IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

10/9

AP 100/93 &
AP 101/93

1499

BETWEEN RICHARD DOUGLAS SMITH and GREG TE AROHA JERRY

Appellants

AND THE POLICE

Respondent

Hearing & Judgment 24 August 1993

Counsel G. Marshall for Appellants
P. Morgan for Respondent

ORAL JUDGMENT OF PENLINGTON J

By consent these two appeals were heard together. Originally each appellant appealed against both conviction and sentence. The appeals against conviction were filed as the result of a misapprehension. They were abandoned at the commencement of the hearing today. That then left the appeals by each appellant against sentence.

The appellant Smith faced 23 charges of burglary in the District Court. He pleaded guilty to those charges. The appellant Jerry faced 11 charges of burglary in the District Court. He pleaded guilty to those charges. Both appellants were represented by counsel. They were each sentenced to 18 months

imprisonment, the learned Judge in imposing sentence recording that he had taken as his starting point two years and that in the circumstances, because the of the appellants' cooperation with the police to which I shall refer further, he therefore imposed a sentence of 18 months in each case.

The background to the prosecution was as follows. In or about November 1992 both the appellants were discharged from prison. They had previously offended in the same way together. About three weeks after their release they commenced to burgle to order. They were in touch with a professional receiver of stolen property. The receiver would indicate what sort of stolen property he wanted and the appellants would then commit burglaries to satisfy the receiver's requests. When the stolen property was handed over to the receiver the appellants would be paid for their dishonest services.

The appellants targetted dwelling houses at night time ensuring that no-one was at home. A substantial quantity of goods were stolen. In the main, the stolen property consisted of videos, stereos, compact disc players, jewellery, coins and firearms.

The police mounted an operation to track down the burglars and ultimately in the early hours of 12 April the appellants were apprehended having successfully committed a burglary shortly beforehand. The appellants were then interviewed. Admissions were made and then each of the appellants, to their credit, assisted the police to solve, in the case of the appellant Smith, 22 other unsolved burglaries and in the case of Jerry, 10 other unsolved burglaries.

The police readily acknowledge that they would not have been able to close their files on these unsolved cases had it not been for the cooperatioin of the appellants.

Each appellant has previous convictions for burglary. As I earlier indicated, they had offended together on a previous occasion in 1992 when they each received a term of imprisonment. When

they appeared for sentence the learned Judge, as I have said earlier, took into account their cooperation. That cooperation related to the solution of the unsolved burglaries which they had committed.

The appellants now appeal to this Court. Mr Marshall, who conducted the appeal for the appellants, in his economical and helpful submissions this morning essentially made three points.

1. That the appellants had given further cooperation in respect of the receiver since the sentencing in the District Court for which they should receive further credit.

2. That on behalf of the appellant Jerry, Mr Marshall raised the issue of disparity.

3. That the learned Judge had not properly taken into account the provisons of s.81 of the Criminal Justice Act.

The first point was the principal point. Since the sentencing of the two appellants the receiver has been arrested and charged on 11 informations for receiving stolen property. The prosecution of the receiver has been made possible as the result of the information received from the appellants.

The receiver has elected trial by jury. The appellants recently gave evidence at the committal proceedings. The receiver was committed for trial. The appellants are the two main witnesses for the prosecution. The trial has yet to take place. The actions of the appellants have been confirmed in a letter from the officer in charge of the prosecution of the receiver to the Crown Solicitor at Hamilton dated 20 August 1993 which was placed before me this morning. The letter records that the evidence has been given in the full knowledge of the criminal antecedents and associates of the receiver. I infer that the appellants have placed themselves at the risk of physical harm because of the fact they have chosen to given evidence for the prosecution against the receiver. I also infer from the text of the letter that

the police fully expect that the appellants will give evidence at the trial in accordance with the sworn evidence which they have given at the depositions hearing and that that evidence will materially assist the prosecution of the receiver.

Mr Marshall accordingly submits that there are now substantial facts relating to the appellants which were not before the sentencing Court. I agree.

Mr Morgan for the Crown has drawn to my attention that the appellants have had a bad record for burglary and other offences involving dishonesty, that they had each gone to prison in 1992 for that kind of offending, that within weeks of their release they had commenced to burgle once again, that the spate of burglaries which gave rise to the charges for which they were sentenced were of a mean nature. and that they had once again acted together.

I accept the points which have been made by Mr Morgan and against that background I am inclined to agree with his submission that the learned Judge's starting point of two years, given all the circumstances, was on the lenient side.

Having said that, however, I am of the view that there is clearly additional material before this Court which was not before the sentencing Court and that that should result in a reduction of the sentence imposed in the District Court. Cooperation is a well recognised factor which gives rise to a credit in favour of a prisoner being sentenced. See for example ***R v T***, CA 5/87. judgment 1 April 1987, per Somers J delivering the judgment of the Court. And generally as to the question of assistance see ***R v Crime Appeal,*** CA 293/92, judgment 1 April 1983 per Eichelbaum CJ delivering the judgment of the Court especially at p.9, ***R v Ewington***, CA 362/92, judgment 26 November 1992 per MacKay J delivering the judgment of the Court, and ***R v Crime Appeal***, CA 462/92, judgment 19 May 1992 per Eichelbaum CJ delivering the judgment of the Court.

As to Mr Marshall's second point, disparity, I recognise that on the one hand the appellant Smith pleaded guilty to 23 charges whereas the appellant Jerry only pleaded guilty to 11 charges. Plainly, the learned Judge drew no distinction between the two appellants. I agree with that approach. I do not intend to draw any distinction between the appellants.

And finally as to the third point raised by Mr Marshall, namely compliance with s.81 of the Criminal Justice Act, it is correct that the point was not expressly referred to by the learned Judge. The position in fact was that the appellants were in custody awaiting sentence for a period of 19 days from 15 April 1993 to 4 May 1993.

I intend as earlier indicated in these reasons to reduce the sentence imposed on each appellant. The reduction will take into account the plea made by Mr Marshall in respect of the s.81 of the Criminal Justice Act point.

The probation officer made an observation in respect of each appellant that there might be merit in post imprisonment supervision under s.77A of the Criminal Justice Act. Because of the length of the sentence imposed by the learned Judge, that observation was put to one side by him. In the light of the new situation I consider that it would be appropriate to take up the suggestion of the probation officer. There is at least a ray of hope for each of these appellants that they might turn from their previous criminal offending and become useful law abiding citizens.

Accordingly, for the reasons given, the appeal is allowed. The sentence in the case of each appellant is reduced to 11 months 3 weeks imprisonment. I impose a special condition under s.77A of the Criminal Justice Act that in the case of each appellant he undertake such rehabilitative counselling and/or other courses as may be directed by the probation officer.

P.G.S. Penlington J

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