IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CRI-2009-454-44

COREY DANIEL STOPFORTH
Appellant

v

DEPARTMENT OF CORRECTIONS
Respondent

Hearing: 15 December 2009

Counsel: P S Coles for Appellant
ASA Hall for Respondent

Judgment: 17 December 2009 at 3.30pm

In accordance with r 11.5 I direct the Registrar to endorse this judgment with a delivery time of 3.30pm on the 17th day of December 2009.

RESERVED JUDGMENT OF MACKENZIE J

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[1] The factual background to this appeal against conviction and sentence is quite complex. In May 2008 the appellant was sentenced on a charge of arson and other less serious charges to a total term of 12 months home detention with reparation of $52,000 and disqualified from driving for 18 months. The supervising probation officer received information that suggested possible breaches of the conditions of home detention. She and another officer visited the appellant on 3 December 2008 and questioned him about that. He made admissions of consumption of both alcohol

and illicit drugs. There was a third allegation of proceeding outside the area permitted by electronic monitoring.

[2] The appellant was arrested on charges arising from those matters on 4 December 2008 and remanded in custody. Bail was refused at several appearances and the detention in custody continued until 31 March 2009 when an application for bail with electronic monitoring was granted.

[3] The appellant pleaded guilty at an early stage to the charge of breach of home detention by consumption of alcohol. On 9 February 2009 there was a defended hearing of the alleged breach in relation to the alleged absence from place of detention recorded by the electronic monitoring. That was adjourned part heard, for further evidence to be obtained. Enquiries were made which revealed that there had been a malfunction in the monitoring equipment which accounted for the apparent breach of condition. On 13 March 2009 counsel for the informant acknowledged that that charge should not have been brought. The granting of electronic monitoring bail followed.

[4] There were two unsuccessful attempts to hear the defended charge which remained, the alleged breach of home detention by the consumption of illicit drugs. That was finally heard on 17 June 2009. The prosecution evidence was completed but the case was adjourned for submissions on the admissibility of the appellant's admission of cannabis consumption, which had been made in questioning by the probation officer without a caution under the New Zealand Bill of Rights Act 1990 (BORA). Written submissions were exchanged and a lengthy reserved decision was delivered by Judge Atkins on 17 August 2009, ruling that the evidence was admissible. There was a further hearing for the presentation of defence evidence on 3 September 2009, and judgment was delivered on 29 September 2009. The appellant was found guilty of the alleged breach by consumption of cannabis. He was remanded on continued electronically monitored bail for sentence on 20 October 2009.

[5] In sentencing, Judge Atkins proceeded as follows:

(a) On the application by Corrections to cancel the sentence of home detention, he noted that the appellant had served seven months of the sentence and had five months to complete. Judge Atkins noted that he felt obliged to follow the approach suggested in *R v Piper* HC Auckland CRI-2007-004-00798, 27 February 2008 indicating that with respect to the cancellation of home detention and the substitution of a prison sentence the appropriate course is to identify the amount of home detention yet to be served and then double it because detainees are automatically released after serving half of the sentence under s 86 of the Parole Act. On that basis Judge Atkins held that the appropriate sentence in substitution of the remaining home detention of five months would be 10 months imprisonment.

(b) For the two breaches, consumption of alcohol and cannabis respectively, he imposed additional cumulative sentences of one month and two months respectively, bringing the total from 10 months to 13 months.

[6] There are appeals both against conviction (effectively, an appeal against the admission of the confession) and against sentence. Somewhat unusually, I propose to consider first the appeal against sentence. In view of the lengthy and somewhat complex history of this matter, I think it is appropriate to set out the overall current position concerning sentence. The appellant had been serving a sentence of home detention, which he would have completed in May 2009, for the original offending. He had served seven months of that sentence by December 2008. He then spent a period of nearly four months, from 4 December 2008 to 31 March 2009, in custody. He then spent a period from 31 March 2009 to the present date on electronically monitored bail (bail having been allowed pending the hearing of this appeal). The effect of the present sentence, if it is upheld, will be that the appellant must return to prison and serve a term of about two months (one half of the sentence of 13 months, less the period spent in custody on remand).

[7] In imposing the sentence of 10 months for the original offending, Judge Atkins had, as I have noted, felt obliged to follow the approach adopted by this Court in *Piper*. There, Keane J had, in very short sentencing notes, said:

> [2] When I sentenced you to home detention I told you that the sentence that I would otherwise have imposed was 18 months imprisonment. Nine months home detention was nevertheless appropriate because you could have expected to be released halfway through the sentence, after nine months. In sentencing you now to imprisonment, in place of home detention, the reverse applies and I have also to take into account under s 80G(2) the extent to which you have served the sentence now cancelled. Six months of that sentence remains to be served.

