IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2009-404-000041

JOSEPH TIE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 16 March 2009

Appearances: P Sinclair for the Appellant
J Donkin for the Respondent

Judgment: 19 March 2009 at 12:00pm

JUDGMENT OF WYLIE J
[Appeal against sentence]

This judgment was delivered by Justice Wylie
on 19 March 2009 at 12:00pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:

P J Sinclair, P O Box 7015, Wellesley Street, Auckland 1141
Crown Solicitor, P O Box 2213, Auckland 1141

[1] This is an appeal against sentence from a decision of His Honour Judge D J Harvey in the District Court at Auckland.

[2] Mr Tie was facing a number of charges. The Judge treated the charge of attempting to pervert the course of justice as the lead offence for which he imposed a sentence of 2 years' imprisonment. He imposed concurrent sentences as follows:

a) Possession of methamphetamine – 1 months' imprisonment;

b) Unlawfully getting into a motor vehicle (two charges) – 3 months' imprisonment on each;

c) Possession of a Class B controlled drug – 3 months' imprisonment;

d) Receiving – 3 months' imprisonment;

e) Driving while disqualified – convicted and discharged; and

f) Providing false details – convicted and discharged.

[3] Mr Tie pleaded guilty to all charges. His guilty plea in regard to the charge of attempting to pervert the course of justice was entered at the pre-deposition stage. In regard to the other charges, these pleas were entered prior to or at status hearings.

Background

[4] In May 2006, Mr Tie was arrested in Auckland on unrelated matters. He told the Police that his real name was Seirasa Areli, and that his date of birth was 4 May 1972. His photograph was taken and the photograph and the details Mr Tie had given to the Police were lodged on the Police's national computer system under Mr Areli's name.

[5] Mr Areli had previously been in a relationship with Mr Tie's ex-girlfriend. Mr Tie had never met him.

[6] Between 24 June 2006 and 30 May 2007 Mr Tie was stopped by Police on five separate occasions while he was driving a motor vehicle. On each occasion he informed the Police that his name was Seirasa Areli. When checks were carried out, the photograph matched Mr Tie. As a result some $2,255 of fines were imposed on Mr Areli. This caused significant embarrassment and inconvenience to Mr Areli. He had to explain repeatedly to debt collection agencies and to the Court that he was not involved. He had to take time off work to deal with the matter. He came under pressure. He became involved in the Court system, unwillingly, because he had to clear his name. He justifiably became concerned that the events might have an impact on his credit rating. He spent a considerable amount of time and energy putting matters straight.

[7] Because of limitation provisions applicable to traffic infringements, by the time the true facts came to light, the offences committed by Mr Tie could not be laid against him. Had Mr Tie not given Mr Areli's name, the total fines imposed on him would have been $4,655, because he was not a licensed driver on any of the occasions when he was stopped by Police.

The appeal

[8] The notice of appeal is dated 5 February 2009. It asserts that the sentence imposed in relation to the charge of attempting to pervert the course of justice was manifestly excessive.

[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—
>
> (a) Confirm the sentence; or
>
> (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—

(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

(ii) Quash any invalid part of the sentence that is severable from the residue; or

(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 Christchurch, 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.

Judge's sentencing notes

[12] The Judge considered that the most serious charge facing Mr Tie was that relating to his attempt to defeat the course of justice. The Judge noted the significant impact on Mr Areli, and then went on to observe that there was a larger aspect to the case – namely the challenge it posed to the credibility of the justice system. He observed that Mr Tie's offending was wilful, and that it evidenced premeditation and pre-planning. He observed that Mr Tie offended remorselessly, and without any consideration for the consequences and damage that his offending caused, not only to Mr Areli, but to the system in general. He noted that Mr Tie was prepared to be totally dishonest when confronted with officialdom. The Judge considered that Mr Tie needed to be held accountable and responsible for his offending. He also noted that the offending needed to be denounced, and that the "aggravating circumstances of premeditation and sustained deception are very, very strong".

[13] The Judge noted that in the past sentences had been generous to offenders faced with the same charge, and he expressed the view that a message needed to be sent to the community that this type of offending would not be tolerated. He observed that elements of deterrence and denunciation needed to take precedence over concerns there might be about Mr Tie's personal circumstances.

