IN THE COURT OF APPEAL OF NEW ZEALAND CA.109/84

THE QUEEN

V

DENNIS BRIAN MORIATY

Coram	Richardson J McMullin J Somers J
Hearing	10 August 1984
Counsel	P.J. Rutledge for Appellant K.G. Stone for Crown
Judgment	10 August 1984

ORAL JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

Dennis Brian Moriaty applies for leave to appeal against a sentence of 3 years imprisonment imposed upon him in the High Court as long ago as 11 September 1978 on a charge of aggravated robbery to which he pleaded guilty. He did not make application for leave to appeal against that sentence until 16 April 1984 so he applies also in terms of s.388 of the Crimes Act 1961 for leave to appeal out of time.

In his application for leave to appeal Moriaty claimed that the sentence of 3 years imprisonment originally imposed upon him was manifestly excessive because his

responsibility and culpability for the crime was less than that of his co-offenders; he claimed that he had played a minor role compared with them. He also claimed that since his escape circumstances have arisen which warrant a reduction in the sentence originally imposed. The third matter which he raised related to his application for leave to appeal out of time.

Mr Rutledge has made submissions in respect of these three issues, and in a very fair and comprehensive way he has placed before us all the matters which are relevant to them.

Having been sentenced to the term of 3 years imprisonment, and while serving it at Wi Tako Prison, Moriaty escaped on 27 November 1978. Soon afterwards he went to the Nelson district where he remained for about 5 months before moving to Australia in about May 1979. He lived in Australia until September 1983 when he was located there in circumstances which have no present relevance. He was arrested and returned to New Zealand, and on 26 October 1983 he faced in the District Court a charge of escaping from lawful custody in 1978. He was fined $1,000 on this charge. It is apparent from the remarks of the sentencing Judge that he imposed a fine rather than a sentence of imprisonment on the charge of escaping because of the exceptional circumstances relating to Moriaty's rehabilitation in Australia. It is acknowledged by Mr Rutledge that the fine was unexceptional

and indeed was a lenient penalty. Hence this application is directed at the original sentence imposed on the charge of aggravated robbery. It should be mentioned that Moriaty has been in prison since his return to New Zealand from Australia last year and is now serving out the original sentence.

While in Australia he worked on a number of construction sites and won recognition on these as a diligent and honest worker who with the help of the woman with whom he has been living since September 1981 has adopted a new lifestyle. He has saved and acquired a large caravan costing $9,000, a motor car, household appliances, and he has some $10,000 in the bank. The woman concerned came to New Zealand soon after Moriaty's return here in 1983, and in an affidavit which she has presented to this Court she has indicated her wish to marry him on his release from prison.

An affidavit from Moriaty's employer in Australia is also before the Court. The deponent, a contractor, is in a very substantial way of business in Australia. He regards Moriaty as a trusted employee who was given the task each week of uplifting from the bank the weekly payroll amounting to some $50,000. The employer's concern for and interest in Moriaty is such that he has declared his preparedness to pay the air fares of Moriaty and his woman friend back to Australia on Moriaty's release from prison, to provide them with accommodation and Moriaty with a job on their return.

These affidavits indicate that from being a shiftless person with the poor work record which he had when sentenced in 1978, Moriaty has acquired in the intervening 5 years both domestic and vocational stability, and he has developed a good pattern of saving and earned an enviable reputation for honesty.

On the hearing of this appeal Mr Rutledge relied on two factors. The first was that the sentencing Judge in 1978 had failed to make a differentiation between the sentences imposed upon Moriaty and his two co-offenders. The second related to Moriaty's rehabilitation since the sentencing, a matter to which, he submitted, we should now have regard.

So far as the first of these matters is concerned, we are of the view that while one of the offenders at least, a man called Salt, was a worse offender than Moriaty and had previous convictions of a much more serious nature, we cannot say that the sentencing Judge, at the time of the imposition of the sentences of 3 years imprisonment imposed on the three offenders, was wrong in the view that he took that all should receive equal treatment for their part in what was a joint enterprise. If then this application is to succeed it must do so on the second submission directed to events which have happened since Moriaty's escape.

