IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA586/2023
[2024] NZCA 29

BETWEEN	HARRY HIRIWI WHAANGA Appellant
AND	THE KING Respondent

Hearing:	12 February 2024
Court:	Collins, Woolford and Mander JJ
Counsel:	T Epati for Appellant M J M Mitchell for Respondent
Judgment:	13 February 2024 at 10.30 am
Reasons:	22 February 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal against sentence is allowed.

B The sentence of 26 months' imprisonment is quashed and substituted with a sentence of 22 months' imprisonment.

C We direct that a pre-sentence report as to the suitability of the proposed residence for home detention is prepared.

D Leave is granted to Mr Whaanga to apply to this Court under s 80K of the Sentencing Act 2002 to substitute the sentence of 22 months' imprisonment with one of six months' home detention.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] On 13 February 2024, we allowed Mr Whaanga's appeal against a sentence of 26 months' imprisonment imposed following his convictions for possession of cannabis and synthetic cannabis for the purposes of sale.[1] We put in place a sentence of 22 months' imprisonment and granted Mr Whaanga leave to apply to have that sentence substituted for one of six months' home detention provided a proposed address was deemed suitable for home detention by the Department of Corrections. We now explain our reasons for allowing the appeal.

The offending

[2] On 26 January 2022, police executed a search warrant at Mr Whaanga's family address at Opoutama which is near Mahia. During the search, the police located 411.7 grams of cannabis and 339.7 grams of synthetic cannabis. The police also found $31,760 in cash, the majority of which was inside a safe. The safe could only be opened by using the password "shop".

[3] On 15 September 2022, police executed a second search warrant at Mr Whaanga's address. At that time Mr Whaanga was on bail in relation to two charges that had been laid following the execution of the first search warrant. During the second search the police located 249.1 grams of cannabis and 131.7 grams of synthetic cannabis. The police also found $13,848.30 in cash as well as Ziploc bags and scales.

[4] Approximately 3,000 messages on Mr Whaanga's phone were examined by the police. None of those messages related to drug dealing. Nor did the police locate a "tick" book, an item commonly associated with sales of cannabis and synthetic cannabis.

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1 *Whaanga v R* [2024] NZCA 14 [Results judgment].

Mr Whaanga

[5] At the time of the offending Mr Whaanga was 33 years old. He and his wife met when they were teenagers. They have four children whose ages range from 4 to 15 years.

[6] In her affidavit filed in support of the appeal, Ms Whaanga explains that her husband is a dedicated parent who has played an active role in bringing up their children. In early 2023, Mr Whaanga became the primary caregiver for the children so as to enable Ms Whaanga to pursue full time studies towards a business diploma. Those studies were placed in abeyance when Mr Whaanga was sentenced to imprisonment.

[7] Mr Whaanga's previous convictions comprised three minor dishonesty offences and two driving offences, including a conviction for driving with excess breath alcohol.

[8] A report prepared pursuant to s 27 of the Sentencing Act 2002 describes in detail Mr Whaanga's difficult upbringing. He was one of ten siblings. Mr Whaanga's mother died when he was eight years old. He says that his father's new partner was psychologically abusive towards him and his siblings and encouraged his father to physically discipline them. Mr Whaanga could recall going to school without lunch and being dependent on "hand-me-down clothes".

[9] Through family connections Mr Whaanga became a member of the Mongrel Mob, although he does not appear to have become immersed in gang culture. This is confirmed by the authors of the s 27 report, one of whom is Dr Jarrod Gilbert, a leading authority on gang culture in New Zealand. Mr Whaanga maintains that his offending was driven by his addiction to cannabis and synthetic cannabis and the Mongrel Mob had nothing to do with his offending. Ms Whaanga also confirms that her husband's offending was not related to gang activities but was rather driven by Mr Whaanga's desire to provide for his family. She also confirms that he has given up drugs since his trial.

The trial

[10] Mr Whaanga's trial before Judge W P Cathcart and a jury commenced in the District Court at Gisborne on 29 May 2023. There were four charges: two charges of possession of cannabis for the purposes of sale and two charges of possession of synthetic cannabis, also for the purposes of sale.

[11] The Crown relied on the presumption in ss 2(1A) and 6(6) of the Misuse of Drugs Act 1975 which provides that those found in possession of more than 28 grams of cannabis plant material and 250 milligrams (when not contained in plant material) or 28 grams (when contained in plant material) of synthetic cannabis are deemed to have those drugs for the purposes of supply.[2] The presumption can be rebutted by a defendant if they wished to contend the drugs in question were for personal use.[3]

[12] Mr Whaanga gave evidence. His defence was that all of the drugs found in his possession were for his personal use, and that the monies recovered from his property comprised cash payments he received from working at an orchard, doing building work, the proceeds of sales of vehicles he restored, and winnings from playing the "pokies". Mr Whaanga told the jury he was a heavy user of cannabis, particularly following an injury to his knee which incapacitated him for five months.

