IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CRI 2007-419-83

REECE TE ORA WANAHI
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 23 August 2007
(Heard at Hamilton)

Appearances: N Brodnax for Appellant
RG Douch for Respondent

Judgment: 29 August 2007

JUDGMENT OF ASHER J

This judgment was delivered by me on 29 August 2007 at 12:00 midday pursuant to Rule 540(4) of the High Court Rules

……..
Registrar/Deputy Registrar

……..
Date

Solicitors:
N Brodnax, Barrister, PO Box 14-155 Hamilton
Almao Douch, PO Box 19173 Hamilton

[1] This is an appeal against a sentence totalling two years, seven months and two weeks' imprisonment imposed in the District Court at Hamilton on 18 June 2007, in respect of a number of charges.

[2] Mr Wanahi is 17 years old. On 18 June 2007 he was sentenced on a total of 15 offences, which can be put into three groups.

[3] The first group comprised five offences for which Mr Wanahi was originally sentenced on 29 November 2006. At the time of the offending he was 16 years old. The original sentencing resulted in his receiving 110 hours' community work in relation to the following charges:

- Unlawfully taking a motor vehicle;
- Escaping custody;
- Burglary; and
- Two wilful damage charges.

[4] This group of charges came again before the District Court at Hamilton on 18 June 2007 by way of an application to cancel the sentence of community work because of Mr Wanahi's failure to report or do any community work. An alternative sentence was sought. The learned Judge imposed an alternative sentence of one year's imprisonment on the burglary charges, and convicted and discharged Mr Wanahi on the other charges in this group.

[5] The second group of charges related to activities in early 2007 when Mr Wanahi was 17 years old. These were:

- Three charges of burglary;
- Unlawfully taking a motor vehicle;

- Disorderly behaviour; and

- Breach of bail.

On these charges Mr Wanahi was sentenced on 18 June 2007 to one-and-a-half years' imprisonment, that imprisonment being cumulative upon the one-year sentence.

[6] The third group of charges arose from four incidents that occurred while Mr Wanahi was in prison on remand, being:

- Three charges of wilful damage; and

- Common assault.

He was sentenced on 18 June 2007 to a further cumulative six weeks' imprisonment on these charges.

[7] The sum of the total sentences was therefore two years and seven-and-a-half months' imprisonment.

[8] It is not necessary to traverse the detailed facts relating to the offending as in the end counsel for both the appellant and respondent agreed that they would not determine the outcome of the appeal. Counsel accepted that there was a jurisdictional error made by the District Court in relation to the first group of charges and that therefore the sentence of one year's imprisonment could not stand. It was also accepted that the sentences imposed on the other charges were appropriate and no change to those sentences was sought. It was therefore agreed that a sentence of one year, seven months and two weeks' imprisonment should stand.

[9] It is necessary to consider first whether there was a jurisdictional error made by the learned Judge in relation to the sentence of one year's imprisonment on the first set of charges. If that is so, it is then necessary to consider whether leave should be granted to seek home detention given that the sentence will be less than two years' imprisonment.

[10] I will not consider the sentence of one year seven months and two weeks' imprisonment as it has not been challenged by either counsel and was indeed a sentence within the range available to the learned District Court Judge.

The sentence of imprisonment relating to offences carried out when the appellant was aged 16

[11] The sentence of imprisonment on the first group of charges was imposed under s 68(3) of the Sentencing Act 2002, which reads:

> **68 Variation or cancellation of sentence of community work**
>
> ….
>
> (3) On an application under subsection (1) or subsection (2), the court may, if it is satisfied that the grounds on which the application is based have been established,—
>
> (a) vary the sentence by reducing the number of hours of work to be done; or
>
> (b) cancel the sentence; or
>
> (c) cancel the sentence and substitute any other sentence (including another sentence of community work) that could have been imposed on the offender at the time when the offender was convicted of the offence for which the sentence was imposed.

[12] A probation officer had applied to cancel the sentence of community work because Mr Wanahi had failed to report to a supervising probation officer consequent to a sentence of community work under s 59 of the Sentencing Act 2002. Mr Wanahi had, Mr Douch for the Crown submitted, shown disdain for the community work sentence that was imposed, and had refused to carry out any aspect of it. The relevant subsection of s 68(3) was s 68(3)(c), which gives the Court the power to substitute any other sentence that could have been imposed on the offender at the time when the offender was initially sentenced to community work. The Judge, without any contrary submission from the appellant, appears to have understandably proceeded on the basis that s 68(3) gave him the power to substitute a sentence of imprisonment for that of community work.

[13] However, s 18(1) of the Sentencing Act 2002 reads as follows:

> **18 Limitation on imprisonment of person under 17 years**
>
> (1) No court may impose a sentence of imprisonment on an offender in respect of a particular offence, other than a purely indictable offence, if, at the time of the commission of the offence, the offender was under the age of 17 years.

It was not brought to anyone's attention at the time of the 18 June 2007 sentencing that in 2006 when the offences in relation to which the sentence of community work had been imposed took place, Mr Wanahi was under the age of 17. Therefore, on its face, s 18 prohibited the imposition of a sentence of imprisonment as none of the charges related to purely indictable offences.

[14] The District Court Judge may well have had in mind s 17 of the Sentencing Act 2002, which reads:

> **17 Imprisonment may be imposed if offender unlikely to comply with other sentences**
>
> Nothing in this Part limits the discretion of a court to impose a sentence of imprisonment on an offender if the court is satisfied on reasonable grounds that the offender is unlikely to comply with any other sentence that it could lawfully impose and that would otherwise be appropriate.

