IN THE COURT OF APPEAL OF NEW ZEALAND

CA83/2009
[2009] NZCA 293

THE QUEEN

v

JOANNA ELIZABETH MCGRATH

Hearing: 25 June 2009

Court: Baragwanath, Randerson and Miller JJ

Counsel: G A Paine for Appellant
S B Edwards for Crown

Judgment: 9 July 2009 at 10.00 a.m.

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed in part by varying the conditions of home detention as detailed in [48] of this judgment.

C The appellant is to surrender to bail by presenting herself to the Registrar of the District Court at Palmerston North not later than seven days from the date of this judgment. Her sentence of home detention is to commence on the date of her surrender.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] After a three day hearing before Judge Garland in the District Court, the appellant was convicted on 18 of 20 charges of dishonesty. She was acquitted on the remaining charges and sentenced on 30 January 2009 by the Judge to five months home detention. In addition she was ordered to pay reparation of $4,000 at the rate of $83 per month.

[2] The appellant was granted bail pending appeal and, apart from one or two initial instalments, payment of reparation has been discontinued. Her appeal against conviction is brought on the ground that the verdicts were unreasonable in that, the Judge, acting reasonably, ought to have entertained a reasonable doubt as to her guilt. The appeal against sentence is brought on the ground that the sentence imposed was excessive and that she should have been sentenced on the basis of the probation officer's recommendation that she should be ordered to come up for sentence if called upon.

[3] It is an important feature of the case that the appellant did not give or call evidence on her own behalf which might have enabled her to give an innocent explanation for her conduct if such an explanation existed.

Background

[4] The charges arose during the period of the appellant's employment as an officer administrator at an automotive workshop in Palmerston North over the 10 month period December 2005 to September 2006. Her duties included purchasing parts and supplies from local businesses, generating invoices for work done in the workshop and administering the firm's payroll. The firm is known as Godding Motors.

[5] The offending arose from three different sets of circumstances:

(a) Count 1 related to the alleged purchase of goods to the value of $1237.50 for personal use using a Godding Motors cheque. The firm from which the goods were purchased is known as C & R Engineering.

(b) Counts 2 to 4 related to the ordering goods from Repco to the value of $540. This involved an allegation that the appellant dishonestly obtained three credit notes in favour of Godding Motors. These were subsequently reversed by Repco leaving Godding Motors having paid for items not ordered for business purposes and which it was said were never received by Godding Motors.

(c) Counts 5 to 20 related to the alleged false claiming of overtime which it was said had resulted in a gross loss to Godding Motors of $10,941.39. In relation to these charges, the appellant was acquitted on counts 13 and 14 involving a total of $2,260.75.

[6] The alleged offending attracted the following charges against the appellant:

(a) **C & R Engineering** – the appellant, with intent to obtain a pecuniary advantage, dishonestly and without claim of right used a document namely a Godding Motors cheque contrary to s 228(b) of the Crimes Act 1961;

(b) **Repco** – the appellant, with intent to obtain a pecuniary advantage or valuable consideration, dishonestly and without claim of right obtained a document (namely the Repco credit notes) contrary to s 228(a) of the Crimes Act.

(c) **The overtime charges** – the appellant by deception and without claim of right, obtained a pecuniary advantage or caused loss to Godding Motors contrary to s 240(1)(a) of the Crimes Act.

Conviction Appeal

[7] It is convenient to address the grounds of appeal against conviction by reference to the three separate sets of circumstances outlined in [6] above.

C & R Engineering

[8] In April 2006, the appellant approached C & R Engineering to design and manufacture some wrought iron speaker stands. Later she ordered a television stand as well. It is not in dispute that these items were for her personal use. While staff of Godding Motors were permitted to buy goods for their personal use from trade suppliers at trade prices and then reimburse the firm, C & R Engineering was not a trade supplier to Godding Motors.

[9] The stands were delivered to the appellant upon completion. The C & R Engineering invoice rendered to the appellant was paid by the appellant using a Godding Motors cheque signed by her. The following day, the appellant made a series of entries in the Godding Motors' computer, the net result of which was to create the false appearance in the firm's financial records that the items had been returned and Godding Motors credited for their cost.

