IN THE COURT OF APPEAL OF NEW ZEALAND

CA602/2009
[2009] NZCA 588

THE QUEEN

v

BATSIRAYI VHAVHA

Hearing: 4 November 2009

Court: William Young P, Chisholm and Priestley JJ

Counsel: P T Birks for Appellant
B D Tantrum for Crown

Judgment: 14 December 2009 at 10.30 am

JUDGMENT OF THE COURT

A Time for appealing extended.

B Appeal dismissed.

REASONS

CHISHOLM AND PRIESTLEY JJ

(Given by Chisholm J)

[1] Having pleaded guilty to 11 charges of immigration fraud, the appellant was sentenced in the District Court at Rotorua to 18 months imprisonment. Home detention was not considered because the sentencing Judge, Judge Weir, considered that *R v Hassan* [2008] NZCA 402 precluded that outcome. This appeal is confined to the issue whether home detention should have been granted.

[2] Because the appeal documents were erroneously lodged in the High Court the appeal is out of time. However, the Crown does not oppose an extension of time within which the appeal may be brought, and an extension is granted accordingly.

Background

[3] On 22 April 2002 the appellant used a fraudulently obtained South African passport to enter New Zealand on a visitor's permit. This offending gave rise to count 1 which alleged fraudulent use of the passport contrary to the Crimes Act 1961.

[4] When he entered New Zealand the appellant was a citizen of Zimbabwe. He is now aged 37 years, and does not have any previous convictions in this country or, as far as is known, elsewhere.

[5] Until he was taken into custody for this offending the appellant lived with his wife and two children, the youngest having been born in New Zealand. We have not been provided with any information about how Mrs Vhavha and the older child entered New Zealand. Mrs Vhavha has not been charged with any breach of New Zealand's immigration laws.

[6] After arriving in New Zealand the appellant used the false passport and false medical and police certificates to obtain work permits. This offending, which occurred between 2002 to 2007, gave rise to nine counts laid under the Immigration Act 1987.

[7] The remaining count, also under the Immigration Act, arose from assistance provided by the appellant to a third party who entered New Zealand using a false

passport. This offending occurred between 1 December 2005 and 4 February 2006. The third party is related to the appellant's wife.

[8] It seems that although the Immigration Department were initially aware as long ago as 2004 that the appellant had entered New Zealand illegally, the file was lost and no further steps were taken at that time. We understand that this prosecution was pursued after the appellant took steps through his local Member of Parliament to regularise his immigration status.

[9] The appellant told the probation officer that he and his family had always managed without having to resort to government assistance. He also told the probation officer that he deemed it necessary to bring his family to New Zealand for "a better way of life". A home detention appendix to the probation report indicated that the appellant was suitable for electronically monitored home detention, and a sentence of community work and home detention was recommended.

Sentencing in the District Court

[10] Judge Weir accepted that the appellant had come to New Zealand because of difficulties in Zimbabwe, that the risk of re-offending was "extremely low", and that the appellant's motivation to address his offending was high. He also accepted that the appellant had never tried to hide and had been completely co-operative with immigration authorities.

[11] On the other hand, the Judge noted a number of High Court decisions had made it clear that deterrence was a primary consideration and this had been reinforced, first, by *Hassan* and, secondly, by a significant increase in Immigration Act penalties in 2002. The Judge also noted that the use of false identities has severe consequences for the integrity and reputation of the Immigration Department.

[12] Having adopted a starting point of two and a half years imprisonment the Judge allowed a one third discount for the guilty pleas. Then he turned to the issue of home detention and concluded that he was bound by the following comment in *Hassan:*

> [34] There can be no question of this sentence being served by way of home detention. The appellant is not entitled to be resident in New Zealand and can expect to be deported immediately upon completion of the sentence.

While the Judge accepted that it was unclear what would happen to the appellant after he had served his sentence (and that is still the position), he nevertheless considered that the observations in *Hassan* meant that home detention was "unavailable for offending of this type".

This appeal

[13] Mr Birks noted that by virtue of his absence from Zimbabwe since 2002 the appellant is no longer a citizen of that country. He emphasised that the appellant is a first offender; one of his children is a New Zealand citizen; throughout the lengthy period that he has lived in New Zealand the appellant has lived openly and been gainfully employed; and at sentencing he was not subject to a deportation order, which distinguishes this case from *Hassan*.

