

THE QUEEN

v

LEUATEA PESETA IOSEFA

Hearing: 16 October 2008
Court: O'Regan, Potter and Fogarty JJ
Counsel: J H M Eaton for the Appellant
G H Allan for Crown
Judgment: 3 November 2008 at 3.30 pm

JUDGMENT OF THE COURT

- A The appeal is allowed. The sentence of ten months' imprisonment is quashed.**
- B A sentence of four months' home detention is imposed subject to the special conditions in [44] of this judgment.**
- C The order for reparation of \$31,664.39 is confirmed.**
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REASONS OF THE COURT

(Given by Potter J)

Introduction

[1] The appellant, Leuatea Peseta Iosefa, pleaded guilty prior to trial to one count of theft by a person required to account under s 222 Crimes Act 1961. He was sentenced to ten months imprisonment and ordered to pay outstanding reparation of \$31,664.39 by Judge Phillips in the District Court at Christchurch on 7 August 2008. He appeals against his sentence on the ground that the Judge was wrong not to impose a sentence of home detention.

Background facts

[2] The appellant was a barrister and solicitor practising in Christchurch. Between December 1999 and May 2000 he made eight unauthorised withdrawals from the firm's trust account totalling \$83,700.73 from funds held on trust for a client, the only client for whom the firm held trust funds. She was, at the time, an 86 year old widow.

[3] From January 2001 to December 2005 the victim requested the return of her funds but received only delayed payments totalling \$30,000. She experienced considerable difficulty in making contact with the appellant and eventually lodged a complaint with the Canterbury District Law Society in May 2006. She then received further payments from the appellant which saw the principal sum repaid and a small amount paid "on account of interest". At sentencing the appellant acknowledged that \$31,664.39 remained outstanding in respect of interest.

[4] Following the unauthorised withdrawals from the firm's trust account the appellant continued to provide monthly certificates to the Law Society stating that all transactions in relation to the victim's trust account had been properly completed and recorded. He disposed of the firm's ledger card recording the victim's funds.

[5] The pre-sentence report referred to three significant events which collectively contributed to the appellant's offending. These were addressed in submissions by Mr Eaton for the appellant. The appellant's mother died suddenly in August 1995 as a result of a stroke. Significant costs were incurred with his mother's funeral. She was accorded a full traditional Samoan funeral recognising her standing in the Pacific community in Christchurch and throughout New Zealand and Samoa. As the "head of the family" the appellant took responsibility for the balance of costs outstanding, amounting to approximately \$70,000. This was the first in a series of events which placed severe financial strain upon the appellant.

[6] Prior to his mother's death, he had committed to building a family home. In early 1999 he could no longer meet the mortgage payments as they fell due. Following a forced sale of the property there was a \$30,000 shortfall owing to the bank.

[7] In 1998 the appellant was required to meet a significant debt to the Inland Revenue Department arising from his tax liability for the 1995/1996 financial years. This debt was to be met by way of instalments through 1999. He fell into arrears with these payments and in December 1999 the Inland Revenue Department petitioned for his bankruptcy. This would have meant the end of his ability to practise as a lawyer and his ability to generate income, and would have resulted in laying off staff who were dependent upon him.

[8] It was against this composite background of financial stress factors that the appellant stole from his client. Cultural issues, particularly his Samoan heritage, his standing in the Samoan and Christchurch community and his role within his family were said to be contributing factors to his failing to seek help when he most needed it and instead resorting to criminal offending to relieve his financial commitments.

The sentence

[9] The Judge stated at the outset of his sentencing notes that the issue for the sentencing was whether the appellant must be imprisoned or whether a sentence of home detention could be imposed in all the circumstances of the serious criminal offending of the appellant.

[10] He concluded at [28]:

... the impact of sentencing must send a strong message of deterrence and denunciation. When I consider all the authorities that have been put before me, the statutory factors that are detailed in s 16 (particularly s 16(2)), in my view a sentence of imprisonment is required. The purposes of denunciation and deterrence cannot be achieved by any less restrictive sentence or combination of any other sentence in the hierarchy of sentencing in my view... You are being sentenced to imprisonment not only to punish you for your offending against this particular victim in the circumstances I have described and for the aggravating circumstances, but the message must be sent out with a strong deterrence and denunciation message.

[11] From a starting point of 18 months the Judge allowed what he described as a “merciful amount of credit” for mitigating factors, and imposed a sentence of ten months imprisonment.

