

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

CRI-2009-070-4244

THE QUEEN

v

**DEBORAH JAN BEARSLEY
DION MOSS**

Hearing: 19 June 2009
(Heard at ROTORUA)

Appearances: Mr D J McWilliam for Crown
Mr P T Attwood for Prisoners

Judgment: 19 June 2009

SENTENCING REMARKS OF LANG J

Solicitors:
Crown Solicitor, Tauranga
Counsel:
Mr P T Attwood, Tauranga

Dion Moss

[1] Mr Moss, you appear for sentence having pleaded guilty in the District Court to two charges of cultivating cannabis. Both of those charges carry a maximum sentence of seven years imprisonment. You also pleaded guilty to a charge of stealing electricity worth \$26,000. That charge carries a maximum sentence of five years imprisonment.

[2] Ms Bearsley, you pleaded guilty in the District Court to a charge of permitting premises to be used for the cultivation of cannabis. That charge carries a maximum sentence of three years imprisonment.

[3] The Crown took the view that the charges to which you have pleaded guilty, warrant a sentence greater than that which the District Court could impose. For that reason the Crown successfully submitted to the Judge in the District Court that you should be sentenced in this Court. The Judge declined jurisdiction and that is why you are here in this Court for sentence.

Factual background

[4] The charges for which you appear for sentence arise as a result of a search that the police carried out on your property at Oropi on 11 December 2008. The genesis of your offending, however, arose much earlier than that.

[5] In order to explain how you have come to be in this position I need to refer to the facts as disclosed by an amended summary of facts that the Crown filed yesterday. I record that your counsel has had full opportunity to have input into the amended summary, and the material in the summary is not disputed in any material aspect.

[6] Your property is situated in a rural area. When the police searched it they found a large shed on the property. The shed had internal partitions made out of plywood. Part of the shed floor had a dirt surface but other parts of the floor had a plywood covering. When the police examined the plywood covering closely they

found a trapdoor. When they opened the trapdoor it revealed a staircase. When the police went down the staircase they entered a buried 40-foot shipping container. That container had, in turn, been divided into three separate rooms, all of which were used in one way or another for the cultivation of cannabis.

[7] In the first room there was a sink and benches along two of the walls. Shelving had been erected along the walls and this stored a wide variety of growing equipment. In addition, there was a power board with a number of wires and fuses, magazines detailing how to grow cannabis, insecticide, containers of Clonex rooting hormone, and other chemicals and equipment generally associated with the growing of cannabis.

[8] There was also a small container above the sink that held 40 cannabis seeds. In the sink there was a white plastic shopping bag that contained eight cannabis-cloned seedlings with roots. In a shelf under the stairs the police located a seedling tray holding 34 cannabis cuttings. These were being grown in pots and had been cloned.

[9] I note that the summary records that cuttings from cannabis plants are routinely dipped into a rooting hormone. They are then placed in a pot to assist with the formation of roots. The use of clones is a desirable procedure for cannabis growers. It ensures consistent quality because the new plant is a replica of the parent plant.

[10] Underneath the sink on the floor was a large black 100 litre plastic bin. This contained water and had an electric pump and pipes connected to it. One of the pipes led to a watering system in the second room, and was used to deliver water into pots containing cannabis plants.

[11] Excess water from underneath the pots was then collected by a second pipe which fed back into the plastic bin. This enabled surplus water to be recycled for future use. In addition, a pH combo metre was positioned next to the large bin with two probes submerged in the water. That instrument had the ability to read pH and nutrient levels in the liquid solution passing through the pipes.

[12] In the second room the police found dried cannabis leaf in a washing basket and plastic bag. Underneath a shelf along the right hand wall of the container they found seven cannabis plants growing in soil in separate pots. These ranged in height from 400 to 600 millimetres. All of them were in healthy condition, with four of them being mature plants that were just beginning to bud.

[13] In the main area of this room the police found a hydroponic cannabis growing operation. This involved 13 cloned cannabis plants growing in a clay medium in nine pipes. These were fed by nutrient rich water flowing from the pipes to which I have already referred. There were a further three cannabis plants ranging in height from 600 to 850 millimetres. These were being grown in soil and pots alongside the hydroponics operation. A further nine cloned cannabis plants in potting bags, 57 cloned cannabis cuttings in pots and 22 cannabis seedlings in pots were also found in this room.

[14] Suspended above the plants were two 400-watt bulbs and two 900 millimetre long metal light shades. The walls had been lined with reflective silver foil wrap which helped to enhance the amount of light in the room. The room also contained two electrical fans that were designed to keep the air circulating so as to avoid the plants from becoming overheated by the heat produced by the light bulbs.

