IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CRI-2016-085-2833
[2018] NZHC 1024

THE QUEEN

v

SUSAN DALE AUSTEN

Hearing:	11 May 2018
Counsel:	P K Feltham for Crown D L Stevens QC and P R Strachan for Defendant
Sentence:	11 May 2018

SENTENCING NOTES OF THOMAS J

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[1] Ms Austen you were found guilty by a jury of two charges of importing the class C controlled drug pentobarbitone.[1] You were acquitted on one representative charge of importing pentobarbitone and one charge of aiding suicide.

Facts

[2] The charges related to two discrete importations.

[3] In March 2016, you arranged an importation of pentobarbitone powder from a supplier based in China. You did so on behalf of Mrs Treadwell, who shortly after committed suicide by taking pentobarbitone. Your actions followed her attempted

[1] Misuse of Drugs Act 1975, s 6(1)(a), maximum penalty eight years' imprisonment.

importation of pentobarbitone being intercepted by the New Zealand Customs Service on arrival in New Zealand. You made an order, paid around $600 via internet banking, provided your cell phone number and arranged a courier to deliver the package to another person's home. Based on the price of other deliveries, the evidence suggested the amount ordered and received was 25 grams. You pleaded not guilty to this charge notwithstanding what might be considered compelling evidence.

[4] In August 2016, you arranged for 25 grams of pentobarbitone to be delivered to your Hong Kong hotel at the airport. You then brought it into New Zealand through Auckland Airport on 30 September 2016.

[5] On 1 October 2016, the police located you and an associate in your car. There were two separate quantities of pentobarbitone in the car and it is fair to infer from the evidence at the trial that the 25.2 grams in the front seat belonged to you. You and your associate were dividing the pentobarbitone into small plastic bags.

[6] Although you pleaded not guilty to the charge, the jury heard an intercepted communication where you spoke at a meeting of EXIT International (EXIT), an organisation which advocates for the legalisation of voluntary euthanasia. You essentially told those present that you had successfully imported pentobarbitone from Hong Kong in the way alleged.

[7] Although the jury found you not guilty on the representative charge of importing pentobarbitone, it was plain from the evidence that, starting with an initial inquiry in 2011, you emailed suppliers in China and Mexico seeking to import pentobarbitone. The evidence disclosed payment for some four orders. It can be inferred from the jury's verdict that they were not sure the pentobarbitone in fact arrived.

Discharge without conviction

[8] You have applied to be discharged without conviction and have filed an affidavit in support of that application. The application requires an analysis under ss 106 and 107 of the Sentencing Act 2002.

[9] The principles governing discharges without conviction are well established.[2] I must first consider whether the disproportionality test in s 107 is met, which requires a three-step assessment.[3] First, I must identify the gravity of the offending. This includes considering all aggravating and mitigating factors relating to the offending and the offender. Secondly, I must identify the direct and indirect consequences of a conviction. Thirdly, I must determine whether the consequences identified are out of all proportion to the gravity of the offending. Finally, if that is established, I may consider whether to exercise my discretion to discharge without conviction.

Gravity of the offending

[10] Mr Stevens submits the offending is of low gravity for a number of reasons. First, he says many others who have been caught importing pentobarbitone into New Zealand have not been charged and three people in Australia have been charged but not convicted. He points to others investigated as part of your offending, against whom charges have not been laid. He suggests this indicates the offence is not a serious one and, given the imperative to ensure consistency between like offending,[4] you ought not be treated any differently. Secondly, he says you were not motivated by profit, suggesting you were perhaps importing for your own use, for your husband and/or friends to provide them comfort from knowing it would be available should they need it in the future. He suggests you are driven by compassion and support others in their suffering. He refers, for example, to a letter written prior to these proceedings by former Member of Parliament, the Hon Maryan Street, who admired you for your "altruistic humanity".

[11] The evidence at the trial from Customs officers was that, in the last 10 years, around 54 importations of pentobarbitone have been seized and all, including a person who imported 1,160 tablets, received a warning. Three of the five were referred to the police.

