R v Zanzoul (No. 2)

Court of Appeal, Wellington CA297/06
13 November 2006; 6 December 2006
O'Regan, Potter & Miller JJ

Article 31 - coming directly from - whether directly - Article 31

Passport - reasonable excuse - what would constitute - Passports Act 1992, s 31(1)(f)(ii)

Sentencing - passport - possession of false passport - factors to be taken into account - Passports Act 1992, s 31(1)(f)(ii)

This was an appeal against the decision in *R v Zanzoul* (High Court Auckland, CRI 2004-092-007694, 4 August 2006, Winkelmann J) which imposed a sentence of fifteen months imprisonment with leave to apply for home detention.

The appellant, a citizen of Syria, travelled to New Zealand from Bangkok on a Syrian passport. When interviewed during immigration processing he surrendered a false Australian passport which he explained allowed him to travel more freely. A charge of possessing a false passport was adjourned pending the outcome of the appellant's New Zealand refugee claim. In determining that claim the Refugee Status Appeals Authority found that the appellant left Syria in 1987 and thereafter travelled extensively, re-entering Syria many times. He had arrived in New Zealand with the intention of reuniting with his wife, an Australian citizen, whom he had married in Australia in 1994, having entered Australia on a visitor's permit. He had subsequently been obliged to leave Australia after unsuccessfully seeking recognition as a refugee in that country. After returning to Syria he travelled to New Zealand via a number of other countries, apparently using false travel documentation.

After his appeal to the Authority had been dismissed the appellant pleaded guilty to a charge under s 31 of the Passports Act 1992 and was sentenced to fifteen months imprisonment with leave to apply for home detention.

On appeal the appellant submitted that even though his claim to refugee status had been ultimately declined, if at the relevant time he had held a genuine belief that he would qualify for refugee status, then that would constitute a reasonable excuse within the meaning of s 31(1)(f) of the Passports Act 1992. It was also submitted that the sentence of fifteen months imprisonment imposed in the High Court was manifestly excessive.

Held:

1 There was nothing which linked the possession by the appellant in New Zealand of a false Australian passport with his claim for refugee status. He had had a valid Syrian passport on which he could and had travelled extensively and on which he had entered New Zealand in March 2004. He was not in the situation of many refugee claimants who were obliged to travel on false documentation because their country of origin would not issue passports. On the facts, his possession in New Zealand of a false Australian passport was completely irrelevant to any genuine belief he may have had in a claim to refugee status. There was simply no nexus. He could not plead any such belief as a basis for "a reasonable excuse" for possession of the false passport (see paras [28] & [29]).

2 Nor could the appellant seek to call in aid Article 31 of the Refugee Convention for he did not come to New Zealand "directly" from Syria, the country where he claimed his life or freedom were threatened. Assuming for the present purposes that *Adimi* correctly stated the law on this point, the appellant, having decided to come to New Zealand and having applied for a visitor's visa in Bangkok, had returned to Syria, exited and re-entered Syria legally on a

number of occasions and had then travelled via a number of other countries on false travel documentation before arriving in New Zealand. On the facts, he clearly fell outside the extended meaning of "coming directly" given to those words in *Adimi* (see para [30]).

R v Uxbridge Magistrates' Court; Ex parte Adimi [2001] QB 667 applied.

3 The deception in possessing the false passport was deliberate. The appellant was not in a class of persons whose involvement in deception was unavoidable, and the use of the false passport was unconnected with the claim he subsequently brought for refugee status. Deterrence was a relevant and important factor in cases of passport fraud. The starting point taken by the Judge was well available to her, if not generous to the appellant, and the resulting sentence could not be regarded as manifestly excessive notwithstanding the mitigating factors, for which the Judge had made appropriate allowance (see para [83]).

Appeal dismissed.

Other cases mentioned in the Judgment

AHK v Police [2002] NZAR 531
Markevich v R (2004) 21 CRNZ 41
R v Dowling (1989) 88 Cr App R 88 (CA)
R v Hoe [2001] 2 NZLR 633 (CA)
R v McLeod [1988] 2 NZLR 65 (CA)
R v Ramstead (CA428/96, 12 May 1997) (CA)
R v Ripia [1985] 1 NZLR 122 (CA)
R v Smith [2003] 3 NZLR 617 (CA)
R v Stretch [1982] 1 NZLR 225 (CA)
R v Webber [1999] 1 NZLR 656 (CA)
Udy v Police [1964] NZLR 235

Counsel

A Shaw and A K Edgler for appellant
A M Powell and J L Verbiesen for Crown

Judgment of the Court

A Leave to appeal against conviction out of time is granted.
B The conviction entered in the District Court on 7 December 2005 in CRN 4092040651 is set aside.
C The appeal against conviction is dismissed.
D The appeal against sentence is dismissed.

Reasons of the Court
(Given by Potter J)

Introduction

[1] The appellant Ahmad Zanzoul appeals against conviction and sentence.

