IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CRI 2009-463-39

	BETWEEN	DUANE NEIL DUFF Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing: 29 June 2009

Counsel: J P Temm for Appellant
S-L Wootton for Crown

Judgment: 29 June 2009

(ORAL) JUDGMENT OF HEATH J

Solicitors:
Crown Solicitor, Rotorua
Counsel:
J P Temm, Rotorua

Appeal

[1] Mr Duff appeals against an effective sentence of two years and three months imprisonment and a reparation order in the sum of $4000.

Background

[2] On 21 May 2009, Judge McGuire, in the District Court at Rotorua, sentenced Mr Duff on charges of cultivation of cannabis, theft of two animals and hunting on land, without the express authority of an occupier to do so. The pleas were entered at an early stage; in respect of the cultivation of cannabis charge, it was entered under s 153A of the Summary Proceedings Act 1957 prior to a preliminary hearing.

[3] Judge McGuire elected to exercise his jurisdiction to sentence, meaning that although the maximum penalty for cultivation of cannabis is 7 years imprisonment, he was restricted (on that charge) to imposing a sentence of no more than two years imprisonment.

[4] The facts were set out fully in the District Court Judge's decision. He said:

> [5] The facts relating to these matters were as follows. The Moerangi Station is in the Taupo/Turangi district and consists of some 500 acres of native bush leased by the complainant as a safari based hunting venture. The area is situated some two kilometres inside the farm boundary and is fully deer fenced. Over recent months, there have been a number of deer illegally hunted and taken from the property.
>
> [6] On 12 November 2008, you entered the station with another person. You walked to the safari area where the deer was fenced, you jumped the fence and while in the area, two deer were shot by you and the person you were with. Those deer have a combined value of $4000. The animals were cut up and carried out.
>
> [7] On 4 December 2008, the police executed a search warrant at your house in Turangi. They found the venison in the freezer. It had been cut up and packaged. In the garage, an area had been cordoned off with polyurethane. There were 17 plants grown under lights in this area, a timer was attached to the lights. The plants were about 60 centimetres in height and had developed heads on them. Under the bench in the garage was a black plastic sack, which was found to contain 3.1 kilograms of cannabis leaf.

> [8] In a trailer at the rear of the property, 110 cannabis plants were located. They were in good condition and up to 60 centimetres in height. So in total, 127 plants were located (all these were cloned plants) and 3.432 kilograms of cannabis leaf and head.
>
> [9] You admitted hunting at the Moerangi Station and that the meat in the freezer was from the shot deer. You also admitted to all the cannabis being yours.

[5] The Judge assessed the dried cannabis to be of "very good quality". He made that assessment from photographs presented to the Court.

[6] At the time of sentencing, Mr Duff was 37 years old. He had prior convictions; mostly for alcohol related offending. Many of those charges were, however, historical; the most recent being in 2003.

Analysis

[7] The methodology employed in sentencing was, with respect, unorthodox. It did not follow the strictures of the Court of Appeal's decision in *R v Taueki* [2005] 3 NZLR 372 (CA). In my view, the way in which the Judge's approach deviated from that general guidance caused him to err in determining the appropriate sentence to impose.

[8] Notwithstanding, the numerous grounds on which the appeal was advanced, I am prepared to allow the appeal against sentence on the ground that the approach amounted to an error of law, giving rise to cause for real concern about the appropriateness of the final sentence imposed.

[9] The first concern is that, while the Judge adopted a starting point for sentence on the cultivation charge which was consistent with the Court of Appeal's decision in *R v Terewi* [1999] 3 NZLR 62 (CA), the credit for the very early guilty plea was not in the range of 33% as indicated in the Judge's decision. Depending upon how one does the arithmetic in relation to the actual sentence imposed, the credit could amount to anything between 25% and 28%.

[10] If a credit of approximately one-third had been given then 10 months would have been deducted from the starting point of two years six months imprisonment. Assuming that there were no cumulative sentence of imprisonment to impose, that would have brought Mr Duff within the range of sentence requiring the Judge to consider whether home detention was appropriate.

[11] After considering the appropriate sentence for the cultivation charge, the Judge turned to the issue of theft of animals. He took a starting point of six months imprisonment and reduced that to one of three months imprisonment. However, he accumulated that sentence with the sentence he would have imposed on the cultivation charge, namely, the maximum available to him of two years imprisonment.

[12] The accumulation of sentence is problematic. A co-offender was dealt with by the imposition of a sentence of 280 hours community work and a requirement that one-half of the reparation of $4000 be paid. Although, the $2000 ordered to be paid by the co-offender has been paid, Mr Duff was also required to pay reparation in the sum of $4000.

[13] On the hunting charge, a sentence of imprisonment was imposed. However, the one month imposed on that charge exceeded the Court's jurisdiction, in that the maximum penalty was a fine.

[14] The additional problem relates to the way in which the Judge addressed the issue of home detention. It was addressed at a point before the Judge had considered whether it was necessary to impose a sentence of imprisonment. Further, it was addressed in the context of two authorities to which the Judge had been referred by counsel then acting for Mr Duff.

[15] The Judge, with respect, appears to have decided that home detention was inappropriate, not so much as a matter of judgment but rather by reference to the particular cases involved. The proper approach to the exercise of judgment in relation to the most appropriate sentence, was identified in *R v D(CA253/08)* [2008] NZCA 254 (CA) at [66]:

> In a case like this, the sentencing Judge is required to form a judgment on whether imprisonment is necessary or home detention can respond adequately to the seriousness of the offending. The closer one gets to the dividing line, the more difficult it becomes to articulate reasons for preferring one approach to the other. In such cases, the view of a sentencing Judge from the jurisdiction in which crimes of the type in issue are frequently tried assumes greater weight. He or she will be in a much better position than an appellate Court to determine which type of offending falls on one side of the line or another. The broader the base of similar offending a particular Judge sees, the more likely it is that the chosen sentencing response will be appropriate.

[16] Those cumulative factors lead me to the view that an incorrect sentence may have been imposed. It follows that it will be necessary to re-sentence.

Procedural issues

[17] Rather than making formal orders at this stage and setting aside the sentences imposed, I adjourn the appeal for hearing at 2pm on 10 July 2009 so that I may re-sentence.

[18] I direct that a Home Detention Appendix be prepared and made available to the Court and counsel for both parties, no later than 3pm on 9 July 2009.

[19] I am satisfied that the prospects of a home detention sentence being imposed are sufficient to justify the grant of bail pending re-sentencing.

[20] Mr Duff shall be released on bail, to surrender at 2pm on 10 July 2009 on the following terms:

a) He shall reside at 45 Patikura Place, Turangi

b) He shall report to the Turangi Police Station each Monday, Wednesday and Friday between the hours of midday and 5pm.

c) He shall not have possession of or consume alcohol or illicit drugs.

d) The Police may call to confirm compliance with the terms of bail at any time.

[21] Ms Wootten, for the Crown, advises that the Police have not had an opportunity to check the suitability of the address, even though there is no opposition to it at present. Leave is reserved to apply to vary terms of bail or, indeed, to terminate bail in the event that the Police have any concern about the address. I will be sitting in Rotorua for most of the next two weeks and any issue in that regard can be referred promptly to me.

Result

[22] The appeal is adjourned on the basis outlined. Mr Duff should not regard the grant of bail as suggesting that he will necessarily receive a sentence of home detention.

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P R Heath J