IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2012-085-009093
[2014] NZHC 1807

THE QUEEN

v

JOHN ARCHIBALD BANKS

Hearing: 1 August 2014

Appearances: P E Dacre QC for the Crown
DPH Jones QC for the Defendant

Date: 1 August 2014

SENTENCING NOTES OF WYLIE J

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[1] Mr Banks, you may remain seated until I ask you to stand.

[2] You appear for sentence today, having been found guilty of one charge of transmitting a return of electoral expenses, knowing it to be false in one or more material particulars. This is an offence pursuant to the now repealed s 134(1) of the Local Electoral Act 2001. The maximum penalty is two years' imprisonment or a fine of $10,000.

Relevant Facts

[3] My analysis of the relevant facts is set out in my reasons for verdict delivered on 5 June 2014.[1]

[4] In 2010 you were a candidate for the position of Mayor in the new Auckland Super City.

[5] You put together an experienced campaign team and you and your team set out to raise approximately $1 million to fund your campaign. You were hoping to persuade 10 major donors to each contribute $25,000 to the campaign, and also to obtain smaller donations from other supporters.

[6] Mr Kim Dotcom had recently settled in New Zealand and you first met him in April 2010. Subsequently, in June 2010, you and your wife attended a private luncheon hosted by Mr Dotcom and his wife, Mona, at their residence in Coatesville. The subject of your mayoral campaign was raised at that lunch. The discussion extended to the campaign's funding and Mr Dotcom offered to donate $50,000 to your campaign. You accepted that offer. You requested that the donation should be split and made by way of two payments – each of $25,000. You explained this request to Mr Dotcom, saying that it would enable you to keep the donation anonymous. When Mr Dotcom asked you about this, you said that if you were to help Mr Dotcom, it would be better if no one knew about the donation.

[7] Two cheques were written, each of $25,000. They were both dated 9 June 2010. They were drawn on Megastuff Limited, a company run by Mr Dotcom, and

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1 *R v Banks* [2014] NZHC 1244.

they were signed by him. The cheques were deposited into a drop box at the Westpac Bank in Albany on 14 June 2010. The cheques were then presented and the monies were credited to your campaign bank account.

[8] In subsequent discussions with Mr Dotcom and his head of security, a Mr Wayne Tempero, you acknowledged receipt of the cheques. You also had a discussion in January 2012 with Mr Dotcom's solicitor, a Mr Greg Towers, in which you referred to the election support Mr Dotcom had given to you.

[9] A member of your campaign team, Mr Hutchison, acted as the treasurer, responsible for campaign finances. He received the bank statements and he was the only person who had online access to the account. You kept yourself at arm's length from the financial side of the campaign.

[10] Pursuant to the Act, you were required to file an electoral return within 55 days of the successful candidate being declared. In the event, your campaign was unsuccessful and your principal opponent, Mr Brown, was declared Mayor on 14 October 2010.

[11] The electoral return was required to set out your electoral expenses, the name and address of each person who had made an electoral donation to you, and the amount of each electoral donation. An electoral donation was defined to mean a donation of more than $1,000. If an electoral donation of money, or of the equivalent of money, was made to you anonymously, and the amount of that donation exceeded $1,000, then the amount of the donation and the fact that it was received anonymously, also had to be set out. An electoral donation was anonymous if it was made in such a way that you did not know who made the donation.

[12] Mr Hutchison prepared the electoral return, and it was his decision whether or not donations to your campaign should be recorded as being anonymous. He did not ask you where particular donations had come from. Rather, he was dependent on you telling him about any donations you were aware of. You were aware of this.

[13] The return prepared by Mr Hutchison was signed by you on 9 December 2010. You did not read it and there was no significant discussion about the donations part of the return. You asked Mr Hutchison whether the return was true and correct, and you received his assurance that it was. There were five donations of $25,000 recorded. All were recorded as being anonymous and none of them were attributed to either Mr Dotcom or Megastuff Limited.

[14] I found that when you signed the electoral return, you knew that you had not provided your campaign team with the critical information, namely that you knew about the donations from Mr Dotcom. I considered that you had engineered the situation, that you had the opportunity to check the return, but that you refrained from doing so. I found that you sought to insulate yourself from actual knowledge of the falsity in the return by seeking an assurance from Mr Hutchison that it was accurate.