[2] On 7 December 2005 the appellant pleaded guilty pursuant to s 153A of the Summary Proceedings Act 1957 on an information laid indictably to a charge under s 31(1)(f)(ii) of the Passports Act 1992, that without reasonable cause he was in possession of a passport issued on behalf of the Australian Government that he knew or had reason to suspect had been falsified.

[3] The appellant was sentenced in the High Court by Winkelmann J on 4 August 2006 to 15 months imprisonment with leave to apply for home detention.

Background

[4] The summary of facts records that on Friday 12 March 2004 Mr Zanzoul arrived at Auckland International Airport from Bangkok, Thailand. He was travelling on a Syrian passport No 4696510. As he proceeded through immigration and customs control he was spoken to by New Zealand Customs and referred to New Zealand Immigration Services. He handed to Immigration Services a false Australian passport No L7017978. When spoken to by Police he stated that he had the passport because he could not travel as easily on a Syrian passport and could travel more freely on an Australian passport. (According to the sentencing notes of Winkelmann J, at sentencing the appellant denied making this statement, but nothing turns on this point.)

[5] The appellant sought refugee status in New Zealand. This was finally declined on 28 June 2005 when his appeal to the Refugee Status Appeals Authority ("RSAA") was dismissed.

[6] The appellant initially entered a not guilty plea to the charge under s 31 of the Passports Act. The matter was adjourned on several occasions pending the outcome of his application for refugee status. After his appeal was dismissed by the RSAA he indicated a wish to change his plea to guilty, prior to the preliminary hearing.

[7] On 7 December 2005 the appellant's guilty plea was received in the District Court under s 153A of the Summary Proceedings Act. The entry on the Record Hearing Sheet records the guilty plea, and under the signature of District Court Judge Rushton:

Conv and RBTC 3.2.06 10 am.

PORS psychological assessment.

[8] It was not in dispute, that this entry in unabbreviated form would read:

Convicted and remanded with bail to continue until 10 am on 3.2.06. Pre-sentence report and psychological assessment.

[9] On 19 July 2006 the appellant came before District Court Judge Blackie for sentence under s 28F of the District Courts Act 1947. Judge Blackie held that he had jurisdiction to sentence the appellant only under s 38 of the Passports Act which would have meant a maximum penalty of three months imprisonment. He found that he could not impose a sentence under s 31(3) which provides for a maximum term of imprisonment of ten years or a fine not exceeding $250,000 or both, because the appellant had not been convicted on indictment. He exercised his power under s 28G of the District Courts Act and declined to convict and sentence the appellant, instead committing him to the High Court for sentence.

[10] In an addendum to his ruling Judge Blackie noted that a conviction was entered on the record but that the District Court did not have jurisdiction to enter a conviction until it decided whether or not to deal with the matter "in a summary sense" or to refer the matter to the High Court for sentence. He considered that the conviction entered would need to be set aside by the High Court.

Appeal against conviction

[11] By s 383 of the Crimes Act 1961 any person "convicted on indictment" may appeal to this Court against conviction and sentence.

[12] Somewhat ironically, since the appellant's argument on his appeal against sentence is premised on his having been convicted summarily on 7 December 2005, the appellant has filed an appeal against conviction under s 383. The Notice of Appeal dated and filed on 13 November 2006 records the date of conviction as 4 August 2006 in the High Court at

Auckland. When sentence was passed on 4 August 2006, the High Court did not enter a conviction, so in order to found the appeal against conviction the appellant must be presumed to accept that he was deemed to have been convicted on indictment under s 3 of the Crimes Act.

[13] The appeal against conviction was filed only on the date of hearing and was out of time by more than two months. The appellant states in the Notice of Appeal that while he filed his appeal against sentence in time he was advised by his counsel only on 9 November 2006 that he had grounds for an appeal against conviction based on a mistake of law.

[14] Mr Powell, counsel for the Crown, responsibly acknowledged that the delay in filing the appeal against conviction had not caused prejudice and of itself the delay was not so lengthy as to be a decisive factor. Therefore the Crown did not oppose leave to appeal being granted, and helpfully prepared and filed at very short notice, submissions on the appeal against conviction.

[15] Because the appellant entered a guilty plea to the charge under s 31 of the Passports Act, only if there are exceptional circumstances can his appeal against conviction succeed: *Udy v Police* [1964] NZLR 235, *R v Stretch* [1982] 1 NZLR 225, *R v Ripia* [1985] 1 NZLR 122.

[16] The appeal against conviction is said to be based on the reasoning of William Young J (as he then was) in *AHK v Police* [2002] NZAR 531. No affidavits have been filed by the appellant or by counsel Mr Trenwith, who represented him at the time his plea was entered, in order to place before this Court evidence of the circumstances in which the plea of guilty was entered. Mr Shaw, counsel for Mr Zanzoul on appeal, has stated in an addendum to his submissions on the sentence appeal, that the judgment of William Young J only came to notice after the sentencing submissions were prepared. It is unsatisfactory that this Court is asked to accept the reasons for the guilty plea in the absence of any evidence.