[10] On 1 September 2006, the appellant re-charged the stands to her staff account and generated an invoice to herself and her husband. The Crown alleged that this step was taken only after she was confronted by her employer on the issue. A few days later, on 4 September 2006, the appellant was suspended from her employment. A search warrant was executed at her home on 21 January 2007. On 28 February 2007 Godding Motors was reimbursed by the appellant for the cost of the goods.

[11] In his meticulous and closely reasoned decision, Judge Garland found:

(a) The appellant ordered and paid for the goods for her own personal use using a Godding Motors cheque when she knew full well she was not authorised to do so.

(b) She then manipulated the computer records to create the false appearance already described.

(c) She re-charged the goods to her staff account only after she was confronted about the issue.

(d) She attempted to cover up her dishonesty by attempting to obtain a letter from a director of C & R Engineering (a Mr Turner) to the effect that he had heard the manager of Godding Motors (a Mr Smith) authorising payment for the goods through Godding Motors. (The Judge accepted Mr Smith's evidence that there was no such conversation and he also accepted Mr Turner's evidence that he did not overhear any conversation to that effect).

(e) Mr Paine submitted on behalf of the appellant that it was not demonstrated to the required standard that the appellant had the necessary dishonest intention in the sense of attempting to obtain the goods without paying for them. His submission in this respect was founded upon the fact that the amount owed for the goods was reimbursed to Godding Motors in February 2007, some seven months after they had been paid for using the Godding Motors cheque.

[12] We accept Ms Edwards' submission on behalf of the Crown that Mr Paine's submission on this point cannot succeed. The offence of dishonestly using the Godding Motors cheque was complete on 27 July 2006 when it was drawn on the Godding Motors account in order to pay for the goods with the necessary dishonest intention. The fact that Godding Motors was belatedly reimbursed for the value of the goods some seven months later after the appellant was confronted by the company and the police is irrelevant to the issue of whether the appellant dishonestly and without claim of right used the Godding Motors cheque for the purpose of obtaining the goods.

[13] The Judge's findings of fact on this issue are not capable of serious challenge given the advantage which he had of seeing and hearing the witnesses and the

absence of any innocent explanation by the appellant. At best for the appellant, the subsequent payment of the value of the goods is a mitigation point.

The Repco credit notes

[14] Counts 2, 3 and 4 all alleged that, on 30 August 2006, the appellant dishonestly and without claim of right obtained the three separate Repco credit notes totalling $540. In essence, the Crown case was that the appellant obtained goods for her personal use from Repco using Godding Motors' cheques. She was entitled to do so as a concession to staff but was then required to reimburse Godding Motors for the cost of the items. The Crown case was that, instead of repaying Godding Motors as she was obliged to do, the appellant falsely claimed that the goods had been returned to Repco and dishonestly obtained credit notes from Repco which had the effect of extinguishing her liability to repay the company. The Crown case was that Godding Motors was left in the position that it had paid for the goods supplied to the appellant but had never received the benefit of those goods. The Crown further alleged that the appellant had dishonestly amended the Godding Motors' computer records to show that the goods had been returned, contrary to the fact.

[15] Central to the findings of the Judge in relation to obtaining the Repco credit notes was his acceptance of the evidence of a Repco assistant manager (a Ms Vertongen) that the goods had not been returned to Repco as the appellant claimed. The Judge found that the appellant approached another employee of Repco (a Mr Davies) who was new to the job and was unsure of the procedures. The appellant accepted Mr Davies' evidence that the appellant told him she had previously returned the items to Ms Vertongen who was too busy to issue the credit notes at the time. The appellant asked Mr Davies to issue the credit notes. The items concerned were an LED car kit (count 2) and various tools (counts 3 and 4). Mr Davies undertook a stock check both on the computer and by physical inspection. He found there were three LED kits still noted on the computer as being in stock and that there were four boxes of the kits physically in stock. He did not examine the inside of the boxes. He assumed that one kit must have been returned as the appellant maintained and therefore issued a credit note.