[12] That Customs officers might not, as a general rule, refer any importations of which it becomes aware to the police is of little weight to my assessment of the gravity

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2 *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [10]–[11].
3 *A (CA747/10) v R* [2011] NZCA 328 at [22].
4 Sentencing Act 2002, s 8(e)

of the offending. It may provide some indication that Customs officers do not consider it serious in comparison to other illegal importations.

[13] You not only imported pentobarbitone by mail but also, in what I regard as more serious offending, walked through customs in possession of pentobarbitone, having signed your arrival card and failed to disclose you were carrying a controlled drug. It is perhaps not surprising that you were charged whereas others have not been. You imported by mail, then imported in person and, as referred to earlier, there was evidence to support a representative charge of importation over a three and a half year period.

[14] In respect of the Australian examples, although the quantities were at times more than in your case, there are sufficient differences to distinguish the outcomes in those cases. Importantly, the defendants had pleaded guilty and the Australian courts availed themselves of legislation which allows the imposition of significant penalties despite entering no conviction.[5]

[15] As regards the two others who were referred to at your trial, the evidence was that they were not charged for reasons of their ill health, age and/or the lesser severity of potential charges, being possession rather than importation, which carries a much lower maximum penalty.

[16] In this case, there was no suggestion in the evidence at the trial that the pentobarbitone was being imported for you personally and indeed the searches of your home revealed you already possessed three separate quantities of pentobarbitone. The evidence made it clear the importations were intended to be passed to other people. The police located you in a car dividing the pentobarbitone you imported from Hong Kong into plastic bags. The obvious inference was that was being done in order to supply it to other people. That inference was supported by the content of your various emails and telephone calls. As I have already noted, the pentobarbitone you imported from China in early 2016 was supplied by you to a person who committed suicide.[6]

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5 Crimes Act 1914 (Aust), s 19B(d).

6 A sentencing judge is entitled to reach his or her own views of the facts relevant to sentencing, provided those views are not inconsistent with the verdict: *R v Accused* [1988] 1 NZLR 422 (CA); *R v Heti* (1992) 8 CRNZ 554 (CA); *R v Connelly* [2008] NZCA 550; and *B (CA58/2016) v R*

[17] You seek to minimise the seriousness of your offending by referring to what I can accept is your genuine desire to help others. What is troubling about that, however, is there is nothing to suggest you were qualified to help people by providing them with a lethal drug. When you were interviewed by the police in connection with Mrs Treadwell's suicide, you told them you were quite naïve about her mental health. She was not suffering from a terminal illness or a grievous or incurable medical condition. Her doctor described her as in physically good condition despite living with arthritic pain and depression. You were not a close relative or even a close friend, as evidenced by your lack of knowledge of Mrs Treadwell's mental health. What I take from that is you supplied her with pentobarbitone without considering whether the support, which you say you want to offer by supplying people with a lethal drug, was appropriate in her personal circumstances.

[18] You could be described as being on something of a crusade seeking to highlight issues and the need for a law change. That, however, does not alter the fact that you broke the law and did so knowingly. Your motivation to change the law cannot reduce your culpability for deliberately seeking to circumvent it.

[19] The offending involved two importations of relatively small quantities of a class C controlled drug, one through the mail and one on your person. It was repeated, premeditated and well-organised. As discussed, there was clear evidence that the purpose of importation was for onward distribution of a drug which is controlled by the law due to its lethal effects.

[20] In terms of mitigating factors, you have not acknowledged the offending, nor taken responsibility for it, given your pleas of not guilty. You have not expressed any remorse. I acknowledge you have no history of offending and have strong support from various members of the community. You are clearly a devoted wife, mother and grandmother, and selflessly volunteer your time to help others.

[21] While the offending itself is moderately serious, the mitigating factors personal to you lead me to reduce that assessment. I conclude the seriousness of the offending is moderate to low.

[2016] NZCA 432.

Consequences of a conviction

[22] Mr Stevens submits a conviction would have a number of significant consequences for you. First, he says you would suffer substantial stigma, which is unwarranted due to the circumstances of your offending. Some stigma is an ordinary and inevitable consequence of a conviction. It is likely suffered by anyone who is convicted of importing a class C controlled drug and there is nothing in the circumstances – of either the offending or you personally – which would make such stigma more severe or carry more weight. Indeed, in circumstances where you described your offending to other members of EXIT as a "calculated risk", the claim you would suffer stigma is doubtful. I note that also, when considering Mr Stevens' submission that you had the impression you would not be prosecuted. That you were aware of the law and the risks was also evident in your emails, which were evidenced at trial.

