NOT
RECOMMENDED

IN THE COURT OF APPEAL OF NEW ZEALAND CA 58/97

THE QUEEN

v

TUREI ATARIA

Coram: Thomas J
Blanchard J
Tipping J

Judgment: 17 July 1997
(ex parte)

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

The appellant was convicted after trial by jury of three charges of burglary, five charges of theft, two charges of unlawful taking and one charge of possession of instruments. He was sentenced to seven years imprisonment for the burglary charges and to concurrent sentences of 18 months imprisonment for the theft charges, 18 months imprisonment for the unlawful taking charges and 6 months imprisonment for the possession of instruments. He appeals against conviction and sentence.

The charges relate to offences carried out by the appellant and his associates at Waimarama Beach on the night of the 31 March 1996. The group burgled three buildings in the area and also stole four cars, two boats and other miscellaneous household items. The total value of the goods stolen was approximately $48,000. The offenders were apprehended later that night when

the Police stopped the appellant's car due to its rough condition. The Police later searched the car and found number of items taken in the Waimarama thefts and various instruments, including jemmy bars, a hack saw, a pair of bulk cutters, an electronic scanner, a torch, screwdrivers, filed down allen keys and a container of black pepper. The appellant was also one of the offenders with whom an undercover police officer had contact in disposing of some of the stolen goods.

After consideration by three Judges of this Court, the appellant's legal aid application was declined. The appeal has, therefore, been determined on the basis of written submissions.

The appellant advances two grounds for his appeal against conviction. The first is that the search of the appellant's vehicle was unlawful and that any evidence obtained therefrom is, therefore, inadmissible. The second is that the Judge erred in a pre-trial ruling allowing the appellant's previous solicitor to give evidence to rebut an alibi defence advanced by the appellant. The appellant also argues that the sentence of seven years for the burglary charges was manifestly excessive and that the disparity between the sentences of the appellant and his co-offender, Te Hau, cannot be justified.

The appellant's first ground in the appeal against conviction is that any evidence obtained in the police search of his car was unlawfully obtained and should have been ruled inadmissible. He argues, firstly, that the police stopped his vehicle on the night of 31 March 1996 because it fitted the description of a vehicle thought to have been involved in the property offences at Waimarama. He reasons that the police must, therefore, have stopped the vehicle pursuant to s317A of the Crimes Act 1961 but did not comply with subsection (4) of that

provision because the officers did not tell him that they were exercising their powers under that section.

We do not accept this submission. The Police officers stated in evidence that they initially stopped the vehicle because it appeared to be unroadworthy. On that basis, the Police did not need to rely on s317A of the Crimes Act 1961 because the power to stop an apparently unroadworthy vehicle is contained in s66 of the Transport Act. There is no requirement in that provision to tell the driver of the car the authority under which the car was stopped.

Secondly, the appellant claims that the search of the appellant's vehicle once it was at the police station was a violation of s21 of the New Zealand Bill of Rights Act 1990. He gives three reasons for this. The first is that the police did not possess reasonable grounds to believe that the requirements of s198 of the Summary Proceedings Act 1959 had been met. The second is that the police should not have conducted a search without a warrant when there was opportunity to obtain a warrant. The third is that the search of the appellant's vehicle was carried out without the appellant's consent.

Again, we do not accept these submissions. When the car was initially stopped because of its condition a police constable noticed a set of allen keys and, upon inquiry, was told they were from a tool box in the boot. One of the other occupants was then arrested for possession of instruments. The appellant was arrested on another matter. The vehicle was brought to the police station, the appellant stating that he did not wish it to be left at the roadside. The search which occurred at the police station was part of the arrest process. On finding instruments in the car and arresting an occupant in that connection the police were entitled to search the car. Even if they had not been so entitled, there was

nothing unreasonable in proceeding to do so. There was, therefore, no breach of the Bill of Rights Act 1990.

