IN THE COURT OF APPEAL OF NEW ZEALAND

CA103/2011
[2011] NZCA 442

BETWEEN	SERA MCMILLAN Appellant
AND	THE QUEEN Respondent

CA104/2011

AND BETWEEN	CASEY TIMOTI HOTAI Appellant
AND	THE QUEEN Respondent

Hearing:	10 August 2011
Court:	Harrison, Rodney Hansen and Andrews JJ
Counsel:	M R Bott for Appellants J E Mildenhall for Respondent
Judgment:	6 September 2011 at 11.30 am

JUDGMENT OF THE COURT

A Mr Hotai's appeal against sentence in CA 104/2011 is allowed.

B The sentence of two years and four months imprisonment is quashed. In its place, Mr Hotai is sentenced to a term of one year and nine months imprisonment.

REASONS OF THE COURT

(Given by Andrews J)

Introduction

[1] On 8 October 2010 Ms McMillan pleaded guilty in the District Court at Palmerston North on one count of possessing cannabis for sale and one count of possessing utensils for consuming cannabis. Mr Hotai (Ms McMillan's husband) pleaded guilty to one count each of selling cannabis, possessing cannabis for sale, possessing utensils for consuming cannabis, and possessing equipment for cultivating cannabis. They were sentenced by Judge Garland on 28 January 2011: Ms McMillan to one year and nine months imprisonment, and Mr Hotai to two years and four months imprisonment.[1] Both appealed against sentence.

[2] We gave an oral judgment on 10 August 2011 allowing Ms McMillan's appeal, quashing the sentence of imprisonment (of which she had now served six months), and substituting a sentence of four months home detention on specified conditions.[2] That judgment also recorded that our decision on Mr Hotai's appeal was reserved, and we directed that the Department of Corrections was to provide, within 14 days, a report as to the suitability of a sentence of home detention for Mr Hotai.

[3] We now set out our reasons for allowing Ms McMillan's appeal, and our judgment on Mr Hotai's appeal.

Facts

[4] The charges were laid after an unrelated search warrant was executed at the appellants' home. In their daughter's bedroom, the police found a bag of cannabis, ten cannabis tinnies, and $7,210 in cash. A combination safe in another bedroom contained two bags of cannabis totalling 45 grams. There was an ice cream container on the kitchen bench which had in it eight and a half tinnies and various "spotting" knives, pipes and bongs. The police found 22 pieces of tinfoil cut into tinnie size, and two caps of cannabis oil. Finally, the police found a cannabis "growing room" under the stairs, fitted with a heat lamp, fan, timer, and transformer.

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1 *R v Hotai* DC Palmerston North CRI-2010-054-1227, CRI-2010-030-847, CRI-2010-031-848, 28 January 2011 (the sentencing notes).

2 *R v McMillan* [2011] NZCA 392.

[5] Mr Hotai admitted to the police that he intended to sell the tinnies, that he had been selling cannabis for about six months, and that half of the money found came from previous sales of cannabis. He said the bags of cannabis and the cannabis oil were for his personal use.

[6] Ms McMillan told the police that she owned the cannabis found in her daughter's room and the tinnies found in the kitchen. She also said that the money that was found had come from the sale of two motor vehicles.

Sentencing

[7] The Judge considered that, for each of Mr Hotai and Ms McMillan, the offending was primarily for financial gain. He found that the number of tinnies, the quantity of cannabis and the amount of money found all indicated that the offending was ongoing and at a moderately serious level. It was common ground that the offending fell within category 2 of *R v Terewi*,[3] with a starting point of between two and four years imprisonment.

[8] For Mr Hotai, the Judge adopted a starting point of two years and six months imprisonment, which he uplifted by six months to take account of Mr Hotai's previous conviction for cultivating cannabis, and the totality of his offending. The Judge then applied a discount of eight months (around 20 per cent) on account of Mr Hotai's guilty plea, to reach the end sentence of two years and four months imprisonment. The Judge was not prepared to make a further reduction on account of Mr Hotai's personal circumstances.[4] As the Judge arrived at an end sentence of more than two years imprisonment, the question of whether home detention was an appropriate sentence did not arise.

[9] For Ms McMillan, the Judge adopted a starting point of two years and three months imprisonment, then applied a discount of six months (around 20 percent) for her guilty plea, to arrive at the end sentence of one year and nine months imprisonment.[5] The Judge then considered home detention. The home detention

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3 *R v Terewi* [1999] 3 NZLR 62 (CA).
4 Sentencing notes at [27].
5 At [32].

appendix to Ms McMillan's pre-sentence report set out concerns as to the suitability of her home address for home detention, because of assaults on Ms McMillan by Mr Hotai and their association with the Mongrel Mob gang. The Judge was also concerned that it would not be appropriate to order a sentence of home detention to be served at the address where Ms McMillan's offending had taken place.[6] He concluded that while he would have been prepared to consider a sentence of home detention, Ms McMillan's home was not a suitable place to serve such a sentence.[7]

[10] However, the Judge gave Ms McMillan leave to apply to the Court to have the sentence of imprisonment cancelled and a sentence of home detention substituted, if a suitable alternative residence could be found.[8] No suitable alternative residence has been found.

