IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA701/2024
[2025] NZCA 574

BETWEEN	MICHAEL KEVIN MILNE Appellant
AND	THE KING Respondent

CA714/2024

BETWEEN	ANTHONY WAYNE HARRIS Appellant
AND	THE KING Respondent

Hearing:	4 September 2025
Court:	Thomas, Brewer and Isac JJ
Counsel:	S J Shamy for Appellant in CA701/2024 J D Lucas for Appellant in CA714/2024 N J Wynne for Respondent
Judgment:	30 October 2025 at 2.30 pm

JUDGMENT OF THE COURT

A The appeals are allowed.

B Mr Milne's sentence of six years' imprisonment is set aside and a sentence of five years and four months' imprisonment is substituted.

C Mr Harris' sentence of five years' imprisonment is set aside and a sentence of four years and four months' imprisonment is substituted.

REASONS OF THE COURT

(Given by Isac J)

Introduction

[1] Michael Milne and Anthony Harris were convicted after trial of cannabis supply offences following the discovery of a hydroponic growing operation on Mr Milne's property. They were sentenced by Judge Kellar to six and five years' imprisonment respectively and now appeal their sentences.[1]

[2] The appellants raise three principal grounds of appeal.[2] First, they contend their sentencing was affected by a factual error concerning the total number of cannabis plants discovered and their potential yield. Second, the starting point adopted by the Judge was too high when compared to similar cases. Finally, they argue additional credit ought to have been provided for personal mitigating factors, and in particular a delay of five years between charge and trial.

[3] For the reasons that follow we find the three principal grounds of appeal have not been made out. However, we have concluded that insufficient credit was provided for personal mitigating factors, particularly the appellants' ages, and have allowed the appeals accordingly.

The offending

[4] Mr Milne owned a secluded 700-hectare property in Westland. The property is largely covered in native bush and a cycle trail passes through on its route between Kumara and Hokitika.

[5] Between 2012 and 2013 Mr Milne built a Western-styled accommodation and entertainment facility — known as "Cowboy Paradise". It includes a restaurant and bar and caters to users of the cycle trail.

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1 *R v Milne* [2024] NZDC 25995 [sentencing decision] at [28] and [32].

2 The appellants requested a full court be convened to revisit this Court's guideline judgment in *R v Terewi* [1999] 3 NZLR 62 (CA). That request was not acceded to, so the issue of the correctness of *R v Terewi* was not pursued before us.

[6] He also constructed a large underground bunker situated in a clearing on the property. The bunker was three metres deep and had a total floor area of 240 square metres. The walls were made of reinforced concrete and the roof was held up by large steel beams. Access was through a trap door concealed in the floor of a 40 foot shipping container that sat above the bunker at ground level.

[7] Contained within this concealed facility were twelve growing bays constructed with plywood walls, heat grow lamps, foiled surfaces, heaters and extractor fans, each connected to a sophisticated hydroponic system. The electricity requirements for the operation were the equivalent to that of a commercial building. The electricity was supplied by a diesel generator.

[8] Each bay could accommodate up to 68 cannabis plants, meaning 816 total plants were capable of being grown at any one time.

[9] Evidence as to the scale of the operation was by given by a Constable Collins, who covertly visited Mr Milne's property on three occasions.

[10] On the first occasion — on 16 July 2019 — the Constable took a number of photographs of the cannabis growing operation, including numerous small cannabis plants growing in some rooms. They varied in height with the smallest being 500 millimetres. Some looked in good condition while others appeared to be dead or dying. It does not appear that he was able to make a further assessment of the scale of the operation on this occasion.

[11] He returned to the site on 8 August 2019 and observed that there were six bays lying north to south, and 12 in total. He opened the door to one bay, observing it was filled with cannabis plants growing in four rows, with approximately 17 plants per row providing a total of up to 68 plants per bay. He observed 11 identical growing bays, but not all of them contained cannabis plants. One bay was completely empty and approximately two were at half capacity. Approximately nine bays were filled with cannabis. At trial the Constable said "[i]f all the bays had been full there would be enough growing room for approximately 800 plants". It was on this occasion that he installed the covert camera.

[12] Constable Collins last visited the site on 22 August 2019. He lifted one of the doors of bay one and observed it was full of cannabis plants approximately 600 to 700 millimetres tall. Cannabis was growing in at least seven bays, but it is unclear if cannabis was found growing in the remaining five.