He may have assumed that s 17 had primacy over s 18 given the opening words of s 17: "Nothing in this Part limits the discretion of a court to impose a sentence of imprisonment". There was certainly a basis for the Court to conclude in terms of s 17 that Mr Wanahi was unlikely to comply with the community work sentence, given his failure to carry out any aspect of it.

[15] However, on 31 May 2007, approximately two-and-a-half weeks before the sentencing took place, the decision of the Court of Appeal was delivered in *R v Chand-Whakaue* CA265/06 31 May 2007. In that decision the majority of the Court of Appeal concluded that despite the opening words of s 17, s 18 in fact had primacy over s 17. It was held, after an exhaustive consideration of the legislative history of s 17, that the phrase "nothing in this Part" was referring to "so much of ss 7-16 as may point against a sentence of imprisonment": at [13]. It was held that s 18 was intended to remain dominant over s 17, which interpretation was supported by the

right of children under s 25(i) of the New Zealand Bill of Rights Act 1990 "to be dealt with in a manner that takes account of the child's age": at [20].

[16] The effect of this decision is that there is no jurisdiction to impose a sentence of imprisonment in relation to offences committed by a 16-year-old other than purely indictable offences. This means that Mr Wanahi's sentence of one year's imprisonment in relation to the offences that took place when he was 16 cannot stand.

[17] In this case, given that a sentence of imprisonment is not open to the Court, there would be no point in varying the sentence by reducing the number of hours of work to be done, as that in itself would be a reward for breach. In any event that would be in itself a breach of s 19(2) of the Sentencing Act 2002, which states that no Court may in respect of two or more offences impose on an offender both a community-based sentence and a sentence of imprisonment. Here, with the sentence of imprisonment being the appropriate sentence for the other offending, a further new and different sentence of community work on the earlier charges cannot be imposed, as it would breach s 19(2).

[18] Here, because Mr Wanahi was over 17 when he failed to attend community service, it was open to the Community Corrections Service to prosecute him for a breach of s 71(1) of the Sentencing Act 2002, which reads:

> **71 Offences relating to breach of sentence of community work**
>
> (1) An offender who is sentenced to community work commits an offence, and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $1,000, who—
>
> (a) fails, without reasonable excuse, to report to a probation officer in accordance with section 59 or section 78 or section 80; or
>
> (b) fails, without reasonable excuse, to notify a probation officer of any new residential address in accordance with section 60; or
>
> (c) fails, without reasonable excuse, to—
>
> (i) do any work satisfactorily in accordance with the sentence; or

(ii) comply with the terms of any agreement entered into for the purposes of section 64(1); or

(d) fails, without reasonable excuse, to complete the required number of hours of work within the period prescribed under section 58 or within any extended period granted under section 69; or

…

(f) fails, without reasonable excuse, to report or to remain at any place as required by or under this subpart; or

(g) fails, without reasonable excuse, to obey any rules governing a community work centre; or

(h) fails, without reasonable excuse, to obey any directions lawfully given regarding the manner in which his or her time must be spent while under the supervision of a probation officer under section 65; or

(i) refuses to work, or fails to work in the manner reasonably required of the offender, or neglects or intentionally mismanages his or her work, while under the supervision of a probation officer under section 65; or

(j) behaves in an offensive, threatening, insolent, insulting, disorderly, or indecent manner while under the supervision of a probation officer under section 65.

[19] However, the Service, perhaps understandably given that the prosecution was initiated before the delivery of the judgment in *R v Chand-Whakaue*, did not choose that option. It can also be observed that the maximum penalty that can be imposed under s 71 is three months' imprisonment, which in certain circumstances might not be seen as an adequate response to a refusal to participate in a lengthy sentence of community work. This option would not have been open to the Community Corrections Service if Mr Wanahi was under 17 when he failed to report because breach of community work is not a purely indictable offence, and therefore s 18 would prevent the imposition of a sentence of imprisonment.

[20] The result of this construction of s 18 that it must bow to the prohibition on imprisonment in s 17, is that the appellant has been able to defy the terms of the sentence of community work without any sanction. I agree with Mr Douch's submission that the present situation is that when an offender breaches a sentence of community work relating to offending when the offender was under 17, the option of

substituting that earlier sentence with imprisonment under s 68(3) is not open to the Court, with the effect that the offender may well escape any effective sanction for the defiance of the sentence originally imposed. This may be seen as an unsatisfactory situation. However, it cannot be addressed in this judgment, and if Parliament desires there to be a sanction of imprisonment available for a failure to carry out a sentence of community work by a person aged under 17 who has not been convicted of an indictable offence, that can only be effected by legislative change.

[21] In all the circumstances, in this case there is no alternative to allowing the appeal in relation to the sentence of one year's imprisonment which was imposed as an alternative to community work.

[22] The appeal will be allowed to that extent. There being no challenge to the other sentences of imprisonment, those sentences will stand.

Home detention

[23] The overall sentence, as a consequence of this appeal being allowed, is one year, seven months and two weeks' imprisonment. Under s 97 the Court must consider granting the offender leave to apply for home detention.

[24] When I raised this issue with Ms Brodnax for Mr Wanahi, she emphasised the appellant's youth. I do not consider, however, despite Mr Wanahi's youth, that this is an appropriate case for home detention. Mr Wanahi has carried out offences close to the place which he has been living. He does not appear to have any fixed and stable abode, and he does not appear to respond well to home authority figures. His indiscriminate burglaries have had a debilitating affect on the victims and are generally destructive.

[25] I decline to grant leave to apply for home detention.

Result

[26] The appeal is allowed. The sentence of two years, seven months and two weeks' imprisonment is substituted for a sentence of one year, seven months and two weeks' imprisonment.

[27] Leave to apply for home detention is not granted.

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Asher J