[12] The Judge identified as aggravating factors of the offending, the appellant’s flagrant abuse of trust, which he described as “continuing for a number of years, not only after you stopped taking the money because it was no longer there, but your continued denial of anything ever having happened”, premeditation, the systemic and repetitive nature of the offending, the vulnerability of the victim with her age and frail health, and the ongoing damage not only to the victim but to the legal profession, the appellant’s family, the Samoan community and the legal community as a whole.

[13] In mitigation he noted the guilty plea and the appellant’s remorse, both of which he described as “limited”; that the appellant would suffer loss of status; his inability to continue in legal practice; and the high standing of the appellant in his profession, community and church evidenced by the references provided in his support.

[14] The Judge was critical of the lateness of the appellant's guilty plea which was entered about four weeks before sentencing. He described this as "entirely unreasonable" and "a clear manipulation by you of the Court system". The Judge was also somewhat cynical about the appellant's expressions of remorse which he considered to be, "in a way, self-serving". Nevertheless, he gave a discount of 45 per cent for the mitigating factors.

[15] The Judge expressly considered the submissions of counsel for the appellant that home detention should be imposed (the sentence of ten months being a short term sentence so that home detention was an available option). But he rejected home detention on the basis that the sentencing principles of deterrence and denunciation could not, in the circumstances of this case, be met other than by a sentence of imprisonment.

Submissions for the appellant

[16] Mr Eaton emphasised that a new regime was introduced into the Sentencing Act 2002 by the Sentencing Amendment Act 2007 ("the 2007 Amendment"), which made home detention a stand-alone sentence. He submitted that it was required of the sentencing Judge to undertake an analysis of cases decided under the former regime, the regime following the 2007 amendment, and a comparison of outcomes. He submitted that because this analysis was not undertaken the process that led to the sentence imposed was flawed, and the sentence was wrong.

[17] Mr Eaton said that all the authorities referred to and relied upon by the Judge in his sentencing notes related to a regime where home detention was entered upon by a different route. He noted that all offenders in the cases referred to under the former regime were granted leave to apply for home detention.

[18] He instanced the case cited by the Judge at [19] of the sentencing notes in the context of considering issues of culpability, *R v Varjan* CA97/03 26 June 2003. He instanced Varjan as a much more serious case where there was deliberate falsification of documents by the offender, a mortgage manager with National Bank, and misappropriation of funds in the vicinity of \$546,000. A sentence of two years

eight months imprisonment was quashed by the Court of Appeal and substituted by a sentence of two years imprisonment with leave to apply for home detention.

[19] He referred also to cases involving solicitor offenders, including *R v Tannahill* HC WN T2129/99 30 June 2000, *Thompson v Police* HC WN CRI 2003-485-63 28 October 2003 and *Police v Reed* DC CHCH CRN04009050904 15 December 2004, all cases referred to by the Judge. Counsel said that in these cases the offending was more serious but leave to apply for home detention was granted, including in each case deferral of the start date for the sentence. The result was that the sentence was effectively one of home detention because, under the former regime, in cases involving defalcation by solicitors, home detention was invariably granted by the Parole Board.

[20] In *Tannahill* the offending occurred over three years and involved a sum of approximately \$17,500. The sentence imposed was four months imprisonment with leave to apply for home detention, with the start date of the sentence deferred. Fisher J in sentencing stated at [18] that the dominant sentencing objective in such a case must be deterrence in order to protect the interests of the public. For that reason, he said at [30], he reflected the matters of significant mitigation in the quantum of the sentence but not by allowing a community-based sentence.

[21] In *Thompson* the amount involved was \$44,000, but was stolen over a period of 15 months from both the firm and clients of the firm where Mr Thompson was employed. He was sentenced to 15 months imprisonment with leave to apply for home detention and was granted deferral of the sentence start date on compassionate grounds.

[22] In *Reed* the defalcation involved about \$133,000. The sentence imposed was 18 months imprisonment from a starting point of two and a half years, with a discount for mitigating factors. Leave was granted to apply for home detention, Judge Kerr stating at [23]:

So it would seem to me that there is as much punishment in you for 18 months being on home detention than being in prison for whatever the period is before parole.

The Judge considered that while living at home, Mr Reed would have to “front up to other persons in Ashburton and that is not actually going to be a very easy task for you”. He deferred the start date for the sentence on compassionate grounds.

