

IN THE COURT OF APPEAL OF NEW ZEALAND

CA306/03

THE QUEEN

v

WAYNE FRANCIS BAILEY

Coram: Glazebrook J
William Young J
O'Regan J

Counsel: J H M Eaton for Appellant
B J Horsley for Crown

Judgment (On the papers): 10 May 2004

JUDGMENT OF THE COURT DELIVERED BY O'REGAN J

[1] This appeal against sentence has been heard on the papers under the Crimes (Criminal Appeals) Amendment Act 2001. The relevant materials, including written submissions which have been received in accordance with r29 of the Court of Appeal (Criminal) Rules 2001, have been considered by the members of the court who have conferred and agreed upon this judgment.

[2] Mr Bailey pleaded guilty at the District Court in Christchurch on 16 June 2003 to one count of using a document with intent to defraud pursuant to s229A Crimes Act 1961. On 30 June 2003 he was sentenced to 400 hours community work and ordered to pay reparation of \$17,840.00 at the rate of \$20 per week. The sentence of 400

hours of community work was concurrent with another sentence of 400 hours of community work imposed in lieu of outstanding fines of \$4,565.

[3] Mr Bailey filed a Notice of Appeal in this court on 14 August 2003, which meant that the appeal was out of time. No reason has been given for the late filing of the appeal. The grounds of appeal are that the sentence was manifestly excessive, particularly having regard to the sentence imposed on a co-defendant and that the reparation order failed to have regard to the reparation orders made against his co-defendant.

Background facts

[4] On 14 May 2001 there was a burglary at the offices situated at Level 3, 12 Cashel Street, Christchurch. Mr Bailey's business (a Call Centre) occupied those premises as a tenant.

[5] Two computers were stolen during the burglary. One of these belonged to Mr Bailey's business and was valued at \$4,125. The other computer was owned by a third party.

[6] An employee of Mr Bailey's business, Mr Steedman, prepared a list of all property stolen during the burglary which said that five computers had been stolen. On 16 May 2001 Mr Bailey signed a State Insurance Limited claim form declaring that five computers had been stolen. He received a cash settlement from State Insurance of \$11,225 for the software he reported stolen, and also had the five computers replaced. The total value of the settlement was in the region of \$22,000. The difference between what State Insurance would have been obliged to pay under the claim if it had been honestly made, and the amount actually paid by State Insurance on the claim which was made was \$17,840.

[7] About three months later the premises occupied by Mr Bailey's business were again burgled. In November 2001 the offender in relation to both burglaries admitted his responsibility for them. He claimed that the second burglary had been

arranged by Mr Steedman. He told police that he had stolen two computers in the May burglary.

[8] Mr Steedman was charged with one count under s 229A Crimes Act 1961 in relation to the inflated insurance claim for the May burglary, and another count of attempting to use a document with intent to defraud under s229A in relation to an insurance claim made following the August burglary, and was also charged with an unrelated fraud. Steedman pleaded guilty to being party to the August burglary and was sentenced to three months periodic detention. Later he pleaded guilty to the three fraud charges referred to above and was sentenced to a further three months periodic detention. No order for reparation was made.

Grounds for appeal

[9] It is submitted on behalf of Mr Bailey that:

- a) A sentence of 400 hours community work was manifestly excessive as a substitute sentence for the remitted fines;
- b) A sentence of 400 hours community work for the s229A offence was disparate to the sentence of three months periodic detention imposed on Steedman;
- c) A sentence of 400 hours community work was in any event manifestly excessive as a sentence for the s229A offence;
- d) In any event the reparation order was inappropriate.

[10] We will deal with each of these in turn.

Remission of fines: Manifestly excessive

[11] Counsel for Mr Bailey said that the sentence of 400 hours community work reflects the maximum number of hours of community work that can be imposed on

an offender under s 55(2) Sentencing Act 2003. He said given the amount of fines this was manifestly excessive in the circumstances.

[12] Counsel for the Crown said that the sentence of 400 hours community work in substitute for the remitted fines of \$4,500 could not be looked at in isolation. Rather, it was clear that the judge had set a sentence which reflected the totality of the criminality encapsulated in the s229A charge and in the remission of fines. He said it was wrong to characterise 400 hours community work as being applicable to the remission of fines alone.

[13] While the judge imposed separate sentences of 400 hours community work in relation to the remission of fines and the s229A offence, and then made those sentences concurrent, we accept Crown Counsel's submission that the sentence must be looked at in the context of the totality of offending. We will consider that issue when we come to the third ground of appeal.

[14] Although the judge had before him a statement of means completed by Mr Bailey as contemplated by s106E Summary Proceedings Act, he did not say in his sentencing notes that he was acting in accordance with that section in remitting a fine imposed on Mr Baxter for previous offending. However there was no challenge to the Judge's jurisdiction to remit the fine in this case.

