

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CRI-2009-485-61
CRI-2009-485-62
CRI-2009-485-63
CRI-2009-485-64**

RONAN WILLIAM BULLOCK
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 29 September 2009

Counsel: R M Gould for appellant
J M Webber for respondent

Judgment: 30 September 2009

RESERVED JUDGMENT OF DOBSON J

Introduction

[1] Mr Bullock appeals against his sentence of 28 months' imprisonment after pleading guilty to a range of offences. His grounds of appeal are threefold:

- the sentence is manifestly excessive;

- insufficient regard was given to Mr Bullock’s recent head injury; and
- home detention was the least restrictive sentence appropriate in the circumstances and should have been imposed.

[2] The nature of Mr Bullock’s convictions and the sentences are as follows:

Offence	Section	Sentence
Type 1		
Receiving stolen property in excess of \$1000.00 (two counts)	Sections 246, 247 Crimes Act 1961	12 months’ imprisonment
Theft of property less than \$500 (two counts)	Sections 219(1)(a) and 223(d) Crimes Act 1961	Convicted and discharged
Type 2		
Driving with excess breath alcohol (third or subsequent offence) (two counts)	Section 56 Land Transport Act 1998	14 months’ imprisonment (cumulative)
Driving while disqualified (third or subsequent offence) (two counts)	Section 32 Land Transport Act 1998	14 months’ imprisonment (concurrent)
Careless driving	Section 37 Land Transport Act 1998	Convicted and discharged
Type 3		
Cultivation of cannabis	Sections 6(1)(b) and 6(2) Misuse of Drugs Act 1975	Two months’ imprisonment (cumulative)

[3] All of the counts within each type of offence were sentenced concurrently. However, the prison terms for each type of conviction were to be served cumulatively, so that the terms for driving, receiving and cannabis offending were assessed separately and are to be served cumulatively, leading to an end sentence of 28 months’ in prison. The cannabis conviction had a maximum penalty of eight years’ imprisonment, and the receiving conviction seven years.

Factual background

[4] The receiving offences refer to a trail bike stolen from the dealership that had just repossessed it from Mr Bullock on 26 April 2004, and secondly a motorcycle stolen from an Island Bay address on 18 October 2006. Both vehicles were located at Mr Bullock’s address after the execution of a search warrant on 21 July 2008. Due to the lapse between this offending and Mr Bullock being charged, Ms Gould invited me to treat them as less serious because they were by then “historic”. I am not inclined to do so.

[5] The theft charges relate to Mr Bullock entering Briscoes Homeware Limited in central Wellington on 14 August 2007, stealing a hair straightener and then returning to the store and stealing a personal groomer.

[6] The cannabis offending involved 10 cannabis plants growing in Mr Bullock's home, found when the Police executed the search warrant on 21 July 2008. The plants were all in a vegetative stage but were growing with the assistance of artificial lights and ventilation. Police estimate that upon maturity, the yield of the plants would generate around \$140,000-\$200,000 per year.

[7] The driving offences involved two separate incidents. On 13 November 2008, Mr Bullock was stopped by Police and was found to have 551 micrograms of alcohol per litre of breath, 151 micrograms in excess of the limit. He was also driving while disqualified. Then, on 29 November 2008, whilst exiting from a car park in suburban Wellington, he braked and skidded, eventually hitting a railing separating the road from the footpath. The railing went through the windscreen and hit Mr Bullock's head, rendering him unconscious. He lapsed into a coma for three weeks. He was a disqualified driver and had 166 milligrams of alcohol per 100 millilitres of blood, twice the limit of 80 milligrams.

District Court decision

[8] In his 1 May 2009 notes on sentencing, after detailing the offending, Judge Mahony noted the pre-sentence report, which detailed Mr Bullock's employment as a carpenter and his long recovery from his accident on 29 November 2008. The Judge also noted that his convictions for driving whilst disqualified were his ninth and tenth such convictions and he also had a number of excess breath alcohol convictions. Mr Bullock has had 69 convictions since 1998. The pre-sentence report noted that Mr Bullock had a harmful pattern of alcohol and cannabis abuse.

