

**IN THE DISTRICT COURT
AT WELLINGTON**

**CRI-2014-085-002145
CRI-2014-085-014786
[2016] NZDC 4550**

THE QUEEN

v

JOSEPH TOBIN

Hearing: 16 March 2016
Appearances: K Scott-Dowell for the Crown
S Hewson for the Defendant
Judgment: 16 March 2016

NOTES OF JUDGE B DAVIDSON ON SENTENCING

[1] Mr Tobin you appear for sentence on a raft of serious drug dealing offences committed over a 6½ year period between March 2007 and July 2013.

[2] The charges include cultivating and dealing in cannabis, dealing in methamphetamine and unlawful possession of a firearm.

[3] More specifically, there are 12 charges of supplying methamphetamine, 19 charges of offering to supply methamphetamine, one of possession of methamphetamine for supply, 5 of cultivating cannabis, 3 of selling cannabis, 7 of offering to sell cannabis, one of possession of cannabis for sale, and one of unlawful possession of a shotgun.

[4] Although the offending covers that 6½ year period, the greater bulk of the offending is said to have occurred in 2013. Charges stem from a police operation known as Operation Hive which occurred that year.

[5] You were involved in the cultivation of cannabis at 5 different addresses. Your degree of involvement at each varied. It is clear that you were deeply involved in respect of 3 of those addresses, less so in respect of the remaining 2. There is also some distinction between your degree of involvement at the 3 addresses, where you were deeply involved.

[6] The first address was at [address 1 deleted] in Porirua. In late 2009 or early 2010 you and your son, who I have already sentenced to imprisonment, set up a cannabis growing operation at the address. Over the next 3 years 7 crops were grown at the address, 6 were harvested, one failed. It is estimated that over that period as least 36 plants were grown with a potential yield of 18 pounds, with a potential value of around \$57,000, possibly more.

[7] From each of these harvests you would receive cannabis for your own use as well as receiving at least 12 pounds of cannabis which you on-sold. There was a profit for you, which you acknowledge, in that process.

[8] A further crop of 8 plants was discovered in 2013 with a value of around \$12,500. You accept that you were fully involved in this cannabis cultivation operation.

[9] The second address was nearby, at [address 2 deleted]. You provided money to assist in the setup. Initially, 23 plants were grown and harvested in July 2013. The harvest is said to have yielded around 1 pound 9 ounces of cannabis, worth about \$6,500. Some of this was sold and you were reimbursed for the setup costs.

[10] When the police searched the property at the end of July 2013 they discovered a second crop of some 48 plants. This had a significantly greater yield, and a significantly greater value.

[11] This forms an important part of your mitigation plea because you distance yourself from any close involvement in this cultivation. You say that this was largely the responsibility of others, and that it shows that the overall cultivation operation was burgeoning and growing in a way in which you had no direct responsibility.

[12] As far as those plants are concerned, I proceed to sentence you on the basis that you knew this was occurring, that it was likely you would be reimbursed for some of your costs from cannabis sold, that you assisted in sourcing some of the plants, and that you had a relationship with the cultivator that could be expected to give you a right to purchase should you wish to exercise it.

[13] The third operation was a [address 3 deleted]. Text messaging shows that cannabis had been grown at this address between March and July 2013. You were involved in helping.

[14] There were 2 harvests, perhaps better regarded as one, in July 2013 of 1.7 kilograms of cannabis worth \$12,000, possibly more. A further 53 plants were grown in replacement, but there is no real evidence that you were directly involved in what can only be seen again as an escalation in the growing operation.

[15] When the police searched the property they also discovered 2 pounds of dried cannabis, worth around \$6,500 dollars, left over from the earlier harvest and ready for sale by you and others.

[16] Your involvement at the other 2 addresses, one in Upper Hutt and the other in Morningside in Wellington, was much less. The cannabis operation at the Upper Hutt address was a very extensive operation. It went on over many years, involving a large number of plants capable of a significant yield with a significant potential value. Your role was in the nature of a supplier of equipment, nutrients and advice. You certainly were not the major cultivator, and I think it fair to say that the cultivation almost certainly would have taken place without your assistance. Nevertheless, what is inescapable, of course, is the sheer size of that particular operation.

[17] The last was a very small cannabis cultivation at an address in Mornington occupied by your brother and his partner. There, 4 plants were found drying by the police when the property was searched at the end of July 2013. Having sentenced each of those defendants, it is clear that this operation was designed to provide cannabis for one of the occupants who had a long-standing cannabis addiction. Again, however, you provided your expertise and your knowledge.

[18] The charges of selling and offering to sell cannabis relate to 3 actual sales and 7 offers. The total amount involved in around \$3,000. These occurred shortly before the termination of the police operation.

[19] As far as the methamphetamine dealings are concerned, it essentially involved the possession of 3.6 grams of methamphetamine worth around \$3,000 for the purpose of supply; actual supply of 4.1 grams of methamphetamine for \$3,650; and offering 2.4 grams of methamphetamine for around \$2,900. These all occurred shortly before the termination of the police operation.

[20] As far as the firearm is concerned, other evidence revealed that you had access to a shotgun which was stored at a relative's address. It must be emphasised that the charge you face is unlawful possession. It cannot be seen by me as a case where you had immediate or hands-on possession, but rather as a case where you had access to the weapon if required.

[21] You have a limited criminal history and no uplift in your sentencing is required to recognise it. However, I cannot give you a credit for your good character because you do have some convictions and, of course, because this offending occurred over a considerable period.