Disparity with Steedman's sentence

[15] Counsel for Mr Bailey said that Steedman received a sentence of three months periodic detention in relation to three separate frauds and was not required to make reparation. He compared this with the 400 hours community work imposed on the appellant and said that a disparity existed because the appellant faced only one charge under s229A, as well as having the fines of approximately \$4,500 remitted. He said this gave rise to a marked difference for which no justification could be shown and that such a marked and unjustified difference would tend to bring the administration of justice into disrepute, relying on the often quoted decision of this court in *R v Lawson* [1982] 2 NZLR 219 at 223 (McMullin J).

[16] Counsel said that Mr Bailey had relied on an indication from the prosecution that if he pleaded guilty the prosecutor would seek a sentence similar to that imposed on Mr Steedman. He said that three months periodic detention equates to about 130 hours of community work and suggested that a sentence of that magnitude was necessary to ensure that no disparity arose.

[17] Counsel for the Crown argued that the circumstances of the sentencing of Mr Steedman and of Mr Bailey in this case did not give rise to a disparity of the kind described in *Lawson*. He said the mere fact that Mr Steedman was sentenced to a lesser sentence did not provide grounds for interfering with the sentence imposed on Mr Bailey. In that regard he noted that the sentence imposed on Mr Bailey could not said to be excessive in the circumstances of the offending and that the leniency shown to Mr Steedman should not lead to a reduction of a sentence imposed on Mr Bailey which is not, in itself, excessive. He also noted the fact that, while Mr Steedman had prepared the fraudulent insurance claim form in relation to the May burglary, it was Mr Bailey who stood to benefit financially from the making of the false insurance claim. He also noted that Mr Bailey had had substantial fines remitted which was not the case in relation to Mr Steedman.

[18] In the circumstances, we are satisfied that, while the sentence imposed on Mr Steedman could be described as lenient in the circumstances, the difference between sentences imposed in this case does not give rise to a disparity of the kind described in *R v Lawson*. In that respect we accept the submission from the Crown counsel that the fact that the appellant was the person who stood to gain financially from the false insurance claim, and the fact that substantial fines were remitted are significant factors.

[19] This ground of appeal therefore fails.

Sentence is manifestly excessive

[20] The third ground of appeal is that the sentence of 400 hours community work was manifestly excessive in relation to the totality of the offending. Counsel for Mr Bailey argued that 400 hours was the maximum community work sentence which

could be imposed, and that it was difficult to see any credit having been brought in for a guilty plea and for the generally positive pre-sentence report.

[21] Counsel for the Crown said that the offending was deliberate, Mr Bailey had gained \$17,800 as a result of it, he had previous convictions for dishonesty offences and his guilty plea came only on the morning of the trial. Crown Counsel suggested that Mr Bailey may have been fortunate to have avoided a custodial sentence and that the sentence of 400 hours community work could not be said to be excessive, let alone manifestly excessive.

[22] While we accept that the pre-sentence report was generally positive, and that the appellant's personal circumstances are now difficult because of the losses suffered in the second burglary, we accept Crown counsel's submission that a sentence of 400 hours community work for the s229A offence and the remission of fines of about \$4,500 cannot be considered excessive in the circumstances. We accept that it was at the upper end of the range available to the sentencing judge, but we are satisfied that it still fell within that range.

Reparation

[23] Reparation of \$17,840 was ordered to be paid at the rate of \$20 per week. That order was made notwithstanding the reparation report presented at sentencing showed that the appellant's financial situation was very poor. As counsel for the Crown conceded, the order which was made, requiring payment of \$20 per week, would require 17 years of payments before full reparation was made. The judge provided for a review of the reparation order after three years, but as was conceded by Crown counsel, this did not alter the fact that the amount of reparation which the judge ordered to be paid under s36 Sentencing Act 2002 was \$17,840. Crown counsel conceded in the circumstances a requirement for payments to continue for a period of up to 17 years as excessive.

[24] Counsel for Mr Bailey submitted that any reparation order was inappropriate in this case. On the other hand counsel for the Crown suggested that an order for reparation extending for a period of five years at the current rate would be

appropriate in the circumstances. That would mean that reparations of approximately \$5,000 would be payable, which is considerably less than the amount gained as a result of the insurance fraud.

[25] We believe the judge was right to impose a reparation order, but we accept that the order has to be set at a level which makes it realistic given the financial circumstances of the person against whom it was made. An order which will require 17 years to achieve for repayment does not fall within that category. In our view, an order that reparation of \$3,000 be made at \$20 per week should be substituted for the current order. That will take about 3 years to pay in full.

Decision

[26] We therefore allow the appeal in part. The order made by the District Court Judge that reparation in the sum of \$17,740 be made will be quashed and replaced by an order that reparation in the sum of \$3,000 be made at a rate of \$20 per week. In all other respects the appeal is dismissed and the concurrent sentences of 400 hours community work will stand.

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