[23] Secondly, Mr Stevens submits a conviction would mean you would be unable to be involved with the school activities of your grandchildren (both currently under two years old) due to schools' practice of undertaking police vetting.

[24] Although there is no onus of proof, the Court needs to be satisfied there is a real and appreciable risk of adverse consequences before they can be taken into account.[7] That usually requires evidence of some kind, such as a letter from a relevant person or authority outlining their procedures.[8] No such evidence has been put before me, rather the Crown has supplied Ministry of Education material which notes criminal history checks or police vetting of volunteers are not required by law.[9]

[25] In the event it is common practice for schools to undertake criminal history checks or police vetting before allowing family members to help on school trips, I am not persuaded that a school's assessment is likely to be based solely on a criminal record, particularly where that record is entirely unrelated to the safety of children. I consider it likely other factors will be more important, such as your long service as a

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7 *DC (CA47/13) v R* [2013] NZCA 255 at [43].
8 *Police v M* [2013] NZHC 1101, (2013) 26 CRNZ 308; and *Gasson v N* [2012] NZHC 2988.
9 Ministry of Education *Vulnerable Children Act 2014: practical guide for Early Childhood Education Services, Ngā Kōhanga Reo, Playgroups, Schools and Kura* at [4.4].

teacher and the fact that any convictions will be several years old by the time any assessment might be undertaken. Moreover, police vetting, rather than criminal history checks, includes charges as well as convictions. Finally, given the publicity of these proceedings, a school will be able to access information about your offending by a simple internet search. I suggest, therefore, any organisation which prohibits you from attending and assisting with school activities is likely to be concerned about your offending rather than simply the fact of a conviction.

[26] Thirdly, Mr Stevens suggests a conviction would prevent you from volunteering as you have in the past. In your affidavit, you say you disclosed your charges to several organisations for which you have volunteered and they put your efforts on hold until the outcome of your trial and sentencing. Two of those have indicated it will be a matter for review by their boards if you are convicted. You note in your affidavit you continue to volunteer for another charity which has intimated that your work for them will be reviewed after this sentencing. Mr Stevens suggests the community and the voluntary sector would be the poorer should a conviction preclude you from continuing your substantial volunteer work.

[27] That you might experience more limited opportunities to volunteer is within the realm of ordinary consequences of a conviction. According to your affidavit, each organisation for which you volunteer has a different approach to convictions. There is no evidence before me that there is a sector-wide bar to volunteering upon conviction for any offence, nor is there evidence that the organisations for which you volunteer will take that approach. Although you provide no evidence, you suggest several organisations will undertake some sort of review upon conviction. This lack of evidence may well be enough to reject this ground for failing to establish a real and appreciable risk.[10]

[28] In any event, to make an analogy with employment, the Court of Appeal recognised in *Edwards v R*,[11] that while some employers may not be prepared to look beyond the bare fact of a conviction to read what the courts said about its circumstances and mitigating factors, it should not be assumed that all or even most

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10 *Police v M*, above n 8, at [58]–[62].
11 *Edwards v R* [2015] NZCA 583 at [18].

will behave in that way, especially where the offender is generally a person of good character.

[29] The Court can reasonably expect volunteer organisations to take into account the level of gravity and the nature of the offence in terms of its relevance to the work undertaken. The Court can also reasonably expect them to take account of your otherwise good character, considerable experience in volunteering, and lengthy relationships with them. Given your long period of volunteering, the nature and seriousness of the offence, and the publicity which your offending has already received, I do not consider there is a real and appreciable risk that you will be barred from future volunteering opportunities either at the organisations where you volunteer currently, or at others simply because of a conviction. That an organisation might decline your services in light of your offending is a different matter.

