IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 172/2025
[2026] NZSC 24

BETWEEN	MICHAEL KEVIN MILNE Applicant
AND	THE KING Respondent

Court: Williams, Kós and Miller JJ

Counsel: S J Shamy for the Applicant
T R Simpson for the Respondent

Judgment: 2 April 2026

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant Mr Milne was found guilty together with his co-defendant Mr Harris of cannabis cultivation and supply offences. Mr Milne was sentenced to six years' imprisonment and Mr Harris was sentenced to five years' imprisonment.[1] On appeal, the Court of Appeal reduced both sentences by eight months.[2] Mr Milne now seeks leave to bring a further appeal to this Court against his sentence.

The offending

[2] Mr Milne owned a 700-hectare rural property in Westland where he constructed an underground bunker to grow cannabis. It was three metres deep and had a total floor area of 240 square metres on which stood 12 growing bays.

1 *R v Milne* [2024] NZDC 25995 (Judge Kellar).
2 *Milne v R* [2025] NZCA 574 (Thomas, Brewer and Isac JJ) [CA judgment].

Access was through a trap door concealed in the floor of a 40-foot shipping container that sat above the bunker at ground level.

[3] Cannabis could be cultivated continuously with three crops of up to 816 plants possible per year. The charges covered the period from January 2017 to September 2019. Mr Milne cultivated and harvested the cannabis, which Mr Harris then transported to Christchurch for sale. Mr Harris's bank accounts disclosed $450,000 that could not otherwise be accounted for. Crown evidence at trial was that, on a conservative analysis, the operation could produce 300 pounds of cannabis annually with a retail value of $1.05 million.

[4] Mr Milne was sentenced to six years' imprisonment. A one-year discount from a starting point of seven years' imprisonment was applied for a combination of totality, previous good character, age and health. Mr Milne was 68 when sentenced, had no relevant previous convictions and had a track record of contributing to his local community.[3]

Court of Appeal

[5] Mr Milne and Mr Harris both appealed to the Court of Appeal against sentence and their sentences were adjusted downwards by a further eight months each for personal factors such as age and health.[4] The appeals were not, however, advanced on those bases. Rather they relied on broader grounds. First, the appellants contended their sentences were affected by a factual error concerning the seriousness of the offending—the sentencing Judge had overstated the number of cannabis plants found at the property. Second, the Court was wrong to focus on the sophistication and scale of the grow—that is, its potential yield—and should instead have given primacy to the number of plants found. Third, they argued the starting point adopted by the Judge was too high when compared to similar cases. Finally, they argued that additional credit ought to have been provided for personal mitigating factors, and in particular a delay of four and a half years between charge and trial.

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3 Mr Harris was sentenced to five years' imprisonment, primarily on the basis that he had a lesser role in the operation (the sentence would have been lower still but for aggravating weapons charges). Although Mr Harris had a largely historical but extensive criminal history, he was much older when sentenced, at 77.

4 CA judgment, above n 2, at [46].

[6] While it allowed the appeals, the Court rejected these broader grounds. The Court concluded there was no material error going to seriousness. Although the sentencing Judge had erred when he said the police had found 816 plants at the property (they had found 780 plants), the error was immaterial.[5] This was the case because plant quantity is not determinative[6] and the estimated yield from them was conservative in any event.[7] In relation to starting point, the Court referenced *R v Terewi*, the guideline judgment for cannabis cultivation offending, and found that the starting point adopted for Mr Milne was consistent with that applied in similar cases.[8] As to delay, this was due to a combination of COVID-19, the availability of defence counsel and (importantly) multiple pre-trial applications by the defendants.[9]

Assessment

[7] In his application to this Court, Mr Milne reprises the arguments made in the Court below, except that in relation to starting point he now advances the more fundamental proposition that *Terewi* is out of date. He invites this Court to undertake a review of cannabis offending sentencing levels. We address matters of yield and delay first before turning to that matter.

