IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA264/2022
[2022] NZCA 472

BETWEEN	MATTHEW IAN ANDERSON Appellant
AND	THE KING Respondent

Hearing:	20 September 2022
Court:	Gilbert, Brewer and Moore JJ
Counsel:	T J Jackson for Appellant D L Elsmore and C L Twisleton-Wykeham-Fiennes for Respondent
Judgment:	6 October 2022 at 9.30 am

JUDGMENT OF THE COURT

A The appeal against sentence is allowed.

B The sentence of three years and one month's imprisonment on charge 1 is set aside and replaced with a sentence of 12 months' imprisonment.

C The concurrent sentences imposed in respect of charges 3 and 4 are confirmed.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Mr Anderson was found guilty by a jury of three charges of cultivating cannabis. These charges arose out of his participation in the cultivation of cannabis at three addresses — King Street, Temuka (charge 1), Waitohi Temuka Road, Temuka

(charge 3) and Te Moana Road, Geraldine (charge 4). He was acquitted on two charges of possession of cannabis for supply (charges 2 and 5). These verdicts appear to be explicable on the basis Mr Anderson satisfied the jury that he did not possess any portion of the cannabis for the purposes of sale.

[2] Mr Anderson was sentenced by the trial judge, Judge M B T Turner, to three years and one month's imprisonment on charge 1 and to concurrent sentences of four months on charge 3 and one month on charge 4.[1] The effective end sentence was constructed as follows:

Starting point[2]	three years and four months
Uplift for previous convictions[3]	three months
Discount for five-year delay while on bail[4]	two months
Discount for personal background and mental health issues[5]	four months
End sentence	**three years and one month's imprisonment**

[3] Mr Anderson appeals against his sentence contending it was manifestly excessive. His primary submission is that the starting point adopted of three years and four months' imprisonment was excessive for three key reasons:

(a) He allegedly had a limited role in the King Street and Waitohi Temuka Road operations.

(b) The cannabis was cultivated solely for medicinal use, with very low levels of the psychoactive ingredient delta-9 tetrahydrocannabinol (THC).

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1 *R v Anderson* [2022] NZDC 9322 [Sentencing judgment].
2 At [101], compare with [73] which refers to three years and six months in respect of King Street with an uplift of four months for the other two cultivations.
3 At [74].
4 At [83].
5 At [96].

(c) Mr Anderson's participation was not for monetary gain, but to obtain high quality medicinal cannabis for the purposes of pain relief and to help manage his mental health issues.

[4] Mr Anderson also contends that greater discounts for personal mitigating factors ought to have been allowed. He argues that a non-custodial sentence should have been imposed, as was recommended by the Department of Corrections in the pre-sentence report and imposed on his two co-offenders.

Background

[5] It is usual to commence by recounting the facts of the offending before turning to the offender's personal circumstances. This aligns with the accepted sentencing methodology. However, in this case, it will be helpful to reverse the order. This will facilitate a better understanding of the background to the offending, Mr Anderson's motivation and role in it, and the personal benefits he sought to derive from it.

[6] At the time of the offending, Mr Anderson was aged 35. He is now 40, separated from his partner, and has three children aged 21, eight and seven. He has a good relationship with his children but, for various reasons, has not been able to see them since he was imprisoned at the end of the trial in February this year.

[7] From a young age, Mr Anderson exhibited hyperactive, anti-social and destructive behaviour which caused difficulties at home and at school. His parents struggled to cope. As a result, Mr Anderson spent time living in various social welfare placements from when he was about 12. He says he suffered physical and other serious abuse during this time and remains traumatised by these events.

[8] Mr Anderson was diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder. He was prescribed carbamazepine to treat his mood disorders. He says he did not like this drug because of its side effects. He experimented with cannabis and found this calmed his mind and enabled him to relax. In the years since, he came to rely on cannabis for this purpose, describing it as a miracle drug for him, superior to other prescription drugs he has received.

He reports that his use of cannabis also affords pain relief from an enduring shoulder injury he sustained in a machinery accident.

[9] Mr Anderson says he had negative experiences obtaining cannabis through gangs and the black market, including being supplied with cannabis laced with other substances and being "ripped off". He says his desire to secure a safe medical-grade product is what motivated him to grow his own cannabis. This led to his convictions in 2009 for cultivating cannabis and possessing cannabis for supply for which he was sentenced to 12 months' home detention.

