IN THE COURT OF APPEAL OF NEW ZEALAND 16/2 CA 198/95

THE QUEEN

59

v

PETER ANDRIAN

Coram	**Eichelbaum CJ** **McKay J** **Thorp J**
Hearing	**12 February 1996**
Counsel	**S N Hewson for appellant** **M A O'Donoghue for Crown**
Judgment	**12 February 1996**

JUDGMENT OF THE COURT DELIVERED BY EICHELBAUM CJ

The appellant pleaded guilty on arraignment to 12 counts of burglary, one representative charge of receiving, and one count each of unlawfully taking a motor vehicle, theft of a motor vehicle and possession of instruments for burglary. Having been sentenced in the District Court to 9 years imprisonment he now appeals that sentence.

The offences were committed between March 1993 and April 1994 in several Wellington suburbs. Entry to homes was usually gained by forcing a window or door while the occupants were absent. The items taken consisted of high quality silverware, jewellery, gold coins, watches, cameras, electronic and computer equipment, compact discs and expensive wines. Many of the items were heirlooms and articles of sentimental value. The trauma caused to the occupiers and their families can be imagined.

Investigations began in December 1993 after the appellant was seen in a stolen vehicle in which property from a house burglary was subsequently found. The appellant was also discovered to be in possession of burglary instruments. In April 1994 police gained access to a safe deposit box used by the appellant in which 561 items of silver coins, jewellery and other items were found valued at in excess of $170,000. Also in the safety deposit box were some sums in cash. The appellant was also found to hold bank accounts in New Zealand and Australia holding significant sums. Further property was located elsewhere. The exact value of the total stolen property involved has been difficult to assess but has been estimated to be approximately a quarter of a million dollars.

In 1988 the appellant had been sentenced to 7 years imprisonment for offending including 23 charges of burglary. On appeal to this Court the sentence was upheld as severe but not manifestly excessive. At this time it was said:

> Andrian is a professional burglar whose burglaries have been committed with skill and careful planning. He carries and uses a comprehensive kit of burglar's tools and specialises in the best of jewellery and silver. The property involved in the charges was of a very substantial value... His depredations have affected hundreds of Wellington residents. The community is entitled to protection and the protection of the public and the longer term needed to deter Andrian and other professional burglars required a substantial prison sentence.

The present offending began just two months after the appellant had been released after serving the 1988 sentence. As the District Court Judge stated this indicated the appellant's total absence of respect for the law. She said it was hard to imagine a worse case of sustained and deliberate criminal dishonesty.

The District Court Judge imposed a sentence of 8 years imprisonment in respect of the 12 charges of burglary. On the charges of theft and unlawful taking of a motor vehicle the sentence was 2 years, and 1 year in respect of the possession of instruments. These sentences were concurrent with that for burglary. The receiving charge was a representative one relating to property taken in a number of burglaries. The Judge stated that the offending again was at the upper end of the scale and that a sentence of 4 years imprisonment was appropriate. As the receiving charges related to activity of a different kind the sentence should be served cumulatively. Credit was then given for the pleas of guilty and the appellant's willingness to cooperate with the authorities. Allowance was also made for an application under the Proceeds of Crime Act 1991 which had still to be determined. In the result a final total term of 9 years imprisonment was imposed.

The appellant is aged 44. It is the 9th separate occasion when he has been before the Courts for burglary, 7 of these involving multiple offending. The appellant now has

78 convictions for burglary alone. In the past he has served terms of supervision, periodic detention and imprisonment. While the appellant met the responsibilities of the community-based sanctions none of the sentences has succeeded in modifying the pattern or quantity of his offending.

On appeal 4 arguments have been advanced to support the contention that the sentence was manifestly excessive. It is convenient to deal first with the complaint that the Judge erred in imposing a cumulative sentence in respect of the receiving count. As stated this was a representative charge and so we were told related to 9 burglaries where the appellant was found in possession of stolen items but the police lacked evidence to link him more directly with the commission of the burglary. Plainly the receiving count represented substantial offending in its own right and any proposition that the sentence should not reflect this would be untenable. The real question must be whether in its totality the sentence of 9 years is manifestly excessive in relation to the offending comprised by 12 counts of burglary and 9 of receiving overall.

We deal next with the submission based on the application for a pecuniary penalty order under the Proceeds of Crime Act. In imposing sentence the District Court Judge stated she was aware that such an application had been filed and had yet to be determined. She said however that she regarded as one factor to be taken into account in the appellant's favour that the application "will probably result in an order of some financial burden". Counsel has submitted that a significant allowance should be made on that account.

Following the appellant's arrest it was discovered he had sums approaching $60,000 in bank accounts or deposits in Australia and New Zealand. Pursuant to the Act the Solicitor-General obtained restraining orders in respect of these funds. After the appellant had been sentenced the Solicitor-General applied for pecuniary penalty orders in terms of Sections 25 to 29 of the Act. We were informed that because of the dates at which the deposits were made, the sums could not be regarded as "tainted property" so as to be subject to forfeiture under the earlier provisions of the Act.

The appellant conceded that the pecuniary benefit could be assessed at $62,666.80. He did not oppose the making of pecuniary penalty orders based on this assessment, seeking only that a sum of $5,000 should be reserved to him to assist him with reasonable expenses while serving his sentence and to re-establish himself in the community upon his release. We accept that the appellant's sensible attitude has saved the Crown the expense and trouble of proof of the facts needed to support the application,

although in return the Crown is not opposing the reservation of a reasonable sum, not exceeding $5,000, for the purposes mentioned. Had the appellant contested the application the amount available could have been eroded by the appellant's own expenses, if the Court allowed them to be deducted under Section 42.