[9] The sentencing Judge noted that Mr Bullock served a term community detention, that this did not act as a deterrent and that the pre-sentence report did not recommend a sentence of home detention. At this point, the Judge held that it was inappropriate to sentence Mr Bullock to a sentence of home detention, due to his

pattern of serious offending and the necessity of the Court to impose a deterrent sentence.

[10] The Judge set a starting point for the receiving offences of 18-20 months, reduced to 12 months' imprisonment to take account of the guilty plea. On each of the four separate driving offences, Judge Mahony sentenced Mr Bullock to 14 months' imprisonment, concurrent with one another but cumulative on the receiving sentence. He added two months' imprisonment for the cannabis offending and convicted and discharged Mr Bullock for the remaining offences. The end sentence was 28 months' imprisonment. He was disqualified from holding a driver's licence for 15 months.

Counsel submissions

[11] For Mr Bullock, Ms Gould submitted that the length of the sentence was manifestly excessive, and should be reduced. If the Court was minded to reduce the sentence below 24 months' imprisonment, then the Court should also consider substituting the sentence of imprisonment with one of home detention. She argued that the Judge did not take proper account of the mitigating factors personal to Mr Bullock: he is highly motivated to reform and the sentence of imprisonment is a 'wake-up call'.

[12] Mr Bullock's mother was present in Court and Ms Gould indicated that she continued to support her son, was confident that he has learnt from his mistakes, and if appropriate she would provide him with accommodation with her, at an address that was hoped would be acceptable for home detention if such an alternative came to be considered. Also present in Court was a Mr Baker, a previous employer of Mr Bullock's, who personally confirmed that he would give Mr Bullock work as a carpenter, and that one of his on-going projects includes numerous one bedroom apartments, one of which could be utilised as a residential address for Mr Bullock, again in the hope that the appeal resulted in the substitution of a sentence of home detention.

[13] In addition, Ms Gould referred to a letter that Mr Bullock has written from Rimutaka Prison to the Presiding Judge, urging that he is making progress with his control of alcohol and drugs, that he draws strength from the support he has from his extended family, that he is motivated to change and has learnt a lesson from the five months or so spent in prison. I was also referred to a recent letter from an aunt of Mr Bullock's who expressed support for him and urged the Court to reconsider the length of his sentence.

[14] In terms of mitigation initiatives, Ms Gould also drew attention to her own record of Mr Bullock's wish to pay reparation to a young man who had been acquiring the second of the motor bikes Mr Bullock is now convicted of receiving, in respect of the continuing hire purchase obligations incurred by that person, notwithstanding the theft of the motor bike.

[15] Ms Gould made both general and specific reference to various of these items, in support of her arguments that the sentencing Judge had overstated the extent of criminality, and underestimated the prospects for Mr Bullock's rehabilitation.

[16] Ms Gould also argued that the Judge overstated the extent of Mr Bullock's previous convictions: half of the eight convictions for violence did not in fact involve actual violence.

[17] Further, Ms Gould submitted that as a matter of sentencing process, the Judge dealt with the considerations on sentencing in the wrong sequence, ruling that home detention was inappropriate before the end sentence was calculated, not afterwards.

[18] For the Police, Mr Webber argued that Mr Bullock had an unfortunate background. However, the fact that the sentence of imprisonment was a 'wake-up call' is not a sufficient basis to hold the sentence was manifestly excessive. If anything, it shows that the sentence was appropriate insofar as it may have motivated Mr Bullock to change. Mr Webber emphasised the serious extent of Mr Bullock's criminal record as a 29 year old with some 84 District Court convictions including 13 for driving whilst disqualified, six for excess breath alcohol and at least a dozen in recent years for receiving. He argued that the mitigating factors outlined on

behalf of Mr Bullock are all outweighed by the extent of this criminal history. Mr Webber submitted that Mr Bullock was plainly unsuitable for home detention, with the report-writer expressing concerns about the proposed address and because Mr Bullock has a history of offending whilst on bail. Thus, even if the Court was minded to reduce the sentence imposed, it would be inappropriate to impose a sentence of home detention.