[23] Mr Eaton submitted that had Mr Iosefa been sentenced under the former regime he would have been granted leave to apply for home detention. Indeed, the Judge would have been obliged to do so on the basis of the relevant authorities, including the above. Counsel said that the appellant would inevitably have been released on home detention by the Parole Board, and at most would have been incarcerated for a few weeks if deferral of the start date had been declined. He contrasted that outcome with the sentence imposed under the new regime, which will oblige the appellant to serve one half of the ten month sentence imposed. That, he pointed out, would be on top of the equivalent of ten weeks’ house arrest because Mr Iosefa has been subject to a 24 hour curfew being a condition imposed by Judge Phillips when he granted bail pending appeal.

[24] Counsel submitted that home detention is not a “soft option”, although that is how the sentencing Judge seems to have viewed it; that it involves a significant loss of liberty and is a deterrent sentence which is immediately above the most restrictive sentence in the hierarchy of sentences in s 10A of the Sentencing Act, inserted by the 2007 amendment, which also introduced the sentence of home detention.

[25] He further submitted that the sentencing Judge was insensitive in relation to certain of the mitigating factors, in particular remorse. He submitted that the appellant’s failure to confront his predicament was seen as an absence of remorse, whereas clearly his cultural background was an overwhelming factor in what was described as his “head in the sand” response.

[26] Mr Eaton submitted that the Judge focused on the factors of denunciation and deterrence to the exclusion of other relevant factors, and that those other factors (including the appellant’s need to be able to generate income to pay the reparation ordered, and the support he could expect to receive from the community given his high standing particular in the Samoan community), supported the appropriateness of a sentence of home detention in this case. He emphasised that, outside the sentence

imposed, for lawyers there were strong elements of denunciation and deterrence that accompanied offending of this kind and the inevitable penalising consequences that flow for the offender. He submitted that those factors are abundant deterrents that render unnecessary and inappropriate a sentence of imprisonment as a general deterrent, with the result that it serves only to punish the offender.

[27] He submitted that a sentence of home detention achieves the purposes of denunciation and deterrence and at the same time meets the requirement of s 16(1) of the Sentencing Act that the Court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.

Submissions for the Crown

[28] In constructive submissions, Mr Allan accepted that home detention is a real alternative to imprisonment and can achieve effectively the purposes of denunciation and deterrence. Further, that in passing the 2007 amendment and introducing home detention as a stand-alone sentence, Parliament's target was reduction in the prison population. He also accepted that for the offender, a sentence of imprisonment under the former regime with leave to apply for home detention and deferral of the sentence start date, and the imposition under the post-2007 amendment regime of a sentence of home detention, would have no or little difference in terms of the practical effects and consequences. But, he submitted, there is a real difference in the "journey" for the offender because a sentence of imprisonment touches strongly on the principles of denunciation and deterrence. He submitted that this type of offending, which involves a gross breach of trust, is really in a category of its own which generally entails a sentence of imprisonment: *R v Boyd* CA199/85 13 December 1985.

[29] Mr Allan submitted that in the case of the appellant the sentencing exercise was finely balanced and that the Judge exercised his discretion in a careful and considered manner. He referred to the substantial discount of 45 per cent as indicative of the Judge's considered approach to the significant mitigating factors in this case.

[30] He said that the issue for this Court is whether the sentencing Judge was wrong to conclude that imprisonment was the only sentence that could meet the principles and purposes of the Sentencing Act including denunciation and deterrence. He submitted that the Judge at [28] of his sentencing notes squarely confronted this issue and determined in the exercise of his discretion that the purposes of denunciation and deterrence could not be achieved in the circumstances of the case by a sentence less than imprisonment. In doing so, he positively and overtly applied s 16(2) of the Sentencing Act, concluding that a sentence of imprisonment was necessary not only to punish the appellant, but to communicate to the public a strong message of denunciation and deterrence in relation to such offending.

[31] In summary, the Crown submitted that the sentence of ten months imprisonment was properly open to the sentencing Judge and there was no basis for interference with the sentencing discretion exercised by the Judge who had properly applied his mind to all relevant factors.

Discussion

[32] Section 8(g) of the Sentencing Act requires that a Court in sentencing or otherwise dealing with an offender:

- (g) Must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in s 10A.

[33] The reference in s 8(g) to s 10A was inserted by the 2007 amendment which introduced home detention as a stand-alone sentence and also inserted s 10A, prescribing a hierarchy of sentences and orders. In s 10A, the sentence of home detention is immediately above the sentence of imprisonment in the hierarchy of relative restrictions.

