IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 199/76

THE QUEEN

v.

MARK CRAIG

Coram: Richmond P.
Woodhouse J.
Cooke J.

Hearing: 10 June 1977

Counsel: R. Harrison for Appellant
P.J. Keane for Respondent

Judgment: 16 September 1977.

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

The appellant and two men named Blewitt and Bongiorno were charged under s.257 of the Crimes Act 1961 that between on or about 1 July 1974 and on or about 25 September 1974 they conspired by deceit or falsehood to defraud Howard Douglas Marshall and others. There were also 12 counts against all three under s.227(a) of the Crimes Act, each count alleging that having received the proceeds of sale of a specified motor vehicle on terms requiring them to account for the same to a named person they fraudulently omitted to account for the same. On a trial before Henry J. and a jury they were all found guilty on the conspiracy count; Craig was found guilty on 10 of the other counts and not guilty on two; Blewitt was found guilty on seven and not guilty on five; and Bongiorno was found guilty on nine and not guilty on three. Bongiorno was fined $750 plus $250 to be paid on account of costs. Blewitt was fined $500 plus $250 costs. Each was allowed four months within which to make payment. Craig, however, was sentenced to 18 months' imprisonment, to be cumulative on any sentence he might then be serving. He now seeks leave to appeal, contending that his sentence should not have been cumulative and was also excessive and out of fair proportion to the sentences of his co-offenders.

The offences were committed in the conduct of the used motor vehicle dealing business, Klaxon Autos Limited. Craig's company Kiwi Life & General Mutual Assurance Company Limited was the major shareholder; Bongiorno was the managing director and Blewitt a salesman. The method of operation was to have an employee telephone members of the public who had inserted in newspapers advertisements to sell cars. The company would agree to endeavour to sell the car on behalf of the owner at a minimum price, representing that it was receiving no commission apart from what it would make on any vehicle traded in by the buyer of the car. Later the company would notify the client that it had a buyer, but only at a lower price, and would obtain the client's consent to sell at a lower price. The charges relate to transactions in which the company, without the knowledge of the client, in fact sold the car at a higher price, commonly receiving payment partly in cash and partly by trade in; and the difference was not accounted for to the client.

The Judge's remarks in sentencing on 7 December 1976 included the following:

> I consider the most important part of your trial is the public disclosure of this practice which I am told is fairly widespread. Whether that is a fact or not I do not know, but it would appear that it might well be so in view of the evidence that I have heard. It is somewhat doubtful how much money the various complainants lost, because that can only be estimated in the open market and what happened was that at least to some extent you depressed the amount that they ultimately got. Various calculations have been made. I do not know whether they are of any great importance because quite obviously you were going to make as much as you could reasonably make in the circumstances and the limitation lay only by circumstance and not intention. But I do take into account that in the result the amount may not have been very large. Never-

theless it is a business practice and it is one that ought to be suppressed and the Courts, of course, have a duty in that respect.

...

I also take into account for the three of you and more so for Bongiorno and Blewitt the fact that you are the ones who have been the medium whereby the public has been apprised of this situation and to some extent you may be taking punishment because of practices which have been so, it is said, widespread by others and in respect of which you may have been misled as to the rightness or wrongness of it. But lies were told and that is that. You justified yourselves I think in the fact that you believed that perhaps the price would be no better than that which you were offering when one took into account the trade-in. Just how that would square up finally on realisation of trades-in and the rest of the transaction it is very, very difficult to say. However, there is the situation and it has been publicised at great length.

As to the questions of length of sentence and disparity, as the trial Judge Henry J. was in a better position than this Court to assess the seriousness of the offences and the relative responsibility of the three men. The Judge obviously regarded Craig as the ringleader and mentioned that Craig had full financial responsibility and the right to reap the benefit not only from the transactions in question but from the cognate transactions which followed. We would not be justified in holding on appeal that the sentence itself or the differentiation was too great.

As to whether Craig's sentence should be cumulative or concurrent, on 10 September 1976 he had been sentenced to 18 months' imprisonment in the Magistrates' Court on a conviction for theft alleged to have been committed in 1976. His appeal against that sentence was dismissed by Perry J. on 6 December 1976. The charges now in question all relate to 1974. It is a recognised principle that in circumstances such as these the total effective sentence that is appropriate

is the one that would properly have been imposed if all the offences had been dealt with by the same Court at the same time.

In this connection there is a feature of the present case which could not have been known to Henry J. As is explained in the judgment we are delivering contemporaneously in Craig v. The Police (C.A. 20/77), we consider that the theft conviction was arrived at on an erroneous view of the law and that the charge of theft by the defendant from his own company was misconceived. But we are also constrained to hold that it is too late to reverse that conviction, as Craig did not appeal from it to the Supreme Court in time, his application for an extension of time for appealing to that Court was dismissed there, and this Court has no jurisdiction to grant him leave to appeal.

This is a very unusual situation. As far as we know, it is unprecedented. In the special circumstances and having regard to the principle previously mentioned, we think that justice will be done if the sentence of 18 months' imprisonment imposed on 7 December 1976 is made concurrent with the sentence of 18 months' imprisonment imposed on 10 September 1976 and upheld on 6 December 1976. In the result the total effective term imposed will be 18 months from 7 December 1976.

Leave to appeal against sentence is granted accordingly and the sentence amended as above stated.

R Bowden J.

Solicitors:
Haddon & Co., Auckland, for Appellant
Crown Law Office, Wellington, for Respondent.