

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

CR NO: 259/11

CROWN

v

GEORGE TUA NICHOLLS

Hearing: 16 December 2011
Counsel: M Henry for the Crown
N George for the Accused
Sentence: 16 December 2011

NOTES OF THE HON JUSTICE GRICE ON SENTENCING

[1] Mr Nicholls, you are here as a result of the operation known as Operation Eagle, which I understand was an undercover operation held in the Cook Islands between September 2010 and April 2011.

[2] You have pleaded guilty to a charge that, together with Dina Tekura Manauea Matapo on 2 October 2010 at Rarotonga, you did sell a Class C controlled drug, namely cannabis plant. It is an offence with a maximum penalty of

10 years' imprisonment under s 6(1)(e) and (3)(b) of the Narcotics and Misuse of Drugs Act.

[3] The facts were read out in the Court and I will not go over them in detail, save to say, you were requested by your co-defendant to talk to the undercover policeman who had been asking her for cannabis. You told the policeman that it would cost \$50 and to return after 6.00 pm.

[4] At 6.36 pm the undercover policeman returned to Trader Jacks and met you. He paid you, and you gave him a small package of newspaper with cannabis plant in it.

[5] To that agreed factual statement can be added that you had apparently received some earlier requests from this undercover policeman for cannabis; that concession was made by the Crown, following the submissions of Mr George on your behalf.

[6] When there was a search warrant executed at your home on 5 May 2011, you were spoken to and immediately admitted the facts and explained that you had sold the cannabis as you needed the cash.

[7] The Crown notes you have not previously appeared before the Courts.

[8] As a matter of completeness, it has been agreed between counsel that the weight of the cannabis was essentially one gram.

[9] The Crown points to the charge for sale of cannabis and the change of climate, or the stiffer climate in the Cook Islands, in relation to cannabis offending. The Crown asked me to take into account the principles of deterrence, accountability for harm, protection of the community and denunciation of the offending conduct.

[10] The Crown also referred me to the decision, in terms of sentencing, of *Police v Tina Upu* [CRN 248/2011]. In that case the offender was charged with possession of cannabis and the Court observed that the previous sentences involving

drug related offending, typically attracted a monetary penalty and/or community service and supervision.

[11] In that case Hugh Williams J indicated these sentences were too lenient and somewhat outmoded. He observed that any person who envisages getting involved in cannabis offending from this point on, can expect the Court to start considering jail as a starting point. In that case he also indicated that although not a binding rule of principle, that possession of 100 grams might equate to approximately one month imprisonment, but that is hedged of course with the circumstances in the case and the totality, and all the other issues that the sentencing Judge must take into account.

[12] The Crown also pointed to the decision of the *R v Terewi* [1999] 3 NZLR 62 (CA 113/99) where the Court of Appeal discussed sentences in relation to offending against the New Zealand Misuse of Drugs Act 1975.

[13] In reviewing the sentencing levels for cannabis offending the Court divided cultivation into three broad categories. Category 1, small scale offending, typically for personal use only, almost invariably dealt with by a fine or non-custodial sentence. Category 2, small scale offending but for commercial purpose with the object of deriving profit, and the starting point was imprisonment. Category 3, the most serious case, in which four or more years' imprisonment would apply.

[14] The Crown said it viewed the offending here as serious and it expressed the community's concern about the use of drugs and the negative impact on society. The Crown also pointed to the fact that you pleaded guilty and it is your first offence.

[15] Mr George, on your behalf, made strenuous submissions concerning the circumstances of the offending, and indicated that you had been persistently asked by this undercover agent for cannabis, that you tried putting him off, and that, due to your generosity essentially, you supplied it.

[16] As I have said, the Crown made a concession that there had been some earlier approaches, but not now many. Mr George also said there were some subsequent

approaches when you did not sell, and while I will take note that is background, and indication of your behaviour, it is not technically speaking, immediately relevant to this offence.

[17] Mr George indicated that you have been a hard worker, that you have been very good to your family, earlier you struggled financially and took responsibility for caring for the family, that you are currently full time employed with the Ministry of Infrastructure, as well as your other job, and that you are considered a good worker. That you send money back to the family, as well as supporting the family here.

[18] Mr George also produced character references from Mr Don Durrell of the Cook Islands Motor Centre, who has known you six years and compliments you on being a valuable asset to any community; by Donye Numa, the Acting Secretary for the Ministry of Infrastructure and Planning, who has provided a character reference saying that he has known you for a long time and since March 2011, has had the opportunity to work with you on a number of initiatives and she speaks very highly of you and says this looks like an isolated incident and hopes you can move on. So she is very complimentary of you.

[19] Further references from Jack Cooper of Trader Jacks, who was your employer at the time of the offence, says you work well, you are holding down two jobs, at the Ministry and Trader Jacks, focused and self-motivated. Mr Bret Gibson who has known you and your family and says you are a peaceful non-aggressive, friendly and honest person and offers his support of a bail. So some very good character references.

[20] Probation have put in a report which confirms the issues that Mr George urged on me. Mr George has indicated that this should be treated exceptionally and a discharge without conviction given under s 112.

[21] I have outlined the general principles of sentencing as outlined by the Crown. I am required to pass a sentence that punishes you, denounces the offence and deters others from similar offending. The sentence must reflect the gravity and seriousness

of the offence. There is growing concern in the Cook Islands concerning these drug offences and, as I have outlined above, the Court has made it clear the defendant should be looking at jail sentences as a starting point for possession offences and cannabis offences, and I refer to that case of *Police v Tina Upu*.

[22] The Court's job is to try and fashion a sentence which will bring home the immediate issue of the harm to the community, but at the same time try and promote a sense of responsibility and, of course punish but deter others. As well it must take into account the mitigating factors and then your particular circumstances surrounding the offence, which Mr Henry has outlined as being co-operative, pleading guilty early, your family background (which I heard about) and impose the least restrictive sentence that is appropriate in the circumstances.

[23] In general terms, this is a selling cannabis case, not just a possession case, which the decision in *Police v Tina Upu* was, therefore it is in a much more serious category. I must accept the statement of facts as I have them before me with the variation and concession obtained by Mr George.

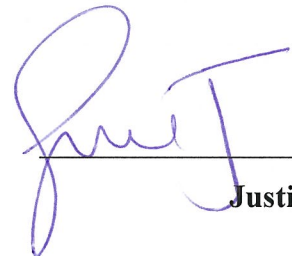
[24] I therefore look at the mitigating factors after I set out a starting point for this offence. This is a case of sale of cannabis, it is very serious, and I see no option but a starting point of imprisonment.

[25] In this case bearing all the circumstances in mind, that starting point I put at two months; there was a small amount of cannabis involved. Out of that you pleaded guilty early, and 20 days served off, leaving one month 10 days. And then I look at the mitigating circumstances. Mr George has put those fully before me this morning, and I take those into account. I take into account the fact of your co-operation. It was a very small amount, you have got a job and any custodial sentence would ruin that, and that is very serious. I also take into account your family circumstances and the support which you have given them and the glowing character references that I have seen this morning.

[26] So taking all those into account I do not propose to impose a sentence of imprisonment, but this is not a case there could be a discharge without conviction. Therefore, I intend to impose:

- (i) 12 months' probation, three months to be served in community service. The conditions as outlined by the Probation Service:
 - (a) to attend any training or workshop as directed by the Probation Services.
- (ii) Court costs of \$30.

[27] So, Mr Nicholls, the sentence is as I have set out above and I have taken very careful notice of your counsel's submissions to reach that point.



Justice Grice