

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA559/07
[2008] NZCA 41**

THE QUEEN

v

JOSEPH COLIN HILL

Hearing: 7 February 2008

Court: Glazebrook, Hammond and Arnold JJ

Counsel: A Speed for Appellant
A Markham for Crown

Judgment: 29 February 2008 at 12 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of two years three months imprisonment is quashed.

C We substitute a sentence of 12 months home detention and 200 hours community work. The sentence of home detention is subject to the following special conditions. The appellant is to:

(a) Reside at 33 Halberg Place, Papakura, Auckland, or such other place as his probation officer approves;

- (b) **Complete the Community Alcohol and Drug Service Intensive Outpatient programme (or an equivalent programme as directed by his probation officer);**
- (c) **Undertake relationship and grief counselling as directed by his probation officer;**
- (d) **Undertake such employment or employment training as his probation officer directs;**

in each case, to the satisfaction of his probation officer.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] Following a jury trial in the High Court before Williams J, the appellant was convicted on one count of possession of methamphetamine, a class A controlled drug, for the purpose of supply. He was sentenced to a term of imprisonment of two years three months.

[2] The appellant appeals against his sentence. Mr Speed raises two points on his behalf:

- (a) The Judge placed the case within band two of *R v Fatu* [2006] 2 NZLR 72 (CA) and took a starting point of three years six months. This was too high as the case properly fell within band one;
- (b) In light of the changes to the home detention regime effected by the Sentencing Amendment Act 2007, the Judge should have sentenced the appellant to 12 months home detention.

Factual background

[3] The police executed a search warrant in respect of a house occupied by members of the Headhunters gang. The appellant was living there at the time. In his bedroom the police found a tin under a cushion, in which they found two snaplock bags containing 6.3 grams of methamphetamine and seven empty snaplock bags (of the type used as point bags). In addition, a further 90 empty snaplock bags were found in the appellant's backpack in his bedroom. The 6.3 grams of methamphetamine had a street value of approximately \$6,300 if sold in point bags.

[4] Under another cushion in the appellant's bedroom, the police found a tin containing \$4,360. In addition, the appellant had a further \$1,225 in his wallet. Six Vodafone SIM cards were also found in the bedroom. Finally, there was a television monitor in the appellant's bedroom, which was linked to surveillance equipment covering the exterior of the premises.

[5] The appellant gave evidence at trial. He said the methamphetamine was for his own use. He said that he was a heavy user at that time. He denied that he had supplied drugs in the past, and said that he had no intention of doing so in the future. He claimed that the cash found in his bedroom came from the sale of a motorbike, which he owned although it was never registered in his name. The appellant was unemployed at the time, but did not receive an unemployment or other benefit.

[6] The appellant accepted that the police did not find a glass pipe and burner of the type typically possessed by users, but said that he "snorted" the drug through his nose.

[7] In returning the guilty verdict, the jury obviously rejected the appellant's claim that the methamphetamine was all for his own use.

High Court decision

[8] In May 2007 (after his arrest, but before his trial) the appellant began a Community Alcohol and Drug Service (CADS) programme as an "intensive out-

patient”. According to his pre-sentence report (written in mid-October), he had been substance free since beginning the CADS programme. The pre-sentence report ascribed the appellant’s use of methamphetamine to two factors in particular – his associates and his inability to deal with the death of his mother, to whom he was very close. The report noted that he had moved to a new address, where he was receiving excellent support from a committed friend, and had begun to re-establish contact with his family, especially his father. In addition, he had become involved, successfully, in soccer coaching for 7-12 year old children.

[9] Overall, the material before the Court indicated that the appellant had a high level of motivation to change and had made good progress towards rehabilitation.

[10] In sentencing the appellant Williams J noted that he was involved intensively in rehabilitation and said that he was described as being “very positive towards rehabilitation” and “a very low risk” of re-offending. The Judge also said that there was nothing of concern in the appellant’s previous record and accepted Mr Speed’s submission that there was no suggestion of past dealing. The Judge said that all he could do was to “draw inferences from the paraphernalia found in [the appellant’s] possession and the evidence as to the prospect of future dealings”: at [11].

