IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CRI 2008-454-41

DAMIEN JOHN ROYAL

v

NEW ZEALAND POLICE

Hearing: 9 June 2009

Counsel: C W J Stevenson for the Appellant
E McCaughan for the Respondent

Judgment: 17 June 2009

JUDGMENT OF MILLER J

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[1] Mr Royal appeals against a sentence of 20 months imprisonment imposed on 8 July 2008. That sentence was cumulative upon a sentence of two years and eight months imprisonment earlier imposed by the same Judge on 29 April 2008. He contends that the Judge ought to have recused himself for apprehension of bias, and that the sentence was manifestly excessive.

The offending

[2] I begin by setting out the charges and sentences. There were 11 charges committed on 10 separate occasions. He was sentenced as follows:

Offence	Date	Sentence
Breach of community work	04 August 2007	Two months imprisonment
Driving whilst disqualified third or subsequent	16 August 2007	12 months imprisonment
Theft	20 September 2007	21 days imprisonment
Driving whilst disqualified third or subsequent	18 September 2007	12 months imprisonment
Breach of release conditions	31 October 2007	Four months imprisonment
Driving whilst disqualified third or subsequent	03 December 2007	15 months imprisonment
Driving whilst disqualified third or subsequent	18 December 2007	15 months imprisonment
Breach of release conditions (x2)	28 December 2007	Four months imprisonment
Driving whilst disqualified third or subsequent	14 January 2008	18 months imprisonment
Driving whilst disqualified third or subsequent	28 April 2008	20 months imprisonment
On each of the charges of driving whilst disqualified the defendant will be disqualified from holding or obtaining a drivers licence for a period of three years commencing on the 24 July 2008.		

[3] I adopt the following undisputed narrative from Judge Garland's sentencing notes:

> [2] The facts relating to your offending are as follows: Dealing with the charge of breach of community work you were sentenced to a 100 hours' community work in the Lower Hutt District Court on 10 July 2007, following a conviction of driving whilst disqualified. You failed to report on 4 August 2007. I am told that 80.5 hours is currently outstanding. The sentence expires on 9 July 2008.
>
> [3] In relation to driving whilst disqualified 16 August. At about 8.36 am on that day you were driving a Ford car on Maire Street in Otaki. When the police spoke to you about that you confirmed that you were a disqualified driver. At that stage you had already been convicted of driving whilst disqualified on a number of occasions.
>
> [4] On 18 September 2007 you were again behind the wheel of a Nissan car on Aotaki Street in Otaki. When police sought to apprehend you, because you were a disqualified driver, you stopped your vehicle, you got out and ran down a pathway.
>
> [5] On 20 September 2007 you were at the New World Supermarket in Otaki. You took a bottle of cooking oil valued at $5.39. You left the store without paying for the cooking oil.
>
> [6] On 31 October 2007, being a person who on the 4 December 2006 had been released from prison on conditions of release. You breached a

condition of your release, namely, you failed to report to the probation officer.

[7] Next, on 3 December 2007 you were again driving a Mitsubishi motor vehicle on Mill Road, in Otaki. At the time you were still a disqualified driver. You had your partner and two children in the car at that time. When police spoke to you you admitted that you were a disqualified driver and stated that you were just returning from a day at the beach with our family.

[8] On 18 December 2007 you were again seen driving a motor vehicle, this time a Honda motor vehicle in Marie Street in Otaki. Again you were apprehended by the police. In explanation you told the police you were only shifting your motor vehicle a few meters down the road. You said your partner was out and that she was unable to do it for you.

[9] You were released on 424 days released on conditions on 4 December 2006, following a term of one year and four months' imprisonment imposed on you, 23 June 2006 for offences of possession for supply of cannabis, cultivating cannabis, shoplifting, driving whilst disqualified, further subsequent, shoplifting, obstructing police, resisting police and breach of community work. You failed to report to probation on 28 December 2007. On that same day the probation service conducted a home visit to your stated address. They found that you no longer lived at that address and hence you breached a special condition that you were not to change addresses without the written consent of the probation officer.

[10] Next on 14 January 2008 you were again driving a motor vehicle on State Highway 1 in Otaki. At the time you were still a disqualified driver. Police stopped the vehicle and you admitted that to them. In explanation you told the police you were just going to get a pie and that you had not driven for ages.

[11] Finally on Monday, 24 April 2008 you were again driving a blue Mazda car in Marie Street in Otaki. You were a disqualified driver at the time. You were seen by a passing police patrol. They pursued you. You drove down a residential driveway onto a vacant section and then you fled on foot with the police patrol in pursuit.

