IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2009-404-000025

BILLY TIHIKA ZACHAN
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 16 March 2009

Appearances: H Kim for the Appellant
J Donkin for the Respondent

Judgment: 18 March 2009 at 4:00pm

JUDGMENT OF WYLIE J
[Appeal against sentence]

This judgment was delivered by Justice Wylie
on 18 March 2009 at 4:00pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:

H Kim, P O Box 76 538, Manukau City, Manukau 2241
Crown Solicitor, P O Box 2213, Auckland 1141

[1] This is an appeal against a sentence imposed by His Honour Judge R Wade in the Manukau District Court on 21 January 2009.

[2] The sentence imposed was 3 years and 7 months' imprisonment, comprised as follows:

a) Burglary – 3 years' imprisonment;

b) Possession of instruments for burglary – 2 years' imprisonment, to be served concurrently;

c) Failure to answer District Court bail – 1 month imprisonment, to be served cumulatively;

d) Receiving – 6 months' imprisonment, to be served cumulatively;

e) Driving while disqualified – 6 months' imprisonment, to be served concurrently, plus disqualification for 18 months.

Background facts

[3] At about 11.20am on Thursday 5 September 2008 Mr Zachan went to an address in Hallbury Road, Mangere. He went to the laundry window and jemmied it open gaining access to the interior of the house. He entered the house and ripped two alarm sensors from the ceiling and an internal siren from the wall. Shortly thereafter he left the property. It seems that he had been observed by neighbours. When he left the property he was confronted. No property was taken by him, and he fled from the scene. The Police were called. Mr Zachan was located by the Police a short time thereafter. He was in possession of black satchel which contained three screw drivers, a jimmy bar, a pair of gloves, and a long sleeve white shirt. When spoken to by the Police, he denied most of the facts outlined, and stated that an associate had gone into the house, and given him the bag of tools to hold thereafter.

[4] Subsequently, on 31 October 2008 and while he was on bail in relation to the burglary offending, Mr Zachan received from an associate a Nissan motor vehicle, knowing that the vehicle had been obtained by crime or reckless as to that fact. He was apprehended by the Police while he was driving the vehicle. In addition he had previously appeared at the Manukau District Court, and been convicted of operating a motor vehicle recklessly. He had been disqualified from driving for a period of 1 year and 6 months. When spoken to by Police, he denied that he was disqualified from driving, but stated that he was a forbidden driver, and that he was not really sure about the vehicle.

[5] In the event, Mr Zachan pleaded guilty to the various charges against him. The guilty plea was entered at the first status hearing. Prior to that hearing, Mr Zachan had entered pleas of not guilty on his first appearance in Court. The case had then been referred to a "simplification process" meeting operated by the District Court in Manukau. As a result of that referral counsel conferred. Two charges against Mr Zachan were withdrawn by the Police and others were amended. Thereafter Mr Zachan entered his guilty pleas.

[6] Mr Zachan has an extensive criminal record, including 43 previous convictions for burglary.

Notice of appeal

[7] The notice of appeal alleges that the sentence imposed by Judge Wade was manifestly excessive, and that the imposition of cumulative sentences was wrong in law.

[8] Ms Kim has advanced the appeal on the following grounds:

a) that the sentence imposed was manifestly excessive in the circumstances;

b) that the Judge failed to give adequate consideration to the aggravating and mitigating features applicable to the case; and

c) that the Judge failed to give adequate consideration to the principles of totality, consistency, and the least restrictive outcome when imposing sentence.