[11] The Judge then said:

[13] As I discussed with counsel during the sentencing submissions, yours is a difficult case – all cases are difficult to sentence but yours is particularly so – in terms of the leading Court of Appeal judgment in this area of *Fatu*. Band 1, which the Court of Appeal describes as “low level supply of less than 5 grams”, draws a starting point of between two and four years’ imprisonment. Band 2, which is the supply of commercial quantities of five grams to 250 grams, draws a starting point of three to nine years’ imprisonment and there is the obvious overlap between those two in the three to four year range and, as has been remarked on other occasions, it is not particularly helpful that band 2 starts at five grams and has a top amount of methamphetamine 50 times that.

[14] However, [counsel for the Crown] suggests, you are towards the bottom of band 2 in terms of a starting point. Mr Speed presses me to say that you were only in band 1. Unfortunately the amount of methamphetamine found in your possession, 6.3 grams, exceeds the band 1 maximum [of] five grams and accordingly I am obliged to deal with you in band 2 but I accept completely that you are at the lower end of band 2.

[12] The Judge then went on to deal with the effect of the Sentencing Amendment Act. He said:

[16] The difficulty here really relates to the coming into force of the Sentencing Amendment Act 2007. Section 80A empowers Judges to impose a sentence of home detention as a sentence in itself, not as a matter of leave from the Parole Board. The difficulty, though, is that Parliament has said the maximum length of home detention that can be imposed is 12 months.

[17] In your case I am still obliged to try and fashion a sentence which will demonstrate a sense of accountability for the harm done to the community by you in the circulation of methamphetamine, try and promote a sense of responsibility in you – that seems to have been achieved with your rehabilitative efforts – and to denounce the conduct in which you were involved and try to deter others, of course.

[18] I am quite unabashed about saying this: your efforts at rehabilitation have been significant and greater than most persons who come before the Court to be sentenced on a matter of this sort. They deserve some significant reduction in the sentence that needs to be imposed upon you.

[19] The new sentence of home detention has only come into force in the last two or three weeks and, as yet, there is very little in the way of guidelines as to how that should operate. But in terms of *Fatu* and the cases to which [counsel for the Crown] referred and others of which I am aware, you are in terms of a starting point to be sentenced at the bottom of band 2, that is to say three to nine years' imprisonment and most of the cases choose a starting point around about three and a half years' imprisonment. That seems appropriate for you in terms of *Fatu* and these other cases.

[20] The real question here is the amount by which that sentence should be reduced to acknowledge your rehabilitative efforts and to encourage them for the future. If it were possible to achieve, there is every reason, both for you and for the community, to encourage you to rehabilitate yourself: to get off drugs and stay off drugs. But, as I remarked to counsel, I do not think I can do that this morning. To reduce what should be the starting point of three and a half years' imprisonment to essentially 12 months' imprisonment, the maximum period allowable for home detention, for the mitigation provided by your rehabilitative efforts is just too big a jump without the Court of Appeal's reflective consideration as to what should now happen to people such as you in light of the new sentencing regime. To be perfectly frank, if the maximum period of home detention available to me were two years, I would have looked very hard indeed at sentencing you to home detention for that sort of period. But it is not. The maximum period, as I mentioned, is only 12 months. To reduce a three and a half year sentence of imprisonment to 12 months' home detention for your efforts to reform without Court of Appeal assistance and consideration in my view is just too much.

[21] What I feel obliged to do, therefore, is to sentence you to the minimum period of imprisonment which I believe reflects the efforts you have made to date and urge you to do everything you can to continue with your efforts to stay clear of drugs, both in gaol and out of it.

[22] In light of that, in my view the appropriate length of imprisonment is two years three months and you will be sentenced to that.

[13] Following his sentencing the appellant applied for bail pending his appeal to this Court. Williams J granted bail, subject to various conditions, including that the appellant continue to participate in the CADS programme.

Discussion

[14] As we have said, the appellant challenges the Judge's starting point and his refusal to impose a sentence of home detention. We deal with each aspect in turn.

Starting point

[15] Before the Judge Mr Speed contended that the appellant's offending fell within band one of *Fatu*. For its part, the Crown contended that the offending fell at the lower end of band two. The Judge accepted the Crown's submission, on the basis that the quantity of drugs found was 6.3 grams (ie, it exceeded five grams).

[16] Before us, Mr Speed was critical of the Judge's approach, because, he said, it overlooked the point that at least some of the methamphetamine may have been for the appellant's personal use. Once that was taken into account, the amount for supply should have been treated as being below five grams, so that band one was the appropriate band.

