

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

**CRI-2012-021-000862
[2013] NZHC 237**

THE QUEEN

v

GERALD TE HERE BROUGHTON

Counsel: J I Mooney for Crown
R Rai for Prisoner

Sentence: 19 February 2013

NOTES ON SENTENCE OF COLLINS J

Introduction

[1] Mr Broughton, you appear for sentence on three charges:

(1) One count of selling cannabis;¹ and

(2) Two counts of possession of cannabis for sale.²

[2] The District Court has declined jurisdiction because of the two year prison sentence limit that can be imposed in that Court for offending of this nature. Judge Roberts indicated he would have reached an end point of one year and nine months' imprisonment, but he did not think that home detention was appropriate.

¹ Misuse of Drugs Act 1975, s 6(1)(e).

² Misuse of Drugs Act 1975, s 6(1)(f) and 6(2)(c).

[3] In sentencing you I will:

- (1) describe your offending;
- (2) explain the starting point for your sentence;
- (3) consider what adjustments can be made to the starting point to reflect the circumstances that are personal to you;
- (4) consider what discount can be applied in response to your guilty plea;
- (5) consider whether home detention can be imposed; and
- (6) explain your end sentence.

Your offending

[4] On 26 July 2012 an undercover police officer visited your home and asked to purchase cannabis. You retrieved a glass case containing approximately 18 “tinnies” of cannabis, and the officer purchased two of them. Those events led to one of the possession charges and the selling charge. On 12 September, a search warrant was executed at your home. Police found cannabis throughout the house, including 15 grams of loose head material, as well as 16 prepared “tinnies” for sale. That search led to the second charge of possession for supply.

[5] You explained that the loose cannabis was for your personal use, although you acknowledged selling to the undercover police officer.

Starting point

[6] In setting the starting point for cannabis offending, guidance is provided by the Court of Appeal in the decision of *R v Terewi*.³ Although the sentencing bands

³ *R v Terewi* [1999] 3 NZLR 62 (CA).

prescribed in that case were for cultivation of cannabis, the Court of Appeal has extended its application to possession for sale and selling cannabis.⁴

[7] The Crown submits that your offending falls within band two of *Terewi*, and that a starting point of two years is appropriate. In support of that submission, the Crown refer to the following cases:

- (1) In *R v Hokianga*,⁵ the defendant faced a charge of possession for sale and sale of cannabis, after a police search of her property revealed approximately 32 tinnies and 28 grams of cannabis. A starting point of two years was adopted, which was reduced to nine months' home detention to take account of the defendant's guilty plea, age and poor health.
- (2) In *R v Evans*,⁶ 32 grams of loose cannabis, 11 tinnies and a tick list was found in the defendant's home, and she admitted selling about 15 tinnies a week at \$100 profit. A starting point of two years and three months' was reduced to 18 months to take into account the defendant's guilty plea and efforts at rehabilitation. Although the defendant had nine previous cannabis convictions, the last was in 2001, and the defendant now showed signs of addressing her drug addiction. Home detention was substituted as the end sentence.

[8] Mr Rai submits that although this offending has a commercial element, and should be assessed within band two of *Terewi*, the starting point should be lower than the range prescribed by band two due to the low quantities involved. He cites a decision of the Court of Appeal in *R v Andrews*,⁷ which held that there was no "twilight area" between bands one and two, as any commercial element should warrant a band two classification. However, the Court stated that if the commercial

⁴ *R v Keefe* CA275/02, 28 November 2002 and *R v Gray* [2008] NZCA 224.

⁵ *R v Hokianga* [2012] NZHC 2609.

⁶ *R v Evans* [2012] NZHC 398.

⁷ *R v Andrews* [2000] 2 NZLR 205 (CA).

element is very small that factor can properly be reflected in a reduction of the normal starting point for category two cases.⁸

[9] In support of that submission Mr Rai refers to the following cases where a starting point of 18 months to two years was adopted for cases with a clear commercial element:

- (1) In *R v Cecil*,⁹ the defendant was in possession of 47 tinnies and 19 tin foil packages, with a combined total weight of 61 grams valued at approximately \$1,200. He was not selling from his home and instead planned to approach people at bus stops. The dealing was classed as small scale with no evidence of the duration of offending and resulted in a starting point of 18 months' imprisonment, reduced to six months' home detention to account for the defendant's guilty plea and youth.
- (2) In *R v Abraham*,¹⁰ the defendant was in possession of 27 tinnies, with a total weight of 20.5 grams, and \$1,440 cash when police executed a search at her home. The defendant had 11 previous convictions relating to cannabis, three of which were within five years of the sentencing date. A starting point of two years imprisonment was adopted, then uplifted by six months to reflect the prior convictions, before finally settling on a sentence of ten months home detention.

[10] I consider the following cases also to be equally relevant:

- (1) In *R v Bosson*,¹¹ the defendant sold one or two tinnies of cannabis to undercover police officers on different occasions, and also faced a representative charge of selling cannabis to unknown persons from her home address. It was estimated that her operation involved sales of approximately one ounce per week, or 16-18 tinnies, grossing

⁸ At [9].