[22] You are aged 61, married with 4 children, one serving a sentence of imprisonment for his role in this offending. You have worked hard during your adult life but, over the last 7 or 8 years, or so, you had been plagued by a back injury and surgery. It seems to me just possible that as a result of the injury you began to self-medicate with cannabis, and this developed into the operation in the way that I have described.

[23] Shortly before the termination of the police operation you realised you had become gripped with addiction and self-referred to an outpatient rehabilitation programme with Care New Zealand. You completed this by the end of 2013.

[24] Your pre-sentence report and other material suggest that there is some remorse. I intend to give you some discount for it, although, I suspect it is rather remorse for your predicament, and the predicament of other family members, than any real and genuine remorse about the scourge of drugs. Even if the end sentence was such that home detention could be considered, there are said to be safety concerns for any occupant of a home detention address because of your fairly deep involvement in the drug underworld, your access to a firearm in the way I have described, and an incident a month or so before the operation terminated, when apparently some threats were made.

[25] The aggravating features, really, of your offending are self-evident. In the way that I have described, you were deeply involved in growing and dealing in cannabis, and in methamphetamine. Your involvement has to be seen as organised, planned and pre-meditated.

[26] The operation viewed globally clearly had a significant potential, as far as yield, value and profit is concerned. There is also evidence of actual sales by you of both cannabis and methamphetamine.

[27] By way of mitigation I take into account your pleas of guilty. You will be given a discount for your pleas of guilty. A very much the key player, at least, in the view of the prosecution in Operation Hive, I have little doubt that your decision to plead guilty was instrumental in others eventually pleading guilty as well.

[28] Other mitigating features include your completion of the outpatient rehabilitation programme, and a settlement offer in respect of forfeiture proceedings brought against you.

[29] Both the Crown and the defence agree on the approach to sentencing, but there are important distinctions between each about the level.

[30] The Crown submit the overall starting point in sentencing of you should sit at around 8½ years. Ms Scott-Dowell makes it clear that this made up by a discreet starting point for the cannabis offending of something between 5 to 6 years; of the methamphetamine dealing of around 4 years, and for the firearms, some 6 months. All are added, but adjusted, to reflect the totality of the offending.

[31] The Crown submit that your credit for pleading guilty should be limited as your pleas were given late and that you should have no good character deduction.

[32] Mr Hewson, on your behalf, submits the starting point should be substantially less, something in the order of 5 years' imprisonment. A key feature of his submission is that you were only deeply involved in 3 cultivations, and in respect of 2 of those, not involved in an apparent escalation of either some time in 2013. He submits that the cannabis dealing charges must be viewed as being very limited. He submits that the uplift for the methamphetamine dealing, which he categorises as supplying to friends in a non-commercial way, should be limited as well. He emphasises your personal circumstances, your age, your relative poor health, your good employment record, your self-referral to appropriate counselling.

[33] Mr Tobin, overall I see your offending as worse than your son's. The starting point that I fixed for him was 5 years' imprisonment. That was based on his involvement in the cultivation, supply and sale of cannabis. Your overall starting point, necessarily, must be greater because, of course, there is the added dimension in your case of actual sales and offers, and also sales and offers of methamphetamine. As against that there is some evidence which, although, I would not necessarily accept, I would find difficult to reject, that the escalation of the cultivation at 2 of the addresses may not have been something in which you fully participated.

[34] The starting point that I adopt for the cannabis offending as a whole is exactly the same as your son, 5 years' imprisonment. There are distinctions between you, and he, but those distinctions pull and tug the starting point either way.

[35] I set the starting point for the cannabis related charges, as I have said, at 5 years' imprisonment.

[36] As far as the methamphetamine charges are concerned, there were 10 grams involved to a total of around \$10,000. The offending occurred over a very limited period in time. However, I can see no starting point less than 3 years as appropriate for the methamphetamine dealing.

[37] As far as the firearm charge is concerned, I have no difficulty with either counsel's submission that this should be met by a sentence of around 6 months' imprisonment.

[38] All of that would lead to an overall starting point of 8½ years' imprisonment before I consider the totality of the offending. I need to stand back from that starting point, and to reflect on issues of parity, particularly with your son. When I do that the overall starting point that I adopt is 7½ years' imprisonment.

[39] There is firstly, a discount of 12 months' imprisonment relating to 3 essential rolled up features. Firstly, your self-referral and completion of the outpatient treatment programme; secondly your very limited resources, but perhaps more significantly, the unlikelihood that you will reoffend; and thirdly your recent forfeiture settlement offer. That deduction of a year would lead to a sentence of 78 months' imprisonment before credit for your pleas of guilty. In my view, it should sit at around 17.5%. It is similar to the credit I have afforded others.

[40] I have already mentioned that I view your plea of guilty as important in breaking what I suspect had become somewhat of an impasse as between the Crown and all of the defendants.

[41] All of that would lead to an end sentence of 5½ years' imprisonment. That is the sentence that will be imposed upon you today.

[42] Mr Tobin, as I have said, the end sentence to be imposed upon you is imprisonment of 5½ years. It is made up as follows:

- In respect of the Crown charge notice dealing with the cannabis offending on charges 1 to 14 inclusive, you are sentenced to 4 years' imprisonment. On charges 15 and 16, 2 years' imprisonment. On charge 17, 6 months' imprisonment. All of those sentences are concurrent to the effect that the sentence imposed for the cannabis offending is imprisonment of 4 years.
- On the second Crown charge notice, that dealing with the methamphetamine charges, on each of the 32 charges you are sentenced to 18 months' imprisonment. That sentence is concurrent, as between the 32 charges but in each case, of course, cumulative on the 4 years imposed for the cannabis offending.

[43] There are orders for destruction and forfeiture where appropriate.

B Davidson
District Court Judge