IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2020-404-000302
[2020] NZHC 332

UNDER	the Habeas Corpus Act 2001
BETWEEN	DERMOT GREGORY NOTTINGHAM Applicant
AND	DEPARTMENT OF CORRECTIONS Respondent

Hearing: 25 February 2020

Appearances: Applicant in person
M J Mortimer for the Defendant

Judgment: 28 February 2020

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by me on 28 February 2020 at 4.00pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
Meredith Connell Auckland
Copy to:
D G Nottingham

[1] On Friday, 21 February 2020, Dermot Nottingham filed a writ of habeas corpus challenging the lawfulness of his detention under a sentence of 12 months' home detention imposed by the Court of Appeal in its decision, *Nottingham v R* of 30 July 2020.[1]

[2] Mr Nottingham's application was heard on Tuesday, 25 February 2020, within three working days of the date of Mr Nottingham's application as required by s 9(3) of the Habeas Corpus Act 2001.

[3] Under s 14(1) of the Habeas Corpus Act, if the defendant, in this case the Chief Executive of the Department of Corrections, fails to establish that Mr Nottingham's detention is lawful, the Court must grant a writ of habeas corpus ordering Mr Nottingham's release.

The Chief Executive's position

[4] The Chief Executive, through his counsel Mr Mortimer, notes that the Court may refuse Mr Nottingham's application in accordance with s 14(1A)(b) of the Habeas Corpus Act, without requiring the Commissioner to establish that Mr Nottingham's detention is lawful, if satisfied that Mr Nottingham's application for a writ of habeas corpus is not the appropriate procedure for considering Mr Nottingham's allegations. Mr Mortimer submits that Mr Nottingham's application is not the appropriate procedure for considering Mr Nottingham's allegations because he says the application is in reality an appeal against Mr Nottingham's sentence by another means.

[5] However, Mr Mortimer also says that if the Court considers that the Chief Executive must establish that Mr Nottingham's detention is lawful he can do so because the order for Mr Nottingham's home detention is before the Court. Mr Nottingham's sentence of 12 months' home detention was imposed by the Court of Appeal on 30 July 2019. Accordingly, Mr Nottingham's sentence has another five months to run.[2] It follows that Mr Nottingham's continued detention is lawful and the Court should refuse the application for a writ of habeas corpus.

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1 *Nottingham v R* [2019] NZCA 334.

2 It should be noted that Mr Nottingham was granted bail and his sentence of home detention was suspended pending the Court of Appeal's decision on his appeal.

Mr Nottingham's position

[6] Mr Nottingham's originating application dated 21 February 2020 sets out in some detail why he considers his current sentence of home detention is unlawful. Mr Nottingham handed up further comprehensive submissions at the hearing on 25 February 2020 and engaged actively with the Court at the hearing. He also filed further submissions after the hearing in which he responded to some of the exchanges that took place at the hearing. Although Mr Nottingham can be a little assertive in the manner he advances his propositions, he was courteous and considered in his engagement with the Court.

[7] The essence of Mr Nottingham's case is his contention that in setting its sentence on 30 July 2019, after the hearing on 25 June 2019, the Court of Appeal failed to take into account the fact that the maximum period for a sentence of home detention is 12 months[3] and that he had already served three and a half months of a sentence of home detention for the same charges as those to which the Court of Appeal's sentence applied. As a consequence, the Court enlarged Mr Nottingham's sentence beyond the maximum allowed under the Sentencing Act 2002, which was beyond the Court's statutory powers. As Mr Nottingham put it, "A lawful sentence is one imposed by a court acting lawfully, and not ultra viresly, and giving a per incuriam judgment." Accordingly, Mr Nottingham's detention was not imposed lawfully and he should be released forthwith.

[8] Mr Nottingham also challenges the basis upon which the Court of Appeal set his sentence – by deciding upon what he calls an "imaginary" sentence of 31 months, then, after making a deduction of seven months (to take account of the three and a half months of home detention already served), arriving at a cumulative sentence of 24 months which it then converted into a series of concurrent sentences of home detention, which it imposed without Mr Nottingham being given an opportunity to be heard, without providing reasons and without regard to the maximum sentences which could have been imposed on each of the charges for which concurrent sentences were imposed. Mr Nottingham says this approach is beyond the Court's powers under the

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[3] Section 80A(3) of the Sentencing Act provides that a sentence of home detention may be for such period as the court thinks fit but must not be less than for 14 days or more than 12 months.

Sentencing Act, in breach of the Court's duty to provide reasoned decisions as found by the Privy Council in *Taito v R*,[4] arbitrary, and in breach of New Zealand's obligations under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Discussion

Is Mr Nottingham's detention unlawful?