[13] The operation was such that cannabis could be cultivated continuously throughout the year with three grows possible in each bay. Expert evidence led by the Crown confirmed that, on a conservative analysis, the operation could produce 300 pounds of cannabis annually with a retail value of $1.05 million.

[14] The appellants were joint venturers. Mr Milne cultivated and harvested the cannabis. Mr Harris transported it to Christchurch for sale. Polling data from Mr Harris's cell phone revealed that he travelled between the West Coast and Christchurch 133 times over the course of 140 weeks. Financial analysis of his bank accounts revealed $470,000 in unexplained cash deposits.

[15] In the subsequent search of Mr Harris's property and vehicles a range of weapons were located including knives, batons, pepper spray dispensers, a stun gun, imitation firearms and nunchucks. Police also found live .38 calibre rounds and shotgun shells.

[16] The jury returned verdicts of guilty for each appellant as follows:

Michael Milne
Charge
Two charges of cultivating cannabis (representative).[3]
Two charges of selling cannabis (representative).[4]
One charge of possession of cannabis for sale.[5]

[3] Misuse of Drugs Act 1975, s 9(1).
[4] Misuse of Drugs Act, s 6(1)(e).
[5] Misuse of Drugs Act, s 6(1)(f).

One charge of possession of equipment for cultivating cannabis (representative).[6]
Anthony Harris
Charge
Two charges of selling cannabis (representative).[7]
Two charges of unlawful possession of ammunition.[8]
Two charges of unlawful possession of a restricted weapon (one of which was representative).[9]

[17] The total period of offending covered by the charges was almost three years, spanning the period between 1 January 2017 and 17 September 2019.

The sentencing decision

[18] After setting out the relevant charges and a description of the operation,[10] Judge Kellar described the number of plants discovered, and yield, in the following terms:

> [4] On a police officer's third visit on 21 August 2019, he counted 816 plants growing in the bunker. That number did not include the seedlings growing in a nursery bay at the back of the bunker or harvested cannabis in large black plastic rubbish bags. The evidence of a detective was that the bunker was in sound condition but weathered and aged and that it was purpose built for hydroponic cultivation. His evidence was that cannabis could be cultivated continuously throughout the year and on a conservative basis the bunker would produce 300 pounds of cannabis with a street value of a bit over $1 million annually.

[19] After referring to this Court's guideline judgment in *R v Terewi*,[11] the Judge surveyed a number of sentencing decisions involving large-scale cannabis

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6 Misuse of Drugs Act, s 12A(2)(a).
7 Misuse of Drugs Act, s 6(1)(e).
8 Arms Act 1983, s 45(1).
9 Arms Act, s 50(1)(b).
10 Sentencing decision, above n 1, at [1]–[3].
11 At [11], citing *R v Terewi,* above n 2.

cultivation.[12] He then identified the relevant aggravating factors for both appellants in these terms:[13]

> [24] The key factors in assessing the overall seriousness of this offending appear to be these:
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> (a) For one, this was a highly sophisticated cultivation.
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> (b) For another, it involved a large area, some 240 square metres.
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> (c) Further, there were 816 plants found by police in August 2019 plus seedlings and harvested cannabis in large plastic rubbish bags.
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> (d) Furthermore, the police evidence was that there could be production of some 300 pounds of cannabis annually with a street value of more than $1 million. There were frequent sales and you, Mr Harris, had large amounts of what is apparently unexplained cash.
>
> (e) Furthermore, the offending went over a period of some two years.

[20] Turning first to Mr Milne, the Judge considered the appropriate starting point was seven years' imprisonment.[14] He then provided a one-year deduction — the equivalent of approximately 14 per cent — for a combination of totality, previous good character, age and health.[15] This resulted in an end sentence of six years' imprisonment.[16]

[21] A lower starting point for Mr Harris of six years' imprisonment was adopted because of his somewhat lesser role.[17] To this was added an uplift of six months' to reflect the charges of possession of restricted weapons and ammunition.[18] The Judge then allowed a discount "of some 10 per cent" to reflect the appellant's age and good character.[19] A further discrete discount of seven per cent was provided to reflect the

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12 Sentencing decision, above n 1, at [11]–[23], citing: *Smith v R* [2022] NZCA 606; *Wilson v R* CA273/04, 13 December 2004; *Taylor v R* [2013] NZCA 417; *R v Watson* [2007] NZCA 432; *Herbert v R* [2022] NZHC 210; *Horopapera v R* [2022] NZHC 646; *R v Nuttall* [2013] NZHC 544; *Borg v R* [2015] NZCA 289; and *R v McMahon* [2012] NZHC 3372.