[16] The Judge accepted Ms Vertongen's evidence, however, that the appellant had not returned the LED kit. She denied the suggestion that she had been too busy at the time to issue a credit note. The Judge also accepted Ms Vertongen's evidence that the fourth box for the LED kit in store was an empty display box. The Judge rejected a suggestion made on behalf of the appellant that the fourth (empty) box gave rise to a reasonable possibility that the kit had been returned and then supplied to another customer (without the box). The Judge observed that there was no evidential basis for this suggestion which he considered highly unlikely.

[17] The Judge found that the appellant had gone to Repco asking for credit notes for the tools (counts 3 and 4) and had given the same explanation to Mr Davies as already described for the LED kit (count 2). The Judge found that, in each case, Mr Davies believed the false explanation given by the appellant and issued the relevant credit notes. Again, the Judge accepted Ms Vertongen's evidence that the relevant items had not been returned to Repco and were not in stock.

[18] On all three counts relating to the Repco credit notes, the Judge found that although the appellant was entitled to order the goods from Repco and charge them to the Godding Motors account, she was obliged to reimburse Godding Motors for any goods obtained for her personal use. He accepted that the appellant had retained the goods personally. He reached that conclusion because he accepted the evidence of the Godding Motors' manager Mr Smith that the items were never received by Godding Motors. The Judge noted that the goods had not been recovered by the police at the time the search warrant was executed in January 2007, but, in the view of the Judge, that did not mean she did not retain the items which had been obtained in May 2006 (some eight months before the date of the search).

[19] The Judge went on to find that the appellant had falsely altered the Godding Motors' computer records to suggest the goods had been returned to Repco. He also found that the appellant had dishonestly obtained the credit notes by deceiving Mr Davies, his consent to issue the credit note having been induced by the appellant's deception.

[20] Mr Paine submitted it was not open for the Judge to infer that the appellant had obtained possession of the goods from Repco and that the appellant should have had the benefit of the doubt on this issue. We cannot accept that submission. The Judge was entitled to accept the evidence of Ms Vertongen that the goods were not in fact returned. He was also entitled to accept the evidence of Mr Smith (who he accepted as an honest, reliable and truthful witness) that the items had never been received by Godding Motors or purchased in connection with their business. The only reasonably available inference in these circumstances was that the appellant had obtained possession of the goods or the benefit of them. We agree with the Judge that the fact that they were not located by the police at the time of the search of her home is not material given the substantial time gap between the time the goods were acquired and the date of the search (which occurred well after the appellant had been confronted by her employer).

[21] Again the appellant's case is significantly undermined by her failure to give evidence and an innocent explanation of her conduct.

[22] Mr Paine also submitted there was doubt over Ms Vertongen's evidence about the car kits. We find there is no basis to disturb the Judge's acceptance of her evidence.

[23] Mr Paine submitted finally that there was no proof beyond reasonable doubt that the appellant had acted dishonestly and without claim of right given the Crown's acceptance that she was entitled to charge the goods to the Godding Motors account. However this submission overlooks the Judge's finding that the dishonesty lay in the appellant's deception of Mr Davies about the return of the goods. There is no basis on which the Judge's finding on that point could be successfully challenged on appeal.

Overtime hours – counts 5 to 20

[24] The essence of the Crown case on these charges was that the appellant was paid overtime by Godding Motors from January to April 2006 through the

appellant's deception. The Crown alleged that the appellant had not in fact worked the overtime hours she claimed.

[25] Before dealing with the specific findings of the Judge on these charges, it is necessary to briefly outline those who were involved in the ownership and management of Godding Motors. The principal shareholder was a Mr Gary Ayling who bought the company in December 2005. He did not have previous experience in the automotive business. In consequence, he operated the business very much on trust and was dependent on his staff for guidance in operating in the business. In this respect, the Judge found he was naïve.

[26] The appellant was employed as an office administrator. She was responsible in the first instance to the workshop manager Mr Smith and ultimately to Mr Ayling. The employment agreement stipulated that the appellant's hours of work were 40 hours per week but he accepted that she could work up to a maximum of 45 hours. The Judge found that Mr Ayling was an honest and truthful witness. The Judge also accepted that two other employees of Godding Motors (Ms Griffin and Mr Petersen) were honest, reliable and truthful witnesses.

