Casenotes

Regina v Brendan Kelly Smith (unreported, 27 August 1997, New South Wales Court of Criminal Appeal)

This is an important decision in the area of criminal law sentencing from the New South Wales Court of Criminal Appeal, particularly as it represents that Court's first consideration of the provisions of the *Home Detention Act*, 1996[1] (the Act). Also, it is interesting from a local perspective, in that it is a decision resulting from a Crown appeal against the manifest inadequacy of a sentence passed by Job DCJ whilst sitting at Newcastle District Court.

A Tragic Episode of Dangerous Driving

The respondent to the appeal was aged eighteen years at the time of the offence. Shortly after completing his work as a pastry cook in the early hours of 24 March 1996, the respondent drove his mother's motor vehicle to a beach in the Newcastle area where he met a male friend. Together they went to another friend's house where they both consumed marijuana. The respondent admitted in his evidence on sentence that he had consumed one "cone" on this occasion. Medical evidence in relation to a blood sample taken from the respondent disclosed that the traces detected in the blood consistent with the use of cannabis, provided readings so as to support the conclusion that the respondent's driving ability would have been impaired at the relevant time.

Later that morning the respondent was again driving the vehicle when it went out of control and impacted with a tree. The respondent

[1] The *Home Detention Act*, 1996 (Act No. 78/1996) was assented to 1 November 1996 and commenced operation on 21 February 1997. The long title of the Act is "An Act to provide for home detention as a means of serving a sentence of imprisonment in certain cases."

later estimated his vehicle speed at the relevant time as 90 kms per hour when travelling on a road with a speed limit of 60 kms per hour. The respondent's friend was a front seat passenger in the vehicle at the time and as a result of the injuries received in the impact, he died.

A Sentence of "Home Detention"

After pleading guilty to a charge of dangerous driving causing death[2] the respondent was convicted by Job DCJ and sentenced to a total term of eight months imprisonment comprising a minimum term of six months and an additional term of two months. As the aggregate sentence of imprisonment did not exceed 18 months[3], his Honour then referred the respondent for assessment as to his suitability for home detention pursuant to s 9 of the Act. The respondent was allowed bail in the interim to facilitate such assessment by an officer of the NSW Probation and Parole Service. When the report assessing the respondent as suitable for home detention[4] was received by Job DCJ, he ordered the sentence of imprisonment previously imposed on the respondent be served by way of home detention.[5] It is pertinent to note that the respondent had no prior criminal convictions when he presented for sentence on this matter.

The Crown Appeals

The Crown appealed against the sentence imposed by Job DCJ on two bases. Firstly it was submitted that the sentence of eight months

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2 The crime was charged under s 52A(1) *Crimes Act*, 1900 which carries a maximum penalty of imprisonment for 10 years. The plea of guilty was originally entered before a magistrate in the Local Court and the respondent was committed for sentence pursuant to s 51A *Justices Act*, 1902. The respondent then adhered to his plea of guilty in the District Court.

3 Pursuant to s 5(1) *Home Detention Act*, 1996, a home detention order may only be made in respect of a sentence of imprisonment where the aggregate term of imprisonment does not exceed a period of eighteen months.

4 Section 10 *Home Detention Act*, 1996 sets out the matters to be investigated and reported upon by the Probation and Parole Service when assessing the suitability of an offender for home detention. Sections 6 and 7 of the same Act provide details of certain offences for which, and offenders with certain histories for whom, an order of home detention is not available. There are significant restrictions on the availability of such orders for persons who commit offences involving domestic violence or have a history of domestic violence, including where an apprehended violence order has been made for the protection of a person with whom the offender would reside if a home detention order were made.

5 Some procedural formalities were overlooked by the sentencing judge at the time of imposing sentence and noted by Grove J in the Court of Criminal Appeal, namely that it is only the minimum term of the sentence which should be directed to be served in home detention and a date for release on parole was required to be specified in accordance with s 8 *Sentencing Act*,1989.

imprisonment would have been manifestly inadequate had it been served full time. Secondly, it was added that as a result of the order for the sentence to be served in home detention, the final sentence was not commensurate at all with the criminality involved.

