

## E. v. R.

### Facts

The appellant was a director in a company that provided seasonal labour in the horticulture and viticulture industries. Said company supplemented labour force with irregular migrant workers. Their status of irregularity derived from being: (i) visa over-stayers, (ii) persons who had jumped ship, or (iii) working in breach of visitor or student permits. The directors of the company attempted to distance themselves from the use of irregular force-labour by engaging legitimate sub-contractors knowing many of the workers they employed were irregular migrants. Fictitious sub-contractors were also resorted to so as to disguise the use of irregular migrants who were in fact employed by the company but not recorded on its payroll. The fictitious sub-contractors were used to provide false invoices in respect of the work carried out by the irregular migrants. Cash cheques were issued to cover the invoices. These cheques were cashed by the false sub-contractors. The money was then returned to the company, reduced of a charged commission. Irregular migrants were paid cash. An amount equivalent to PAYE (i.e. withholding tax on income payments to employees) was deducted from the workers' remuneration. Yet, it was not provided to the Inland Revenue Department. Those funds (referred to as "*bush money*") were used to make commission payments to associates of the appellant, notably supervisors of the workers. The balance was divided among the directors. In the period 2 February – 9 March 2006, false invoices

in the total amount of 274 493, 65 NZD were issued. Some managers had raised concerns with the directors of the company (including the appellant) re the number of irregular migrant workers. Those concerns were "*brushed aside*". The appellant and co-directors of the company had, at times, organised the transfer of irregular migrants between locations. The appellant was sometimes – in the absence of the person usually in charge of the task - involved in calculating and making the various payments of "*bush money*". He also assisted on occasion by liaising with invoice writers. Irregular workers were housed and employed in remote locations.

The appellant pleaded guilty to conspiring, for a material benefit, to aid or abet persons to remain in New Zealand unlawfully, or to breach a condition of a permit granted to them. An appeal followed regarding the proportionality of the sentence (i.e. three years' imprisonment).

### Elements of success

- Financial or other material benefit as constituent element of offence

### Challenges

- Sophistication and fluidity of the criminal plan

### Background

Horticulture and viticulture industries had experienced labour shortages for a number of years. The criminal plan

designed by the appellant and his associates aimed at responding to such a situation.

The appellant was charged together with two other directors of the company and a pay clerk.

The appellant and the three co-accused pleaded guilty on the third day of the respective trial (scheduled to run for six weeks).

## Key issues

- ❖ Financial or other material benefit
- ❖ Sentencing
- ❖ Migration law *versus* criminal law

## Investigation

In ascertaining the facts, authorities relied considerably on testimonial evidence.

## Reasoning

On appeal, the Defence challenged the penalty applied on the basis of the following main arguments: (i) no violation of the country's border as most workers were already staying illegally in New Zealand, (ii) no evidence the appellant had arranged for migrants' illegal entry in the country, (iii) no significant commercial benefit gathered.

The individual who, "*for a material benefit, aids, abets, incites, counsels, or procures any other person to be or to remain in New Zealand unlawfully or to breach any condition of a permit granted to the other person*" commits an offence against immigration laws. The essence of the offence is carrying out the activities listed "*for a material benefit*".

Those who, for material benefit, arrange for irregular migrants "*to enter or be brought to New Zealand, knowing, or being reckless as to whether, the migrant is unauthorised*" commit a more serious offence (i.e. migrant smuggling, Crimes Act 1961), the core of which is also the purpose of obtaining a financial benefit.

*In casu*, the offence was committed for a commercial purpose. It does not matter that the Prosecution could not establish the precise extent to which the appellant benefited. The company benefited from the scheme and was able to derive profits that would have been denied to others operating lawfully. The scheme also had the consequence of diverting tax revenue that would otherwise have been payable by employees engaged in the work that was carried out. The offending took place over a prolonged period, and was well organised with a view to ensuring that the relevant authorities would not discover it.

The appellant was a principal offender and a central figure in the overall criminal scheme.

Even if one accepted the Defence's argument that the particular circumstance of labour shortage was unlikely to be repeated as a result of subsequent regulatory changes, that would not remove the need for deterrence. This will always be required in the case of commercially motivated breaches of the relevant immigration legislation.

The Court *a quo* evaluation of the appellant's previous good character and the discount for the guilty plea is not to be criticised. The Judge *a quo* allowed a credit of six months for these factors,

which does not appear substandard. The discount allowed for the guilty plea of 15 per cent was, if anything, generous having regard to the lateness of the plea. This position takes into account the time and resources saved had the plea agreement not been reached.

It deserves no merit the Defence's submission that the Court *a quo* should have applied a sentence other than imprisonment. This is so in view of the seriousness of the offence.

The sentence applied in first instance was not disproportional.

## **Verdict/Decision**

Appeal dismissed.

## **Opinion**

The reasoning in this case provides useful insight re the definition of the concept of 'financial or other material benefit'. If certain considerations and outcomes (e.g. tax evasion) are relevant in the context of migration law it seems reasonable to argue that the same should remain valid – *a fortiori* – in respect of penal law.

Even though the accused were sentenced for a breach of migration law (rather than the crime of migrant smuggling), the similarities between the two offences are obvious. As such, the case further unveils the close relationship and dynamics between the two aforementioned branches of law in the context of facilitation of illegal entry and stay. The leeway is settled for assessment regarding the realm of outlawed activities to be reserved to the treatment of criminal law, on the one hand, and

other areas of law (e.g. administrative law, immigration law), on the other.

It is worth noting that, in line with the Protocol against the Smuggling of Migrants by Land, Sea and Air – the purpose of obtaining a financial or other material benefit is a constituent element of migrant smuggling.