[27] The overtime at issue was claimed over a period of 16 successive weeks, the excess overtime ranging from 15 to 27 hours per week. It is evident that a substantial part of the appellant's case at trial depended upon Mr Ayling's acceptance that he became aware of the overtime hours being claimed by the appellant and authorised their payment despite the fact that they were in excess of the agreed hours of work. The same line was pursued before us. But this overlooks the focus of the Crown case which was that the appellant had not in fact worked the overtime hours she claimed.

[28] The Judge found it was proved beyond reasonable doubt that the appellant did not in fact work the overtime hours she claimed except for the weeks of 12 and 19 March 2006 (the subject of counts 13 and 14 upon which the appellant was acquitted).

[29] Without detailing the Judge's very thorough examination of this issue, his finding was based upon the following elements:

(a) His acceptance of the evidence of Mr Smith and Ms Griffin that there was no need for the appellant to work between one and a half and twice the hours of a normal week.

(b) His acceptance of the evidence of Mr Smith that if the appellant was constantly working in the workshop the overtime hours she claimed, this would have been obvious to everyone in the business including Mr Smith who was responsible for authorising her overtime.

(c) His acceptance of Mr Smith's evidence that the appellant did not seek approval for any of the overtime claimed and appeared reluctant to disclose her time records to him when requested. Further, his acceptance of Mr Smith's evidence that the appellant worked similar hours in the workshop to those of Mr Smith.

(d) His acceptance of Mr Ayling's evidence that the appellant did not have remote access to the company's computer system and was not therefore able to undertake office work on a computer at her home.

(e) His acceptance of Mr Petersen's evidence about his observations of the hours of work undertaken by the appellant at the workshop.

(f) His acceptance from alarm activation records that the appellant could not have been working at the workshop on the days or for the hours she claimed.

[30] For these reasons, the Judge found that the appellant had obtained a pecuniary advantage and that she had done so by the deception of making false representations in her time sheets intending to deceive her employer and knowing that the hours claimed were false.

[31] Having reviewed the evidence, we see no basis upon which the Judge's finding could be disturbed on appeal. The Judge had the advantage of reviewing all the documentary evidence as well as seeing and hearing the witnesses. Mr Paine's

main attack on the Judge's findings was that the evidence of Mr Ayling tended to undermine the evidence of the other witnesses. It is clear however that Mr Ayling lived in another city and that the time when he was physically present at the company's workshop in Palmerston North was relatively minor in comparison to the full time employees whose evidence the Judge accepted.

[32] Mr Ayling was frank in accepting that he was aware of the overtime hours being claimed by the appellant and approved payment for them. He accepted that, on several occasions (in March, April and August 2006) he had expressed concern to the appellant about the overtime hours she was apparently working. But he accepted the appellant's explanation at that time and trusted her. Matters came to a head when she was suspended from employment on 4 September 2006. However, there was no evidence to suggest that Mr Ayling was aware prior to that time that the appellant was exaggerating the hours she claimed to have worked. Mr Ayling accepted in that respect that he may have been lax and too trusting of others including the appellant who he expected to be his "eyes and ears" in the business. The Judge also accepted that Mr Ayling had left the issue of overtime hours to Mr Smith on a day to day basis.

[33] Given the findings of the Judge as already outlined, we do not see any basis upon which it could be said that Mr Ayling's evidence undermined the substantial body of evidence upon which the Judge relied to reach his conclusion that the appellant deceived her employer by claiming overtime hours she knew she had not worked.

[34] Mr Paine raised some subsidiary issues challenging, for example, the Judge's finding that the appellant did not, as least as a general rule, work from home other than on the occasions which were the subject of counts 13 and 14 (which led the Judge to acquit the appellant on those counts). We are not persuaded that there was any substance in these subsidiary points raised by Mr Paine.

[35] It follows that the appeal against conviction is dismissed.

Sentence appeal

[36] We have considerable sympathy for the unenviable position in which the appellant finds herself. She has a child born in February 2007 who was brain damaged at birth and whose motor skills are seriously affected. He requires constant care and attention. The appellant and her husband attend to the child's care and they are supported by the appellant's parents who live locally. The appellant and her husband have a further child born earlier this year after the appellant's sentencing. Fortunately, the second child has normal health.

