IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP No. 250/86

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BETWEEN BRENT MARCHANT EWINGTON

Appellant

AND POLICE

Respondent

Hearing: 14 November 1986

Counsel: G.L. Colgan for Appellant
T.W. Fournier for Respondent

Judgment: 14 November 1986

(ORAL) JUDGMENT OF CHILWELL J.

Brent Marchant Ewington appeals against a sentence of 12 months imprisonment imposed in the District Court on 22 August 1986 for the crime of receiving stolen goods. It appears that on two occasions in April 1986 the premises of a motor parts firm were broken into. In consequence, carburetters, pistons and bearings totalling $77,184.55 were stolen.

The appellant entered into an arrangement with an undercover policeman to dispose of six tea chests containing motor parts of the type referred to for $3,000. The value of the contents of the tea chests disposed of by the appellant was

$35,443.67, that is to say, approximately half of the total in quantity and value of the stolen goods.

In sentencing the appellant the District Court Judge was influenced by the fact that the burglaries indicated a professional operation because of the selective nature of the stolen goods, of the value of the goods and the professional nature of the operation overall. For example, the Judge said in regard to the three matters just mentioned:

> "In July you took six tea chests of those goods for sale to another motor type business and offered to sell them for $3,000." (page 1).
>
> "You are a businessman and this operation has all the earmarks of starting off as a professional type of operation with burglary to order." (page 1).
>
> "I think a case here calls for a severe deterrent penalty when someone engaged in an operation of this magnitude is apprehended and accordingly you are sentenced to 12 months imprisonment." (page 2).

The Judge was required to consider ss.6 and 7 of the Criminal Justice Act 1985. In regard to that he said:

> "I have considered s.7 and s.6 of the Criminal Justice Act and the constraints that are placed upon the Courts in respect of custodial sentences and I am aware the Court must take into account those factors and a custodial sentence is not to be passed unless there are

> special circumstances and the other penalty is inappropriate or inadequate. I think that this is such a case where the other penalty which is periodic detention is inappropriate or inadequate. The circumstances here show professionalism, a very large amount is involved, the goods were selected. Receiving is an offence which is very hard to detect and one upon which of course a large percentage of the burglars depend for their livelihood." (page 2).

The appeal is advanced on two principal grounds. The first is that the District Court Judge was not given an adequate account of the facts, thereby leading him into error in respect of the appellant's connection with the overall transaction. The second is that the District Court Judge did not adequately consider alternatives to imprisonment except for periodic detention when there were other alternatives available to him, such as a shorter term of imprisonment plus a fine or a term of periodic detention plus a fine or community service plus a fine. The appellant's financial position, as revealed in the pre-sentence report, establishes that he had the ability to pay the maximum amount which could have been imposed in the District Court, that is to say, $4,000. A recent decision of Ongley J. noted in [1986] Recent Law 271 provides the first judicial review, of which I am aware, of the interpretation and application of ss.6 and 7 of the Criminal Justice Act. The case is McDonald and Garrett v Police (unreported; 11 March 1986, M. Nos. 41

and 42/86; Wellington). The following note appears in Recent Law 271:

> "Section 6 contains a direction that imprisonment is not to be imposed for property offences carrying penalties of less than seven years imprisonment in the absence of 'special circumstances of the offence or of the offender', that would make any other sentence inappropriate. Section 7 imposes a general limitation on imprisonment where other sentencing options are 'consonant with promoting the safety of the public'.
>
> The Court noted that s.7 provides a primary tenet of penal policy which must be considered where imprisonment is a lawful penalty, and is a direct successor to s.13(B)(a) of the Criminal Justice Act 1954.
>
> As regards offences coming within the ambit of s.6, the Court noted that imprisonment could no longer be regarded as an alternative penalty, but could only lawfully be imposed where the circumstances of the offence or offender were such as to satisfy the Court that other alternatives were inadequate or inappropriate, as a matter of certainty.