In the leading judgment in the Court of Criminal Appeal, Grove J carefully considered the contentions of the Crown used to support the argument that the sentence was manifestly inadequate. Most particularly he agreed that because of the prevalence of "dangerous driving" offences amongst young drivers the courts had a duty to deter this type of behaviour by imposing salutary sentences.[6] This was so even in a case where the respondent was able to draw upon a considerable number of favourable subjective features in addition to the fact that it was his first criminal offence. Also the restructuring of s 52A *Crimes Act* which resulted in the maximum penalty being increased from five years to ten years imprisonment for the offence which the respondent had pleaded guilty to was a significant factor for the court to consider in order to "give effect to concerns manifested by Parliament"[7]. Thus, Grove J held that the total sentence of eight months imprisonment involving such an extremely serious offence, with the aggravating features of voluntary ingestion of drugs and consequent impairment of driving ability together with driving at a speed exceeding the applicable speed limit by a margin of 50 percent, was "an imposition so low that it demonstrates miscarriage of sentencing discretion."[8] Accordingly, the Crown's arguments on this point were successful and, having regard to the double jeopardy involved in Crown appeals, Grove J considered that a total sentence of sixteen months imprisonment comprising a minimum term of twelve months and an additional term of four months, should be substituted.

Is Home Detention Equivalent to Full Time Imprisonment?

As to the second basis of the Crown appeal, namely, that the order for home detention introduced a significant degree of leniency into any sentence imposed and that was a matter to be taken into account when assessing the adequacy of such a sentence, Grove J noted that this case represented the first occasion upon which the Court of Criminal Appeal had been called upon to examine a sentence directed to be served

[6] Grove J noted that "dangerous driving" offences were in a separate category in this regard whereby the usual rule that "considerations of general deterrence are not as important when sentencing young offenders" did not apply to dangerous driving offences. In this regard his Honour made specific reference to the case of *R v Justin Gregory Slattery* (unreported, CCA, 19 December 1996) at p 6 where Hunt CJ at CL, in the leading judgment, emphasised the prevalence of dangerous driving offences amongst young drivers. (Grove J at p 5)

[7] per Grove J at p 6.

[8] per Grove J at p 7.

pursuant to the Act[9]. Accordingly, this was a most important aspect of the case requiring careful consideration of the status of such sentences, particularly having regard to the observations of the Court of Criminal Appeal in *R v Hallocoglu*[10] that sentences of periodic detention were recognised as having a strong degree of leniency built into them by being outwardly less severe in the denunciation of the crime.[11]

The Crown sought to draw a parallel between periodic detention and home detention as "a matter of commonsense and logic" from the reasoning in *R v Hallocoglu* to support the proposition that home detention should be regarded as more lenient than full time incarceration. On this point Grove J[12] held that as a matter of statutory construction of s 4 of the Act, the Crown's contention could not be sustained. This section sets out the objects of the Act and importantly begins in ss(1) by stating that the Act is "to provide for home detention *as a means of serving a sentence of full-time imprisonment ...*".[13] Further it is expressly provided in sub-section 2 of s 4 that: (2) It is not the object of this Act to divert to home detention offenders who might be appropriately dealt with by way of periodic detention or by a non-custodial form of sentence.

Grove J noted from these statutory provisions that a clear contrast was to be perceived between periodic detention and home detention. This contrast was identified as being that one option, namely periodic detention, is truly semi-custodial in nature and is an option available within the discretion of the judge at the time of imposition of the sentence whereas the home detention option is "explicitly a potential means of serving an already selected option of full-time imprisonment"[14]. Therefore, on this analysis, home detention is to be viewed as fully custodial in nature and as a method of serving a sentence of imprisonment in the same context as serving a sentence under a particular security classification in a correctional centre. By reference to *Home Detention Regulation* 9, Grove J drew a parallel between home detention and the position of a prisoner in a minimum security institution who is permitted work or study release privileges.[15]

Also, Grove J used the structure of the Act generally to support his conclusion that home detention is a punishment equivalent to full time

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9 per Grove J at p 8.

10 (1992) 19 NSWLR 67 at 73 per Hunt CJ at CL.

11 A number of other cases were cited by Hunt CJ at CL in *Hallocoglu*, in which the Court of Criminal Appeal had recognised this feature of sentences of imprisonment to be served by way of periodic detention under the *Periodic Detention of Prisoners Act*, 1981. These cases include *R v Duroux* (unreported, CCA, 11 April 1991); *R v Pangallo* (1991) 56 A Crim R 441 at 444; *R v Sadebath* (unreported, CCA, 14 May 1992); and *R v Seung Ho Bang* (unreported, CCA, 1 September 1992).

12 with whom Studdert J agreed.

13 per Grove J at p 9. The emphasis is that made by his Honour in reproducing the provisions of s 4 in his judgment.

14 per Grove J at p 10.

