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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.914/83

(J) X

No Special Consideration

1107

BETWEEN R THORNTON

Appellant

A N D DEPARTMENT OF LABOUR

Respondent

Hearing : 20th August 1984

Counsel : Miss S.J. Callanan for Appellant
Miss L. Shine for Respondent

Judgment : 31 September 1984

JUDGMENT OF BARKER, J.

The appellant appeals against his conviction in the District Court at Auckland on 28th April 1983; he was charged under Section 5(1)(a) of the Immigration Act 1964 ("the Act") that, being a prohibited immigrant as defined by Section 4(2)(c) of the Act, he did unlawfully land in New Zealand on 3rd July 1981.

The hearing of this appeal had been adjourned several times until the result was known of an application for leave to appeal to the Judicial Committee of the Privy Council in a test case; the point at issue was whether offences such as those for which this appellant was convicted where detention pending deportation was a consequence, required a defendant to be given the right to elect trial by jury. The decision of the Privy Council refusing special leave in the test case was given only recently; this appeal was then brought on for hearing on other grounds.

The prosecution evidence in the District Court came first from an officer in the Immigration Department who produced a

certificate under Section 34(2) of the Act, that the appellant was not a New Zealand citizen and that he had entered New Zealand on or about 3rd July 1981. The only other witness was a police officer, Detective Senior Sergeant Byrne; he gave evidence of an interview with the appellant in the Ashburton Police Station on 14th December 1982 commencing at 9 p.m. This was a lengthy interview concerned principally with other matters. At its commencement, Detective Senior Sergeant Byrne administered what he called an "informal caution"; some 5 hours into the interview - around 2 a.m. - he discussed with the appellant what he was doing between 1972 and 1976. The evidence-in-chief of Detective Senior Sergeant Byrne on the vital issue is as follows:

> "The defendant replied, "Well I was away for a while". I said, "What were you doing between 1972 and 1976?" He said "I was running my own business". I said, "Could it be that you were in prison during that period?" I have a note to the effect that the defendant appeared shocked and he then said, "Well I was away for a while, is that relevant?" I said, "Was it because you were in prison?" He said, "Yes". "Do you have to bring that up?" I said, "What was it for?" He said, "Fraud". I said, "You were in prison from 24.3.72 were you not?" He said, "Yes". I then produced to the defendant a document that I had on my file and I asked him to inspect the document. I said to him, Do you agree with your criminal history? Is it correct?" The defendant said "Yes these are all my convictions", after inspecting the document. I said, "Do you agree that this document, which also shows your name as Q[illegible] refers to you?" The defendant said "Yes". That terminated the discussion on this matter. I finished the interview some hours later and rendered to the defendant the formal caution. Following the interview at 9.13 a.m. on 15 December I again handed this criminal history to the defendant and asked him to certify that it was a correct record of his convictions. The defendant wrote at the bottom of the document, "I verify that the above convictions relate to me", and he then signed it, R[illegible] Thornton. I witnessed the defendant's signing of that document as did another detective, Detective Thurston who was present at the time. I now produce that document to the Court as exhibit two."

The document produced by the detective, on which the appellant wrote, is headed "Metropolitan Police" "Convictions

recorded against R Q at Thornton". It records Ccurts, offences, sentence and date of release. It does not bear any certification at all. It refers to:

(a) convictions on 25 June 1969 in Chester for obtaining money by forged instrument for which 18 months' imprisonment was imposed;

(b) convictions in April 1962 for obtaining credit by fraud for which six months' imprisonment was imposed consecutively on each of two charges.

Finally, it refers to convictions on 24th March 1972 in the Central Criminal Court in London on 31 charges of forgery and uttering for which various concurrent sentences were said to have been imposed - up to 4 years' imprisonment as a total sentence. The document also gave a release date of 28th June 1973 which casts some doubt on the accuracy of the total document.

Detective Senior Sergeant Byrne produced a passport which was given to him by the appellant at the interview; this shows that he entered New Zealand not only on 3rd July 1981 but also on 1st July 1978. There is also stamped in the passport a permanent entry and multiple re-entry visa issued by the New Zealand Embassy at Bangkok. The notation on the visa refers to compliance "with normal immigration requirements".

The District Court Judge, in an oral decision, found that the appellant was a prohibited immigrant. The Judge considered that the appellant came within Section 4(2)(c) of the Act in that he had been convicted of offences for which he was sentenced to a term of imprisonment of one year or more. He considered that this essential issue was proved by his admissions made to the police officer, although the District Court Judge found that the Judges' Rules had been breached; he found that the appellant was in custody at the time he was questioned on this matter; he was not cautioned but was cross-examined by the police officer. Nevertheless, the District Court Judge, in the exercise of his discretion, decided not to exclude the confessions on the ground of unfairness.

Miss Callanan, for the appellant, submitted:

(a) There was no proper proof that the defendant was a prohibited immigrant as defined in Section 4(2)(c);

(b) Alternatively, there was an onus on the prosecution to disprove the matters referred to in Section 4(1)(a) and (b) of the Act; and

(c) The District Court Judge should have rejected the evidence of the confessions.

Section 4(1) and (2) of the Act read:

"4. Persons prohibited from landing in New Zealand - (1) Subject to subsection (4) of this section, it shall not be lawful for any person to whom this section applies (in this Act referred to as a prohibited immigrant) to land in New Zealand unless -

(a) He holds and is named in a certificate in the form in the First Schedule to this Act, signed by the Minister or any officer, whether in or outside New Zealand, authorised by the Minister to grant such certificates; and

(b) He holds a permit granted to him in accordance with section 15 of this Act.

