IN THE COURT OF APPEAL OF NEW ZEALAND

CA519/2010
[2010] NZCA 611

	BETWEEN	MILES GAISFORD ELLIOTT Appellant
	AND	THE QUEEN Respondent

Hearing: 8 November 2010

Court: Ellen France, Gendall and Cooper JJ

Counsel: M J Phelps for Appellant
N P Chisnall for Respondent

Judgment: 14 December 2010 at 10.30 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] On the third day of a trial scheduled to run for six weeks, the appellant and three co-accused pleaded guilty to a charge that between 30 September 2004 and 5 December 2006 they conspired for a material benefit to aid or abet persons to

remain in New Zealand unlawfully, or to breach a condition of a permit granted to them.

[2] The charge was laid under s 142(1)(ea) of the Immigration Act 1987 and s 310 of the Crimes Act 1961. The appellant and two co-accused were directors of Contract Labour Services (NZ) Ltd (the Company) and were each sentenced to three years' imprisonment. The fourth accused was employed by the Company as a pay clerk and he was sentenced to nine months' home detention.

[3] The appellant now appeals against the sentence.

Background facts

[4] According to the agreed summary of facts, the Company provided seasonal labour in the horticulture and viticulture industries, operating primarily in Hawkes Bay where it was the largest labour supply company of its type, but also in Marlborough, Tasman, Christchurch and Pukekohe. It had an annual turnover of $4.9 million for the six months from 30 September 2004 to 31 March 2005, of approximately $7.4 million for the year ending 31 March 2006 and approximately $5.3 million for the period from 1 April to 22 December 2006.

[5] The industries serviced by the Company had experienced labour shortages for a number of years. In response, the directors of the Company supplemented the labour force with illegal workers. Their illegal status arose because they were either over-stayers, persons who had jumped ship or were working in breach of visitor or student permits. There was a direct financial benefit for the company in using these workers and its turnover was increased as a consequence. The directors of the Company attempted to distance themselves from the use of the illegal labour by the use of sub-contractors who were either legitimate or fictitious. They engaged legitimate sub-contractors knowing that many of the workers that they employed were illegal. They also used fictitious sub-contractors so as to disguise the use of illegal workers who were in fact employed by the Company but not recorded on its payroll.

[6] The workers used fell into three categories. Those in fact employed by the Company (referred to as the "A" list of workers), those employed by the company but attributed to false sub-contractors (known as the "B" list of workers), and those employed by legitimate sub-contractors. It was accepted that most on the "B" list were illegal.

[7] The false sub-contractors were used to provide false invoices in respect of the work carried out by the "B" list workers. Cash cheques were issued to cover the invoices, and the cheques were cashed by the false sub-contractor. The money was then returned to the Company less a commission. The cash was then used to pay the "B" list workers in cash. An amount equivalent to PAYE was deducted from the workers' pay, but not provided to the Inland Revenue Department. Instead, that money (referred to as "bush money") was used to make commission payments to Surjit Singh and supervisors of the workers. According to the agreed summary of facts, the balance was divided among the directors.

[8] Surjit Singh was primarily responsible for calculating and making the various payments of the "bush money". However, on occasions when he was absent, Mr Elliott was involved in that aspect of the operation. He also assisted on occasions with liaison with the invoice writers. The Crown conceded that it was unable to determine the total weekly amount of the false invoices issued in respect of the "B" list workers. However, it was in a position to refer to the period between 9 February 2006 to 2 March 2006 when the false invoices issued in the name of one sub-contractor were as follows:

week ending 9 February 2006	$68,158.83
week ending 16 February 2006	$64,092.27
week ending 23 February 2006	$76,731.90
week ending 2 March 2006	$65,510.65.

[9] In Blenheim, workers were paid through cash deposits made into two personal bank accounts. There was evidence that nearly half the deposits had been made by Mr Elliott, with other deposits made by persons including his co-accused. It was said that the Company's Blenheim managers had raised concerns with

Messrs Elliott, Porter and Dhaminder Singh about the number of "B" list workers, however those concerns was "brushed aside". An assurance was given to a Blenheim manager that he would not be liable for prosecution in respect of the use of illegal labour. It was also alleged that Messrs Elliott, Porter and Dhaminder Singh were each responsible at different times for organising the transfer from Hastings to Blenheim of groups of workers which they knew included "B" list workers. Illegal workers were housed and employed in remote locations thus giving them a measure of protection from investigation under the Immigration Act.

[10] The appellant suggested in submissions in the District Court that he was less blameworthy than his co-accused Messrs Porter and Dhaminder Singh. When the Crown, however, indicated that it sought that any disputed facts be the subject of a hearing under s 24 of the Sentencing Act 2002, the appellant filed a memorandum in which he accepted that he and his co-directors were equally culpable.

The sentence imposed by the District Court

[11] The Judge considered that the offending was of such seriousness that a term of imprisonment was required for the appellant, Mr Singh and Mr Porter. He took into account that the scheme had involved the use of illegal workers for commercial gain, that the offending was of a large scale and at its peak had involved a large number of people, that the offending continued throughout the period of the Company's existence, for more than two years, that the offending had involved concerted efforts to avoid detection, that there had been an "unquantifiable benefit" by way of tax evasion and that another company (owned by unrelated parties, which acquired the Company) suffered loss as a result of the offending coming to light.

[12] The Judge also took into account defence submissions that the offending had to be understood against the shortage of labour and that each of the co-accused had not been involved in the whole range of unlawful activities referred to in the summary of facts.

[13] The Judge fixed the starting point of four years' imprisonment. He noted that neither the accused nor his co-offenders Porter and Dhaminder Singh had any

previous convictions and referred to their low risk of re-offending. He also took into account the guilty plea, which had come after the commencement of trial, but had nevertheless resulted in a considerable saving of time and cost since the trial had been estimated to run for six weeks. He allowed a 15 per cent credit in respect of the guilty plea on top of a six months' credit in respect of the appellant's previous good character. He took the same approach in respect of the accused Dhaminder Singh and Michael Porter. He treated Surjit Singh more leniently, apparently on the basis of his lower status in the Company, a degree of commercial naivety and his age. The appellant does not complain that his sentence was disproportionately severe when compared to Surjit Singh's sentence of nine months' home detention.

The appeal

[14] Mr Phelps submitted that the starting point adopted by the Judge was too high. He noted that the offending had occurred against a backdrop of labour shortages. In written submissions filed for the appellant there was reference to the desperate need for labour of orchardists and viticulturists in the Hawkes Bay and Marlborough regions, circumstances that Mr Phelps submitted were unlikely to be repeated. As a consequence, the need for deterrence was not as strong as the Judge considered it to be. He submitted that the offending had not of itself compromised the integrity of the country's borders. He claimed that most of the workers involved were persons already in New Zealand. This was not a case of immigration fraud that required a stern response and there was no suggestion that the appellant or his co-offenders had been arranging for persons to enter the country illegally, or soliciting them to do so, falsifying documents or maltreating the workers. In the circumstances, a starting point in the region of between two and three years would have been sufficient to mark the seriousness of the offending.

[15] There were numerous character references attesting to Mr Elliott's good character and given that he had no previous convictions, Mr Phelps submitted that more credit should have been given for his good character. The appellant also endeavoured to argue that Mr Elliott had not derived much financial benefit in the form of "bush money" distributed to the offenders. Mr Phelps referred to a report

that had been available at sentencing from accountants which purported to review the appellant's financial affairs and demonstrated that there were few unaccounted for deposits in his bank accounts over the relevant period. In the circumstances, it was submitted that the appellant had not benefited personally from the offending and this should also have resulted in a lower starting point.

[16] Mr Phelps also argued that the Judge had erred by not giving proper consideration to the possibility of sentencing the appellant to home detention or some combination of home detention and other community-based sentences. Even if an end sentence of two years' imprisonment was not arrived at, the appellant was entitled to have the issue of home detention considered, under the transitional arrangements that applied under s 57 of the Sentencing Amendment Act 2007. In those circumstances, a Court's power to sentence to home detention is not limited to cases where a "short-term sentence of imprisonment" would otherwise have been imposed.[1] Mr Phelps submitted that the Judge had erred by not considering whether a sentence less severe than imprisonment could have adequately met the relevant purposes of sentencing under s 7(1) of the Sentencing Act.

[17] For the Crown, Mr Chisnall submitted that the starting point adopted was not too high. Although the appellant had not been involved in offending at the border, nevertheless there had been a conspiracy that sought to exploit persons who were already in the country by frustrating immigration processes. The activity had a commercial element, had involved many individuals and had taken place over more than a two year period. Mr Chisnall also submitted that the six month reduction for the appellant's previous good character could not be criticised and that a generous discount had been given for the guilty plea given that it occurred after the commencement of the trial. In the result, the term of imprisonment of three years imposed was well within the range available to the Judge. The Judge had also been entitled to take the view that a sentence of imprisonment was necessary having regard to the seriousness of the offending, and did not err by failing to order home detention.

---

[1] *R v Hill* [2008] NZCA 381, [2008] 2 NZLR 381 at [28].

