

IN THE SUPREME COURT OF NEW ZEALAND

**SC 41/2013
[2013] NZSC 45**

BRADLEY MATENGA KAHUI

v

THE QUEEN

Counsel: A J Bailey for Applicant
M R Davie for Crown

Judgment: 1 May 2013

JUDGMENT OF WILLIAM YOUNG J

A The application for bail is refused.

B Any further submissions from the applicant are to be filed and served by Friday 3 May at 5.00pm and submissions from the respondent are to be filed and served by Tuesday 7 May at 5.00pm.

REASONS

[1] The applicant is serving a sentence of four months imprisonment imposed on 26 March 2013 for obstruction, cultivation of cannabis and possession of utensils. As part of the same exercise, the sentencing Judge convicted and discharged him on a charge of assault.

[2] The assault offending occurred first in time and the applicant spent five months in custody before being released on bail. It seems that he had been remanded in custody because at the time of his arrest for the assault, he was on bail for other offending (burglary and attempting to pervert the course of justice). When

he was sentenced to home detention on those charges, he was released on bail on the remaining charge of assault. The three other offences were committed while he was on bail and serving his sentence of home detention.

[3] The applicant's complaint is directed to the way the Judge dealt with the assault charge. He says that the appropriate sentence was a short cumulative term of imprisonment. Had such a sentence been imposed, the five month pre-trial detention in relation to the assault charge would have counted against the total sentence imposed and, providing the sentence imposed on the charge of assault was no more than six months imprisonment, would have resulted in the applicant's immediate release. The applicant's complaint is that the way the Judge structured the sentences she imposed resulted in him losing "credit" for the five months he spent in custody.

[4] The applicant's appeal against sentence was dismissed by the Court of Appeal and he now seeks leave to appeal to this Court against the Court of Appeal's judgment.¹ His release date is 22 May 2013. Unless released on bail, there is little likelihood of his appeal being heard (assuming leave is granted) in time to make any practical difference to the time he must spend in prison. For this reason he applies for bail.

[5] The relevant jurisdiction to grant bail is conferred by s 70 of the Bail Act 2000 which provides:

- (1) This section applies if a person is in custody under a conviction and is appealing the conviction or sentence, or both, to the Court of Appeal or the Supreme Court.
- (2) The Court of Appeal or the Supreme Court (as the case may be) or the Judge who presided at the trial in the court below may, if it or the Judge thinks fit, on the application of an appellant and on such terms and subject to such conditions as the court or Judge thinks fit, grant bail to the appellant pending the determination of the appeal, if the appellant is in custody only under the conviction to which the appeal relates.

...

¹ *Kahui v R* [2013] NZCA 124.

[6] For the purposes of s 70(2), the conviction to which the appeal relates is the assault and in relation to that conviction, the applicant is not in custody. Accordingly counsel for the respondent asserts that there is no jurisdiction to grant bail. When asked to address this issue, counsel for the applicant responded:

... the appeal relates to the sentences imposed by the District Court at the same time. Mr Kahui is appealing that four month sentence of imprisonment and the way it was structured. It is therefore submitted that the Court does have jurisdiction to grant bail.

I do not see that as addressing the jurisdictional point just identified which I think is unanswerable. That there should be a jurisdictional problem is not entirely surprising as it is plausible to assume that s 70 was not drafted with a case of this sort in mind – where an offender seeks a more, rather than a less, severe sentence.

[7] Accordingly bail is refused.

[8] Any further submissions from the applicant are to be filed and served by Friday 3 May at 5.00pm and submissions from the respondent should be filed and served by Tuesday 7 May at 5.00pm. Two points which I would like to see addressed in those submissions are:

- (a) The way the applicant's pre-trial detention would have been allowed for had the applicant been sentenced on the assault charge to a term of imprisonment (say four months) to be served concurrently with the sentences imposed on the other charges.
- (b) The allowance, if any, which was made for the applicant's remand in custody when he came to be sentenced on the burglary and attempting to defeat the course of justice charges earlier referred to.

Solicitors:
Crown Law Office, Wellington