IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CA 3/12

THE QUEEN

v

GIOVANNI MARSTERS
SAMUEL TANGAROA

Coram: Barker, P
David Williams, JA
Paterson, JA

Hearing: 27 November 2012

Judgment: 30 November 2012

Counsel: Messrs T Arnold & S S Perese for the Appellants
Ms S McKenzie & Ms C Evans for the Crown

JUDGMENT OF THE COURT

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[1] The appellants, Giovanni Marsters and Samuel Tangaroa, had each pleaded guilty on 11 July 2012 to a variety of charges brought under the Narcotics and Misuse of Drugs Act 2004 ("the Act").

[2] Their guilty pleas came on the third day of a trial in the High Court which had been expected to take 10 days. The jury had been empanelled and counsel for the prosecution had made an opening address. One basis for the pleas had been the

receipt by the trial judge, Doherty J, of sentencing indication submissions from the Crown.

[3] These submissions had been produced after discussions in Chambers by the Judge with counsel for the Crown and counsel then representing the appellants plus one other accused person, a former Police officer, who is not now pursuing an appeal against sentence. Eventually, some charges were withdrawn and others amended before the guilty pleas were proffered and the sentencing indications canvassed by the Judge with counsel.

[4] Marsters faced 3 counts of importing a class C drug, namely cannabis, one count of conspiring to import cannabis, 3 counts of selling cannabis, 4 counts of offering to supply cannabis and one count of cultivation of cannabis plant.

[5] Tangaroa faced one charge of importing, one of conspiring to import, one of selling and one of offering to supply. All of these charges related to cannabis.

[6] The trial was a result of an undercover operation by the Cook Islands Police assisted by the New Zealand Police. Over the period of this operation which lasted from September 2010 to May 2011, there were some 30 officers involved, 18 of them from New Zealand. Other persons are still to face charges as a result of the operation and others have already been dealt with by the Court.

[7] The prosecution alleged some drug-dealing by the appellants prior to the commencement of the operation in September 2010. The operation was set up because of concerns about the spread of cannabis use in the Cook Islands with the possible involvement by Police officers in drug-dealing.

[8] On 20 July 2012, Doherty J sentenced Marsters to 6 years' imprisonment on the charges of importing and conspiring to import. He was also given a concurrent term of 2 years' imprisonment on the remaining charges.

[9] Tangaroa was sentenced to 4 years' imprisonment on the importing and conspiring to import charges. He was also given a concurrent sentence of 12 months' imprisonment on the remaining charges.

[10] A co-accused, who had been a Police officer and who was the de facto wife of Marsters, was sentenced at the same time to 2 ½ years' imprisonment for corruption charges as well as for some cannabis-related charges. Although she too filed a notice of appeal against sentence, that appeal has now been abandoned and the Court does not need to consider her situation.

Facts

[11] An extensive Statement of Facts was prepared by the prosecution. The Judge accepted this Statement because there was no challenge to it and no application for a pre-sentencing hearing to establish disputed facts relevant to the sentencing. This Court takes a similar approach.

[12] The Statement of Facts disclosed numerous admissions made by Marsters to an undercover police officer. In pre-trial rulings, Doherty J had rejected defence challenges to the admissibility of the undercover officer's evidence. Despite their then defence counsel's florid characterisation of the use of undercover officers as "new, strange and socially repugnant," no appeal was filed against the judge's ruling. A misconceived appeal against conviction was filed after the sentencing but, when it was pointed out to counsel that such an appeal would be difficult to run after pleas of guilty, and that, in order to mount a viable appeal against conviction, a successful application to change pleas would have to have been made to the High Court, the appeals against conviction were withdrawn. The Court notes that all this occurred before Mr Arnold and Mr Perese were instructed for the appellants. The Court records its appreciation of their thoughtful and responsible submissions. The Court also records its appreciation of equally helpful submissions from Ms McKenzie and Ms Evans for the Crown.