15 per Grove J at p 11. His Honour observed that the conditions prescribed under the regulation restricting the freedom of movement of the prisoner under such a sentence were "comparatively as rigorous" as those applied to a prisoner serving his or her sentence in a minimum security institution and allowed certain work privileges.

imprisonment, in that it only allows for the decision about home detention to be made *after* a sentence of imprisonment not exceeding eighteen months in aggregate has been imposed.[16] Arguably the subsequent order for home detention then amounts to a type of classification of the prisoner along the same lines as the classification of prisoners by officers of the Department of Corrective Services when such prisoners are sentenced to full time imprisonment, without an order for home detention, by a court. His Honour was thus lead to the conclusion on this important matter:

> "that an order for home detention is a *collateral* order to a sentence of imprisonment and accordingly is *not a matter to be taken into account by this Court in assessing the adequacy of a term of imprisonment* imposed in the Court from which appeal is brought."[17] (emphasis added)

Grove J then remarked that in effect the decision on *where* a sentence of imprisonment imposed by a court is to be served was transferred by the Act from the Executive, the officers of which would normally make such administrative decisions, to the Judiciary. Arguably this shift in responsibility represents a movement consistent with the "truth in sentencing" reforms of 1989.[18]

Consistently with his analysis, and also having regard to a very positive report from the respondent's probation and parole officer[19], his Honour considered it appropriate that the minimum term of the substituted sentence should be served in home detention and made orders accordingly. It seems that Grove J would have been loathe to order the respondent complete the substituted sentence of imprisonment in a correctional facility at that time, when it appeared to his Honour, although not directly spelt out by him, that the purposes of punishment were being adequately fulfilled by the respondent's detention in his home.

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[16] Generally sections 5, 8, 9, 10 and 11 of the *Home Detention Act*, 1996 reflect the structure available in which the courts can consider the use of the home detention option. It can be described as a scheme which clearly provides that a sentence of imprisonment must first be imposed before judicial consideration can be given as to whether the particular prisoner should serve his or her sentence in a correctional centre or in their home.

[17] per Grove J at p 11.

[18] The *Sentencing Act*, 1989 provided for the fixing of minimum and additional terms of imprisonment by the judiciary and, at the same time, the abolition of remissions from those sentences. This legislative scheme provided that the sentence imposed by the courts was the one to be served by the prisoner without executive interference by way of a system of remissions to reduce the time a prisoner would serve both in prison and on parole, and was thus labelled "truth in sentencing". Consistently with this philosophy, it might be argued that giving responsibility to the judiciary as to how and where certain sentences of full-time imprisonment are to be served is providing another layer to "truth in sentencing" so that the public is receiving even more information at the time of sentencing about other important aspects of a prisoner's sentence, aside from the actual length of the sentence

[19] Grove J sets out material from an affidavit by Dennis Norman Graham sworn 22 August 1997 at pp 12-13 of his judgment, which basically concluded that the respondent was keeping strictly to the requirements of the order and "at the same time was making good progress at work, at study, and at life in general".

A Partial Dissent

It is interesting to note the judgment of Smart J, who disagreed with Grove J about the nature of home detention as a form of punishment but, at the same time considered home detention was still appropriate in this case. Smart J stated:

> "I regard service of home detention as *substantially less onerous* than service of a sentence of the same length in gaol ... The fact that a sentence may be served in different ways or by different means does not result in the sentence being necessarily of the same severity. *The means of service are important.* I would take them into account in assessing the severity or adequacy of a sentence."[20] (emphasis added).

The language of his Honour in this passage reflects that he believed the judicial responsibility in deciding how and where a prisoner would serve a sentence was a new and very important matter to consider and that the provisions of the Act were such that a judge will only make a reference under s 9(1) when he or she thinks that home detention could or would be appropriate in a particular case. Accordingly it appears Smart J's argument is that at the time of imposition of the sentence of imprisonment the judge, as a practical matter, will already have determined whether or not a reference for assessment as to home detention will be made. Arguably, such a decision will already have been influenced by considerations as to the nature of the offence being dealt with, the prisoner's criminal history and character generally as well as any other relevant matters disclosed during presentation of the prisoner's case on sentence.

Therefore, even though the chronology prescribed by the Act means that a sentence of full time imprisonment of a certain length is imposed as the first course of action, his Honour regarded that consideration must already have been given to the means of service of the sentence particularly when, as a practical matter, the limits of ss 5, 6 ,7, and 8 of the Act are considered. Otherwise, Smart J agreed with the orders of Grove J increasing the sentence in this case to a total term of sixteen months imprisonment to be served by the respondent by way of home detention.