Approach to appeal

[9] This appeal is brought pursuant to s 115 of the Summary Proceedings Act 1957. As noted it is an appeal against sentence, and s 121(3) provides as follows:

> In the case of an appeal against sentence, the [High Court] may—
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> (a) Confirm the sentence; or
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> (b) If the sentence (either in whole or in part) is one which the Court imposing it had no jurisdiction to impose, or is one which is clearly excessive or inadequate or inappropriate, or if the [High Court] is satisfied that substantial facts relating to the offence or to the offender's character or personal history were not before the Court imposing sentence, or that those facts were not substantially as placed before or found by that Court, either—
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> (i) Quash the sentence and either pass such other sentence warranted in law (whether more or less severe) in substitution therefor as the [High Court] thinks ought to have been passed or deal with the offender in any other way that the Court imposing sentence could have dealt with him on the conviction; or
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> (ii) Quash any invalid part of the sentence that is severable from the residue; or
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> (iii) Vary, within the limits warranted in law, the sentence or any part of it or any condition imposed in it.

[10] The grounds on which this Court may quash or vary a sentence are not necessarily confined to those set out in s 121(3). I refer to the decision of Smellie J in *Wells v The Police* [1987] 2 NZLR 560 at p 566. I also refer to the decision of William Young J in *Nicol v The Police* HC CHCH, A104/99 11 June 1999.

[11] Where it is alleged that the sentence is manifestly excessive, it is a well established principle that this Court should not substitute its own opinion for that of the sentencing Judge, and that it only has jurisdiction to interfere when it can be said that the sentence imposed was clearly excessive – see *Wells* at p 565.

The District Court's sentencing notes

[12] The Judge recited the facts, and then noted that:

> Despite the overwhelming evidence against [him, Mr Zachan] chose to deny when [he was] interviewed that [he was] involved in the burglary at all.

The Judge noted that Mr Zachan had come before the Court, and entered what was described as a "totally dishonest" plea. As a consequence of that plea, Mr Zachan was granted bail, and His Honour recorded that he then showed his "utter contempt" for the curial system by failing to attend in Court when required. While Mr Zachan was "effectively on the run" he committed the further offences – receiving, and driving while disqualified. He observed that again Mr Zachan chose initially to deny the facts, but that eventually he pleaded guilty to them.

[13] The Judge went on to comment on Mr Zachan's appalling record of offending, describing him as a "prolific burglar". He referred to the pre-sentence report, and noted that it was "totally negative". His Honour then referred to two well-known decisions – *Senior v The Police* (2000) 18 CRNZ 340, and *R v Columbus* CA608/07, 27 June 2008. He then adopted a starting point of 18 months' imprisonment for the lead offence of burglary. He noted that people who plead guilty normally get a discount to reflect their honesty and their remorse, but he rejected that approach in Mr Zachan's case. He noted that Mr Zachan:

> … chose to bearfacedly deny [his] offending and had the gall to seek bail when [he] next appeared before the Court …

His Honour took the view that a guilty plea, although eventually tendered, was some five months after the burglary was committed and that "… any credit for a guilty plea ha[d] long since evaporated …"

[14] His Honour considered that there was nothing to discount his starting point of 18 months. He then examined Mr Zachan's personal circumstances, and in particular his criminal record. He considered that that justified an uplift of at least 100%. On that basis he sentenced Mr Zachan to a sentence of 3 years' imprisonment on the burglary. He emphasised that that sentence was imposed in order to protect

the public from Mr Zachan. He noted the failure to answer bail was deliberate, and he imposed a 1 month cumulative sentence for that offence because he considered that there has to be a punitive element when people deliberately choose not to attend Court. In relation to the driving while disqualified and receiving charges, he noted that the sentences he was imposing should be substantially more. Having regard to the totality principle, he imposed the sentences noted above at [2]. His Honour also considered whether or not he should impose a non parole period, but decided that that was not necessary, because he was confident that with Mr Zachan's record, the parole board were unlikely to allow his release prior to his statutory release date, at least not without some convincing evidence on Mr Zachan's part that he had turned his life around.