[30] Furthermore, the consequences in respect of your volunteer work and ability to assist at your grandchildren's schools were entirely predictable consequences of the decision you, an educated and experienced volunteer worker, took in importing, on two occasions, a controlled drug into New Zealand.

[31] Fourthly, Mr Stevens submits you are likely to experience significant difficulties with international travel. Your husband appears to suffer difficulties when travelling due to his age and, if you cannot accompany him, he will be unable to visit family in Australia and Britain. You intend to travel to South Africa later this year to attend a euthanasia conference. You expect to be in high demand as a speaker due to these proceedings and Mr Stevens suggests it is not in the public interest that your contributions to the international debate on euthanasia be impeded by travel restrictions. After the conference, you plan to visit family in London. You are also planning a "once in a lifetime" trip next year involving travel to the United States and Canada, two countries to which Mr Stevens submits you will find particular difficulty in gaining entry.

[32] The courts have allowed a discharge without conviction due to impacts on international travel. I note, in the context of likely preclusion of travel to particular jurisdictions, the courts ordinarily expect evidence that the jurisdiction requires

disclosure of convictions or whether offending or charges must be disclosed. Evidence is also required that disclosure of a conviction will preclude entry or require onerous alternative processes to procure entry.[12] The courts are also unlikely to find relevant consequences where travel plans are speculative.[13] Despite the lack of evidence, and the somewhat speculative nature of your plans, I accept that a conviction for importing a controlled drug will affect to some degree your intended travel.

[33] Finally, Mr Stevens submits an indirect consequence of conviction would be to leave unaddressed public concern regarding an unlawful police vehicle check which occurred near your home after an EXIT meeting at your home. That check was initiated in order for the police to obtain the details of those attending the meeting and was subsequently found to be unjustified by the Independent Police Conduct Authority. Mr Stevens suggests the check breached a number of rights, including the right to hold opinions without interference, the rights to freedom of expression, assembly, association and movement, and the right not to be arbitrarily detained.[14] He further suggests a stay of prosecution might have been appropriate but, in lieu of that, a discharge without conviction could be an alternative remedy.[15] He submits this is a discrete ground for a discharge and a consequence that is out of all proportion to an offence of a low level of gravity.

[34] This is an irrelevant consideration in sentencing you today. It is a matter for resolution through separate proceedings in the Independent Police Conduct Authority, as has already been pursued successfully, or proceedings for Bill of Rights breaches. You yourself were not subject to the unlawful stop. No evidence obtained during that stop was used against you at your trial.

Out of all proportion?

[35] Having found there are likely consequences for your ability to travel, I now consider whether those consequences are out of all proportion to the gravity of your

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12 At [26].
13 *Brunton v Police* [2012] NZHC 1197 at [16].
14 New Zealand Bill of Rights Act 1990, ss 13, 14, 16, 17, 18 and 22 respectively.
15 Mr Stevens suggested this could be an alternative remedy as described in *Wilson v R* [2015] NZSC 189 at [60].

offending. In this exercise, it is appropriate to take into account the nature, seriousness and likelihood of the consequence arising.[16]

[36] I am not persuaded that difficulties in international travel are out of all proportion to your offending. As noted above, the offending is of moderate to low gravity. You used your international travel to break the law and it is ironic you seek to avoid a conviction because of the impact on potential future travel. You chose to bring a controlled drug through New Zealand's border and an obvious and logical consequence of that decision was a potential restriction of future overseas travel. In addition, I note this consequence is not at the more serious end of the scale. It will impact on your travel for leisure, activism and family visits. It will not, for instance, impact on your employment,[17] and will not restrict your family from visiting you and your husband instead.

[37] In case I am wrong to conclude there is no real and appreciable risk that your ability to attend school activities and volunteer will be affected, I consider those consequences at this stage. There are public interest concerns weighing in favour of allowing bodies such as schools and volunteer organisations to carefully vet those wanting to offer their services. For the same reasons for which I found there was no relevant risk, I find any restriction would not be out of all proportion to the gravity of your offending. The consequences will not have the effect of preventing you from earning a living or preventing you from spending time with your grandchildren. And, finally, as already observed, your offending has attracted a significant amount of publicity. Organisations will be able to discover your offending via an online search of your name, meaning the consequences may not be consequences of a conviction per se but rather consequences of your offending, which cannot be undone by a discharge.