Mr Stone on behalf of the Crown has submitted that this application raises important issues of principle. Summarised

his submissions are that Moriaty did not during the time before his escape indicate that he had any sense of grievance by lodging an application for leave to appeal against the sentence; that he has served only a relatively small part of it; that his subsequent efforts to establish himself in life were not related to matters relevant to the sentence originally imposed upon him; that this Court should not, by interfering with the sentence, condone the actions of those who escape from custody; and that this Court cannot take account of events subsequent to escape; only those relevant to the offender and to the offence at the time that the sentence was imposed. He did however concede that a sentencing Court could take account of factors intervening between the date of the commission of an offence and the date of the imposition of sentence. It followed from this concession that if Moriaty, having committed the offence of aggravated robbery, had left New Zealand before any sentence was imposed upon him, the facts of his subsequent rehabilitation would be relevant to the question of sentence.

In R v. Little, CA.48/82, judgment 24 February 1983, this Court had to consider an application for leave to appeal against sentence where there had been a considerable lapse of time between the imposition of the sentence and the hearing of the appeal in this Court. As the judgment of this Court records, regrettably, and because of a sequence of unusual events, the application for leave to appeal was not

able to be disposed of for some time. Three fixtures had to be vacated for various reasons not of the applicant's making. In these circumstances it was submitted that however the original sentence might have been viewed in this Court shortly after its imposition, after the further time which had elapsed it would be unduly harsh and contrary to the interests of justice to require the applicant to serve a sentence of imprisonment. This Court agreed. It went on to say of the applicant:

> "She has a very favourable reference from her present employer who has engaged her in a position of trust on a part time basis for the last 18 months, and she has worked hard in that employment and her regular employment with a view to meeting her financial liabilities."

With these considerations in mind the Court acceded to the application for leave to appeal against sentence.

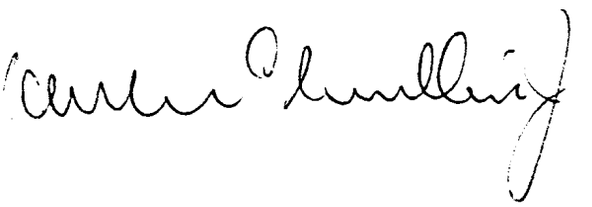
We think that this judgment is germane to the present application, and that this Court is free in the exceptional cases in which they will occur, to take account of factors which have occurred since the imposition of the sentence appealed from. Circumstances such as the present where an application is made by a person who has escaped from serving the very sentence in respect of which the appeal is brought must be exceptional. In the light of the information which has been placed before us we think it proper to take account of this man's efforts, apparently very successful, to

rehabilitate himself in the community. We think it would be quite idle and not serving of the public interest to require him to remain in prison to serve out the remainder of the sentence originally imposed upon him. In this connection we note the case of R v. Duguid, (Ontario Court of Appeal) 1974 17 C.R.370. It was a case of a man who had escaped from custody and subsequently worked without resorting to crime until at a later stage, having lost his employment and feeling that he was a hunted man, he resorted again to crime. The Ontario Court of Appeal said:

> In cases of this kind where a man is guilty of armed robbery the punishment should be severe. But where a man seeks deliverance from past crimes which he has committed and admits past guilt, and particularly where he has been living a respectable life, for a period of years, it is desirable, if practicable, for one Court to review the whole situation and decide what the total punishment should be in order to permit the accused to resume his life freed from the fear of the past."

In sentencing Moriaty for the aggravated robbery the Judge said that it was his obligation to take note of the seriousness of the crime, and to impose a sentence consistent with that imposed upon others, and which was likely to deter people from repeating such an act. He was of course entitled to bear that consideration in mind. But Moriaty has subsequently demonstrated by the conduct of his life that the need for rehabilitation is past, as is also the need to require him to serve a sentence which would operate as a deterrent for the future.

Before announcing our decision on the application for leave to appeal we should also mention the application for leave to appeal out of time. We think that in accordance with previous authority this is to be considered along with the merits of the substantive application. We have already expressed our views upon them. The application for leave to appeal out of time is therefore granted, as is also the application for leave to appeal against sentence. The appeal is allowed. The sentence of 3 years imprisonment imposed in the High Court is quashed. In lieu thereof we impose a sentence of imprisonment to expire on this day.



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