

**IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE PAPAIOEA ROHE**

**CRI-2019-454-23
[2020] NZHC 716**

TOBY BRYAN HIKAKA

v

NEW ZEALAND POLICE

Hearing: 7 April 2020
Appearances: W Kronast for the Appellant
J Harvey for the Respondent
Judgment: 7 April 2020

JUDGMENT OF COOKE J

[1] On 27 August 2019 Mr Hikaka was sentenced before Judge Rowe in the District Court at Palmerston North to 19 months' imprisonment for the following charges:¹

- (a) Two charges of breach of community detention,²
- (b) One charge for breach of intensive supervision,³
- (c) Three charges of theft (under \$500),⁴

¹ *New Zealand Police v Hikaka* [2019] NZDC 16907.

² Sentencing Act 2002, s 69G, maximum penalty six months' imprisonment or \$1,500 fine.

³ Section 70(A)(a), maximum penalty six months' imprisonment or \$1,500 fine.

⁴ Crimes Act 1961, s 219 and 223(d), maximum penalty three months' imprisonment.

- (d) One charge of intentional damage,⁵
- (e) Two charges of driving contrary to an alcohol interlock licence,⁶
- (f) One charge of driving in a dangerous manner,⁷ and
- (g) One charge of failing to stop for red/blue flashing lights while exceeding the applicable speed limit.⁸

[2] Mr Hikaka appeals his sentence on the grounds that the District Court erred in failing to grant Mr Hikaka leave to cancel his sentence of imprisonment.

[3] For the reasons set out in my decision in *White v New Zealand Police*, the Court retains the jurisdiction to make decisions such as bail decisions, or decisions concerning substituting a sentence of imprisonment for home detention notwithstanding the COVID-19 situation.⁹ The COVID-19 situation may, however, affect the decision the Court should make. For example the Court may need to have information to be satisfied that the bail address, or home detention address, remains suitable notwithstanding the COVID-19 situation.¹⁰

[4] By memorandum dated 6 April 2020 the respondent suggested that this appeal should be adjourned in light of such considerations. I declined that application as it is important that the Court proceed to deal with important matters, such as matters affecting the liability of the person, notwithstanding the COVID-19 situation.

Factual background

[5] The two breaches of community detention relate to two instances where Mr Hikaka returned to his address after curfew. On 30 December 2018 Mr Hikaka

⁵ Section 269(3), maximum penalty seven years' imprisonment.

⁶ Land Transport Act 1998, ss 32(1)(b) and 32(3), maximum penalty three months' imprisonment or \$4,500 fine.

⁷ Section 35(1)(b), maximum penalty three months' imprisonment or \$4,500 fine and minimum six month disqualification.

⁸ Sections 52A(1)(a)(ii), 52A(3), 52A(6) and 114(2), maximum penalty \$10,000 fine and six month disqualification.

⁹ *White v New Zealand Police* [2020] NZHC 684 at [11]–[15].

¹⁰ At [24]–[26].

returned home almost an hour late. Prior to that occasion Mr Hikaka had returned late almost every day prior for the previous week despite repeated warnings from his parole officer. Then in early January, non-compliance with curfew continued. On 6 January Mr Hikaka returned home late. On 7 January Mr Hikaka returned home seven hours and 13 minutes after curfew. He then left the curfew address at about 3.15 am.

[6] The breach of intensive supervision relates to Mr Hikaka's continued failure to report to his probation officer, and repeated failures to attend alcohol and drug rehabilitation programmes.

[7] The theft charges relate to several occasions where Mr Hikaka filled up his car with petrol at a station and then left without paying:

- (a) At 12.30 pm on Thursday 18 April 2019 Mr Hikaka was at Z Energy petrol station. He asked the floor attendant to pump \$40 worth of petrol into his car and entered the store. He went to the bathroom before walking out of the door and drove off without paying. In explanation Mr Hikaka said he had forgotten to pay.
- (b) At 7.51 am on Tuesday 14 May Mr Hikaka was at a petrol station in Palmerston North. He put \$20 worth of petrol into his car and drove off without paying. In explanation he said he could not afford to pay for the petrol.
- (c) At 6.07 pm on Friday 17 May Mr Hikaka put \$40 worth of petrol into his car at a petrol station. He drove off without paying. In explanation he said he had left his wallet at home.