Index offending

The cultivations

[10] The Judge described the three cultivations as follows:

> **The Cultivations**
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> [6] The first, and by far the most serious, offence was the indoor cultivation at King Street discovered by police in February 2017. On executing a search warrant on 22 February 2017 at the residential property in King Street, police found cannabis growing in two outdoor sheds. Inside the house, which prior to residential use had been a bank, a secret door had been constructed in the pantry, opening into the front of the building. Inside was a highly sophisticated cannabis growing operation. Five rooms had been constructed using plywood and timber, a nursery had been established and each of the rooms contained plants at different stages of growth.
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> [7] There was a sophisticated heating, lighting, water and air filtering system, the power for which had been diverted so as not to run through the electricity meter for the house. There were several whiteboards on which a schedule and other data for growing the cannabis were set out, and other various pieces of equipment, including a trimming machine to remove leaves from stalk.
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> [8] In total 891 plants were found. Over 2.7 kilograms of cannabis was found packaged at the house in different quantities, ounce and pound bags. This formed the basis of the first possession for sale charge which Mr Anderson was found not guilty of.
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> [9] Experienced police officers giving evidence at trial stated this was amongst the most sophisticated indoor growing operation they had seen. It was estimated that four grows were possible per year, giving a potential yield of around $800,000 per annum based on 2017 street prices, dependent on how the cannabis was packaged for sale. Police estimated that it would

> have cost tens of thousands of dollars, if not hundreds of thousands of dollars to set up the operation.
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> **Waitohi [Temuka] Road**
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> [10] The same day police executed a search warrant at a residential address at Waitohi [Temuka] Road, Temuka occupied by Mr Richardson's mother. In a container on the property police found another indoor growing operation, a miniature version of what had been found at King Street. Power had been diverted to the container to run the heating, extraction and watering systems. A total of 32 plants were found.
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> **Te Moana Road**
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> [11] On 10 May 2017, police executed a search warrant at Mr Anderson's home address in Te Moana Road, Geraldine. In a container on the property a cannabis growing operation involving 67 seedlings and several mature plants were discovered. In a freezer at the address police found just under 1.5 kilograms of cannabis. This was the subject of a second possession for sale charge brought against Mr Anderson of which he was found not guilty.

[11] The King Street property belonged to one of Mr Anderson's co-offenders, Mr Snow. The Judge found that the genesis of the operation at that property was the common interest Mr Anderson shared with Mr Snow in cannabis, its perceived health benefits and its likely legalisation.[6] Mr Snow had limited knowledge of the processes involved in cultivating cannabis whereas Mr Anderson was highly knowledgeable and skilled in the cultivation of high-quality cannabis.[7] Mr Snow was to be an absent landlord who would have no direct involvement in the operation but would receive a share of the profits.[8] Another co-offender, Mr Richardson, was invited to oversee the operation and provide a level of security in return for being able to live at the property rent-free, receive some of the cannabis and a share of the profits.[9] The Judge described Mr Richardson's role as "very much a hands-on one".[10] He was at the property every night between 8 pm and 8 am to ensure the automated watering, filtering and heating equipment was operating properly and to provide a measure of security.[11] He also undertook the practical tasks such as trimming the plants.[12]

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6 At [27].
7 At [29]–[30].
8 At [31].
9 At [32]–[33].
10 At [38].
11 At [38].
12 At [38].

Mr Anderson's role

King Street

[12] The Judge described Mr Anderson's role in the King Street cultivation as follows:

> [51] … Mr Anderson was involved in the cultivation from the beginning, he had the requisite specialised knowledge, skill and experience required for a cultivation on this scale. I am satisfied he was involved in the recruiting of Mr Richardson who was to take sole responsibility if the cannabis was found, on the basis he would be looked after. Mr Anderson obtained significant materials to construct the indoor growing operation and to set it up, he assisted in the construction, as Mr Richardson described, and he provided the detail and sophisticated growing instructions, and was at the address during the evening when the system was operating, no doubt to check on it and, if necessary, to provide advice. He was the person the others turned to when problems arose, both before and after the discovery of the cannabis by police.
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> [52] Each of those three men played a role, Mr Richardson described himself as the overseer, providing security and being present on a day-to-day basis, but he also had a hands-on role in the cultivation. Mr Snow was the owner of the house - he provided the environment where the cultivation could occur and, through his business, various supplies which were needed for the grow. Mr Anderson brought his knowledge, advice and expertise, in addition to providing physical assistance in obtaining materials and equipment.

Waitohi Temuka Road

[13] Mr Anderson's role in the Waitohi Temuka Road cultivation was found to be "more limited".[13] He provided Mr Richardson with the container used in the growing operation and he helped with a significant electrical problem that arose. Mr Anderson explained that "he did not want his friend to get electrocuted".[14] The Judge stated that this highlighted Mr Anderson's skills and Mr Richardson's deficiencies. The Judge accepted there was no suggestion Mr Anderson was in any other way involved in the small commercial cannabis cultivation at this address.[15]

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13 At [54].
14 At [54].
15 At [55]–[56].

Te Moana Road

[14] It was not disputed that Mr Anderson was solely responsible for this small non-commercial and relatively unsophisticated cultivation at his own address.[16]

Was the starting point too high?

