IN THE COURT OF APPEAL OF NEW ZEALAND 30/10 C.A.330/92

2101

THE QUEEN

v.

MICHAEL ROBERT BOURKE

Coram: Casey J (presiding)
Holland J
Thorp J

Hearing: 22 October 1992

Counsel: D C S Morris for Crown
B J A Daniell-Smith for Appellant

Judgment: 22 October 1992

JUDGMENT OF THE COURT DELIVERED BY THORP J

This is an appeal against a sentence of 3½ years' imprisonment imposed in the High Court at Nelson on 7 September 1992 following the applicant pleading guilty to one charge of conspiracy to manufacture heroin, one charge of conspiracy to supply heroin and two charges of supplying heroin.

The ground of appeal is that the sentence was inappropriate in that the sentencer failed to take sufficient account of the offender's personal circumstances. Essentially Mr Daniell-Smith's argument was that the sentencer should have chosen a treatment option rather than imprisonment, having regard to the appellant's past addiction and his progress at Odyssey House during the previous six months.

Reference was made and reliance placed on the decisions of this Court in **R v Taylor [1990] 1 NZLR 385, R v Edgecumbe (CA39/89; 10/11/89), and R v Gillman (CA399/91; 11/5/91).** In **Taylor** the Court reconsidered penalties for what are commonly called home-bake cases. It noted that this activity had progressed from experimental production of morphine of uneven quality using closely guarded recipes to a more common and better understood business, producing overall a significant proportion of the total morphine and heroin in New Zealand and in a form of relatively consistent quality and potency.

Home-bake operations were seen as still predominantly small scale and generally for the use of those marketing those drugs and their associates, rather than for profit. This Court noted that the increase in this activity not only added to the availability of narcotics and the number of addicts, but also brought with it a considerable body of crime in the form of burglaries and like offending to obtain raw materials and other offending to obtain money for the home-bake drugs. It concluded that the level of sentences it had proposed in **R v Latta [1985] 2 NZLR 504** - i.e. six months' imprisonment for a first offender for the manufacture of a small quantity of drugs for personal use, up to several years' imprisonment for greater quantities or repeated offending, might be inadequate but "that was not to overlook the point that the ultimate interests of society and of the offenders are best served by breaking the addiction through treatment where there is a willingness on the part of the offender to undergo that treatment and some suitable agency to provide that treatment is available".

The present case arises from a drug investigation in Nelson in mid 1990, It involved the use of telephone tapping of the appellant's home telephone and video monitoring of movements in and out of that address. That operation resulted in three men, the appellant and Messrs Gairns and Briggs, being charged with conspiracy to manufacture and supply heroin, the appellant being charged with the

two counts of supplying the drug and Gairns and a fourth man being charged with manufacturing it. All three were addicts and all three pleaded guilty just before trial.

Briggs and Gairns, neither of whom had shown any endeavour to help themselves, received sentences of 5 and 4½ years' imprisonment respectively. The appellant, whom Mr Daniell-Smith accepted was properly seen as having similar culpability as the others and who had spent six months since his arrest at Odyssey House and had a favourable report from that organisation, received a sentence of 3½ years, the sentencer expressing the wish to recognise his endeavours to help himself.

The sentencer had a good deal of information to assist him to assess the size of the home-bake operation and the appellant's part in it. In addition to the usual summary of facts, he had a graph indicating the number of calls to and from the appellant's house and a transcript of those telephone calls. That evidence clearly took the group's activity outside the usual small home-bake operation into a larger and, accordingly, more serious category. The appellant's part in the operation was that of handling the distribution of the manufactured drugs. At p7 of his summing-up after citing a passage from **Taylor** to the effect that there is little commercial exploitation by persons manufacturing simply for financial profit, that homebakers generally manufacture in relatively small batches, partly for their own use and partly for the use of those who supply the ingredients and the premises or who belong to a close group of paying associates, the sentencer said :

> "....for the reasons I have already given I consider the activity as disclosed in these charges suggested a greater degree of commercialisation and a wider involvement of people than the Judge expressed there."

Later on the same page he said :

> "In my view all of you were involved in this in the knowledge that whilst it would have some immediate advantage to you and provide some supply it was contemplated that it would be made available to others as well, as indeed was the plan."

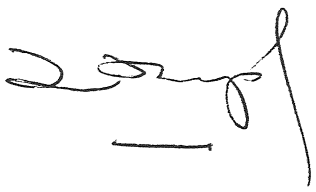
We believe that his assessments were clearly justified. Granted that penalties from home-bake operations raise the special considerations discussed in **Latta** and **Taylor**, neither of those decisions nor others bearing on penalties for such activities, indicated any intention to eliminate the usual significance of the size of the operation and the amount of narcotic involved. Indeed, **Latta** confirmed the significance of "greater quantities".

The question then becomes primarily one of balancing such considerations against the desirability of encouraging attempts by addict/offenders to overcome their addiction. Here the sentencer spent some time on sentencing discussing his consideration of the two options. He thought the appellant's involvement in the offending too significant and the offending too serious to make that treatment a proper option. He also had regard to the circumstances that others involved in the same operation were being sentenced at the same time, and was concerned to avoid injustice being raised in the minds of the others by any apparent disparity. Mr Daniell-Smith accepted, as we do, that that was a proper consideration.

We are satisfied that the essential balancing exercise was carried out by the Learned Judge with due regard to the factors which bore upon it. His knowledge of the case was more extensive that ours, even with the assistance we have received from both counsel. We are not persuaded that the conclusion he reached was not the correct conclusion, particularly having regard to the size of the operation and the number of persons intended to be supplied with those particularly pernicious narcotics.

It still remains open, of course, for the appellant to return to treatment on his release from prison. Indeed, he may very well propose such a course to the relevant District Prisons Board when he becomes eligible to appear before it. But at this time we are not prepared to interfere with the decision reached by the sentencer which, indeed, appears to be an appropriate one.

The appeal is accordingly dismissed.



Solicitors: Crown Solicitor, Nelson