[38] For these reasons, I conclude that neither the effect on travel nor the effect on your volunteer work, including with your grandchildren, either separately or in

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16 *Hughes*, above n 2, at [82]; and *Maraj v Police* [2016] NZCA 279 at [31].

17 See for instance *Hore v Police* [2015] NZHC 2313; and compare *Shakib v Police* [2014] NZHC 2596.

combination, is out of all proportion to the gravity of the offending. The application to be discharged without conviction is declined.

Sentence

[39] The Crown has referred to a number of analogous cases where the sentences ranged from being convicted and discharged,[18] 150 hours' community work[19] and two years' imprisonment.[20] In light of these, the Crown submits a sentence of community work is appropriate. Mr Stevens submits the case does not call for such a sentence.

[40] I am mindful of the purposes and principles of sentencing, chiefly in this case, of promoting accountability and responsibility for your offending, and to deter both the community and specifically you from further offending.[21] I am also mindful of the need to keep offenders in the community as far as practicable[22] and to impose the least restrictive outcome.[23] I do note that others who have imported pentobarbitone do not appear to have been charged.

[41] Your offending is not subject to a tariff case. However, analogies can be drawn from cases where other class C drugs have been cultivated or imported.[24] The Court of Appeal has set guidelines for cannabis cultivation, for example, with three categories of offending.[25] Relevant in this case is category 1, involving growing a small number of cannabis plants for personal use by an offender without any sale to another party occurring or being intended. Offending in this category is almost invariably dealt with by a fine or other non-custodial sentence. Where there have been supplies to others on a non-commercial basis, this category still applies but the monetary penalty will be greater and, in more serious cases or for persistent offending, a short prison term may be warranted.

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18 *R v Mihos* HC Wellington CRI-2005-085-5886, 4 April 2007.
19 *Amir v Police* [2013] NZHC 2546.
20 *Fraser* [2013] NZCA 250.
21 Sentencing Act 2002, s 7.
22 Section 16.
23 Section 8.
24 *Fraser*, above n 20.
25 *R v Terewi* [1999] 3 NZLR 62 (CA) at [4].

[42] I take into account the aggravating factors of premeditation, frequency (two instances) and the purpose of the importations. Small quantities were involved and there was no commerciality. I give you credit for your otherwise clean criminal history and your previous good character, in particular your significant contribution to society through your volunteer work.

[43] I am aware, for the reasons discussed above, that the fact of two convictions for importing a class C controlled drug will have adverse consequences for you.

[44] Weighing all these factors, I am satisfied a fine is the appropriate sentence. While you are now retired, Mr Stevens confirms you have assets and are in a position to pay a fine.

[45] I have considered a range of analogous cases in setting your fine.[26] Most relevantly, in *R v Allen-Fanning* a fine of $1,500 was imposed for the importation of 1.2 grams of hashish and 0.6 grams of amphetamine.[27] That case might be viewed as more serious than yours in terms of the type of drugs imported. However, the drugs were in very small quantities, were solely for personal use, and the defendant pleaded guilty. For those reasons, I consider the offending in *Allen-Fanning* slightly less serious than your offending which forms the basis for the charge of importing by mail. I therefore set the fine in respect of that charge at $2,500. Your offending which forms the basis of the charge of importing in person is more serious again, as I have explained. I therefore set the fine in respect of that charge at $5,000.

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[26] See for example *R v McGoldrick* HC Christchurch CRI-2007-009-7608, 14 August 2008; *Filo v Police* HC Wellington CRI-2007-485-61, 13 September 2007; and *Hudson v Police* [2012] NZHC 2769. I note the lower level of fines imposed in the latter two cases were in circumstances of cultivation for personal use by first time offenders who pleaded guilty.

[27] *R v Allen-Fanning* CA214/96, 7 November 1996.

Result

[46] On the two charges of importing a controlled substance, you are convicted. I sentence you to a fine of $2,500 in respect of the first offence of importation by mail and $5,000 in respect of the second offence of importation in person. Court costs are also imposed.

Thomas J

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