IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CRI-2010-419-43

BETWEEN	KENNETH JAMES ROSS Appellant
AND	NEW ZEALAND POLICE First Respondent
AND	COMMERCE COMMISSION Second Respondent

Hearing: 8 October 2010

Appearances: Appellant in Person
N Flanagan and I M Brookie for First and Second Respondents

Judgment: 8 October 2010

JUDGMENT OF COOPER J

Solicitors:
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Copy to: K J Ross, 151 Bankwood Road, Chartwell, Hamilton 3210

[1] Mr Ross was convicted on 25 November 2009 on five charges under s 242(1)(b) of the Crimes Act 1961 and five charges under s 40(1) of the Fair Trading Act 1986. The convictions were entered following a defended hearing in the Hamilton District Court before Judge Spear, which commenced on 21 September 2009 and concluded on 12 October 2009. Sentencing took place on 30 March 2010 when the Judge sentenced Mr Ross to an effective term of nine months' home detention and 200 hours community work.

[2] Mr Ross lodged an appeal on 28 April 2010 against both his conviction and sentence. The notice of appeal was in the familiar short form alleging that the learned Judge erred in fact and law in entering convictions and that the sentence was manifestly excessive.

[3] In sentencing Mr Ross, Judge Spear directed that he should go immediately to the address at which the sentence of home detention was to be served and it appears that Mr Ross complied with that direction and has been serving the sentence of home detention until very recently, notwithstanding the appeal and the provisions of s 124(3) of the Summary Proceedings Act 1957, which enacts that where there is an appeal against a sentence of home detention the term of the sentence specified ceases to run from the day the notice of appeal is filed.

[4] There was a call-over before White J on 30 June 2010 in relation to the appeal. In the minute that White J issued on that day he directed that the appeal be heard on 8 October 2010 and made time-table orders in respect of the filing and service of submissions. He noted in the minute that Mr Ross had sought a hearing date "in approximately 60 days". Amongst the directions made were that Mr Ross was to file and serve his written submissions four weeks prior to the hearing, that is by Friday 10 September 2010.

[5] I infer from the White J's minute that Mr Ross must then have been of the view that a fixture on 8 October would allow him sufficient time to prepare for the appeal.

[6] By a letter dated 31 August 2010, Mr Ross sought an adjournment of the hearing. The basis of the application was summarised by Heath J in his minute of 13 September 2010 in which he recorded Mr Ross' assertion that he did not "have the ability to interview witnesses and review all the documents and the like" during his time on home detention. Mr Flanagan, for the respondents, took the stance that Mr Ross had had ample time to prepare submissions based on the record of the District Court proceedings. Heath J noted that Mr Ross had made no application to adduce further evidence on appeal or to identify the topics on which he wished to interview witnesses. He directed that there be a telephone conference to consider the application for adjournment on 15 September 2010 because he was not prepared to grant it on the papers.

[7] The telephone conference took place on 15 September. Heath J recorded that:

> Mr Ross has explained to me that he has had difficulties in accessing relevant documents for the purposes of the appeal; namely the sentencing notes of Judge Spear, the notes of evidence taken at the defended hearing and the exhibits produced.

[8] Heath J noted that Mr Ross had a copy of the judgment given by Judge Spear at the conclusion of which he had been found guilty of the offences and recorded Mr Flanagan's assurance that the other material which Mr Ross required would be provided by Friday 17 September 2010. Heath J continued at [4]:

> I am not prepared to rule on the adjournment application at this stage. Rather, I adjourn the appeal for mention before me at 9.00am on 29 September 2010. If Mr Ross considers that he is unable to prepare his appeal adequate[ly] at that stage he may appear and make those submissions to me. If I consider that the appeal cannot fairly be presented at that time, I will adjourn it. Otherwise, the appeal will need to proceed.

[9] Heath J also noted that Mr Flanagan would need to consider how he wished to deal with submissions, particularly if Mr Ross had not been able to provide written material in relation to the appeal.

