

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

**CRI 2009-019-7265**

**THE QUEEN**

v

**ZANE JACK KETTLE**

Hearing: 19 November 2009

Appearances: R B Annandale for Crown  
C M Clews for Prisoner

Sentence: 19 November 2009

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**SENTENCE OF KEANE J**

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Solicitors:

Crown Solicitor, Hamilton

[1] Zane Kettle, you appear for sentence for two offences on or about 5 September 2008. You produced the Class B drug cannabis oil and you cultivated the prohibited plant cannabis. You pleaded to these offences in the District Court in its summary jurisdiction. The Court declined jurisdiction and you appear for sentence in this Court.

[2] On 12 September 2008 the police executed a search warrant at a Hamilton address you shared with your then partner Joanna McCracken. She was present. You were not. The police discovered a number of planter bags and trays sitting on a table outside the garage. These contained 58 cannabis seedlings. They also discovered a 20 litre bucket containing a large amount of cannabis leaf soaking in solvent. Also, a tin of Acetone, three glass bottles, a steel bowl, a packet of filters and some used filters, and under the kitchen sink a small tin containing a small quantity of freshly made cannabis oil.

[3] Shortly before you were charged with these offences in August this year you admitted that the cannabis seedlings had been planted the week before the search. You said you intended to give them to an associate to grow to maturity. You were to receive half back. You and your associate, you said, had made cannabis oil in the garage. You had received half back and given it to Ms McCracken. You retained the bucket of cannabis material in solvent.

[4] It is also material that Ms McCracken, at the time of the search, was charged with possession of a small quantity of cannabis, some seeds and some utensils. She has pleaded guilty to permitting cultivation, to selling, and to possession for sale. She is for sentence in the District Court on 18 December 2009.

### **Pre-sentence report**

[5] Your pre-sentence report recommends that you be sentenced to imprisonment with conditions on release, if a short term is imposed, requiring you to undergo a rehabilitative programme. It does not recommend a sentence of home detention, a sentence opposed by the police, though you would be otherwise suitable and your parents would be excellent sponsors.

[6] Your report begins by recording that, at age 35, you have for the last four months lived with your parents in Ngaruawahia, after separating from your partner of two years, with whom you were living at the time of the search last year. It says that you are employed by a construction company that happens also to employ your father. You have been employed there for the last 18 months and you and your father work together as a team. You are highly valued as an employee.

[7] You are in good general health. You suffer no mental health issues. You are, however, a problem gambler, as you acknowledge. Your use of alcohol borders on the harmful. You claim not to have used any illicit drugs since 2002. You accounted for your present offending by saying, your report says, that you wished to support your partner. She suffered an addiction. You did not wish to expose her to dealers. You said also that you did not produce the cannabis oil yourself. You cleaned up afterwards.

[8] You show some remorse, your report says, but you minimise your part and in that display 'skewed judgment', which is very concerning. You are, however, assessed as at medium risk of re-offending.

[9] Finally, your report refers to your previous related convictions. Within the last 12 years, these present offences aside, you have cultivated cannabis three times and manufactured cannabis oil once. You have also committed other offences showing that, in the earlier years at least, you had an entrenched habit. Whatever sentence is imposed, your report says you must address these issues.

### **Purposes and principles**

[10] In sentencing you I must hold you accountable, promote in you a sense of responsibility, denounce your conduct, deter you and others, protect the community and provide for the interests of any victim. In this category of case there can be victims, although they are not always instantly identifiable. I must also, so far as it is compatible, assist you in your rehabilitation and re-integration into the community.

[11] In this I must have regard to the following principles: the gravity of your offending, the need to be consistent in sentence with like cases, the need to impose a sentence near the maximum, should that be warranted. Equally, I must take into account those in contrast: the least restrictive outcome appropriate, anything that would make any otherwise proper sentence disproportionately severe, the need to recognise you as an individual within your context.

[12] In the balance to be struck between those purposes and principles, which can be in tension, it has often been said that drug offending of the order for which you appear allows little room for personal circumstances. There is a presumption in favour of imprisonment, as a matter of law. That is not to say, however, that personal circumstances are irrelevant, especially when they have a bearing on what sentence will best assure a halt to offending.

### **Crown submissions**

[13] The Crown, contending for a sentence of imprisonment, takes as your lead offence the cultivation of the seedlings. That offence, in contrast to the production of cannabis oil, is tangible in scale, there were 58 seedlings, and when set against the production offence, that can only give rise only to one inference, that you were cultivating and producing on a commercial scale.

[14] The Crown has invited me to link your offences with those of your partner, but as I have said, in the absence of a conceded statement of facts making the link explicit, I am unable to do so. On the basis of the facts even as they are, however, the Crown contends, your cultivation offence lies within category two: *R v Terewi* [1993] 3 NZLR 62. It seeks a starting point for that offence of two and a half years, and uplift of six months for the production offence, relying on *R v Wallace and Christie* [1999] 3 NZLR 159. It seeks as well an uplift of six to twelve months for your previous related offending – the three cultivation offences between 1996, 2000, and 2001 and the production of cannabis oil on the latter date.