[15] In the third room of the container the police found 22 mature budded cannabis plants that were approximately three to four weeks away from harvest. These ranged in height from 250 millimetres to one metre tall. These plants were also being grown hydroponically using the same method as had been used in the second room. There was a separate plastic bin and pump in this room that was used to feed nutrient rich water to the plants. Once again, pipes underneath the pots were used to recirculate surplus water back into the system.

[16] Other equipment was found in this room including a pH meter, air pump and heater unit. In addition, there were bottles of fertilisers, chemicals and insecticides consistent with being used in the growing operation.

[17] This room also had a sophisticated lighting system with nine 400-watt bulbs and six 600-watt bulbs attached to shades. These were suspended from the ceiling of the container. There were also seven electrical fans located in the room. The lights had been set on a timer which meant that they were in operation for 12-hour periods before being switched off for 12-hour periods. This was used to encourage the plants to start flowering. When the police went through the container the lighting system was off but the electric fans were in operation.

[18] The shipping container also had two large extractor fans and a carbon filter suspended from the ceiling. These were connected to all three rooms and were vented to outside vent ports that projected through the hillside in which the container had been buried.

[19] When the police examined the interior of the implement shed above the container, they found a number of old cannabis stalks and what appeared to be piles of growing medium or soil. This suggests strongly that at least one previous harvest had been obtained from the operation.

[20] The police then called in technicians from two local electricity companies. They traced the power supply from the container back to the house. In the ceiling of the house they found a very sophisticated system that enabled power to be drawn directly from the mains supply without going through the meter to your property. This meant that electricity could be drawn off the main supply without being recorded on your meter. As a result, the chances of detecting the cannabis growing operation were greatly reduced and you received free electricity. Electricity worth \$26,000 was stolen using this method, although I am not sure exactly how that sum came to be calculated.

[21] The electricity that was drawn off the mains supply in this way was also used for other purposes, including the powering of a spa pool adjacent to your house. Power to the container could be switched on and off from the house using a switch in the house.

[22] In summary therefore, the police found an extraordinarily sophisticated cannabis growing operation. In total, they found 175 cannabis plants at varying stages of maturity. These included the 29 mature plants to which I have referred. The police estimate that the yield to be obtained from the plants that they found on 11 December 2008 would have been worth about \$33,000. They take that as being the yield from eight ounces, or half a pound, per plant. In addition, the seven mature plants would, the police believe, produce an estimated financial return of \$10,500.

[23] The nature of the operation was such that you could generate roughly three growing cycles per year. This means that the operation had the potential to produce about \$100,000 worth of cannabis per annum. I shall come back to that aspect of the matter shortly.

Sentencing principles

[24] As you must now be aware, issues of deterrence and denunciation are to the forefront in any case involving criminal offending as serious as this. The commercial cultivation of drugs is routinely met with sentences of imprisonment. That is the only realistic way in which the courts can send a message to commercial cultivators that they will go to prison in the event that they are caught.

[25] The real issue in a sentencing such as this is to impose a sentence that is broadly consistent with those imposed in relation to offending in other cases. In saying that, I accept immediately that the circumstances of no two cases are ever exactly the same.

[26] It is also important in a case such as this that the ultimate sentence is one that imposes the least restrictive outcome that is possible in all the circumstances. I have to say for you, Mr Moss, that that is inevitably a sentence of imprisonment. It would also be a sentence of imprisonment for you, Ms Bearsley, but for some factors that I shall mention shortly.

Starting point

[27] It is necessary for me first to select the starting point that is appropriate for your offending. The starting point is the sentence that would be imposed following a defended trial. It does not take into account mitigating and aggravating factors that are personal to you both.

[28] Both counsel acknowledge that the sentence to be imposed upon you falls to be determined according to a decision of the Court of Appeal called *R v Terewi* [1999] 3 NZLR 62. In that case the Court of Appeal identified several categories of offending in relation to the cultivation of cannabis. Both counsel agree that your offending falls within the second category identified in *Terewi*. That category relates to commercial cultivation of cannabis where relatively small quantities are involved.

The scope of the cannabis growing operation

[29] Although 175 plants were found in the container, I accept that the operation was nevertheless small in terms of quantity and volume compared to other cases of cultivation with which the Court often deals. The size of the operation in the present case was really determined, or restricted, by the limited physical confines of the container. It could only contain a limited number of cannabis plants at any given time.