[17] However, because we have reached a clear conclusion that the appellant's argument must fail on the facts, we do not propose to consider further the potential jurisdictional and evidential complexities and inadequacies of the appeal against conviction.

[18] In *AHK v Police* the appellant, a 21 year old Iranian student, arrived in Christchurch on a flight from Japan. He presented a false French passport. He applied for refugee status in New Zealand. He was charged with possessing a falsified passport without reasonable excuse under s 31(1)(f) of the Passports Act 1992. He pleaded guilty and was sentenced to 12 months imprisonment. At the time he entered the guilty plea his claim for refugee status was still being processed. The appellant's appeal against conviction was allowed. The conviction was quashed and a re-hearing ordered on the grounds that the plea of guilty was made on the basis of a material mistake as, if the appellant was a true refugee, then possession of the falsified passport might well constitute a reasonable excuse within the terms of s 31(1)(f).

[19] William Young J stated at [12]:

If it is, indeed, the case that he is found to be a true refugee then the probabilities are that the charge will be withdrawn. In any event, his claim to refugee status may well result in a reasonable excuse defence being successful if the case proceeds to trial.

[20] Counsel for the appellant in this case focused on this statement, and submitted that even when, as here, the appellant's claim to refugee status has been ultimately declined, if the appellant at the relevant time had a genuine belief that he would qualify for refugee status, then that could constitute a reasonable excuse within the meaning of s 31(1)(f). In support of this argument counsel drew on Article 31 of the 1951 Convention relating to the Status of Refugees (the Refugee Convention) which provides that Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who "coming directly from a territory where their life or freedom was threatened", enter the territory without authorisation.

[21] Counsel also claimed support from the observation of Winkelmann J on sentencing, that she was not satisfied on the material before her that the appellant's refugee claim was "false

or manifestly unfounded" which, she said, was not a necessary inference to be taken from the fact that it was ultimately not successful.

[22] We have had the opportunity of perusing the decision of the RSAA in Refugee Appeal 75429 dated 28 June 2005 which found that the appellant was not a refugee under the Refugee Convention and dismissed his appeal from the decision of the Refugee Status Officer of the New Zealand Immigration Service which declined him refugee status. It appears that this decision may not have been before Winkelmann J and it is clear from our reading of the decision that the RSAA did not share her view of the appellant's application for refugee status.

[23] The RSAA decision records that the appellant left his country of origin, Syria, in 1987. Since then he has many times entered and exited Syria and has travelled elsewhere on a Syrian passport although he claims that his current Syrian passport issued in 2002, was issued only after a large bribe was paid to an official by his brother. He arrived in New Zealand on 12 March 2004 from Bangkok on a Syrian passport (summary of facts).

[24] He intended to reunite in New Zealand with his wife, an Australian citizen whom he married in Australia in 1994, having entered Australia on a visitor's permit. (He was obliged to later depart Australia because he had no legal right to remain having made an unsuccessful application for refugee status.)

[25] From New Zealand he planned to apply for residence in Australia on the grounds of his marriage to an Australian citizen. However, he and his wife separated in July 2004, following which there have been extensive proceedings in the New Zealand Family Court in relation to custody and access of the two children of the marriage.

[26] Before he decided in early 2004 to travel to New Zealand from Thailand he returned to Syria (the country from which he sought refuge in New Zealand on the grounds that he would be imprisoned and tortured), and he entered and exited Syria on several occasions without encountering any difficulties. He then came to New Zealand via a number of other countries where he apparently used false travel documentation.

[27] The RSAA found a number of inconsistencies in the appellant's account of events. The Authority found that the Syrian authorities had shown no real interest in the appellant from 2002, notwithstanding his numerous trips in and out of Syria and rejected the appellant's claim of their continuing interest in him. The Authority concluded that there was not a real chance the appellant would suffer persecution if he returned to Syria.

[28] The significant point in relation to the appeal against conviction, that arises from this history of events, is that there is nothing that links the possession by the appellant in New Zealand of a false Australian passport with his claim for refugee status. He had a valid Syrian passport on which he could, and had travelled extensively, and on which he entered New Zealand in March 2004. He was not in the situation of many refugee claimants who are obliged to travel on false documentation because their country of origin will not issue passports. But in New Zealand, where he proposed to seek refuge and subsequently applied for refugee status, he handed over a false Australian passport (possibly because this avoided meeting visa requirements for entry into New Zealand).

[29] On the facts, the appellant's possession in New Zealand of a false Australian passport was completely irrelevant to any genuine belief he may have had in a claim to refugee status. There is simply no nexus. He cannot plead any such belief as a basis for "a reasonable excuse" for possession of the false Australian passport.

