IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

CRI 2009-483-42

PATRICK THOMAS BUTLER

v

NEW ZEALAND POLICE

Hearing: 3 November 2009

Counsel: E Hall for Appellant
I Murray for Respondent

Judgment: 4 November 2009

JUDGMENT OF SIMON FRANCE J
(Appeal against sentence)

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[1] This is a sentence appeal arising from guilty pleas to cultivating cannabis and possession of a firearm. Mr Butler was sentenced to twenty-one months' imprisonment, which involved:

a) a starting point of thirty months for the cannabis;

b) a one third discount for the guilty plea, calculated at being twelve months;

c) a three month cumulative term for the firearm.

Home detention was declined.

Facts

[2] Mr Butler was living at a rural address out of Wanganui. Near the house, in a fenced area, there were sixteen cannabis plants ranging in height from 20 cm to 1.4 metres. Adjacent was a small room, in which cannabis plants were growing. These plants ranged in height from 15 cm to 1 metre. The room had a heating lamp, the plants were fertilised and well tended. Nearby a caravan was set up for drying purposes.

[3] In total there was thirty-one plants found. The dry leaf weight 1.1 kg and the wet head material 0.9 kg.

[4] Under the bed in the master bedroom was a sawn off shotgun loaded with two twelve gauge shells. Mr Butler does not have a gun licence. Elsewhere in the house there were found a quantity of .222 and 12 gauge shells.

Sentencing

[5] The Judge noted that Mr Butler said in the pre-sentence report that he was a hunting man and that was the reason for the gun. His Honour accepted Mr Butler hunted but noted it was an odd way to hide it if that were the case. To that I would add that such an explanation seems to afford little justification for it being loaded inside the house. I also note Mr Butler is not licensed to have a firearm.

[6] The Judge noted that there was a dispute as to value, and also uncertainty as to likely yield. The prosecution's low figure for each yield option was either $54,000 or $108,000.

[7] Mr Brosnahan's figure was $30,000. No evidence to support this was filed. The Judge preferred the National Drug Intelligence Bureau estimates and came to a figure of $60,000 as a sensible compromise. It was noted this would produce a significant profit.

[8] Concerning a claim of personal use, the Court said it did not believe Mr Butler, noting that all cannabis dealers say that.

[9] The Court noted that Mr Butler had a stable lifestyle, and was heavily involved in school activities. There were a number of positive references, but they were to be off-set by the manner in which those who traffic in cannabis must be dealt with. The Court queried the Departmental assessment of low offending risk on the basis that there was no genuine remorse and Mr Butler seemed to accept the outcome as an occupational hazard.

[10] Concerning home detention, the Judge considered the purposes of sentencing could not be met by that sentence. It would send the wrong message as regards someone who was involving himself with children [the children Mr Butler has care of]. It would hold Mr Butler insufficiently accountable.

Procedural matters

[11] The appellant did not give an explanation in respect of the cannabis or firearm. Charges were laid on 2 April 2009. Originally there was a possession for supply charge. This was dropped at some point. The firearm charge was amended 23 June 2009; originally it alleged a charge of using a gun to assist a crime, but this was amended. I take the effect of that change to be that a direct link between the gun and the cannabis is no longer an available inference. A preliminary hearing was scheduled for 23 June 2009. Mr Butler pleaded guilty to the cannabis charge of 20 June and to the gun charge on 23 June.

Submissions

[12] The appellant submits the starting point was too high. Reference is made to a list of what are submitted to be comparable cases where a lower point has been taken. Particular focus is given to a recent Wanganui High Court Sentencing – *R* v *Te Tua* (CRI 2008-083-002383, 23 September 2009, Miller J). There the charge was possession for sale. A shed has been modified, there was 0.97 kg of dried

material, and fifty-five cannabis stalks. Mr Te Tua had previous convictions for cultivation, possession and sale. The final outcome was seven months.

[13] Ms Hall submits that the appropriate starting point was no more than eighteen months to two years where there was no actual evidence of supply, or of sale, no cash located, and no evidence of actual dealing. It is submitted that the appropriate end sentence was in the range then of twelve months – sixteen months and that home detention ought to have been imposed. It is noted no guilty plea discount was given in relation to the firearm.

[14] Concerning home detention, reference is again made to recent cases, including two sentencings of my own where home detention was given in circumstances where the offending was from the home. Ms Hall submits the Judge's reasoning here was wrong, especially when the Court had otherwise recognised that the rehabilitation aspects would be served by the sentence.

[15] For the Crown, Mr Murray had not filed the written submissions but appeared on instructions. The written submissions referred initially to *R* v *Terewi* [1999] 3 NZLR 62. As with Ms Hall, reference was made to *R* v *Rauhihi* (High Court, Napier, CRI 2008-031-1438, Clifford J), where a number of authorities with lower starting points were assessed.

[16] The submissions had advanced the point that based on *Terewi* a starting point towards the bottom of band two is appropriate. Lower points require the commercial element to be "very small". That is not the case here:

a) the quality of the plants was good;

b) there was planning and effort put into the growing process;

c) the drugs found;

d) the gun.

[17] Concerning home detention it was submitted it was an available exercise of discretion.