[37] The probation officer considered a sentence of either community detention or home detention but recommended against those options on the basis that the appellant would need flexibility to seek medical care for her first child should that be necessary. The probation officer recommended that the appellant be ordered to come up for sentence if called upon.

[38] Mr Paine submitted that given the extreme personal circumstances faced by the appellant and her lack of previous convictions, the sentence of home detention was inappropriate and excessive. He submitted that the appropriate sentence was that recommended by the probation officer.

[39] With regard to the reparation order, Mr Paine submitted that payment of the amount ordered (even by instalments) would impose a substantial financial burden on the appellant, the household income being of the order of $600 to $700 per week. Accident compensation payments were also received but these must be put aside for reparation purposes. Mr Paine informed the Court that the appellant and her husband were seeking to establish a trust fund for their impaired child and this would inevitably be adversely impacted if the reparation order remained.

[40] Ms Edwards submitted that home detention was appropriate given the breach of trust by the appellant towards her employer, the significant level of pre-meditation and her repeated acts of dishonesty over a period of eight months. The sentence recommended by the probation order would, in the circumstances, be inadequate and home detention was appropriate in the circumstances. The reparation order had been

carefully considered and, it is accepted, was a sum "negotiated" in discussions which took place between counsel and the Judge at the time of sentencing.

[41] While submitting that the sentence was not manifestly excessive, Ms Edwards accepted there might be a need to provide greater flexibility to enable the needs of the child to be met.

[42] While we are wholly cognisant of the appellant's personal circumstances and her obligations towards her children, the appellant's actions were calculated, dishonest and persistent. She went to considerable lengths to prevent detection of the offending in relation to C & R Engineering and Repco and breached the trust her employer placed in her. But for her personal circumstances, her offending may have warranted a short term of imprisonment. In the circumstances, a sentence of home detention was justified.

[43] There is no evidence that a fine could be met given the financial circumstances of the appellant. We also note that the Sentencing Act 2002 requires that reparation must be the priority in these circumstances..

[44] We consider that the sentence of reparation was justified given the extent of the losses and the need to recognise appropriate compensation to the appellant's employer.

[45] However, there is a need for greater flexibility in the special conditions the Judge imposed on the sentence of home detention. The appeal against sentence is allowed in part to enable this to occur.

[46] The special condition number 8 imposed by the Judge will be amended to read as follows:

> You are not to leave the home detention address for any purpose except to seek urgent medical attention for your children or for yourself or for such other purposes as may be approved by your probation officer and subject to such conditions as may be directed.

[47] Special conditions 9, 10 and 11 are also amended to refer to both of the appellant's children.

[48] For clarity, the special conditions as amended are:

> 5. You are to travel directly from the Palmerston North Court to your house at 18 Acacia Street, Palmerston North and await the arrival of a probation officer and a representative of the monitoring company.
>
> 6. You are to reside at that address for the duration of the home detention.
>
> 7. You are to abstain from the consumption or possession of alcohol, non-prescription drugs and prescription drugs unless prescribed to you by a medical practitioner for the duration of home detention.
>
> 8. You are not to leave the home detention address for any purpose except to seek urgent medical attention for your children or for yourself or for such other purposes as may be approved by your probation officer and subject to such conditions as may be directed.
>
> 9. When seeking urgent medical attention for either of your children or for yourself you are to travel directly from the home detention residence to the emergency medical service provider and you are to remain on site at all times and to return directly to the home detention residence on the completion of the necessary treatment.
>
> 10. If required to leave the home detention residence to seek urgent medical attention for either of your children or for yourself you are to provide to your probation officer verifying documentation for each occasion within 24 hours.
>
> 11. All regular absences relating to any medical appointment for either of your children, or for yourself must be requested from your probation officer 48 hours in advance of appointment.

[49] The reparation order of $4,000 at the rate of $83 per month, first payment on 1 March 2009 remains in force.

[50] The appellant is to surrender to bail by presenting herself to the Registrar of the District Court at Palmerston North not later than seven days from the date of this judgment. Her sentence of home detention is to commence on the date of her surrender.

Solicitors:
Crown Law Office, Wellington