[13] The Court notes for the guidance of the High Court in future cases that, in principle, it sees no reason against a trial judge admitting evidence obtained from an

undercover officer, leaving it to the jury to assess the relevance and credibility of that evidence. The Court makes this general observation without commenting on whether Doherty J was correct on the facts of this case to admit the undercover evidence. That question simply does not arise since there has been no appeal in that regard, although it appears from the Judge's sentencing remarks that he had indeed applied the usual and correct tests for the admissibility of this sort of evidence.

[14] It is not necessary to set out all the facts relating to the offending in this judgment. As the Judge noted, Marsters was the primary offender, if not the ringleader. He arranged and financed imports of cannabis and engaged in the retail selling of it. He cultivated cannabis for himself in small crops but using paraphernalia of some sophistication. He imported cannabis from New Zealand because it was of a better quality and therefore commanded a better price in the Cook Islands. This meant he derived a greater profit and would also have been "cutting out" the middle man, namely his supplier. Nevertheless, the appellant's operation was small in comparison to some revealed in the reports of New Zealand cases. It was however significant in its potential in a Cook Islands context.

[15] Tangaroa was an important player in the illegal operation because he had been employed by the Post Office. And as a result of this employment, he was able to intercept imported contraband before it got to Customs. He was paid in cannabis. He used this substance himself, but, in the view of the Judge, he sold the balance for profit. He therefore was dealing on his own account.

[16] Conversations with Marsters reported by the undercover officer indicated that he had used or was considering using a variety of methods for introducing into and/or circulating drugs within the Cook Islands.

[17] Various calculations were submitted by the Crown as to the profits the appellants may have been expected to have made. Marsters opined to the undercover officer that, at least, his drug dealing had financed two cars. The Judge noted the difference in relative worth of profits in New Zealand as compared with profits in the Cook Islands. The Judge accepted that some of the assumptions of profit made by the Crown "may be on the wild side". He accepted that the cannabis dealing of the

appellants was of a moderate level but was at a level to be significant in Cook Islands society. The Crown assessments had ranged between $46,500 and $107,275 for Marsters and between $26,414 to $53,700 for Tangaroa. The ranges depended on numbers of sales whether there had been bulk deals or sales of a multitude of 'tinnies'.

[18] Detailed and comprehensive reports on each appellant from the Probation Service were supplied to the Judge. Numerous laudatory references including a petition signed by 209 persons, were also filed. Apart from an historic assault conviction against Marsters, both had clean criminal records. Both had settled domestic arrangements and were well regarded in the community. The Judge noted correctly that limited regard should be had to personal circumstances of offenders in drug-dealing cases.

[19] Marsters gave the impression to the report writer that the undercover officer was to blame for his (Marsters') predicament. The Judge considered that Marsters had seen the undercover operator as providing an opportunity to further his drug-dealing operations. Tangaroa took a similar stance, but the Judge noted that Marsters had told the undercover officer that Tangaroa's involvement in drug dealing preceded his.

The Judge's Sentencing Approach

[20] Doherty J's sentencing remarks were comprehensive and carefully structured. He made a number of observations which clearly pointed to the reasons for the sentences which he ultimately imposed. These can be summarised thus:

(a) This was the first sentencing in the Cook Islands for major drug dealing. There had been sentences imposed for simple possession of cannabis in recent times which had contemplated imprisonment where the amount was clearly more than needed for personal use.

(b) The scourge of drugs in any society and its impacts are well-known. Not just the impact on users, the wasted lives of addicts and the

impact on their immediate families, but also on the wider society. Dealing in drugs and the money it generates involves, generally other crime – crime to finance the habit and crime to enforce drug debts or even between drug factions. Things such as those are likely to have significant impacts on an island society.

(c) Whilst it is useful to draw on New Zealand precedent for drug offending, there are distinctions between the two jurisdictions. The Cook Islands and the New Zealand Parliaments have treated class C drugs differently with regard to maximum sentences. For example, for cultivation, the New Zealand penalty is 7 years' imprisonment, but in the Cook Islands it is 20 years.