Dealing first with the facts, it is unfortunate that the District Court Judge did not have before him a copy of the statement made by the appellant when he was apprehended. So far as the Judge was aware, the appellant had accepted the summary of facts contained in the police caption sheet which, being a summary only, does not contain the more detailed account of the facts appearing in the appellant's statement. Counsel for the appellant, who was not counsel in the Court below, has been able to provide this Court with a

more precise analysis of the part played by the appellant. In my view, the District Court Judge cannot be criticised for taking the serious view which he did of the appellant's conduct on the information which he had before him. On the further information which is before me, it is clear that the appellant was not the principal receiver. The principal receiver is a person known to the police who has escaped to Australia. While the appellant had every reason to believe that the six tea chests contained stolen items, it is clear from his statement that he was not involved in the burglary nor was he involved in any organisation relating to the receiving but was placed in a position where he felt obliged to take possession of the six tea chests by the principal receiver, Zainey. There was even some suggestion in the statement that Zainey might have been standing over the appellant to some extent. It is not correct to say of the appellant's conduct that he took six tea chests of the goods in question for sale to another motor type business and offered to sell them for $3,000. What happened was that an undercover policeman, who knew that he had access to the six tea chests, telephoned the appellant and requested him to meet him at a particular place where the transaction took place. Insofar as the District Court Judge tended to associate the appellant with a professional type operation, that is not borne out by the appellant's statement. The professionalism referred to by the

Judge applied to the original theft or thefts and to Mr Zainey. When the statement of the appellant is read along with the police summary the inference is not justified that this appellant was in on a professional type of operation with burglary to order.

In the longer of the three passages cited from the sentencing remarks of the Judge there were three aspects of the transaction which he considered to amount to special circumstances sufficient to make imprisonment the proper punishment as a matter of certainty. The first relates to the professionalism of the operation. When the appellant's statement is examined that conclusion is not justified. The second is the very large amount involved. That is a circumstance relevant to the appellant's sentencing. The third is the issue of selectivity. The appellant was not involved in that aspect of the matter. The question is whether the value of the goods, not taken out of context but looking at the facts as a whole, is sufficient to justify, as a finding of certainty, that imprisonment was the appropriate penalty.

Counsel for the respondent submitted that, even allowing for the new facts made available to this Court, it is still permissible to say of the sentence below that the Judge was entitled to take into account the fact that the appellant is a businessman

and, when the overall scope of the criminal escapade is considered, the Judge, if given the fresh facts, would still be entitled to take the view that the appellant in the role he took, which was remote from the principal's, was obviously to his knowledge connected with stolen goods having a substantial value and that in itself would justify imprisonment, if only on the ground that the law ought not to be too concerned about treating receivers in the same way as it treats the thief. In my judgment, once the sting of professionalism and selectivity and crime to order is removed from the appellant's criminality the value of the goods stolen is not, in the context of the whole of the facts, a special circumstance of the offence or of the offender which is such as to satisfy the Court that the alternatives other than imprisonment are inadequate or inappropriate as a matter of certainty.

Putting that aside for the moment, I agree with the submission of counsel for the appellant that the District Court Judge appeared not to have considered other alternatives than periodic detention. Community service had been suggested by the probation officer but I cannot consider that the Judge would have been justified in adopting that option. There was the other option available to him, that of a fine. Alternatively, if the Judge had considered that this appellant should not be fined merely because he could

afford to be fined and that the question of deterrence had to be taken into account, then in terms of s.7 of the Criminal Justice Act he was required to consider the desirability of keeping the offender in the community and that the term of sentence should be as short as consonant with promoting the safety of the community. It is in the combined context of ss.6 and 7 that the District Court Judge had further options to him, such as those previously mentioned, of mixing the penalty between a fine and some other form of penalty, including imprisonment. Had the Judge been presented with the much more full account of the facts made available to this Court, it would be appropriate to comment that he had failed to give proper attention to the available options under ss.6 and 7. As the case was presented to him, I do not consider that his approach to the sentence ought to be the subject of any criticism.

For the reasons which I have given, I conclude that 12 months imprisonment was clearly inappropriate and also excessive in the circumstances as they appear now to be. In my judgment, the deterrent aspect could have been adequately dealt with by an appropriate term of periodic detention and also, if the sentencing Judge so thought, with a fine. The appellant has now served three months of the term of imprisonment imposed. That would seem to me to be adequate deterrence. The overall criminality, however,

requires some further sentence. In the circumstances, and having regard to the value of the goods involved, it is my view that he should be fined $3,000. The appeal is accordingly allowed.

The sentence imposed in the District Court is quashed to the extent that a term of imprisonment expiring today is substituted plus a fine of $3,000.

Solicitors:

For Appellant : Haigh, Lyon & Co., Auckland
For Respondent: Crown Solicitor, Auckland