Sentencing

[4] The Judge reviewed the probation report, noting that Mr Royal has a significant drug abuse history. (The Judge was plainly familiar with the appellant's history because he noted that when sentencing on 29 April 2008 that the Court had made extreme efforts to try to help him break his drug addiction without success.) The sentence of two years and eight months imprisonment had been imposed for cultivating cannabis. The appellant had eight convictions for driving whilst

disqualified, numerous drug convictions, and also one conviction for aggravated robbery. There were some 57 convictions for dishonesty.

[5] The Judge noted aggravating factors: the offences were all committed while Mr Royal was subject to release conditions and serving a sentence of community work, and he was also on bail pending sentence on a charge of cultivating cannabis. In mitigation, he had entered early guilty pleas.

[6] The Judge chose to sentence by imposing cumulative sentences in respect of the different types of offending, recognising that the offences occurred on ten separate occasions. A starting point of two years imprisonment was appropriate for the six charges of driving whilst disqualified. With respect to the charge of breach of community work, Mr Royal had done only 19½ hours of the 100 hours imposed, and was plainly unwilling to complete the sentence. Given his previous convictions for similar offending, the appropriate starting point was three months imprisonment. With respect to the theft, the offending was at the lower end of the scale, but having regard to the previous history of dishonesty a starting point of one month was adopted. Six months was adopted for the three offences involving breach of release conditions, the Judge noting that there were three previous convictions for similar offending.

[7] This resulted in an overall starting point of two years and ten months imprisonment, from which 11 months was deducted on account of the early guilty pleas. The Judge then applied the totality principle, concluding that a cumulative sentence of 20 months imprisonment on the existing sentence would not be disproportionate.

Grounds of appeal

[8] Mr Stevenson, appearing on instructions from Mr Surridge who has represented Mr Royal throughout, invited me to allow the appeal and remit the matter to the District Court for resentencing before another Judge, relying on reasonable apprehension of bias. Alternatively, the sentence was manifestly excessive, in that the starting point for the disqualified driving charges ought to have

been eight to 12 months imprisonment and a greater allowance should have been made for totality.

Reasonable apprehension of bias

[9] The bias allegation arises out of the circumstances relating to Mr Royal's conviction and sentence for cannabis cultivation. He was charged with Benjamin Way, who Mr Royal says was the principal offender, and a relative, David Royal, with cultivation of cannabis and possession of a firearm, namely an air gun. Both the appellant and Mr Way pleaded guilty to the cannabis charge, but the appellant did so much later, on 24 May 2007, and he went to trial on the charge of possession of the air gun. David Royal pleaded not guilty to the cannabis cultivation as well, and he and the appellant were tried together on 6 - 7 June 2007.

[10] In the meantime, Mr Way had been sentenced by a different Judge on 15 September 2006. The Judge adopted a starting point of three years imprisonment having regard to the quantity (104 plants). Having regard to his age (22), guilty plea, and prospects of rehabilitation, the sentence was reduced to two years imprisonment. Cumulative terms were imposed for various minor charges, including one month for possession of the air gun.

[11] At the trial Judge Garland discharged the jury. He later recorded that he did so because David Royal gave evidence which the police alleged was false. They investigated the evidence, and sought to call evidence in rebuttal while the jury were deliberating. The Judge chose instead to discharge the jury. The appellant opposed the discharge, complaining that the evidence did not relate to the charge that he faced. However, the appellant was later discharged under s 347 in relation to the firearm charge.

[12] It appears that the appellant was to appear for sentence in December 2007, and wished to contend that he was merely a party to the cannabis offending. In response to a facsimile from Mr Surridge which is not before me, the Judge advised:

> I have heard the evidence at the trial which was abandoned. I am in a position to make findings of fact. If Mr Surridge on behalf of Damien Royal

> wishes to call evidence which might suggest that Damien Royal was less involved in the cultivation than the other two, that is his right. It is not the Crown's obligation to call evidence to mitigate his client's offending.

Counsel complains that by approaching the matter in that way, the Judge effectively reversed the onus of proof on a sentencing hearing.

[13] A sentencing hearing was held on 11 February 2008. Counsel agree that the Judge issued a Minute stating that he found the facts proved and that no reasons were given at that time.

[14] The appellant appeared for sentence on 29 April. The Judge reviewed the background and dealt with the disputed facts hearing, reminding himself that the onus was on the prosecution to prove beyond reasonable doubt any disputed aggravating fact and to negate beyond reasonable doubt any mitigating facts raised by the defendant. The parties had agreed that he could take certain evidence in the trial into account. It included a video which the offenders had taken of the cultivation. The appellant gave evidence at the sentencing hearing, saying that he only went to the cannabis plot twice, to look after the cannabis plants so no one stole them. The Judge rejected his evidence, pointing to numerous inconsistencies. He went on to review the evidence at some length, and concluded that each of the defendants was a principal together with Mr Way.