[30] I consider that the state in which the police found the container when they executed the search warrant provides a useful snapshot of the scale of your operation. As I have said, there were approximately 29 mature plants, of which 22 were close to harvest. Then you have the other cannabis plants of varying sizes right down to the clones, cuttings, seedlings and seeds. This was an ongoing operation that probably, at any given time, had between 20 and 30 plants ready for harvest or close to harvest.

[31] The sheer sophistication of the operation, and the effort and expense that must have gone into its construction, suggests to me that this operation was set up on a very long-term basis. Nobody would go to the trouble that you went to, Mr Moss,

unless they intended to carry on cultivating cannabis on a continuous basis for a very long period of time. It seems that the container was installed in or about February or March 2006. I accept that it would have taken some time for the operation to have produced healthy plants ready for harvest. In all likelihood, therefore, you have been cultivating cannabis for around two years - probably from around the end of 2006 until December 2008 when the police searched the property.

[32] In that time you would undoubtedly have produced a reasonably significant quantity of cannabis. I accept, also, your counsel's submission that it is highly likely that you were assisted in your endeavours by an associate. The sheer scale of this operation and its complexity would probably put it beyond the ability of one person to design, construct and operate.

[33] I therefore accept that you did have assistance from another person and that you are the only person who will be accepting responsibility for the operation. I accept also that it is likely that that person would have been given a reasonable proportion of the cannabis that the operation produced. Similarly, I accept that you would have used some of the cannabis for your own purposes and that you supplied some of it to Ms Bearsley for her consumption.

[34] For this reason I accept the submission of your counsel that it is difficult to place an accurate estimate on the commercial aspect of the operation. Nevertheless, nobody goes to the time and trouble to construct a complex such as this unless there was to be some financial return. I therefore proceed on the basis that there was a reasonable degree of commerciality in the operation.

The culpability of Mr Moss

[35] Although I accept that another person was involved in the operation, Mr Moss, nevertheless, you were obviously a principal player. You were a joint owner of the property and it is clear that you were there from the outset when the facility was installed. You were also present on the property and, no doubt, involved in the ongoing maintenance and cultivation of the plants throughout the two year period between the end of 2006 and the end of 2008.

Authorities

[36] Counsel have referred me to a number of authorities in this area. They are only of limited assistance because each case depends so much on its own facts. Perhaps the greatest assistance that I have gained is from a case cited by the Crown, namely *R v Pearce* HC WHA CRI 2008-088-00298 9 December 2008. In that case the growing operation was similar to yours in terms of sophistication and complexity. The number of plants, however, that the police located in that case were less than the police found in your case. In addition, the growing operation had been in existence for a lesser period than is the case with respect to your offending.

[37] In that case, Venning J took a starting point of two years nine months imprisonment on the cultivation charge alone.

Conclusion

[38] Taking into account the scale and nature of your operation, coupled with the fact that it involved the theft of electricity, I consider that a starting point of not less than three years six months imprisonment is warranted. I consider that your case falls towards the upper end of Category 2 as identified in *Terewi*.

Culpability of Ms Bearsley

[39] So far as you are concerned, Ms Bearsley, I accept that to some extent you were a passive participant in the operation. You were passive in the sense that you were not physically involved in the operation. I am satisfied that your physical incapacities would have prevented you from doing that. Nevertheless, when that shed was built you must have known what was going on. It was impossible for Mr Moss and his associate to bury a 40-foot container in a hill on your property without you having some idea of what is likely to happen. The very sophisticated nature of the electricity equipment that was in the ceiling of your house must also have been obvious to you. That must have taken a number of days, if not weeks, to install.

[40] You say that you were aware that Mr Moss was carrying out cannabis growing operations but you say that you did not know the nature or extent of it. I have to say that I find that difficult to believe. I consider that you must have had a reasonable idea of what was happening in the container beneath the shed on your property.

[41] In the end you had knowledge of what was going on. It may have been difficult, but it was up to you to stop Mr Moss from doing what he was doing. The alternative was to leave the property.

[42] Counsel for the Crown has referred to *R v Edmonds* CA645/2008 6 March 2009. It has some broad similarities, although I accept it is more serious than the offending in your case. I take the view that your offending is such that it warrants a starting point of 15 months imprisonment.

Aggravating factors

[43] I now need to consider whether there are aggravating factors that operate to increase the sentence that should be imposed upon you.

[44] Ms Bearsley, you have some limited previous convictions that are cannabis related. I take the view that they are really of no consequence in this context and I put them to one side.

[45] Mr Moss, the position is different for you because you had quite a steady involvement with cannabis from about 1984 until 1990. You were convicted in 1990 on charges of selling cannabis and supplying a Class B drug. I understand from the pre-sentence report that these charges arose out of your involvement with an undercover police officer. You were sentenced at that time to a sentence of approximately one year's imprisonment. That ought to have served as a warning to you, Mr Moss, about what happens to people who become involved in commercial drug related activities.

