AP 78/94

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

BETWEEN ANDREW JOHN COOK
Appellant

AND THE POLICE
Respondent

Hearing: 18 May 1994

Counsel: K.B. Campbell for the Appellant
M.T. Lennard for the Respondent

Judgment: 18 May 1994

ORAL JUDGMENT OF HERON J

This is an appeal against a sentence imposed in the District Court at Upper Hutt on 1 March 1994. The appellant was sentenced to six months imprisonment for escaping from lawful custody, that sentence cumulative on a sentence being served of four years imprisonment for burglary imposed on 13 November 1992. It is of some importance I think to note that on present parole conditions it is likely the appellant would have been eligible for parole in March of 1994, and in any event likely to be released in 1995 if early parole was not allowed.

The position is that the appellant was given weekend leave on Thursday 13 January 1994, to return on Sunday 16 January at 9 a.m. He failed to return. Some eleven days later he was located at the address where his wife resides at Otaki. He volunteered at the time that his reason for not returning to prison was that "it is a long story". Before the District Court Judge counsel submitted that the reasons for not returning were due to some difficulties his wife had with the law, and some

problems with their child and other domestic events. It is plain that he knew that he would be obliged to serve a further term of imprisonment for this behaviour and he saw the domestic requirements as being more important at the time. That is of course a calculation he makes and it seems to me he can hardly complain if the Court regards it as flagrant offending, and in this case, as the District Court Judge observed, in breach of trust.

It should be said that if a relaxed and somewhat casual attitude is taken to return from home leave this affects the workings of the prison and has a consequent impact on morale overall. It is conduct likely to prejudice the granting of home leave for others who have no intention of not returning when directed.

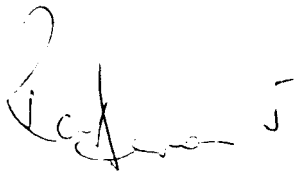
Much the same personal reasons have been put forward by Mr Campbell today and they are unconvincing so far as amounting to any form of compulsion. There are cases, and R v Martin CA 206/83 8/12/83 is one, where an escape was justified on grounds of imminent physical harm to the wife of the prisoner. A sentence of four months there was reduced to one month. But those were very special circumstances and not reflected in the facts here. Mr Campbell has submitted that the average sentence for this type of offending in 1993 was 4.7 months and in 1992 4.5 months, the range being between one week and two and a half years. In Hohepa v Police AP 103/91 Hamilton Registry, 18/11/91, Penlington J, some of the authorities are reviewed. That case involved a reduction from nine months for escaping down to five months and was apparently only an attempt at escaping, not the complete offence. In Daniels v Police AP 24/92 Auckland Registry 25/2/92 Williams J, a sentence of six months imprisonment for escaping was reduced to two months. It is not clear from the narrative as to whether the six months imprisonment was effectively eleven months but that is what the Judge said:

> "Passing to the substantive submissions made in support of the appeal, counsel submitted that a six months sentence (or indeed, as the Crown acknowledged, effectively an eleven month sentence) was manifestly excessive bearing in mind the particular facts of this case. The facts that were emphasised were that the escape itself was not the normal type of breaking out or a planned escape nor was it attended with any violence or other similarly unattractive elements which are often present."

In that case the appellant took the opportunity of walking out of an unguarded cell and was at large for two days. In contrast the appellant here was at large for some eleven days, but without any offending, which was the case in Daniels. However all these cases I think largely confirm the overall submission made by Mr Campbell, that the tariff in this area is clearly to be measured in months, not years, unless there are grossly aggravating circumstances. On the authorities submitted to me it is not difficult to accept the statistical average as reflecting the approach in most of the cases.

However Mr Lennard I think touches on three matters which are relevant to the actual sentence imposed here. The first was the breach of trust, carrying with it in my view implications for other prisoners and surprisingly undertaken at a time when parole ought to have been uppermost in the appellant's mind. He did not attend to his concerns about his wife and child and then return to prison, giving himself up, which would commend itself to the Court. His history suggests that he is casual about matters of this kind. He appeared in the High Court at Wellington in January 1993 in respect of failing to answer bail. Having regard to all those circumstances and the requirement that the sentence in the Court below be shown to be manifestly excessive I do not think a sentence of six months meets that description in any respect, and whilst arguably higher than might have been the case not such as to require any intervention by this Court.

Accordingly the appeal is dismissed.



Solicitors

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