Analysis

[15] Ms Kim for Mr Zachan referred to the decision of John Hansen and Young JJ in *Senior v Police*. In that case, Mr Senior appealed unsuccessfully against a sentence of 4 years' imprisonment imposed in relation to 23 charges of burglary and one charge of theft. Mr Senior had burgled a number of homes in affluent suburbs, taking property worth some $60,000. Their Honours discussed various features which can be seen as aggravating features in relation to burglary. They noted – at [21] – that a plea of guilty at an early stage is a significant mitigating feature. They differentiated between various types of burglaries, and referred specifically to recidivist burglars, where they noted that the protection of the public is a significant factor.

[16] Mr Donkin placed rather more weight on *R v Columbus* where the Court of Appeal allowed an appeal against sentence of 2 years and 3 months' imprisonment following a guilty plea to one charge of burglary, two charges of theft, one charge of possession of cannabis, and one charge of possession of a pipe. The sentence was replaced with 1 year and 10 months' imprisonment for the burglary to be served concurrently with the other terms of imprisonment imposed. The Court referred to the appropriate starting point in situations where an offender has a number of other convictions. The Court cited its earlier decision in *R v Lowe* CA 62/05, 4 July 2005

at [31], where it noted that the normal meaning of starting point is the sentence appropriate for the offending, prior to considering aggravating and mitigating factors relevant to the offender. It observed that relevant prior convictions, if taken into account at all, are taken into account by way of uplift to the starting point. It also observed that in the case of recidivist burglars, the Court has frequently taken the appellant's prior history into account when fixing the actual starting point. The Court went on to endeavour to offer some guidance. It referred to *R v Taueki* [2005] 3 NZLR 372 at [42] to [44]. The Court noted that the starting point must identify the culpability inherent in the offending by reference to its circumstances. It noted that the same principle applies in burglary sentencing where the intrinsic nature and gravity of the offence charged is the primary consideration. The Court noted as follows:

> [14] Thus, in sentencing for burglary as for other offences the circumstances of the offending predominate when fixing the starting point. However, as this Court noted in *Lowe*, previous dishonesty convictions, while aggravating personal circumstances, are often treated as components of the burglary starting point. The rationale is that, while prior dishonesty offending is not of itself an element of the offence, it is directly relevant to assessing the degree of the offender's culpability within the gravity of the particular offending (ss 8(a) and 9(1)(j) Sentencing Act 2002) and to the purposes of deterrence and community protection (s 7(f) and (g)). The justification for this greater weighting for prior offending is explained in *Senior v Police* (2000) 18 CRNZ 340 at [27]-[30] (HC).
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> [15] Sentencing Judges must, however, guard against the risk of undue emphasis on past dishonesty convictions that lies in fixing the starting point by imposing a sentence which is primarily a punishment for previous offending: *R v Ward* [1976] 1 NZLR 588 (CA) and *Power*. The terms "recidivist" or "habitual", while convenient descriptions, are not of themselves determinative. There are different types of recidivists, the most egregious being the professional burglar who burgles or steals for a living: *Senior* at [30]. The principal inquiry must be undertaken into the relationship between the nature of persistent offending and the crime itself.

[17] Here the Judge fixed a starting point of 18 months. It does not seem from his sentencing notes that in so doing he was unduly influenced by Mr Zachan's criminal history. I have considered a number of the authorities referred to me by counsel, including *Tumohe v Police* HC HAM, CRI 2008-419-72, 13 November 2008, Priestley J; *White v Police* HC GIS, CRI 2009-416-0002, 27 February 2009, Courtney J; and *Pomana v Police* HC GIS, CRI 2008-416-0019, 24 February 2009,

Courtney J. I am satisfied that the starting point of 18 months adopted by the District Court Judge was entirely appropriate.

[18] The Judge then went on to consider the various aggravating and mitigating features applicable to Mr Zachan. The key aggravating feature was his criminal history. The Judge rightly noted that his history was appalling, and that it justified a significant uplift in the starting point. His Honour was also entitled to take into account the very negative pre-sentence report, and the Probation Officer's assessment that Mr Zachan posed an extremely high risk of re-offending.

