

IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

A.P. No.170/97

eg ✓  
12/97

BETWEEN MICHAEL DAVID BRIAN

Appellant

A N D POLICE

Respondent

Hearing: 6 August 1997

Counsel: No appearance of or for Appellant  
M.N.Zarifeh for Respondent

Judgment: 6 August 1997

prosecution/18m

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ORAL JUDGMENT OF FRASER J

11, 5, 1, 13, 28

This is an appeal against a sentence of two and a half years imprisonment imposed on 12 charges of burglary. The Appellant was refused legal aid and was not represented but his contention, as is apparent from the material on the file, is that the sentence is too long.

The circumstances are that between 3 and 21 May this year the Appellant committed 12 burglaries from dwellinghouses, taking property in excess of \$4,000.00 in value, part only of which has been recovered and there is no prospect of reparation. The Appellant was 19 years of age at the time of committing the offences and had just turned 20 at the time he was sentenced. It is clear that the major factors influencing the Judge in imposing the sentence which he did were the number of burglaries over such a short period of time and the effect on the victims, combined with the Appellant's record.

In that respect the Appellant first appeared in the District Court in 1996 and during that year and in early 1997 he was before the Court on various

charges, including some of dishonesty such as using a document for pecuniary advantage and theft. He was sentenced to periodic detention and supervision but it appears that he did not comply and ultimately on 23 May, that is after he had been apprehended on the burglary charges, the subject of the appeal, he was sentenced to three months imprisonment for breach of periodic detention and he was serving that sentence at the time of his sentence on the burglary charges.

In the course of his remarks the District Court Judge carefully reviewed all relevant factors, including mitigating circumstances: the plea of guilty, the Appellant's co-operation and his age. He said that in his opinion the starting point was four years imprisonment but he gave the Appellant the benefit of 18 months for the mitigating circumstances which I have referred to.

Mr Zarifeh has helpfully supplied me with particulars of a number of judgments of this Court on appeal where sentences on burglary charges were considered. One of these is Police v Devlin an unreported judgment of Hansen J in the High Court at Christchurch AP 56/95 7/9/95. That was a Crown appeal against a sentence of seven months imprisonment imposed on one charge of burglary, two of unlawfully taking a motor vehicle and one of failing to report for periodic detention. The burglary was described by the Judge as clearly commercially orientated and extremely professional. The Appellant had 20 previous convictions for burglary and had previously been sentenced to imprisonment. In the result the Judge took the view that the starting point was a sentence of two and a half years imprisonment but having regard to the mitigating factors and taking into account that it was a Crown appeal, he replaced the sentence of seven months with one of 18 months imprisonment.

In the course of his judgment Hansen J referred to a number of other decisions including Galbraith v Police unreported High Court Christchurch AP 261/90 9/10/90 a judgment of Holland J dealing with an appeal against a sentence of two years imprisonment where there were 23 previous burglaries.

The appeal was dismissed. The next case mentioned was Malloch v Police unreported High Court Christchurch Williamson J AP 284/90 7/11/90 in which a sentence of one year eleven months was imposed where there were 15 previous offences. In Carey v Police unreported High Court Dunedin AP 158/90 13/11/90. Tipping J upheld a sentence of 18 months imprisonment where there were three previous convictions.

In Mangles v Police unreported High Court Invercargill AP 56/92 the Chief Justice, Sir Thomas Eichelbaum, upheld a sentence of two years imprisonment in respect of a burglary committed shortly after the Appellant had been released from prison after serving a sentence of one year and seven months for burglary.

Mr Zarifeh also referred me to Te Kira v Police an unreported judgment of Tipping J in the High Court at Invercargill AP 9/96 23/4/96 an appeal against three years imprisonment for a single offence of burglary combined with a concurrent charge of possession of instruments. In this case the Appellant was 28 years of age and had a number of previous convictions. A co-offender had been sentenced to 12 months in respect of 13 charges including three of burglary, two of them being from dwellinghouses. The submission was made to Tipping J in that appeal that in the case of repeat burglaries the likely sentence to be expected was something between 13 and 24 months imprisonment. Justice Tipping accepted that that was in very general terms indicated by the information that had been supplied to him, but emphasised that each case must depend on its own facts and that these indications of other sentences have to be taken into account with some caution because of the infinitely varying circumstances of the different cases.

I think it is clear in this case that imprisonment was inevitable and that a substantial term was required. I agree with the District Court Judge that 18 months effective credit for the mitigating factors was appropriate but, with due respect to the different view taken by the Judge, it is my opinion that in the case

of an offender who is 19 years of age, had no previous convictions for burglary and had not previously been sentenced to imprisonment, four years was too high a starting point, notwithstanding the significant number of individual burglaries that he committed.

It is my opinion that the appropriate starting point in this case should have been three years. In the result, taking into account the discount for the mitigating factors, I consider that the sentence should be reduced to 18 months.

The appeal is accordingly allowed and in lieu of the sentence imposed in the District Court the Appellant is sentenced to 18 months imprisonment.