

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

CRI-2009-043-1190

THE QUEEN

v

KEVIN JOHN HARNISH

Hearing: 30 June 2009

Appearances: T C Walls for the Crown
K Pascoe for Mr Harnish

Sentence: 30 June 2009

SENTENCING REMARKS OF MALLON J

Introduction

[1] Mr Harnish you appear for sentence on a charge of possession of cannabis for sale (s 6(1)(f) and (2)(c) of the Misuse of Drugs Act 1975), sale of cannabis to persons 18 years or over (s 6(1)(e) and (2)(c) of the Misuse of Drugs Act), and cultivation of cannabis (s 9 of the Misuse of Drugs Act). These offences carry maximum penalties of eight years' imprisonment, eight years' imprisonment and seven years' imprisonment respectively.

[2] You appear for sentence in this Court because the District Court declined jurisdiction. It declined jurisdiction because of the lower maximum penalty that would have applied if the District Court had sentenced you.

Circumstances of offending

[3] The circumstances of your offending are that on the morning of 24 March 2009 the police executed a search warrant at your home address. They found:

- a) In a large plastic bag in a set of drawers in your bedroom, 19 smaller snaplock bags, each containing cannabis head with weights ranging from 3.2 to 5.1 grams, and in total weighing 82.8 grams;
- b) In a second drawer in your bedroom, two plastic bags with cannabis head material, weighing 34.5 grams and 32.5 grams;
- c) Inside an ammunition tin found in the garage or storage area, seven snaplock bags of cannabis head ranging in weight from 26.1 to 37.9 grams, and totalling 223.6 grams;
- d) Drying cannabis head and some cannabis leaf was found throughout the house, in a number of rooms (but not including your son's bedroom). The cannabis head found in this way totalled 1,312 grams, and the leaf found totalled 1,963 grams. There were also approximately 20 stalks from cannabis plants with the cannabis head and leaves plucked off; and
- e) Twelve cannabis plants growing in a fenced off area outside, seven of which were 1.5 to 2 metres in height, and five were approximately 0.5 metres tall.

[4] Altogether, then, the police found 1,684 grams of cannabis head, 1,963 grams of cannabis leaf and 12 relatively mature cannabis plants. An affidavit from the police places a conservative value of all the cannabis found at around \$46,000.

[5] A jacket was found in your bedroom with \$933.90 cash in the pocket. In a Portacom building on the property, \$4,060 cash was found in a snaplock bag. That

money was in small denominations, primarily \$20 notes, and was found alongside a set of electronic scales, a cash receipt for a bottle of “Supergrow”, a receipt for a 25 kilogram bag of “Growhow” (potassium sulphate) – both items being used in the cultivation of cannabis, prescription medicine with your name on it on the packet and cannabis head material.

[6] You admitted to the police that the cannabis material belonged to you, and that you had been selling the cannabis in smaller bags for \$20 each. You thought you had sold around 1 to 2 ounces.

[7] You pleaded guilty to all three charges.

Personal circumstances

[8] Mr Harnish you are 66 years old.

[9] You have four previous convictions, but two of those are historical dating back to 1963 and 1970 and are not relevant for the purposes of sentencing you today. The other two convictions are for manufacturing cannabis oil in January 1999 and possession of cannabis oil for supply in August 2000. For the first of these you served a sentence of eight months’ non-residential periodic detention. For the latter you were sentenced to one year’s imprisonment which you were permitted to serve in home detention (prior to home detention being a sentence in its own right).

[10] You currently live with your adult son, as indeed you did during the period in which you committed the current offending. The pre-sentence report writer notes that you have “positive support and oversight from your family” and in the probation writer’s view this will motivate you not to offend again.

[11] You do not use cannabis. You have had an earlier problem with alcohol which has left you with serious health issues. I have evidence from your medical practitioner and reports and clinical summaries from hospitals which indicate the seriousness of your medical concerns. They significantly restrict your mobility, and require you to be on a gluten-free diet. You are seen by a specialist on a regular

basis at Taranaki Base Hospital and are on about ten different medications. You have been assessed for a liver transplant.

[12] You say that you got involved in the current offending solely for financial reasons, your sickness benefit being insufficient to meet your expenses. Your counsel advises that you receive a benefit of \$280 a week from which you must pay rent of \$135 a week and \$70 a week for power, leaving the remainder for food. Your counsel advises that your weekly food costs are significant because of your special diet. You are now eligible for Government Superannuation which has improved your financial situation.

[13] You have told the probation officer that you will never do this again because the prospect of imprisonment is too stressful for you.

Sentencing Act principles and purposes

[14] In sentencing you I am required to take into account the principles and purposes of sentencing set out in the Sentencing Act 2002. These include the need to hold you accountable, to denounce your conduct and to deter. Consistency with sentences imposed on similar offenders is important but I must also take into account any particular circumstances that relate to you that mean that the sentence that would otherwise be appropriate would, in your case, be disproportionately severe.

Starting point

[15] I approach your sentence by first considering what sentence for the nature of the offending would be appropriate, before taking into account aggravating or mitigating factors personal to you.

[16] It is appropriate to take the possession for sale charge as the lead offence, given the quantity of cannabis material that was found. I intend to impose concurrent sentences on the other two charges, which means that you serve the sentence for each charge simultaneously, instead of each sentence being added on to

the end of the other. This is appropriate because of the similar nature of the three charges.

[17] The Crown submits that an appropriate starting point for the nature of the offending would be three to three and a half years' imprisonment. This is on the basis of the multiple charges which you face, the significant quantity of cannabis located, the purely commercial motivation to your offending, the premeditation it says is indicated by what the Crown says is the well-organised nature of your operation and the evidence of significant commercial dealing. The Crown's indicated starting point would indicate a scale of commerciality that would fall within the middle to upper range of what is called band two in the Court of Appeal's guideline case of *R v Terewi* [1999] 3 NZLR 62.

