

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

CRI-2008-009-020800

REGINA

v

TROY JACK CRAIG SMITHURST

Hearing: 18 June 2009

Appearances: S J Jamieson and K Beaton for Crown
R A Peters for Prisoner

Judgment: 18 June 2009

SENTENCE OF HON. JUSTICE FRENCH

[1] Troy Jack Craig Smithurst, following pleas of guilty you appear for sentence this morning on two counts under the Misuse of Drugs Act 1975, namely one count of manufacturing heroin and one count of supplying heroin.

[2] These are very serious charges and carry a maximum sentence of life imprisonment. As stated by another High Court Judge in another case, the reason why the penalties are so high for dealing in this drug is because of its chronic addictive power. Heroin has been rightly described as a scourge because of the harm and misery it inflicts.

[3] The facts of your offending are that on 18 December 2008 police executed a search warrant at the address where you were living. The police found you in

possession of a large spoon with black residue, later identified as heroin. On the table at which you were seated were two piles of tin foil, each pile containing about 16 sheets, while behind a cushion on the couch was a chalky powder identified as approximately 50 milligrams of morphine, extracted from morphine sulphate capsules. It is estimated this morphine would have produced the same amount of heroin as that found on the spoon.

[4] In the course of their search, police also located a plastic tool kit containing miscellaneous paraphernalia used in the manufacture of heroin from codeine and morphine. Police described the tool kit, which had your fingerprints on it, as being a very well organised kit. It contained morphine powder wrapped in a small package, a mortar and pestle, testing strips, filter paper, modified filters, a bag containing over 100 empty M-Eslon capsules, three syringes and other miscellaneous paraphernalia, all of which, as I have said, is used in producing heroin from codeine and morphine.

[5] You admitted to police you had possession of the equipment for the manufacturing process, but that you were not the main manufacturer because you did not know exactly how it all worked.

[6] When police examined your cellphone, they discovered you had been selling heroin to numerous other parties between 3 December and 18 December 2008. It is accepted you were on-selling to support your own heroin addiction. However, the text messages also show that on occasion you were actively encouraging your supplier to provide you with the drug.

[7] You admitted selling between 15 and 45 sheets a day, which for the relevant 15-day period equates in monetary terms to between \$4500 and \$13,500 in total.

[8] The pre-sentence report tells me you are 22 years of age and have no previous drug convictions. You in fact have only two previous convictions, one for common assault and the other for driving while prohibited.

[9] From the account you have given of your childhood, it was a most unhappy one. You displayed behavioural problems during your youth and began to drink on a

daily basis. After your father died, towards the end of 2007, you turned to heroin, and sadly have become it seems so hopelessly addicted it has affected your ability to maintain a job or save money – even your inheritance from your father. As I have mentioned, you only have two previous convictions, and because of that the probation officer believes that if you were only able to abstain from drugs, your risk of reoffending would be rated as low. According to the report writer however, your motivation to change is seen as being only moderate.

[10] Because of the seriousness of the offending, no firm recommendation is made in the report for the use of community-based sentences.

[11] I note from the report that you apparently deny being involved in either manufacturing or supplying heroin. However, you have pleaded guilty to both counts and accordingly I am required to sentence you on that basis.

[12] I turn now to explain the sentencing decisions that I have to make today.

[13] In determining what is an appropriate sentence I am required to follow what is essentially a two-stage approach.

[14] In the first stage, I have to fix what is known as a starting point. What that means is the sentence which reflects the culpability or blameworthiness associated with your offending.

[15] The second stage is, having fixed the starting point, I am then required to consider whether your personal circumstances, as distinct from your offending, warrant any adjustment upwards or downwards to that starting point.

[16] Turning then to the first stage, identifying the starting point.

[17] As you will have heard, the lawyers disagree on the appropriate starting point. Originally, in its written submissions, the Crown said it should be four to five years' imprisonment. That was said in reliance on the Court of Appeal decisions of *R v Stanaway* [1997] 3 NZLR 129 and *R v Urlich* [1981] 1 NZLR 310. Since then, the Crown has obtained a copy of another Court of Appeal decision, *R v Cartwright*

CA462/05, 10 August 2006, and agrees that four years, in light of that decision, may be a more appropriate starting point.

[18] Mr Peters, your lawyer, submits it should be three years. In advancing three years, Mr Peters argues that while the Court of Appeal decisions relied upon by the Crown, *Stanaway* and *Urlich*, are still relevant, I also need to have regard to guidelines that have been more recently laid down in respect of what he says is a worse drug than heroin, namely methamphetamine. However, in the case that set out the methamphetamine guidelines, *R v Fatu* [2006] 2 NZLR 72, the Court of Appeal specifically state that the guidelines are applicable only to offending involving methamphetamine. It is said that other appellate authorities should continue to guide sentencing for other class A dealing, including other class A manufacturing.

[19] In my view, your case is clearly one of low-level manufacturing and dealing by an addict seeking primarily to support his own habit. The commercial element is low-level, but its existence is nevertheless a serious aggravating feature of the offending. As was stated in *R v Taylor* CA117/90, 19 July 1990:

... when dealing with a conviction [involving] a class A drug, for supply, the sentence must not only punish the offender for such a serious crime as that — he was a man who was not only a user of heroin but also prepared to deal in it — it also calls for a deterrent sentence to demonstrate that dealing in that way is just not worth it. It also calls for a sentence sufficient to recognise the expression by Parliament of society's abhorrence and total rejection of dealing in class A drugs.

[20] I note too that in the police summary of facts, the police say they have noticed a recent resurgence in popularity of heroin, coming at a significant social cost.

[21] Having regard then to all the circumstances of the offending and the comparator cases, I have come to the view that a starting point of three and a half years' imprisonment is appropriate.

[22] Having then fixed the starting point, I turn to consider your personal circumstances.

[23] I find first that there are no aggravating personal circumstances which would warrant an uplift. Secondly, I find that there are a number of mitigating factors.

[24] In drug offending cases, personal circumstances do not generally carry the weight they might do in other types of cases. However, I am prepared to give some weight to your relative youth, your personal background (which has had its fair share of tragedies), and the absence of any relevant criminal history.

[25] Of greater significance in terms of mitigating factors is your guilty plea. The guilty plea was not made at the earliest possible opportunity, and as a result the Crown submit you should receive a discount of 25% rather than the full one-third. However, having regard to Mr Peter's explanation for the delay and your co-operation with the police, I am prepared to give you the full one-third credit.

[26] In total, I consider you are entitled to a reduction of 18 months on account of mitigating factors. That results in an end sentence of two years' imprisonment.

[27] Such a sentence means you are eligible to be considered for home detention. However, in my view, having regard to the seriousness of the offending, home detention would be an inappropriate response. In my view, it would not sufficiently meet the needs of deterrence and denunciation which must take primacy.

[28] Troy Jack Craig Smithurst, on the charge of manufacturing heroin you are convicted and sentenced to a term of imprisonment of two years. On the count of supplying heroin you are convicted and sentenced to a term of imprisonment of two years, the two years to be concurrent.

[29] There will be an order that the standard release conditions are to apply until the sentence expiry date. In addition I impose a special condition that you are to attend any drug rehabilitation programme as may be specified by your probation officer. This condition is also to apply until the sentence expiry date.

[30] Finally, I order the destruction of all the drug equipment found by the police.

*Solicitors:
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