

IN THE COURT OF APPEAL OF NEW ZEALAND

CA691/2010
[2011] NZCA 452

BETWEEN	ASHVEER MANIKPERSADH Appellant
AND	THE QUEEN Respondent

Hearing: 1 September 2011

Court: Stevens, Ronald Young and Venning JJ

Counsel: E Orlov and S Malavia for Appellant
M D Downs for Respondent

Judgment: 14 September 2011 at 10.30 am

JUDGMENT OF THE COURT

- A The appeal against sentence is allowed.**
- B The sentence of four months' imprisonment is quashed.**
- C A sentence of five months' home detention is imposed on each charge.**
- D The sentence is imposed with the following special conditions, namely, that the appellant is:**
- (a) immediately upon release of this judgment, to remain at or travel directly to the address of 7 Delmont Close, East Tamaki and await the arrival of the Probation Officer and the representative from the monitoring company;**
 - (b) to reside at the address of 7 Delmont Close, East Tamaki for the duration of the sentence;**
 - (c) to abstain from the consumption of alcohol and illicit drugs as directed by a Probation Officer;**

- (d) to undertake any programme of counselling if directed by a Probation Officer.
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REASONS OF THE COURT

(Given by Ronald Young J)

Introduction

[1] This Court gave special leave to the appellant to appeal his sentence of four months' imprisonment imposed on appeal in the High Court on two charges of driving with excess breath alcohol causing injury under s 61(1)(b) of the Land Transport Act 1998.¹ The question on which leave was granted was:

Whether at [55] of the judgment on appeal (*Manikpersadh v NZ Police*)² the High Court Judge correctly identified and applied the test on which an appellate Court will intervene in a sentencing judge's decision to impose a sentence of imprisonment as opposed to home detention.

Background

[2] When the appellant failed to stop his car at a red light in February 2010, he collided with another vehicle. He was found to be driving with an excess breath alcohol level of 223 milligrams of alcohol per 100 millilitres of blood.

[3] The appellant was 19 years of age at the time and a maximum allowable blood alcohol level was 30 milligrams. Two people were injured in the accident from the other car. One fractured her right ankle, had a serious cut to her right knee and a fractured left leg. The other passenger suffered a number of cuts to the face and a minor head injury.

[4] In the District Court, Judge Everitt sentenced the appellant to six months' imprisonment.³ The Judge used as a starting point a sentence of 12 months'

¹ *Manikpersadh v R* [2011] NZCA 28.

² *Manikpersadh v New Zealand Police* HC Auckland CRI 2010-404-252, 28 September 2010.

³ *New Zealand Police v Manikpersadh* DC Auckland CRI-2010-004-6225, 30 June 2010.

imprisonment taking into account what he saw as very bad driving and a high level of intoxication. He reduced the start sentence by four months for the appellant's early guilty plea and a further two months for his relative youth, his lack of previous convictions and his offer to pay reparation.

[5] As to home detention the Judge said:

[10] I consider whether any form of home detention is appropriate for you and I do not believe it is. Home detention and community detention for that matter do have deterrent aspects but it would be inviting the public, in my view, to lose confidence in the Court if you were sentenced to home detention.

[11] The public of Auckland is outraged and rightly so by drunks like you crashing through red lights and causing serious injury. I do not believe that home detention is a sufficient deterrent for people like you and others who are likeminded to do that and I decline to sentence you to a sentence of home detention.

[6] On appeal in the High Court, Andrews J reduced the sentence of imprisonment by two months to reflect the time the appellant had spent on tight bail conditions and the actual payment of reparation.

[7] As to the District Court Judge's approach to home detention, the Judge said:

[55] I do not accept Mr Orlov's submission that the Judge failed to consider home detention. That the Judge did consider home detention is evident from [10] and [11] of the Judge's sentencing notes. Whether the Judge imposed a sentence of home detention rather than imprisonment was a question for the exercise of the Judge's discretion. I am not satisfied that in the exercise of that discretion the Judge failed to take into account relevant matters, took into account irrelevant matters, or was wrong in principle. The Judge was entitled to conclude that no sentence short of imprisonment would achieve the relevant purposes of sentencing.