[30] Nor can the appellant seek to call in aid Article 31 of the Refugee Convention for he did not come to New Zealand "directly" from Syria, the country where he claimed his life or freedom were threatened. Mr Shaw referred to *R v Uxbridge Magistrates' Court and another, ex parte Adimi* [2001] QB 667 (QB) for authority that Article 31 does not require refugees to claim asylum in the first country they can reasonably do so. In that case the Court held that a mere short-term stopover en route to the intended sanctuary cannot forfeit the protection of

the article, and that the "touchstones" for determining whether the protection is excluded will include the reasons for the stopover or stay in the intermediate country. We shall assume for present purposes, that *Adimi* correctly states the law on this point. Mr Zanzoul, having decided to come to New Zealand and having applied for a visitor's visa in Bangkok, had returned to Syria, exited and re-entered Syria legally on a number of occasions, and then travelled via a number of other countries on false travel documentation, before arriving in New Zealand on 12 March 2004 (RSAA decision). On the facts, he clearly falls outside the extended meaning of "coming directly" given to those words in *Adimi*.

[31] We conclude therefore that on the facts the appellant's appeal against conviction cannot succeed. There are no exceptional circumstances which would justify this case being reopened following his guilty plea to the charge under s 31(1)(f).

[32] Our finding leaves open whether a claim to refugee status which is ultimately dismissed could, in some circumstances, nevertheless provide a basis for a reasonable excuse defence to a charge under s 31(1)(f).

[33] The appeal against conviction is dismissed.

Appeal against sentence

[34] The appellant contends that the maximum lawful sentence of imprisonment that could be imposed on him was three months pursuant to s 38 of the Passports Act and that therefore the sentence of 15 months imposed exceeded the jurisdiction of the Court and was manifestly excessive.

[35] It was submitted:

(a) That the conviction entered in the District Court on 7 December 2005 was a summary conviction and accordingly the appellant was not convicted on indictment within the meaning of s 31(3) of the Passports Act and was not susceptible to the penalties prescribed by s 31(3).

(b) Having been summarily convicted the maximum sentence of imprisonment that could be lawfully imposed upon the appellant was three months pursuant to s 38(1) of the Passports Act.

(c) Conviction having already been entered on 7 December 2005 there was no jurisdiction for Judge Blackie to decline to sentence the appellant and commit his case for sentence in the High Court.

(d) Alternatively, even if the High Court had jurisdiction to sentence the appellant, the maximum sentence of three months imprisonment under s 38(1) of the Passports Act still applied.

(e) Alternatively, the sentence of 15 months imprisonment in any event is manifestly excessive as Winkelmann J erred in according particular regard to the need for deterrence. Having found that the appellant's refugee claim was neither "false nor manifestly unfounded", a sentence of community service was the appropriate response.

"Conviction" in the District Court

[36] Counsel for the appellant relied significantly on the entry of conviction by Judge Rushton in the Record Hearing Sheet on 7 December 2005 after the appellant's guilty plea to the charge under s 31(1)(f) of the Passports Act was received under s 153A of the Summary Proceedings Act. It was submitted that this being a summary conviction, the Court was limited to penalties which follow a "summary conviction" and that the proceeding against the appellant was "taken in a summary way" in terms of s 38 Passports Act.

[37] Section 153A of the Summary Proceedings Act relevantly provides:

Defendant may plead guilty before or during preliminary hearing

(1) If a defendant is represented by a barrister or solicitor …, he may, at any time before or during the preliminary hearing of any information, request that he be brought before the Court (or if he is at that time before the Court, that he be permitted) to plead guilty to the offence with which he is charged.

. . .

(6) If the defendant pleads guilty, then, subject to section 66(6) of this Act,

(a) Where –

(i) The offence is an indictable offence referred to in section 6(2) of this Act; or

(ii) The offence is an indictable offence described in any of the enactments referred to in Schedule 1 to this Act; or

(iii) The defendant elected under section 66 of this Act to be tried by a jury; or

(iv) The offence is an indictable offence referred to in Part 1 of Schedule 1A to the District Courts Act 1947; or

(v) The offence is an indictable offence referred to in Part 2 of Schedule 1A to the District Courts Act 1947,

the Court shall record the plea and adjourn the proceedings for the sentencing of the defendant in accordance with section 28F of the District Courts Act 1947, and section 47 of this Act [and section 50 of the Bail Act 2000] shall apply on every such adjournment; or

(b) In any other case, the Court shall commit the defendant to the High Court for sentence.

[38] A parallel process is provided by s 168 Summary Proceedings Act where the guilty plea is entered *after* the preliminary hearing.

[39] Section 31(1) Passports Act 1992 is an indictable offence described in Part 2 of Schedule 1 to the Summary Proceedings Act and is therefore included in s 153A(6) under subsection (6)(a)(ii).

[40] Once a guilty plea has been received, by subsection (6) of s 153A the Court *shall record the plea* and adjourn the proceedings for sentencing under s 28F of the District Courts Act 1947. The remand *must* be to the District Court if the offence meets the criteria in subsection (6) as was the case here. Otherwise the committal must be to the High Court.