[10] Heath J conducted a further conference on 29 September 2010. He noted in the minute that he issued on that day, that Mr Flanagan had provided all material to Mr Ross that he had promised to provide on 15 September. Mr Ross, however,

evidently told Heath J that notwithstanding receipt of that material he was unable to prepare his appeal adequately for the hearing on 8 October. Heath J was not persuaded that an adjournment was justified and confirmed the hearing date. He noted that Mr Flanagan would file submissions prior to the hearing and serve them on Mr Ross without the opportunity of seeing submissions in support of the appeal in advance.

[11] At [6] and [7] Heath J wrote:

> [6] Mr Ross has today and previously, expressed a concern about an inability to access a lock-up where various documents are stored. He believes access to those documents is important for the purpose of preparing his appeal. I am told that he has requested permission from the probation officer supervising his home detention sentence to attend and uplift those documents but that permission has been refused.
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> [7] To enable the appeal to proceed without further difficulties on 8 October, the Court would appreciate favourable consideration being given to Mr Ross' request at the earliest possible time. In saying that I recognise that I have no jurisdiction to direct the probation officer in that regard.

[12] On 5 October 2010, I was advised by the Registrar of communications that had been received from Mr Ross. One was that his appointed barrister, Mr Kevin Gould, whom he had asked to represent him at the hearing today, would not be able to attend. He asked that a further date be "proposed and scheduled". In response to the Registrar's request Mr Ross forwarded a copy of the letter that he had received from Mr Gould dated 30 September 2010, which was in the following terms:

> Further to yours of 29th inst., I advise that unfortunately I am involved in a trial on 8th October, 2010.
>
> I wish you well in your adjournment application, but reiterate my advice that it is unlikely that you will successfully postpone the hearing of the Appeal for such a lengthy period as you seek.
>
> I look forward to hearing from you.

[13] A further communication was received by the Registrar in which Mr Ross sought that the Court appoint a lawyer to act on his behalf. In a minute that I issued on 5 October 2010, I noted that the fixture in this case had been established over three months ago and that Mr Ross had had ample time to prepare and secure such legal assistance as he required. I expressed my view that no basis had been disclosed

on which the Court could contemplate appointing a lawyer to act on his behalf and I directed the fixture should proceed.

[14] Perhaps prompted by Heath J's minute of 29 September and its request for co-operation, it appears that the probation service may have been alerted to a difficulty having regard to the fact that Mr Ross was in fact serving his sentence of home detention notwithstanding the fact that he had appealed to this Court and as a consequence, the sentence of home detention had ceased to run when the appeal was filed under s 124(3) of the Summary Proceedings Act.

[15] Whatever the reason was, a communication was sent to the Registrar of this Court on 6 October 2010 from the probation service, stating that on that day Mr Ross had been disconnected from electronic monitoring and that his sentence had been "suspended" pending the result of the appeal.

[16] Mr Ross says that, having been released, he was then in a position to go to the lock-up facility in Auckland and to uplift some of the material that he needed, but as he was in a small borrowed car he had not been able to collect it all and he would need to return to the lock-up before he could be in a position properly to instruct counsel to prepare for the appeal.

[17] Mr Ross has now made a more formal application for an adjournment which is based on five grounds. The application is opposed by Mr Flanagan, for the respondents. He submits that in the circumstances of this case if the Court is satisfied that there are no proper grounds to adjourn the appeal then, in view of Mr Ross' stance that he is not in a position to proceed, the appeal should be struck out under s 133(1) of the Summary Proceedings Act.

[18] The first ground on which Mr Ross advances his application for an adjournment is that he has been unable to obtain the necessary documents for the appeal hearing to proceed. He makes a submission that he has been denied access to Court documents because a request that he made to the Registrar of the District Court for a copy of the transcript was declined, the Registrar evidently taking the view that the material must all have been in Mr Ross' hands as a consequence of his

appearance at the trial. In the meantime he has, of course, received a copy of the transcript from Mr Flanagan in accordance with Heath J's minute of 15 September 2010.

