IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2009-404-000047

SHANE PATRICK BOYLE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 16 March 2009

Appearances: P Le'au'anae for the Appellant
J Donkin for the Respondent

Judgment: 17 March 2009 at 3:30pm

JUDGMENT OF WYLIE J
[Appeal against sentence]

This judgment was delivered by Justice Wylie
on 17 March 2009 at 3:30pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:

Crown Solicitor, P O Box 2213, Auckland 1141
P Le'au'anae, P O Box 76 616, Manukau

[1] Mr Boyle appeals against a sentence imposed by Judge M R Radford in the District Court at Manukau on 30 January 2009.

Background

[2] On 30 January 2009 Mr Boyle was sentenced by Judge Radford to 2 years and 2 weeks' imprisonment. This sentence was made up as follows:

a) Perverting the course of justice – 9 months' imprisonment;

b) Breach of a protection order on two occasions – 3 months' imprisonment on each – to be served cumulatively;

c) Burglary – 12 months' imprisonment, to be served cumulatively;

d) Intentional damage, threatening behaviour, and criminal harassment – 3 months' imprisonment to be served concurrently; and

e) Bringing a cellphone into a prison – 2 weeks' imprisonment, to be served cumulatively.

[3] The appeal relates only to the 2 weeks' term of imprisonment imposed by the Judge in relation to the cellphone charge. There is no challenge to the balance of the sentence. The notice of appeal asserts that the sentence of 2 weeks was manifestly excessive, and that the Judge should have ordered that the sentence run concurrently with the other terms of imprisonment imposed.

Approach to appeal

[4] The appeal is brought under s 115 of the Summary Proceedings Act 1957. Pursuant to s 121(3), this Court can confirm the sentence. It can allow the appeal if, *inter alia*, the sentence is clearly excessive or inadequate or inappropriate. The grounds on which the Court may quash or vary a sentence are not necessarily confined to those set out in s 121(3) – see *Wells v The Police* [1987] 2 NZLR 560 at

566. I also refer to the judgment of William Young J in *Nichol v The Police* HC Christchurch A104/99, 11 June 1999. It is an established principle that this Court on appeal should not substitute its own opinion of that of the sentencing Judge.

Submissions

[5] Here Mr Le'au'anae on behalf of Mr Boyle submitted that the Judge should have taken into account the "totality" principle. He submitted that the effect of the additional two week sentence imposed by the Judge was to deny Mr Boyle parole after the expiry of one half of his sentence.

[6] Under s 86 of the Parole Act 2002, the release date of a short term sentence is the date on which the offender who is subject to the sentence has served half of it. A short term sentence is a sentence of two years or less. No parole board hearing is required. Where a long term sentence is imposed – which is *inter alia* defined to mean a determinant sentence of more than 24 months – then the release date is the sentence expiry date, and there is a non parole period of one third of the length of the sentence – s 84.

[7] It follows that as a consequence of imposing the additional two week cumulative sentence, Mr Boyle will have to go before the Parole Board, and seek parole. It was submitted that this consequence breached the totality principle.

Analysis

[8] Mr Boyle was sentenced pursuant to s 141(1)(a) of the Corrections Act 2004. It provides as follows:

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> **Unauthorised deliveries, communications, and recordings**
>
> (1) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months, to a fine not exceeding $2,000, or to both who, except under the authority of this Act or of any regulations made under this Act or the express authority of the prison manager or the chief executive,—

> (a) brings any thing, or causes any thing to be brought, into a prison, intending that it should come into the possession of a prisoner;

[9] The summary of facts discloses that Mr Boyle came in possession of the cellphone when he was visited by his then lawyer while he was in custody at the Manukau District Court. He refused to hand the cellphone back to his lawyer following the visit. When he was searched by the Police, the cellphone was not found on his person. He was returned to custody at the Auckland Central Remand Prison at Mt Eden. He was then confronted by Corrections staff. Upon request, he removed the cellphone from his rectum. He subsequently pleaded guilty to the offence.

[10] Counsel had been unable to identify any comparable authorities which assist and which involve similar offending. Given that one sentence permitted by the statute is 3 months' imprisonment, and given the lack of any real alternative because Mr Boyle was already a serving prisoner, in my view it cannot be said that the sentence imposed was clearly excessive or that it was inappropriate.

[11] Moreover I am not persuaded that the District Court Judge erred when he imposed a cumulative sentence.

[12] Sections 83 and 84 of the Sentencing Act 2002 are relevant. Cumulative sentences are generally appropriate if the offence in respect of which the offender is being sentenced is different in kind.

[13] Here the cellphone offending was different in kind from the other charges in respect of which Mr Boyle had been sentenced. It was unrelated to the other charges in any way. In my view it was appropriate in the circumstances that the cellphone charge was dealt with by way of a cumulative sentence.

[14] Mr Le'au'anae submitted that the overall sentence was not in accordance with the totality principle. I have difficulty in seeing how a sentence of two years in respect of unrelated offending is not manifestly excessive, but a sentence of 2 years and 2 weeks which includes a sentence for offending under the Corrections Act is excessive. There may be parole consequences, but those were not relevant from the

Judge's perspective. Nor are they relevant on appeal. Rather the Court must have regard – under s 85 – to whether the cumulative sentences did or did not result in a total period of imprisonment wholly out of proportion of the gravity of the overall offending. In my judgment the total sentence here imposed – 2 years and 2 weeks – cannot be said to be out of proportion to the gravity of the overall offending, given the nature of the charges faced by Mr Boyle.

[15] The appeal is dismissed.

Wylie J