[18] Your counsel submits that your offending is within the middle to perhaps low range of band two of that same case. She emphasises in her submissions the lack of sophistication and the absence of evidence, as in some of the other cases, that the operation in those other cases had been ongoing. She submits that a starting point of around two and a half to perhaps three years may be appropriate.

[19] I am not persuaded by the Crown's submission that this was a well organised operation. There is certainly evidence of the cannabis being put into snap lock bags ready for sale but there does not appear to be much sophistication about the operation. The cannabis appears to have been grown outside in your back yard in a residential area, then dried in various places in the house where there was space. There does not appear to have been much effort to conceal the operation or specialist equipment to grow the cannabis. There is no indication that the operation has been ongoing with the rotation of crops as in some of the other cases.

[20] I consider that the scale of the offending is around the mid level of band two in *Terewi* and is comparable to the offending in other cases such as *R v Smith* HC PMN CRI 2005-015-498 6 December 2005 and *R v Carey* HC AK CRI 2007-044-6944 1 July 2008, and is less serious than, for example, in *R v Scott* CA170/05 9 November 2005 where there was a two to three year operation with a degree of sophistication, involving rotational crops and with a conservative estimated yearly

return of \$20,000. I also consider it to be a little less serious than *R v Wilson* HC INV CRI 2008-017-483 31 March 2009, as referred to by the Crown, where there was evidence of a two-year operation, a purpose-built room and rotation of crops.

[21] In my view the circumstances of your offending, before I take into account aggravating and mitigating factors that apply to you, warrant a starting point of between two and a half years to three years' imprisonment. I consider the starting point is appropriate taking into account the totality of your operation which is reflected in the three related charges which have been brought.

Aggravating and mitigating factors

[22] The Crown submits that the aggravating factor personal to you is that you have previous convictions for cannabis-related offending and that the starting point should be uplifted because of this. However, given the period of time since those convictions, I do not consider that there is a special need for particular deterrence that would warrant a lengthier term of imprisonment than the starting point I have adopted.

[23] The mitigating factor is your guilty plea. I allow you the full discount for that which means that I arrive at an end sentence of between 20 to 24 months' imprisonment.

Home detention

[24] A sentence in that range qualifies as a short term sentence of imprisonment and so means that a sentence of home detention can be considered. The proposed residence is your house in which you are living with your adult son. That residence has been assessed as being suitable for electronic monitoring.

[25] In *R v Hill* [2008] 2 NZLR 381 the Court of Appeal said that home detention can be considered for drug offending. It noted that while the courts are generally reluctant to sentence an offender to home detention when the offending has occurred

in the home there is no inflexible rule. Where an offender is motivated to change and there is a realistic prospect that he or she will be able to change, home detention may be appropriate.

[26] Health considerations may also make imprisonment disproportionately severe for a particular offender and may make it unlikely that re-offending will occur such that home detention may be appropriate, as was the case in *R v Marchant* HC TAU CRI-2008-087-001222 26 November 2008, a case which is relied on by your counsel.

[27] Here the probation officer has recommended a sentence of home detention because of your health situation, the practical and emotional support you would receive from your family and because he considered your risk of re-offending to be low.

[28] Your counsel submits that a sentence of imprisonment would be particularly severe for you and that your health issues would be difficult to manage in prison. She has submitted a note from Dr White at Taranaki Base Hospital about your medical conditions and medication. Dr White says you need to be on a gluten free diet and if you do not it is likely that you will become very ill. He says your liver disease could deteriorate easily with infection and that you are at significant risk of your health deteriorating in a prison environment unless special provision was given to treating and monitoring your condition. Your counsel has said that even in your home when you are on the appropriate diet and eating at the various times at which you have to eat that you are even then prone to attacks of very poor health.

[29] The Crown oppose home detention because your offending occurred at the proposed residence. It also refers to your previous cannabis offending. It says that your health issues can be managed in prison. It says that there is nothing to take your case out of the usual position that imprisonment is the appropriate sentence in light of the need to denounce and deter this offending.

[30] I note that your improved financial situation, your ongoing health issues and the stress arising from these charges all make it less likely that you will re-offend. I

am also concerned from the material that is before me that your poor health will be difficult to manage in prison and that as a result a sentence of imprisonment would be more severe for you than a person in reasonable health. I am satisfied that the needs to denounce, deter and hold you accountable are met by imposing a sentence of home detention.

[31] I consider that the appropriate length of home detention is 12 months. I therefore sentence you to 12 months' home detention on the charge of possession of cannabis for sale. I sentence you to concurrent sentences of 12 months' home detention for each of the sale of cannabis and cultivation charges.

[32] The home detention address will be at your present address at Waitara. The probation officer seeks and I accordingly order the following further conditions:

- a) Firstly, that you travel directly on release from Court to that address and there await the arrival of a probation officer and a representative of the monitoring company; and
- b) Secondly, that you are to live at that address for the duration of the home detention period.

Forfeiture

[33] The Crown seeks forfeiture of the \$4,060 and the \$993.90 found during the search. Your position is that the \$4,060 cash found in the Portacom does not belong to you but belongs to a boarder. The Crown says that because the cash was found in small denominations and with the scales, receipts for "Supergrow", "Growhow", and the cannabis head and also the prescription medicine with your name on it, I should infer that the money was in your possession and was clearly connected to your offending. I agree with the Crown's position. No evidence has been submitted from the boarder that it belongs to him and given where the money has been found and the amount of it I am satisfied that it is connected to the offending.

[34] I am therefore satisfied that a forfeiture order should be made in relation to the cash both found in the Portacom and in your jacket and accordingly I so order.

Mallon J

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