[14] The Judge noted that sentences in previous cases varied considerably, and he referred to two authorities – *Morrison v Police* (no citation was given by the Judge) and *Dean v Police* HC NAP, AP 58/2001, 13 December 2001, Gendall J. He referred to Mr Tie's previous convictions, including one for perverting the course of justice in October 2007. He also referred to Mr Tie's breaches of community work orders, periodic detention and bail. He noted that this record indicated a callous disregard for Court orders. He referred to the submissions made to him, and then adopted a starting point of 2½ years. He gave Mr Tie a discount of 20% for his guilty plea, and noted that that was the only element of mitigation he could find. As a consequence, Mr Tie was convicted and sentenced for a term of imprisonment of 2 years on the charge of attempting to pervert the course of justice.

Submissions

[15] Ms Sinclair for Mr Tie referred to ss 7 and 8 of the Sentencing Act 2002. She emphasised s 8(e) – the need to take into account the general desirability of consistency with appropriate sentencing levels, and s 8(g) – the need to impose the least restrictive outcome that is appropriate in the circumstances.

[16] She properly acknowledged that there were various aggravating features relating to Mr Tie's offending which the Court was entitled to take into account. In particular, she accepted the following:

a) the offending took place over a period of 11 months and occurred on five separate occasions;

b) the offending was premeditated;

c) the offending caused distress and inconvenience to Mr Areli;

d) Mr Tie has a large number of convictions, including a previous conviction for obstructing the course of justice in June 2005; and

e) an additional charge of providing false details in October 2008 was relevant in terms of Mr Tie's *modus operandi*.

[17] Ms Sinclair referred to the general approach to sentencing in *R v Taueki* [2005] 2 NZLR 372, and she then turned to the appropriate starting point for the offence of attempting to pervert the course of justice. She pointed out that there is no "tariff" case, no doubt because such offending can occur in a multitude of different ways. She referred me specifically to a number of authorities, where the sentence imposed ran from 200 hours community work to 15 months' imprisonment. She accepted that there were factual differences, and that each case turned upon its peculiar factual scenario. She noted that in many of the authorities, the prisoner was sentenced on a number of more serious charges, as well as the charge of attempting to pervert the course of justice. While acknowledging that imprisonment is inevitable in this case, she submitted that the sentence imposed was inconsistent with the sentences imposed by other Courts in relation to the same offence. She submitted that the starting point should have been no more than 9 months' imprisonment. She then submitted that the sentence should have been reduced by 25% to 30% given Mr Tie's early guilty plea.

[18] Mr Donkin for the Crown accepted that the starting point of 2½ years adopted by the Judge was "stern", but submitted that it was not manifestly excessive. He referred to four authorities, where the sentences imposed ranged from six months to 21 months' imprisonment. He acknowledged that the Judge seems to have taken into account the appellant's previous criminal history before the starting point was set, but submitted that this did not affect the final sentence arrived at. He suggested the appropriate way to look at the matter was to adopt a starting point of 2 years, which he submitted which was in line with the authorities, to impose uplift of 6 months for the appellant's criminal history, and then to allow a discount for the guilty plea. He accepted a discount of around 25% was common, but submitted that

the discrepancy of around 5% had not resulted in an end sentence which could be said to manifestly excessive.

Analysis

[19] I start with the Judge's overall approach to the sentence imposed. It appears to me from reading the sentencing notes that the Judge did take into account Mr Tie's history of previous convictions in fixing the starting point. He should not have done so. The approaching to sentencing discussed by the Court of Appeal in *Taueki* should have been adopted. It envisages that a starting point will be set having regard to the aggravating and mitigating features of the offending, and the end sentence will then be reached, by adjusting the starting point to take into account aggravating and mitigating features personal to the offender.

[20] The processes followed by the Judge however is not as important as the final sentence that is imposed.

[21] I now turn to the more difficult issue – the appropriate starting point in this case. The offending is undoubtedly serious; as the Judge pointed out, it strikes to the heart of the justice system. Section 117 of the Crimes Act 1961 provides for a maximum term of imprisonment of 7 years.

