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

**CRI-2009-470-19**

**ROBERT WILLIAM WOODS**
Appellant

v

**NEW ZEALAND POLICE**
Respondent

Hearing: 25 March 2009
(Heard at ROTORUA)

Appearances: Mr G Barnett for Appellant
Ms C A Harold for Respondent

Judgment: 25 March 2009

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**(ORAL) JUDGMENT OF LANG J**
**[on appeal against sentence]**

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Solicitors:
Crown Solicitor, Tauranga
Counsel:
Mr G Barnett, Tauranga

[1] Mr Woods pleaded guilty in the District Court to charges of being in possession of cannabis for supply, cultivating cannabis, selling cannabis and theft (x 3). His Honour Judge Geoghegan sentenced him to two years imprisonment. In doing so he rejected a submission made on behalf of Mr Woods that a sentence of home detention was appropriate in all the circumstances.

[2] Mr Woods now appeals to this Court against the sentence that the Judge imposed. He contends that the Judge did not give sufficient weight to Mr Woods' personal circumstances and that a sentence of home detention was appropriate.

[3] In order to understand the grounds advanced in support of the appeal, it is necessary to have regard to the factual background to Mr Woods' offending. This is to be discerned from an amended summary of facts that was handed to the Judge at the time of sentence. There is no dispute regarding the summary and counsel for Mr Woods accepts that the Judge did not make any mistakes in referring to the factual background in his sentencing notes.

**Factual background**

[4] The theft charges arose as a result of the actions of Mr Woods and an associate who went to three optometrists in the Papamoa, Mt Maunganui area. The Judge said that the two men adopted "what is a standard approach where one of you distracts an assistant while the other one helps himself". As a result of these activities Mr Woods and his associate stole glasses frames having a total value of approximately $5000.

[5] The police subsequently executed a search warrant of Mr Woods' home. There they located the glasses but also located a significant quantity of drugs and drug related paraphernalia.

[6] While searching the kitchen of the address the police found a set of digital scales in a cupboard. On top of the scales was a small lunchbox containing five small snaplock plastic bags, each of which contained five grams of dried cannabis.

Beside these were 112 similar brand new snaplock bags and a film container containing ten cannabis seeds.

[7] In the washhouse the police located a large bag of dried cannabis in a cardboard box. This weighed approximately 220 grams. There were also two dried cannabis branches sitting on top of a chest freezer.

[8] When the police searched the ceiling of the address they discovered a relatively sophisticated cannabis cultivation set-up. Walls made from wood panelling had been screwed to roof trusses. The inside walls were covered in plastic sheeting and two industrial type extractor fans were operating. The police found a total of 14 small cannabis plants in the ceiling, each of which had an average height of about six inches. Hanging above the plants was a large single fluorescent light on a timer. Further dried cannabis branches were found hanging from the centre of the room and a tray on the floor contained dried cannabis weighing approximately 500 grams.

[9] When the police searched Mr Woods' vehicle they found two further five-gram bags of cannabis together with another 50 snaplock bags in the glovebox.

[10] Mr Woods was completely co-operative with the police. He explained to them that he had four young boys to provide for and that he had turned to growing and selling cannabis to supplement his income. He said that he sold bags of cannabis to friends for $50 each. He said that he would sell on average between two and five bags of cannabis per week. This meant that Mr Woods was selling cannabis having a value of approximately $250 per week in order to supplement his income.

**The Judge's decision**

[11] The Judge found that Mr Woods was carrying on a commercial operation, albeit at the lower end of the scale. He reached that conclusion no doubt as a result of the quantity of cannabis that was found, together with the manner in which it was

stored. The relatively sophisticated nature of the growing set-up would also have supported that conclusion.

[12] The Judge selected a starting point of two years eight months imprisonment on the drugs charges. Allowing for the guilty plea and other mitigating factors he reached an end sentence of one year nine months imprisonment on those charges. He imposed a cumulative sentence of three months imprisonment on the theft charges. This led to the total sentence of two years imprisonment. In addition, he ordered Mr Woods to pay $1486 by way of reparation.

**Grounds of appeal**

[13] On appeal, counsel for Mr Woods submits that the Judge gave insufficient weight to Mr Woods' personal circumstances. These included the fact that he appeared for sentence at the age of 33 years and with limited previous convictions. Apart from a conviction for simple possession of cannabis some years ago he had no other drug convictions.

[14] In addition, he had suffered a traumatic series of incidents beginning in June 2008 when a gang associate attempted to sexually assault his partner. Mr Woods had also apparently been the victim of a drive-by shooting perpetuated by that person.