⁹ *R v Cecil* HC Auckland CRI-2008-092-16315, 31 March 2009.

¹⁰ *R v Abraham* HC Auckland CRI-2008-092-15060, 27 February 2009.

¹¹ *R v Bosson* [2012] NZHC 1956.

between \$400-\$450 per week. It was described as small-scale commercial dealing, warranting a starting point at the lowest end of band two, of 21 months' imprisonment.

- (2) *R v Palau*,¹² the defendant sold a total of 20 cigarettes on four occasions to undercover police officers and later admitted selling for the past eight months. A starting point of two years' imprisonment was adopted but substituted for six months' home detention and 150 hours community service.
- (3) In *R v Hohepa*,¹³ the defendant was sentenced to six months' home detention and 150 community work, for three charges of selling cannabis to undercover police officers. The offending was described as low level cannabis dealing for profit justifying a starting point of two years' imprisonment.

[11] I assess a starting point of two years' imprisonment is appropriate. I reach that conclusion by:

- (1) estimating the commerciality of your operation; and
- (2) taking into account the number of sales and the value of the enterprise to you.

On both occasions when police officers visited your home you were found with between 16-18 tinnies, which have an estimated gross value of \$400-\$450. There is no indication of how many sales took place from your address, but I can infer you were selling from this address on a regular basis. For that reason, I am not prepared to depart from the ordinary sentencing range prescribed by band two of *Terewi*. However, because of the small quantities involved I accept that your offending is at the lower end of band two in *Terewi*.

¹² *R v Pakau* HC New Plymouth CRI-2008-043-3109, 15 December 2009.

¹³ *R v Hohepa* HC New Plymouth CRI-2008-021-1155, 15 December 2008.

Adjustments for personal circumstances

[12] This is not the first time you have faced charges relating to dealing in cannabis. Your criminal history shows a long association with cannabis, with convictions in:

- (1) 1993 for cultivation;
- (2) 1994 for cultivation, possession of cannabis seeds and possession of utensils;
- (3) 1997 for manufacturing, cultivation, possession of oil and possession for supply;
- (4) 2000 for cultivation;
- (5) 2004 for cultivation and possession for supply; and
- (6) 2010 for possession of cannabis plant.

[13] The Crown submits that a three month uplift is necessary to reflect your previous convictions. I consider this is justified, and therefore reach a starting point of two years and three months' imprisonment.

Guilty plea

[14] The only discount that is warranted is for your guilty plea, which came at an early juncture. I propose to give you a discount of 25 per cent (or six and a half months) to reflect your acknowledgement of your wrongdoing.

Home detention

[15] That results in an end sentence of 20 and a half months' imprisonment, which allows home detention to be considered as an alternative to imprisonment. The

Crown strongly resists the sentence of home detention, as your offending occurred at your home, and because of your history of cannabis use.

[16] Mr Rai submits that your health issues (which include emphysema and heart disease) and your remorse justify a sentence of home detention.

[17] However, I consider home detention is not appropriate in your case. Your offending is driven by your desire to earn money from cannabis sales and your dependence upon cannabis which the presentence report describes as being “entrenched”. You appear to be completely unwilling to address your cannabis dependency and you therefore present a high risk of reoffending. You told the pre-sentence report writer you intend to continue using cannabis. Your motivation to change is therefore very low.

[18] Your “entrenched” cannabis habit is borne out by your criminal history. The most serious sentence you have served for cannabis offending is two years’ imprisonment for the 1997 offences. More recent offending has been addressed with various sentences of community work, the most recent of which was imposed in March 2010. These sanctions have not served to deter you from reoffending in a similar manner.

[19] For these reasons I consider that a sentence of home detention would not serve as a sufficient deterrent for your offending. In addition, I consider the address nominated for a sentence of home detention is not suitable due to the other occupants that reside there and your likely influence on them.

Overall assessment

[20] In reaching a final sentence I have reflected on the overall appropriateness of that sentence. In my judgement the sentence that I must impose is an appropriate response to your offending. It is a sentence that:

- (1) holds you accountable for your offending;¹⁴

¹⁴ Sentencing Act 2002, s 7(1)(a).

- (2) denounces your conduct;¹⁵
- (3) should deter others from offending in a similar way;¹⁶
- (4) is comparable to sentences imposed for similar offending;¹⁷ and
- (5) is the least restrictive sentence that can be imposed in the circumstances.¹⁸

End sentence

[21] Mr Broughton, can you please stand now.

[22] On all three counts I am sentencing you to concurrent sentences of one year eight months' imprisonment.

[23] I am ordering the destruction of the cannabis material located by the police when they searched your home on 12 September 2012.

[24] You may now stand down.

D B Collins J

Solicitors:
Crown Solicitor, New Plymouth
Till Henderson, Stratford for Prisoner

¹⁵ Section 7(1)(e).

¹⁶ Section 7(1)(f).

¹⁷ Section 8(b).

¹⁸ Section 8(g).