[22] Comparable authorities however are of limited assistance. Many involve very different facts. There are however four cases amongst the many cited to me which provide some assistance. I list them as follows:

a) *Ashton v The Queen* HC CHCH A56/03, 22 May 2003, John Hansen J

> The appellant gave his brother's details when stopped by the Police for drink driving offences. The false information came to light when the brother saw his name in the newspaper. The appellant was sentenced in the District Court to two sentences of 9 months' imprisonment each on the driving offences, and to a term of imprisonment of 6 months in relation to the charge of perverting the

course of justice, to be served cumulatively. It is not clear from the High Court decision whether the charge for perverting the course of justice was brought before or after the trial. The appeal dealt primarily with the issue of home detention, and not the length of sentence imposed.

b) *Buchanan v Police* HC ROT, CRI 2008-470-26, 27 August 2008, Gendall J

The Police stopped the appellant, and he provided his brother's details, and eventually pleaded guilty in Court under his brother's name. A term of 12 months' imprisonment as a starting point was adopted by the sentencing Judge. The sentence was reduced to 8 months for mitigating factors, and then to 6 months on account of the totality principle in relation to all of the offending. The appeal against the end sentence was dismissed. Gendall J referred to a passage in a decision of the Court of Appeal in *R v Churchwood* CA439/05, 2 March 2006, at [14], where the Court noted that any attempt to disturb the process of the administration of justice is to be deplored, and that following conviction, it is, in all but the most exceptional circumstances, required to be met with a moderately lengthy term of imprisonment.

His Honour observed that the appellant's attempt to pervert the course of justice was pursued to the extent of appearing in Court under a false pretence, and that it resulted in the conviction and disqualification of an innocent party. He noted that it showed a determination to flaunt the law and the process of justice, and that it was serious offending.

c) *Dean v Police*

The appellant in this case provided somebody else's details when stopped by the Police. This deception was followed through to a

guilty plea in Court. A starting point of 2 years was adopted, reduced to 21 months for mitigating circumstances. The appeal was rejected. Gendall J observed as follows:

> Given his past history and the repeat conviction for attempting to pervert (and in fact succeeding in perverting) the course of justice, he was indeed fortunate he was not sentenced to 3 years' imprisonment on that crime. Certainly he could well have expected a term of 2½ years for that crime …

d) *Wellis v Police* HC AK, CRI 2005-404-437, 13 July 2006, Rodney Hansen J

Here the appellant was arrested for aggravated robbery. He provided his brother's details, and as a result obtained bail. The deception was discovered the following day. A starting point of 12 months' imprisonment was adopted by the sentencing Judge. This was reduced to 8 months to take into account the guilty plea, and the totality of the offending. This was upheld on appeal.

[23] In *Ashton, Buchanan* and *Wellis*, the Court was faced with situations where the accused provided false details on a single occasion. Here Mr Tie deceived the Police and perverted the course of justice on six separate occasions – once initially when he gave his name as Mr Areli and allowed his photograph to be taken on that understanding, and then on five separate occasions when he was stopped while driving motor vehicles. As a consequence of committing the offence on six separate occasions, the accused managed to avoid substantial fines. As a consequence of his deception, and through the operation of the limitation provisions, he has permanently escaped the convictions and resulting fines to which he should have been subject. The deception was maintained for a substantial period. The offending was serious and sustained. It showed premeditation and it could not be described as opportunistic. I note the comments of Gendall J in *Dean* noted above. While the starting point adopted by the Judge was high, but I am not persuaded that it was so high as to be manifestly excessive in the circumstances of this particular case.

[24] I acknowledge the submission made by Mr Donkin. It may have been preferable for the Judge to have adopted a lower starting point – say 2 years – and then to have imposed an uplift because of Mr Tie's previous convictions, and in particular his conviction in June 2005 for perverting the course of justice. The end result however would have been same.

[25] There was an early guilty plea by Mr Tie. The 20% discount allowed by the Judge for this plea was at the low end. A more appropriate discount would in my view have been in the vicinity of 25% to 30% of the sentence imposed. This would have suggested a term of imprisonment of somewhere between 21 months and 22½ months. Mr Tie was sentenced by the Judge to 2 years' imprisonment. While I would have proceeded by a different route, I am not persuaded in the circumstances of this case that the sentence imposed by the Judge was manifestly excessive, or that it was otherwise inappropriate.

[26] The appeal is dismissed.

Wylie J