[8] Mr Hikaka has been convicted of driving with excess alcohol on a previous occasion. As a consequence of that conviction he is required to have an Alcohol Interlock device attached to his car at all times. This is a breath testing device wired into the car's starting system. At 1 am on Saturday 27 April Mr Hikaka was stopped by Police driving in Palmerston North. He revealed he was required to drive a car fitted with an alcohol interlock device but the car was not fitted with such a device.

At 5.15 am on Sunday 5 May 2019 Mr Hikaka was stopped by Police driving in Palmerston North. Again, his car was not fitted with the alcohol interlock device. In explanation he said that his car was getting fixed and he was driving to McDonalds.

[9] While on bail for the theft offences and while still subject to a sentence of intensive supervision, Mr Hikaka was the subject of a dangerous police chase in Palmerston North. At about 3.30 am on Saturday 22 June 2019 Mr Hikaka was driving a car in Palmerston North. There were limited cars on the road and the conditions were good. Police observed the car travelling at excessive speed with no headlights on. Police activated red and blue flashing lights and sirens and began pursuit. Mr Hikaka did not stop for Police and drove to the wrong side of the road with his lights off. He reached speeds of 90 kilometres per hour in a residential speed area with a posted speed limit of 50 kilometres per hour. Mr Hikaka then left Palmerston North, entering a rural area towards Feilding reaching speeds of 150 kilometres per hour.

[10] He turned onto Affco Access Road, a dead-end street, and did a power slide to complete a U-turn driving straight towards Police. Police had to take evasive action to avoid a collision. Mr Hikaka continued driving into the Feilding township, reaching speeds of 90 kilometres per hour in a 50 kilometre zone. He continued to drive on the wrong side of the road with his headlights off.

[11] While driving along Makino Road he stopped the car and tried to reverse into the Police car. He completed another sliding U-turn and continued onto North Street driving on the wrong side of the road. His car began to smoke, back fire and began to slow. Another Police car attempted to pass Mr Hikaka on the inside lane. Mr Hikaka then turned into the passing lane, causing the Police car to slide and hit the curb and colliding with the driver's side. Mr Hikaka's car spun in the opposite direction.

[12] The entire pursuit lasted for a total of 16 minutes, covering 48 kilometres. All three vehicles were moderately damaged but fortunately no one was injured. When spoken to by Police, Mr Hikaka was paranoid and frightened, convinced that everyone was trying to kill him including the Police. He said he had been given some form of drugs and was "tripping out".

District Court decision

[13] The Judge took the dangerous driving charges as the lead offences and took a starting point of 14 months' imprisonment, noting it "could be a great deal higher".¹¹ She uplifted by three months for driving in breach of his interlock licence requirements, one month for the theft, one month for the breach of community detention and one month for breach of intensive supervision.

[14] The Judge noted it was highly aggravating that Mr Hikaka continued to offend while subject to bail and subject to sentence for previous offending and uplifted by a further four months. That resulted in a total starting point of 24 months' imprisonment. With a discount for guilty plea, that resulted in an end sentence of 19 months' imprisonment.

[15] Turning to a consideration of whether the sentence ought to be commuted to a sentence of home detention, the Judge noted that Mr Hikaka did not have a suitable address. But in any case, the Judge considered home detention was not appropriate in the circumstances:

[23] ...You have so comprehensively breached your community-based sentences that I do not consider you would serve a home detention sentence. I also need to send you a very strong message that if you do not stop for the police and you put people at risk in this way, particularly for that length of time and over that period, then the only outcome I can possibly impose that will protect the public is one of imprisonment.

Leave to appeal

[16] Notice of appeal was filed out of time, on 9 October 2019. Counsel for Mr Hikaka advises the delay was due to the fact that his lawyer for sentencing, did not appear to be available for the appeal. Delays in communication resulted in the appellant himself filing the notice of appeal and making an application to Legal Aid Services after the fact. The respondent does not oppose the appeal being determined out of time. In the circumstances I grant leave to appeal out of time.¹²

¹¹ *New Zealand Police v Hikaka*, above n 1, at [14].

