IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

M 32/91

BETWEEN MARK PHILLIP RUSSELL

Appellant

A N D THE POLICE

Respondent

Hearing: 30 October 1991

Counsel: I Hay for appellant
M J Robb for Crown

Judgment: 30 October 1991

ORAL JUDGMENT OF EICHELBAUM CJ

The appellant appeals against sentences imposed in the District Court on 6 charges of burglary, one of possession of cannabis, one of being in possession of instruments for burglary, and one of receiving. In respect of the six burglary charges, the sentence was one of two and a half years imprisonment in each case. For present purposes the sentences on the other three charges really do not matter. Plainly in the circumstances the District Court Judge had to fix a sentence appropriate having regard to the totality of the offending. The offences were of a substantial nature although all committed within a relatively short period of time. Significant values were involved, in particular in relation to the burglary of the safe at Claridges Cabaret where $11,000 in cash was taken, very little of which has been recovered. Although only 21 years of age, the appellant had accumulated a considerable list, including four convictions for theft, two for receiving, one for

conversion and one possession of housebreaking instruments. On the one previous occasion when he had been convicted of burglary he was sentenced to periodic detention and given a final warning. In October 1990 he had been imprisoned for 9 months on two charges of driving while disqualified. In passing it should be mentioned that he has a deplorable list of driving offences but they are only marginally relevant to the matters now before the Court. If Russell's case is considered in isolation then against the background I have recited, I do not think that the effective sentence of a little over two and a half years imprisonment (the appellant having been in custody on remand for some two and a half weeks) could be regarded as manifestly excessive.

Two other subsidiary grounds were argued which I can dispose of immediately. The first related to the manner in which the Judge dealt with the appellant's inability to provide restitution; the second an assertion that the Judge failed correctly to apply the provisions of SS 6 and 7 of the Criminal Justice Act 1985. There is nothing in either of these points.

The essence of the appeal lies in the remaining point relating to disparity. In the case of three of the burglary charges the co-offender was a man named Donohue. On the same day as Russell was sentenced Donohue came before the same Judge in respect of those three charges and two other burglaries as well. Donohue was sentenced first, and received an effective sentence of one year imprisonment. In dealing with Russell the Judge made it clear in her sentencing remarks that she considered Russell's level of culpability to be the greater. He was involved in a larger number of offences, although this point is somewhat marginal when the real issue relates to the burglaries alone. More importantly the personal circumstances of the two offenders varied considerably.

It was possible for Donohue to be regarded as effectively a first offender and there were other matters in his favour which will be referred to shortly. The Judge's own assessment of the respective degrees of culpability was demonstrated in her sentencing remarks when after referring to the one year given to Donohue she sentenced Russell to two and a half years imprisonment. As matters stood at that stage, I think it highly unlikely that there could be any room for criticism on grounds of disparity. However, Donohue appealed and as it happens - although this is mere coincidence - his appeal was dealt with by myself also. Analysis of the judgment allowing Donohue's appeal and substituting a sentence of nine months periodic detention shows that the success of the appeal turned entirely on his personal circumstances. The judgment recorded that the events although numerous could properly be regarded as one continuous series, a single isolated fall from grace. He was described as a "quite promising young man" with a good work and sports record. Clearly the amendment to the sentence on appeal had nothing to do with the circumstances of the offending themselves. I should say now that on the information before the Court there is no basis for regarding Russell as the ringleader in those offences in which both he and Donohue took part. Indeed there is no sufficient information before the Court to form any judgment on that aspect.

In R v Lawson [1982] 2 NZLR 219, 223 the test of disparity was put on this basis: whether a reasonably minded independent observer, aware of all the circumstances of the offence and of the offenders, would think that something had gone wrong with the administration of justice. As that case emphasised, the test is objective, not subjective. It is not merely whether the offender thinks he has been unfairly treated but whether there is real justification for that grievance. In this respect, on the hearing of the

present appeal the Crown accepted that in the light of the outcome of Donohue's appeal there appeared to be some disparity now present.

Having regard to the very different personal circumstances of the two offenders, the answer to the question of the outlook of the objective observer as to whether he would be left with any feeling that justice had miscarried is not necessarily clear cut. However, having regard to the very considerable reduction of penalty achieved by Donohue, he might reasonably question whether such reduction should not be reflected in some degree of recognition in respect of the other offender. I am persuaded that having regard to the circumstances which are now before the Court, which I emphasise are different from those which were before the District Court Judge, the case for disparity has been made out.

Accordingly, in respect of the sentence imposed on each of the 6 burglary charges I quash the sentence and substitute one of 15 months imprisonment. The sentences on the remaining three charges will stand, and all the sentences will be concurrent as before. The effective result is that the previous sentence of two and a half years imprisonment has been reduced to 15 months. The appeal succeeds accordingly.

Thomas J

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