[9] Although the Chief Executive submits that it is not necessary for the Court to decide the point, I am satisfied that a sentence of home detention comes within the definition of "detention" as provided for in s 2 of the Habeas Corpus Act:

> **detention** includes every form of restraint of liberty of the person

[10] There can be little doubt that home detention amounts to a restraint of liberty of the person having regard to s 10A of the Sentencing Act which lists home detention as the second most restrictive form of sentence in the hierarchy of sentences and orders. It follows that, in accordance with s 14 of the Habeas Corpus Act, the Chief Executive must establish that Mr Nottingham's detention pursuant to the sentence of home detention is lawful or the Court must grant Mr Nottingham as a matter of right a writ of habeas corpus ordering his release.

[11] Mr Nottingham's originating application helpfully annexes copies of:

(a) The Notice of Result of the Court of Appeal's decision in which it was adjudged that:

(i) Mr Nottingham's request to adduce further evidence was declined;

(ii) Mr Nottingham's appeal against the conviction entered by the District Court was dismissed;

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4 *Taito v R* [2002] UKPC 15; [2003] 3 NZLR 577; (2002) 19 CRNZ 224.

(iii) Mr Nottingham's "existing (part-served) sentence of home detention" was quashed and a new sentence of 12 months' home detention, with identified concurrent home detention sentences, plus 100 hours' community work was imposed, subject to the same conditions as imposed by the District Court.

(b) The Order for Sentence of Home Detention dated 30 July 2019 and signed by the Deputy Registrar stating that Mr Nottingham had been sentenced to home detention for a total period of 12 months made up of the seven concurrent sentences imposed by the Court. The Order also states that the start date of the sentence was the 30th day of July 2019.

[12] On the face of these documents, the veracity of which Mr Nottingham does not dispute, Mr Nottingham has been sentenced by the Court of Appeal to a period of 12 months' home detention starting on 30 July 2019. In accordance with those documents, Mr Nottingham's period of home detention runs until 29 July 2020. It follows that those documents establish that Mr Nottingham's detention is lawful, having regard to the Court of Appeal's observations in *Manuel v Superintendent of Hawkes Bay Prison*:[5]

> [49] A person who detains another can fairly be expected to establish, effectively on demand, the legal justification for the detention. In cases involving imprisonment or other statutory confinements, this will involve the production of a relevant warrant or warrants or other documents which provide the basis for the detention. We accept that apparently regular warrants (or other similar documents) will not always be a decisive answer to a habeas corpus application. But it will be a rare case, we think, where the habeas corpus procedures will permit the Court to enquire, into challenges on administrative law grounds to decisions which lie upstream of apparently regular warrants. This is particularly likely to be the case where the decision maker is not the detaining party. …

[13] Whether provided by the Chief Executive or by Mr Nottingham, the documents annexed to Mr Nottingham's application provide the lawful basis for Mr Nottingham's detention. They are more than a regular warrant. They are evidence of the sentence imposed by New Zealand's second most senior Court, the decision-maker, and not the

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5 *Manuel v Superintendent of Hawkes Bay Prison* [2005] 1 NZLR 161 (CA).

detaining party, the Commissioner. Having regard to the Court of Appeal's observations in *Manuel*, it would have to be a particularly rare case where the habeas corpus procedures would allow a Court to enquire into a challenge to the decision of the decision maker itself, particularly where the decision-maker is a court superior to that considering the habeas corpus application.

[14] I am satisfied that this is not one of those rare cases and that I must accept the evidence of the Court of Appeal's sentence as establishing the lawfulness of Mr Nottingham's detention. To do otherwise would be for this Court to act as an appeal Court from decisions of the Court of Appeal.

Is a habeas corpus application the appropriate procedure for considering Mr Nottingham's allegations?

[15] Mr Nottingham's challenge is not overtly based on administrative law grounds, the basis of challenge under consideration in *Manuel*, although it has strong similarities to the administrative law grounds of illegality, error of law, and excess of jurisdiction. At its heart, however, Mr Nottingham's challenge is to the substance of the Court of Appeal's decision. He says the decision was made *per incuriam* or without regard to the law. In other words, he says the Court of Appeal's sentence was wrong in law.

[16] That is classically a question for appeal. This underscores the Chief Executive's submission that Mr Nottingham is seeking to use the writ of habeas corpus to appeal the Court of Appeal's decision. In his engagement with the Court at the hearing of his application, Mr Nottingham confirmed that that is precisely what he is doing.

