IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2009-004-006524

QUEEN

v

ANTHONY LLOYD MORRISON

Hearing: 28 July 2009

Appearances: J G Donkin for the Crown
P Winter for the Prisoner

Judgment: 28 July 2009

SENTENCING NOTES OF WYLIE J

Solicitors:

Crown Solicitor, P O Box 2213, Auckland
P Winter, P O Box 105 495, Auckland

[1] Mr Morrison you appear for sentence today having pleaded guilty to two charges under the Misuse of Drugs Act 1975. Those charges are as follows:

a) Possession of the Class C controlled drug cannabis for supply. This is an offence pursuant to s 6(1)(f) of the Misuse of Drugs Act 1975, and the maximum penalty is imprisonment for a term not exceeding 8 years.

b) Cultivating the prohibited plant cannabis. This is an offence pursuant to s 9(1) of the Misuse of Drugs Act 1975, and the maximum penalty is a term of imprisonment not exceeding 7 years.

[2] The District Court has a limited jurisdiction in relation to sentencing on these matters, and on 28 May 2009 His Honour Judge Perkins in the District Court at Auckland declined jurisdiction, and referred you to this Court for sentence.

Relevant facts

[3] At the relevant time you were the owner of the Beehive Lunch Bar, which was situated in Broadway, Newmarket. Between January 2008 and October 2008 you installed a hydroponic garden system in the ceiling cavity of the lunch bar.

[4] On 4 October 2008, the New Zealand Fire Service attended a flooding incident at the lunch bar, and found the hydroponic garden system in the roof space and they immediately notified the Police.

[5] The Police then attended the address, and searched the roof space. They found the hydroponic garden system. They also found:

a) 261 cannabis plants;

b) 139 grams of dried cannabis;

c) $6,700 in assorted $10, $20 and $50 notes;

d) scales;

e) dried cannabis;

f) 5 light hoods;

g) 4 ventilation systems; and

h) numerous items including plastic piping, and electrical and plumbing equipment.

[6] Later on the same day, the Police executed a search warrant at your home address which was then on the North Shore. The Police found a number of items, which if assembled, could be used as a hydroponics system. These included 21 white PVC gully segments, 4 black polythene sheets, 11 black tubes, and 3 white painted shades. The Police also found a black plastic rubbish bag full of cannabis off cuts and plants.

[7] You were spoken to, and you admitted growing approximately 160 cannabis plants, and having 5 mother plants, in the ceiling space of the Beehive Lunch Bar. You also stated that you had dried the cannabis at your residential address and by way of further explanation, you told the Police that this was your second attempt at growing cannabis.

Pre-sentence report

[8] I have received a helpful and full pre-sentence report from the Probation Service. You are a 49 year old Caucasian male. You were raised and educated at Thames, and you enjoyed a supportive and comfortable childhood as one of three children. You maintain a close relationship with your family, but your sister is the only family member aware of your present offending.

[9] You were married in 1985. You initially continued to live in the Thames area until you and your wife moved to the North Shore in 1992. You separated from your wife in 2006 and you have two daughters from that relationship, aged 18 and 19.

[10] Since February of this year you have been residing with your sister and brother-in-law, together with their children.

[11] You have generally been self-employed. In recent years, you ran the lunch bar in Newmarket. You are now employed as a part-time delivery driver by your sister and brother-in-law.

[12] Your drug use was canvassed at the interview with the Probation Officer. A departmental screening tool was used, and this revealed a score of 5, which I am told indicates a harmful pattern of drug use. You told the Probation Officer that you began using cannabis when you were aged 16 years old. You have said that you have only ever used cannabis, and that you have smoked up to three joints a day "on a fairly regular basis". You have stated that it gives you a feeling of wellbeing. You also stated that you considered that the habit has not been detrimental to your health, and that you are keen cyclist. You advised that you have never smoked cannabis in the presence of your family and that you have not smoked it since your arrest in relation to the present offending.

[13] You pleaded guilty at an early stage. You have accepted the Police summary of facts. In explanation you stated that you could see that your marriage was over, and that the lunch bar was doing badly. You told the Probation Officer that your involvement with cannabis was about keeping the business and your life going. You asserted that "it paid the bills".

