IN THE COURT OF APPEAL OF NEW ZEALAND

CA298/2008
[2008] NZCA 448

THE QUEEN

v

NIHAT SABUNCUOGLU

Hearing: 15 September 2008

Court: Robertson, Wild and Cooper JJ

Counsel: A G V Rogers and R P McLeod for Appellant
T Epati for Crown

Judgment: 30 October 2008 at 9 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Cooper J)

[1] This is an appeal against an effective sentence of 24 months' imprisonment imposed by Judge Gittos when the appellant pleaded guilty to two counts of using

documents with intent to defraud under s 229A of the Crimes Act 1961 and three counts alleging that he supplied information to an immigration officer and refugee status officers knowing that it was false or misleading in material respects.

[2] The former charges have maximum penalties of seven years' imprisonment. The other three charges, laid under s 142(1)(c) of the Immigration Act 1987 were punishable by a maximum term of seven years' imprisonment and/or a fine not exceeding $100,000.

[3] The appellant is a citizen of Turkey and the holder of a Turkish passport. He is also an Iraqi citizen, having been born in that country. He was granted a visitor's visa to New Zealand on 4 April 2001 and arrived here on 16 April, with the intention of staying.

[4] Judge Gittos found that in order to further his intent of entering New Zealand permanently, the appellant had disposed of his legitimate Turkish passport and on entry to New Zealand had passed himself off as a refugee coming from a different destination, giving a different name and identity to the New Zealand immigration authorities. The Judge observed:

> He concealed his true name and Turkish travel credentials and persisted in the falsehood of his assumed name and identity and his application to stay here as a refugee. This was the subject of thorough investigation by the authorities, and the charges that he faces have to do with his uttering false documents in support of this cover story as a refugee, which he stubbornly adhered to for a very long time, putting the authorities to a great deal of trouble in the matter of his identification.

[5] On 30 October 2001 and 2 April 2002 the appellant completed applications to work in New Zealand in the name of "Jahad". In each of those applications he failed to declare that he is known by another name and that he holds Turkish citizenship. Further false work applications were tendered by him on 14 November 2002, 9 May and 21 October 2003, and 27 June 2005. Within the same time period he completed the false claim for refugee status in New Zealand. He was interviewed by a refugee status officer, maintained that he was Raed Jahad and again failed to disclose both his true name and his Turkish nationality.

[6] Charges were laid against the appellant in the Auckland District Court on 29 November 2006. He was committed for trial on 12 July 2007. He pleaded guilty on 28 February 2008 and on 9 May 2008 the Judge sentenced him to an effective term of two years' imprisonment.

[7] The appellant does not challenge the starting point adopted by the Judge. However, he says that the final sentence was clearly excessive. He alleges in particular that the sentencing Judge gave an inadequate discount for his guilty pleas, failed to make allowance for the fact that he suffers from post traumatic stress disorder and gave insufficient weight to the consequences of a sentence of imprisonment of more than 12 months. The most relevant consequence is the fact that, given such a sentence, the appellant will be subject to the provisions of s 7(1)(b) of the Immigration Act and consequently ineligible for an exemption or permit under that Act for a period of ten years.

The sentence

[8] Judge Gittos noted that the relevant maximum penalty in relation to the Immigration Act offences had been very significantly increased (from three months to seven years) in June 2002, and referred to various High Court authorities emphasising the importance of deterrence in sentencing for breaches of immigration laws. He noted that since his arrival in New Zealand, the appellant had met and married his wife and that they have an infant child together. The appellant's wife is a person who came here from Iraq, with her family, and has been granted New Zealand citizenship.

[9] The Judge noted submissions advanced on the appellant's behalf that for humanitarian reasons, sentences of home detention and community work should be imposed. The Judge recorded at [17] that the appellant's application for refugee status had been finally determined against him, and that the issue for the immigration authorities concerned what country he should be removed to. At [18] he observed:

> Whatever the Court does in respect of this sentencing, that process must take its course. The limits of the influence of the sentence that I impose upon that will be as to whether and when this man might be able to apply for further

> entry into New Zealand. I am advised that if he is sentenced to a sentence of 12 months' imprisonment or more, he could not, as a matter of statutory prohibition, apply to enter this country or to legally remain in this country for a period of some 10 years, which would have serious consequences as to the appropriate place of residence for his wife and child.

[10] The Court's decision could not influence execution of the removal warrant or the place to which the appellant might be removed.