[41] The Court's jurisdiction under s 153A is limited to receiving the plea and adjourning the proceedings for sentencing. There is no jurisdiction to convict.

[42] Once a guilty plea has been received, by operation of s 28F(3) and (4) the District Court may sentence an offender on an indictable offence described in Schedule 1 to the Summary Proceedings Act. Alternatively, the Judge may decline to sentence and instead commit the offender for sentence in the High Court under s 28G of the District Courts Act.

[43] In this case the notation on the Record Hearing Sheet indicates that Judge Rushton purported to enter a conviction and remanded the appellant for sentence. This was no doubt one of many matters she had to attend to that day, and it is likely that she overlooked that under s 153A her role was limited to receiving the guilty plea and remanding for sentence. She had no jurisdiction to convict. The Judge made no election to either sentence the

appellant or to commit him to the High Court for sentence. Thus, when Judge Blackie became seized of the matter it was open to him to make the election. Judge Blackie elected under s 28G to commit the appellant to the High Court for sentence. He therefore did not convict the appellant and he did not sentence, and explicitly stated so. Had he elected jurisdiction and convicted and sentenced, it would have been a "summary conviction": *R v McLeod* [1988] 2 NZLR 65 (CA); *R v Webber* [1999] 1 NZLR 656 (CA). But once he made the election to commit to the High Court, conviction and sentence came within the jurisdiction of that Court.

[44] In Webber Richardson P explained the process at 661:

In short, ss 153A and 168 provide a two-stream process. Where s 153A(6)(b) (or s 168(1)(b)(ii)) applies, the defendant is immediately committed to the High Court for sentence. Where s 153A(6)(a) (or s 168(1)(b)(i)) applies, the proceedings are adjourned for s 28F to operate. The result of that process will be either the acceptance of jurisdiction to sentence and sentencing in the District Court or the declining of that jurisdiction and the committal of the defendant to the High Court for sentence.

As an integral part of the s 28F process applied through s 153A and s 168 the District Court has the option to transfer the matter to the High Court for sentencing. Where it exercises that option the defendant has not during the course of the process up to that point been convicted. He or she is then deemed to be convicted on indictment in terms of s 3(c) of the Crimes Act, having been committed for sentence under s 153A (or s 168) incorporating ss 28F and 28G.

This conclusion is reinforced by considering the expression "summarily convicted" in s 6(3) of the Misuse of Drugs Act and how it fits with s 153A and s 28F. A defendant who pleads guilty under s 153A cannot be described as summarily convicted. The plea is recorded and the proceedings are adjourned for the s 28F process to follow. The District Court is not obliged to accept jurisdiction to sentence. On the contrary, the District Court Judge may decline to sentence the offender under s 28F and instead commit him or her to the High Court for sentence. Where that course is taken the defendant is never summarily convicted and must be deemed to be convicted on indictment (s 3 (c) of the Crimes Act).

[45] In *Webber* the District Court file had been noted "convicted" when guilty pleas to cannabis dealing were entered under s 153A. Richardson P continued at 662:

We are satisfied that the District Court Judge's initial notation must be regarded as erroneous. He had no jurisdiction under s 153A to enter a conviction. He was limited to recording the guilty plea and adjourning the proceedings for sentencing following the s 28F processes.

[46] It is clear, as explained in *Webber*, that the "conviction" notation of Judge Rushton on the Record Hearing Sheet on 7 December 2005 was made without jurisdiction and in error.

[47] Mr Shaw submitted that Webber should not be followed because of the decision in *R v Smith* [2003] 3 NZLR 617 where this Court stated at [46]:

Unless a judgment of a Court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides. If it were not so, the principle of legality would be undermined. The record of the Court of Appeal dismissing the appellant's appeal is accordingly conclusive as to disposition of the appeal until set aside or amended. The suggestions that the determination can be ignored without being formally set aside and that the appeal can be heard despite the record of its dismissal, are contrary to principle.

[48] We consider the situation in *Smith* differed from the situation in this case. There the Court had done what it had jurisdiction to do, but in a manner later found by a superior court to be deficient. Here, Judge Rushton purported to take a step for which she did not have jurisdiction, that is, to enter a conviction before the District Court had elected jurisdiction. Judge Blackie correctly approached his task as required by s 28F as if the appropriate steps

had been taken under s 153A (receipt of the guilty plea and remand for sentence). The conviction was treated as having no legal consequence for the appellant.

[49] If, on the basis of the judgment in *Smith*, a formal step is required to bring about the outcome mandated by *Webber*, then it is appropriate that we take it, because had this aspect been drawn to the attention of Winkelmann J when she sentenced the appellant after the matter was committed to the High Court she could, and no doubt would, in the exercise of the High Court's supervisory jurisdiction, have set aside the conviction entered in error in the District Court.