[17] We see no error of principle in the Judge's approach. He was well aware that the appellant was an addict and that some of the methamphetamine was for his personal use. But, as the verdict shows, the jury did not accept the appellant's claim that all of the methamphetamine was for his own use and not for supply. There was, then, some element of commerciality involved, albeit on a small scale. Given that there is, as the Judge recognised, some overlap between bands one and two in *Fatu* and that the Judge's assessment of where the appellant's offending fell depended on his view of the evidence, we cannot say that the Judge was wrong to treat the offending as falling at the bottom of band two.

[18] The particular starting point adopted (three years six months) was within the range available to the Judge in terms of *Fatu* and the cases in which that decision has subsequently been applied, albeit at the upper end.

Home detention

[19] Subparts 2A and 2B of the Sentencing Act 2002, as introduced by the Sentencing Amendment Act, establish a new regime for home detention. Home detention is now a sentence in itself and is imposed by the Court (see ss 80A and 15A). The maximum term available is twelve months (s 80A(3)). Home detention does not constitute imprisonment in terms of the Sentencing Act (s 80A(4)), and a sentence of home detention must be served in full – parole is not available.

[20] This regime is to be contrasted with the previous regime, under which the Parole Board could grant home detention to a person sentenced to imprisonment for 2 years or less, provided that the Court granted leave to apply.

[21] Section 15A sets out the circumstances in which a Court may impose a sentence of home detention. It provides:

Sentence of home detention

- (1) If a court is lawfully entitled under this or any other enactment to impose a sentence of home detention, it may impose a sentence of home detention only if—
 - (a) the court is satisfied that the purpose or purposes for which sentence is being imposed cannot be achieved by any less restrictive sentence or combination of sentences; and
 - (b) the court would otherwise sentence the offender to a short-term sentence of imprisonment.
- (2) This section is subject to any provision in this or any other enactment that—
 - (a) provides a presumption in favour of or against imposing a sentence of home detention in relation to a particular offence; or
 - (b) requires a court to impose a sentence of imprisonment in relation to a particular offence.

[22] The words “short-term sentence” in s 15A(1)(b) are defined in s 4. They have the same meaning as in s 4(1) of the Parole Act 2002. Relevantly, s 4(1) of the Parole Act defines “short-term sentence” to include “a determinate sentence of 24 months or less ...”. This definition will be repealed and replaced with a new definition (a sentence of imprisonment of 12 months or less) on a date fixed by the Governor-General in Council – see s 4(3) of the Parole Amendment Act 2007. A new parole regime will come into effect at that time.

[23] Under the current parole regime the general principle is that those sentenced to determinate sentences of more than two years are eligible for parole after serving one third of their sentence (s 84(1) of the Parole Act). By contrast, those sentenced to imprisonment for two years or less serve one half of their sentence before being released automatically (s 86(1) of the Parole Act). The jurisdictional limit for home detention presently found in s 15A(1)(b) through the definition of “short-term sentence” reflects this position. (Under this regime, the appellant will be eligible for parole after serving nine months of his two year three months sentence.)

[24] Under the parole regime to be introduced, persons sentenced to imprisonment for more than one year will have to serve the greater of 12 months or two thirds of their sentence before being eligible for parole, while those sentenced to one year or less will not be eligible for parole at all. Rather, they will have to serve the full sentence. When these changes take effect, the new definition of “short-term sentence” will become applicable to s 15A so as to maintain the coherence of the regime.

[25] Section 57 of the Sentencing Amendment Act deals with transitional arrangements. It provides:

Transitional arrangements for home detention

If an offender is convicted of an offence committed before the commencement of section 80A, the court may sentence the offender to home detention if—

- (a) the court would have had the power to sentence the offender to imprisonment if it were dealing with the offence immediately before

that date; and

- (b) the requirements of section 80A are satisfied; and
- (c) the offender consents to the imposition of home detention.

[26] Finally, we should note that none of the changes referred to above affects the presumption of imprisonment in s 6(4) of the Misuse of Drugs Act 1975. That presumption applies to the offence for which the appellant was convicted.

[27] Against this statutory background we consider Mr Speed's submission that the Judge should have sentenced the appellant to 12 months home detention.

