IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2009-485-14

LATU RIMANI
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 21 April 2009

Appearances: M Overton for the appellant
J M Webber for the respondent

Judgment: 30 April 2009

JUDGMENT OF CLIFFORD J

Introduction

[1] Ms Rimani appeared in the District Court on 12 February 2009 as a result of breaching terms of sentences of community detention and intensive supervision which had been imposed on her, in November 2008, for burglary and breach of intensive supervision offending which had occurred in July 2008.

[2] Ms Rimani was sentenced by Judge Thomas to:

a) Concurrent sentences of twelve months' imprisonment on the original July 2008 burglary and breach of intensive supervision offending; and

b) Concurrent sentences of three months' imprisonment for the more recent breaches of the community detention and intensive supervision sentences imposed in November 2008.

[3] Ms Rimani appeals against that total sentence of twelve months' imprisonment as being manifestly excessive in the circumstances.

Background

[4] It is appropriate to set out the background to Ms Rimani's appearance in, and sentencing by, the District Court on 12 February in some detail.

[5] On 12 October 2007 Ms Rimani pleaded guilty to, and was convicted of, robbery by assault and sentenced to twelve months' intensive supervision and 150 hours' community work. The facts of that offending were not provided to me.

[6] On 7 November 2008 Ms Rimani – having again pleaded guilty – was sentenced on burglary offending which had occurred on 14 July 2008. That offending involved Ms Rimani together with an associate entering a liquor centre by cutting a padlock, lifting a roller door and smashing the front doors with a rock. A large amount of alcohol was apparently uplifted before Ms Rimani took off on foot.

[7] That offending occurred at the time Ms Rimani was subject to her sentence of intensive supervision for the October 2007 robbery by assault. In November 2008, therefore, she also faced a charge of breaching that sentence.

[8] In sentencing Ms Rimani on that occasion the Judge commented that Ms Rimani had not complied with her October 2007 sentence of intensive supervision (for which she faced the fresh charge) and nor had she completed her community work. Ms Rimani was sentenced to concurrent terms of four months' community detention on the July 2008 burglary charge and the intensive supervision breach

charge, and a further sentence of twelve months' intensive supervision was also imposed. The Judge also cancelled two earlier sentences of community work, including 150 hours which was imposed as part of her sentence for the October 2007 robbery by assault. The Judge commented that it was Ms Rimani's last opportunity to avoid a sentence of imprisonment.

[9] It is somewhat unclear whether, in that sentencing exercise, Ms Rimani was re-sentenced on the earlier robbery by assault offending. The Judge recorded that Ms Rimani had failed to comply with her intensive supervision sentence for that offending from the start, and had not completed any of her community work, which the Judge cancelled. However, the sentencing notes explicitly state that Ms Rimani was to be sentenced on the "two charges" – burglary and the breach of intensive supervision – only. In these circumstances, and in light of my findings on this appeal, I will proceed on the assumption most favourable to Ms Rimani – i.e. that Ms Rimani was not being re-sentenced on the October 2007 robbery charge.

[10] Ms Rimani was fully inducted into her 7 November intensive supervision and community detention sentences on 12 November 2008. The community detention equipment was installed on 14 November 2008. That same day Ms Rimani failed to comply with her curfew – a breach of her community detention – and warning letters were delivered.

[11] On 19 November Ms Rimani failed to report for her sentence of intensive supervision.

[12] On 8 January Ms Rimani was arrested in relation to the breaches of her community detention and intensive supervision. She was bailed on 13 January 2009 and reported as per her bail conditions.

[13] On 16 January the community detention equipment was reinstalled at the address. On 17 January Ms Rimani left the address at 1.24pm in breach of her curfew, leading to the second charge of breaching her community detention.

[14] The probation officer subsequently applied for the cancellation of the community detention and intensive supervision sentences. This was consented to on 3 February 2009.

[15] Accordingly, when Ms Rimani appeared before Judge Thomas again for sentencing on 12 February 2009, the relevant offences for that sentencing exercise were the July 2008 burglary and intensive supervision breach, together with the three breach charges that had been laid as regards the sentences of community detention and intensive supervision that were imposed on 7 November 2008.

