

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 13/2020
[2020] NZSC 24**

BETWEEN DAVID SIMON BARTON
 Applicant

AND THE QUEEN
 Respondent

Court: Glazebrook, Ellen France and Williams JJ

Counsel: Applicant in person
 R K Thomson for Respondent

Judgment: 25 March 2020

JUDGMENT OF THE COURT

The application for bail is dismissed.

REASONS

[1] Mr Barton applies for bail pending the determination of his application for leave to appeal to this Court or at least until he has filed his submissions on the leave application.

Background

[2] Following a jury trial in December 2017 before Judge Glubb in the District Court at Auckland, Mr Barton was convicted of 10 charges of knowingly failing to provide a tax return when required to do so, with the intention of evading the assessment or payment of tax.¹ Each charge related to a tax year between 31 March 2008 and 2017 inclusive.

¹ Tax Administration Act 1994, ss 143B(1)(b) and (f). Each charge carries a maximum term of imprisonment of five years or a maximum fine of \$50,000 or both.

[3] In August 2018, Judge Glubb sentenced Mr Barton to three years, two months and two weeks' imprisonment.² Mr Barton appealed to the Court of Appeal against that sentence on the ground that it was manifestly excessive.³

[4] The Court of Appeal dismissed his appeal and declined his application to defer the commencement of his sentence.⁴ Mr Barton applied to the Court of Appeal to recall its judgment. That application was dismissed on 9 March 2020.⁵

[5] Mr Barton seeks leave to appeal to this Court.

Mr Barton's submissions

[6] Mr Barton submits that he is unable to comply with the timetable for filing his submissions in support of his application for leave to appeal because of restrictions in prison. He has been denied internet access to retrieve instructions sent to his counsel in the Courts below. He submits access is necessary in order to prepare the submissions for his application for leave to appeal.

[7] Mr Barton says it is relevant that, while on bail previously, he assisted a number of homeless people. Further, he will, if released on bail, have "an opportunity to make further payments to IRD" of the core tax default figure of \$400,000 as calculated by Judge Glubb.⁶ Mr Barton has also offered his assistance to the police relating to unrelated major crimes and this assistance would not be practical to provide from prison.

[8] In addition, Mr Barton says it is relevant that he suffers from a medical condition which could need urgent surgery. Mr Barton provided a copy of his hospital discharge dated 26 January 2020 noting his diagnosis with a hernia. The discharge records that Mr Barton had previously been treated for a hernia in 2018.

² *R v Barton* [2018] NZDC 17502 [DC sentencing remarks] at [46].

³ Mr Barton abandoned his appeal against conviction on 5 March 2019.

⁴ *Barton v R* [2019] NZCA 644 (Cooper, Ellis and Peters JJ).

⁵ *Barton v R* [2020] NZCA 45 (Cooper, Ellis and Peters JJ) [CA recall judgment].

⁶ DC sentencing remarks, above n 2, at [3].

[9] He submits that he is not a flight risk and that he will comply with all bail conditions. He gives examples of previous compliance with community-based sentences in relation to other offending. He denies that he breached his bail conditions pending his sentence appeal in 2019 as alleged by the Crown.

[10] Mr Barton has provided an email from a client saying he did not have time to file an affidavit but that he had personally met some of the people Mr Barton helped. The client says there is a risk he will lose in the vicinity of \$500,000 to \$700,000 if Mr Barton is not bailed.

[11] In a further memorandum of 24 March 2020, Mr Barton submits that the interests of justice require bail to be granted because of the imminent elevation to Covid-19 Alert Level 4. He is also concerned that Alert Level 4 will restrict his internal movements within prison as well as the possibility of domestic travel to meet with his counsel.

The Crown's submissions

[12] Mr Barton's application for bail is opposed by the Crown, on the basis that it is not in the interests of justice to grant bail.⁷

[13] The Crown submits it is not clear why Mr Barton would need to retrieve his instructions given to counsel as it is only a sentence appeal, but he could in any event ask a friend or relative to retrieve them or ask counsel for his file.

[14] As to other matters raised, the Crown says that the police have confirmed that Mr Barton has nothing of value to impart. There is also no reason to believe Mr Barton will be able to make substantial inroads into his taxation debt, having to date not managed to do so. In any event, any repayment now would not substantially reduce his sentence.

⁷ Bail Act 2000, s 14(1A).

[15] As to Mr Barton's health, it is submitted that there is no reason to believe this could not continue to be managed in prison. The Crown notes that the Court of Appeal was also of the view Mr Barton's condition could be managed while in prison.⁸

[16] Further, Mr Barton failed to comply with his last two community sentences resulting in convictions.. He also failed to comply with bail conditions pending his sentence appeal and in addition failed to surrender to begin his sentence of imprisonment ordered by the Court of Appeal. The Crown submits there can be no confidence he would abide by bail conditions now.

Our assessment

[17] We accept the Crown's submission that it is not in the interests of justice to grant bail.

[18] With regard to his instructions to counsel, we accept the Crown's submission that bail is not necessary to retrieve these. He could for example ask his lawyer for a copy of his file. If necessary, Mr Barton can apply for an extension of time to file his submissions in support of his application for leave to appeal if he is not able to get copies of his emailed instructions in time.

[19] None of the other matters raised, including Covid-19,⁹ would justify bail and Mr Barton's history suggests there is a real risk he would not comply with bail conditions. In addition, Mr Barton is a sentenced prisoner. His appeal against sentence was dismissed by the Court of Appeal, as was his application to recall the judgment.

[20] Mr Barton can renew his application for bail should his application for leave to appeal be granted.

⁸ CA recall judgment, above n 5, at [9].

⁹ This is not to say that issues relating to Covid-19 would not be a valid consideration in other cases, especially with regard to those seeking bail before trial.

Result

[21] The application for bail is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent