IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CRI 2009-463-43

	BETWEEN	HARLEY SORENSON Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing: 30 June 2009

Counsel: T Barclay for Appellant
M Wright for Respondent

Judgment: 30 June 2009

(ORAL) JUDGMENT OF HEATH J

Solicitor:
Crown Solicitor, Rotorua
Counsel:
T Barclay, Rotorua

The appeal

[1] Mr Sorenson appeals against a sentence of nine months imprisonment imposed by Judge Tompkins, in the District Court at Rotorua, on 10 June 2009.

Background

[2] Mr Sorenson was before the Court on one charge of burglary and one of possession of an offensive weapon, to which he had previously pleaded guilty. The burglary charge arose out of an incident that occurred on 12 October 2008, whereas the charge of possessing an offensive weapon arose out of a later incident on 27 January 2009.

[3] The burglary charge was originally set down as a defended hearing in conjunction with another charge of the same type. During the course of that hearing (on 30 April 2009), Mr Sorenson entered a plea of guilty to the burglary charge on which he was subsequently sentenced The Police withdrew the other burglary charge.

[4] Judge McGuire called for a pre-sentence report. The notation he made on the information suggests that he had a sentence of community work and/or supervision in mind. No home detention Appendix was sought by the Judge.

The District Court sentencing

[5] On 10 June 2009, Judge Tompkins sentenced on the basis of a limited pre-sentence report. The report did not contain all information of the type that would ordinarily be available. For example, referring to s 26(2) of the Sentencing Act 2002, it did not provide much information about Mr Sorenson's personal family, whanau and community background.

[6] Yet, the sentencing Judge appears to have been told about anti-social behaviour that may have arisen from Mr Sorenson's association with younger people; Mr Sorenson is said to be of "subnormal" intelligence.

[7] Judge Tompkins did not consider expressly the possibility of home detention. Rather, he took the view that the offending proved required to be marked by a sentence of imprisonment.

Analysis

[8] It is unnecessary for me to go into detail about the offending at this stage. There are a number of matters which have led me to the view that home detention was indeed a viable sentencing option that ought to have been considered.

[9] In making that observation, I do not criticise either Judge McGuire or Judge Tompkins. It seems that this was one of those cases in which the appropriateness of the home detention sentence may not have been clear because the probation officer was unable to interview Mr Sorenson or members of his whanau fully.

[10] The first concern relates to Mr Sorenson's personal circumstances. Because Mr Sorenson had failed to attend on the probation officer, a limited report was prepared. Nevertheless, there was a period during which Mr Sorenson was held on custodial remand, during which a full interview could have taken place.

[11] In *R v Harriman* [2009] NZCA 156, the Court of Appeal referred to authority going back, at least as far as 1943, which required the Courts to consider full pre-sentence reports before imposing custodial sentences. The Court said:

> [19] This Court has consistently held (both before and after the Act came into force) that a custodial sentence should only be imposed in rare circumstances without the benefit of a pre-sentence report. In *re Moulin* [1943] NZLR 325 at 327 (SC), Myers CJ explained why:
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> > … I think I am right in saying that, in except where a sentence is fixed by law, a Judge of the Supreme Court never sentences a prisoner to a term of imprisonment or reformative detention without having Probation Officer's report before him. The reason is simple. No matter what the prisoner's previous criminal record may be, and

> no matter what the police or Crown Prosecutor may say of the offender's character as gleaned from the Police records, there is always the possibility of the careful inquiry which the Probation Officer is expected to make resulting in the obtaining of some information which might dispose the mind of the Court to a more lenient sentence than might have been imposed without such information. It is not right, in my opinion, that any Court should sentence a person to a long term of imprisonment – in this case twelve months' imprisonment with hard labour to be followed by twelve months' reformative detention – without having had the opportunity of considering a report from the Probation Officer.

> [20] That statement of principle has been followed frequently: eg *R v Spring* CA221/85 18 November 1985, *R v Johansen* (1997) 15 CRNZ 111 (CA) and *R v Bellingham* (2005) 21 CRNZ 561 (CA). The Court in Bellingham said:
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> > [12] [The comments of Myers CJ set out at [19] above] are as pertinent now as they were over 60 years ago. Although it has often been said that personal circumstances can carry little weight when sentencing for drug offending, it is nonetheless important that the Court should have the benefit both of the factual information supplied in a pre-sentence report and the opinion of the officer in his or her areas of expertise. Having said that, we accept that in this case, as counsel for the respondent has submitted, the principal matters able to be put in mitigation or otherwise relevant to sentencing were in fact before the Judge. We, of course, have had the benefit of reading the pre-sentence report and have been able to take it into account in our deliberation.
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> [21] The purpose of a pre-sentence report is to ensure that a sentencing Judge has adequate information about an offender, before imposing a sentence of imprisonment or deciding whether a non-custodial sentence is sufficient to respond to particular offending. Given that purpose, it is inappropriate to sentence unless the Judge can rule out any reasonable possibility that further information might come to light that could affect the credit to be given to mitigating factors.

[12] Given the recent introduction of home detention as a discrete sentence and the requirement for the least restrictive outcome to be imposed by way of sentence, it was necessary for a sentencing Judge to form a judgment as to whether imprisonment was necessary to mark the particular offending. To do that it would have been necessary for the Judge to consider whether home detention could adequately mark the offending.

[13] The second point of concern relates to Mr Sorenson's age. He was 17 years old at the time both offences were committed. While he had appeared in the District Court on a number of occasions arising out of incidents since July 2008, there is no record of any appearance before the Youth Court. The sudden change in behaviour

is something that ought to have been explored in a full pre-sentence report. The best way to deal with the offending, namely, whether by rehabilitation or a punitive response, would need to be considered in that light.

[14] It is not clear that a sentence of imprisonment would be inappropriate, but I agree with Mr Barclay's submission, on behalf of Mr Sorenson, that his client should have the benefit of a proper assessment on that issue. There is no jurisdiction for this Court to remit sentencing to the District Court. For that reason, it will be necessary to convene a further hearing for disposition on a re-sentencing.

[15] I call for a full pre-sentence report and a home detention Appendix. The home detention Appendix shall consider the suitability of the residence and occupants of 15 Susan Street, Rotorua, where Mr Sorenson's grandmother lives. The pre-sentence report should also canvas the possibility of community detention and/or intensive supervision, as well as home detention and imprisonment as sentencing options.

[16] As I will not be in Rotorua at a time after the pre-sentence report and Appendix are available, it will be necessary to convene a hearing later. I am not prepared to deal with a sentence appeal by way of a telephone link. Rather, I have made arrangements for a video link to be made available so that counsel can be heard from Rotorua, while I sit in Auckland.

Outcome

[17] The sentence appeal is adjourned for further consideration and, if necessary, re-sentencing, at 8.30am on Friday 24 July 2009. Counsel will be required to attend at the Court in Rotorua for the hearing to proceed by video link.

[18] Mr Sorenson will remain in custody pending the completion of the appeal.

P R Heath J