Discussion

Was the overall sentence manifestly excessive?

[19] Although the appeal is brought mainly on the basis that the Judge failed to take account of mitigating factors personal to the offender, I first look to comparative decisions to assess whether Judge Mahony's sentence was within the acceptable range.

- *R v McQuillan* CA129/04 12 August 2004

In this decision, cited by Ms Gould, the offender was convicted of two counts of driving while disqualified and two counts of driving with excess breath alcohol, arising from two separate instances. The District Court imposed cumulative sentences of 12 months' imprisonment, which was reduced to 20 months' imprisonment in total on appeal to the High Court. The Court of Appeal held that the original sentence was not out of the range, but was restricted due to jurisdictional concerns about how the indictment was originally laid and so did not change the High Court's reassessment.

- *R v Cartwright* CA175/02 28 August 2002

This offender was convicted of two counts of driving while disqualified and two counts of driving with excess breath alcohol, arising from two separate instances, and also charged with two counts of a breach of a protection order. They were the offender's fourth and fifth excess breath alcohol convictions, his second and third disqualified driving convictions and his third and fourth for breach of a

protection order. Counsel argued that the imposition of cumulative sentences for each was inappropriate, and that leave to apply for home detention should have been granted. The Court held at [27]:

We are of the view that, however this raft of offending is put together, and giving allowance for the fact that there were eventually pleas of guilty (although one would have anticipated them at a much earlier stage) it could not possibly be said that the total sentence of two years was outside the properly available sentencing range. The starting point cannot be criticised.

Accordingly, the sentence of 24 months' imprisonment was upheld.

- *Elder v New Zealand Police* HC INV CIV-2009-425-10 29 June 2009
Hugh Williams J

The appellant appealed against a sentence of 25 months' imprisonment on three counts of driving whilst disqualified, two counts of burglary, and one count each of driving with excess breath alcohol, male assaults female, breaching protection order, and intentional damage. The sentence was for three different instances of offending. Counsel for the appellant argued that the totality of the cumulative sentences meant that the sentence was manifestly excessive. Hugh Williams J held:

[20] When, as the Judge did, one stands back and looks at the cumulative effect overall it has not been shown in this Court's view that the overall sentence of two years and one month imprisonment was manifestly excessive. It may have been rated as stern but the appellant's actions both in relation to the three incidents under consideration and in relation to his background merited a stern response from the Court.

- *Horton v New Zealand Police* HC AK CRI 2007-404-000150 13 August 2007
Andrews J

The appellant appealed against his sentence of 28 months' imprisonment arising from 10 separate charges. The appellant was sentenced to three 15 month concurrent terms for burglary, and, served cumulatively, two concurrent 13 month terms driving with excess breath alcohol and driving while disqualified, also to be served concurrently. Andrews J held that the sentence

was 'stern', reduced it to twenty-four months' imprisonment and granted leave to apply for home detention.

- *Shaw v New Zealand Police* HC GRY CRI 2005-418-5 27 July 2006 Chisholm J

The appellant appealed against his sentence of 24 months' imprisonment for two counts of driving with excess breath alcohol, three counts of giving false particulars, two counts of driving while disqualified and one count of possession of cannabis. Chisholm J held:

[9] When arriving at the total sentence of two years imprisonment the Judge carefully considered all relevant factors. There can be no doubt that he was entitled to take a cumulative approach to the sentencing and, as [counsel] sensibly conceded, there can be no criticism of the individual sentences. It is also plain from the sentencing remarks that the Judge was conscious of totality considerations.

[10] While it is true that the sentence of two years imprisonment is much sterner than any of the earlier sentences imposed on him, it is equally true that the sentence on this occasion reflected a much wider range of offending by the appellant. I am not therefore persuaded that the sentence of two years imprisonment was manifestly excessive.