[14] Having met the criteria for home detention under s 80A of the Sentencing Act 2002, submitted Mr Birks, the appellant was entitled to have that issue considered and determined, but that had not happened because the sentencing Judge had erroneously believed that home detention was not an available option. He noted that leave to apply for home detention had been granted in *R v Zanzoul* HC AK CRI 2004-092-007694 4 August 2006 which also involved immigration fraud, and that it had been considered (although leave was not granted) in *Lee v Department of Labour* HC AK CRI 2007-404-0126 9 July 2007.

[15] Factors advanced by Mr Birks to support his argument that home detention should have been granted can be summarised: s 15A of the Sentencing Act requires offenders to be kept in the community as far as practicable; s 8(g) requires the Court to impose the least restrictive outcome; given the appellant's conduct since he had been in New Zealand, there was no need to protect the community by imposing a custodial sentence; delays in prosecuting should be taken into account; since coming to New Zealand the appellant has co-operated with the authorities, is genuinely remorseful for the methods he used, and has family responsibilities; there is

uncertainty about whether he will be deported; and home detention was recommended by the probation officer.

Crown's response

[16] Mr Tantrum claimed that the Judge's conclusion that *Hassan* ruled out home detention was correct. He noted that the language used in that case was clear and emphatic and that it effectively placed a "blanket prohibition" on the imposition of home detention in such cases. To the extent that the decision of this Court in *R v Ondra* [2009] NZCA 489 (delivered after the appellant was sentenced) purported to limit the scope of *Hassan*, Mr Tantrum argued that *Ondra* had been wrongly decided.

[17] The Crown's alternative submission was that even if *Hassan* did not impose a blanket prohibition on home detention, it would only be in rare and exceptional cases that home detention could be granted. Mr Tantrum stressed that the Courts have consistently emphasised the fundamental role of denunciation and deterrence in immigration fraud cases. He submitted that home detention was incapable of providing the necessary denunciation and deterrence. Moreover, he submitted, it would enable offenders to continue to achieve the objective of the offending.

Discussion

[18] When Judge Weir sentenced the appellant he did not have the benefit of the observation in *Ondra* that the comment in *Hassan* that he relied on:

> [5] ... was not intended to mean that offenders unlawfully in New Zealand can never be sentenced to home detention; the Court was simply saying that on the facts and in the circumstances of *that case*, home detention was out of the question.

Although the offending in *Ondra* did not involve immigration fraud, those comments are equally applicable to that type of offending. Thus the Judge erred by failing to consider the possibility of home detention on its merits and it is now necessary for us to do so.

[19] As this Court observed in *Hassan* with reference to immigration fraud:

> [27] ... judges ... have stressed deterrence as an important sentencing principle in this area. The integrity of the country's immigration system is a vital part of its integrity as a state in deciding who may live within its borders. Those who dishonestly challenge the immigration system can expect deterrent sentences and can expect to be sent to prison.

This message reflects that, as stated by Keane J in *Department of Labour v Liao* HC AK CRI 2004-404-000499 14 April 2005 at [16], "Immigration status in New Zealand has become a precious commodity" and "The law requires any persons entering New Zealand to be truthful".

[20] Home detention is one of a number of options provided for in the Sentencing Act 2002. It ranks below imprisonment in the hierarchy of sentences. Section 15A confers on a sentencing court a discretion to impose a home detention sentence where otherwise an imprisonment term of two years or less would result. The President's judgment at [31] sets out the two-stepped process involved.

[21] That said, we consider that although home detention is available as an alternative sentence to imprisonment in immigation fraud cases, it is only likely to be an appropriate sentence in rare and exceptional cases.

[22] We say this because identity fraud (this being such a case) has serious repercussions in the immigration and passport fields. Accurate passport information is fundamental to New Zealand's ability to control its frontier and enforce its immigration policy. A person seeking entry into New Zealand must carry a passport which accurately sets out that person's identity, age, and country of origin. Visa requirements can all too easily be circumvented by obtaining a false passport purportedly issued by a state with which New Zealand has visa-free arrangements. False passport identities are also a mechanism for circumventing legitimate security controls.

[23] These potent policy factors give rise, so far as Sentencing Act considerations are concerned, to a requirement that sentences in the immigration and passport fraud area appropriately reflect deterrence and denunciation. In that regard we respectfully disagree with the President to the extent that he suggests immigration offending might not warrant a greater emphasis on deterrence than other types of offending.

Assuming a false identity in an immigration context is qualitatively different from criminal activity by people legitimately in New Zealand. Acquiring and deploying the false document is a deliberate and premeditated act designed to circumvent immigration and frontier controls and obtain entry into New Zealand which might not otherwise be permitted. An assault of this nature on the integrity of the state's borders justifies a stern approach when exercising the discretion whether to substitute home detention for a short term of imprisonment. Deterrence would be undermined if there was a general perception on the part of people smugglers and those who seek and supply false documents that a more relaxed home detention regime was readily available.