Yield and delay

[8] The arguments in relation to yield and delay are essentially factual. As to the first, the sophisticated nature and duration of the operation and the evidence of financial rewards obtained all clearly go to seriousness as a matter of fact and logic. No question of principle arises.[10] As to the second, the delay was lengthy, as the Court of Appeal accepted, but cannot be sheeted home to the prosecution or the Court's processes. Again, no question of principle arises. Further, nothing in these grounds suggests there is a risk that justice may miscarry if leave is not granted.[11]

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5 At [26].
6 At [27] citing *R v Terewi* [1999] 3 NZLR 62 (CA).
7 At [29]–[30].
8 At [33]–[34] citing *R v Watson* [2007] NZCA 432, *R v Wilson* CA273/04, 13 December 2004 and *Hall v R* [2024] NZCA 532.
9 At [37].
10 Senior Courts Act 2016, s 74(2)(a).
11 Section 74(2)(b).

Review of Terewi

[9] As to the third, more fundamental, ground, it is argued that *Terewi*'s focus on deterrence and the limited effect on sentence of personal factors is out of date and should be revisited in light of the purposes, principles and factors in the Sentencing Act 2002 (enacted three years after that decision) and in light of the approach in *Zhang v R*.[12] Mr Milne notes that on several occasions the Court of Appeal has suggested that revisiting *Terewi* may be appropriate.[13] It is also argued that societal attitudes toward cannabis use have changed since 1999, with nearly half of New Zealanders preferring decriminalisation according to the 2020 referendum on the issue.

[10] The Crown submits that *Terewi* is still good law. While it is accepted that, in line with the view at the time, deterrence was emphasised by that Court, that matter was not mentioned in Mr Milne's sentencing in the District Court or by the Court of Appeal. The necessity for deterrence is circumstance specific—both as to offence and offender, in accordance with contemporary sentencing practice. The Court of Appeal in recent cases has emphasised that guideline judgments should not be applied "slavishly."[14]

[11] The Crown accepts that various Court of Appeal decisions have commented on the need to revisit *Terewi* but submits none involved "high-end commerciality" of the kind in this case. Further, the Crown notes that there has been a "steady decline" in cannabis-only convictions and it is increasingly rare for sentences of imprisonment to be imposed.

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12 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648. Mr Milne notes that *Zhang* looks to quantity at the first stage of its analysis.

13 See for example *R v Smyth* [2017] NZCA 530 at [17]; *Anderson v R* [2022] NZCA 472 at [20]; *Smith v R* [2022] NZCA 606 at [12]; and *Hall v R*, above n 8, at [26(b)], n 41. Mr Milne advises that he had asked the Court of Appeal to set the appeals down before a full Court so that *Terewi* could be revisited, however the Crown opposed that course and the Court of Appeal did not accede to the request.

14 See *Anderson v R*, above n 13, at [20] citing *Zhang v R*, above n 12, at [48].

Assessment of the Terewi *ground*

[12] The Court of Appeal has expressed doubt about whether *Terewi* remains appropriate on a number of occasions (as noted above), most recently in *Iloahefaiva v R*, where it replaced a two-year sentence of imprisonment with a non-custodial sentence for reasons including "the need to revise the *Terewi* guidelines and the changing attitudes towards cannabis-dealing offending".[15]

[13] It seems clear therefore that *Terewi* should be revisited. It would, we venture, be better done sooner rather than later. However, the Court of Appeal is best suited institutionally to performing that task given the large number of sentencing appeals that come before it. This Court has expressed on a number of occasions its reluctance to review sentencing guidelines without the benefit of the Court of Appeal's views on the matters of principle under challenge.[16]

[14] The proposed challenge to *Terewi* advanced in this application does not appear to have been mounted directly in the Court of Appeal. It may be that the Court did not take up counsel's request for a full Court for the reason suggested by the Crown: the offending in this case was too serious to trigger the factors of concern identified in decisions such as *Iloahefaiva*. In any event, given the scale and sophistication of this operation, we are not satisfied that a reconsideration of *Terewi* would have produced a different outcome given the terms of s 8(c) and (d) of the Sentencing Act. It follows that no question of general importance arises on this ground and there is no risk of a substantial miscarriage of justice if leave is not granted.

Result

[15] The application for leave to appeal is dismissed.

Solicitors:
Linwood Law, Christchurch for Applicant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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15 *Iloahefaiva v R* [2025] NZCA 467 at [45].
16 See *McGregor v R* [2008] NZSC 10 at [2]; and *Tandy v R* [2008] NZSC 8 at [6].