[14] Since your arrest, I am advised that you have successfully completed a Change Skills programme with Community Alcohol and Drug Services, and that you have attended an evening maintenance group. Mr Winter appearing on your behalf today has produced certificates confirming your attendance at those courses and at the evening maintenance group.

[15] You have no prior convictions.

[16] The Probation Officer noted that you have expressed shame for your behaviour, and accepted culpability. She also noted that you are acutely aware of how your offending will impact upon your family, and specifically your daughters. You are loathe for your parents to find out about it. I am told that your sister and brother-in-law are supportive of you, and are prepared to offer their home to enable you to undergo any electronically monitored sentence I may impose. Indeed your brother-in-law has appeared in Court this morning to support you. I am told that you are keen to redeem yourself and to regain the high regard of your family by maintaining employment, and self respect. I am also told that you are assured of work through the assistance of your sister and brother-in-law, and that should you be sentenced to electronic monitoring, and are unable to undertake your driver delivery role for any reason, that you could work on the proposed new home which your sister and brother-in-law are shortly intending to build.

[17] The Probation Officer reports that your risk of re-offending is not considered to be high.

Submissions received

[18] I have received submissions from Mr Donkin for the Crown, and from Mr Winter on your behalf.

[19] Mr Donkin emphasises the purposes of sentencing as set out in s 7 of the Sentencing Act 2002. In particular, he refers to the need to hold you accountable for the harm done to the community by your offending – s 7(1)(a), the need to denounce your behaviour – s 7(1)(e), and the need to deter you and others from committing similar offences – s 7(1)(f). He also referred me to the principles of sentencing set out in s 8 of the Sentencing Act 2002, and in particular made reference to the gravity of your offending, the seriousness of the type of offence, the general desirability of consistency with appropriate sentencing levels, and the need to impose the least restrictive outcome that is appropriate in the circumstances.

[20] Mr Donkin pointed to various factors he submitted aggravated your offending – namely the commercial element attaching to it, the sophistication, planning and pre-meditation evident from the set up in the ceiling of the lunch bar, and the harm to society caused by those involved in drug dealing and supply generally. He referred to the leading authority in relation to cannabis offending – *R v Terewi* [1999] 3 NZLR 62. He submitted that the size of the cultivation operation placed your offending at the upper end of Category 2 discussed in *R v Terewi*, and that the starting point for sentencing you should be between 2 and 4 years' imprisonment. He then referred me to other comparable authorities.

[21] In summary, Mr Donkin submitted that the appropriate starting point for your offending should be in the range of 3 to 4 years' imprisonment. He accepted that you have no previous convictions, and that you are entitled to a credit for pleading guilty at an early stage. He also acknowledged your remorse and insight, and he recognised that the end sentence might be such that a sentence of home detention could be considered as an option.

[22] Mr Winter on your behalf also referred me to the purposes and principles of sentencing. In particular he emphasised s 7(1)(h), which records that sentencing should assist in your rehabilitation and reintegration. He also referred to s 8(g) – the need to impose the least restrictive outcome that is appropriate in the circumstances, and s 8(h) – the need to take into account your particular circumstances.

[23] Mr Winter also submitted that pre-meditation is not an aggravating feature of your offending. He submitted that a level of pre-meditation is implicit in the nature of the charges themselves, referring to *R v Potter* HC AK CRI 2006-004-017287, 15 May 2007, Winkelmann J. He referred to the mitigating factors – your plea of guilty, and your previous good character – and to the pre-sentence report. He accepted that your offending fell within Category 2 discussed in *R v Terewi*. He discussed comparable authorities, and submitted that a starting point of between 2 years and 2 years and 6 months' imprisonment was appropriate.

Approach to sentencing

[24] I have considered the principles set out in ss 7 and 8 of the Sentencing Act 2002. I have had regard to the need to hold you accountable for your offending, the need to promote in you a sense of responsibility for and acknowledgement of your offending, and the need to denounce the conduct in which you were involved. I am also mindful of the need to deter others from committing the same or similar offences. I have taken into account the gravity of your offending including your degree of culpability, the seriousness of this type of offence and the general desirability of consistency of the appropriate sentencing levels with similar offenders committing similar offences. I am also mindful of counsel's submissions that I must impose the least restrictive outcome that is appropriate in the circumstances.