[50] Accordingly we set aside the conviction entered on the Record Hearing Sheet of the District Court on 7 December 2005 in respect of the appellant in CRN 4092040651.

Conviction on indictment

[51] Neither a guilty plea nor a guilty verdict operates as a conviction: *R v Ramstead* CA428/96 12 May 1997. The operative conviction in any case is the pronouncement of that conviction in open Court: *R v Dowling* (1989) 88 Cr App R 88, at 91 (CA).

[52] However, s 3 of the Crimes Act 1961 provides an extended meaning of "convicted on indictment":

Meaning of "convicted on indictment"

For the purposes of this Act, a person shall be deemed to be convicted on indictment if

(a) He pleads guilty on indictment; or

(b) He is found guilty on indictment; or

(c) He is committed to the [High Court] for sentence under section 44 or section [153A or section] 168 of the Summary Proceedings Act 1957; or

(d) After having been committed … for trial, he pleads guilty under section 321 of this Act.

[53] Subsections (a) and (b) apply only where there is an indictment. Prior to committal, the charges are set out only in the information laid in the District Court to commence the process though, as in this case, the charge may be laid indictably.

[54] Section 3 does not expressly refer to s 28G which provides a further route to committal to the High Court for sentence. However, s 28G provides that ss 169-171 Summary Proceedings Act apply when committal to the High Court is pursuant to that provision.

Section 170 of the Summary Proceedings Act provides:

Defendant committed for sentence to be brought before High Court

A defendant who is committed for sentence shall as soon as practicable be brought before the [High Court] for sentence, and any Judge of that Court shall have the same powers of sentencing or otherwise dealing with the defendant, and of finally disposing of the charge and of all incidental matters, as he would have had if the defendant on arraignment at any criminal sittings of the [High Court] had pleaded guilty to the offence charged on an indictment [duly presented].

[55] Richardson P summarised the effect of these interrelated provisions in *Webber* at 661 as follows:

As an integral part of the s 28F process applied through s 153A and s 168 the District Court has the option to transfer the matter to the High Court for sentencing. Where it exercises that option the defendant has not during the course of the process up to that point been convicted. He or she is then deemed to be convicted on indictment in terms of s 3(c) of the Crimes Act, having been committed for sentence under s 153A (or s 168) incorporating ss 28F and 28G.

[56] Thus when Judge Blackie committed the appellant for sentence in the High Court there was no need, nor would it have been appropriate, for Winkelmann J to pronounce the conviction, for the appellant was deemed convicted when he was committed to the High Court for sentence.

[57] It is that conviction on indictment which provides the basis for the appellant's right of appeal to this Court pursuant to s 383 of the Crimes Act.

District Court's jurisdiction to sentence

[58] Judge Blackie declined to accept jurisdiction to sentence the appellant in the District Court because he was not satisfied that he had jurisdiction to impose a sentence at the appropriate level. He reached the conclusion that if he accepted jurisdiction he would be convicting the appellant summarily: *R v Hoe* [2001] 2 NZLR 633 (CA). He reasoned that because the penalties under s 31(3) would apply only if the appellant was convicted on indictment, he would be limited by the penalties prescribed by s 38 of the Passports Act for a person liable on summary conviction, being imprisonment for a term not exceeding three months or a fine not exceeding $2,000. He therefore declined jurisdiction and committed the appellant to the High Court for sentence.

[59] There is no doubt that the Judge was correct that if he had entered a conviction it would have been a summary conviction. *McLeod* affirmed by *Webber* holds that whether a person has been summarily convicted or convicted on indictment depends on the disposition of the charges and not on the manner in which the prosecution was commenced and *Hoe* is clear authority that a conviction upon a plea entered under s 153A before committal to trial, is a summary conviction. Section 3 of the Crimes Act comes into play to effect a deemed conviction on indictment only when a person is committed to the High Court.

[60] However, it is s 28F District Courts Act which provides the maximum sentences when sentencing is to be in a District Court pursuant to s 153A(6) after a guilty plea has been received. Section 28F relevantly provides:

Maximum sentences

. .

(3) This subsection applies to any case where –

(a) A person pleads guilty under section 153A or section 168 of the Summary Proceedings Act 1957, before or during the preliminary hearing, to

(i) Any indictable offence triable summarily described in section 6(2) of that Act; or
(ii) Any indictable offence triable summarily described in Schedule 1 to that Act; or
(iii) Any offence for which the accused elects trial by jury under section 66 of that Act; or
(iv) Any indictable offence referred to in Part 1 of Schedule 1A to this Act; or
(v) Any indictable offence referred to in Part 2 of Schedule 1A to this Act; and

(b) The Court accepts jurisdiction.

(4) In any case to which subsection (3) of this section applies,

(a) Any trial Judge may sentence the person to imprisonment or a fine or both, not exceeding,

(ii) In the case of imprisonment, the maximum term prescribed by law; or
(iii) In the case of a fine, the maximum amount prescribed by law or, if no maximum amount is so prescribed, $10,000:

(b) Any Judge who is not a trial Judge may sentence the person to imprisonment or a fine or both, not exceeding the maximum term or amount prescribed by section 7 of the Summary Proceedings Act 1957.

