IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CRI-2009-454-47

KEN DAVEY
Appellant

v

MINISTRY OF SOCIAL DEVELOPMENT
Respondent

Hearing: 14 December 2009

Appearances: O S Winter for Appellant
P L Murray for Respondent

Judgment: 15 December 2009 at 2pm

In accordance with r 11.5 I direct the Registrar to endorse this judgment with a delivery time of 2pm on the 15th day of December 2009.

RESERVED JUDGMENT OF MACKENZIE J

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[1] The appellant faced a number of charges under ss 228, 229A and 240 of the Crimes Act 1961 of obtaining benefits under the Social Security Act 1964 by fraudulent, dishonest and deceptive means over a period of some seven years. The amount involved was $110,280.

[2] Charges were laid on 13 July 2009 and he first appeared, before a Registrar, on 25 August 2009. On his first appearance before a Judge on 27 August 2009 he

entered guilty pleas to all charges. The appellant was remanded in custody for sentencing. Judge Garland ordered a pre-sentence report but declined to seek an appendix assessing the appellant's suitability for home detention.

[3] The sentencing date was 21 October 2009. On 19 October, counsel for the appellant filed a memorandum in respect to the absence of an appendix on home detention and community detention. Counsel indicated an intention to seek an adjournment in order that a home detention appendix could be completed for the appellant. In that memorandum counsel set out the features on which counsel intended to rely to support a submission that a sentence of home detention should be considered.

[4] At the hearing on 21 October Judge Ross dealt with the application for further remand, before sentencing. He noted that a home detention appendix had not been sought by the convicting Judge when the guilty pleas were entered and expressed the view that it was a deliberate step on the part of the convicting Judge not to seek such a report in the particular circumstances of the case. Judge Ross went on to say:

> I have read the memoranda of both counsel, for the defendant as well as the informant, and prepared for sentence today in relation to the defendant. Sentencing will take place today. The view that I have formed about the matter is that even if there were a report in respect of the home detention, that though there is not, I can proceed on the basis that home detention might otherwise have been available for him but not considered and that for the purposes of sentencing today he might be regarded as suitable for such a sentence.

[5] Judge Ross then proceeded to sentence the appellant. He adopted a starting point of two years and six months. He allowed a full one third discount for the guilty plea which was very early and at the first available opportunity that gave a reduction of ten months, to one year and eight months. He also took into account some personal circumstances for which he allowed a further discount of three months with an end point sentence of one year and five months.

[6] Mr Winter does not take issue with either the starting point or the end point of that sentence, if a sentence of imprisonment was appropriate. Rather, the essence of the appeal is that, by reason of the failure to obtain a home detention appendix, the

possibility that home detention might in the circumstances of the case be an available sentencing option was not properly considered.

[7] Mr Winter relies, as he had in the District Court, on the decision of Heath J in *Werahiko v Ministry of Social Development* HC Rotorua CRI-2008-463-55, 5 September 2008. In that case the appellant had pleaded guilty to four charges of benefit fraud over a period of ten years involving $85,000. The sentencing Judge did not consider whether home detention was an appropriate sentencing option and imposed a sentence of one year. Heath J noted that the possibility of home detention had not been expressly addressed, because the then recent decision of the Court of Appeal in *R v Hill* [2008] 2 NZLR 381 had not been drawn to the Judge's attention. Heath J said:

> Had that case been known to the Judge, I am sure that she would have embarked upon analysis of whether home detention was a more appropriate sentence.

[8] Heath J according undertook the sentencing exercise afresh. He noted the starting point as being s 16(2) of the Sentencing Act 2002 (the Act) which requires consideration of whether the sentencing purposes can be addressed by a sentence other than imprisonment. He referred to the Court of Appeal decision in *Hill* which also emphasised the need to consider imposition of a sentence of home detention in the light of the hierarchy sentences now set out in s 10A of the Act. He noted that the appendix to the probation officer's report made it clear that the appellant was suitable for a sentence of home detention and he also noted the Judge's finding that the appellant was unlikely to offend again and was remorseful. Heath J was satisfied that the Judge ought to have imposed a term of home detention and substituted a term accordingly.