[19] Mr Ross when questioned by me in fact confirmed that he had been to see his former counsel, Mr Speed in Auckland and Mr Speed had provided him with a copy of the transcript in May. However, he said that there were pages missing. He did not indicate how much of the transcript was missing and as I have noted that in any event he has now received from Mr Flanagan the complete transcript and I do not see in this ground any basis upon which the matter should be adjourned.

[20] The second basis upon which Mr Ross seeks an adjournment is that his "appointed counsel is unavailable" to appear at the hearing today. In submissions, Mr Ross clarified that Mr Gould had not in fact been instructed to do anything other than review documents relating to the appeal when they became available. I was invited to accept that Mr Gould had told Mr Ross that that was a process that might take up to six weeks. The suggestion is implausible. It may be the position that Mr Gould has said that he will advise Mr Ross in relation to the appeal once he is given the relevant material to review. But there is no proper explanation as to why that could not have occurred in time for this fixture to proceed. There was evidence that Mr Ross met with Mr Gould in June, prior to the call-over before White J. However, I am in doubt in fact as to whether Mr Gould has been instructed in any formal sense. If he had been, it would be extraordinary that, knowing an adjournment was to be sought on the basis of his unavailability he would make no attempt to communicate with the Court or to explain himself why it was that he could not appear or even arrange for an appearance on his behalf.

[21] The third ground that Mr Ross advances for an adjournment is that he has made every effort since the appeal to prepare, but had not reckoned on being denied access to the documents required.

[22] Mr Ross has placed great emphasis on the contents of his lock-up in Auckland. In fact, Mr Flanagan says that Mr Ross raised the same issues before Heath J, but in the end the only documents which he conceded at that stage were

necessary were the documents to which Heath J specifically referred in his minute of 15 September. I questioned Mr Ross about what the documents in the lock-up were and was given only vague responses. At one stage he referred to an affidavit from an expert whom he named as a Mr Stitchbury, but he then said that Mr Stitchbury's affidavit had been sworn after the convictions had been entered.

[23] I simply do not accept Mr Ross' stance that he has been denied access to important documents because of being detained on home detention and unable to access the lock-up given his complete inability to describe what these documents were or what their contents or relevance to the case might be. I have the clear impression that Mr Ross is simply making up excuses in an attempt to secure an adjournment and thereby delay the hearing of the appeal. Even after his recent visit to the lock-up he has been unable to give any specifics as to these important missing documents. In the circumstances, I am not persuaded that the fact that he has been required to serve his sentence on home detention, apparently contrary to the provisions of s 124(3) of the Summary Proceedings Act should be influential on the question of an adjournment.

[24] The fourth ground advanced is that Mr Ross has made no earlier requests for a delay in the proceedings since being arrested in June 2008. However, he has now made successive applications for adjournment of this fixture. None of them have been on credible grounds, and both Heath J and I have issued minutes stating the fixture must proceed. The suggestion that there were adjournments at the Crown's request prior to the trial in the District Court is rejected by Mr Flanagan and I am not in a position to deal with that allegation. However, what took place in the District Court prior to the trial is not relevant here.

[25] Finally, Mr Ross refers to his rights to a fair hearing under the New Zealand Bill of Rights Act 1990. That is an important right, but as Mr Flanagan notes, it requires co-operation on Mr Ross' part if it is to be exercised. In the circumstances as I have recounted them it seems to me that rather than seeking to exercise his right Mr Ross has rather occupied himself with reasons why the appeal should not proceed.

[26] In the circumstances his reliance on the Bill of Rights is unpersuasive.

[27] There are, consequently, no proper grounds advanced for adjourning the hearing of the appeal. Mr Ross has indicated that he is not in a position to proceed. I consider the circumstances are such that it is appropriate now to grant the respondents' application and to dismiss the appeal for non-prosecution under s 133(1) of the Summary Proceedings Act 1957.

[28] I make an order accordingly.

[29] Mr Ross you must now return forthwith to the address at 151A Bankwood Road, Chartwell, Hamilton to resume serving the sentence of home detention.