[24] Turning to the appellant, the factors relied on by his counsel are heavily outweighed, not just by the above policy considerations, but also by the seriousness of the offending. Not only did the appellant deploy a false passport over a period of approximately five years but he also, doubtless encouraged by his success, became a party to the unlawful entry of another person using the same method. His offending was compounded by the use of a fraudulently obtained South African police clearance certificate to obtain a work permit. We are of the clear view that to impose a home detention sentence here would run counter to the deterrence and denunciation factors we have outlined.

[25] For these reasons, we do not consider this is one of the rare and exceptional cases where home detention should have been granted. The discretion must be exercised to bring about the same result as the Judge reached.

Outcome

[26] The appeal is dismissed.

WILLIAM YOUNG P

[27] My approach to the relevance of the appellant's illegal immigrant status is broadly, although not exactly, in line with that taken in *R v Ondra* [2009] NZCA 489. I think that the immigration status of an offender may sometimes be a relevant

sentencing consideration, along with all the other circumstances of an offender. For instance, if it is clear that the offender is about to be removed from New Zealand, a fine which could only be paid by instalments over a number of years might not be a good sentencing option. On the other hand, I find it difficult to see the justification (or point for that matter) of treating an offender's immigration status as warranting a sentence of imprisonment which would not otherwise be imposed. There is nothing in the Sentencing Act that favours such an approach. Because there is no likelihood of the appellant being removed from New Zealand in the foreseeable future, I do not see his immigration status as itself precluding home detention.

[28] This means that this Court must address afresh the exercise of the sentencing discretion.

[29] Eligibility for home detention depends upon the sentencing judge deciding that, but for the availability of home detention, the offender would otherwise be sentenced to a short-term sentence of imprisonment (ie of two years or less): s 15A of the Sentencing Act 2002. In effect, the Court is given a discretion to commute to home detention what would otherwise be a short-term sentence of imprisonment. There is nothing in the Sentencing Act to suggest a presumption for or against such commutation, either generally or in respect of particular types of offence. So what is called for is an exercise of sentencing discretion in a way which gives effect to the purposes and principles of sentencing recorded in ss 7 and 8 of the Sentencing Act.

[30] A review of the many relevant cases cited in Hall's *Sentencing* show that the practice of the courts has not been consistent. This is not surprising.

[31] The two-step process required for a sentence of home detention requires the Judge first to decide that the sentence which is otherwise appropriate is a short-term sentence of imprisonment ("stage one") and then whether to commute that sentence to home detention ("stage two"). Similar (at least broadly) two stage processes were associated with the power to suspend prison sentences and the power to give leave to apply for home detention – the precursors of the present discretion to sentence to home detention. Faithful adherence to such processes requires the judge at stage one to operate on the assumption that there is no stage two. The underlying legislative

purpose is to avoid net-widening and, more particularly, to ensure that the more lenient sentences which can be imposed at stage two are reserved for those who would truly otherwise have been imprisoned. But while there is thus good reason for the legislature to require a two stage approach to sentencing, the artificiality of the intellectual processes which are involved can cause sentencing judges some difficulty. This is particularly so as two stage sentencing processes put pressure on conventional ideas about the hierarchy of sentences.

[32] Let us assume two offenders, A and B. A's culpability is greater than that of B and so, for the purposes of the stage one exercise, the otherwise appropriate sentences are fixed at 18 months for A and 12 months for B. But at stage two, A's otherwise appropriate sentence of 18 months imprisonment is commuted to nine months home detention whereas B is sentenced to 12 months imprisonment. So, despite greater culpability, A receives a sentence which most people would regard as distinctly more lenient than the less culpable B.

[33] This differential treatment might be able to be justified by reference to circumstances which are particular to the offender. If B has a history of non-compliance with court orders and has re-offended while on home detention, that would logically justify the difference in outcome. As well, the exercise of the discretion may perhaps just come down to whether the offender has a suitable address at which a sentence of home detention can be served.

[34] I suspect that many criminal judges exercise the home detention discretion primarily on the basis of whether the offender is, by reason of personal circumstances and history, a good candidate for home detention, an approach which has some attractions (at least to me) in terms of consistency and predictability.

