IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

I TE KŌTI MATUA O AOTEAROA
TŪRANGANUI-A-KIWA ROHE

CRI-2019-016-1336
[2021] NZHC 1032

THE QUEEN

v

JOHN RICHARD BRACKEN

Hearing:	11 May 2021
Appearances:	M Mitchell for Crown Defendant appears in person A M Simperingham as standby counsel
Judgment:	11 May 2021

SENTENCING REMARKS OF LANG J

Solicitors:
Elvidge & Partners Lawyers, Napier
Woodward Chrisp Solicitors, Gisborne

[1] Mr Bracken, you appear for sentence having been found guilty on 39 charges of dishonestly and without claim of right using goods and services tax returns with the intention of obtaining a pecuniary advantage.[1] The returns in question spanned a period from August 2014 until July 2018. The maximum penalty on each charge is seven years imprisonment.

[2] You were found guilty in verdicts I delivered on 26 March 2021.[2] The factual findings made in that decision provide the basis on which you are now to be sentenced.

The offending

[3] At all times material to this proceeding you were the sole director of a company called Bracken Enterprises Limited (Bracken Enterprises). This company carried on two forms of business. First, it operated a sheep and beef dry stock farming business on land situated near Matawai, to the west of Gisborne. Secondly, it operated a business involving the sale and purchase of plywood and other timber products. It also exported goods of this type to customers in the Pacific Islands along with other products such as kitset houses, milk, honey and bottled water.

[4] Bracken Enterprises initially filed GST returns every two months on what is known as a payments basis. This requires GST to be calculated in accordance with payments the registered person has made and received during the relevant period. In February 2016, Bracken Enterprises began accounting for GST on an invoice basis. This required it to account monthly for GST on transactions for which it had either invoiced debtors or been invoiced by creditors during the previous month.

[5] You and your wife engaged the Gisborne accounting firm Bain & Sheppard Limited (Bain and Sheppard) to act as the tax agent for Bracken Enterprises. At the end of each month you or your wife would provide Bain and Sheppard with copies of bank statements and invoices that recorded the sales and purchases of product Bracken Enterprises had made during the previous month. Bain and Sheppard would then reconcile the company's bank statements with the invoices to calculate whether

---

1 Crimes Act 1961, s 228(1)(b).
2 *R v Bracken* [2021] NZHC 609.

Bracken Enterprises was required to pay GST or was entitled to a GST refund. Determination of that issue depended on whether the input tax Bracken Enterprises claimed for product that it purchased equalled or exceeded the output tax it was required to pay on taxable supplies made to its customers.

[6] Each month during the period covered by the charges Bracken Enterprises received a refund. This occurred because it claimed to have sold virtually all of the product that it purchased to customers in the Pacific Islands. When goods are sold overseas the sale is taxed at zero per cent for GST purposes. This meant Bracken Enterprises was required to pay very little in the way of output tax on product that it sold.

[7] The Inland Revenue Department (the IRD) commenced an investigation into Bracken Enterprises' taxation affairs in early 2018 after being notified by the Serious Fraud Office (SFO) of potential irregularities. The SFO had become involved in 2017 after Ms Raelene Poole, a person who was responsible at that time for preparing Bracken Enterprises' invoices, contacted it to enquire about the legality of what she was doing. The SFO also referred the matter to the Assets Recovery Unit of the New Zealand Police.

[8] During the investigation the IRD used its powers under s 17 of the Tax Administration Act 1994 to obtain information about Bracken Enterprises' financial affairs from a variety of sources. First, it obtained from Bain and Sheppard the bank statements and folders of invoices you and your wife had supplied to that firm for the tax year ending 30 June 2018. This material extended into April 2019. Bain and Sheppard had earlier returned the invoices and bank statements for previous years to you on the basis that you would comply with your obligation under the taxation legislation to retain those documents for seven years. You ignored notices that the IRD served on you requiring you to provide documentary records held by Bracken Enterprises.

[9] The IRD then obtained copies of invoices from suppliers with whom you dealt. When these were compared with the invoices and bank statements held by Bain and Sheppard, material discrepancies became evident. The investigation discovered that

you had set up a crude but effective scheme that permitted Bracken Enterprises to regularly obtain substantial tax refunds to which it was not entitled.