[15] I found you either had actual knowledge of the falsity when you signed the return, because you knew that you had not given to Mr Hutchison the information he required, or that you deliberately chose not to check the return to see whether the donations from Mr Dotcom/Megastuff were properly disclosed, because you had no real doubt as to what the answer was going to be, and wanted to remain in ignorance.

Pre-Sentence Report

[16] I have received a helpful pre-sentence report.

[17] The probation officer who interviewed you recorded that you currently reside in an apartment in central Auckland. She stated that your wife has been profoundly affected by the prosecution, and the publicity surrounding it, and that she has moved to a residence in central Otago as a consequence. The probation officer spoke to your wife and she confirmed her ongoing support for you.

[18] You resigned from Parliament on 13 June 2014, shortly after being found guilty of the charge. You told the probation officer that you felt "it was the honourable thing to do", but that it was not something you wanted to do.

[19] The probation officer advised me that you are currently working as a project manager. You informed her that you have plenty of opportunities for employment moving forward, particularly in the area of restructuring small businesses, where you can use your wealth of experience to provide strategic advice to fledgling business men and women.

[20] When the probation officer spoke to you about your offending, you stated that you remain "bewildered" by my verdict. You described the past year as a "process of incremental humiliation", that has been extremely difficult for you.

[21] While you maintained your innocence, you advised that you are willing to pay a fine, or undertake community work. You refused to consider yourself a victim, and said that you were not seeking sympathy.

[22] The probation officer acknowledged in her report that you have already paid a substantial price for your actions.

[23] You have no identified rehabilitative needs. The probation officer recommended that you be sanctioned by way of a fine and community work.

Submissions

[24] Mr Dacre QC, on behalf of the Crown, referred to s 7 of the Sentencing Act 2002. He noted that the purposes for which a court can sentence or otherwise deal with an offender include accountability, denunciation, and deterrence. He referred to what the Crown says are the aggravating and mitigating features of your offending. He suggested that there are two aggravating features in your case, namely premeditation, and your stated reasons for seeking anonymity. He submitted that your offending involved a high level of premeditation, and noted that you told Mr Dotcom that you would not be able to help him in the future if his name was recorded in the electoral return. He suggested that the donation was in a significant sum, and put it to me that it was a "politically sensitive" donation. Mr Dacre argued that the appropriate starting point was in the vicinity of nine to 12 months' imprisonment. He accepted that there are no aggravating features personal to you,

and that your previous good character and public record are mitigating factors. He accepted that a community-based sentence could well be the appropriate outcome.

[25] Mr Jones QC, on your behalf, submitted that the starting point of nine to 12 months' imprisonment suggested by Mr Dacre was inappropriate. He referred to the hierarchy of sentences set out in s 10A of the Sentencing Act. He also referred to s 8 of the Act, and noted that the court is required to impose the least restrictive outcome that is appropriate in the circumstances. He argued that the sentence sought by the Crown is unrealistic, and that it substantially overstates the seriousness of your offending and the application of the accountability, deterrence and denunciation principles in this case. He argued that your offending can be characterised as being at a low level of seriousness, and that a starting point of near the maximum fine of $10,000 permitted by the section is more appropriate. He went on to submit that there are no aggravating features personal to you, but that there is much that can be said by way of mitigation on your behalf. He argued that any fine should be discounted to recognise your good character. He submitted that a fine would properly reflect the relevant purposes and principles of the Sentencing Act as they apply in the circumstances of this case.

Purposes and Principles of Sentencing

[26] In sentencing you, I have considered the principles set out in ss 7 and 8 of the Sentencing Act. In particular, I have had regard to the need to hold you accountable for your offending, the need to promote in you a sense of responsibility for and an acknowledgement of your offending, and the need to denounce the conduct in which you were involved. I am also mindful of the need to deter others from committing the same offence. In this regard, I note that there was evidence presented at the trial suggesting that the way in which you managed your campaign finances was common practice. I have taken into account the gravity of the offending with which you were involved, including your degree of culpability. I have considered the seriousness of this type of offending by reference to the Local Electoral Act. Although there are no directly comparable cases, I have endeavoured to take into account the general desirability of consistency of appropriate sentencing levels with offenders committing other electoral-type

offences. In this regard, I have paid particular consideration to the case of *R v Singh*[2] referred to me by counsel. I am also mindful of the hierarchy of sentences recognised in the Act and that I must impose the least restrictive outcome that is appropriate in the circumstances.[3]

Analysis

[27] I start by referring to the provisions of the Local Electoral Act.

