IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.P. No.37/88

BETWEEN WAYNE BADEN JOHANSEN

Appellant

NOT RECOMMENDED

A N D POLICE

Respondent

Hearing: 23 March 1988

Counsel: J.S. Halls for Appellant
J. Sandston for Respondent

Judgment: 23 March 1988

ORAL JUDGMENT OF TIPPING, J.

This is an appeal by Wayne Baden Johansen against a sentence of nine months imprisonment imposed upon him in the District Court at Christchurch.

He and three others had pleaded guilty to a charge of conspiring by fraudulent means to defraud a bankcard company. One member of the group had come into possession of a bankcard and the group had agreed, as is inherent in the allegation of conspiracy, to use that card fraudulently for their joint purposes. Some $14,000.00 worth of property was procured by the fraudulent use of this card.

Mr Halls, who appeared for the Appellant in support of his appeal, rested his argument on the proposition that the disparity in the sentence imposed on this Appellant, as against those imposed on the other three was so great as to

lead to a sufficient injustice entitling this Court to intervene on appeal. It is therefore necessary to say something as to what happened to the others.

There were two men involved and two women. One of the women, Sharon Ranger, was sentenced to five months periodic detention and seventeen months supervision. She had only one previous conviction. This was a conviction for theft on which I am told she received a suspended sentence.

The other woman, Leah Ranger, has not yet been sentenced. She was apparently pregnant and shortly to give birth and her sentencing has been adjourned until 21 April.

Counsel informed me that this was with a view to the imposition of a sentence of periodic detention. She has no previous convictions of any kind but is I gather an undischarged bankrupt.

The other male, one Christopher Taylor, was aged only 18. The present appellant is aged 23. Taylor was sentenced to corrective training on the conspiracy to defraud charge and also on charges of assault and obstruction which were dealt with at the same time by a concurrent sentence.

A sentence of corrective training implies a maximum period of three months and the essential submission for the Appellant was that this maximum, viewed against the Appellant's sentence, represented too great a disparity.

As Mr Halls put it, the present Appellant has been sentenced to a term effectively or potentially three times longer than that of the next most serious sentence.

I was informed that the Appellant Johansen feels a sense of grievance as to the disparity. That may be understandable and indeed a number of Appellants come to the Court expressing a sense of grievance when there has been some degree of disparity in the sentence they have received as against those received by others involved in the crime.

The proper approach is to look at the matter objectively, as Mr Halls recognised, and to determine whether an impartial and objective observer would on being appraised of all the relevant circumstances regard the disparity as being so great as to amount to an injustice.

For the Crown Mr Sandston drew to my attention the points upon which the learned Judge implicitly focused when distinguishing this Appellant from the others and in particular the other male.

First, there is the significant difference in thier ages, the Appellant is 23 and the man Taylor is 18, but then comes the point which is really at the nub of this matter.

The present Appellant has an appalling list of previous convictions. They only have to be categorised to show the extent to which this present Appellant has flouted the criminal law in his relatively short criminal history. He has convictions for theft, unlawful taking, fraudulent use of documents, burglary, aggravated robbery, escaping, false pretences, receiving and breaches of periodic detention.

While the Court must always be alive to the fact that people must not be sentenced again for past crimes, it is in my view another matter when one is determining what is

the appropriate penalty for the instant crime.

One is entitled in those circumstances to look at a past record to see what response, if any, the particular person has made to previous sentences. On the face of it this Appellant has made no response whatever.

While mindful of the fact that there is a significant disparity here, in my view it was entirely justified.

This man is not for sentence again for his previous crimes. He is simply receiving an appropriate sentence for this crime on the basis that he can claim no mitigation whatever for a good previous record.

In my view the objective fair minded observer while recognising the disparity would take the view that there was ample reason for it. Admittedly Taylor has a previous list but not nearly as extensive or as serious as that of Johansen.

Mr Halls properly recognised that imprisonment had to be imposed in these circumstances. The learned Judge properly directed himself as to the terms of the Criminal Justice Act. This was a case beyond any doubt of special circumstances.

I am brought to the view that the sentence was not manifestly excessive either in itself or by reason of the disparity with the others, particularly Taylor.

The appeal was candidly and fairly presented by Mr Halls who advanced everything that could reasonably be advanced for this Appellant. However the appeal is dismissed.

J