

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 13/2020  
[2020] NZSC 84

BETWEEN                      DAVID SIMON BARTON  
   Applicant  
  
AND                                THE QUEEN  
   Respondent

Court:                            Glazebrook, Ellen France and Williams JJ

Counsel:                        W C Pyke for Applicant  
   R K Thomson for Respondent

Judgment:                      21 August 2020

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**JUDGMENT OF THE COURT**

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- A     The application for an extension of time to apply for leave to appeal is granted.**
- B     The application for leave to appeal is dismissed.**
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**REASONS**

**Introduction**

[1] Mr Barton was convicted by a jury on 10 charges of knowingly failing to file a tax return with the intention of evading his tax obligations. Judge Glubb sentenced him to three years, two months and two weeks' imprisonment.<sup>1</sup> That sentence was upheld by the Court of Appeal.<sup>2</sup> Mr Barton seeks leave to appeal against the Court of Appeal decision.<sup>3</sup>

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<sup>1</sup> *R v Barton* [2018] NZDC 17502 [DC judgment] at [46].

<sup>2</sup> *Barton v R* [2019] NZCA 644 (Cooper, Ellis and Peters JJ) [CA judgment].

<sup>3</sup> Mr Barton was unsuccessful in his application to have the Court of Appeal judgment recalled: *Barton v R* [2020] NZCA 45 (Cooper, Ellis and Peters JJ).

[2] Mr Barton's application is out of time. However, the delay is not significant, is explained, and the application for an extension of time in which to apply for leave to appeal is not opposed. The application is granted.

[3] Mr Barton also applied to file further material after his written submissions were received. This request was refused on the basis that it would not assist the Court.

### **Background**

[4] The District Court took a starting point of four and a half years' imprisonment. It applied a discount of 20 per cent for reparations paid, remorse and payment of tax arrears. A further eight per cent discount was given for community and philanthropic work. The end sentence was rounded down to the final sentence of three years, two months and two weeks' imprisonment.<sup>4</sup> Fines of \$10,126 were remitted.<sup>5</sup>

[5] As at the date of the sentencing, Mr Barton had repaid \$43,000. A further sum of \$122,000 was remitted the week prior to the Court of Appeal hearing, on Mr Barton's behalf, to the Commissioner of Inland Revenue, who paid it to the Official Assignee. If the Commissioner receives most of the \$122,000, Mr Barton will have paid \$165,000, or 40 per cent of the core tax, leaving \$235,000 and interest and penalties outstanding.<sup>6</sup> Mr Barton claims he spent \$147,00 to support homeless and other people in need while he was on bail but has not been able to supply proof in the form of financial records.

### **Grounds of application**

[6] Mr Barton's grounds of appeal are that the sentence imposed is manifestly excessive and that the Court of Appeal erred by not giving further credit for his payments towards his tax arrears and his contribution to the community. Repayment is, he says, evidence of his serious efforts to meet his obligations. Failing to recognise this was an error as one of the purposes of sentencing is to promote in the offender a

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<sup>4</sup> DC judgment, above n 1, at [45]–[46].

<sup>5</sup> At [50].

<sup>6</sup> CA judgment, above n 2, at [8].

sense of responsibility.<sup>7</sup> In addition, a reparation order was mandatory. Mr Barton submits it is in the public interest that tax offenders pay their tax. He contends it is rare for imprisoned tax defaulters to pay back tax or to make an effort to do so and thus this is an issue of public importance.

[7] Mr Barton also seeks to raise a number of other issues, including that the District Court Judge failed to refer to two relevant affidavits.

### **Crown submissions**

[8] The Crown points out that Mr Barton was bankrupt at the time of his sentencing and submits that an order for reparation would not have been appropriate in relation to the same debt. In any event, Inland Revenue did not seek reparation. The Crown also submits that it is not clear that any further reparation could justify a substantially greater discount. In other cases, even full repayment of a substantially greater tax debt did not warrant a discount as large as Mr Barton received. Finally, it is submitted that his extracurricular philanthropy is not relevant to the sentencing exercise.

### **Our assessment**

[9] We accept the Crown's submission that a reparation order was not appropriate. We also accept the submission that it is unlikely that any further reparation would result in a higher discount. We note that the District Court Judge described this discount as "generous"<sup>8</sup> and the Court of Appeal described it as "substantial".<sup>9</sup> We also accept the Crown's submission that Mr Barton has had many opportunities over the past five years, including through adjournments of court proceedings, to repay his tax debt. With regard to Mr Barton's post-sentencing philanthropic expenditure, we note Mr Barton did receive a sentencing discount for his "selfless commitment and contribution to the community".<sup>10</sup>

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<sup>7</sup> Sentencing Act 2002, s 7(1)(b). He submits it is an error under s 256 of the Criminal Procedure Act 2011.

<sup>8</sup> DC judgment, above n 1, at [44].

<sup>9</sup> CA judgment, above n 2, at [30].

<sup>10</sup> DC judgment, above n 1, at [45].

[10] The issues Mr Barton seeks to raise are related to the particular circumstances of his case. No issue of general or public importance arises. Nor does any matter raised by Mr Barton indicate a risk of a miscarriage of justice. The criteria for leave to appeal are not made out.<sup>11</sup>

### **Result**

[11] The application for an extension of time to apply for leave to appeal is granted.

[12] The application for leave to appeal is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>11</sup> Senior Courts Act 2016, s 74(2).