[28] One of the principles the Act was intended to implement was the promotion of public confidence in local electoral processes.[4] In my view, the disclosure of significant donations, as required by the Act, contributes to the provision of a transparent electoral system. In the absence of proper disclosure, there is no way of knowing whether or not donations to a candidate are likely to influence decisions taken if the candidate is elected, or whether the candidate is improperly accepting personal donations in exchange for promises of future action once elected. A transparent electoral process is critical to the democratic process under which our country is governed, both at a local level and at a national level. In my judgment, the statutory provisions dealing with disclosure have to be read in this context.[5]

[29] I have given anxious consideration to the appropriate starting point in your case. In the United Kingdom, and Australia, the approach has been taken that a substantial term of imprisonment is the appropriate starting point in cases of electoral fraud. The approach taken overseas does not necessarily assist in New Zealand. In this regard, I agree with the observations of Woolford J in *R v Singh*.[6] Electoral fraud is not common in this country. Further, your case does not, in my view, involve electoral fraud – rather, it involves dishonesty, albeit in an electoral context, and the legislation in this country expressly provides for an alternative to imprisonment – namely a relatively modest fine of $10,000. This is an important consideration in determining the appropriate sentence in your case. The

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2 *R v Singh* [2014] NZHC 209.
3 Sentencing Act 2002, s 8(g).
4 Local Electoral Act 2001, s 4(1)(c).
5 See *Banks v District Court at Auckland* [2013] NZHC 3221, [2014] NZAR 591 at [5]; Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (December 1986).
6 *R v Singh*, above n 2, at [32].

section dealt not only with electoral donations, but also with electoral expenses. It is strongly arguable that a breach in relation to the expenses cap is a more serious breach than a breach of the disclosure requirements relating to electoral donations, because a breach of the electoral expenses provisions could affect the electoral result.

[30] In my view, there are a number of features to your offending, some of which aggravate the offending, and some of which mitigate it. I deal with those features as follows:

(a) Degree of falsehood

Frequently, in dishonesty-related offending, the culpability of the offender will, at least in part, depend upon the extent of the dishonesty or falsehood involved. Here, there was nothing wrong with you receiving the donations from Mr Dotcom/Megastuff. What was at issue was your failure to record the donations in the electoral return, and the transmission of that return knowing it to be false. The only areas of falsity relate to the two donations, each of $25,000, made by Megastuff Limited, on behalf of Mr Dotcom. Your offending did not involve a knowing failure to disclose multiple donors, or an attempt to hide donations under other names.

(b) The deliberateness of your failure

You did not reveal Mr Dotcom's identity to your campaign staff. It was therefore inevitable that a false return would be filed, given that Mr Hutchison was preparing the return. Your later statements to Mr Dotcom, Mr Tempero and Mr Towers, make it clear that you were aware of the donations. The only conclusion is that you made a conscious and deliberate decision not to disclose the source of the donations to your campaign team.

(c) Scope of the offending

You failed to declare only two donations from Mr Dotcom. There is nothing to suggest that there was a more extensive pattern of failing to disclose, and then transmitting the return knowing it to be false.

(d) Purpose

In your discussions with Mr Dotcom, you indicated that, if the donations were made anonymously, it would be easier for you to advocate on Mr Dotcom's behalf. A similar comment was made to Mr Towers. That is directly against the spirit of the legislation and the comments attributed to you are a matter of significant concern.

However, I note that when the opportunity arose for you to do so, you did not do anything surreptitious or untoward for Mr Dotcom. There can be no assertion that any political influence was obtained as a result of the donations. Nor was there any evidence to suggest that the donations resulted in any actions by you that you had not already offered, or that you had not been willing to give from the outset in any event. Were it otherwise, I would take a very different view of your offending.