Sentencing

[13] Mr Whaanga was sentenced on 13 September 2023.

[14] The pre-sentence report prepared by the Department of Corrections recommended Mr Whaanga be sentenced to home detention.

[15] In sentencing Mr Whaanga, Judge Cathcart observed the jury must have rejected Mr Whaanga's claim that the drugs were for his personal use,[4] although it was accepted by the Court that Mr Whaanga was a moderate to heavy user of cannabis.[5]

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2 See Misuse of Drugs Act 1975, ss 2(1A), 6(6), sch 5, sch 2 pt 1, and sch 3 pt 1.

3 Section 6(6). See also *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [210] citing Hon T M McGuigan, 399 NZPD 3142 (18 July 1975), at p 3143.

4 Sentencing notes, at [1].

5 At [8].

[16] The Judge adopted a provisional starting point of 30 months' imprisonment which was increased by a further two months to reflect the fact that two of the offences occurred when Mr Whaanga was on bail.[6]

[17] When considering mitigating factors, the Judge recognised Mr Whaanga was addicted to cannabis which was "part of the driving force" behind the offending "but not the entire driving force, given the commerciality element captured by the verdicts".[7]

[18] The Judge also accepted from the s 27 report that there was a link between Mr Whaanga's "tough upbringing" and his offending.[8]

[19] The combination of Mr Whaanga's addiction and his difficult up-bringing led the Judge to deduct six months from the overall starting point of 32 months' imprisonment. This produced an end sentence of 26 months' imprisonment.[9]

[20] At sentencing the Crown sought forfeiture of the cash found at Mr Whaanga's property. The Judge was satisfied such an order was appropriate an accordingly ordered that $45,608.30 be forfeited to the Crown pursuant to s 32(3) of the Misuse of Drugs Act.[10]

Grounds of appeal

[21] Ms Epati, counsel for Mr Whaanga in this Court, advanced three grounds of appeal:

(a) insufficient recognition was given to reflect Mr Whaanga's personal use of and addiction to cannabis and synthetic cannabis;

(b) the District Court Judge erred by failing to give any discount to reflect the impact of incarceration upon Mr Whaanga's children; and

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6 At [15]–[16].
7 At [20].
8 At [21].
9 At [27].
10 At [26].

(c) a further discount should have been granted to Mr Whaanga to reflect the forfeiture of the money found at his property which included cash obtained from sources other than drug offending.

The Crown's position

[22] Ms Mitchell for the Crown submitted that:

(a) Judge Cathcart was aware that some of the cannabis located at Mr Whaanga's property was likely to be for his personal consumption and that Mr Whaanga was a moderate to heavy user of cannabis. The Judge also gave explicit recognition to Mr Whaanga's addiction by way of the discount of six months' imprisonment.

(b) The Judge could not be criticised for omitting to provide any discount for the impact of incarceration of Mr Whaanga upon his children because this issue was not drawn to the Judge's attention. Alternatively, a discrete discount was not appropriate in this case.

(c) No discount was sought in the District Court to reflect the fact of a forfeiture of the cash found at Mr Whaanga's property. In any event, s 32(3) of the Misuse of Drugs Act makes it plain that any forfeiture order is "in addition to any other penalty imposed" pursuant to the Misuse of Drugs Act. Accordingly, a forfeiture order is supplementary to, rather than a substitute for, any part of an appropriate sentence.

Analysis

Starting point

[23] In the District Court, Mr Lynch, trial counsel for Mr Whaanga, accepted that Mr Whaanga's offending fell within band 2 of this Court's judgment in *R v Terewi.*[11] In *R v Terewi*, it was said that the starting point for small scale cannabis offending for a commercial purpose would generally attract a starting point between two to four

[11] *R v Terewi* [1999] 3 NZLR 62 (CA).

years' imprisonment.[12] Notwithstanding Mr Whaanga's offending was within band 2 of *Terewi*, Mr Lynch argued for a starting point of 18 months' imprisonment.

[24] In this Court, Ms Epati appropriately took no issue with the starting point adopted by Judge Cathcart. We agree with the Judge that a starting point of 30 months' imprisonment was appropriate, as was the uplift of two months' imprisonment to reflect the fact that the second instance of offending occurred when Mr Whaanga was on bail.