[61] In this case the appellant entered a guilty plea under s 153A to an indictable offence in Schedule 1 to the Summary Proceedings Act (s 31 of the Passports Act) and accordingly subsection (3)(a) applied. If the District Court had accepted jurisdiction as provided in subsection (3)(b), then the District Court Judge could have imposed a sentence within the limits prescribed by subsection (4).

[62] Pursuant to subsection (4)(a) the maximum term of imprisonment and maximum fine prescribed by law are those prescribed by s 31(3) of the Passports Act:

Every person who commits an offence against subsection (1) is liable on conviction on indictment to imprisonment for a term not exceeding 10 years, a fine not exceeding $250,000, or both.

[63] By s 28F(4)(b) a further limitation is imposed by s 7 of the Summary Proceedings Act if the appellant had been summarily convicted of the offence. Section 7 provides:

Maximum penalty on summary conviction for indictable offence

(1) Subject to subsection (2) of this section, where any person is summarily convicted of an offence mentioned in section 6 of this Act, the Court may sentence that person

(a) To imprisonment for a term not exceeding 5 years; or

(b) to a fine not exceeding,

(i) The maximum amount prescribed by law; or

(ii) If no maximum amount is so prescribed, $10,000,

or to both.

[64] The Summary Proceedings Act allows for the possibility that a proceeding commenced indictably might be directed back to the summary jurisdiction and expressly preserves by s 28F the maximum terms of imprisonment, subject to the jurisdictional limitations prescribed by s 7. The words "is liable on conviction on indictment" do not have the effect of excluding summary jurisdiction. They have the effect of establishing indictable jurisdiction for penalty purposes.

[65] Section 31(3) does not restrict the penalties it prescribes to persons convicted on indictment. It provides the level of penalties for persons *liable* to conviction on indictment (whether convicted on indictment or summarily convicted).

[66] As the Crown analysed in its submissions, "is liable" is a shorthand device used throughout the Crimes Act. It is defined in s 2 of the Crimes Act:

Is liable means is liable on conviction on indictment.

[67] The expression in s 31(3) of the Passports Act ("… liable to conviction on indictment …"), is thus identical to that used to describe the penalty for indictable offences in the Crimes Act. The Crown noted that this is consistent with s 11 of the Crimes Act which provides that all

indictable crimes under other enactments are subject to the generic provisions of the Crimes Act dealing with crimes.

[68] By way of example, s 231 of the Crimes Act provides:

Burglary

(1) Everyone commits burglary and is liable to imprisonment for a term not exceeding 10 years who –

[69] By the definition of "is liable" in the Crimes Act that provision means "… liable on conviction on indictment for a term not exceeding 10 years …".

[70] Persons charged indictably with burglary who exercise their right to plead guilty under s 153A prior to committal, must be sent to the District Court for sentence because burglary is a Schedule 1 offence. But they must then be sentenced in the District Court to a penalty in accordance with s 231. There is no summary equivalent for the offence of burglary so if the imposition of the penalty prescribed by s 231 required conviction on indictment, there would be no provision under which to sentence following the guilty plea. Plainly, as the Crown pointed out, that cannot be correct.

[71] In s 31(3) of the Passports Act the shorthand expression available under the Crimes Act is not used, and the full description "liable to conviction on indictment" is stated. However, that provision applies in the same way as provisions such as s 231 of the Crimes Act, to prescribe the level of penalties for a person liable to conviction on indictment under s 31.

[72] Once the correct interpretation of s 31(3) is understood, s 38 follows logically. Section 38 provides penalties for offences under the Passports Act and relevantly provides:

Penalties

(1) Every person who commits an offence under this Act in respect of which either

(a) No penalty is provided elsewhere than in this section; or
(b) Proceedings in respect of that offence have been taken in a summary way in accordance with the Summary Proceedings Act 1957,

is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000.

[73] Section 38 applies in two situations:

(a) As the fallback if there is no applicable penalty provision in the Act; or
(b) Where proceedings are "taken in a summary way".

[74] There are numerous examples in the Passports Act where the fallback provision in s 38(1)(a) comes into play including ss 11(1), 12(4), 15(2), 22(1), 27(1) and 42(2) which are all offences involving a failure without reasonable excuse to comply with the demands of Customs Officers. No penalty is provided elsewhere in the Act, and it is appropriate that the maximum penalties in s 38 should be applied to these clearly minor offences.

[75] In relation to s 38(1)(b), s 6 of the Summary Proceedings Act provides for summary jurisdiction in respect of indictable offences. Section 6(1) provides:

Summary jurisdiction in respect of indictable offences

(1) A Court presided over by a [District Court Judge] shall have summary jurisdiction in respect of the indictable offences described in the enactments specified in Schedule 1 to this

Act, and proceedings in respect of any such offence may accordingly be taken in a summary way in accordance with this Act.

