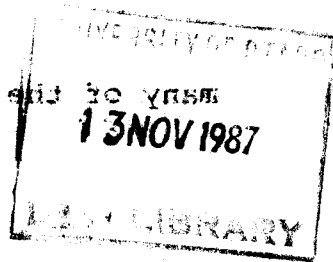
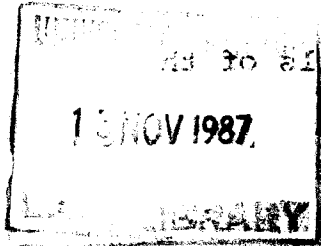


THE QUEEN

-v-

KATHRYN JEAN BRAND



Coram : Cooke P
Somers J
Bisson J

Hearing : 29 June 1987

Counsel : J. Haigh for appellant
Miss Kristy McDonald for Crown

Judgment : 15 September 1987

JUDGMENT OF THE COURT DELIVERED BY SOMERS J.

In April 1986 Mrs Kathryn Jean Brand brought into New Zealand two packages of a total weight of 538 grams of which 198.3 grams was pure heroin. She had obtained it when her flight from London stopped at Bombay and had taped it to her body. All this was done at the instigation of a man called Raymond Warry Page.

The two stood trial in Auckland in September 1986 on a charge of importing heroin. Mrs Brand had admitted the facts to the Police but her statement was excluded at the trial because it was not shown to have been made voluntarily. She gave evidence to the effect that she believed she was importing diamonds for another person. Both were found guilty. Page was sentenced to 13 years' imprisonment. His application for leave to appeal against

sentence was dismissed by this Court in a judgment delivered on 26 March 1987 in which many of the details of the offence are set out.

Mrs Brand was sentenced to six years' imprisonment. By then she had again admitted her part in the matter. She now applies for leave to appeal against her sentence.

It is clear that Page organised the importation and that Mrs Brand, who at that time was infatuated by him, was induced by him to carry the heroin, although not coerced or forced into doing so. It is equally clear that a sentence of six years could not of itself possibly be described as excessive - indeed Mr Haigh rightly conceded that a courier involved in such a large importation might well have expected to receive a sentence of seven to eight years' imprisonment.

The application is grounded upon special and quite unusual circumstances. Mrs Brand has two children, a daughter of her first marriage, aged 10 years, subsequently adopted by her second husband, and a son of her second marriage aged 2½ years. The son suffers from a multi-handicap congenital condition called Prader-Willi's Syndrome which affects his physical and mental ability. One of its symptoms is an extreme form of bulimia or morbid hunger which uncontrolled leads to obesity disposing the victim to a variety of serious complications. The child requires, and had received from Mrs Brand, constant care and attention.

Both children accompanied Mrs Brand to New Zealand. This itself is a curious feature of the case. Despite her affection for and unremitting care of her children she placed them at serious risk by her actions. Between her conviction and sentence her husband travelled to New Zealand from England and began proceedings for guardianship. Mrs Brand sought custody. Some time after she was sentenced an order was made on the husband's application placing the two children under his guardianship. He took them to England where they now are.

The Judge at sentencing may have suspected such a result. At all events he was well aware of the particular needs of Mrs Brand's son and the obvious distress imprisonment would occasion both the children. He dealt with the case sensitively. He imposed a lesser sentence than he would otherwise have done. He drew attention to the provisions of ss 91 and 93 (3) of the Criminal Justice Act which in the event of significant deterioration of the child's condition would provide an occasion for an application for release to the Minister or Secretary for Justice. He arranged for a recommendation to be made to the Registrar for urgency in the hearing of the guardianship application and he recommended to the Court exercising custodial jurisdiction over the children that it be a term of its exercise of the same that regular quarterly reports on the health of the boy be prepared by an independent specialist paediatrician and copies provided to Mrs Brand so that if a real and urgent need arose for her reinvolvement in his care an

application for release could be made by her.

The special grounds urged on behalf of Mrs Brand are obviously such as to arouse compassion. Mr Haigh submitted that in the circumstances the sentence should be reduced to one of three or four years' imprisonment.

We have given anxious consideration to the whole case but in the end we do not think we can interfere with the sentence. If the child plainly needed Mrs Brand's care and attention we may well have acceded to the plea made and perhaps have gone further. We were told however that she has received the first two quarterly reports which the Judge mentioned and that neither gives rise to any undue concern about him. The special provisions of the Act to which we have referred are available if the condition of the child deteriorates. If the sentence were reduced as suggested it would carry no guarantee that at the end of its reduced term she would obtain the care or control of the child. The Judge weighed the duty of the Court to see that major criminality in drug dealing is properly punished, against its obligation to endeavour to avoid injury to innocent third parties and the special weight a sentence of imprisonment would have on Mrs Brand. We cannot say he misjudged the matter.

Shortly after the hearing of this application we were told that the applicant also wished to appeal against the determination made by the High Court under s.81(1) of the

Criminal Justice Act 1985 as to the total period during which Mrs Brand was held on remand in penal custody. In a memorandum received in late August counsel for the Crown and for Mrs Brand agreed that the Judge was wrongly informed as to the period - it was not 29 days as determined but 50 days.

In the meantime s.81 of the Criminal Justice Act has been repealed and replaced by a new s.81 as enacted in s.8 of the Criminal Justice Amendment Act (No.3) 1987 which came into force on 1 August 1987. The new s.81(1) and (2) provide, in effect, that periods in remand in penal custody shall be taken into account in determining the term of imprisonment by reducing the term that would otherwise be appropriate by so much of that period as is reasonably practicable in all the circumstances. The new s.81(1) however does not apply to sentences imposed before 1 August 1987 or any sentences imposed in substitution for any such sentences.

The provisions of s.20 of the Acts Interpretation Act 1924 however enable the Court to deal with this matter as it ought to have been originally dealt with had the correct facts been put before the Judge.

Accordingly the appeal against the determination under s.81 of the Criminal Justice Act 1985 (as originally enacted) is allowed and the warrant is to be amended to show 50 days penal custody in remand in lieu of 29 days.

The application for leave to appeal against the sentence of six years' imprisonment is refused.

W. J. Jones

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Crown Law Office (Wellington)