[28] We deal first with jurisdiction. The appellant's offending occurred in October 2006. Section 80A of the Sentencing Act came into force on 1 October 2007 (see s 2 of the Sentencing Amendment Act and the Sentencing Amendment Act 2007 Commencement Order 2007). Accordingly the Court's power to impose a sentence of home detention in this case was governed by s 57 of the Sentencing Amendment Act rather than s 15A of the Sentencing Act. In contrast to the position under s 15A, a court's power to sentence to home detention under s 57 is not limited to cases where a "short-term sentence of imprisonment" (currently two years or less) would otherwise have been imposed. Rather, it depends simply on the existence of a power to imprison (s 57(a)). In the present case, then, the Judge had jurisdiction to sentence the appellant to home detention. The question is whether he was wrong as a matter of principle not to have exercised that jurisdiction.

[29] As is apparent from [20] of his sentencing notes (quoted at [12] above), the Judge considered that to reduce a sentence from a starting point of three years six months to 12 months home detention was "too big a jump" in the absence of guidance from this Court. In his bail decision the Judge put the matter in the following way:

[8] It is also significant that the Court of Appeal has not as yet had an opportunity to consider whether participation in rehabilitation to the extent undertaken by Mr Hill is a mitigating circumstance which can properly be taken into account in sentencing those convicted of drug-dealing offences sufficient that Home Detention for 12 months might realistically be regarded as an appropriate alternative to a significantly longer period in gaol. Put another way, is a sentence of 12 months Home Detention plus Community

Work a sufficient detriment or denouncing punishment in itself so as to equate roughly with a rather longer gaol term? Are significant rehabilitative efforts properly to be given as much weight as that?

[30] Sentences of home detention have been imposed on persons convicted of the manufacture, supply or attempted supply of methamphetamine, albeit in some instances with hesitation on the part of the sentencing judge – see *R v Jones* HC WHA CRI 2007-088-2320 16 November 2007, *R v Piper* HC AK CRI 2007-004-00798 22 November 2007, *R v Cowlshaw* HC CHCH CRI 2007-009-8970 22 November 2007 and *R v Punnett* HC AK CRI 2004-044-007303 5 December 2007. In each case the offender accepted responsibility for the offending by entering a guilty plea, and the sentencing Judges were persuaded that the prospects for rehabilitation were sufficient to justify imposing home detention.

[31] We make the following points in relation to the sentence of home detention and whether it should be imposed in this case.

[32] First, although the relevant requirements are differently worded, both ss 57 and 15A indicate that home detention was intended to be a mechanism to reduce the number of people sentenced to imprisonment. It is apparent from the explanatory note to the relevant Bill, the Criminal Justice Reform Bill no. 93-1, that an important objective of the new sentence of home detention is to reduce the prison population. The opening sentence of the explanatory note reads:

The purpose of the Bill is to introduce a range of measures to arrest the sharp increase in the prison population in recent years. This increase is no longer sustainable, neither financially nor socially. New Zealand's imprisonment rate is considerably higher than countries that we habitually compare ourselves with, such as the United Kingdom, Canada, and Australia. The Bill, which includes some measures that will have an immediate effect and others that will take longer for their impact to be felt, is intended to contribute to a reduction in the imprisonment rate over time.

[33] The sentence of home detention reflects a perception that society's interests are better served in some cases by the imposition of restrictions on liberty through home detention rather than through imprisonment. The explanatory note identifies the "acknowledged advantages" of home detention as including "low rates of re-conviction and re-imprisonment, high compliance rates, and positive support for offenders' reintegration and rehabilitation": at 5.

[34] Second, the home detention provisions sit within the general context of the Sentencing Act. Accordingly, a sentence of home detention must be imposed in a way that is consistent with the purposes and principles of sentencing as set out in the Act (and in any other relevant legislation).

[35] Third, as Ms Markham submitted, this Court has said previously that sentences should not be artificially “tailored” to enable offenders to have the benefit of the home detention option (*R v Sipa and Edwards* CA390/05 7 December 2005 at [24]). This will be particularly relevant to cases governed by s 15A, given the absolute jurisdictional limit it imposes through the use of the defined term “short-term sentence”.

[36] Fourth, in determining whether there is jurisdiction under s 15A(1)(b) (ie, whether the Judge would otherwise impose a “short-term sentence”), the relevant figure is the end sentence rather than the starting point. But under both ss 15A and 57 the starting point and the factors which lead to the end sentence will be relevant to the decision whether or not a sentence of home detention should be imposed. Where the giving of a significant discount to reflect an offender’s personal circumstances produces an end sentence that is sufficiently low to raise the possibility of home detention, those personal circumstances will also be relevant to the question whether home detention should be imposed.