[46] I have no doubt, therefore, that this Court would be justified in applying an uplift from the starting point that I have selected to reflect your previous convictions. In the end I have decided not to do that. You can consider yourself fortunate for that. I have elected not to apply an uplift because I accept that the last offending occurred about 16 years ago. I am not satisfied that you have remained free from drug related offending in the meantime, because your cannabis habit makes it clear that you must have been involved in cannabis for at least a significant part of that period. Nevertheless, I am prepared to give you some credit for that 16-year hiatus in offending and I do not propose to increase the sentence that I have selected notwithstanding your counsel's concession that that avenue is open.

Mitigating factors

[47] I now need to consider the mitigating factors that operate to reduce the starting point that I have selected. The most obvious for both of you is the fact that you entered guilty pleas at a very early stage in the District Court. I accept that that would warrant a reduction of one third.

[48] In your case, Ms Bearsley, that is the reduction that I propose to make so that your end sentence would ordinarily be one of ten months imprisonment.

[49] So far as you are concerned, Mr Moss, in addition to the reduction for your guilty plea, I am prepared to make a further small reduction to reflect the fact that, as your counsel advised me this morning, you have been prepared to co-operate with the police to some extent. You have provided the police with the name of the electrician who installed the equipment and also the name of your co-offender. That information may ultimately be of little practical assistance, because you have also indicated that you are not prepared to give evidence or make a statement incriminating those people. Nevertheless, I accept that you should be given some credit for the fact that you have been prepared to co-operate to some extent. I propose to reduce your sentence by a further three months to reflect that fact.

[50] This means that on the lead charge, which I take to be cultivating cannabis between 2006 and 2008, your end sentence would be one of two years one months' imprisonment. As a result, the issue of home detention does not arise in your case.

Home detention: Ms Bearsley

[51] So far as you are concerned, Ms Bearsley, your counsel submits that you should serve a sentence of home detention rather than imprisonment. He points out that you appear for sentence at the age of 47 years. You are severely incapacitated as a result of a motor accident that you were involved in in 1983. ACC assesses you as being 85 per cent disabled. It is quite clear that you have very significant physical infirmities that you must deal with on a daily basis.

[52] The Court always hesitates when considering a sentence of home detention in respect of offenders who have committed offences, and particularly drug related offences, at their own homes. The concern arises in two ways.

[53] The first is that a sentence of home detention may, of itself, produce further offending. This is because the offender may be tempted to consume or become involved in drugs simply to pass the time and reduce the boredom of serving a sentence of home detention. The second is the fact that, as a matter of policy, it seems wrong to impose a sentence of home detention when the offending has been committed at home. That can send an entirely the wrong message to other people who are involved in activities such as this.

[54] In your case I have been persuaded that a sentence of home detention is appropriate. This is because I accept that you were not in any sense the mover or brains behind this operation. Mr Moss has taken full responsibility for that, as he had to do.

[55] I accept also that you have endeavoured to some extent from time to time to remonstrate with him about what he was doing. In addition, you will be serving your sentence of home detention in circumstances where I would hope it will be impossible for you to become involved in drug related activities undetected.

[56] There was earlier some doubt about whether the property at which you propose to serve a sentence of home detention was suitable for that sentence because of the lack of a landline. Your counsel tells me that that matter has been remedied, but that fact needs to be confirmed by the monitoring authorities.

[57] For that reason I propose to defer sentencing you until Tuesday 23 June 2009 at 9.30 am, when I will impose a sentence of home detention upon you provided I am satisfied that the address is acceptable to the authorities. A term of your sentence of home detention will be that you submit to regular, and that is not less than three weekly, tests for the presence of cannabis in your blood or urine. I would be grateful if your counsel could liaise with the probation service over the next five days to ensure that a suitable condition can be drafted to cover this.

[58] You are therefore bailed on existing terms until 9.30 am on Tuesday. At that time, provided I am satisfied that you can serve a sentence of home detention at the nominated address, I will impose a sentence of five months home detention with special conditions.

Sentence – Dion Moss

[59] Mr Moss, on the lead charge of cultivating cannabis between 2006 and 2008, you are sentenced to two years one month imprisonment.

[60] On the charge of cultivating cannabis on 11 December 2008, you are sentenced to 18 months imprisonment.

[61] On the charge of theft of electricity, you are sentenced to six months imprisonment.

[62] All of those sentences are to be served concurrently.

[63] I make an order for the destruction of all of the equipment and plants that the police located at your address.

Lang J