Discussion

[8] We are satisfied the Judge in the District Court was in error when he focussed solely on deterrence when considering whether he could impose a sentence of home detention instead of imprisonment. We are also satisfied the Judge in the High Court was in error when she failed to recognise that the District Court's narrow focus was an error that needed correction on appeal.

[9] Section 15A(1) of the Sentencing Act 2002 authorises the imposition of home detention 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.

[10] This Court in *Osman v R*⁴ supported William Young P's comments in *R v Vhavha*⁵ (in a dissenting judgment) when he said:

[29] Eligibility for home detention depends upon the sentencing judge deciding that, but for the availability of home detention, the offender would otherwise be sentenced to a short-term sentence of imprisonment (ie of two years or less): s 15A of the Sentencing Act 2002. In effect, the Court is given a discretion to commute to home detention what would otherwise be a short-term sentence of imprisonment. *There is nothing in the Sentencing Act to suggest a presumption for or against such commutation, either generally or in respect of particular types of offence.* So what is called for is an exercise of sentencing discretion in a way which gives effect to the purposes and principles of sentencing recorded in ss 7 and 8 of the Sentencing Act.

(Emphasis added.)

...

[45] So, coming back to this case again, I do not see the requirements of holding the appellant to account, denunciation or deterrence as logically controlling the decision whether to commute the otherwise appropriate sentence of imprisonment to home detention. That being so, and the appellant being in all respects a good candidate for home detention, I see the least restrictive outcome principle (see s 8(g)) as the primary consideration, with the result that I would allow the appeal and sentence the appellant to nine months home detention.

[11] This Court identified the appropriate approach in *James v R* in this way:⁶

[17] We record that an appeal against a refusal to grant home detention does not provide an opportunity to revisit or review the merits. The question is whether [the Judge] erred in exercising his sentencing discretion: that is, did he apply an incorrect principle, give insufficient or excessive weight to a particular factor, or was he plainly wrong? Ms Guy Kidd for the Crown properly accepts that home detention can satisfy the objectives of deterrence and denunciation, but to a degree. We are satisfied, in accordance with

⁴ *Osman v R* [2010] NZCA 199.

⁵ *R v Vhavha* [2009] NZCA 588.

⁶ *James v R* [2010] NZCA 206, (2010) 24 NZTC 24,271 (CA).

earlier authority in this Court, that the decision about whether home detention will meet those objectives in a particular case is a strictly evaluative exercise. It is a matter of judgment for the sentencing Judge to determine whether home detention is an adequate response to the seriousness of the offending.

(Footnotes omitted.)

[12] We agree with counsel for the respondent's assessment that the proper approach of an appellate Court in cases such as this is that "the choice between home detention and a short sentence of imprisonment is the exercise of a fettered discretion, with appellate review focusing, as in other sentencing appeals to this Court, on the identification of error, if any, in the court below".

[13] We also agree with the Judge in the District Court that the appropriate starting point was a sentence of imprisonment. This was serious offending. The appellant must have been grossly intoxicated; he drove through a red light and injured two people, one seriously.

[14] We endorse the observations of William Young J in *Vhavha* that in exercising the discretion whether to commute a sentence of imprisonment to home detention, those ss 7 and 8 purposes and principles of sentencing, relevant to the particular case, must be considered by the sentencing judge.

[15] Section 7 deals with the purposes of sentencing. It includes deterrence, denunciation, accountability, promoting a sense of responsibility, providing for the interests of the victim and the protection of the community. However, it also includes assistance to an offender's rehabilitation and reintegration.