(d) Consequently, there should not be a lighter approach to sentencing in the Cook Islands when one considers the significant differences in maximum sentences.

(e) There needs to be kept in mind the difference in the relative worth of profits in the two countries. New Zealand wages are much higher than Cook Islands wages: therefore, profits from easy drug-dealing may incentivise people significantly to supplement their Cook Islands lawful earnings. For example, the Crown alleged that an ounce of cannabis sold in the Cooks would represent 2 to 4 weeks' salary depending upon the range.

(f) Cannabis is becoming more prevalent in the Cook Islands. There had been 27 sentencings for cannabis-related offences in the preceding 12 months.

[21] Doherty J referred to several New Zealand Court of Appeal cases: *R v Terewi* [1993] 3 NZLR 62 (approved by this Court in *Mata v R* (CA 2/2000)), *R v Qui* (NZCA 202/06) and *Cai v R* [2012] NZCA 293. *Terewi* related to growing and dealing and *Qui* to importing. The categorisation of importing offences in the New

Zealand High Court decision of *R v Ho* (CRI 2005-092-000567, Winkelmann, J 12 April 2005) had been approved by the New Zealand Court of Appeal in *Qui* and *Cai*.

[22] These New Zealand authorities set levels for different degrees of criminality. In *Qui*, the Court of Appeal approved the starting points identified in *Ho*, namely:

> Category 1: offenders at top level, instigators, masterminds, prime movers and controllers – a start point in the range of 6-7 years.
>
> Category 2: offenders who are crucial players but not masterminds, but without whom the enterprise would not be brought to fruition – a start point in the range of 3-5 years.

[23] The New Zealand Court of Appeal in *R v Terewi* classified cannabis cultivation offences into 3 broad categories:

> Category 1: Growing a small number of plants for the offender's personal use without any sale to a third party being intended. A fine or another non-custodial sentence is appropriate. Where there has been some supply to others, prison could be appropriate in serious cases.
>
> Category 2: Small scale cultivation for commercial purposes. The starting point for sentencing is usually 2-4 years but, if sales were limited, a lower start point could be justified.
>
> Category 3: Large scale commercial growing with a considerable degree of sophistication and organisation. The start point is 4 years or more.

[24] The Court in *Terewi* remarked that the borderlines between categories could be indistinct and sometimes incapable of exact demarcation. This Court in *Mata v R* (CKCA 1) referred to *Terewi* with approval when it upheld a sentence of 2 years' imprisonment for the cultivation of 11 small cannabis plants.

[25] The New Zealand Court of Appeal in *R v Gray* (2008) NZCA 224 stated that for sentencing purposes, no distinction should be made between selling and

cultivating. Hence, Doherty J applied *Terewi* principles to dealing as well as to cultivation offences.

[26] Doherty J, whilst accepting the general thrust of the above New Zealand decisions, noted the need to adapt their principles to Cook Island conditions. The first necessary qualification arose from the greater penalties imposed under the Cook Islands statute. For example, for possession of even a small amount of cannabis, the New Zealand maximum is 3 months' imprisonment, whilst the Cook Islands maximum is 2 years. For importation, 7 years in New Zealand but 20 years in the Cook Islands. For supplying, 8 years in New Zealand but 10 years in the Cook Islands.

[27] The Judge considered that the *Terewi* tariff ought to be adjusted upward to reflect the Cook Islands situation. Thus Category 1, fine to short term imprisonment, Category 2, 2-6 years' imprisonment and Category 3, 5-10 years' imprisonment. On the *Ho* analysis, he saw Category 1 as deserving 5-9 years and Category 2, 3-6 years.

[28] The Judge used the above principles-guidelines in sentencing the appellants. He placed Marsters in Category 1 of *Ho* and Tangaroa in Category 2. His starting points were 5 years and 4 years respectively.