[15] The Judge placed the offending in respect of King Street in category 3 of this Court's guideline judgment in *R v Terewi*, where starting points in excess of four years' imprisonment are generally warranted.[17] The Judge considered the offending in relation to Waitohi Temuka Road fell within category 2 and the small cultivation at Te Moana Road in category 1.[18]

[16] Messrs Richardson and Snow pleaded guilty and received community-based sentences that took account of their assistance in giving evidence for the Crown at Mr Anderson's trial.[19] Judge Maze adopted a starting point of four years' imprisonment for Mr Richardson and three years and six months for Mr Snow.[20]

[17] Judge Turner considered Mr Anderson's involvement was greater than that of Mr Snow and comparable to Mr Richardson.[21] He therefore set a starting point of three years and six months' imprisonment for the King Street cultivation and applied an uplift of four months for the other two cultivations yielding an adjusted starting point of three years and 10 months' imprisonment.[22] However, the starting point the Judge adopted when calculating the sentence was three years and four months' imprisonment.[23]

[18] The essence of Mr Jackson's submissions for Mr Anderson is that the starting point was too high, particularly because he contends Mr Anderson's role in the King Street operation was comparatively limited (and at Waitohi Temuka Road),

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16 At [57].
17 At [58], applying *R v Terewi* [1999] 3 NZLR 62 (CA).
18 At [61]–[62].
19 *R v Richardson* [2021] NZDC 756 at [16] and [21]; and *R v Snow* [2021] NZDC 6982 at [14] and [17]–[18].
20 *R v* Richardson, above n 19, at [15]; and *R v* Snow, above n 19, at [14].
21 Sentencing judgement, above n 1, at [72].
22 At [73].
23 At [101].

the cultivations all involved medicinal cannabis with very low levels of THC, and Mr Anderson was not seeking monetary gain and was not to participate in the profits. He argues that this Court's 1999 guideline judgment in *R v Terewi* is outdated and needs to be applied with caution given subsequent changes in societal attitudes concerning cannabis.

[19] Ms Elsmore, for the Crown, submits that the Judge made no error in assessing Mr Anderson's role and overall culpability. She submits that appropriate parity was reflected in the starting point adopted for Mr Anderson compared with the starting points chosen for his co-offenders. She says that any reform of the Misuse of Drugs Act 1975 in relation to cannabis is for Parliament and the question of whether *Terewi* should be re-visited is a matter for the permanent Court of Appeal to consider.

[20] As has previously been stated by this Court, it may be that *Terewi* is somewhat outdated and should be reconsidered.[24] However, like all guideline judgments, it should not be applied slavishly or in a mechanistic way.[25] Ultimately, the sentencing judge is required to consider the objectives of sentencing and have regard to the matters set out in the Sentencing Act 2002 to arrive at a sentence that is appropriate in all the circumstances.

[21] We have been persuaded that the starting point adopted was excessive having regard to three factors that were emphasised at the hearing. First, as appears to have been accepted by the Judge, the cultivations were solely for medicinal-grade cannabis with very low THC content. Secondly, Mr Anderson's motivation was to ensure high quality medicinal-grade cannabis was produced and to receive a supply of this product for his own use. Thirdly, he did not stand to share in the profits of the operation. For these three reasons, we do not consider Mr Anderson's offending falls neatly into either of categories 2 or 3 of *Terewi*. The examples given in the schedule attached to that guideline judgment all involved offending for financial gain.[26] Further, the commerciality of the particular operation required consideration, including whether

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24 *R v Smyth* [2017] NZCA 530 at [17].
25 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [48].
26 *R v Terewi*, above n 17, at [2].

the plants had "higher narcotic levels" and contained "significantly increased levels of [THC]".[27]

[22] Mr Anderson's unchallenged evidence was that no matter how much medicinal-grade cannabis is consumed, it would be "very, very hard" for the user to get "high". Self-evidently, the social harm caused by the consumption of medicinal-grade cannabis is considerably lower than that caused by cannabis with high levels of THC which may produce acute intoxication and has been linked to multiple undesirable effects such as paranoia, memory impairment, increased risk of psychotic illness and addiction.[28] The passing of the Misuse of Drugs (Medicinal Cannabis) Regulations 2019, for the purpose of enabling "the research, manufacture, and supply of medicinal cannabis products and related ingredients, and the cultivation of cannabis for the products and ingredients" and amendments to the Misuse of Drugs Act provides further evidence of this.[29] While we were not referred to any New Zealand authorities that grapple with the sentencing implications of this significant distinction, some assistance can be derived from considering the approach taken in other comparable jurisdictions. For example, the British Colombia Court of Appeal observed in *R v Koenders* that production of cannabis solely for medical use, including by others, will generally attract a non-custodial sentence.[30]

