

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CRI-2020-404-347  
[2020] NZHC 3162**

BETWEEN XUE CHEN  
Appellant

AND THE QUEEN  
Respondent

Hearing: 30 November 2020

Appearances: F Pilditch for the Appellant  
J Barry for the Respondent

Judgment: 2 December 2020

---

**JUDGMENT OF GORDON J**

---

This judgment was delivered by me  
on 2 December 2020 at 3.30 pm

Registrar/Deputy Registrar

Date: 2/12/20. AC STEVEN-RILEY.

Solicitors: Crown Solicitor, Auckland  
Martelli McKegg, Auckland  
Counsel: F Pilditch, Auckland

## Introduction

[1] The appellant, Xue Chen, was sentenced to 12 months' home detention<sup>1</sup> after pleading guilty to a representative charge of obtaining by deception<sup>2</sup> following a sentence indication.<sup>3</sup> He now appeals against that sentence on the basis that the starting point adopted was too high and that a sentence of home detention was not the least restrictive outcome nor one which best provided for his rehabilitation and reintegration.

## Background

[2] Mr Chen, through his company Black Water Trading Ltd (trading as Gold Chick), sold eggs. The company leased a property in Henderson where chickens were kept in free range conditions. The eggs they produced were marketed and sold as free range. However, between 3 September 2015 and 20 October 2017, Mr Chen purchased eggs laid by caged chickens. In outward appearance, eggs laid by caged chickens and those laid by free range chickens are the same. Mr Chen arranged for the eggs laid by caged chickens to be packed on his premises in cartons labelled as free range.

[3] Mr Chen sold these eggs, laid by caged chickens, as free-range eggs at the premium price of free range eggs. One of the companies supplied by Gold Chick required a declaration and other documentation certifying the eggs were sourced from a free range production process. That company paid \$1.48 per dozen more for free range eggs than it paid for caged eggs.

[4] The caged eggs were supplied to Mr Chen by two companies. Mr Chen went to some effort to conceal the offending. He hired an unmarked rental van twice a week to drive to one supplier, which produced only caged eggs. The van returned with a large quantity of eggs. An employee undertook this task at Mr Chen's direction. The caged eggs were delivered by the employee to the packing shed at Gold Chick and unloaded. Invoices from that supplier, addressed to a different person, were found by

---

<sup>1</sup> *R v Chen* [2020] NZDC 14129.

<sup>2</sup> Crimes Act 1961, s 240. Maximum penalty (s 241(a)): seven years' imprisonment.

<sup>3</sup> *R v Chen* DC Auckland CRI-2018-090-4688, 19 December 2019.

the Commerce Commission with Mr Chen's business papers. Eggs from the second supplier were apparently collected by Mr Chen.

[5] When questioned about his activities, Mr Chen denied he was selling caged eggs as free range. He insisted he supplied customers who wanted caged eggs, which were cheaper, and that he had not sold these eggs as free range. Mr Chen could not substantiate this claim.

[6] The evidence also established that Gold Chick sold more eggs than it produced over the period of the offending. The estimated benefit to the company by on selling caged eggs as free range eggs was calculated to be \$323,011.

[7] This was, in essence, the nature of the offending. Further detail about how the offending was undertaken is unnecessary for the purposes of this appeal.

### **District Court judgment**

[8] The Judge determined the benefit derived from packaging approximately 3,113,000 caged eggs as free range, to be \$323,011 after acknowledging this amount was only an estimate. However, it was a substantial sum and the Judge considered a sentence of imprisonment was appropriate. He stated the offending appeared motivated by financial gain.

[9] Deterrence was the key sentencing principle engaged in the case. Eggs could easily be repackaged and consumers misled on the production process. This could easily discredit the entire industry. The Judge observed that the mechanism for the offending was simple but sophisticated; efforts were taken to conceal what was happening. The offending was premeditated. The Judge identified three groups of victims: those companies supplied by Gold Chick, members of the public who purchased caged eggs which they were told were free range, and Mr Chen's employees who were drawn into the offending.

[10] The Judge could not identify any mitigating features of the offending.

[11] The Judge referred to his consideration of authorities for the purposes of the sentence indication hearing and adopted a starting point of three years' imprisonment (the starting point in the sentence indication). Mr Chen's previous record was a key mitigating factor. But that had to be balanced against the extended period of the offending. The Judge did not consider a discount was available for prior good conduct in consequence. Of greater concern was the effect of imprisonment on Mr Chen's business and the hardship this would cause to employees and his family. The Judge also noted that Mr Chen was no longer involved in the supply of eggs but was focused on supplying chicken meat.

[12] The final sentence determined by the Judge was arrived at by giving a discount of 25 per cent for a guilty plea and taking into account an offer by Mr Chen to donate \$50,000 to the SPCA, which justified a further discount of between eight and 10 per cent. The Judge was prepared to allow a total discount of around one third, giving a final sentence of two years' imprisonment.