[37] In the present case, the Judge applied a discount of 35% to the starting point to reflect the appellant’s efforts at, and prospects for, rehabilitation. Clearly, such rehabilitative considerations will be important in determining whether to sentence to home detention. Where an offender is motivated to change, and where there is a realistic prospect that he or she will be able to change, there are obvious benefits in a sentence of home detention, both from society’s perspective and from that of the offender.

[38] Fifth, in this class of case the presumption of imprisonment created by s 6(4) of the Misuse of Drugs Act must not be overlooked. That presumption reflects the seriousness with which Parliament views drug offending and the weight it gives to factors such as denunciation, accountability and deterrence in this context. Such

factors are of particular importance in the case of methamphetamine, the use of which is currently seen as a serious social problem in New Zealand.

[39] Cases involving the supply of methamphetamine vary greatly – from sophisticated, large-scale commercial operations undertaken by persons whose motivation is financial, to cases involving addicts who deal in a small way to friends or acquaintances essentially as a by-product of their own use and involvement in the drug sub-culture. End sentences that meet the definition of “short-term sentence” for the purpose of s 15A are only likely to be imposed in cases at the lower end of the spectrum. (The same is true for the purposes of s 57.) In this type of case, we consider that a sentencing judge may properly give significant, even decisive, weight to the prospects for rehabilitation. This will be particularly so if the assessment that there are good prospects for rehabilitation is based not simply on conjecture or expressions of intent or hope but on evidence which demonstrates that the offender has made a real commitment to change and is working towards that in specific and realistic ways.

[40] In the present case, while accepting that he had made some positive steps towards rehabilitation, Ms Markham submitted that it was relevant that the appellant had failed to acknowledge his guilt by pleading guilty, had maintained his association with the Headhunters gang and had not attended a residential (as opposed to an out-patient) drug course. These factors, she said, militated against sentencing to home detention. While we accept that factors of this type may count against sentencing to home detention, we consider that there are countervailing factors in the positive features of the appellant’s personal circumstances referred to earlier.

[41] Finally, we should note that it is now well established that home detention is unlikely to be granted where a person is convicted of dealing in a drug from his or her home – see, for example, *R v Paki* CA165/05 5 September 2005 at [6]. In the present case, however, that consideration is of limited weight. This is because the appellant has moved from the gang house where he was living when he was apprehended and has been living at another property where he has good support available to him. He has been on bail for a significant period without incident and would serve any period of home detention at his new address.

Conclusion

[42] As we have said, the starting point of three years six months was within the range available to the Judge, albeit at the upper end. The Judge also gave a significant discount to reflect the appellant's personal circumstances. The resulting sentence of two years three months cannot be said to be manifestly excessive, although it was at the upper end of the range.

[43] Under s 57 the Judge had jurisdiction to grant home detention. We consider that home detention was the appropriate sentence in this case. The offending, although involving an element of commerciality, was at the low end of the spectrum. In addition, and critically, there is strong evidence that the appellant:

- (a) Has committed himself to dealing with his drug addiction and has made considerable progress in doing that;
- (b) Is addressing the personal issues which caused him to enter the drug subculture, and in particular is re-establishing his relationship with his father;
- (c) Is able to serve his period of home detention at a place where he has good support.

We consider that there is sufficient in this case to rebut the presumption in s 6(4) and that the requirements of s 80A are met.

[44] In our view, then, this is the type of case in which the courts should be prepared to sentence to home detention in order to achieve the social and individual benefits that home detention offers.

[45] Accordingly, we quash the sentence of two years three months imprisonment imposed on the appellant. We substitute a sentence of 12 months home detention and 200 hours community work. The sentence of home detention is subject to the following special conditions. The appellant is to:

- (a) Reside at 33 Halberg Place, Papakura, Auckland, or such other place as his probation officer approves;
- (b) Complete the Community Alcohol and Drug Service Intensive Outpatient programme (or an equivalent programme as directed by his probation officer);
- (c) Undertake relationship and grief counselling as directed by his probation officer;
- (d) Undertake such employment or employment training as his probation officer directs;

in each case, to the satisfaction of his probation officer.

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