[34] Pursuant to s 15A, also inserted by the 2007 amendment, a sentence of home detention may be imposed only if the Court could otherwise sentence the offender to a short-term sentence of imprisonment and the Court is satisfied the purpose or

purposes for which sentence is being imposed cannot be achieved by a less restrictive sentence or combination of sentences.

[35] Home detention provides a sentencing Court with a further sentencing option, which is particularly relevant in light of s 16(1) of the Sentencing Act which requires the Court to have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community; and of s 16(2) which provides that the Court *must not* impose a sentence of imprisonment unless it is being imposed for the purposes in s 7 *and* those purposes cannot be achieved by a sentence other than imprisonment *and* no other sentence would be consistent with the principles of sentencing in s 8.

[36] As this Court observed in *R v D* [2008] NZCA 254 at [34], the changes in the 2007 amendment were made "... in an unashamed endeavour to reduce the prison muster". The Court referred at [35] to a passage from the Explanatory Note to the Criminal Justice Reform Bill, no. 93/1:

The purpose of the Bill is to introduce a range of measures to arrest the sharp increase in the prison population in recent years ... 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.

[37] At [36] of the judgment in *R v D* the Court contrasted the former regime where the role of the sentencing Judge was as "a gatekeeper", deciding whether in the circumstances of the particular case, leave to apply for home detention should be given, with the new regime which adds home detention to the sentencing options available to a sentencing Judge.

[38] At [60] the Court referred to the judgment in *R v Hill* [2008] 2 NZLR 381 where the Court said that creation of a 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", and observed:

In other words, home detention should be treated as a real alternative to imprisonment.

[39] Judge Phillips did not refer to the judgment in *R v D* although clearly *R v Hill* was referred to him (refer [27] of the sentencing notes). This, we understand, was the first sentencing of a lawyer for defalcation since home detention was made a sentence in its own right, though Mr Eaton told us that non-lawyer first offenders who have been convicted of fraud have invariably received a sentence of home detention since the 2007 amendment.

[40] We agree with Mr Eaton, that under the former regime the appellant, in the circumstances of this case, would have received a sentence of imprisonment of ten months or thereabouts, and would have been granted leave to apply for home detention possibly with the start date for the sentence being deferred. Even without deferral at most he would have spent a very short time in prison before, undoubtedly, he would have been granted home detention by the Parole Board. The authorities to which we have referred at [18] - [22] above demonstrate that the sentencing Judge would have been directed to such an outcome.

[41] The sentence of home detention introduced by the 2007 amendment indeed provides a real alternative to imprisonment. It carries with it in considerable measure, the principles of deterrence and denunciation. It is clear parliamentary policy that for short-term sentences, those of two years or less, the restriction on liberty through home detention can more appropriately be imposed by a sentence of home detention than by imprisonment. In cases of more serious offending which justify a sentence greater than two years, the sentence of home detention will not be available and in such cases in accordance with the hierarchy of sentencing in s 10(A) a sentence of imprisonment usually will be required to reflect the purposes of denunciation and deterrence.

[42] We consider the Judge was wrong to determine that a sentence of home detention would not appropriately reflect the purposes of denunciation and deterrence in this case. While he considered, and rejected, a sentence of home detention, he did not sufficiently analyse the place of the sentence of home detention under the new regime. In relying on authorities decided under the former regime, he failed to take into account that the sentences there imposed consistently resulted in the sentence being served by way of home detention.

[43] We propose therefore to re-determine the sentence. We take the same starting point as the sentencing Judge of 18 months, which we consider appropriate in the circumstances of this case. Allowing a discount of one-third for the mitigating factors including the guilty plea, we reach a sentence of twelve months' imprisonment. That would equate approximately with a sentence of six months' home detention. We make a further allowance for the fact that the appellant has been on bail with a 24 hour curfew, a significant restriction on his liberty, since he was sentenced on 7 August 2008. We therefore impose a sentence of four months' home detention. There will be special conditions as recommended in the Home Detention report.

Result

[44] The appeal is allowed. The sentence of ten months' imprisonment is quashed. A sentence of four months' home detention imposed, subject to the following conditions:

- (a) To reside at 45 Stour Drive, Burwood;
- (b) To await the arrival of the probation officer at 45 Stour Drive, and installation of the electronic monitoring equipment;
- (c) To participate in a cultural assessment and undertake any such intervention or counselling to reduce the appellant's risk of re-offending as may be directed by the probation officer.

[45] The order for reparation of \$31,664.39 is confirmed.

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