Analysis

[25] As I have noted, the leading authority is the decision of the Court of Appeal in *R v Terewi*. In that decision, the Court of Appeal discussed sentencing guidelines for those involved in the cultivation of cannabis. *R v Terewi* has subsequently been extended to apply to cases involving possession for supply, and the sale of cannabis – see *R v Keefe* CA 275/02, 28 November 2002.

[26] *R v Terewi* sets out three broad categories for sentencing those involved in cannabis offending. Here it is common ground between counsel that your case falls within Category 2. Category 2 involves small scale cultivation of cannabis plants for a commercial purpose. The Court of Appeal suggested that a starting point of between 2 and 4 years' imprisonment is generally appropriate, but that a lower starting point may be adopted if sales are infrequent, and are of limited extent.

[27] I accept that your offending falls within Category 2 discussed in *R v Terewi*. Notwithstanding Mr Winter's submissions to the contrary, I also accept that there are aggravating aspects to your offending. There were a large number of plants found – 261. A substantial amount of dried cannabis was found – 139 grams. There was also evidence of commerciality – namely the presence of the scales, and the cash. In

your explanation for the offending, you indicated that you were cultivating and selling cannabis for the purpose of commercial gain. There was clearly a degree of sophistication and pre-mediation in the hydroponics set up. I consider all of these matters to be aggravating features.

[28] There are a large number of comparable authorities. I refer for example to *R v Wells* HC HAM CRI 2007-039-024, 19 April 2006, Stevens J, where the Court took a starting point of 2 years and 6 months' imprisonment in relation to eight cannabis plants, 160 seedlings, and 144 grams of dried cannabis. In *R v Houkamau* HC CHCH CRI 2006-019-007516, 24 November 2006, Panckhurst J adopted a starting point of 3 years and 6 months' imprisonment for an offender who was found in possession of 127 tinnies containing cannabis. In *R v Mamanu* HC AK CRI 2008-090-4226, 18 November 2008, John Hansen J adopted a starting point of 2 years and 6 months' imprisonment where a Police search found 110 grams of cannabis and some $2,500 in cash. In *R v Andrews* [2000] 2 NZLR 205, the trial Judge adopted a starting point of 2 years' imprisonment for an offender who had cultivated 81 plants, and was in possession of 156 grams of dried cannabis head. The Court of Appeal did not criticise that starting point. In *R v McPherson* CA 34/00, 10 April 2000, the Court of Appeal adopted a starting point of 3 years' imprisonment for an offender found in possession of 193 cannabis plants, and 425 grams of dried cannabis. In *R v Broughton* CA18/05, 9 June 2005, the Court of Appeal adopted a starting point for an offender found in possession of 50 mature plants, 24 seedlings, and 250 grams of dried cannabis of 4 years.

[29] As previously noted, in my view your offending falls within the middle of Category 2 in *R v Terewi*. I have taken possession for supply as the lead charge, and I consider that a starting point of 2 years and 9 months' imprisonment on that conviction is appropriate. I consider that there should be an uplift for the cultivation charge, and that an uplift of 6 months is appropriate. In my view, a final starting point of 3 years and 3 months' imprisonment is appropriate in your case.

Personal aggravating/mitigating features

[30] There are no personal aggravating features that I am aware of. There are however a number of mitigating features. First, you entered a very early guilty plea, prior to the taking of depositions. Further, you have a previous good record, you have expressed considerable remorse, and you have undertaken some rehabilitation already.

[31] Noting the comments of the Court of Appeal in *R v Walker* [2009] NZCA 56, I accept that you are entitled to a one third discount on the sentence I would otherwise have imposed on you for your early guilty plea.

[32] Further, in my view you are entitled to some minor credit for the fact that you are a first time offender. Generally such matters are not given much weight in the sentencing process, because the drug offending in respect of which you have pleaded guilty falls within Category 2 in *R v Terewi*, and the fundamental requirement is that the sentence imposed should act as a deterrent to others minded to engage in similar activity. Here you have also shown considerable remorse and you have moved to address your dependence on and use of cannabis. In the circumstances I allow you a further discount of 2 months.