[13] The proposed donation to the SPCA satisfied the Judge that a sentence of home detention was appropriate. Mr Chen was no longer a threat to the community. Home detention was the least restrictive outcome. The Judge rejected a submission on behalf of Mr Chen that a community sentence was available (a combination of community detention and community work was proposed) because the offending was too serious.

### **Approach on appeal**

[14] Section 250(2) of the Criminal Procedure Act 2011 provides that the appeal must be allowed if there has been an error in the sentence imposed and a different sentence should have been imposed. While there is no mention in s 250(2) of a "manifestly excessive" sentence being a ground of appeal, it is consistent with the statutory language and "there is no reason not to use it when considering s 250(2)".<sup>4</sup> The appellant must show that an error occurred in sentencing and that this error resulted in a sentence which was outside the range or otherwise not justified by accepted sentencing principles.<sup>5</sup>

---

<sup>4</sup> *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [35].

<sup>5</sup> *Ripia v R* [2011] NZCA 101 at [15].

## Submissions

### *Appellant's submissions*

[15] In summary, Mr Pilditch, for Mr Chen, submits the starting point adopted by the Judge was too high. The Judge relied on another case<sup>6</sup> to arrive at this starting point rather than undertaking the assessment required by *R v Varjan*.<sup>7</sup> The appropriate starting point was two years' imprisonment.

[16] With this starting point, Mr Pilditch says, the Judge could and should have considered outcomes less restrictive than home detention. A sentence of community detention and community work would have allowed Mr Chen to more effectively manage his business, in particular by making deliveries. These sentencing options would have been available had the starting point been correctly identified. A sentence of home detention was not the least restrictive outcome as a result. Nor was it the outcome which best provided for Mr Chen's rehabilitation and reintegration.

[17] More particularly Mr Pilditch submits *Commerce Commission v Garnett* is not a suitable comparison because the District Court Judge in that case did not properly consider the *Varjan* factors in assessing culpability. In *Garnett* a starting point of three years and six months' imprisonment was adopted for offending over a 20 month period where the defendant sold 206,000 dozen caged eggs as free range. The pecuniary advantage was approximately \$376,000. Mr Pilditch's submissions focus heavily on what he says was the Judge's failure in *Garnett* to properly reason the starting point by reference to the *Varjan* factors. However, the question I have to deal with is whether the Judge in this case properly considered the *Varjan* factors, even if he relied on another judgment to ensure consistency in sentencing.

[18] Mr Pilditch does, however, go further and implies the Judge wrongly assessed the *Varjan* factors in this case. Mr Pilditch says quantum of a fraud is "a solid marker of culpability". He points to a table of fraud cases he has compiled, involving all types of fraud, and says that the starting point adopted by the Judge in this case is one which has been applied to frauds which have caused substantial monetary losses to victims

---

<sup>6</sup> *Commerce Commission v Garnett* [2014] DCR 300.

<sup>7</sup> *R v Varjan* CA97/03, 26 June 2003.

or gains to the defendant. He says lower sentences have been adopted where defendants have received larger gains from their fraudulent activities.

[19] Mr Pilditch further submits the victims in this case are not identified and the individual harm they have suffered is limited; this is to be compared with other offending where specific and identifiable victims have suffered substantial financial losses at the hands of the defendants. The harm suffered by those who purchased caged eggs rather than free range eggs is to be contrasted, in stark terms, with the direct and pecuniary losses suffered by other victims of fraud. This case does not have that serious aggravation. He also submits that other factors, particularly abuse of trust, sophistication of the fraud and premeditation need to be handled with caution in determining culpability. All three are essential characteristics of fraud and are inherent in the offence.

[20] In short, Mr Pilditch says in assessing Mr Chen's culpability according to the *Varjan* factors, weight should be accorded the gain Mr Chen received from his offending and less weight to other factors such as harm, abuse of trust, sophistication and premeditation. On this basis, a starting point of two years' imprisonment was appropriate to reflect the seriousness of the offending. The Judge should then have conducted the necessary exercise of considering the hierarchy of sentences in s 10A of the Sentencing Act 2002.

#### *Respondent's submissions*

[21] Mr Barry, for the Crown, submits the Judge was not in error in setting the starting point. He points to the sentencing indication, where the Judge set out the factors in *R v Varjan* for assessing culpability. The Judge then applied those factors in reaching a starting point of three years. Mr Barry says the starting point was within range and arguably generous. A starting point of four years imprisonment would have been warranted.

## Analysis

[22] This appeal is concerned primarily with the appropriate starting point for Mr Chen's offending. Whether an alternative and less restrictive sentence was available to the Judge follows from determining the starting point.

