

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

**CRI-2014-406-010
[2014] NZHC 3106**

BETWEEN HAYDEN JAMES KERWIN
 Appellant

AND NEW ZEALAND POLICE
 Respondent

Hearing: 28 November, 2 December and 5 December 2014

Counsel: R A Harrison for Appellant
 E J Riddell for Respondent

Judgment: 5 December 2014

JUDGMENT OF GODDARD J

This judgment was delivered by me on 5 December 2014
at 11.45 am, pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Inangahua Chambers, Blenheim for Appellant
Crown Solicitor, Nelson for Respondent

[1] Further to my interim judgment of 2 October 2014, this appeal has been adjourned on three occasions: to 28 November 2014; and 2 December; and now to today's date.

[2] In my interim decision, I accepted the advice of both counsel that a starting point of three years or less was appropriate. In this regard I record the acknowledgement of Ms Riddell for the Crown that the correct starting point should have been three years. On that basis, and having regard to comparable cases, I am satisfied that a starting point of three years imprisonment is appropriate.

[3] The outstanding matters for determination today are whether a greater discount than that allowed by Judge Russell at sentencing for remorse and for participation in restorative justice ought to be given to reflect those factors and whether the best interests of all concerned would be served if Mr Kerwin were able to continue in his current employment, which he has now been undertaking for some time now and was therefore able to continue making weekly reparation payments of up to \$50 to the victim company. The payment of reparation already made, of more than \$14,000, can be taken as a reflection of greater contrition than appeared to have been the case at the time of the restorative justice meeting and does justify a greater percentage discount to reflect genuine remorse. The views of the owners of the victim company are an important part of this consideration. However, I record that the owner of the victim company is not mollified by any of the steps taken by Mr Kerwin, including the payment of reparation and feels it is more important that he serve a full time custodial sentence than continue in his present employment. This is regardless of the fact that continuing in employment will enable the continuation of reparation payments and is also based on a misconception that Mr Kerwin's current employer is a business competitor.

[4] Another aspect on which the Court required updated information was the certainty of ongoing employment with Mr Kerwin's current employer, Vent, and the enhanced possibility of future full time employment with that company. Other related and important issues on which the Court required updating were the feasibility of Mr Kerwin being able to continue with Vent if he is sentenced to home detention, in lieu of a full time custodial sentence. Another aspect was the necessity

for an up to date health report, which is now to hand, together with information about the availability of suitable drug rehabilitation programmes, should a community based sentence be imposed in lieu of imprisonment. Also important was Mr Kerwin's expressed willingness to undertake a drug rehabilitation programme and to persist in working to overcome his addiction and his underlying depression.

Should there be a greater discount given for remorse and participation in restorative justice?

[5] Yes. The steps taken by Mr Kerwin since sentence was passed in the District Court in July are evidence of true remorse and of willingness to try and repair the damage and restore the situation with the victim company. There is still some \$35,000 to pay in reparation but with the assistance of his mother, who is managing his budget, and as the result of the employment opportunity he has been given with Vent, reparation is being made. A discount of 15 per cent for remorse is therefore appropriate. From a starting point of three years' imprisonment and after the discount of 25 per cent given by the District Court for the early guilty pleas, an end sentence of 23 months' imprisonment is now reached following the further discount of 15 per cent for remorse.

Should there be a sentence of home detention imposed in lieu of imprisonment: the issues to weigh

[6] Against the understandable desire of Mr Clark, the owner of the victim company, to see the appellant undergo a full time custodial sentence, there are a number of factors to weigh. These centre on whether the positives that have emerged from the wreckage caused by Mr Kerwin's offending tip the balance in favour of a positive reconstructive approach or do not. The original sentence imposed by the District Court was neither wrong in principle nor manifestly excessive. While the starting point required a slight downward adjustment to three years' imprisonment, the sentence was otherwise unassailable. I would not therefore have been minded to entertain in any respect disturbing that sentence, were it not for the passage of time that has occurred since the sentence was passed and the manner in which events have unfolded since. For the reasons that follow, I am prepared to allow the appeal and impose a sentence of home detention in lieu of imprisonment.

In doing so I reinforce that home detention should not be regarded as a soft option: it is not.

The positives

[7] A great deal of personal and emotional stress was caused to Mr Kerwin's partner who felt that she had been betrayed and lied to just as much as the victim company. The wedding which was imminent was cancelled and the relationship fell apart. The couple have two young boys and over the past 11 months, whilst living close by in his parents' home, it seems much has happened to restore the relationship between Mr Kerwin and his partner and consequently his relationship with his sons has been hugely enhanced. His partner says in her recent affidavit to the Court:

10. I believe that if Hayden was sent to prison it would have a terrible impact on our children who have only just discovered who their father really is. For them, to have their Dad removed from their lives would have a dramatic effect on the bonds they are now building.
11. Hayden is a good man who, unfortunately, has made some terrible decisions and he is now trying to get it right. I believe that sending him to prison would do more harm than good and I fear that he would not cope mentally with such a sentence.
12. I believe that Hayden can address his addiction issues whilst serving a sentence in the community. If he was given a community-based sentence not only could he repay [the complainant company] the money they are owed by he could also maintain and grow the loving relationship he is developing with our two boys.

[8] Another positive is in the affidavits sworn by the owner of Vent Limited, who attests in fulsome vein about the work ethic and skill that Mr Kerwin is bringing to his employment with that company. Mr Kerwin is said to have proven himself to be a real asset and is fitting in well. His new employer is fully aware of the detail of Mr Kerwin's offending against his previous employer; and fully aware that home detention will create difficulties with Mr Kerwin's ability to work; and also understands that he will need to attend a residential drug programme for at least three months during the period of home detention.

[9] I have already referred to Mr Kerwin's parents, who are very supportive; provide him with a home; with general supervision; and with budgeting supervision.

His father has emphasised, however, that from their point of view it is critical for Mr Kerwin to attend a residential drug rehabilitation programme.

[10] Other factors that weigh in favour of imposing a sentence of home detention in lieu of imprisonment are the length of time that has passed since the offending came to light and the length of time since sentence was passed in the District Court. Also the fact that Mr Kerwin was a first offender.

Result

[11] The sentence of two years three months imprisonment is quashed. In lieu a sentence of one year home detention is imposed with special conditions as follows:

- Mr Kerwin is to proceed directly to 16 Macey Crescent, Blenheim and await the arrival of the Probation Officer.
- Mr Kerwin is to reside at 16 Macey Crescent, Blenheim in accordance with the conditions of his sentence of Home Detention.
- Mr Kerwin is to attend an alcohol and drug assessment and any recommended treatment, including residential, to the satisfaction of the Probation Officer.
- Mr Kerwin is to attend an assessment for a Departmental Programme and attend any resulting Departmental Programme as recommended, to the satisfaction of the Probation Officer.

[12] Standard post-detention conditions are to apply until six months after detention end date.

[13] Special post-detention conditions to apply until six months after detention end date are imposed as follows:

- Mr Kerwin is to attend an alcohol and drug assessment and any recommended treatment, including residential, to the satisfaction of the Probation Officer.
- Mr Kerwin is to attend an assessment for a Departmental Programme and attend any resulting Departmental Programme as recommended, to the satisfaction of the Probation Officer.

[14] The order for reparation in the sum of \$50,000 stands.

Goddard J