[29] For Marsters, the Judge placed him at the lower-end of the main-player category of *Ho* and used 5 years as a starting point. He then added another 2 years for the other drug-dealing offences, deducted 6 months for the very late guilty plea and 6 months for his personal circumstances, reaching an end sentence of 6 years' imprisonment.

[30] For Tangaroa, the Judge placed him in the secondary offender category of *Ho* and therefore a starting point of 4 years was adopted. He then added another year for the other offences and deducted 6 months for the late plea and 6 months for personal circumstances, reaching the end sentence of 4 years' imprisonment.

Grounds of Appeal

[31] In his useful submissions, Mr Perese rightly acknowledged some of the grounds in the notice of appeal which were unsustainable and concentrated on a submission that the sentences were manifestly excessive. He rightly acknowledged that the discount for personal circumstances is not a strong mitigating factor in a drug-dealing case and that the discount for the guilty plea was generous when one considers the stage at which it had been made – part way through a trial.

[32] Mr Perese acknowledged the decision of this Court in ***Mata*** in 2000 which endorsed the sentencing Judge's view that the appearance of drugs in the Cook Islands was a matter of great anxiety and that the deterrent aspect of sentencing had to be emphasised. Counsel also acknowledged the enactment of new legislation in 2004 in the Cook Islands which fixed higher maximum penalties than those found in its New Zealand counterpart on which it was based.

[33] The Court has had, thanks to the sterling efforts of all counsel, exhaustive details of sentences imposed in the Cook Islands High Court in recent years for drug-related offending. Mr Perese referred to some recent sentencing decisions which show a rather lenient trend by dwelling on offender's personal circumstances. Much of the offending related to simple possession or to minor supplying. More recent sentencing of small-time offenders shows a gradual tightening which led Hugh Williams J to remark in ***R v Upu*** (3 June 2011):

> "...that there is an increasing concern in this community at the prevalence of cannabis and cannabis offending, and in view of that fact it would appear the responsible position for the Court to take is to reflect those increasing community concerns to an extent at least and impose stiffer sentences for cannabis offending. This has been the case in the past."

[34] Mr Perese submitted that there needed to be a recalibration of the balance between deterrence and rehabilitation – especially in the Cook Islands context. He noted a recent report by the New Zealand Law Commission which concluded that the criminal law can be most effective when it adopts a more holistic approach to drug control rather than a purely punitive purpose. He pointed out that there had

been no Crown appeals against lenient drug sentences and, that in the 7 years since the introduction of the harsher maximum sentences, there had been several cases where cultivation offenders had been discharged without conviction or placed on probation.

[35] Counsel discovered a sentence imposed in March 2007 by Hingston J in the High Court in ***R v Rubena***. 3 ½ years' imprisonment was imposed for possession of firearms, possession of 2.57 kg of cannabis and selling and offering to sell cannabis. No sentencing notes could be found. However, this offending seems to have been the most serious shown in previous sentencings for drug offences.

[36] Mr Perese criticised what he called Doherty J's "uncritical application" of *Terewi* and *Ho'*, despite *Terewi* having been approved by this Court in *Mata*. He acknowledged that the *Terewi* categories were helpful in determining culpability as between offenders, but submitted that the length of sentences these indicated should not be followed. He noted that New Zealand has drug rehabilitation programmes for prisoners and parolees. The Cook Islands does not.

[37] Counsel emphasised that many of what would be normally aggravating circumstances were absent. There were no firearms, large amounts of cash or caches of cannabis. Two of the importation charges were the result of confessions to the undercover policeman. There was no suggestion of class A or B drugs.

[38] Counsel essentially submitted that the Judge was wrong in his approach when he rejected a lighter approach to sentencing. Counsel said that an almost lateral transportation of New Zealand tariffs underlines the integrity of the Cook Islands sentencing paradigm.

[39] Next, counsel for the appellants criticised the Judge for his use of "aggravating but untested" evidence. Basically this evidence was the record of conversations by the appellants with the undercover officer. Transcripts of these conversations were given to the jury at the start of the trial – well before the guilty pleas. They were reflected in the Summary of Facts.