(e) Personal benefit

You did not derive any personal benefit from failing to disclose Mr Dotcom's donations. Filing the return was the last act of a failed campaign. As I have noted, there was nothing wrong in you accepting a donation or donations from Mr Dotcom. At the time that Mr Dotcom made the donations, he was not a person of high profile. There was nothing before me to suggest that the donations were of a sensitive nature at the time they were made or when you filed the return.

(f) *Consequences of the offending*

> The fact that you filed a false return did not have any effect on the election result. There were other means, which the evidence suggested were used by other electoral candidates, which you could have utilised if you wanted to better conceal the identity of donors – in particular, a secret trust. It is ironic that you expressly made the decision not to use a secret trust, because you did not consider that the use of a secret trust was in the spirit of the applicable electoral laws.
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> However, this was not a victimless offence. The public were entitled to assume that the provisions of the Act would be complied with by local electoral candidates. The victim of your offending is the community at large.

[31] Considering all of these various factors, I consider that your offending falls at a relatively low level. While it is not minor or insignificant, I do not consider that it is at the higher end of offending of this kind.

[32] I have considered the case of *R v Singh*. I have also considered the approach taken in a Canadian case – *R v Aftergood*,[7] decided in Alberta, albeit under different statutory provisions and on different facts.

[33] In my view, *Singh* does not significantly assist. The offending there in issue involved electoral fraud, properly so called. The defendants were convicted of charges of causing other people to use, deal with, or act upon forged documents as if they were genuine, knowing that they were forged. The charges were laid under s 257(1)(c) of the Crimes Act 1961, and the maximum sentence available to the court in that case was one of 10 years' imprisonment. The conduct there found was directed at perverting the democratic process by falsifying votes, and on multiple occasions. The court set out various starting points, and imposed sentences on each of the various defendants. The highest starting points adopted were 18 months'

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7 *R v Aftergood* (2007) 419 AR 82 (ABPC).

imprisonment. Woolford J went on to adjust those starting points and ended up imposing sentences of community detention and community work.

[34] For reasons which I will explain shortly, I do not consider that a fine is the appropriate starting point in your case. In my view, the appropriate starting point is one of six months' imprisonment.

Aggravating/Mitigating Circumstances Personal to You

[35] There are no aggravating circumstances personal to you in relation to this offending.

[36] There are, however, a number of mitigating circumstances:

(a) First, you have not previously offended. You are entitled to a discount in this regard.

(b) Secondly, I accept the submissions made on your behalf by Mr Jones, and the evidence which was presented on your behalf at the hearing. You are generally a person of good character. You have spent much of your life serving the community, and until this offending, you had an untarnished reputation for integrity and honesty. The evidence from those who supported you, was that you have always strived to conduct yourself with integrity, and have been careful to do the proper and right thing in the various public roles which you have assumed over the years.

(c) Thirdly, I accept that you have made a valuable and positive contribution to New Zealand in very many ways, both publicly and privately, and over a number of decades. Your record of public and private service is something you are entitled to call in aid.

(d) Fourthly, you have already suffered significantly as a result of the present offending. There has been a very high degree of public interest in this case. The media interest has been intense and, I have

> no doubt, intrusive. You will have suffered great personal embarrassment as a result of my verdict. You have resigned from public office – as leader of the Act Party, as a Cabinet Minister and as a Member of Parliament. The stance you took in the latter regard was appropriate, and I accept, the honourable thing to do. Nevertheless, your standing in the community has been significantly diminished as a result of the verdict. All of this will have caused considerable anguish to you, to your wife, and to your family.

[37] I am prepared to allow you a discount of one-third (that is two months) to recognise all of these various mitigating factors.

Appropriate End Sentence

[38] As I have noted, I have determined that the appropriate starting point is a term of imprisonment of four months. That is a short term sentence in terms of the Sentencing Act and other alternatives are open to me, including home detention.

[39] I do not consider that a fine is appropriate in your case. Given the maximum fine permitted by the section, any fine would necessarily have to be modest, and I do not consider that a fine of itself would sufficiently denounce the conduct in which you were involved, nor act as a deterrent to others.

[40] That leaves me with effectively four other options – namely imprisonment, home detention, community detention, or community service. Not all of these are mutually exclusive.

