, then I have to be aware of the general desirability of consistency with sentencing. There is also the need to impose the least restrictive outcome that is appropriate in the circumstances. There are other principles which I do take into account, but which I do not need to refer to in any detail.

Aggravating and mitigating features

[13] Section 9 of the Sentencing Act lists various aggravating and mitigating features which I may consider in relation to sentence. Most of these are not applicable to you, but I do note that there were two separate charges. You were obviously deeply involved in this cannabis selling operation and drug dealing involves an element of premeditation.

[14] So far as the features of yourself are concerned, I note that you have previous convictions for possession of cannabis. Therefore, repeat offending is a relevant aggravating factor.

[15] In mitigation, I do take into account your early guilty pleas and will give you credit for that. I also take into account the fact that you have certain health difficulties.

Approach to sentencing

[16] In *R v Taueki* [2005] 3 NZLR 372 the Court of Appeal set out the approach to sentencing. I will first set a starting point based on the features of the offending and then adjust the starting point according to any mitigating and aggravating features relating to you the offender.

Analysis

[17] I have noted that the leading case is *Terewi* and that case can be applied by analogy to cases involving the commercial sale of cannabis: see *R v Gray* [2008] NZCA 224. Therefore, I am obliged to apply the principles in *Terewi* when sentencing you. I have also taken into account what the Court of Appeal said in *R v Andrews* [2000] 2 NZLR 205 about commercial selling operations involving cannabis.

[18] I have also noted that where you sell drugs for profit, the personal circumstances of the offender, particularly where you are in category 2 or 3 of *Terewi*, are not usually given much significance in the sentencing process. That is because of the fundamental requirement that the sentence imposed should act as a deterrent to other persons minded to engage in similar activity.

[19] The cases that I have referred to, apart from those already mentioned, are: *Kemp v Police* HC NWP CRI 2008-443-3 7 April 2008, Heath J; *R v Hunt and*

Fuller HC HAM CRI 2007-019-1317 19 March 2008, Priestley J; *R v Paki* CA165/05 31 August 2005; and *R v Hansen* (2005) 22 CRNZ 83.

Starting point

[20] Your case is at the lower level of category 2 and is comparable to the type of offending in *Hunt and Fuller*. It is less serious than in *Paki*. Therefore, I take a starting point of two years' imprisonment.

[21] Turning then to the factors personal to you, I note that you pleaded guilty before trial, although not at the first opportunity, but I will take that into consideration. I make an allowance of eight months for the early guilty plea. However, because you have relevant prior convictions I make an uplift of four months. Finally, I note your personal health issues which may add to the harshness of your sentence and make a small allowance of two months for that.

[22] Therefore overall, I discount the starting point of two years by six months and would come to a final sentence, if I were minded to impose imprisonment, of 18 months' imprisonment.

Home detention

[23] As this is a short term of imprisonment as defined, I am obliged to consider the possibility of home detention. The importance of rehabilitation arises in that context: see *R v Hill* [2008] 2 NZLR 381. Your probation officer has confirmed that a suitable address is available. You have consented to home detention, so the question is whether I should grant you home detention. Fortunately, your sister has agreed to supervise you carefully and to make sure that you comply with your sentence requirements.

[24] There are barriers to home detention, but on balance I am persuaded that this is an appropriate case to grant you home detention. In that regard, I am satisfied that home detention would best facilitate your rehabilitation. But rehabilitation requires

you to make a decision to put cannabis behind you and make some changes in your life, and I encourage you to work with the probation officer and with the Brain Injury Association to get the help you need.

[25] Having agreed that home detention is appropriate, I have to decide on the length of home detention and where a sentence of 18 months' imprisonment would apply, it is appropriate that I fix a period of nine months home detention. So the sentence of the Court is nine months' home detention on each charge, to be served concurrently.

[26] Mr Heremaia, you are ordered upon your release from Court today to travel directly to 127 Smeatons Drive, Raumanga, Whangarei and await the arrival of a probation officer and security personnel who will install electronic monitoring equipment. Next, you must reside at 127 Smeatons Drive, Raumanga, Whangarei for the duration of your sentence of home detention. You must refrain from consuming alcohol and illicit drugs for the duration of your sentence of home detention. In addition, I direct the following special conditions:

- a) To the satisfaction of the probation officer, you are to attend the Northland Branch of the Brain Injury Association for assessment, advice and assistance and to engage in any counselling that organisation recommends and the probation officer approves.
- b) You are to attend the Association first, at 1pm on Tuesday, 31 March 2009 at 98 Cairnfield Road, Otangarei.

[27] You may stand down.

Stevens J