[23] In *Varjan*, the Court of Appeal said:<sup>8</sup>

Culpability is to be assessed by reference to the circumstances and such factors as the nature of the offending, its magnitude and sophistication; the type, circumstances and number of the victims; the motivation for the offending; the amounts involved; the losses; the period over which the offending occurred; the seriousness of breaches of trust involved; and the impact on victims.

[24] The Court of Appeal added that comparison with other cases is to be undertaken in assessing culpability as are mitigating factors such as reparation, co-operation with investigators, plea, remorse and personal circumstances.

[25] Leaving aside the question of the correctness or otherwise of the reasoning in *Garnett*, Mr Pilditch's approach is one which would place greater weight on one factor – quantum – and less weight on other factors. There can be no objection to this submission in general terms. Sentencing always involves not just identifying relevant aggravating and mitigating features but attributing weight to them depending on the specific circumstances of the offending.

[26] Weight of the individual factors must always depend on the nature and circumstances of the offending. I do not understand the Court of Appeal in *Varjan* to be saying otherwise. This is also evident from the summary table of cases provided by Mr Pilditch. The table establishes, when reviewed by starting point, that a court looks to the overall culpability of the offending and not only the quantum involved in the fraud.<sup>9</sup> The additional cases offered by the Crown reinforce this point. I acknowledge a good number of those cases involve offenders who were in a special relationship with their victims. Having said that, the starting points were higher than the starting point adopted in this case.

---

<sup>8</sup> *R v Varjan*, above n 7, at [22].

<sup>9</sup> I am also unclear how the column headed "sum involved" was calculated and, in particular, whether it is limited to the quantum of loss (or gain).

[27] In his sentence indication, the Judge acknowledged that he was required to take into account a number of factors. Those he took into account were the:

- (a) magnitude and sophistication of the offending (including that the actual benefit was likely to be considerably higher than the calculated profit, such as retaining a supply contract which would otherwise have been lost);<sup>10</sup>
- (b) high degree of premeditation;
- (c) steps taken to conceal the offending;
- (d) seriousness of the breach of trust which arose from the difficulty of detection;
- (e) victims of the offending (in three groups: those who purchased eggs, competitors and employees who were drawn into the fraud);
- (f) period of the offending (over 25 months); and
- (g) importance of consumer protection.

[28] All of these were relevant factors to take account of in assessing Mr Chen's culpability. I do not accept Mr Pilditch's submission that their relevance is primarily for the purposes of identifying imprisonment per se as a starting point. They are relevant to the length of the term as part of the starting point. Each was weighed by the Judge according to the circumstances of the offending. The Judge recognised that the amount involved was an important factor but it was not the only factor. I also take the view that even though many, probably most, of the victims of the offending could not be specifically identified, this does not reduce the significance of this factor.

[29] As already noted, the cases identified by the Crown, where there were breaches of special relationships and had identified victims, adopted higher starting points. I

---

<sup>10</sup> The agreed statement of facts states that the benefit of the contract was \$870,086 over the charge period.



also do not accept Mr Pilditch's submission that the alternative charges under the Fair Trading Act 1986 being aimed at consumer protection and which are essentially aimed at wrongful "passing off", somehow diminish the seriousness of the offending in the charge on which Mr Chen was sentenced. The charge of obtaining by deception was brought under s 240 of the Crimes Act 1961, for which the maximum penalty is seven years imprisonment.

[30] After setting out the aggravating features of the offending the Judge referred to *Garnett* for the purposes of consistency. The Judge noted that deterrence was a key sentencing principle along with the importance of holding Mr Chen accountable for his actions and to denounce the conduct.

[31] Whatever errors, if any, there may have been in *Garnett*, they were remedied by the approach the Judge in this case took in his sentencing indication. He properly considered the relevant *Varjan* factors and gave appropriate weight to them in the circumstances of the offending in arriving at the three year starting point. He drew on *Garnett* as a final check for reasons of consistency.

[32] There was no error. The starting point adopted by the Judge was within the available range and Mr Pilditch does not appear to challenge the discounts for mitigating factors. The Judge's decision to impose home detention as the least restrictive sentence, rather than a combination of community detention and community work, reflected the seriousness of the offending. The Judge did not fail to consider the hierarchy of sentences. He simply found that a lesser sentence would not reflect the seriousness of the offending. He was correct in that regard. The final sentence was not manifestly excessive.

[33] One further submission on Mr Chen's behalf requires comment. Mr Pilditch states that Mr Chen served 45 days in prison after he was convicted of obstructing the course of justice. His appeal against conviction for that offence was allowed. Mr Pilditch says Mr Chen was separated from his family and his experience in prison had a significant personal deterrent effect. Mr Pilditch submits this should have been considered by the Judge in determining the least restrictive sentence. However, that sentence related to distinct offending and was not relevant to the assessment of

culpability in the fraud offending nor in considering mitigating factors in determining the final sentence.

### **Result**

[34] The appeal is dismissed.

---

Gordon J