13 Sentencing decision, above n 1.

14 At [25].

15 At [26]–[28]. This reflected a 10 per cent reduction for personal mitigating factors, and an additional deduction of approximately four months' imprisonment for totality.

16 At [28].

17 At [29]. Mr Harris had not been involved in the cultivation.

18 At [29].

19 At [30]. This was despite Mr Harris' largely historical but extensive criminal history.

effect of incarceration on Mr Harris' two sons, both of whom suffer from serious health issues.[20] After an adjustment for totality, a final sentence of five years' imprisonment was imposed.[21]

Did the Judge proceed on a factually incorrect estimate of yield and value?

[22] The first ground of appeal is that Judge Kellar proceeded on a factually inaccurate estimate of the total number of plants located at the property and therefore their potential yield.

[23] Mr Shamy highlighted that when assessing the seriousness of the offending Judge Kellar twice referred to police finding 816 plants at the property in August 2019.[22] However, as the respondent before us concedes, the evidence at trial did not support such a finding.

[24] The Judge's figure of 816 plants appears to have been derived from a calculation of 12 growing bays, each capable of holding up to 68 plants. However, the evidence at trial did not establish that all 12 bays were full on any of the three occasions police undertook covert inspections. The knock-on effect of the error is significant, in Mr Shamy's submission. Expert evidence of the value of the operation was provided by a Detective Darrell Adlam. He said 68 plants per bay could produce — conservatively — two ounces of cannabis each, equating to 136 ounces, or eight and a half pounds per grow cycle. This equated to 408 ounces or $87,500 per year. Extrapolated over 12 growing bays this would equate to around 300 pounds of cannabis annually, yielding a potential return of $1,050,000.

[25] Mr Shamy argues that if the calculation of yield were based not on 816 plants but, say, 540 plants (comprised of nine bays of 60), the total yield on which sentencing would proceed would have been approximately three-quarters of what was alleged.

[26] Despite the Judge's reference to a total of 816 plants, we do not consider his approach to sentencing was materially affected by an error of fact. First, as Ms Wynne

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20 At [31].
21 At [32]. A totality adjustment of approximately five months' imprisonment was made.
22 At [4] and [24].

for the respondent argued, the appellants were not sentenced on the basis of a total number of plants located by police on a specific occasion. Rather, they were sentenced for operating a sophisticated hydroponic operation undertaken from a purpose-built and concealed bunker over a period of two and a half years.[23] The trips completed by Mr Harris over almost three years and the cash deposits made to his bank account demonstrated a mature and ongoing commercial venture rather than one discovered before it had achieved commercial production.

[27] We also agree with Ms Wynne that in assessing the starting point, the number of plants was only one of the relevant factors identified by the District Court, as noted above at [19]. This Court in *Terewi* consciously avoided specifying numbers of plants for each offending category because, while relevant, it may not provide an adequate guide:[24]

> … where intensive cultivation methods are being employed with a view to enhancing the yield of usable cannabis — either by increasing the number of crops beyond what would occur naturally or by producing plants with higher narcotic levels.

[28] We therefore consider the appellants' focus on the Judge's reference to the total number of plants located is misplaced. By itself, the misidentification was not material to the District Court's overall assessment of the seriousness of the offending or the resulting starting points.

[29] Second, the Crown's expert evidence at trial was that based on the condition of the plants observed, each could be expected to produce between four and six ounces of cannabis per grow. However, Detective Adlam adopted a conservative figure for his analysis of yield of only two ounces. In our view, the considerable margin applied in his estimate suggests the Judge's overall assessment of yield was fair.

[30] Finally, the evidence established that on at least one occasion when police undertook a covert examination, there were at least 780 plants, including nine full bays, two bays that were half full, and 100 smaller plants growing in large plastic tubs referred to at trial as the "nursery". The evidence indicates that at any given time while

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23 Between 1 January 2017 and 15 July 2019.

24 *R v Terewi*, above n 2, at [5].

some bays were likely to be empty or contain new plantings, the operation was designed to sustain the cultivation of hundreds of plants continuously.

[31] For these reasons we see no error in the Judge's assessment of the relevant yield or aggravating factors.

Was the starting point otherwise too high?