Discussion

[18] Section 142(1)(ea) of the Immigration Act provides that every one commits an offence against the Act who:

> for a material benefit, aids, abets, incites, counsels, or procures any other person to be or to remain in New Zealand unlawfully or to breach any condition of a permit granted to the other person;

[19] The offence is punishable by a maximum term of imprisonment of seven years. As can be seen from the statutory wording the essence of the offence is carrying out the activities referred to "for a material benefit". The legislative intent is clearly to proscribe conduct which seeks to profit from breaches of the immigration laws.

[20] In *R v Chechelnitski*[2] there was a discussion of the more serious offence created by s 98C of the Crimes Act which created the offence of smuggling migrants. The Court observed that the offence was "concerned with persons who, for material benefit, arrange for illegal migrants to enter or be brought to New Zealand, knowing, or being reckless as to whether, the migrant is unauthorised".[3]

[21] The Court said that the core of that offence was the "commercial element of the activity".[4] That offence is punishable by a maximum term of imprisonment not exceeding 20 years, and the Court considered that a five year starting point that had been adopted in the High Court to reflect the appellant's role as an important, but not central, offender in an operation to smuggle three people into New Zealand was "generous".

[22] In the present case, the offence carries a significantly lower maximum penalty. Nevertheless, we accept Mr Chisnall's observation that, as in *Chechelnitski*, the present offending was carried out for a commercial purpose. Here, there was a sophisticated and dishonest scheme under which the appellant and his co-accused in

---

[2] *R v Chechelnitski* CA160/04, 1 September 2004.
[3] At [3].
[4] At [8].

fact profited from breaches of the immigration laws. We reject the appellant's contention that he did not benefit personally from the "bush money", which is contrary to what was said in the summary of facts. Nor do we consider it matters that the prosecution were not in a position to establish the precise extent to which the appellant may have benefited in that way. The Company benefited from the scheme and was able to derive profits that would have been denied to others operating lawfully. The scheme also had the consequence of diverting tax revenue that would otherwise have been payable by employees engaged in the work that was carried out. The offending took place over a prolonged period, and was well organised with a view to ensuring that it was not discovered by the relevant authorities.

[23] The appellant was a principal offender, and was one of the directors and owners of the Company. He was a central figure in the overall scheme. Even if Mr Phelps was correct in his assertion that the particular circumstance of a labour shortage affecting orchards and viticulture is unlikely to be repeated as a result of subsequent regulatory changes, that would not remove the need for an emphasis on deterrence in sentencing in this field. That consideration will always be significant in the case of commercially motivated breaches of the Immigration Act. In all the circumstances, we do not consider that the Judge's starting point of four years was too high.

[24] We do not consider that the allowance made in respect of the appellant's previous good character and the discount for the guilty plea can be criticised. Plainly, until his involvement in the present offending, the appellant had behaved in a law abiding way. He was able to rely on a substantial number of references from those with whom he had had contact in the community, as well as friends and family, attesting to his good character. However, the Judge allowed a credit of six months for these considerations and in our view that was not insufficient.

[25] The discount allowed for the guilty plea of 15 per cent was, if anything, generous having regard to the lateness of the plea. The sentence was imposed on 23 July 2010 and consequently this Court's decision in *Hessell v R*[5] applied. While *Hessell* envisaged discounts for guilty pleas of up to 33 per cent where the plea was

[5] *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298.

entered at the first reasonable opportunity, in cases where the plea was not entered until after the commencement of the trial, the Court referred to a "small reduction of less than ten per cent" as being possibly warranted, depending on the circumstances. Seen in those terms, the discount actually allowed was generous.

[26] While this judgment has been reserved the Supreme Court has delivered its decision in *Hessell v R*[6] which rejects any notion of a sliding scale of discounts for guilty pleas as the trial date approaches, but also states that any reduction for a guilty plea should not exceed 25 per cent.[7] The required approach is to consider all the circumstances in which a plea is entered, including whether it is truly to be regarded as an early or late plea, and the strength of the prosecution case.

[27] While we have considered the Supreme Court judgment to see if there are any aspects of it that might assist the appellant, we are satisfied that there are none. On whatever view, this was a very late plea, and the prosecution case was obviously strong. Although the plea saved the resources that would have been devoted to completing a six week trial, we do not consider that it could reasonably be contended that a 15 per cent discount for the guilty plea was insufficient.

[28] That leaves for consideration the appellant's argument that the Judge should have imposed a less severe sentence than imprisonment. We are satisfied that there is no merit in that submission. This was not the kind of case where this Court's reasoning in *R v Hill* could be applied in the appellant's favour. Given the seriousness of the offending, imprisonment was the appropriate response.

Result

[29] The appeal is dismissed.

Solicitors:
Scannell Hardy & Co., Hastings for Appellant
Crown Law Office, Wellington for Respondent

---

6 *Hessell v R* [2010] NZSC 135.
7 At [75].