(2) Subject to subsection (3) of this section, this section applies to -

(a) Any mentally disordered person;

(b) Any person suffering from any disease specified by the Governor-General by Order in Council:

(c) Any person who at any time, whether before or after the commencement of this Act, has been convicted of any offence for which he has been sentenced to a term of imprisonment or other form of detention for one year or more or to any form of indeterminate detention for which he may be detained for a period of one year or more:

(d) Any person who at any time, whether before or after the commencement of this Act, has been deported from New Zealand, otherwise than under

section 158 of the Shipping and Seamen Act 1952, or deported from any other country."

Where, as here, reliance is placed on Section 4(2)(c), the prosecution must prove that the appellant was a person who has been convicted of any offence for which he has been sentenced to a term of imprisonment or other form of detention for one year or more or to indeterminate detention for which he may be detained for one year or more. The prosecution relied solely on the admissions and the written acknowledgement of the appellant for proof of this vital point.

I have read the whole of the evidence of the police officer; including the extensive cross- examination; the written statement of the appellant proved that he was admitting his convictions. He also admitted he had been in prison and was there from 24th March 1972.

What the appellant did not admit in unequivocal terms was that he had been sentenced to a term of imprisonment for one year or more. He seems careful not to have admitted that crucial matter. The prosecution did not submit this unauthenticated sheet headed "Metropolitan Police" as proof of its contents. The appellant's written acknowledgement only confirms part of the contents. One does not know whether the sentences might have been reduced by an appellate Court. It would have been simple for the Police Officer to have asked the appellant to have agreed that the sentences were correctly recorded: yet he did not. Indeed, the document raises a query on its face. If the appellant were sentenced to 4 years' imprisonment in March 1972, it seems extraordinary that he was released in June 1973 - 15 months after sentence.

In my view, the sentence of one year or more must be properly proved. There is a relatively simple method laid down for proof of convictions entered against a person in the United Kingdom and Australia. Section 3 of the Evidence Amendment Act 1962 provides for copies of fingerprints to be certified by responsible police officers as fingerprints of a person convicted of any offence of which particulars are given.

The prosecution could, in this case, have availed itself of that section; the Detective Senior Sergeant could have obtained an admission from the appellant that he had been sentenced to one year's imprisonment or more. In the absence of any such admission, I cannot speculate that the appellant was agreeing to anything more than to the propositions (a) that he had been in prison and (b) that there was a correct record of his convictions.

The District Court Judge did not turn his attention to this point because he said:

> "The prosecution relies for proof of the conviction first on the verbal statement and secondly on the written admission."

I acknowledge that there could be an inference that the appellant accepted by his conduct the correctness of the information relating to the sentences as shown on the document. However, this is a criminal prosecution and I cannot exclude, as a reasonable possibility, that he intended to admit only the convictions but not the sentences; his careful reply to the police officer indicates this.

The Court of Appeal in McLachlan v. Department of Labour (1983) NZLR 708 required strict proof of the ingredients of a charge of being a prohibited immigrant because of the serious consequences of deportation for the persons concerned. I believe that the approach I have taken accords with the spirit of McLachlan's case.

Accordingly, the appeal must be allowed. Counsel did not suggest a rehearing in the event of the appeal succeeding as was ordered in McLachlan's case. I therefore simply quash the conviction and deportation order.

I record that I reject the alternative submissions of counsel for the appellant that the prosecution had to prove that the appellant did not come within Section 4(1)(a) and (b) of the Act. In my view, these were matters which are encompassed by Section 67(8) of the Summary Proceedings Act 1957.

They are in the category of "any exception, exemption, proviso, excuse or qualification" proof of which lies on the defendant in summary proceedings.

I adopt, with respect, the thoughts on that submission in relation to the Immigration Act in the judgment of Sinclair, J. in Kaloni v. Department of Labour (M.1032/81, Judgment 27th August 1982). In that case, the learned Judge referred to two of the best-known authorities on Section 67(8), namely, Akehurst v. Inspector of Quarries, (1964) NZLR 621, 625 and R v. Edwards, (1975) Q.B. 27. I had occasion to consider Section 67(8) at some length myself in McFarlane Laboratories Limited v. Department of Health, (1978) 1 NZLR 861, 878-881. The view I took in that case confirms my view in this case.

I also reject a submission that there was no proof that the appellant landed unlawfully on 3rd July 1981 because he first landed in New Zealand on 1st July 1978 and there was no proof of his ever having left. This argument is quite untenable in view of the presumptive evidence that he arrived in New Zealand on 3rd July 1981. It was open to him to have called evidence to rebut the presumptive evidence, but he did not do so.

Next, counsel for the appellant referred to McLachlan's case (supra) where it was held that the prosecution had to prove that a defendant was deported under a valid deportation order if it wished to rely on the ground in Section 4(2)(d) (supra). Counsel submitted that the evidence of the appellant's previous convictions fell far short of what was required. Any person is likely to be able truthfully to answer a question whether he had ever been sentenced to a term in prison. He may not be able to answer with such certainty whether a valid deportation order had been made against him. It would have been possible here for admissions to have proved the essential issue. However, as indicated already, I do not consider that the prosecution proved this admission beyond reasonable doubt.

I am uneasy concerning the admissions made without a caution whilst the appellant was in custody. However, the District Court Judge was entitled to admit them in the exercise

of his discretion. I cannot say that he exercised his discretion in a wrong manner. The District Court Judge directed himself correctly as to the onus of proof as to the effect of a breach of the Judges' Rules. He saw and heard the detective who was extensively cross-examined; I cannot say that he exercised his discretion wrongly, although I have misgivings about an admission obtained as this one was.

For the reasons indicated, the appeal must be allowed and the conviction and deportation order quashed.

R.J. Barker J.

SOLICITORS:
Daniel, Overton & Goulding, Onehunga, for Appellant.
Crown Solicitor, Auckland, for Respondent.