IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI 2009-409-000200

ALEXANDRE FIRIOUBINE
Appellant

v

POLICE
Respondent

Hearing: 31 March 2010

Counsel: S Poore for Appellant
T J Mackenzie for Respondent

Judgment: 31 March 2010

JUDGMENT OF FOGARTY J

---

[1] On 19 November last Judge M A Crosbie imposed a sentence of three years four months imprisonment on the appellant as a result of a number of offences of a fraudulent character and he went on to impose a minimum period of imprisonment of 18 months. This is an appeal against the imposition of a minimum period of imprisonment.

[2] The principal argument advanced in the written submissions is that it is unusual for a case of this sort to have a minimum period of imprisonment imposed. The decision to impose a minimum period of imprisonment is made under s 86 of the Sentencing Act 2002. This grants a discretion to the sentencing Judge to impose a

minimum period of imprisonment taking into account all or any of four criteria. In this case the Judge gave as his reasons:

> [34] Applying the decision of Winkelmann J in *Fitzsimmons* and the provisions of the Act, the period that you would otherwise serve would be inadequate for the purposes of denouncing your conduct and for general deterrent purposes. There should be a minimum period of imprisonment. That will be, in your case, 18 months imprisonment.

[3] Section 86(2)(b) and (c) of the Sentencing Act provides:

> **86 Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment**
>
> ...
>
> (2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:
>
> ...
>
> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> ...

[4] From this set of criteria it can be seen that the Judge selected two criteria: (b) denouncing the conduct; and the second part of (c) deterring other persons from committing the same or a similar offence.

[5] The law is quite clear that on appeals from the exercise of discretion the appellate Judge must be satisfied that the sentencing Judge made an error of principle or that the decision manifestly cannot stand.

[6] Mr Poore was not able to argue that there was any manifest error of principle. Rather, he was arguing that this was an unusual decision because it is not commonly done. That latter argument is not available on a contention that there has been an error of principle. Accordingly, the appeal falls back on the proposition which is in Mr Poore's written submissions, that a minimum period of imprisonment was clearly excessive in relation to the offending in this instance. Translated into an appeal

against this power, it means that Mr Poore has to persuade the Court that the exercise of the discretion in favour of imposing a minimum period of imprisonment is simply not reasonably open to the sentencing Judge.

[7] It is a slightly different question from the test of whether or not the term of imprisonment, as distinct from the minimum term, is excessive. In that latter instance Judges are very often applying established tariffs of comparable sentencing.

[8] I am of the view that Mr Poore cannot sustain an argument that the minimum period of imprisonment was clearly excessive for the combination of reasons that the Judge was clearly addressing two specific criteria and on the facts was dealing with a serious case of fraud. There are two ways of measuring financial fraud of this sort. One is by the dollar amount taken but the other is by the impact on the victims. Stripping a trading bank or a large institution of some hundreds of thousands or millions of dollars is one thing. However, taking a much smaller amount away from a pensioner can be viewed also as a very serious set of offending.

[9] Standing back from the case, I am satisfied that this decision by Judge Crosbie is clearly within his competence and no basis has been advanced for an appellate Judge disturbing it. As I understand from the bar, if the decision had not been imposed the appellant would be eligible for parole after 13 months. He is now going to be eligible for parole after 18 months.

[10] The appeal is dismissed.

Solicitors:
S Poore, Christchurch, for Appellant
Raymond Donnelly & Co, Christchurch, for Respondent