6/6 NZLR X

FILE

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

T.2-4/84

588

Appeal reported but substantive issue not dealt with - see [1985] 2 NZLR

THE QUEEN v. J P
and F F
G F
B

Charges: Importing heroin into New Zealand - (Jointly charged)
Selling Class A controlled drug - charge against Grime

Plea: All plead Not Guilty

Counsel:

Hearing and Ruling: 28 May 1984

FIRST ORAL RULING OF GALLEN J.

The accused are all charged with the importation into New Zealand of a Class A controlled drug, namely heroin. Because at this stage the submissions which have been made relate to factual material which is contained in depositions, I think it is necessary to make certain assumptions in ruling on the present application and I do not propose to consider the evidence in detail for that reason.

In very broad terms, the charges arose out of a situation where one, H , sent into New Zealand certain quantities of heroin by the post, the heroin being concealed

in postcards and calendars. These missives were addressed to fictitious persons at addresses where it may be assumed Hoben had some prospect of later collecting what had been sent. In the circumstances which occurred, F appears to have returned to New Zealand before the arrival of the material through the post and the evidence establishes that he had at least the opportunity of discussing what had taken place with the accused before the arrival of the heroin. There is no evidence to indicate that any of the accused were involved with H in the planning of this enterprise apart from suggestions that H had discussed the matter some considerable time before his departure from New Zealand with one of the accused and I do not consider that the evidence concerned is sufficiently strong to justify a conviction, even if it were accepted in totality.

The Crown relies substantially upon material obtained by way of an interception warrant and recorded conversations. Mr Laurenson submits that this material establishes that each one of the accused was aware of the scheme and participated in it in one way or another. The alleged participation consists of suggestions contained in the conversations as to what either had been or would be done with the heroin when it arrived and some evidence relating to what Mr Laurenson described as a "dummy run" when the conversations suggest that a proposal was discussed whereby one or more of the accused would check the mail box at one of

the addresses to which it appears Hoben had consigned some of the heroin.

I should say immediately that the evidence against the accused J C in my view at most, goes no further than to establish some possible knowledge of the scheme and although there are comments contained on the recorded conversations which, if accepted, would suggest he had some intention of participating, there is no evidence at all that he did so and I do not consider that it would be possible for a case to be established against him on the importation charge on the material which is before me.

As far as the other accused are concerned, the problem comes with determining at what stage the substance concerned was "imported" into New Zealand. The Act does not contain any definition of "imported" or "importation". These words have been the subject of a number of decisions, some in relation to other Acts but two which have some direct analogy with the situation now before me. The first of those decisions was the decision of White J. in Purdy v. The Collector of Customs (Wellington Registry, M.459/78, judgment delivered 25 October 1978). In that case, although the factual material set out in the judgment of White J. is not extensive, I have had the advantage of seeing the reserved decision of the learned Magistrate upon which that judgment was based. It is clear that the appellant had been informed before the arrival of the drug concerned of

the scheme by which it was designed to import it, that is the forwarding of the heroin to a post office address, addressed to a fictitious addressee. The appellant had been to the Post Office and given the name concerned. There is clear evidence and indeed a decision that he had been guilty of a conspiracy to import the heroin, a decision which may have coloured the balance of the case and the specific decision of the learned Magistrate was that he was a party to the importation of the drug.

The other decision is a more recent decision of Thorp J. in R. v. Anthony William Hart (Auckland Registry, T.3/82, ruling delivered 21 April 1982). That was a case where the accused had been informed by telephone that a shirt was being forwarded to him from the United States as a present to his wife and that inside it he would find other presents, which it was accepted he understood to mean cocaine. The shirt was examined when it arrived at the Auckland Central Post Office, as a result of which a substantial quantity of cocaine was found. Dummy sachets having been substituted, the parcel was delivered to the accused's home in suburban Auckland. After its delivery, the police found the accused in circumstances which suggested and which he admitted, involved his using the cocaine which had been sent.

Thorp J. considered the question of the time when importation must have been completed. He took the view

that "importation" for the purposes of the Act should be given a rather broader meaning than it normally receives under the Customs Act. With respect, I agree with that conclusion. He went on to say that "clearly there must be some point at which the offence of importation is completed, and after which dealings with a controlled drug, although illegal, would not constitute importing" as such.

There is some difficulty in reconciling the two decisions and I do not find it easy to arrive at any formula which would have some general application in circumstances of this kind. Clearly enough, participation in the transaction as a whole would normally amount to importation. I was concerned over the possibility that if the accused had become aware of the transaction before completion and had then involved themselves in its completion, that they might properly be said to have become involved in the importation, but for this, knowledge is not enough. It is necessary for them to have actually performed some overt act which would directly involve them in participation. If going to the letter box to pick up an expected missive amounted to participation, then this would be a conclusion directly contrary to the decision of Thorp J. in Hart's case.

It has been submitted to me that importation ceases when the substance concerned ceases to be under the control of the appropriate authorities. I do not find this to be an acceptable test as such because it is clearly not all

embracing. I should have thought for example, that if Hoben had arrived in New Zealand, had informed the accused of the transaction in which he was involved and requested them to assist by collecting the substance when it arrived and they had taken it to him at some pre-conceived destination, that it would then at least be arguable that they had at least participated in the importation, but that is not the case here. Thorp J. specifically left open the possibility that a person who went to the authorities and became directly involved in collecting a substance which was held by the authorities, would be involved in the importation. In my view, a line has to be drawn somewhere between the importation and the subsequent use or distribution of the substance. The evidence which is before me at this stage would I consider, fall into the second category, not the first. If it were established, it would go no further I think, than to establish that the accused with knowledge of what they were going to receive, waited for it and then subsequently took action in relation to it. I agree, with respect, with the views of Thorp J. and applying them as expressed by him, the importation in this case ceased at the time the substances concerned were placed in the letter boxes of the addresses to which they had been sent.

Under those circumstances, I am obliged to find that the charges relating to importation cannot be sustained and the counts in the indictment relating to

those charges will accordingly be quashed under the provisions of s.345 of the Crimes Act. Under those circumstances, two of the three accused must be discharged. F and B , you are discharged.

R. L. Blackmore.