Comment

Smart J's view is cogent to the extent that, in keeping with what Hunt CJ at CL said in *R v Hallocoglu*, a sentence of home detention with its immediate features of being in one's home, continuing with one's work or study and not being subjected to institutional regimentation and other

[20] per Smart J at pp 14-15.

restrictions, would arguably be regarded by the general public as "outwardly less severe in its denunciation of the crime"[21]. It does not appear that Smart J was contending that home detention was as lenient a sentence as that of imprisonment by way of periodic detention, however he certainly was arguing that it should not rank as equivalent in severity to a sentence of full time imprisonment served in a correctional institution. Smart J seems to recognise and give effect to the hierarchical system of sentencing necessarily involved in establishing positions on a scale of severity for types of punishment for criminal offences, whereas it is arguable that the literal approach taken by Grove J to the construction of the provisions of the Act results in his overlooking that important "appearance" aspect of a sentence.

An examination of the parliamentary debates in relation to the Bill for the Act does little to provide support for either view expressed by the judges in this case. During his second reading speech, the Minister for Corrective Services, Mr Debus stated:

> "There is clear consensus in the community that full-time imprisonment should be reserved for those who represent a threat to public safety or who have committed crimes meriting the harshest of sanctions. The majority of offenders are not in this category and are far better dealt with through various community-based options. The Home Detention Bill is designed to establish home detention as one such sentencing option which is an alternative to full-time imprisonment ... The Government is satisfied that a home detention scheme can divert offenders from full-time imprisonment, exert sufficient control over offenders to minimise the risk of their re-offending while under supervision, and generate savings through reduced imprisonment costs."[22]

Thus, the Minister emphasised that the purpose of the bill, consistent with Labor's corrections policy, was to divert suitable offenders from full-time imprisonment. Mention was made of home detention not being a soft option in that it would place severe constraints on the liberty of offenders by subjecting them to intensive supervision and electronic surveillance, however no direct comparison was made between that option and a sentence of full-time imprisonment to be served in a correctional centre. Certainly the Minister referred to alternatives to enable diversion of non-violent offenders from correctional centres, but at the same time referred to home detention as a "low-cost custodial option"[23].

Perhaps the classification of the nature of home detention as a sentencing alternative to full-time imprisonment was a matter deliberately left by the legislature for judicial interpretation. One matter, however is clear, that is, the legislature specifically required an order for

[21] See note 13 above.
[22] *New South Wales Parliamentary Debates [Hansard]* Legislative Assembly 20 June 1996 at 3385.
[23] See above.

full-time imprisonment to be made before the order for home detention and during debate on the bill this feature was put forward as demonstrating that "home detention be regarded as an alternative to full-time imprisonment and not an alternative to a lesser penalty".[24] This statement of the legislative objective, arguably lends support to Grove J's analysis that home detention is not available as a general sentencing alternative in the entire criminal penalty structure and thus should only be considered as an attendant order to be made in an appropriate case. On the other hand, Smart J, whilst acknowledging that the length of the sentence is determined first, seems to focus on the reality experienced by a sentencing judge when coming to exercise his or her discretion as to whether or not a reference for an assessment as to suitability of an offender for home detention will be made. This, it seems from the reasoning of Smart J, will be carefully considered before the judge begins making any orders in relation to the sentence to be imposed.[25]

It is clearly of some moment that the Act gives to the judiciary a new responsibility to add to their existing sentencing discretion in regard to the means of service of a sentence of imprisonment. Such further responsibility must necessarily result in careful exercise by judges of their sentencing discretion in relation to an expanded armoury of sentencing options, whether home detention be characterised as a sentencing option in its own right or as an option available only as an accompanying order to a sentence of full-time imprisonment, to ensure that the sentence imposed remains proportionate to the gravity of the offence and that the other relevant purposes of punishment are achieved in the context of a particular case.[26]

As Studdert J agreed with Grove J's analysis of the Act and the effect of its provisions, the "collateral order" analysis and interpretation represents the law as to the nature of a sentence of home detention and is binding on sentencing judges in the District and Supreme Courts of New South Wales. The dissent of Smart J, however, provides an interesting dimension which may well mean that a differently constituted Court of Criminal Appeal may come to re-consider this important judgment on the provisions of the Act at some time in the future.

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[24] *New South Wales Parliamentary Debates [Hansard]*, Legislative Assembly 18 September 1996 at 4286 per Mr Lynch, Member for Liverpool.

[25] See Smart J at p 16.

[26] See generally the High Court decision in *R v Veen (No 2)* (1988) 164 CLR 464 in relation to the primacy of proportionality as a factor in fixing an appropriate sentence.