[11] The Judge articulated the dilemma of sentencing judges in this area, it being necessary to balance what he described as the "court's humanitarian instincts" to be generous to the appellant and his family, with the need, which the Crown emphasised, to apply proper sentencing principles and to sentence in accordance with established precedents.

[12] At [21] – [23] he said:

> [21] In the end, if the Court is prepared to deal with these cases on the basis that the personal circumstances of the offender are given primacy, as heartrending and persuasive as they may be, then the floodgates are open to a stream of people who will be quite undeterred in presenting similar false claims to the Immigration Service, which is already hard enough pressed.
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> [22] It gives entirely the wrong message to those who deal honestly with the Immigration authorities and are straightforward, and may sometimes be disappointed and sent away, if they see that other people's dishonesty and criminal deception pays off in the end. The adage that 'cheats never prosper' must not be seen to be the subject of a notable exception when it comes to maintaining the integrity of New Zealand's border controls.
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> [23] In the end, if I were to deal with this matter as defence counsel contends, there can be no guarantee for the prisoner that the Crown would not successfully appeal, given the very clear messages that have come from the High Court in relation to the way in which these things should be determined. As sorry as I am personally to have to say so, I think the Court really has an overriding duty to maintain the integrity of the immigration system, and to impose a deterrent sentence to discourage others from seeking to profit from dishonesty and deception in this way.

[13] The Judge concluded that the appropriate starting point for the offending was a sentence in the order of two years and nine months' imprisonment. Applying a substantial discount for the appellant's guilty plea, he reduced the sentence to two years. He rejected a defence plea for home detention, on the basis that it would not result in an adequate deterrent to others who might be minded to try to enter the country illegally. Such an approach would not be fair to those who presented

themselves "honestly at the border", nor would it uphold the integrity of the immigration system.

Discount for guilty plea

[14] In support of the first ground of the appeal, Mr Rogers submitted that the Judge should have given a full discount of one-third from the starting point of two years nine months, instead of the nine months that the Judge allowed. The appellant was charged at the end of November 2006, committed for trial in July 2007 and entered guilty pleas at the end of February 2008. Mr Rogers pointed out that there had been negotiations on the counts to be laid in the indictment, and an application under s 344A of the Crimes Act had been dealt with. After a change of counsel, when Mr Rogers was instructed, a brief of evidence was prepared and signed on 19 January 2008. Having obtained that brief of evidence Mr Rogers then obtained instructions from the appellant to plead guilty. The guilty plea was entered on 26 February 2008.

[15] Mr Rogers claimed to rely on a "well established sentencing practice" that a defendant is entitled to have matters of law, such as those that were dealt with in the s 344A application, resolved before entering guilty pleas, without forfeiting any part of a reduction in sentence for a guilty plea, particularly where one of the matters raised goes to jurisdiction to hear the evidence proposed to be adduced by the Crown.

[16] For the Crown, Ms Epati contested the existence of any sentencing practice that defendants could await admissibility determinations before entering guilty pleas without forfeiting any reduction in sentence. Referring to *R v Fonotia* [2007] 3 NZLR 338 and *R v Hannigan* CA 396/04, 18 July 2005, she submitted that the proper approach was simply to allow for a discount of up to one-third for a guilty plea at the first reasonable opportunity, with the deduction diminishing when a guilty plea is entered at the door of the Court or after a trial had begun.

[17] We are satisfied that there is nothing in this ground of appeal. While it is now common for a discount of one-third to be given in respect of guilty pleas

entered at the first reasonable opportunity, the extent of the discount properly diminishes as the trial approaches. It is not correct that there is a well established sentencing practice that a defendant can delay the entry of a guilty plea whilst pre-trial issues are advanced and still expect to obtain full credit in respect of a relatively late guilty plea.

[18] In the present case, Judge Gittos described the guilty plea as one that was entered "somewhat belatedly". That description was justified having regard to the chronology that we have earlier set out. Yet the Judge gave a substantial discount for the guilty plea, a discount of about 27 per cent. There is no room for a suggestion that any greater discount should have been granted. We consider that what the Judge allowed was very generous in the circumstances. The first ground of appeal must fail.

Post Traumatic Stress Disorder

[19] On the second issue, Mr Rogers noted that a consultant psychiatrist, Dr Russell Wyness had conducted an assessment of the appellant and has provided a report dated 10 April 2008. This assessment was that the appellant suffers from symptoms and behaviours that are consistent with Post Traumatic Stress Disorder. Mr Rogers submitted that the disorder was a mitigating factor with regard to offending and was critical of the Judge for failing to refer to that issue in sentencing. He referred to the decision in *R v Tapueluelu* CA 172/99, 29 July 1999 in which reference was made to a decision of the Supreme Court of Victoria in *R v Tsiaras* [1966] 1 VR 398 at 400. In discussing that case, the Court of Appeal said:

> In an analysis which was not intended to be and is not exhaustive, serious psychiatric illness was considered by the Court there to be capable of reducing moral culpability as distinguished from legal responsibility and thereby affecting the punishment that is just in all the circumstances. It was also recognised that by reason of a psychiatric illness a given sentence may weigh more heavily on the prisoner than it would on a person in normal health.

