

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

AP. 17/87
AP. 18/87

BETWEEN: GRAHAM FRANKLIN JOYCE
Appellant

A N D: THE POLICE
Respondent

BETWEEN: SONNY HUATAHI EMERY
Appellant

A N D: THE POLICE
Respondent

Hearing: 26 May 1987

Counsel: Mrs T. McKenzie for both Appellants
 R.H. Ibbotson for Respondent

Judgment: 26 May 1987

ORAL JUDGMENT OF JEFFRIES J.

Before the court are two appeals, one by Sonny Huatahi Emery and the other by Graham Franklin Joyce, against sentences of two years and 18 months' imprisonment respectively imposed by the District Court Judge at Invercargill on 16 and 14 April 1987. Although the Judge sentenced them on different days as stated, he acknowledged

in the sentencing of both that they were involved with another in the central crimes for which they were sentenced. The facts of those two crimes, very shortly, are as follows.

Both appellants met, apparently for the first time I am informed by counsel, in Queenstown and on 11 March 1987 set out to commit two burglaries. The first was on the Amber Lodge Motel where one entered unit 13 by removal of glass louvres at the rear and Emery climbed through into the unit. It was at the time occupied by two elderly women who were asleep inside. Personal items, handbags, camera equipment, jewellery, passports and travellers' cheques to the total value of \$21,000 were removed. The items were passed by Emery to Joyce. They returned to the crib they were occupying at the camping ground and divided the proceeds of the burglary. No doubt emboldened by the success of that burglary they left again and went to unit 4 of the Ambassador Motel. There again a similar sort of burglary was committed by Emery entering the premises and, while the occupant was asleep, proceeding to rifle his belongings. On this occasion the occupant, a male, woke and thereafter a fight took place between Emery and the occupant resulting in quite serious injuries being sustained by the occupant. It was said in the sentencing notes of the Judge that the complainant in the assault was struck in the face several times by Emery and had to return to Australia, being his home country, with a suspected broken nose, a black eye and swollen head.

Mrs McKenzie in argument on Emery's appeal submitted that her instructions were he denied the extent of the assault as contained in the summary of facts which came through in the sentencing remarks of the Judge just mentioned.

Mrs McKenzie did not appear for Emery at sentencing but was able to inform the court that Emery had advised his then counsel of his view of the facts, but she was unsure whether the dispute on those facts was put before the sentencing Judge. There is certainly nothing in his remarks to reveal that was so.

To complete the facts on the two burglaries just mentioned the total amount taken from the Ambassador Motel was \$1,600 in cash, together with a camera and shaving items to the value of \$200. The total amount from both burglaries amounted to \$22,600, of which \$17,164 mostly in travellers' cheques was recovered. Both offenders were apprehended within two days of the events, but in that relatively short time had managed to spend many thousands of dollars in the town. Reparation was asked for in the sum of \$2,718, which was denied in Joyce's case but some order was made in Emery's. Reparation is not the subject of this appeal.

Joyce out of the foregoing facts faced two charges of burglary, as did Emery but he also faced a separate charge of assaulting the complainant with intent to facilitate the flight of himself upon the commission of the crime of burglary. Further Emery faced another charge of theft of woollen jerseys amounting to \$1,150 from the luggage compartment of a locked vehicle. I am informed by counsel that seven of the 10 jerseys were recovered in a worn condition, but not the suitcase. Joyce faced a separate charge of being in possession of cannabis.

The learned Judge who sentenced both saw the similarities and differences between them in regard to their offending and their personal circumstances. He sentenced Emery to 18 months' imprisonment on the two burglaries and six months on the assault charge, making those sentences cumulative

and a total of two years for Emery. On the theft charge he sentenced Emery to three months' imprisonment to be concurrent on the burglary charges. For Joyce he sentenced him to the identical sentence of 18 months for the burglaries and one month for the drugs charge, but made them concurrent. The net result is that Emery through the assault was sentenced to six months more imprisonment than his co-offender in the burglaries, Joyce. From those sentences both appellants filed appeals, and the central ground for each is that the sentences were manifestly excessive in all the circumstances. Before the sentencing Judge were pre-sentence reports and in the case of Joyce two worthwhile references. It is convenient in dealing with these appeals to do so by one judgment.

As stated earlier in this judgment apparently the co-offenders did not know each other until they joined together in Queenstown and the offences mentioned were committed. It is significant that Joyce openly admitted to the Police that he had committed many burglaries for which he had not been caught or charged. Emery did not make that same admission. Both appellants have much in common. Each has had an unstable and, to say the very least, difficult childhoods. For different reasons each suffered much as a child and turned to drug dependency and extensive criminal offending. There is clearly a link between drug and alcohol dependency for both and the list of burglaries and property offences committed by them. There are other aspects that they share which are much more positive, and it is that they both seem to have intelligence and ability in different fields, and some insight into the cause of their extreme anti-social behaviour. I have already mentioned that Joyce had the advantage of being able to place before the court two worthwhile references. In regard to Emery the District Probation Officer was able to say the following:

"There is a genuine side to Emery which has the ability to see his need and call for help and a keenness to impress in the workplace with his obvious ability at this stage wasted by drug dependency."

It may be, as Mrs McKenzie said, crimes committed because they were together.

Mrs McKenzie on behalf of both appellants treated each separately and carefully articulated and delineated the points that could be made on behalf of each. However, she was able to summarise her submissions on behalf of appellants by stating to the court that the ends of society and their permanent rehabilitation by breaking the offending cycle would best be served by shorter sentences than those imposed by the District Court Judge. By that submission I understood her to concede that some imprisonment at least was called for. In respect of each she drew attention to the favourable aspects of commitment to change and she submitted there were positive attempts on the part of each to bring about a more permanent rehabilitation.

Mr Ibbotson on behalf of the Crown submitted that the sentences were not manifestly excessive and that for the main ones of the burglaries there were many aggravating features, particularly in regard to Emery's assault for which Joyce would be a party in law. He submitted that the sentencing Judge in the course of sentencing each had adverted to these aggravating factors and that in any event both burglaries were bold and daring. The likelihood of assaults must have been apprehended by them both when they undertook commission of the burglaries. Mrs McKenzie has ably advanced to the court everything that can be said on behalf of each appellant, but notwithstanding that cannot bring the court to the position where it can say the sentences

are manifestly excessive. In regard to Joyce Mrs McKenzie eloquently stated that he had almost written his own sentence by virtue of his persistent offending and that he had exhibited, I understood her to indicate, little real resolve excepting in the urgency of sentencing. There is a distinction between Joyce and Emery in that Emery had apparently sought help before commission of the offences, but that does not entitle him in these circumstances to be treated differently.

For the foregoing reasons both appeals against sentence are dismissed.



Solicitors for Respondent:

Crown Solicitor, Invercargill