[20] I incline to the view that by comparison with these other cases, the extent of criminality in the convictions on which Mr Bullock was being sentenced, and the extent of his prior convictions, makes his case somewhat more serious than most of them. However, it could still be said that the sentence imposed on Mr Bullock was towards the stern end, but certainly not outside of the available range. The decisions above involve driving offences as the core of the offending, with other offences in the periphery. In the current proceedings, the driving convictions are very serious, given his previous convictions for offending of this type, and the accident that resulted in one instance. In addition, the receiving and cannabis convictions are also both very serious. The receiving convictions, given the time between the two offences, could indicate a potential pattern of offending, and the cultivation of cannabis went beyond production for personal use.

[21] There cannot be any challenge to the Judge's approach to the imposition of cumulative and concurrent sentences. The driving offences were all assessed

concurrently, as were the receiving offences. The sentence for each of these groups was then imposed cumulatively upon one another in addition to the cannabis offending. This was the correct approach.

[22] Accordingly, the only issue can be with the totality of the sentence. Given the seriousness of the offending that was involved, I do not agree that the sentence is manifestly excessive; it was within the range available to Judge Mahony.

Was significant regard given to the mitigating factors?

[23] Some criticism could be made of the failure by the Judge to set individual starting points to represent the culpability of the offending, and then look to the mitigating circumstances personal to the offender. Only the receiving offences received a particular discount for the guilty plea. It is clear, however, that implicit discounts were given Mr Bullock's guilty pleas for the driving and cannabis offending and there is no serious error in this regard.

[24] In terms of the other mitigating factors, Mr Bullock's rehabilitative efforts have been significant, and the impact of the head injury he suffered as a result of the 29 November 2009 offending was detrimental, but these factors are outweighed by Mr Bullock's lengthy criminal history, made all the more lamentable given he is only 29 years old. Both these aggravating and mitigating factors were mentioned by the Judge and I see no material error in the Judge not reflecting them in a defined extent of discount; they are reasonably seen as effectively cancelling one another out. Mr Webber argued that I should disregard rehabilitative progress made since sentencing, as that is a matter for the Parole Board, not to be reflected in an appeal against the sentences imposed before such conduct arose. In the present case, I agree with that.

[25] Accordingly, although the Judge could have been more specific and clear with his sentencing process, I am satisfied that the end sentence of 28 months' imprisonment is nevertheless appropriate and cannot be seen as manifestly excessive.

Refusal to consider home detention

[26] Given the Judge was within his discretion to impose a sentence of 28 months' imprisonment, thereby removing the jurisdiction to grant home detention, I do not see the Judge's refusal to consider home detention before looking to the sentences as of any great consequence. Due to the length of the sentence, he would not have had to consider it at all. Of course, the correct approach to such matters is the determination of the length of sentence before the consideration of home detention, but this error is insufficient to undermine the decision in any meaningful way. Home detention was not recommended in the pre-sentence report and doubts were expressed about the appropriateness of the only address proposed.

[27] Ms Gould was inclined to suggest that the Judge's premature rejection of home detention as an option inappropriately hardened his consideration on the length of sentence. As should be apparent from the analysis above, I do not accept that there were any inappropriate influences on the ultimate sentence, and reject this point.

Conclusion

[28] Mr Bullock was convicted on a range of offending, the majority of it serious. The cumulative effect of the individual sentences for each type of offending led to a stern sentence, but given the seriousness of the offending, this was well within the Judge's discretion. His Honour should have given explicit regard to the mitigating factors present in the proceedings and ought to have adopted a more methodological process for dealing with such factors and the question of home detention, but these errors are not significant enough to diminish the validity of the end sentence.

[29] I was impressed with the extent of support demonstrated for Mr Bullock. He has a good deal to put behind him and hopefully that support will avail him upon his release. However, the sentences have to fit the crimes and I am satisfied that they do.

[30] Accordingly, the appeal is dismissed.

Dobson J

Solicitors:
Luke Cunningham & Clere, Wellington for respondent