[10] The scheme had three key components. First, it involved circular payments through Bracken Enterprises' bank account. You would go to the bank and withdraw funds from the account in the form of either a bank cheque or cash. You would then immediately re-deposit either exactly the same sum or an amount close to it. On some occasions you added further cash to make the re-deposit larger than the withdrawal.

[11] You then gave copies of Bracken Enterprises' bank statements to persons who were paid to create invoices that matched the deposits and re-deposits to the company's bank account. You gave those persons the information necessary to enable them to create those documents. By this means you created a false record of transactions allegedly undertaken by Bracken Enterprises.

[12] The third component of the scheme related to invoices you arranged to have created recording the on-sale of product to overseas entities. This product was the product Bracken Enterprises had purported to purchase using the false invoices. In this way Bracken Enterprises was able to dispose of the fictitious product without accounting for output tax on it.

[13] This scheme enabled Bracken Enterprises to claim that it had entered into transactions amounting to almost $133 million when that was not the case. This enabled the company to obtain tax refunds to which it was not entitled amounting to approximately $17.3 million.

[14] You have never engaged with the Crown's theory or the substance of the charges. At trial you cross-examined witnesses largely about peripheral issues and the evidence that you called was directed to a similar end. Although your sentencing submissions claim you were acting on the advice of others there is no evidence that this was so. In short, you have never provided an explanation to counter the Crown's theory of the case.

[15] In your submissions today you have again repeated that you are a living person and not subject to the jurisdiction of the Court. You claim the Court is endeavouring to sentence a corporate entity when you do not fall within that description. I disagree with that analysis. Sadly Mr Bracken, the courts are required to sentence human beings to terms of imprisonment every day of the week. You are no exception to that process.

Starting point

[16] The first step in the sentencing process is to select the starting point for the sentence that reflects the overall culpability of your offending. This does not reflect any aggravating or mitigating factors personal to you.

[17] As counsel for the Crown points out, in this area of the criminal law there is no tariff or guideline judgment of the Court of Appeal to assist in setting the starting point. This is because offending of this type can occur in numerous different ways. The starting point is selected instead by taking into account all factors about the offending that are relevant for sentencing purposes. These will generally focus on the nature and consequences of the offending, including its duration, sophistication and resulting loss to victims.[3] The starting points selected in other broadly similar cases will also be of assistance in setting the starting point. I use the term "broadly similar" because no two cases in this area of the law are ever exactly the same factually.

Aggravating factors

[18] There are several aggravating factors about your offending. The first of these is that it enabled Bracken Enterprises to receive a very substantial sum by way of GST refunds to which it was not entitled. On my review of the authorities this appears to have been the largest sum involved in any case of tax fraud of its type in New Zealand's history.

[19] Tax fraud often occurs when an entity unlawfully evades tax it is legally required to pay. Such conduct obviously results in loss to the tax base but in many

---

3 *R v Varjan* CA 97/03, 26 June 2003 at [22]-[23].

cases the offender would never have been in a position to pay the tax in the first place. In your case, however, the loss represents funds actually received by Bracken Enterprises to which it was not entitled. The New Zealand tax base has therefore suffered an actual loss of more than $17 million through your offending. It goes without saying that the sum you enabled your company to obtain fraudulently could have been used for the benefit of the community in many different ways.

[20] The offending also occurred over a very long period and at very regular intervals. It was plainly premeditated and involved considerable effort on your part. Your frequent attendances at the bank to withdraw and re-deposit cash and bank cheques attracted the attention of bank staff. They endeavoured to make things easier for you by suggesting alternative ways of conducting your business. These plainly did not suit you because they would not have enabled you to carry on with the scheme you had begun.

[21] The scheme also required you to undertake considerable personal effort in addition to the time that you spent at the bank. You arranged for literally hundreds of invoices to be created from no fewer than 14 different suppliers. Each of these had to be matched to individual transactions in Bracken Enterprises' bank account. You must have spent hundreds of hours attending to this aspect of the scheme.