[32] Counsel for the appellants also rely on a number of authorities to suggest the starting points adopted by the Judge were excessive.[25] The hallmark of the appellants' argument was its focus on the number of cannabis plants discovered by police in those cases. But for the reasons we have already set out, such comparison is unhelpful. The cases relied on by the appellants involved a snapshot of offending discovered on the execution of a search warrant and are otherwise distinguishable. Setting the appellants' offending apart in the present case was the lengthy duration over which it occurred and the circumstantial evidence of its scale and seriousness. That evidence included:

(a) The method of construction and size of the bunker. It was purpose built and represented a significant commitment of capital, consistent with an intention to offend over years.

(b) The scale of power consumption and the use of a diesel generator to produce electricity, removing the risk of discovery due to unusual levels of power usage.

(c) The number and frequency of journeys made by Mr Harris to Christchurch for sales.

(d) The significant value of cash deposits into Mr Harris' bank account.

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[25] *Dinh v R* [2023] NZHC 3667; *Leather v R* [2011] NZCA 59; *R v Bearsley* HC Tauranga CRI 2009-070-4244, 19 June 2009; *Herbert v R* [2022] NZHC 210; *Horopapera v R*, above n 12; and *R v Nuttall* [2013] NZHC 544.

(e) The regular changes in the size and numbers of plants during the police covert inspections in July and August 2019, indicating a busy commercial venture.

(f) The presence of weapons and ammunition consistent with serious drug dealing.

[33] *Terewi* remains the relevant guideline judgment.[26] The appellants' offending fell clearly within category three, consisting of "large-scale commercial growing, usually with a considerable degree of sophistication and organisation".[27] Despite its age, *Terewi* remains good law, particularly in cases of serious offending involving high levels of commerciality. Major commercial operations necessarily attract penalties at or near the maximum of eight years' imprisonment.[28] While contemporary sentencing practice in drug dealing cases requires consideration of the role of the offender in the operation, both appellants can be correctly considered to have held leading roles: one as the grower or "farmer", the other as a wholesale retailer.[29] Nor can there be any doubt that there are significant social harms attributable to cannabis use and addiction.

[34] Of relevance in assessing the starting points in our view are the decisions in *R v Watson*, *R v Wilson* and *Hall v R*, where starting points between five and 11 years' imprisonment were adopted.[30] They indicate the starting points of six and seven years in this case were within range. We are therefore unable to accept the appellants' submission that the starting points were excessive based on previous cases.

Should the Judge have provided a discount for delay until trial?

[35] The appellants argue that the four and a half year delay between charge and trial represented a substantial departure from the right in s 25(b) of the New Zealand Bill of Rights Act 1990 to be tried without undue delay. They refer to the Supreme Court's decision in *R v Williams*, where the Court held:[31]

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26 *R v Terewi*, above n 2.
27 At [4].
28 Sentencing Act 2002, s 8(1)(c)–(d).
29 See *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [71].
30 *R v Watson*, above n 12; *R v Wilson*, above n 12; and *Hall v R* [2024] NZCA 532.
31 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750 (footnotes omitted).

> [18] The remedy for undue delay in an accused coming to trial must provide a reasonable and proportionate response to that delay. A stay is not a mandatory, or even a usual remedy. … If an accused is convicted after being on bail pending trial, a reduction in the term of imprisonment is likely to be the appropriate remedy. If the accused has been in custody, that time will count towards service of the term of imprisonment. …

[36] The Court considered the trial Judge's 25 per cent reduction to acknowledge a five-year delay between arrest and conviction was generous.[32]

[37] At first blush, the delay in the present case is significant and given the ages of the appellants, troubling. However, we are satisfied the delay has not arisen due to systemic concerns. Rather, it was the product of a combination of COVID-related disruptions, the availability of counsel, and the appellants' choice to exercise their right to challenge the admissibility of evidence and have their charges determined at trial. The procedural history reveals that pre-trial challenges based on the search warrants commenced in 2020. As late as May 2023 the appellants were instituting fresh pre-trial applications. The same year trial dates in August and November were lost due to the unavailability of defence counsel. The trial occurred in March 2024. In the circumstances there is no basis on which to conclude the delay until trial was undue or a factor calling for a reduction in sentence.

Should greater credit have been provided for personal mitigating factors?