Mr Hotai's appeal

Submissions

[11] Mr Bott accepted that a sentence of imprisonment was an appropriate starting point, but submitted that the Judge failed to give appropriate consideration to Mr Hotai's personal circumstances, including his prospects for rehabilitation, in determining the appropriate end sentence, and in refusing to call for a home detention appendix to the pre-sentence report. Ms Mildenhall submitted that the starting point adopted for Mr Hotai was within the available range for the circumstances of his offending, and that personal circumstances are of little significance for sentencing for drugs offending. In support of this submission, Ms Mildenhall referred to the judgment of this Court in *R v Bryant*, in which the Court said that mitigation for personal factors when sentencing on drugs offending "is usually reserved for those situations where the combination of factors takes the case out of the usual range which one sees repeatedly in this area".[9]

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6 At [38].
7 At [38].
8 At [44].
9 *R v Bryant* [2009] NZCA 287 at [28].

[12] Further, Ms Mildenhall submitted that even if the end sentence for Mr Hotai were to be brought within the home detention range, it would not have been an appropriate sentence for his offending.

Discussion

[13] We begin consideration of Mr Hotai's appeal with the starting point. The sentence imposed on Mr Hotai was required to reflect that the totality of his offending was greater than Ms McMillan's offending. He pleaded guilty to additional charges of selling cannabis and possessing equipment for cultivation. That feature was appropriately recognised in the higher starting point adopted by the Judge for Mr Hotai of two years and six months imprisonment. However, we are satisfied that the Judge erred by applying an uplift of six months on account of Mr Hotai's previous convictions. The relevant offences occurred eight years before, and the sentence imposed of 100 hours community work indicates that it was relatively minor. We are not satisfied that any adjustment to the base starting point was required.

[14] The next issue is whether a discount should have been made for Mr Hotai's personal circumstances. Mr Hotai left school at 14 with no qualifications, and was a member of the Mongrel Mob gang for 11 years. He moved to his present home in Levin in order to break his ties with the gang. In late 2010 Mr Hotai obtained work at the local meat processing plant, this being his first significant work since he was 19 (he is now 35). He had taken up a health and fitness regime and as a result had lost 72 kilograms over the past three years. Letters of support provided before sentencing show that Mr Hotai is very highly regarded by his work supervisors, and in the social setting of the local golf club.

[15] The Judge considered Mr Hotai's personal circumstances. He was apparently unconvinced by Mr Hotai's efforts at rehabilitation. The Judge noted, in particular, that the references from the golf club members were based on impressions formed of Mr Hotai at a time when he was deeply involved in drug dealing. The Judge emphasised that Mr Hotai was distributing harmful drugs from the family home

within the same community. He gave little weight to Mr Hotai's attempts to leave the Mongrel Mob gang.

[16] The Judge was right to consider personal circumstances even though Mr Hotai was convicted of drug dealing. While deterrence remains the predominant factor in sentencing for this type of offending, it does not and cannot of itself preclude any consideration of personal factors. They are relevant, not only in the context of contributing towards the offending or on purely compassionate grounds,[10] but also to the sentencing objective of rehabilitation and reintegration.[11] As this Court emphasised in *R v Hastings*:

> [29] We do not see a submission that the sentencing Judge should give weight to the sentencing purpose set out in s 7(1)(g) of the Sentencing Act as engaging the requirement to give little weight to personal factors in sentencing for drug dealing. Section 7(1)(f) may call for recognition of the efforts that have been made by the offender to rehabilitate herself or himself if those efforts are accepted as genuine and the Judge considers that they should be recognised in order to achieve the sentencing purpose of assisting the offender's rehabilitation and reintegration. Section 8(i) of the Sentencing Act also requires the Court to take into account the offender's family background when imposing a sentence with a rehabilitative purpose. However, the important role of deterrence cannot be lost sight of in that process. In the present case we believe that the undoubted progress that Ms Hastings had made and the apparently positive prognosis for continued progress would have justified the Judge in taking a sentencing response that gave more emphasis to the rehabilitation factor.

[17] We agree with Mr Bott, however, that the Judge erred in declining to make an allowance for Mr Hotai's personal circumstances insofar as they related to his prospects of rehabilitation and reintegration into society. We respectfully disagree with the Judge's assessment. In the context of Mr Hotai's upbringing and previous history, we are satisfied that by the time he appeared for sentencing in January 2011 he had taken real and meaningful steps along the path to rehabilitation. Mr Hotai had attempted to remove himself and his family from the gang environment; he obtained employment, essentially for the first time, in order to provide for his family; he had developed a pro-social network of friends who apparently remain supportive despite his convictions; and he was motivated to make constructive lifestyle changes.

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10 *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612 at [12]–[14].

11 *R v Hastings* [2011] NZCA 105 at [26]–[29].

All these factors reflect a positive degree of self discipline and determination which merits formal recognition in his sentence.