[17] After the Court of Appeal's decision, Mr Nottingham sought leave from the Supreme Court to appeal the Court of Appeal's decision, including on the grounds that the Court of Appeal's approach to sentence ignored time served. That application was dismissed, although the Supreme Court did not consider Mr Nottingham's ground of

appeal based on time served except to record that nothing advanced by Mr Nottingham gave rise to any appearance of a miscarriage of justice arising out of this ground.[6]

[18] At the hearing before me, Mr Nottingham handed up a minute from the Supreme Court dated 24 February 2020 that was apparently issued in response to Mr Nottingham's application for recall of the Supreme Court's judgment. In its minute the Court states:

> [2] The Court would like to receive further submissions from the Crown that address Mr Nottingham's submission that the sentence imposed by the Court of Appeal exceeds the statutory maximum of 12 months. In particular, the Crown is asked to advise whether the time served by Mr Nottingham prior to the decision of the Court of Appeal (three and a half months) will be taken into account by the Department of Corrections in determining the detention end date and, if so, what the statutory basis of that decision is for that decision.

[19] Understandably, Mr Nottingham is encouraged by this Minute which he sees as indicating that the Supreme Court may validate his position. That is a matter for the Supreme Court and not this Court. Nonetheless, I consider it appropriate to observe that the Crown and the Supreme Court may wish to consider whether the intent if not the precise language of s80B(2) of the Sentencing Act is engaged by Mr Nottingham's circumstances.[7]

[20] For the purposes of this habeas corpus application, however, the relevance of the Supreme Court minute is that Mr Nottingham told this Court that the question he is pursuing before the Supreme Court in exactly the same question he is pursuing in his habeas corpus application. In other words, he is pursuing through the Supreme Court's appeal and recall processes the same question he is pursuing through his application for a writ of habeas corpus.

[21] This acknowledgement further confirms that Mr Nottingham is using the habeas corpus procedure to appeal against the Court of Appeal's decision. It also

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6 *Nottingham v R* [2019] NZSC 144 at [15].

7 Section 80B(2) provides:

> If a court imposes cumulative sentences of home detention or imposes 1 or more sentences of home detention on an offender who is already serving a sentence of home detention, the total term of the sentences of home detention must not be more than 12 months.

confirms that Mr Nottingham's application for a writ of habeas corpus is not an appropriate procedure for considering his allegations that his sentence of home detention is unlawful.

[22] Lest there be any doubt, I record that I would have reached the same conclusion without Mr Nottingham's acknowledgement. It is apparent that Mr Nottingham is asking the High Court to hold that the Court of Appeal's decision to impose a sentence of 12 months' home imprisonment is wrong in law. That is a matter for appeal. It is well beyond the jurisdiction of this Court.

[23] In conclusion, therefore, I decline Mr Nottingham's application on two grounds:

(a) In terms of s 14(1) of the Habeas Corpus Act, the Commissioner has established that Mr Nottingham's detention is lawful based on the documents attached to Mr Nottingham's application;

(b) In accordance with s 14(1A)(b) of the Habeas Corpus Act, I am satisfied that Mr Nottingham's application is not the appropriate procedure for considering Mr Nottingham's allegations that his sentence of home detention is unlawful.

[24] I record, however, that Mr Nottingham's situation may be reviewed by the Supreme Court in the context of Mr Nottingham's application for recall of that Court's decision to dismiss his application for leave to appeal. That is a more appropriate context for assessing Mr Nottingham's essential point that the Court of Appeal should not have imposed what Mr Nottingham considers to be an effective sentence of 15 and a half months' home detention, albeit one that was punctuated by a period of release on bail while Mr Nottingham's appeal was in progress.

Application for relaxation of home detention conditions

[25] Mr Nottingham also requests that the Crown agree or the Court order that he be allowed four hours a day of unsupervised leave pending the outcome of the Supreme Court's consideration of his recall application. Mr Nottingham submits that

he has already served well over 75 per cent of his full sentence as he sees it, based on the three and a half months served of the sentence imposed by the District Court and the seven months served of the sentence imposed by the Court of Appeal.

[26] That request appears to be based on a misapprehension that early release is available for persons serving sentences of home detention in the same way that parole is available for persons serving sentences of imprisonment. The Parole Act 2002, however, does not apply to persons serving sentences of home detention and the expectation is that sentences of home detention are served in full.

[27] Even under Mr Nottingham's calculation of his sentence, that sentence does not expire until mid-April 2020. In its minute dated 24 February 2020, the Supreme Court has asked the Crown to file its submissions by 2 March 2020 and that Mr Nottingham file any submissions in reply by 9 March 2020. That should ensure that the Supreme Court has the opportunity to decide whether to review Mr Nottingham's sentence before mid-April 2020 when the issue will become acute.

[28] In any event, I do not consider that it is appropriate to seek a variation of the conditions of home detention through an application for a writ of habeas corpus and decline to make the order sought.

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G J van Bohemen J