[38] As we have noted, the Judge provided reductions for both totality and personal mitigating factors. Although the Judge did not expressly identify the totality adjustments, they were approximately four months' imprisonment and five months' imprisonment for Mr Milne and Mr Harris respectively.[33]

[39] Accounting for this, the total credit provided for personal mitigating factors amounted to 10 per cent for Mr Milne and 17 per cent for Mr Harris.[34] Mr Milne's discounts addressed a range of factors, namely his age, previous good character and health.[35] For Mr Harris they addressed age, good character and the impact of his

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32 At [18].
33 Sentencing decision, above n 1, at [25]–[32].
34 At [27] and [30]–[31].
35 At [27].

incarceration on his adult sons.[36] Apart from the last factor the Judge did not identify the extent to which discrete mitigating circumstances contributed to the overall level of discount.

[40] The circumstances of both appellants on sentencing were out of the norm for offenders appearing on serious drug dealing charges. Mr Milne appeared for sentence as a first-time offender at 68 years of age. Mr Harris had historical convictions and was almost a decade older, at 77. Both appear to be healthy although suffer from ailments typical of men their ages.[37]

[41] The pre-sentence report discloses that Mr Milne lived on his West Coast property before imprisonment for 30 years while maintaining good relationships with his four adult children. A total of 23 character references were provided to the District Court from a range of individuals, including prominent business and community leaders, former employees and friends. The references speak to the appellant's significant contribution to his local community over many decades.[38]

[42] Mr Harris provided seven character references from neighbours and friends. They too indicate the offending was out of character. Of importance is a report from a solicitor who has been involved in the care and treatment of one of Mr Harris' sons for over a decade. It reveals the serious health difficulties the son has had to contend with and Mr Harris' considerable support. The appellant's impending incarceration led his son to seek admission to hospital for respite care.

[43] A thematic report by the Department of Corrections' Office of the Inspectorate in 2020 suggests older people who are imprisoned are more likely than those in the community to experience a decline in their mental health.[39] Advanced age and the impact of a lengthy term of imprisonment are also mandatory considerations in terms

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36 At [30]–[31].

37 In particular, Mr Milne reports muscular issues, a recent hip x-ray, and other medical conditions including gout that requires medication. Both appellants report a high level of anxiety and stress.

38 One referee describes the appellant leaving school at the age of 14 to run the family farm as a result of his father's ill health, and to enable his five younger siblings to continue their education.

39 Office of the Inspectorate | Te Tari Tirohia *Thematic Report: Older Prisoners — The lived experiences of older people in New Zealand prisons* (Department of Corrections, August 2020) at [105]–[106].

of ss 8(1)(h) and 9(2)(a) of the Sentencing Act 2002.[40] Whether a discount is appropriate for age or ill-health, and the amount of any discount, is a matter of fact and degree turning on the particular circumstances of the case.[41] Discounts, where given, are generally modest.

[44] This Court has also observed that a good character discount reflects two purposes.[42] A defendant without prior convictions and otherwise of good character deserves leniency for an offence that represents an isolated fall from grace and because that fall may itself provide a degree of punishment; and a greater capacity for rehabilitation and reduced probability of reoffending may be inferred from previous good character.[43]

[45] In the present case the extent to which good character operates as a mitigating factor is constrained by the long period of offending and the focus on deterrence as a primary consideration in cases involving serious offending.[44] Nevertheless, the sentencing discounts needed to adequately reflect the combination of personal mitigating factors, including the impact of lengthy sentences given the appellants' ages, the consequences for Mr Harris' family, and in Mr Milne's case, a striking fall from grace after a long life as a contributing member of his community.

[46] While the Judge's sentencing remarks were a model of care, we do not consider there was sufficient acknowledgment of the combination of mitigating factors in the global discounts provided. For both appellants, we would allow further discrete reductions of 10 per cent. Adopting the Judge's adjustments for mitigating factors and totality would result in a sentence reduction of eight months for both appellants. We are satisfied such an adjustment is beyond the scope of mere tinkering.

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40 Section 8(1)(h) provides that the court must take into account "any particular circumstances of the offender" that means a sentence otherwise appropriate would be disproportionately severe. Section 9(2)(a) provides that the court must, to the extent it is applicable in the case, take into account the age of the offender as a mitigating factor.

41 *M (CA91/12) v R* [2013] NZCA 325 at [54].

42 *Hore v R* [2024] NZCA 216 at [24].

43 At [24].

44 *Tonga v R* [2011] NZCA 257 at [24]; and *Payne v R* [2016] NZCA 284 at [21]–[22].

Result

[47] The appeals are allowed.

[48] Mr Milne's sentence of six years' imprisonment is set aside and a sentence of five years and four months' imprisonment is substituted.

[49] Mr Harris' sentence of five years' imprisonment is set aside and a sentence of four years and four months' imprisonment is substituted.

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