[15] Counsel submits that these have had a profound effect on Mr Woods and that he began to use cannabis as a means of dealing with stress and other issues arising from them. Counsel also points to the fact that, by the time he came to be sentenced, Mr Woods had sought help with his problems with cannabis. He went to the Hamner Clinic in Tauranga shortly after his arrest in October 2008. By the time he was sentenced he had attended at the Hamner Clinic on six separate occasions at two weekly intervals. A letter from the Clinic points out that ,if Mr Woods was able to continue with the programme, the prognosis for continuing growth in recovery would be good.

**The approach to be taken on appeal**

[16] In considering these submissions, I need to have regard to the approach this Court is required to take on appeal. A decision as to whether or not to impose a sentence of home detention is the exercise of a judicial discretion. As a result, this Court has but a limited ability to intervene on appeal. It may only intervene if the judicial officer who has exercised the discretion at first instance has done so in accordance with an erroneous principle. Alternatively, it may interfere if the judicial officer has omitted to take into account a relevant principle. Finally, the Court may intervene if the decision can be shown to be plainly wrong.

[17] The nature of the discretion to impose a sentence of home detention is, in my view, well summarised by Rodney Hansen J in *Savage v Police* (HC Whangarei CRI 2008-488-0001 14 February 2008. In that case the Judge said:

> When the further conditions in s 80A(2)(a) of the Sentencing Act are satisfied, the Court has a discretion whether to impose home detention. No further criteria are specified in the statute. There has been some discussion and debate by commentators as to the additional factors which may properly be taken into account in deciding whether or not to impose a sentence of home detention. I am in respectful agreement with the learned author of *Hall's Sentencing* at SA80 A.4A that, in line with the approach formerly taken to the grant of leave to apply for home detention, regard should be had as appropriate to the purpose and principles of sentencing as codified in the Sentencing Act and, in particular, ss 7 and 8. Other factors which may properly be considered will include those which formerly governed a decision to grant leave – the nature and seriousness of the offence, the circumstances and background of the offender, and any relevant matters relating to the victim. However, it is clear that the legislature intended to confer a broad discretion and the weight to be given to relevant factors will be a matter for the sentencing Judge.

**Decision**

[18] In this case there can be no doubt that the Judge took into account a wide range of factors in considering both the sentence to be imposed on Mr Woods and whether or not the sentence should be one of home detention.

[19] Although the Judge did not expressly articulate the reason why he came to the view that home detention was not appropriate, I consider that some clue is gained from the structure of his decision. In this regard I refer to the following paragraphs:

> [13] Mr Barnett has made every submission that can be made on your behalf and of course he has recognised that you come within category 2 of a case called *R v Terewi* [1999] (3 NZLR 62 (CA)) which provides sentencing guidelines to the Courts. He has submitted very strongly, on your behalf, that there should be home detention and of course has referred me to cases where home detention has been granted.
>
> [14] What is clear is that the nature of this offending requires some emphasis on deterrence and denunciation as a purpose of sentencing. There is also a need to hold you accountable and to take account of society's concern at this type of offending.
>
> [15] The aggravating features of your offending is that clearly there is a commercial element. There was actual sales going on; that much is clear. The only mitigating circumstances are your guilty plea and that you have no previous convictions for this type of offence.

[20] And then the Judge said:

> [17] I have taken account of the High Court decisions referred to me and of the points made very strongly by Mr Barnett on your behalf, namely that there was no sale from your home and that you have no previous convictions. In some ways it is rather a fine distinction to say that there was no actual sale from your home taking into account that your home formed the very basis for this, albeit small, commercial operation.

[21] Thereafter the Judge moved immediately to his conclusion at [18], which was that home detention was not appropriate in all the circumstances and that a sentence of imprisonment was warranted.

[22] Reading these passages in context and in order, I am left in no doubt that the Judge decided that home detention was not appropriate because the overriding factor was the need for emphasis on deterrence and denunciation as purposes of sentencing. In addition, there was the need to hold Mr Woods accountable and to take account of society's concern at this type of offending. Finally, there was the fact that the offending had occurred within Mr Woods' home. All of those matters were factors that, in my view, are either prescribed by the Sentencing Act 2002 or are consistent with the principles prescribed therein.

[23] At the end of the day a sentencing Judge must make an overall assessment as to where the balance must be struck. This is not a mechanical exercise as is required when fixing the length of a sentence of imprisonment. Rather, it is a question of where the emphasis lies and where the line must be drawn.

[24] Here the Judge drew the line in favour of the principles of denunciation and deterrence. I consider that that was an approach that he was authorised by the Sentencing Act 2002 to take. He therefore cannot be said to have exercised his discretion in accordance with an erroneous principle.

[25] I am also satisfied that he did not omit to take into account Mr Woods' personal circumstances. In the end counsel for Mr Woods was required to submit that the Judge had not given these sufficient weight, but as the passage that I have already cited above at [17] confirms, issues of weight are very much matters for the sentencing Judge. That being the case, I find that I am unable to interfere with the sentence that the Judge imposed.

**Result**

[26] The appeal is accordingly dismissed.

Lang J