[18] Our assessment is supported by a supplementary report prepared for this Court by the Department of Corrections on 24 August as to the suitability of a sentence of home detention for Mr Hotai. A similar report was not available to the Judge. Materially, the report writer advises that Mr Hotai was due to complete a Medium Intensity Rehabilitative Programme (MIRP) at Hawkes Bay Regional Prison on 1 September 2011, from which Mr Hotai reports significant benefits. He is also tentatively booked to enter the Drug Treatment Unit on 19 September 2011, and is reported to be looking forward to that prospect. The report writer says that the intensive programmes Mr Hotai has been able to access, without distractions, can be most beneficial for providing long term change for people with the motivation levels shown by Mr Hotai. Similar intensive programmes are not available in Levin.

[19] A discount is also appropriate for Mr Hotai's guilty plea, in line with this Court's decision in *Hessell v R*,[12] which was the binding authority at the time the guilty plea was entered.

[20] We are satisfied that a reduction of about 30 per cent or nine months from the starting point of two years and six months is warranted on account of Mr Hotai's personal circumstances and his guilty plea. An end sentence of one year and nine months imprisonment is appropriate both to meet the needs of deterrence and promote the prospects of Mr Hotai's rehabilitation and reintegration into society.

[21] As he arrived at an end sentence that was greater than two years imprisonment, the Judge did not consider whether home detention was an appropriate sentence. We have done so.

[22] Section 6(4) of the Misuse of Drugs Act 1975 creates a presumption of imprisonment for offences under the Act. In *R v Hill* this Court said:[13]

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12 *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298.
13 *R v Hill* [2008] NZCA 41, [2008] 2 NZLR 381 at [41].

> ... 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. ...

[23] In Mr Hotai's case we are not satisfied that a sentence of home detention would be appropriate. Our conclusion is based primarily on two points raised in the supplementary report from the Department of Corrections.

[24] First, the only available address for a sentence of home detention for Mr Hotai is the house where he and Ms McMillan lived up until they were both sentenced, and where Ms McMillan is completing her sentence of home detention as a result of our decision on her appeal. The report writer expresses justified concern for the integrity of the sentence of home detention if two drug dealing co-offenders are given home detention at the same address.

[25] Secondly, undue pressures would be placed on the household by having two people confined to the property by virtue of their sentence, with an added factor being that Mr Hotai's and Ms McMillan's 16 year old daughter will shortly give birth to a child. Further, the report writer notes that the meat processing plant where Mr Hotai was previously employed is at present closed for maintenance. The report writer has been informed that Mr Hotai may have a position offered to him following an application process, but we infer that that is not possible immediately.

[26] Also we are satisfied that it is important to maintain the apparent momentum of Mr Hotai's progress through the rehabilitation programmes available to him in the prison environment but which will not be available to him in the community.

Result

[27] Mr Hotai's appeal is allowed. His sentence of two years and four months imprisonment is quashed. In its place, Mr Hotai is sentenced to a term of one year and nine months imprisonment.

Ms McMillan's appeal – reasons for judgment

[28] Our reasons for quashing Ms McMillan's sentence of imprisonment and substituting a sentence of home detention may be stated quite briefly, with reference to the discussion of Mr Hotai's sentence.

[29] The probation officer's conclusion that Ms McMillan's home was unsuitable for a sentence of home detention was based on two matters: the fact that Mr Hotai had previously assaulted Ms McMillan, and a concern that the property would not be safe for probation officers to access, due to the possibility of gang connections.

[30] As to the first concern, Mr Bott referred to Mr Hotai's convictions for male assaults female in 2005 and 2007. He submitted that while there had been some relationship problems in the past, Ms McMillan had completed a course of counselling, and there had been no ongoing relationship problems. It is relevant to note that the home detention report records Ms McMillan as having said that she instigated the disputes between herself and Mr Hotai.

[31] With respect to the second concern as to gang association, Mr Bott submitted that there was no evidence of ongoing gang association, in terms of meetings or visits to the house, or that Ms McMillan is a member of any gang, or that any of their children have gang associations. When sentencing Ms McMillan, the District Court Judge noted that the probation officer's view was based on information received from the police, but that he had not been provided with any evidence upon which the police had based their opinion as to Ms McMillan's association with the gang.

[32] Mr Bott also submitted that the probation officer's concerns made no sense, in that there was no evidence that probation staff would be unsafe visiting the house, and no evidence of dealing having continued after Mr Hotai and Ms McMillan were arrested and released on bail. In fact, he submitted, the address had provided a stable environment for the family with three children still attending local schools, and the family had lived there while Mr Hotai and Ms McMillan were on bail, without incident, for 10 months before they were sentenced.

[33] We accept Mr Bott's submissions. We are persuaded that a sentence of home detention is appropriate for Ms McMillan. She has been assessed as being a suitable candidate for home detention, and we are satisfied that a sentence of home detention would meet the purposes and principles of sentencing referred to in our discussion concerning Mr Hotai. We are not persuaded that Ms McMillan is precluded from being granted home detention by the fact that the only available address is that where the offending occurred. When all of the factors which favour home detention are considered against that factor, the balance falls in favour of a sentence of home detention.

[34] Accordingly, Ms McMillan's appeal was allowed, the sentence of imprisonment was quashed, and she was sentenced to a term of four months home detention in its place.

Solicitors:
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