[20] Mr Rogers also referred to *R v Mohamed* [2007] NZCA 170. That case actually concerned an appellant who suffered from Post Traumatic Stress Disorder, including homicidal fantasies. The doctor who assessed him considered that his

historical experiences contributed to his offending behaviour. The Court said at [20]:

> Dr Dean advises that if the appellant is able to address his psychological issues, then his risk of re-offending would be reduced. In that sense his offending is related to his post-traumatic stress disorder.

[21] In the result, the Court reduced the sentence on account of that consideration to one of six years' imprisonment. Mr Rogers argued that there should have been a reduction in the sentence to take account of the appellant's mental state in the present case.

[22] Ms Epati submitted that the appellant was not entitled to any allowance on account of Post Traumatic Stress Disorder. She argued that the propriety of a sentencing discount for a mental condition should be dependant on a clear causal link between the condition and the offence. That could not be shown here where the offending had not been spontaneous, but rather, prolonged and sustained.

[23] Apart from recording of the fact that the appellant suffers from that disorder, Mr Rogers did not articulate a basis upon which it should have been relevant to the sentencing exercise. In *R v Clarke* CA 225/98, 3 September 1998 the appellant suffered from a condition known as dysthyma, which is a depressive disorder. He was also described as having an anti-social personality disorder. The Court observed that the psychiatric reports were "inconclusive as to the connection between the appellant's conditions and his offending and the outlook for modification of his behaviour" (p 7). At page 8, the Court observed:

> Whilst disorder will often provide an explanation for offending which it is appropriate to take into account in assessing the culpability of the offender, sentencing serves other ends. Both the need for deterrence and the protection of the public may affect the weight to be given to the offender's personal circumstances.

[24] We have already set out the summary which the Court in *R v Tapueluelu* gave of the Supreme Court of Victoria's decsision in *Tsiaras.* The emphasis was on mental illness considered to be capable of reducing moral culpability for the offending.

[25] In the present case, the psychiatrist who saw the appellant, Dr Wyness, wrote:

> In my opinion Mr Sabuncuoglu suffers from symptoms and behaviours consistent with a Post Traumatic Stress Disorder which has likely developed in him from around the time he served in the Iraqi Army. He was a young man who was drafted into the Iraqi Army as a reluctant rather than keen soldier. While in the army he was exposed to front line fighting during which he witnessed the deaths at close quarters of many of his fellow soldiers. Following a two year period in the army, he was only discharged for a few months before he was recalled to the army. His fear and reluctance at returning led to him going into hiding and subsequently fleeing into neighbouring Turkey. Despite his attempts to pursue a tertiary education and a career, he was apparently coerced into working for the Turkish Security Service by repeated threats and physical violence which he suffered at their hands. This in turn appears to have led to him making the attempt to leave Turkey and enter New Zealand to claim refugee status.

[26] Later in his report, Dr Wyness said:

> Since he has been in New Zealand Mr Sabuncuoglu has continued to experience symptoms of Post Traumatic Stress Disorder which have fluctuated to some extent depending on the level of stress he was experiencing at any one time. His symptoms have included on-going distressing recollections of the events which he has suffered, some dreams of those events and psychological distress when exposed to queues which symbolise the traumas such as seeing combat situations or bomb explosions from Iraq on television. He has ongoing numbing of emotional responsiveness including the feelings of reduced ability to have loving feelings towards his wife and the child they are expecting and a feeling of estrangement or detachment from other people. He also is unable to see a future for himself and his wife and child. He also has persisting symptoms of increased arousal including sleep problems which have been present over the years since his flight from Iraq, difficulties concentrating and hypervigilance.

[27] These observations do not create a sufficient nexus between the Post Traumatic Stress Disorder from which the appellant evidently suffers and the offending for which he has been convicted. The point made by Ms Epati was that the offending was neither impulsive nor spontaneous. On the contrary, it was prolonged and sustained. It may be that the appellant acted on the basis of a strong desire to escape the circumstances in which he was living in Turkey. His claim to refugee status, however, has been rejected. We do not consider that it can be said in this case that the Post Traumatic Stress Disorder reduced the appellant's moral culpability for the offending. Further, we are satisfied that any link between the offending and the disorder is too weak to be influential on the sentencing outcome. Consequently, the second ground of appeal also fails.