[76] Thus, proceedings in respect of an offence under s 31(1) of the Passport Act *may* be "taken in a summary way". This simply reflects the discretion of the prosecuting authority to proceed in the manner it sees fit. If proceedings are taken summarily, then the lesser penalties prescribed by s 38 apply. That is not the case here. The appellant was charged indictably. Section 38(1)(b) can be contrasted with a provision such as s 9(3) of the Misuse of Drugs Act 1975 which was in issue in *Hoe*. It provides a lesser penalty where the person is "summarily convicted". The reliance of the appellant on the authority of *Hoe* is misplaced.

[77] In this case, Judge Blackie could have elected to summarily convict the appellant and to sentence him to a penalty under s 31(3) of the Passports Act, subject to the limits imposed by s 7 of the Summary Proceedings Act. Indeed, the Judge could have imposed the same sentence as did Winkelmann J, of 15 months imprisonment.

[78] The Crown acknowledged in submissions that the argument advanced by the Crown to Winkelmann J on sentencing that s 7 of the Summary Proceedings Act supplies a penalty of five years imprisonment for the purpose of s 38(1)(a) cannot be supported. We agree. Section 7 does not provide the penalty for any offence. Its sole purpose and effect is, as set out in [63] and [64], to limit the jurisdiction of the District Court in sentencing following summary conviction.

Judge's decision to commit for sentence in the High Court

[79] While Judge Blackie had the jurisdiction to sentence the appellant in the District Court in accordance with the penalty provision in s 31(3) of the Passports Act, and could have done so on a summary conviction, he also had a discretion under s 28G to elect to decline jurisdiction and commit the appellant for sentencing in the High Court. Section 28G provides:

Judge may decline to sentence

Notwithstanding section 28F of this Act, in any case to which that section would otherwise apply, the Judge may decline to sentence the offender under that section and instead commit him to the High Court for sentence; and sections 169 to 171 of the Summary Proceedings Act 1957, with any necessary modifications, shall apply.

[80] When the Judge made that election to commit the appellant to the High Court for sentence, the High Court became properly seized of the matter.

Was the sentence manifestly excessive?

[81] The High Court Judge had jurisdiction to impose a penalty in accordance with s 31(3) of the Passports Act on committal by Judge Blackie pursuant to s 28G. Winkelmann J referred to the judgment in *Markevich v R* (2004) 21 CRNZ 41 and having determined that the facts of this case were less serious than those in *Markevich*, adopted a starting point at the lower end of the range of two to three years adopted by Priestley J in *Markevich*. >From the starting point of two years she allowed a discount for the appellant's guilty plea and also on account of his suffering from clinical depression. She granted leave to apply for home detention. In finding that the facts of this case were less serious than those in *Markevich* the Judge observed that she was not satisfied the appellant's refugee claim was false or manifestly unfounded on the material before her, which we have noted, did not appear to include the decision of the RSAA dated 28 June 2005.

[82] For the appellant, issue was taken with the starting point adopted by the Judge and that she considered deterrence to be a relevant factor in sentencing . Mr Shaw submitted that where an individual has claimed refugee status and that claim cannot be said to be either abusive or manifestly unfounded, there was no room for any notion of deterrence.

[83] The appellant's deception in possessing a false passport was deliberate. As we have observed at [28], the appellant was not in a class of persons whose involvement in deception was unavoidable, and the use of the false passport was unconnected with the claim he subsequently brought for refugee status. Deterrence is a relevant and important factor in cases of passport fraud. We consider the starting point taken by the Judge was well available to her, if not generous to the appellant, and the resulting sentence cannot be regarded as manifestly excessive notwithstanding the mitigating factors, for which the Judge made appropriate allowance.

[84] The sentence appeal is dismissed.

Observation

[85] The provisions dealing with the indictable and summary jurisdiction that are exposed by this appeal and which we have been obliged to address in considerable detail have been strongly criticised for their complexity. In the judgment of this Court in *Webber* in 1998 the Court recorded at 662:

… our continuing strong concern that unnecessarily complex and confusing procedural provisions of the criminal legislation are causing difficulties for those engaged in the busy work of the criminal courts.

The Court recommended very early legislative consideration.

[86] Nothing has changed. The Criminal Procedure Bill currently before Parliament does not address these provisions. The Courts and counsel involved in the criminal jurisdiction continue to wrestle with the complexities of these procedural provisions, as this judgment demonstrates. Nearly a decade after this Court expressed its concern in *Webber*, we reiterate that concern. The need for legislative consideration is obvious and urgent.

Result

[87] We set aside the conviction entered by Judge Rushton in the District Court on 7 December 2005 in CRN 4092040651.

[88] We grant leave to appeal against conviction but dismiss the appeals against conviction and sentence.

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