[16] Section 8 of the Act requires the Court in sentencing to take into account those matters set out in subss (a) to (j). Those factors will be relevant in deciding whether a sentence of imprisonment initially is appropriate. They are also relevant in deciding whether or not, in a particular case, a sentence of home detention might be imposed. The s 8 factors include the gravity of the offending and culpability of the offender, the seriousness of the offence and victim impact. But s 8 also requires the Court to have regard to the least restrictive appropriate outcome, the offender's

personal circumstances including his personal and family background and relevant rehabilitation.

[17] In the District Court the Judge focussed solely on deterrence. No mention was made of the other relevant purposes and principles of sentencing that we have identified.

[18] In the High Court, the Judge acknowledged that the appellant would have to identify an error by the District Court Judge if there was to be a successful challenge on appeal. However, the High Court Judge did not then go on to analyse whether the District Court Judge, at sentencing, had taken into account all relevant ss 7 and 8 matters in the exercise of his discretion relating to imposing a sentence of imprisonment or home detention.

[19] We, therefore, are satisfied that the High Court Judge erred when she failed to recognise that the Judge in the District Court had failed to take into account all the relevant considerations when assessing whether or not to impose a sentence of home detention.

Outcome

[20] Given the delay in resolving this case, the appropriate course is now for us to reconsider the question of whether the sentence imposed should be imprisonment or home detention, taking account of all relevant factors that we have identified.

[21] As we have said we accept that the appropriate start sentence was one of imprisonment. We now, therefore, turn to consider whether in the circumstances it would be appropriate to commute the sentence to home detention or whether a sentence of imprisonment is appropriate and justified.

[22] As this Court has observed, the statute identifies no presumption either way.⁷ This Court has also observed that the closer the appropriate prison sentence is to the

⁷ *R v Vhavha* [2009] NZCA 588.

two year maximum, the more likely home detention will be inappropriate and the lower the appropriate prison sentence is the more likely home detention will be appropriate.⁸ The four month prison sentence, therefore, favours home detention.

[23] With that background, as we have observed, it is necessary to consider the relevant ss 7 and 8 factors in deciding whether to impose home detention.

[24] The seriousness of the offending in this case points toward the need for denunciation and deterrence and, therefore, favours imprisonment. However, as this Court has observed, home detention by itself is a deterrent sentence.⁹

[25] The appellant's personal circumstances and his rehabilitation and reintegration into society as a useful member, in our view, all point strongly toward a sentence of home detention in this case.

[26] The appellant was still a relatively young man of 19 years of age at the time of the offending. He had no previous convictions. He pleaded guilty immediately and is clearly remorseful. He has paid over \$9,000 by way of full reparation. He has a supportive family who, with the appellant, have recognised he has an alcohol problem. He has not drunk alcohol since the offending and has attended Alcoholics' Anonymous meetings since that time. He is in part time employment. The trauma of his offending and his imprisonment for seven days after his initial sentence has caused him depression. He is extremely anxious about having to serve a prison sentence.

[27] We consider that these ss 7 and 8 factors overall clearly favour a sentence of home detention. We are satisfied that such a sentence in the particular circumstances is sufficient to deter and denounce and recognises the strength of the appellant's personal circumstances favouring home detention.

⁸ *R v Hessel* [2009] NZCA 450, [2010] 2 NZLR 298; *Garnett v R* [2010] NZCA 173.

⁹ *Osman v R* [2010] NZCA 199.

[28] In setting the period of home detention we take into account all of these factors. We consider the appropriate sentence is five months' home detention, which we impose on the two charges the appellant pleaded guilty to.

[29] The sentence is imposed with the following special conditions, namely, that the appellant is:

- (a) immediately upon release of this judgment, to remain at or travel directly to the address of 7 Delmont Close, East Tamaki and await the arrival of the Probation Officer and the representative from the monitoring company;
- (b) to reside at the address of 7 Delmont Close, East Tamaki for the duration of the sentence;
- (c) to abstain from the consumption of alcohol and illicit drugs as directed by a Probation Officer;
- (d) to undertake any programme of counselling if directed by a Probation Officer.

Solicitors:
Crown Law Office, Wellington for Respondent