[40] Next, it was submitted that the sentencing Judge failed properly to consider rehabilitation of the appellants. A short sentence of imprisonment should have been followed by a period of probation during which rehabilitative measures would have been put in place. Reference was made to the wealth of testimonials provided for each appellant.

[41] Finally, mention was made about the discretionary nature of parole in the Cook Islands as compared with the detailed legislation in New Zealand relating to the release from detention, giving statutory rights to those admitted to parole.

Decision

[42] The Court is impressed with the careful and thoughtful approach taken by Doherty J, who has had considerable experience in criminal trials and sentencing in New Zealand. With respect, his analysis is by far the most stringent and focussed amongst the many sentencing remarks in the Cook Islands High Court to which we were referred. The Court considers that he canvassed fully all relevant matters, especially those raised by the appellants. This case, with the possible exception of *Rubena* for which no sentencing comments exist, appears to reveal the most serious crop of drug-related offences to date to come before the High Court of the Cook Islands. It showed, albeit on a smallish scale, a dedicated enterprise to circulate drugs in a small community which had indicated in its legislation, a very condemnatory view of cannabis importation, cultivation and dealing. Clearly, the Judge was entitled to send a clear message of deterrence which he effectively did.

[43] The Court is unable to find that the sentences were manifestly excessive. Possibly, they were towards the upper end of the acceptable levels, but were still within the range. Therefore, this Court cannot interfere with them.

[44] Previous sentencing for drug offences seems in some instances in the High Court to have been too lenient. In some cases, too little regard appears to have been paid to the very high maximum sentences. The Court must faithfully heed the message sent by the legislature by stipulating these maximum sentences. It may be regarded, as suggested by Mr Perese, that legislating for heavy maximum sentences

is rather a blunt instrument. Regard should be had to the economic and social costs of lengthy terms of imprisonment – especially the impact on offenders' families who could usually be left with minimal financial resources for years while the breadwinner was incarcerated. However, that is a matter for the legislature and not for this Court.

[45] In some of the sentences to which we were referred, too much regard seems to have been placed on the personal circumstances of offenders. Because drug-dealing is so corrosive in its impact on the community, with often an unknown number of persons affected detrimentally, the law for some time in the Cook Islands – certainly since this Court's decision in *Mata* in 2000, has indicated that deterrence must assume greater importance in sentencing over personal circumstances in drug cases. For other types of offending which do not have as wide a community impact as drug-dealing, leniency based on personal circumstances can play a bigger part in the sentencing process.

[46] The Court, following its earlier endorsement of *Terewi* classifications in *Mata*, approves of Doherty J's adaptation of the *Terewi* and *Ho* classifications as indicated above. The Judge adopted the tariffs he indicated to acknowledge the higher maximum sentences mandated in this jurisdiction.

[47] In an ideal world where there were ample resources for criminal rehabilitation in a small economy, approaches such as those suggested by the New Zealand Law Commission and by counsel for the appellants might be possible and desirable. However, this Court has to operate within the existing legal structures where the legislation has sent a clear message about the distaste with which it views drug-dealing in this community.

[48] As to parole, we were informed from the bar that although there is nothing specific in a statute it is routine for prisoners of good behaviour to be paroled at the half-way point of the sentence for those serving more than 5 years, and at the two-thirds point for those serving less than 5 years. The operation of this somewhat arbitrary scheme would mean that, if Marsters were to be imprisoned for 4 ½ years instead of 6 years, he would be legible for parole after 3 years in both situations.

Section 17(5) of the Criminal Justice Act suggests that parole for any prisoner is discretionary.

[49] We reject the ground of appeal that the Judge relied on 'untested' evidence. There could have been a untested facts hearing before sentencing, had the defence chosen not to accept aspects of the Statement of Facts. In the absence of any challenge, the Judge was entitled to rely on the Statement of Facts and did so.

[50] Both appeals against sentence are dismissed.

Sir Ian Barker, President

Justice David Williams

Justice Paterson