[33] Allowing for your early guilty plea, and the fact that you are a first time offender, it seems to me that a finite sentence of 2 years' imprisonment is appropriate for the charge of possession of cannabis for the purpose of supply. On the charge of cultivating cannabis, I consider that a concurrent sentence of imprisonment of 1 years is appropriate.

Intensive supervision and community detention/home detention

[34] Mr Winter on your behalf asked that you be sentenced to either intensive supervision and community detention or to home detention.

[35] I am mindful that the Probation Officer has recommended a sentence of community detention and intensive supervision. I have given anxious consideration

to the issue of whether or not a sentence of intensive supervision and community detention is appropriate. I am not satisfied that this type of sentence would be appropriate in the circumstances of your case. It would not to my mind sufficiently deter other persons minded to engage in similar activity. I now to the question of home detention.

[36] Mr Winter referred me to the decision of the Court of Appeal in *R v Hill* (2008) 23 CRNZ 744.

[37] I have jurisdiction to sentence you to home detention because I have sentenced you to a "short term" sentence of imprisonment. A short term sentence of imprisonment is a determinate sentence of 2 years or less. I note that Mr Donkin appearing for the Crown does not oppose a sentence of home detention.

[38] I can only impose a sentence of home detention if I am satisfied that the purpose or purposes for which the sentence is being imposed cannot be achieved by any less restrictive sentence or combination of sentences.

[39] My discretion as to whether or not to sentence you to home detention falls to be exercised in accordance with the principles set out in ss 7, 8 and 9 of the Sentencing Act 2002. I note the guidance given by the Court of Appeal in *R v Hill* in relation to the imposition of such sentences. It is clear that your personal circumstances, which I referred to already, are relevant to the question of whether home detention should be imposed. Rehabilitation is important. Where an offender is motivated to change, and where there is a realistic prospective that he or she will be able to change, there are obvious benefits to a sentence of home detention, both from society's perspective, and from that of the offender.

[40] In the present case, you are a first time offender at the age of 49 years. You have the strong and ongoing support of your sister and brother-in-law. You have expressed a desire to rehabilitate yourself and you have actively taken steps in that regard. You have expressed remorse, and you have demonstrated insight into your offending. Those factors weigh in favour of granting you home detention. On the other hand, you were involved in the cultivation of cannabis for supply. The

cultivation did not occur in your home, but the drying of the cannabis did. In the event I accept that you are now living with your sister and brother-in-law.

[41] In my view, a sentence of home detention is appropriate in your case, largely because of your expressed remorse, the fact that you are clearly motivated to change your habits, and the fact that you have already taken significant steps in that regard.

[42] The proposed address is 228 St Heliers Bay Road, St Heliers, Auckland. The Probation Officer reports that that house is suitable for home detention purposes. You have consented to the conditions of home detention, and have signed the requisite agreement. I am told that your sister and brother-in-law who rent and live in the house in St Heliers Bay Road have given informed consent, and that there are no impediments to a sentence of home detention.

Sentence

[43] In the circumstances, I sentence you to 12 months' home detention. The following conditions are to apply:

a) You are to travel from this Court directly to the property at 228 St Heliers Bay Road, St Heliers, Auckland, and to there await the arrival of the home detention probation officer, who will connect you to the electronic monitoring that will be required.

b) You are to remain at that address for the duration of the sentence, except as may be expressly permitted from time to time by your home detention probation officer.

c) You are to undertake an alcohol and drug abuse assessment for a non-residential programme, and if appropriate, you are to attend and complete such a programme to the satisfaction of your probation officer.

d) You are to undertake such further or other counselling or programmes that may be directed by your probation officer.

e) That you are to abstain from the consumption of alcohol or illegal drugs for the duration of this sentence.

Destruction and forfeiture order

[44] The Crown seeks an order for destruction of the cannabis and drug related paraphernalia found at both the lunch bar and your home address. It also seeks an order for the forfeiture of the $6,700 found in your possession pursuant to s 32 of the Misuse of Drugs Act 1975.

[45] Those orders are not opposed by Mr Winter on your behalf.

[46] I make the orders accordingly.

Wylie J