In ***R v Brough*** [1995] 1 NZLR 419 this Court considered the possible circumstances in which orders made under the Act might impact upon the sentence imposed. The Court said -

> It is our conclusion, having regard to the scheme of the Act, that as a general proposition, confiscation orders under the Act should not be taken into account when assessing sentencing, subject to two qualifications. First, there may be exceptional or unusual circumstances where orders made, particularly orders to forfeit valuable property used in the commission of an offence, may have a disproportionate or exceptional affect on the offender, sufficient for some regard to be had to it when imposing sentence. Secondly, recognising that one of the purposes of the sentence to be imposed is to deter others who may be minded to commit like offences, if forfeiture orders of property used in the commission of offences are particularly severe, some adjustment to the sentence may be appropriate because the deterrent effect of the forfeiture orders may lessen the need for the deterrent element in the sentence. (p. 424)

Pausing there, we note that both the exceptions mentioned relate to forfeiture orders in respect of property used in the commission of an offence. This is not such a case. The judgment continued:

> But it is difficult to conceive of circumstances where orders to forfeit the proceeds of the offence or for a pecuniary penalty order reflecting the benefit derived from the commission of an offence, should have any relevance to an appropriate sentence. These reflect the offender's ill-gotten gains which, in accordance with the policy of the Act, and irrespective of sentencing for offences, the offender should be required to disgorge. (p. 424)

The last passage may not apply literally, since the funds from which it is proposed the pecuniary penalty order should be satisfied are not "ill gotten gains", at least of the offending for which the appellant is before the Court. However, what the Court said covers the present situation in principle. The agreed sum is said to reflect an assessment of the proceeds of the offences for which the appellant was sentenced. The appellant has admitted that he profited to at least this extent. Since he is in a position to pay that sum there is not the slightest injustice in exacting it from him. To the contrary, to give him any credit for the fact that such payment has been exacted would be to allow him to profit by his crimes - precisely the result that the legislation is designed to defeat. Furthermore there can scarcely be room for doubt that directly or indirectly the appellant's prior offending contributed to the accumulation of these funds in the first place. This reinforces the proposition that there is no injustice in requiring the appellant to pay without receiving

any credit in sentencing. Nor are we taken with the submission that the deterrent effect of the pecuniary penalty order will be such that the term of the prison sentence can be tempered to reflect that. To the contrary we think that this is a case where the merits of the pecuniary penalty order can speak for themselves and that to give the appellant credit for the payments would be seen as a sign of weakness in the response of criminal justice system to an unusually persistent offender. The possible exceptions referred to in ***Brough*** were directed at quite a different situation, broadly speaking the possibility that in some circumstances the effect of forfeiture orders in respect of property used in connection with offending may be so draconian that some sentencing credit should be given. On present facts we see no justification for applying that situation by analogy, nor for creating any fresh exception. The appellant deserves recognition for his realistic and cooperative attitude to disposal of the application. To an extent, as we have pointed out, this is reflected in the Solicitor-General's response to the conditions the appellant has sought to obtain. As to any balance, this can be considered under a later heading.

The next point taken is that the allowance of one year for the plea of guilty was inadequate. We state this as a fact, not as a criticism but the decision to plead guilty was advised at a very late stage. The Judge was justified in making a lesser allowance than would otherwise have been appropriate.

The final and critical issue is the length of the effective sentence of 9 years. The Judge reached this from a starting point of 12, one year being allowed for the plea and the other 2 being deducted for all the other mitigating factors, including the likely impact of the pecuniary penalty order. Under this last heading account must now be taken of the appellant's cooperation relating to that application.

Under this heading counsel argued that the sentence was not in accord with the principles laid down by this court in ***R v Ward*** [1976] 1 NZLR 588. In that case this Court held that where the previous convictions of the accused indicate a predilection to commit a particular type of offence, for the protection of the public the Court may take the accused's record into consideration and lengthen the term accordingly. At the same time the Court took into account remarks by Sir Michael Myers CJ in ***R v Casey*** [1931] NZLR 594 to the effect that the sentence ought to bear some relation to the intrinsic nature and gravity of the current offending, or as the Court put it in ***Ward***:

> We recognise that this balancing is not easy. No rigid lines are really possible. Moreover, the protection of the public against those likely to offend repeatedly can all too easily be seen as an additional punishment for past offences. For these reasons the law has sought to preserve the preventive aspect being given too much importance. The controlling principle which it has developed to prevent it taking charge in a dominant way is that a reasonable relationship to the penalty justified by the gravity of the offence must be maintained. The desirability of prevention must be balanced against that gravity. (p 591).

The present is pre-eminently a case where subject to adherence to these principles, the protection of the public needs to be given weight. Indeed that was the approach of the Courts in dealing with the appellant when in 1988 he appeared for sentencing in similar circumstances. In the event the sentence of 7 years imposed on that occasion did not protect the public sufficiently. There must be a limit to which the Courts in reliance on the principle in ***Ward*** can continue to increase the sentence for broadly similar offending, and the 9 years imposed here must be at or close to it; but the case is exceptional and we are not persuaded that the sentence is manifestly excessive. For these reasons the appeal is dismissed.

Solicitors
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