[18] Mr Murray picked up on the points discussed with Ms Hall. He accepted the Court's proposition that given the Crown had dropped the possession for supply charge, it could not seek to draw on dealing inference in relation to the dried cannabis. His quite reasonable riposte was that if it be accepted, as it must, that the dried cannabis of nearly 1 kg as for personal use what could the purpose of further cultivation be but for commercial reasons.

Decision

[19] The first matter is the sentence of twenty-one months, consisting of an eighteen month term for the cannabis and three months for the gun. Whilst the focus is on the starting point of thirty months for the cannabis, it is of course the sentence as a whole that is under appeal.

[20] The case has considerable factual and process similarities to *R* v *Gatenby* CA 511/04, 28 April 2005. There twenty-four cannabis cuttings were found, as well as a modified shed with two mother plants and thirty-eight seedlings ranging from 20 to 45 cm. Mr Gatenby asserted personal use.

[21] The court observed:

> The case illustrates the difficulties which can occur when the requirements of s 24 of the Sentencing Act are not met. That is where the significance of a disputed fact to the likely sentence is not articulated, and if sought, evidence called to facilitate a finding upon the disputed aspect by a sentencer.

[22] Here there was plainly a disputed fact. The Crown alleged a commercial aspect to the offending. That can only mean an allegation that Mr Butler was growing for financial gain, and not just personal use. He denied that.

[23] Mr Murray observed that there had obviously been a deal done in that charges were dropped or amended and guilty pleas entered. That may be so, but the

basis of the agreement needs to be articulated at the time. What happened here is that:

a) the Crown alleged possession of the dried cannabis for supply, but withdrew that allegation;

b) it alleged a link between gun and drugs, but withdrew that allegation;

c) it prepared a summary of facts to which Mr Butler pleaded that did not on its face allege a commercial purpose to the cultivation.

[24] In my view those factors tell strongly against the capacity to allege a commercial component. If commerciality remains the allegation, it should be noted at the time that it remains a disputed fact and that the withdrawal of charges is not to affect the capacity to argue that.

[25] Moving forward then to the sentencing, as noted in *Gatenby*, s 24(2)(a) requires the Court to indicate to the parties what weight would be likely to be attached to a disputed fact. Here the parties may well have known the answer, but in fact commerciality both increased the sentence length and in the Judge's assessment removed home detention as an option.

[26] It is important that this be made clear, and that the opportunity to call evidence is given. A brief reference in the sentencing remarks to this having been done then provides assurance that the process has been followed.

[27] It being a disputed fact of significance, the prosecution has the onus of establishing it beyond reasonable doubt. There is no indication in the ruling what factors satisfied the Judge, and with respect, an observation that all dealers say it is for personal use, even if true, does not suffice. Presumably all personal growers who are alleged to be dealers also say it. The issue is into which group does Mr Butler fall?

[28] As in *Gatenby*, the claim of personal use is in my view dubious. However I do not consider the circumstances of the case and the likely difference in penalty

merits further inquiry. Mr Gatenby will be the beneficiary of a doubt. In *Gatenby* the Court adjusted the starting point to eighteen months. That seems similarly appropriate here since it remains significant cultivation which is illegal, be it for commercial use or not.

[29] I am in effect reassessing the whole sentence and do not consider myself limited to the Judge's allocation for the gun. What is in issue is the sentence as a whole, and an apportionment within the Court's sentence of three months for the gun was in my view inadequate. In particular:

a) it was modified and dangerous;

b) it was loaded;

c) there was other ammunition;

d) Mr Butler is unlicensed;

e) Mr Butler has a previous conviction for this offence.

[30] Six months was in my view the minimum, and more could be considered. Ready access to loaded modified guns by unlicensed persons who can have no legitimate reason for having it loaded inside the house must be denounced and deterred.

[31] The change that occurred as regards the firearm charge means that a direct link between gun and drugs is not possible. If it were, the sentence would be longer. However, it remains the case that the gun, which Mr Butler had no right to have, was available to him in circumstances where he was concurrently undertaking an illegal drug activity. The risks are patent.

[32] I therefore take a starting point of two years, which should be reduced by eight months to reflect the pleas. The final sentence is therefore fourteen months' imprisonment.

Home detention

[33] The sentencing remarks under appeal could be read as saying that home detention is not available for drug offending with a commercial component. If so, that is not correct as many contrary cases illustrate.

[34] However, I share the Judge's concerns with this case although I express them with a different emphasis. This was still significant drug cultivation, even if shorn of the commercial aspect. Mr Butler has previous drug offences, albeit not very recent. Seriously concerning is the presence of a loaded sawn off shotgun, hidden under the bed, and with other ammunition available. The two factors of the drugs and the gun, for reasons already expressed, lead me to agree with the Judge's decision to reject home detention as an option.

[35] I appreciate that in some cases a gun has not been a final impediment to home detention. Here, however, a person growing significant drugs has separately chosen to have a significantly modified weapon. He has no licence. He has a previous conviction for the same thing. The gun is very dangerous and was fully loaded and ready to go. Given that and given an albeit dated similar conviction, I consider individual and general deterrence make home detention inappropriate and I therefore decline that aspect of the appeal.

Conclusion

[36] The sentence appeal is allowed and the term of imprisonment is reduced to fourteen months.

Simon France J

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