The sentencing exercise

[16] In her sentencing notes of 12 February, the Judge summarised the points made at the previous sentencing, noting that she had at that time sentenced Ms Rimani on "two charges of burglary and breach of intensive supervision". She noted that Ms Rimani failed to comply with the sentences "essentially from the beginning".

[17] Her Honour referred to the need to make sure Ms Rimani accepted responsibility, to hold her accountable and also to send a message to the rest of the community in relation to the breach of electronically-monitored sentences. She noted that everyone had bent over backwards to help Ms Rimani and to give her opportunities to avoid imprisonment and that it had been her choice not to take these opportunities.

[18] She then took a starting point for the original offending of about 6 months' imprisonment, including credit for the guilty plea. An uplift of 6 months was added in terms of Ms Rimani's previous convictions and continued flouting of community-based sentences and the totality of the offending. On each of the new charges, the Judge sentenced Ms Rimani to three months' imprisonment concurrently.

[19] Her Honour imposed release conditions for 6 months after release "in the hope that a period in custody is going to motivate [Ms Rimani] to try and get some help to avoid being sent back to prison". The release conditions essentially mirror the conditions imposed in the October 2007 sentence of intensive supervision.

Cancelled sentences

[20] Sentences of intensive supervision and community detention may be cancelled under ss 54K and 69I of the Sentencing Act 2002 respectively. An application to cancel intensive supervision or community detention may be made by a probation officer if the offender has been convicted of an offence punishable by imprisonment.

[21] On hearing such an application, the Court may, amongst other things, cancel the sentence and substitute any other sentence (including another sentence of the same type) that could have been imposed on the offender at the time that the original sentence was imposed. In doing so, the Court must take into account the portion of the original sentence that remains unserved.

Submissions

[22] For Ms Rimani, Ms Overton accepted imprisonment was the appropriate sentencing outcome given the history of non-compliance. She also accepted that Ms Rimani had failed to take advantage of sentencing outcomes focused on her rehabilitation. However, she submitted that the length of imprisonment was excessive.

[23] Ms Overton noted that Ms Rimani's sentences of intensive supervision and community detention "barely got off the ground" and that Ms Rimani pleaded guilty to all charges at the earliest opportunity. She stated that there was no new offending not related to the breaches.

[24] With regard to Her Honour's approach, Ms Overton noted that the Judge's sentencing notes of 12 February 2009 refer to there being two charges of burglary, as opposed to just one (at para [2]).

[25] Ms Overton submitted that the six month starting point took into account Ms Rimani's prior convictions and questioned where the "extra three months imprisonment came from" – citing the 6 month starting point and the concurrent

sentences for the new charges of three months (each). More generally, Ms Overton submitted that imprisonment was a harsh sentence in itself for a young woman, and that the unorthodox approach taken by the Judge to the sentencing exercise, although accepted by Ms Overton as understandable perhaps in the context of a busy list, had resulted in a sentence that had increased inappropriately from the identified starting point.

[26] Ms Overton submitted that a sentence of three months' imprisonment for the new charges plus the original six months starting point – i.e. a term of nine months – would reflect both the gravity of the offending and Ms Rimani's poor response to community detention and intensive supervision, having regard to the fact that release conditions were imposed.

[27] The Police acknowledged that the Judge had taken a somewhat unorthodox approach to the sentencing exercise. That is, the "starting point" identified was not in fact a true starting point, as it took into account credit for a guilty plea. The Police submitted, however, that the sentence arrived at by the Judge was appropriate bearing in mind that the Judge was re-sentencing Ms Rimani on the additional burglary and breach of supervision charges, together with sentencing her on the additional three breaches. At the same time, the Judge had to bear in mind the significance of the earlier, 2007 robbery offence, and the way in which Ms Rimani had breached her community detention and intensive supervision sentences.

[28] In that context, the Judge was correct to hold that both specific and general deterrence was a significant factor in the sentencing. The sentence of twelve months' imprisonment was, therefore, within the range available to the District Court Judge and ought to be upheld.

Discussion

[29] First, addressing Ms Overton's specific points, I do not understand how the fact that the community detention and intensive supervision sentences "barely got off the ground" can be seen as a mitigating factor. Indeed, to my mind it illustrates that Ms Rimani was entirely unwilling to attempt to comply with any rehabilitative,

community-based sentence. Nor does the lack of new offending unrelated to the breaches mitigate the offending that is at issue.