[8] I do not consider that, in that decision, Keane J is to be taken as establishing a general rule that in all cases there must be an arithmetical calculation of the sort he considered appropriate in that case. Where a sentence of home detention is cancelled, the Court may, under s 80F(4)(d) of the Sentencing Act 2002: "Cancel the sentence and substitute any other sentence (including another sentence of home detention) that could have been imposed on the offender at the time that the offender was convicted of the offence for which the sentence was imposed". The appropriate sentence becomes at large. In some cases it may be appropriate to adopt the approach which Keane J adopted. In others it may not. Because Judge Atkins had felt obliged to follow that approach here, I consider that, on this appeal, it is appropriate to consider for myself what would be the appropriate sentence.

[9] In doing so, I consider it appropriate to take into account the overall sentence position, which I have earlier set out. Adopting that approach, the effect of the sentence, namely that the appellant would have to return to prison for a short period, following a lengthy period of electronic bail, is an important consideration. I need to assess whether that outcome is appropriate and necessary to achieve the purposes of sentencing in s 7.

[10] This young man had not previously served a term of imprisonment. He has now experienced four months in prison. The "clang of the prison gates" effect, so far as it may serve to deter him, or assist in his rehabilitation, has already been achieved. I do not regard those purposes of sentencing as now requiring a return to prison for a comparatively short period. Also relevant as purposes of this sentencing

are the denunciation of his conduct and the deterrence of others. Counsel for the respondent submitted that the original offending was serious offending, and that the original sentence of home detention rather than imprisonment was preferred by a narrow margin. He also, quite rightly, emphasised the need to maintain the integrity of the sentence of home detention. Counsel referred to the judgment of this Court in *Pahi v Police* HC Christchurch CRI-2008-409-102, 10 July 2008 where the need for deterrent sentences for breaches of home detention, to bring home that the sentence is not to be trifled with, is emphasised. Those considerations are indeed important in this case. I consider that those purposes have been achieved by the history which I have described. The appellant has already suffered a significant additional penalty from his actions. His breaches of home detention have meant that, rather than completing his sentence and being free from it in May 2009, the appellant has spent nearly four months of what would have been a term of home detention in jail and has, since his term of home detention would have ended, spent another six months on bail terms which were similarly restrictive to home detention.

[11] In reaching the view that the relevant purposes of sentencing have been achieved by the sentence imposed to date, I also take into account that a co-offender of the appellant, who was similarly sentenced to home detention but breached those terms, received considerably lesser consequences than those which have been visited on the appellant. Judge Atkins did take that aspect into consideration in the sentence which he imposed. However, I have, for the reasons I have indicated, adopted a rather different approach. I must therefore reconsider the question of disparity.

[12] Accordingly, in all of the circumstances, and recognising that the history of this case is unusual and somewhat convoluted, I have reached the view that the appeal against sentence should be allowed. The total sentence of imprisonment imposed should be reduced to a term which is equivalent to the term of imprisonment already served. The effect of that will be the appellant is entitled to immediate release.

[13] I turn now to the appeal against conviction. The issue raised on that appeal is Judge Atkins' ruling as to the admissibility of the appellant's admission of consumption of cannabis. It was the subject of a considered and carefully reasoned

judgment. The Judge held that the appellant's rights under s 23 of BORA had been breached, but that on the basis of the balancing exercise in s 30 of the Evidence Act 2006, the evidence was admissible. The application of the rights of a person who is under detention which are contained in s 23 of BORA, to the specific case of an ongoing detention by way of home detention, is a matter which may at some stage require close consideration. A similar, but not identical, question was addressed by the Court of Appeal in *R v R* CA184/92, CA171/92, 3 August 1993. Judge Atkins applied that case in concluding that the appellant's rights under s 23 were breached. The respondent did not seek to challenge that conclusion. The focus of the appeal was as to the way in which Judge Atkins applied the balancing test in s 30 of the Evidence Act. My decision on the sentence appeal means that the practical effect of the conviction on the second breach of home detention, the consumption of cannabis, assumes much less importance. I consider that the way in which the balancing test is to be applied in the case of a probation officer who is monitoring compliance with a sentence of home detention is an important matter, which may require more detailed consideration in the future. I do not consider it appropriate to venture upon that issue here. It is sufficient to say that Judge Atkins conducted a very careful and thorough review in carrying out the balancing exercise. I would not regard this case as a proper one for the intervention of this Court on that balancing exercise. For these reasons, I would dismiss the appeal against conviction.

[14] The result of the appeal is as follows:

a) The appeal against conviction is dismissed;

b) The appeal against sentence is allowed. The term of 10 months imposed on the original charge is quashed and a term of seven and a half months is substituted. The sentences on the other charges are to be served concurrently, not cumulatively, with that sentence.

"A D MacKenzie J"

Solicitors: Crown Solicitor for Respondent
P S Coles, Palmerston North for Appellant