[9] Before a sentence of home detention may be imposed, the pre-sentence report must be prepared in accordance with s 26A of the Act. The probation officer must prepare the pre-sentence report in accordance with subs (2) if the Court has indicated that it is considering a sentence of community detention or home detention or the probation officer intends to recommend a sentence of community detention or home detention. The issue on this appeal is whether, by reason of the absence of such a report, the sentencing Judge has failed to consider whether a sentence of home

detention would have been appropriate, and therefore the least restrictive outcome, and so has erred in principle in imposing the sentence of imprisonment.

[10] This case is clearly distinguishable from *Werahiko*, in that here the possible availability of a sentence of home detention was clearly known to the sentencing Judge and in his mind. The terms of his judgment refusing the adjournment, set out above, make it clear that he approached the task of sentencing on the basis that a sentence of home detention was potentially available. He clearly reached the conclusion that such a sentence was not appropriate.

[11] I do not consider that, in every case in which a sentence of home detention is, as a matter of jurisdiction, potentially available, a s 26A report must be directed. That is clear from s 26(1) which requires such a report to be prepared only where the Court has indicated that such a sentence is under consideration, not in every case where it is, as a matter of jurisdiction, available. The Act contemplates that a Judge may at the stage when a pre-sentence report is ordered, reach the view that home detention will not be an available sentencing option. Here, the Judge clearly had in mind the potential availability of home detention but concluded, having considered all relevant factors, that that was not an appropriate sentence.

[12] Mr Winter further submits that the rejection of that sentence should have been explicit in the sentencing notes, and that the effective rejection of that option in the oral judgment refusing an adjournment was not appropriate.

[13] The Judge has, in quite lengthy notes, carefully balanced all factors. He specifically noted the need for deterrence in the case of benefit fraud. He said:

> [27] The reason for this is that the beneficiary numbers in the New Zealand community are at such significant numbers and a proportionate of the population that there needs to be a tangible and measurable deterrent for offending of this kind and on this scale. This is a reminder to that group of the need for faithful accuracy and honesty in answering the requirements of the department and it is for this reason that a term of imprisonment, which is a measurable, tangible and understandable consequence as the most restrictive penalty and the most detentive penalty and as the most senior penalty that can be imposed can in an appropriate case, be the only penalty that the Court ought to consider as appropriate for the offending in the circumstances which I have outlined.

> [28] It is for this reason that the approach is taken, in your case, that there should not be a reference to consideration of home detention as the appropriate or a suitable sentence for you in the particular circumstances.

[14] The Judge, in the course of reaching that conclusion, had already referred to the three aspects of the appellant's personal circumstances which are particularly relied upon by counsel for the appellant; namely absence of previous convictions, medical problems of the appellant and that the reasons for the appellant's initial offending involved his daughter. The Judge clearly took into account that there was jurisdiction to impose a sentence of home detention. He assumed that the appellant was qualified by his personal circumstances for that sentence. He reached his conclusion that it was not an appropriate sentence by a clear and cogent reasoning process. There is no error in the Judge's approach.

[15] It is clear that a sentence of imprisonment is a usual and appropriate outcome for cases of substantial benefit fraud. A full court of this Court made that clear, before the amendment, in *Hogan v Ministry of Social Development* (2005) 23 CRNZ 500. The introduction of the new sentence of home detention introduces a new aspect which may need to be addressed in such cases. I agree with the view expressed by Rodney Hansen J in *Savage v New Zealand Police* HC Whangarei CRI-2008-488-0001, 14 February 2008 that the legislation intended to confer a broad distinction and the weight to be given to relevant factors is a matter for the sentencing Judge.

[16] This was a serious case of benefit offending where a sentence of imprisonment was clearly an appropriate outcome and counsel for the appellant does not challenge that proposition, nor the length of the term imposed. I consider that the availability of a sentence of home detention was clearly in the Judge's mind. He expressly approached the task of sentencing on the basis that that sentence was an available option, and expressly rejected it. In doing so he took into account the personal circumstances of the appellant. His assumption that the appellant would have been suitable clearly removes any suggestion that his rejection of that option was for reasons on which the availability of a s 26A appendix may have cast further light.

[17] I am satisfied that the appellant has not demonstrated any error in principle. For these reasons the appeal must be dismissed.

"A D MacKenzie J"

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