[19] I am not prepared to hold that an uplift of 18 months was manifestly excessive in the circumstances. Such an uplift is stern but it is not inconsistent with the various authorities. In *Columbus* an increase of 12 months based on Mr Columbus' 89 previous convictions, including 13 for burglary was upheld. In *Tumohe*, Priestley J noted that an uplift of 2 years would not have been untoward, given the fact that the prisoner had 10 previous convictions. In *White* an uplift of 1 year was considered reasonable, where Mr White had 53 previous convictions, and in *Pomana*, a 1 year increase was applied because of 34 previous convictions.

[20] I am however concerned that Judge Wade did not allow Mr Zachan any discount for his guilty plea. While the process followed by the Judge in sentencing Mr Zachan is not as important as the end sentence imposed, in my view, the Judge, by failing to allow any discount for the guilty pleas, has imposed a sentence which is clearly excessive.

[21] Pursuant to s 9(2)(b) of the Sentencing Act 2002, the Court was required to take into account whether and when Mr Zachan pleaded guilty as a mitigating factor. There are various public interest considerations in giving an offender a discount for a guilty plea. Such a plea demonstrates an offender's acceptance of responsibility for his actions. It may be indicative of remorse. The victim is spared the stress of trial, and the giving of evidence. The pressure on Court resources is reduced, and inconvenience to other witnesses is avoided. I refer to *Adams on Criminal Law – Sentencing* – para SA9.18.

[22] There can be cases where no credit is warranted – see e.g. *R v Beri* [1987] 1 NZLR 46 – but in my view this is not such a case.

[23] Mr Zachan's guilty plea came at a relatively early stage. It came at the status hearing after a partial resolution was reached from the simplification process meeting. I accept Ms Kim's point that Mr Zachan was initially facing additional charges, which were withdrawn. Other charges were amended. His guilty pleas were entered at the first status hearing date thereafter. It indicates some acceptance of responsibility for the offending – although not necessarily contrition.

[24] I am left with the impression from reading the Judge's sentencing notes that Mr Zachan was denied any credit for his guilty plea because the Judge was affronted by Mr Zachan's initial denials. An offender should not receive a higher sentence in such circumstances – *R v Minto* [1982] 1 NZLR 606 at p 609.

[25] A discount should have been applied to take into account the guilty plea. In the circumstances, it seems to me that a discount of 25% would have been appropriate. But for Mr Zachan's criminal history, and his offending while on bail, the discount would have been greater. In my view the appropriate sentence on the principal offence of burglary in the circumstances was one of 2 years and 3 months' imprisonment.

[26] In my judgment the Judge was right to impose cumulative sentences of imprisonment in relation to the failure to answer bail, the receiving, and driving while disqualified offences. The initial offending relating to the burglary. It was very different in kind from the later offending. There was no relationship between the two types of offending and they were not a connected series of offences. In my view the separate and cumulative sentences imposed by the Judge were appropriate. I refer to s 84 of the Sentencing Act. The cumulative sentences take the total end sentence to 2 years and 10 months' imprisonment.

[27] Ms Kim submitted that the imposition of cumulative sentences was not in accordance with the "totality" principle. The Court was required to have regard to the totality of Mr Zachan's offending under s 85 of the Sentencing Act 2002. It was

required to assess his overall culpability, and determine what effective sentence was appropriate for the totality of his conduct. If a sentence of 2 years and 10 months is substituted, then in my view the totality principle is not offended. The total period of imprisonment is not out of proportion to the gravity of his overall offending.

Conclusion

[28] I am satisfied that the District Court Judge should have given credit to Mr Zachan to recognise his guilty pleas. In my view His Honour erred in failing to do so, and the resulting sentence was as a result clearly excessive. I substitute a sentence of 2 years and 10 months' imprisonment. The appeal is allowed.

Wylie J