The second submission relates to a decision of the Crown to call the appellant's previous solicitor to rebut false alibi evidence given by the appellant. The solicitor gave evidence of the fact that, on the appellant's instructions, he filed in the Court a memorandum supporting the appellant's bail application which included a claim that the appellant was not in Waimarama on the night of the offences, but with a Mrs Tracy Morrison in Flaxmere. This alibi was proved to be false when, in the first trial on this matter, the appellant testified that he did in fact go to Waimarama on the weekend in question and Mrs Morrison testified that the appellant's co-accused, Puna, had asked her to say that the appellant and Puna had been with her, even though that was not the case. Mrs Morrison also gave similar evidence in the second trial. By adducing evidence of the appellant's instructions to his solicitor, the Crown sought to link clearly the appellant with the false alibi.

The decision to call the solicitor as a witness raises two issues. The first is whether the instructions given by the appellant to his solicitor are covered by solicitor/client privilege. The second is whether, notwithstanding waiver, that the Judge should have exempted the solicitor from giving evidence under s35 of the Evidence Amendment Act (No 2) 1980.

These issues can be dealt with quite shortly. Firstly, any privilege attaching to the alibi story was clearly waived when the appellant instructed the solicitor to communicate it to the Court in the bail memorandum. The bail application related to the charge upon which the appellant was ultimately convicted and he must have been aware that the police would have access to the information for

the purpose of the prosecution. The appellant's right to expect his solicitor not to disclose that information must have been waived on that basis.

For largely the same reasons, this is not a case where it would have been appropriate for the trial Judge to exercise his discretion under s35. That section gives judges the discretion to excuse a witness from giving evidence on the grounds that to do so would be to breach a confidence that, having regard to the special relationship existing between the witness and the person from whom he or she obtained the information, the witness should not be compelled to breach. The inclusion of the story in the bail memorandum removed from it the nature of confidence and, in our opinion, takes it outside the ambit of this section. Further, it would be against the public interest to excuse a witness in circumstances where it could be seen to encourage this kind of abuse of court process. Thus, no circumstances exist to support either the claim of privilege or the exercise of the Judge's discretion under section 35.

We turn now to the appellant's appeal against sentence. He submits firstly, that the sentence of seven years imprisonment on the burglary charges was outside the range available to the sentencing Judge and was, therefore, manifestly excessive. The appellant claims that his situation can be distinguished from other cases where severe penalties have been imposed for these kind of offences such as ***R v Wickliffe*** CA387/95, 20 March 1996 (where the offender was sentenced to nine years imprisonment) and ***R v Andrian*** 13 CRNZ 449 (where the starting point was set at six years imprisonment, but was reduced to reflected various mitigating circumstances). This is because the burglaries in which the appellant was involved did not display the same degree of sophistication as in those cases; he was convicted of fewer offences than those offenders; all of his offences were committed on the same night whereas the

activity of these offenders spanned a number of months; and those offenders had more previous convictions for burglary.

We do not accept that these differences warrant a departure from the primary concern of the sentencing Judge in this case which was to protect the public from the appellant's offending. The appellant has more than one hundred previous convictions, including fifty-five for burglary and the amount of property taken in one evening and the instruments found in the appellant's car, suggest that he was a burglar of some sophistication. Further, the fact that all the burglaries were carried out on one night simply demonstrates the appellant's destructive ability to commit a number of offences in a short space of time. We cannot accept that this weighs in the appellant's favour. We are, therefore, of the view that the sentencing Judge was justified in having regard to the need to protect the public in sentencing the appellant and a sentence of seven years imprisonment was not outside the range available to him.

The appellant also submits that there is an unjustified disparity between his sentence and that of his co-accused, Te Hau. Te Hau was sentenced to a total of three years and nine months imprisonment for the same burglary offences. The Judge justified the disparity on the grounds that Te Hau was six or seven years younger than the appellant, that the appellant was the leader of the group, that Te Hau had considerably fewer previous convictions than the appellant and that the appellant had deliberately attempted to manufacture an alibi, which resulted in the first trial on these matters being aborted. The disparities between the sentences can be justified on this basis.

Therefore, none of the grounds of appeal are accepted and the appeals against conviction and sentence are dismissed accordingly.