[22] There was also a level of sophistication in the way in which you arranged for false invoices to be created to show the purchase of product for which you sought input tax credits on Bracken Enterprises' behalf. These were not created in the names of fictitious suppliers or entities. Rather, the invoices were created in the names of entities with which you had either a commercial relationship or at least an association. In some cases you created fictitious invoices in the name of suppliers from whom you had bought products in the past. In these cases you created false invoices that appeared similar to invoices you had received from those suppliers. In other cases you approached suppliers and indicated that you were interested in purchasing product from them for export overseas. You asked them to send a proforma invoice setting out their terms of trade. Those entities duly obliged by sending you proforma invoices. You then used these to have false invoices created in the names of the entities from whom you had acquired the proforma invoices.

[23] The Crown submits that a further aggravating factor is that you used the services of innocent persons whom you paid to create the invoices you provided to your accountants. I do not accept that this was an aggravating factor of the offending, because it merely reflects the manner in which you chose to implement the scheme. You could of course have created the invoices yourself, but the difficulties you have with reading and writing probably precluded this. I do not consider, however, the fact that you used other innocent persons to implement aspects of the scheme to be an aggravating factor.

[24] Finally, you failed to co-operate in any way once the IRD began its investigation. Instead, you sought to thwart or impede the investigation by refusing to hand over (if indeed they still existed) records about Bracken Enterprises' financial affairs that you had a legal obligation to retain for seven years.

Relevant cases

[25] I now turn to consider other cases involving fraud. These provide some assistance in setting the starting point I am required to fix.

[26] In *R v Rowley*, two accountants utilised false invoices on behalf of their clients to reduce the income tax liability of those clients.[4] They retained the consequential GST refunds as their fee. Between them, the defendants obtained a benefit of between $1.8 and $2.3 million. Starting points of seven years and six years six months imprisonment respectively were selected.

[27] In *R v Patterson*, the defendant fraudulently obtained approximately $3.4 million in payments from the Ministry of Social Development using forged documents to create false identities in whose name he claimed various benefits. The offending occurred over a three year period and ceased only when the defendant was apprehended. A starting point of nine years six months imprisonment was upheld by the Court of Appeal.[5]

---

4 *R v Rowley* [2012] NZHC 2087.
5 *R v Patterson* [2008] NZCA 75.

[28] In *R v Swann*, the defendant and another person had submitted a total of 198 fraudulent invoices to the Otago District Health Board. This resulted in them receiving payments in excess of $16.9 million. The bulk of this was received by the defendant Mr Swann. The Court adopted a starting point of ten years six months imprisonment in relation to Mr Swann.[6]

[29] Counsel have also referred me to several cases involving mortgage fraud. I regard these as somewhat different to your offending because in cases of mortgage fraud the victim will often only stand to make a loss if the property market falls. When the property market continues to rise, as has been the case in recent years, the victim can escape without loss. Your offending is different because it resulted in direct and immediate loss to the New Zealand tax base.

[30] The Crown contends the overall culpability of your offending justifies a starting point of at least 10 years imprisonment. Mr Simperingham, who I appointed as counsel to assist the Court at sentencing,[7] has provided cases that lead him to suggest a starting point of eight years imprisonment is appropriate.[8]

[31] I regard your offending as being largely comparable to that of Mr Swann, principally because the total loss in that case was similar to the loss you caused. In addition, the offending in *Swann* involved the use of fraudulent invoices, although considerably less than you created. I accept, however, that the offending in *Swann* involved a level of breach of trust that is less apparent in the present case because it related to theft from the defendant's employer. It also continued for six years, whereas your offending continued for approximately four years.

[32] Taking these factors into account, I am satisfied a starting point of eight years six months imprisonment is appropriate to reflect your culpability on all charges.

---

6 *R v Swann* HC Dunedin CRI-2007-012-4181, 11 March 2009.

7 Mr Simperingham was appointed as standby counsel during the trial but Mr Bracken has made it clear throughout that he does not wish to avail himself of Mr Simperingham's services.

8 *R v Varjan*, above n 3; *D'Villiers v R* [2010] NZCA 85; *Aryasomayajula v R* [2011] NZCA 633; *Watson v R* [2012] NZCA 17; *Mayer v R* [2015] NZCA 206; *R v Christie & Ho* [2019] NZHC 1460; *Palmer v R* [2010] NZCA 53, (2010) NZTC 24,116; *R v Dhillon* [2009] NZCA 597, (2010) 24 NZTC 24,030; and *Rowley v R* [2015] NZCA 233, (2015) 27 NZTC 22-011.