[35] Another approach is to focus on the nature of the offending. Many sentencing judges will feel from time to time, that a sentence of home detention is just not right for the particular offending - that despite the otherwise appropriate sentence being two years or less and irrespective of the suitability for home detention of the offender, the case calls for the imposition of a real sentence of imprisonment. Similar issues arose around suspended sentences and the power to grant leave to

apply for home detention. Rules of thumb tended to develop, for instance this Court expressed the view in *R v Terewi* [1999] 3 NZLR 62 at [14] that in cases of commercial drug dealing, the power to suspend a prison sentence should be exercised only in exceptional circumstances. Later, there was often reluctance to grant leave to apply for home detention in cases in which the offender had been growing or dealing in drugs from home. Such reluctance is understandable. Sentencing an offender to reside in the house in which the offending occurred detracts from the credibility and robustness of the criminal justice system, particularly as perceived by people who live in the same neighbourhood and know the offender.

[36] Given the relatively open-textured nature of the relevant sentencing discretion, I accept that there is scope for sentencing judges to imprison on the basis that a sentence of home detention would not give the right message or simply would not look right. In the context of the Sentencing Act, this involves resort at stage two of the sentencing process to the more punitive of the potentially applicable principles of sentencing (ie those provided for in s 7(1)(a) (holding accountable), (e) (denunciation) and (f) (deterrence)). For reasons which I am about to give, however, I think that sentencing judges should be cautious about doing so.

[37] The purposes of holding an offender to account and denunciation are obviously applicable at stage one of the process, but as the example which I have given above (at [31] – [33]) illustrates, they do not easily justify outcomes under which more culpable offenders receive more lenient sentences than less culpable offenders.

[38] Turning to the facts of this case, the Judge concluded that the appellant's culpability warranted a sentence of imprisonment of 18 months. I have no problem with that assessment. As such, his culpability was effectively the same of any other offender (say a robber, burglar or drug-dealer) whose culpability, as assessed at stage one, warrants a sentence of 18 months imprisonment and who might well be sentenced to home detention. There is no obvious reason for concluding that the appellant is in any more need of being held to account than the postulated robber, burglar or drug dealer and likewise there is no obvious reason for regarding his

conduct as being any more worthy of denunciation than that of the robber, burglar or drug dealer.

[39] What about deterrence?

[40] General deterrence is one of the primary purposes (and justifications) of sentencing. The general deterrent effect of the criminal law puts a great deal of downwards pressure on levels of offending. I also accept that legal sanctions imposed on an offender and the probability of more severe sentences in the event of further offending have the tendency (obviously not always realised) of deterring that offender from further offending. What I am more sceptical about is marginal deterrence, that is, the idea that moderate variations in sentencing severity (such as between a sentence of imprisonment and home detention) have an appreciable impact on rates of offending.

[41] Despite my general reservations about marginal deterrence, I accept that some types of offending may be more likely to be deterred than others. I also accept that this may be true of immigration offending.

[42] Obviously a firmly maintained border, the effective investigation and prosecution of immigration offences and a robust criminal justice system serve to deter immigration offences. Further, it may be that a firm approach to immigration offending might produce some marginal deterrent effect. I say this given:

(a) The premeditation and planning associated with the obtaining and use of fraudulent passports.

(b) The reality that there is something of a market for the provision of false documentation.

(c) The well-informed nature of those on the supply side of this market, in particular those who assist in the obtaining of false passports, and give advice on how to circumvent passport control.

(d) The probability that those who acquire and use false documentation will be well-informed.

[43] While those considerations may suggest that a strong line on immigration offending (for instance a policy of always imprisoning offenders) might have a tendency to reduce immigration offending, similar lists can be prepared in relation to robbery, burglary and drug dealing (mentioned here because of the examples I have earlier given). Yet when judges deal with robbers, burglars and drug dealers where the otherwise appropriate sentence is imprisonment for two years or less, they do not operate on the basis of a presumption against home detention or treat home detention as appropriate only in "rare and exceptional cases". And, in any event, there are limits to the amount of prison accommodation which the State can be expected to provide in the interests of maximising deterrence.

[44] Given these considerations, I am reluctant to single out immigration offending as a particular type of crime for which considerations of deterrence assume such great significance as practically to exclude home detention.

[45] So, coming back to this case again, I do not see the requirements of holding the appellant to account, denunciation or deterrence as logically controlling the decision whether to commute the otherwise appropriate sentence of imprisonment to home detention. That being so, and the appellant being in all respects a good candidate for home detention, I see the least restrictive outcome principle (see s 8(g)) as the primary consideration, with the result that I would allow the appeal and sentence the appellant to nine months home detention.

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