IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI-2009-409-000001

KIMIORA DUDLEY (AKA COLLEEN PAREKURA)

v

POLICE

Hearing: 26 February 2009

Appearances: G B Henderson for Appellant
S L Litt for Police

Judgment: 26 February 2009

ORAL JUDGMENT OF HON. JUSTICE FRENCH

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[1] This is an appeal against sentence, an appeal against conviction having been abandoned.

[2] Following a plea of guilty, the appellant was convicted in the District Court of one charge of burglary and one of possession of instruments for burglary. She was sentenced to twelve months' imprisonment in respect of the burglary, and six months in respect of the possession charge, the six months to be served concurrently.

[3] The facts of the offending were that the appellant entered a private dwelling house in the early hours of the morning of 11 July 2008. She located a backpack and golf bag, and placed the following items inside: CDs, shoes, a wooden elephant and

a watch. She then ventured upstairs and took the following further items, hiding them in her jacket: bank card, keys, camera and watch.

[4] The appellant was disturbed by the occupier, and the police were called.

[5] The appellant has a significant criminal history with some 87 previous convictions for dishonesty-related offences dating from October 1975 to December 2000.

[6] It was common ground that at the time of the burglary the appellant was under the influence of drugs and/or alcohol.

[7] In sentencing the appellant to 12 months' imprisonment, the District Court Judge identified the aggravating features as being the effect on the victims, the invasion of privacy, and the fact that it was a burglary by night. In relation to the offender personally, aggravating features were the fact of her previous convictions, and the fact that at the time of the offending the appellant was subject to release conditions.

[8] From a starting point of 18 months' imprisonment, the Judge deducted six months on account of the early guilty plea, a letter of apology, and efforts made towards rehabilitation.

[9] The pre-sentence report recommended home detention. However the Judge considered home detention would be an inappropriate response, and that in the circumstances of the case considerations of denunciation and deterrence took primacy:

> [10] In dealing with sentencing of burglaries, denunciation and deterrence is still an important component of this type of offence. It is important that you and the public understand that if you enter people's homes by night to steal property, that there will be some real sanction around that.
>
> [11] Mr Glover has endeavoured to persuade me that because there are suitable rehabilitative aspects to the sentence of home detention that that could be considered. I have given that as much weight as I feel I can but it still seems to me that in this case, for there to be some element of deterrence, that there has to be a custodial sentence. I say that because I have been persuaded that offending, so soon after having served home detention, would

not be seen by the public as an appropriate response to this type of offence by someone who is still subject to release conditions.

[10] The appellant submits the sentence was manifestly excessive, and contends:

i) That the Judge failed to take into account, or give sufficient weight to, the following mitigating factors:

1. the offer to attend a restorative justice conference;

2. the fact the appellant remained at the address until the police arrived, and was co-operative;

3. the fact the appellant had been on the methadone programme for quite some time with only one negative result;

4. the fact the appellant had, of her own volition, undertaken a second parenting course;

5. the positive aspects of her relationship with Mr Beatson;

6. the fact she had completed, without incident, a brief term of home detention in relation to driving-related offending;

7. her willingness to accept assistance for her alcohol addiction;

8. the length of time since her last dishonesty offence (2000)

9. the fact her last burglary conviction was 1986;

10. the fact the appellant had a supportive employer, who spoke of her in positive terms.

ii) That the structure of the sentencing notes, in terms of the order in which the Judge dealt with issues (dealing as he did first with home detention and only then going on to consider imprisonment), was contrary to principle.

iii) That the Judge took into account an irrelevant factor: namely how the public would react to a sentence of home detention in these circumstances.

iv) That the Judge erred in relying on a previous sentencing he had undertaken that same day.

v) That the Judge overlooked that the interests of deterrence and denunciation can be served by a sentence of home detention, as has been emphasised by the Court of Appeal in *R v Iosefa* [2008] NZCA 453. Home detention is to be viewed as a genuine alternative to imprisonment, and is not a soft option.

vi) That the Judge was wrong to take the view that, because the appellant had already undertaken a sentence of home detention, she should not be given home detention again.

[11] In my view, having regard to comparator cases such as *R v Phillips* [2008] NZCA 440 and *R v Columbus* [2008] NZCA 192, the starting point and end sentence were well within range.

[12] That point was not taken by the appellant. Essentially, this appeal turns on the issue of home detention.

[13] I accept the sentencing Judge did not expressly advert to all of the matters raised by counsel. However, at the same time, reading the sentencing notes in their entirety, I also accept Ms Litt's submission that it is evident the Judge was well versed with the pre-sentence report and personal details of the appellant. The Judge

specifically acknowledged the work that had been done by the appellant in terms of rehabilitation.

[14] However, it was simply that in the Judge's assessment, considerations of rehabilitation were outweighed by the interests of deterrence and denunciation. That was a view that was clearly open to the Judge.

[15] I agree that completion of one sentence of home detention for different offending is not and cannot be an absolute bar to that sentence being considered a second time. However, again reading the notes in their entirety, I do not consider the Judge was purporting to lay down some invariable rule to that effect, but rather that it was simply that in the circumstances of this particular case and this particular offender, home detention would not be an appropriate or sufficient response.

[16] I note the criticisms of the structure the Judge adopted, and I accept that the structure was not optimum. However, that said, what is more important is the substance of the sentencing notes, and they do clearly demonstrate that the Judge did take into account all relevant factors, and did turn his mind to the issues which the authorities say he must consider when deciding whether or not to impose home detention.

[17] I note in this regard a recent decision of the Court of Appeal, *R v D* [2008] NZCA 254, where the Court made the following comment at [66]:

> In a case like this, the sentencing Judge is required to form a judgment on whether imprisonment is necessary or home detention can respond adequately to the seriousness of the offending. The closer one gets to the dividing line, the more difficult it becomes to articulate reasons for preferring one approach to the other. In such cases, the view of a sentencing Judge from the jurisdiction in which crimes of the type in issue are frequently tried assumes greater weight. He or she will be in a much better position than an appellate Court to determine which type of offending falls on one side of the line or another. The broader the base of similar offending a particular Judge sees, the more likely it is that the chosen sentencing response will be appropriate.

[18] I have carefully considered all the submissions that Mr Henderson ably made on behalf of the appellant. However, I am not persuaded that appellate intervention is justified.

[19] The appeal is therefore dismissed, and the sentence confirmed.

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