Consequences of imprisonment for 12 months or more

[28] In relation to the third ground of appeal, Mr Rogers noted that Judge Gittos had not referred to the obligation to impose the least restrictive sentencing outcome (s 8(g) of the Sentencing Act 2002). Nor had the Judge referred to the obligation under s 16(1) of the Sentencing Act to have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with its safety. Mr Rogers also mentioned the rule in s 16(2) that the Court must not impose a sentence of imprisonment unless it is satisfied that such a sentence is being imposed for all or any of the purposes in ss 7(1)(a) to (c), (e), (f), or (g), that those purposes cannot be achieved by a sentence other than imprisonment and that no other sentence would be consistent with the application of the principles in s 8.

[29] Mr Rogers referred to a number of District Court decisions in which those two considerations had been emphasised as well as observations made by this Court in *R v Aurora* CA 428/02, 27 March 2003 at [13]:

> The administration of immigration laws often has wretched and distressing consequences for people seeking a better life in New Zealand for themselves and their families. Yet every country regulates its borders for the security and other proper interests of its subjects. Those who administer and apply the law must resist the temptation of sentimentality. But this does not mean that humane considerations have no place. It was, therefore, open to the learned District Court Judge to impose a sentence which, on the factual position as he understood it, left room for mercy after the ends of punishment and deterrence had been adequately met.

[30] We also heard from Mr McLeod who, in a further submission for the appellant, acknowledged that an alternative sentence of less than 12 months' imprisonment, or of 12 months' home detention would not prevent the appellant's removal from New Zealand under s 59 of the Immigration Act, but would, however, reduce the period of time that the appellant would be barred from lawfully re-entering New Zealand from any removal. The reduction would be from ten years to five years in the event that removal was effected following completion of the sentence. Mr McLeod argued that that consequence was properly a matter to be weighed in sentencing the appellant.

[31] Ms Epati relied, by analogy, on what was said in *R v Zhang* CA 56/05, 24 May 2005, at [16]:

> The appropriate sentence is a matter for the Courts, bearing in mind the totality of the relevant circumstances of both offence and offender. The issue of removal from New Zealand is for others and not a factor that can properly weigh in the sentencing process.

[32] She also pointed out that the penalty for the offences of which the appellant was convicted was increased to a maximum of 7 years' imprisonment from 18 June 2002 by s 16 of the Immigration Amendment Act 2002. That change must have been made in full knowledge of the consequences under s 7 of the Immigration Act.

[33] We see no reason to depart from the approach that was taken by this Court in *R v Zhang*. In that case, the sentencing Judge took into account the fact that the offender would be deported immediately on the expiration of the sentence, reducing the sentence by 12 months on that account.

[34] On appeal this Court held that the Judge had been in error in making the reduction. Its reasoning was encapsulated at paragraphs [12] to [16]. In brief, the Court relied on *R v Appitu* CA 31/98,29 April 1998 and *R v Ahlquist* [1989] 2 NZLR 177 to emphasise that the function of the Courts in their criminal jurisdiction is to impose sentences which are appropriate to the particular offending, which should not be adjusted so as to take account of other processes which have their own bases and established regime. The Courts must also maintain consistency of sentencing and not differentiate between convicted persons or according to their country of origin or the consequences which would flow following their release.

[35] This appeal arises in a somewhat different setting, but must be approached on the same basis. Although cases such as the present do not give rise to issues of consistency with other sentences, there is an analogous consideration, which was recognised by Judge Gittos. That analogy is to persons who present themselves legally at the border, and comply with New Zealand's immigration laws. It would send a very wrong message if persons making false claims to refugee status and committing various offences for the purpose of advancing such claims were then given reduced sentences so as to avoid what Parliament has stipulated the

consequences of an appropriate sentence should be under s 7(1)(b) of the Immigration Act.

[36] While we acknowledge that Mr Rogers was able to refer to some sentences imposed in the District Court where that approach appears to have been taken, it is wrong in principle and should not be continued. In our view, the approach taken by Judge Gittos was entirely correct.

Conclusion

[37] In our view, a starting point adopted in this case of two years and nine months was well within the range available to the Judge. He then gave a very generous discount for a comparatively late guilty plea. We have not been persuaded that any of the grounds of appeal has merit. The appeal is dismissed.

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