[23] *R v Simpson*, a decision of the Nova Scotia Supreme Court, involved a case having similarities to the present.[31] Mr Simpson was convicted of possession of cannabis, possession for the purposes of supply, and production.[32] He had cultivated approximately 1,100 plants (there were just under 1,000 plants in the present case) in a commercial-style operation but there was no evidence that he was acting for profit. As here, the product was entirely for medicinal use.[33] Cacchione J considered the usual principles of sentencing were "somewhat problematic" given Mr Simpson's

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27 At [5].
28 Sarah D Pennypacker, Katharine Cunnane, Mary Catherine Cash and E Alfonso Romero-Sandoval "Potency and Therapeutic THC and CBD Ratios: US Cannabis Markets Overshoot" (2022) 13 Frontiers in Pharmacology 1 at 2.
29 Misuse of Drugs (Medicinal Cannabis) Regulations 2019, reg 3; and Misuse of Drugs Act 1975, s 2A.
30 *R v Koenders* 2007 BCCA 378, [2007] BCJ No 1543 at [22].
31 *R v Simpson* 2008 NSSC 57, [2008] NSJ No 70.
32 At [1].
33 At [7].

motivation for committing these offences.[34] The Judge reasoned that it would be "difficult to denounce unlawful conduct which has as its sole purpose the alleviation of pain and suffering".[35] The same applied to deterrence. The Judge did not regard Mr Simpson as a danger to society. There was therefore no need for him to be "segregated from the rest of society for the protection of society".[36] The Judge considered the case was exceptional and sentenced Mr Simpson to one day in jail, effectively time served for his day in Court, and imposed a fine of $2,000.[37]

[24] Given Mr Anderson's motivation was to secure the cultivation of high quality medicinal cannabis including for his own use, he was not involved in the supply of the product and he was not to share in the profits, we do not consider a starting point any higher than 18 months' imprisonment could possibly be justified.

Were the adjustments for personal factors appropriate?

Uplift for previous convictions

[25] We are obliged to consider the sentence that ought to be substituted having been persuaded that the starting point was manifestly excessive. The Judge applied an uplift of three months' imprisonment for Mr Anderson's convictions in 2009 for cultivation of cannabis and possession of cannabis for supply.[38] Given the historical nature of these previous convictions and the fact Mr Anderson had served a community-based sentence of home detention for this offending, we consider an uplift of three months' imprisonment involved considerable further punishment for this offending. We do not consider an uplift was required in all the circumstances.

Discount for five-year delay while on bail

[26] A search warrant was executed at the King Street address on 22 February 2017 followed by a warrantless search at Waitohi Temuka Road. A search warrant was executed at Mr Anderson's address at Te Moana Road on 10 May 2017 and he was arrested and charged at that time. He was remanded on bail at his first court

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34 At [22].
35 At [22].
36 At [22].
37 At [29].
38 Sentencing judgment, above n 1, at [74].

appearance on 12 May 2017. Mr Anderson was not brought to trial until nearly five years later, in February 2022. He was remanded in custody to await sentencing at the conclusion of the trial.

[27] The Judge allowed a discount of two months for the period Mr Anderson spent on bail, observing that the bail conditions could not have been less restrictive.[39] While the bail conditions may not have been particularly restrictive, we recognise that five years is a long time for Mr Anderson to have these charges hanging over him. A discount for this factor, reflecting the right to be tried without undue delay, is more appropriately calculated by reference to the period of undue delay rather than as a percentage of the starting point.[40] However, we consider the effective discount given by the Judge in this case was appropriate taking account of the reasons for that delay — Covid-related delays, counsel unavailability, pre-trial applications by Mr Anderson and his co-defendants which were tested on appeal pre-trial, and that an earlier trial had to be abandoned after three days because a witness recognised a juror.[41]

Discount for personal background and mental health issues

[28] We will not interfere with the discount of four months the Judge allowed for Mr Anderson's personal background and mental health issues despite the adjusted starting point. We consider a discount at that level is in range in all the circumstances.

Conclusion

[29] These adjustments result in an end sentence of 12 months' imprisonment calculated as follows:

Starting point	18 months
Discount for five-year delay while on bail	two months
Discount for personal background and mental health issues	four months
End sentence	**12 months' imprisonment**

39 At [83].
40 *Bublitz v R* [2019] NZCA 364 at [164].
41 Sentencing judgment, above n 1, at [75]–[78].

[30] Mr Anderson has been in custody since February 2022. We understand the effect of this substituted sentence will be his immediate release for time served. It is therefore not necessary to consider whether a sentence of home detention ought to have been imposed.

Result

[31] The appeal against sentence is allowed.

[32] The sentence of three years and one month imprisonment on charge 1 is set aside and replaced with a sentence of 12 months' imprisonment.

[33] The concurrent sentences imposed in respect of charges 3 and 4 are confirmed.

Solicitors:
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Crown Solicitor, Christchurch for Respondent