[41] I accept the submission made by Mr Jones that I must take into account the hierarchy of sentences set out in s 10A of the Sentencing Act, and that I should impose the least restrictive outcome that is appropriate in the circumstances.

[42] I do not consider that your offending requires a sentence of either imprisonment or home detention. The seriousness of your offending does not warrant such a sentence, and the purposes and principles of sentencing do not mandate either alternative.

[43] Any sentence, however, must be meaningful; I must denounce your conduct, and deter others. In my view, a sentence of community detention, together with a period of community service is appropriate.

[44] Community detention can involve a curfew of up to 84 hours a week, for a maximum period of six months.[8] I can order a curfew in units of not less than two hours.

[45] Such a sentence can be imposed if it is likely to prevent the offender from reoffending, or if it would achieve the purposes of accountability, responsibility, denouncement or deterrence.[9] There can be no suggestion that a sentence of community detention with a curfew is necessary to prevent you from reoffending. There is no risk of that. However, a period of community detention with a curfew will, in my judgment, achieve the purposes of accountability, responsibility, denouncement and deterrence, which, in my view, are important in this case.

[46] In my judgment, a curfew is appropriate, taking into account the nature of the offence and your personal circumstances and background. Your residential address is suitable. There is no one else living at the address, and you have signed a form acknowledging that you are aware of and understand the conditions that will apply. The curfew address is in an area in which a community detention scheme is operated by the Chief Executive of the Department of Corrections. I propose to impose a curfew on four nights each week, to hold you accountable and to ensure that there is no adverse effect on your employment obligations. That is broadly in line with the recommendation made by the probation officer in the pre-sentence report.

[47] In relation to a sentence of community work, I have considered the matters detailed in ss 55 and 56 of the Sentencing Act. There is nothing to suggest that such a sentence is inappropriate. In my view, the nature of your offending makes it appropriate that you be held accountable to the community.

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8 Sentencing Act 2002, s 69B.
9 Section 69C.

Sentence

[48] Mr Banks, will you please stand.

[49] In respect of the offence of breaching s 134(1) of the Local Electoral Act 2001, you are sentenced to a term of community detention of two months. You are to report to the Mt Eden Service Centre, 17–25 Boston Road, Mt Eden, by 4.00 pm on Monday, 4 August 2014. There is to be a curfew between the hours of 7.00 pm and 7.00 am every Thursday, Friday, Saturday and Sunday night for the length of this sentence. The first curfew is to begin on Thursday, 7 August 2014. The curfew address is [suppressed].

[50] In addition, you are sentenced to undertake 100 hours' community work.

[51] The sentences are to be served cumulatively.

Costs Application

[52] I record that a memorandum has been filed by Mr McCready, both for himself, and on behalf of New Zealand Private Prosecution Service Limited. Mr McCready and the company are seeking costs under the Costs in Criminal Cases Act 1967.

[53] I record that I convened a telephone conference with Mr McCready, Mr Jones and Mr Dacre last evening. Mr Jones submitted that your conviction should proceed, notwithstanding that I have not, as yet, fixed what costs (if any) should be payable to Mr McCready and to the company. Mr Dacre and Mr McCready agreed. Mr Dacre and Mr Jones have confirmed that position in open court today.

[54] It will be necessary for me to hold a separate hearing in that regard, pursuant to s 12 of the Costs in Criminal Cases Act. As a result, your certificate of conviction will record that it is subject to such costs (if any) as I may award pursuant to that Act.

[55] I record that your sentencing proceeded on this basis at the request of Messrs Dacre and Jones, and with the agreement of Mr McCready, both for himself, and on behalf of his company.

[56] Mr Banks, you may stand down.

Addendum

[57] In open court, I indicated that the two sentences imposed by me, namely community detention and community work, should be served cumulatively. I was in error in that regard. The two sentences must be served concurrently. That is required pursuant to s 69D(3) of the Sentencing Act.

[58] I convened a telephone conference with Mr Jones and Mr Dacre. They agreed that I should issue this addendum to clarify the position. They did not seek that Mr Banks be brought back into open court. The correction does not impose a greater sentence on him. Rather, it is to his advantage.

[59] I direct that the two sentences imposed by me are to be served concurrently, and not cumulatively.

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Wylie J