Discount for addiction

[25] In *Zhang v R,*[13] this Court accepted, in a case that involved methamphetamine offending, that a pre-existing addiction which adversely impacted upon an offender's ability to make appropriate decisions and which contributed to their drug offending may be a mitigating factor, even in cases that engage commercial quantities of drugs.[14] In *Berkland v R*,[15] the Supreme Court said that addiction could logically lead to a discount of up to 30 per cent of the sentence that would otherwise be imposed, depending on the extent to which addiction mitigated moral culpability for the offending.[16] The same principles apply to cases involving cannabis and/or synthetic cannabis.[17]

[26] In *Berkland v R,* the Supreme Court explained that it was sufficient for there to be a "causative contribution" between an offender's addiction and their offending.[18] The Court said that concepts such as "operative" or "proximate" connection set the bar too high and that a causative connection was all that was required before a drug addiction could be considered a mitigating factor.[19]

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12 At [4].
13 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
14 At [133]–[136] and [139]–[150].
15 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.
16 At [36] and [41].
17 See for example *Johnson v New Zealand Police* [2023] NZHC 3302 where a discount for addiction was given in relation to sentencing for cannabis and other offending; and *Corkery v R* [2021] NZHC 2298 at [45]–[50] where the High Court discussed the relevance of addiction in the context of commercial cannabis dealing. See also Mathew Downs (ed) *Adams on Criminal Law – Sentencing* (Thomson Reuters, online ed) at [SA27.02].
18 *Berkland v R,* above n 15, at [109]–[112].
19 At [109].

[27] It is difficult to determine from the sentencing notes what discount was allowed for Mr Whaanga's addiction because the six month deduction applied by the District Court Judge for mitigating factors related to both Mr Whaanga's addiction and his troubled upbringing.

[28] Although addiction was only a partial cause of Mr Whaanga's offending, it did, nevertheless, causatively contribute to his offending and warranted a reduction of somewhere in the vicinity of 10 per cent.

[29] Similarly, Mr Whaanga's difficult upbringing, which also contributed to his offending, would have justified a further reduction in the vicinity of 10 per cent.

[30] Therefore, we consider that the discount given for addiction and Mr Whaanga's upbringing was appropriate.

Discount for impact of incarceration on Mr Whaanga's family

[31] An allowance should have been made to reflect the fact that incarcerating Mr Whaanga has had a significant impact on his children.

[32] We appreciate that this issue was not raised by counsel for Mr Whaanga in the District Court. Nevertheless, both the Supreme Court and this Court have, on many occasions, recognised the importance of taking into account the effect of imprisonment on children of an offender.[20]

[33] As we have previously observed, Mr Whaanga has played an important role in the lives of his children. Ms Whaanga reports that since their father was imprisoned all four of his children have exhibited behavioural issues and profound distress. Ms Whaanga has also suffered significantly. Through no fault of her own, she has been forced to put aside her studies whilst she resumes the role of primary carer for her children.

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[20] *Phillip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [47]–[58]; *Sweeney v R* [2023] NZCA 417 at [21]–[27] and [32]; *Campbell v R* [2020] NZCA 356 at [40]–[45]; and *R v Harlen* (2001) 18 CRNZ 582 (CA) at [19]–[31].

[34] In our assessment, had the impact on Mr Whaanga's family of him being incarcerated been taken into account, the end sentence would have been no greater than 22 months' imprisonment.

Discount for additional punishment of forfeiture

[35] We agree with Ms Mitchell that s 32(3) of the Misuse of Drugs Act provides that any forfeiture order is in addition to and not a substitute for any other penalty that is properly imposed.[21] Accordingly, it was not incumbent on the District Court Judge to provide a further discount to reflect the fact that a forfeiture order was being made.

[36] For completeness, we record that there has been no appeal from the forfeiture order which therefore remains in place.

Home detention

[37] At the hearing of Mr Whaanga's appeal, we canvassed with Ms Epati whether or not an assessment had been made of an address where Mr Whaanga could serve home detention. No assessment of that address had been carried out. We therefore released a results judgment in the expectation those inquiries would be conducted expeditiously.

[38] We are satisfied Mr Whaanga is an appropriate candidate for home detention. We grant Mr Whaanga leave to apply to this Court under s 80K of the Sentencing Act to substitute the sentence of 22 months' imprisonment for a sentence of six months' home detention at the proposed address, if the address is deemed suitable.

[39] The sentence of six months' home detention reflects the fact Mr Whaanga has already served five months in prison.

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[21] *Henderson v R* [2017] NZCA 605 at [40]; and *McKechnie v R* [2018] NZHC 1811 at [20].

Result

[40] The appeal against sentence is allowed.

[41] The sentence of 26 months' imprisonment is quashed and substituted with a sentence of 22 months' imprisonment.

[42] We direct that a pre-sentence report as to the suitability of the proposed residence for home detention is prepared.

[43] Leave is granted to Mr Whaanga to apply to this Court under s 80K of the Sentencing Act 2002 to substitute the sentence of 22 months' imprisonment with one of six months' home detention.

Solicitors:
Crown Solicitor, Napier for Respondent