

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

**CRI-2012-412-18
[2012] NZHC 1125**

GLEN ROBERT CHERRY
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 24 May 2012

Counsel: J A Westgate for Appellant
R D Smith for Respondent

Judgment: 24 May 2012

(ORAL) JUDGMENT OF LANG J
[on appeal against sentence]

[1] Mr Cherry pleaded guilty in the District Court to a charge of theft by a person in a special relationship. On 3 April 2012, Judge Crosbie sentenced him to nine months imprisonment.¹ Mr Cherry now appeals against sentence. He contends the Judge ought to have sentenced him to home detention.

[2] The charge arose out of Mr Cherry's employment as a security guard. One of his duties was to replenish the cash in automatic teller machines. In order to carry out this function, Mr Cherry was entrusted with a security clearance, keys and codes that enabled him to gain access to the machines.

[3] Mr Cherry encountered health issues that meant he was no longer able to hold a driver's licence of the category required by his employer. His employer found other duties for him for a period, but was ultimately obliged to terminate his employment. On his last day of work, Mr Cherry used his access codes to gain access to a bank ATM. He then withdrew the sum of \$5,160 in cash from the machine. When the theft of the cash was discovered, Mr Cherry acknowledged accessing the machine, but denied taking any cash. He also subsequently refused to explain to anyone what he had done with the money.

[4] The Judge rightly took the view that Mr Cherry's offending had significant aggravating aspects. These included the fact that Mr Cherry had abused a position of trust to steal money from both his employer and the bank. He stole from his employer because his employer was required to reimburse the funds that Mr Cherry had stolen.

[5] Faced with the gravity of the offending, the Judge properly considered that the issue of deterrence was to the forefront. He selected a starting point of 18 months imprisonment, and then allowed a generous deduction of 50 per cent to reflect Mr Cherry's early guilty plea and the fact that the Judge was ordering reparation in full. This produced the end sentence of nine months imprisonment.

¹ *R v Cherry* DC Dunedin CRI-2012-412-18, 3 April 2012.

[6] I consider the sentence the Judge imposed was entirely appropriate given the aggravating aspects of Mr Cherry's offending and the material available to the Judge at the time of sentencing. Matters have now changed to some extent, because Mr Cherry has today paid the reparation in full. More importantly, however, I now have detailed information regarding Mr Cherry's domestic situation and the manner in which the sentence of imprisonment is affecting the family. The Judge did not have this information when he sentenced Mr Cherry.

[7] Counsel for Mr Cherry has provided material from Mr Cherry's fiancée, including a medical certificate and a letter in which she explains the effect that Mr Cherry's imprisonment is having on the family as a whole. She explains that she and Mr Cherry have three children aged nine years, eight years and eight weeks. His fiancée suffers from depression, migraines and anaemia. She also has a brain condition that requires treatment. She has also been involved in an accident recently, and is now on crutches. Her nine year old son has anger and behavioural problems that need constant attention and monitoring. Her new-born daughter has serious health complications and is very unsettled. All of these factors mean that Mr Cherry's fiancée is finding it extraordinarily difficult to manage the household on a day to day basis.

[8] Had these matters been before the Judge, I am not sure that they would have affected the sentence that he imposed. The tenor of his sentencing remarks suggests that issues of deterrence would have outweighed even the effect that imprisonment would have on Mr Cherry's family.

[9] Mr Cherry has, however, now served the equivalent of a four month sentence of imprisonment. This is likely to have had a salutary effect on him. Taking into account the fact that reparation has now been paid and the effect that imprisonment is having on Mr Cherry's family, I am prepared to intervene in order to alleviate the family's stress. I am only prepared to do so, however, on the basis that Mr Cherry serves a reasonably lengthy sentence of home detention in substitution for the balance of the sentence of imprisonment that Mr Cherry would otherwise serve.

[10] For that reason I allow the appeal and quash the sentence of imprisonment that the Judge imposed. In its place, I impose a sentence of four months two weeks home detention and impose the following conditions:

- (a) Mr Cherry is to be released from prison at a time convenient to the prison authorities on 25 May 2012.
- (b) He is to travel from Otago Prison to 39 Molyneux Avenue, Cromwell by the most direct practicable route, and is there to await the arrival of the probation officer and monitoring company.
- (c) He is to reside at 30 Molyneux Avenue, Cromwell for the duration of the sentence and is not to change address without the prior written approval of the probation officer.
- (d) He is not to possess or consume alcohol or illicit drugs for the duration of the sentence of home detention.
- (e) In all other respects he is to comply with the directions of his probation officer.

Lang J

Solicitors:
Crown Solicitor, Dunedin
Counsel:
JA Westgate, Dunedin