Aggravating factors

[33] You have several convictions for offending under the Resource Management Act 1991. Those are plainly irrelevant for present purposes.

[34] In 2010, however, you were convicted of four charges of dishonestly using a document. The details of those charges are not before me. This followed six convictions in 1993 for dishonestly using documents relating to ACC claims. These convictions demonstrate that you have been prepared to use documents in a dishonest way for your own benefit on earlier occasions. It could therefore be argued that your failure to learn from your earlier offending makes the present offending more serious and that an uplift is required to reflect that fact.

[35] The scale and culpability of the present offending is, however, considerably greater than that relating to your previous convictions. Although the issue may be regarded as finely balanced the Crown does not suggest an uplift is required to reflect previous convictions and I take my cue from that. I do not apply any uplift to reflect your previous convictions.

Mitigating factors

Previous good character

[36] At the conclusion of your trial you produced numerous references attesting to your good character. At 55 years of age you are obviously liked and admired by many in your community. Many people see much that is good in you. It is clear also that you are a family man and although there is no evidence to support this fact, I consider it likely that you may well have offended to provide material benefits for not only yourself but also your family. Those facts must be tempered, however, by your previous convictions and the fact that the present offending occurred over such a lengthy period. I do not consider I can realistically apply a discount to reflect your previous good character.

Restitution

[37] The evidence at trial did not disclose how you used the funds that Bracken Enterprises received through your offending. I am told, however, that proceedings under the Criminal Proceeds (Recovery) Act 2009 are currently underway and that assets having considerable value are now subject to restraining orders issued under that legislation. At present, however, you have not made any offer to provide restitution or reparation for the loss caused by your offending. I therefore cannot provide you with a discount in relation to that factor either.

[38] A Court may sometimes apply a discount in circumstances where an offender frankly acknowledges responsibility for offending and demonstrates remorse in relation to it. That factor is plainly not present in your case. You continue to maintain your innocence and say you believe you are the victim effectively of persecution in this case. You believe you are being kidnapped without your consent and that your consent ought to have been obtained before the charges were laid. As I advised you during the hearing, Mr Bracken, issues of consent do not arise in this particular context. I am unable to give you any discount to reflect acceptance by you or responsibility for your offending or for any remorse that you may otherwise have expressed.

[39] It follows that the end sentence remains the same as the starting point, namely a sentence of eight years six months imprisonment.

Minimum term of imprisonment

[40] In any case where the Court sentences an offender to a term of imprisonment of two years or more it may impose a minimum term of imprisonment that the offender will be required to serve before being eligible to apply for parole.[9] The Crown submits I should make such an order in your case having regard to the seriousness of your offending.

---

9 Sentencing Act 2002, s 86(1).

[41] The Court may make such an order where it is satisfied that the usual parole provisions are not sufficient to reflect issues relating to deterrence, denunciation, the need to hold the offender accountable and the need to protect the community. In your case you will be eligible for parole after serving two years eight months of your sentence. That is a significant sentence in its own right and it is one that I suspect will not be easy for you to serve given your current and misplaced expectation that you will receive a community-based sentence.

[42] Although an argument can be made for a minimum term of imprisonment, I have concluded such an order is not necessary in the circumstances of your case. Issues of denunciation, deterrence and the need to hold you accountable for your actions are adequately met by the sentence of eight years six months imprisonment. Issues of the protection of the community do not really arise. The point at which you are ultimately released will depend on a range of factors the parole authorities will be required to take into account, including your acceptance of responsibility for your offending. I have therefore concluded that it should be left to parole authorities to determine the point at which you should be released having served one-third of the sentence.

Sentence

[43] On Charge 19 you are sentenced to 7 years imprisonment. On Charge 31 you are sentenced to 18 months imprisonment. The second sentence is to be served cumulatively on the sentence imposed on Charge 19.

[44] On the remaining 37 charges you are sentenced to four years imprisonment. Those charges are to be served concurrently with each other and concurrently on the sentences imposed on Charges 19 and 31. This means your effective sentence is one of eight years six months imprisonment.

[45] Stand down.

Lang J