[15] The Crown accepts that you are entitled to some credit for your plea. But it points to the fact that the offences happened in September 2008 and that you only

admitted your part, as a result of which you are charged, in perhaps August this year. The Crown opposes a sentence of home detention, contending that such a sentence would be insufficient to mark the seriousness of your present offending and your propensity.

### **Defence submissions**

[16] Your counsel accepts, on your behalf, the statement in the pre-sentence report that you did show skewed judgment. But, he contends, the context is important. You were then living with your partner, who is charged with separate offending. You offended without thinking through the implications, without calculation. You are not to be seen as a commercial cultivator or producer of any sophistication.

[17] The sentence the Crown contends for, your counsel contends, is disproportionate to your present offences even when set against your prior offending. He contends for an end sentence no greater than two years' imprisonment and for a sentence of home detention to be imposed. Although the police may oppose such a sentence, you have been assessed to be suitable. Your parents will provide excellent support. You are in secure work with your father. You are at a point in your life where you will respond. You have not offended since 2001.

### **Conclusions**

[18] Your two offences, cultivation and production, as the Crown says, are complementary. The cultivation of cannabis enables the production of cannabis oil, and also cannabis itself. They are to be seen together. Though it is difficult to say how many seedlings would have grown to maturity, or how much potential there was for cannabis oil to be extracted from the material in the bucket, both offences exhibit a level of commerciality.

[19] You cannot, as I hope you now understand, excuse your offending by saying that you committed the offences only to assist your partner. Clearly she did or could have benefited. But the offences are yours, as you have now acknowledged, and you

must be held accountable for them. That is more especially so because you have offended in this way in the past.

[20] When you first cultivated in 1996 that must have been relatively modest. But you cultivated again in 2000. You were then sentenced to four months periodic detention and placed under supervision for one year. Eventually, for offending in 2001, you were sentenced not merely for cultivation but also for producing cannabis oil and other offences to three years three months' imprisonment.

[21] As against that, you have not offended since that sentence was imposed and your pre-sentence report contains much that is encouraging. You have been in stable work for at least 18 months and you are very well regarded. Just as encouraging, you are working with your father and that appears, from his point of view, to have been highly beneficial. You have lived at home with your parents for four months. That appears to have worked well for them and for you.

[22] The result is that you do present something of a predicament on sentence. Your offending is not to be minimised. But it does seem to me that you are at a cusp and that ought to be recognised in the sentence I impose.

[23] I do not see any great distinction between your two offences in their inherent seriousness. Counsel for the Crown may well be right to focus on your cultivation offence, though it attracts the lesser maximum. The number of seeds provides some indication of sale. But even that is not to be taken too literally. They had been planted for a week. How many would have survived to maturity has to be speculative. Nevertheless the intent was there. For that offence, which I will take as your lead offence, as counsel for the Crown invites me to, my starting point is two years.

[24] The seriousness of the production offence, as counsel accepts, cannot adequately be measured. I am going to add for that offence an uplift of three months. Your previous offending was serious. But it has tailed off more recently. I will add another three months for that. That takes me to two years six months.

[25] You are entitled to some credit for your plea. You were charged with this offending on the basis of admissions you made. These may have been made well after the date of search. But without them you would not be for sentence today. You did not plead at the earliest opportunity. You pleaded only when your present counsel became engaged on your behalf. So you are not entitled to the fullest credit on that account. Balancing those factors, I give you a credit of 20 percent.

[26] The upshot is that your sentence for the two offences, between which I do not distinguish, will be two years imprisonment for each, concurrently; and the issue then becomes whether you should be sentenced to home detention. I acknowledge that there are factors pointing both ways. But, as I have said, it seems to me you are at the cusp and if you are ever to wean yourself from this form of offending, this is the time. I am not convinced that a sentence of imprisonment would serve that purpose as well. I am highly encouraged by the support you have from your parents.

[27] You will be sentenced to one year's home detention. That will be on the terms that are set out in your pre-sentence report. They are:

- (a) You are to travel directly to 43B Galbraith Avenue, RD1, Taupiri, Ngaruawahia, to await the arrival of your supervising probation officer and the monitoring company representative.
- (b) You are to reside at that address and not to move from it without prior written approval from your probation officer.
- (c) Any proposed employment or training is to be approved by your supervising probation officer to ensure monitoring requirements are met.
- (d) You are to undertake and complete an assessment for a community programme and Psychological Services rehabilitation programme. If deemed suitable, you are to undertake and complete such a programme.

- (e) You are to undertake such further assessment to address offending factors and participate in and complete any counselling programme or course deemed appropriate to the satisfaction of your supervising probation officer and the service provider.

[28] There will also be an order for the destruction of the drug items seized.

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P.J. Keane J