IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 354/94

2095

THE QUEEN

v

RONALD MAYER PATON

Coram: Casey J
Gault J
Thorp J

Hearing: 2 November 1994 (at Auckland)

Counsel: Mr M A Woolford for the Crown
Mr M A Edgar for Appellant

Judgment: 2 November 1994

JUDGMENT OF THE COURT DELIVERED BY THORP J

The appellant Ronald Paton was convicted of 10 charges of forgery, uttering, using a document and impersonating a shareholder, all relating to dealings with scrip for 200,000 convertible notes owned by one Picot, those offences being said to have been committed by him with two men called Damien Grant and Leo Zalkalnins in the first half of 1993. He was also convicted on one charge that between July and October 1993 he wilfully attempted to prevent the course of justice by purchasing and using an ocean-going vessel to enable Zalkalnins to leave New Zealand to avoid the fraud proceedings which had then been commenced against him.

On each of the 11 convictions he was sentenced to a concurrent term of three years' imprisonment.

He gave notice of appeal against all 11 convictions and the sentences imposed following them. However, when the appeal first came on for hearing last week Mr Edgar made it plain that the appeal against conviction was limited to the 10 fraud charges and that in respect of the charge on the 11th count of preventing the course of justice the appeal was limited to one against sentence.

The fraud charges arose from a complicated scheme which used stolen investment records, fraudulent declarations of loss of scrip, and interference with postal boxes, in order to obtain duplicate stock certificates which were then sold and the proceeds converted into gold bullion.

Both Grant and Zalkalnins pleaded guilty to the fraud charges.

At the appellant's trial Grant gave evidence for the Crown. He said that the appellant was the originator and brains behind the stock frauds, which were the appellant's concept and plan, and for that reason he was to receive the lion's share of the proceeds, although he, Grant, and Zalkalnins had carried out all the physical steps necessary to obtain and then sell the duplicate scrip.

By contrast Zalkalnins, who gave evidence for the defence, said that Grant was the principal party in the stock frauds, that he himself had played an active though lesser part in those, and that the appellant was not involved at all, let alone the prime mover, until he agreed to join in buying a boat and taking Zalkalnins with him to Australia. Zalkalnins denied that at that time he had told the appellant that he had been charged with the stock frauds, but evidence given by another witness confirmed that such discussions had occurred.

The appellant himself gave evidence. He denied any involvement with Grant or with the stock frauds, but acknowledged that he had allowed his bank accounts to be used by Zalkalnins, and that he had purchased a boat, with funds provided by Zalkalnins, in his, the appellant's, name.

Shortly after the appellant's conviction on all 11 charges the Crown Solicitor at Auckland was told by the police that they held an outstanding file relating to an earlier and smaller stock fraud, involving stock owned by a Mr Thorne, which had been carried out using the same complex scheme used to obtain and deal with the Picot stock, and that Messrs Grant and Zalkalnins were implicated in the Thorne transaction but Mr Paton was not.

Realising that this information would bear upon the dispute between the three central figures in the present case, and particularly on Grant's contention that the scheme was the appellant's concept and plan, the Crown Solicitor referred the Thorne file to defence counsel.

We note in passing that no suggestion of any withholding of information by the Crown Solicitor has been made and that although, as Crown counsel acknowledge, it was unfortunate that the Thorne file was not made available to the defence before trial, it is understandable that the detective concerned may not have appreciated its significance to the Picot case.

However, we are satisfied that the appellant's conviction on the fraud charges must now be considered unsafe. Grant's evidence was central to the Crown case against the appellant and the Crown concedes that the new information must affect the credibility of his claim that the appellant was the planner and instigator of those frauds.

We are equally satisfied that Mr Edgar's abandonment of the appeal against conviction for preventing the course of justice was appropriate, as that conviction did not in any way rely on Grant's evidence.

Accordingly, we quash the appellant's conviction on counts 1 to 10 in the indictment on which he was tried, and the penalties imposed in relation to those convictions.

The Crown has asked for an order for a new trial on those charges. An order is made accordingly, but we invite the Crown to consider whether those charges are appropriate to the present evidentiary situation.

The appellant was granted bail without opposition from the Crown when the additional evidence was discovered. On the first call of this appeal Mr Edgar asked that this be continued, and that the appeal against sentence on the 11th count be deferred until the fate of the fraud charges was known. Because any retrial of those charges will almost certainly be deferred until the middle of next year at the earliest, the Court then asked that that appeal proceed but deferred its hearing until today to give Mr Edgar the opportunity he sought to obtain an up to date medical report for the appellant.

The concurrent sentences of three years imposed on each count were clearly imposed on the totality principle, and the sentence imposed on the 11th count must accordingly now be reviewed.

It has been properly accepted by Mr Edgar that the conviction on that count necessarily implies the rejection by the jury of the appellant's denial that he knew Zalkalnins had been charged with serious stock fraud and was on bail awaiting trial in this country for those matters.

In our view that knowledge and the appellant's actions in buying an ocean-going launch in his name, but with Zalkalnins' money, and leaving for Australia with Zalkalnins, the vessel then carrying a significant quantity of the bullion acquired with the proceeds of the stock frauds, and later claiming the ownership of that bullion, now he says to provide cover for Zalkalnins, all point to his engaging in that activity for other than altruistic reasons or simply a desire to help a friend in trouble.

An intentional and carefully planned endeavour to assist a criminal to escape the consequences of serious criminality carried out for personal gain would normally call for a significant term of imprisonment. However, the concurrent terms of three years must have contained a substantial sentence for the fraud convictions, and it is also necessary to bear in mind the effective sentence of three years imposed on Zalkalnins and the term of two and a half years imposed on Grant after his entering a plea of guilty.

Mr Edgar has placed some reliance on the recent medical certificate given to the Court today, which reports that the appellant suffers from a heart condition and that "his health has been getting worse lately as he was not taking his medication for some time while he was in prison". No reason has been given to us why appropriate medication could not be maintained if a term of imprisonment is imposed. The factor of Mr Paton's health was considered by the sentencer. We see no reason to consider that factor has greater significance than it was given by him. In particular the advice we have been given that an appointment with a specialist is pending need not, in our view, require particular response from this Court as that appointment can most certainly be kept.

This Court's first need is to send out a clear signal to others who might otherwise be inclined to endeavour to interrupt the administration of the criminal justice system. We accept that the appellant is, otherwise than for these matters, of good

character. We believe that the fact of the imposition of a term of imprisonment to mark the Court's concern about such conduct is the most important function of this sentencing.

In our view an appropriate sentence in those circumstances for this offence is the imposition of a term of imprisonment for 12 months, and that is the sentence now imposed.

Appeal against sentence allowed by replacing the term of three years imposed in respect of count 11 to one of one year.

Crown Solicitor, Auckland, for Crown
M A Edgar, Auckland, for Appellant