¹² Criminal Procedure Act 2011, s 231(3).

Approach to appeal

[17] This appeal is governed by subpart 4 of Part 6 of the Criminal Procedure Act 2011. The Court must allow the appeal if, for any reason, there is an error in the sentence imposed and a different sentence should be imposed.¹³ The focus will be on the final sentence and whether that was in the available range, rather than the exact process by which it was reached.¹⁴ Decisions in relation to home detention involve a principled choice between different forms of sentence in light of sentencing principles.¹⁵

Analysis

[18] As at sentencing, it appears Mr Hikaka still does not have a suitable home detention address. The justification for an appeal is somewhat unclear but, as the respondent suggests, the appeal may be properly framed as an appeal against the District Court's refusal to grant Mr Hikaka leave to apply for cancellation of sentence of imprisonment pursuant to s 80I of the Sentencing Act 2002:

80I Leave to apply for cancellation of sentence of imprisonment and substitution of sentence of home detention in certain cases

- (1) This section applies if—
 - (a) a court has sentenced an offender to a short-term sentence of imprisonment; and
 - (b) at the time of sentencing, the court would have sentenced the offender to a sentence of home detention if a suitable residence had been available.
- (2) At the time of sentencing, the court must make an order granting the offender leave to apply to the court of first instance for cancellation of the sentence of imprisonment and substitution of a sentence of home detention if the offender finds a suitable residence at a later date.

[19] The Judge made it clear that, even if a suitable address were identified, Mr Hikaka would not be a suitable candidate for home detention.¹⁶ Mr Kronast for Mr Hikaka refers to a number of reasons to explain Mr Hikaka's most recent breaches

¹³ Criminal Procedure Act 2011, s 250.

¹⁴ *Ripia v R* [2011] NZCA 101 at [15]; see also *Palmer v R* [2016] NZCA 541 at [19].

¹⁵ *Fairbrother v R* [2013] NZCA 340 at [30]. See also *Bishop v Police* [2018] NZHC 657 at [48]–[49].

¹⁶ *Hikaka v New Zealand Police*, above n 1.

of his sentence conditions such as poor time management and deterioration of relationship with the occupation of his curfewed address.

[20] I am not satisfied the Judge was incorrect to find Mr Hikaka was an unsuitable candidate for home detention. Mr Hikaka has an extensive history of failures to comply with Court orders and sentence conditions. Not only has he failed to comply with the conditions of those sentences and bail, but he has a history of offending while subject bail and while subject to sentence. I have no confidence that Mr Hikaka would comply with any home detention conditions and am not otherwise satisfied a sentence of home detention would be appropriate for the following reasons:

- (a) The offending was serious — in particular the driving charges were the result of a lengthy, reckless and highly dangerous car chase.
- (b) Being subject to intensive supervision and community detention has not deterred Mr Hikaka from further offending. This latest set of offending was committed while subject to a sentence of intensive supervision and the dangerous driving offending was committed while on bail for the theft charges.
- (c) Apart from his most recent offending Mr Hikaka has a demonstrated history of failure to comply with sentence conditions and court orders extending back to 2007, with five previous convictions for breach of release conditions, four convictions for breach of intensive supervision conditions and seven convictions for driving while disqualified. He also has a history of offending on bail and breaching the conditions of bail.
- (d) Mr Hikaka has failed to attend programmes in accordance with the special conditions of his sentence of intensive supervision, including Care NZ Drink Driving Programme and alcohol and drug counselling through the MASH Trust. The potential rehabilitation potential of a home detention sentence is likely to be lost on Mr Hikaka.

- (e) The pre-sentence report noted “there is little confidence that Mr Hikaka will comply with a community-based sentence including an electronically monitored sentence” and recommended a sentence of imprisonment.
- (f) Mr Hikaka has not displayed any motivation to address his non-compliance, does not appear to understand the importance of community-based sentences and has not demonstrated any remorse for his offending or non-compliance.

[21] I am not satisfied there was any error in the sentence imposed, nor did the Judge err in declining to grant leave to apply for cancellation of the sentence of imprisonment. For those reasons the appeal is dismissed.

Cooke J