[30] I note, however, that, whilst the Judge took into account Ms Rimani's guilty plea on the original charges, it is not clear whether she took it into account in relation to the new breaches.

[31] I also accept that the Judge referred to there being two charges of burglary at para [2]. Later, however, Her Honour refers to "the burglary" at [9] and "burglary" (singular) at [18]. Looked at overall, therefore, it is slightly ambiguous as to the basis on which the Judge undertook the February sentencing exercise. (In saying this, I note that her November judgment clearly indicated that there was one burglary charge.)

[32] I do not accept Ms Overton's submission that the 6 month starting point took account of Ms Rimani's prior convictions. The Judge specified the starting point and said, "I *then, of course,* look at your previous convictions and your continued flouting of any community-based sentences" (my emphasis). Nor, in my view is it correct to extrapolate from the concurrent 3 month sentences for the new breaches that the Judge took an uplift of 3 months for these sentences. It seems to me, therefore, that the mathematical calculation the Judge undertook was to take a 6 months starting point for the July 2008 offending and an uplift of 6 months to account for her previous convictions, continuing flouting of sentences and the totality of the offending.

[33] As the Police acknowledged, however, the approach the Judge took to sentencing Ms Rimani was somewhat unorthodox. That is:

a) On the July 2008 breach of intensive supervision and burglary charges that were, as I understand it, before her in November 2008, she assessed a starting point of six months' imprisonment, giving credit for a guilty plea.

b) She then looked at Ms Rimani's previous convictions, and her continued flouting of any community-based sentences.

c) On top of that, she referred to the three breaches of sentence in front of her on 12 February.

d) Referring to the fact that she was, therefore, sentencing Ms Rimani in respect of a re-sentence of the original breach of intensive supervision and burglary, as well as for the three additional breaches, she concluded, having regard to the totality of that offending, that a total sentence of twelve months' imprisonment was appropriate.

e) Within that total sentence, she imposed nominal concurrent sentences of three months on each of the three most recent breaches of sentence.

[34] As has been frequently commented by the Court of Appeal, see for example in *Commerce Commission v O'Neil and Martini* [2007] NZCA 466, an appeal from a decision of mine in which I did not follow the orthodox approach, the better approach to sentencing in terms of transparency and consistency is to first identify a starting point and then any specific discounts (or uplifts) which are necessary, including for any guilty plea. In *R v Taueki* [2005] 3 NZLR 372 (CA) the Court defined the term "starting point" as taking into account aggravating and mitigating features of the offending, excluding mitigating and aggravating features relating to the offender, and stressed the importance of specifying the starting point before considering these further matters.

[35] I note, therefore, that the orthodox approach to sentencing Ms Rimini would have involved an identification of the relevant separate charge or charges in respect of which Ms Rimani was being sentenced, whether those charges were to be sentenced cumulatively or concurrently, the identification of an appropriate starting point or points to reflect the seriousness of the offending, and then making any necessary adjustment for aggravating or mitigating factors personal to Ms Rimani, including – and importantly – her guilty pleas.

[36] I also note the well-established authority that an appeal of this nature will not succeed simply because a Judge may not have adopted a totally correct approach to a sentencing exercise, but rather will depend on whether the end point identified is or is not manifestly excessive: see *R v MacCulloch* [2005] 2 NZLR 665 (CA) at [50]; *R v Martin* CA199/04 14 February 2005. Given, therefore, the unorthodox approach taken to Ms Rimani's sentencing, it is appropriate that I reconsider the sentencing exercise.

[37] In line with my understanding of the accepted approach to sentencing, I propose to identify first a starting point for the offending for which Ms Rimani was being directly sentenced by the Judge on 12 February 2009, namely the July 2008 burglary, the breach of intensive supervision, and the two breaches of community detention and one breach of intensive supervision committed in November 2008 and January 2009.

[38] In my view, it would be appropriate to impose cumulative sentences for the breach offending as opposed to sentences which are concurrent on the lead burglary offence. This is both because the breach offending is different in nature (and at least some of it is disconnected in time) from the burglary offending in terms of s 84 of the Sentencing Act, and because of the need to deter Ms Rimani and people generally from breaching Court orders.