[15] The Judge accordingly adopted the same three-year starting point that was used for Way. He imposed a sentence of two years and eight months imprisonment, having regard to a previous conviction for cannabis offending, for which he added two months, and after deducting six months for a late guilty plea and personal circumstances. I observe that the appellant, at 37, is much older than Mr Way and has an unenviable list of convictions.

[16] The appellant appealed to the Court of Appeal. His grounds of appeal complained that the sentence could not be justified having regard to the lesser sentence imposed on Mr Way, who he characterised as the principal offender. He also complained that the Judge gave no written decision following the sentencing hearing. The appeal was subsequently abandoned, but the appellant still maintains

that the Judge erred by failing to give reasons, and that the sentence imposed was excessive having regard to that imposed on Mr Way.

[17] When he appeared for the appellant at sentencing on the present charges, Mr Surridge asked the Judge to recuse himself on the ground that the appeal to the Court of Appeal was still pending and there was a reasonable apprehension of bias. The Judge declined.

[18] Mr Stevenson was careful to emphasise that there is no allegation of actual bias but that is not required. He cited *Antoun v R* (2006) 80 ALJR 497 (HCA) for the proposition that the accused is entitled to the benefit of any legitimate doubt as to impartiality. He did not argue that a reasonable apprehension of bias arises merely because a Judge has dealt with an offender on a previous occasion. The core of his argument was that the Judge ought not to have sentenced the appellant on this occasion when an appeal was pending against a previous sentence on grounds not only that the sentence was manifestly excessive but also that the Judge had failed to give reasons after the sentencing hearing.

[19] The test is whether a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to a decision he was called upon to make: *Muir v CIR and Accent Management Limited* [2007] NZCA 334. Before answering that question, the Court must carefully establish the actual circumstances which directly bear on the allegation.

[20] I do not accept that a fair-minded lay observer would reasonably apprehend a possibility of bias in the circumstances. Appeals are routine, and cannot in themselves give rise to a reasonable apprehension of bias. There was no reason to suppose that the appeal, which was subsequently abandoned, would have succeeded in this case. The starting point chosen was not only consistent with that used for Mr Way but also squarely within the range established by *R v Terewi* [1999] 3 NZLR 62, and detailed reasons were given for the finding that the appellant was a principal in the Judge's sentencing notes. There is no suggestion even now that those findings were not open on the evidence. Further, I see nothing in the Judge's conduct in the sentencing hearing and the sentencing itself to justify any

apprehension of bias. He had made it clear on 17 December that having heard the evidence at trial, he was in a position to make findings, but invited the appellant to seek a sentencing hearing if he wished to argue that he was a mere party. There can be no criticism of the Judge for that. He did not reverse the onus, but merely made it clear that the evidence he had heard would show the appellant was a principal. It was not necessary that he give reasons on 11 February; it was enough for sentencing purposes that he advised counsel, as he did, that he found the facts proved and recorded his reasons in the sentencing notes.

[21] The only remaining argument in relation to apprehension of bias relates to the sentences imposed on the present charges. For reasons outlined below, I find that the effective sentence was not manifestly excessive. This ground of appeal fails.

Starting point for the driving offences

[22] Mr Stevenson argued that Judges routinely adopt much lower starting points than the two years used in this case, even for recidivist offenders such as Mr Royal. I accept that lower starting points are sometimes used, but sentences vary widely. The question is whether the sentence was manifestly excessive. There were six charges of driving while disqualified over a short period, and eight previous convictions for doing so. He was subject to release conditions. In these circumstances, it was open to the Judge to take a starting point of two years, the maximum for a single offence, before credit for guilty pleas: *R v Butterfield* CA100/97 23 July 1997. As the Court held in that case, disqualification is an important instrument for dealing with irresponsible driving, and adherence to such orders is essential if the integrity of the driver licensing system is to be preserved. Mr Royal has made it plain that he is not prepared to accept disqualification, and must take the consequences.

Discount for totality

[23] Mr Stevenson sensibly did not argue that the Judge ought to have sentenced Mr Royal on the basis that the sentences should run concurrently with the cannabis

sentence. The cannabis offending was different in kind and occurred some 16 months before the earliest of the offences for which the appellant was being sentenced. The issue rather is whether the three-month adjustment for totality was sufficient. The totality principle applies in such a case: *R v Johansen* CA42/92 23 May 1997.

[24] The adjustment for totality is very much a matter of judgment, requiring that the Judge stand back and look in a broad way at the whole of the criminal behaviour and the circumstances of the offender. In this case, I am not persuaded that the Judge erred. The combined effective sentence is substantial, but justified when its components are considered and having regard to the appropriate mix of concurrent and cumulative sentences. The sentences took account of all mitigating factors, but properly recognised that Mr Royal is now a mature man who continues to offend repeatedly and so merits a deterrent sentence.

Decision

[25] The appeal is dismissed.

Miller J

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 3.30pm on the 17th day of June 2009.

Solicitors:
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