[39] Relevant earlier offending, including in particular the 2007 robbery by assault charge and previous breach offending, would then be taken account of by way of an uplift to those starting points. Consideration would then need to be given to any mitigating factors, including in particular Ms Rimani's guilty pleas. Finally, I would consider whether the totality of the sentence is wholly out of proportion to the gravity of the overall offending.

[40] In terms of undertaking that exercise, and as regards the July 2008 burglary offending, I note that there is no tariff or guideline case for burglary, the range of burglary offending being too great. In *R v Nguyen* CA11/01 2 July 2001 the Court of Appeal noted that the seriousness of the offending would depend on the degree of planning and sophistication, the nature of the premises entered, the kind and value of

the property stolen, the damage done, the impact and potential impact on the occupants or owners and the extent of the offending (where multiple burglaries are involved).

[41] A number of cases have considered burglary of a not dissimilar scale to that involved in Ms Rimani's 2008 offending. I refer particularly to the following cases:

- *R v Columbus* [2008] NZCA 192 – forced entry of a residential garage during the day, causing $672 worth of damage and taking a mountain bike (which was later recovered), gardening tools and a tool box. A starting point of 12 months was adopted.

- *Zachan v Police* HC AK CRI-2009-404-25 18 March 2009 – forced entry into a residential house during the day, causing damage but taking no property. A starting point of 18 months was taken (uplifted for extensive previous offending).

- *Whatarau v Police* HC NAP CRI-2008-441-24 25 September 2008 – taking a motorcycle (valued at $1,000) from the back of a residential property, he had a low risk of re-offending and no dishonesty convictions since 2002. A sentence of 12 months' imprisonment following a defended hearing (and with associated lesser offending) was stern but not manifestly excessive.

- *Ewart v Police* HC TIM CRI-2008-476-11 31 July 2008 – forced entry by smashing the window of a tavern during the afternoon, disguised, taking a small amount of cash and cigarettes valued at over $1,000. A starting point of 12 months was considered appropriate.

[42] Here, the offending occurred at night and involved property damage. A "large amount" of alcohol was taken. However I do note that the burglary was of a commercial premise as opposed to a domestic premise. I also note Ms Rimani's relative youth. Therefore, having regard to the above cases, it is my view that a

starting point of between ten and twelve months would be appropriate here for the 2008 burglary.

[43] An uplift would then be required to reflect Ms Rimani's previous relevant convictions, particularly the 2007 robbery by assault. In my view, this would take the sentence to about twelve and fourteen months' imprisonment. Reflecting her guilty plea, a final sentence in the range of nine to eleven months would be appropriate.

[44] In terms of the July 2008 breach of intensive supervision, I would adopt a starting point in the vicinity of one month. Again, an uplift would be necessary in light of her previous relevant offending, in particular her four breaches of community work. Conversely, she would be entitled to credit for her guilty plea. Balancing these factors, I am of the view that a final sentence of one month would be appropriate on this charge. I note that this is largely consistent with similar offending in *Wilson v Police* HC CHCH CRI 2008-409-35; CRI 2008-409-36 26 March 2009.

[45] Thus, and subject to the totality principle, I am of the view that the re-sentenced offending required a sentence in the range of ten to twelve months' imprisonment.

[46] As to the new offending, the breaches were blatant and deliberate and almost instantaneous on the imposition of the sentences. I also note that the failure to report for intensive supervision was ongoing until Ms Rimani was arrested. The second breach of the community detention curfew was also sustained. I acknowledge too the need for deterrence – both generally and specifically in relation to Ms Rimani – as referred to by the Judge.

[47] In these circumstances, and in light of the multiple breaches, I am of the view that a sentence in the vicinity of four to six months would be justifiable. I do not think it would be appropriate to impose an uplift for previous offending, as this has essentially been taken into account in terms of the July 2008 breach of intensive supervision. Again, however, Ms Rimani would be entitled to credit for her guilty

plea and, in my view, a final sentence in the range of three to four months' imprisonment for these breaches (concurrent on each other) would be appropriate here.

[48] Together, this would result in an overall sentence in the range of thirteen to sixteen months. In terms of totality, it might be appropriate to discount this to a sentence in the vicinity of twelve to fourteen months' imprisonment. In any event, as can be seen from this reconsideration of the sentencing exercise, it cannot be said that the sentence of twelve months' imprisonment imposed on Ms Rimani is manifestly excessive.

[49] This appeal is therefore dismissed.

"Clifford J"

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