IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CRI-2009-416-12

SAMUEL BOWRING
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 31 July 2009

Appearances: Mr L Maynard for Appellant
Mr C R Walker for Respondent

Judgment: 31 July 2009

(ORAL) JUDGMENT OF LANG J
[on appeal against sentence]

Solicitors:
Rishworth, Wall & Mathieson, Gisborne
Crown Solicitor, Napier

[1] Mr Bowring appeared in the District Court having pleaded guilty to one charge of burglary, one charge of assaulting a female and one charge of breaching his release conditions.

[2] His Honour Judge Adeane took a starting point on the burglary charge of two years imprisonment, reduced that sentence by eight months to reflect an early guilty plea and then imposed a cumulative two-month sentence on a charge of assaulting a female. The Judge convicted and discharged Mr Bowing on the charge of breaching his release conditions.

[3] Mr Bowring now appeals to this Court against the sentence that the Judge imposed. He contends that the Judge adopted an incorrect approach to sentencing and that the starting point that he adopted was too high. As a result, he contends that the sentence that the Judge imposed was manifestly excessive.

[4] In order to understand the issues that the appeal raises, it is necessary to briefly refer to the factual background. I take this largely from the Judge's sentencing remarks, which reflect the summary of facts presented to the Court by the Prosecutor.

Facts

[5] The burglary charge arose as a result of an incident that occurred on the afternoon of 15 February 2009. On that date Mr Bowing and two associates entered a wrecker's yard in Gisborne. There they found a large quantity of scrap metal in the form of glass, copper and magnesium. This was obviously very heavy and they used a rolling chassis that they found on the premises to transport the stolen goods to a fence near a roadway. They then cut a hole in the fence and brought their own vehicle to that location. Thereafter they transferred the scrap metal from the rolling chassis into their own van.

[6] In order to be able to sell the property without fear of detection, one or more of the appellant's associates then drove through to Whakatane, where they sold the

scrap metal to a scrap metal dealer for approximately $900. The summary of facts records that the market value of the property was in the vicinity of $1,800.

Ground of appeal

[7] Counsel for Mr Bowring contends that the Judge failed to follow the approach to sentencing set out in the well known decision of the Court of Appeal in *R v Taueki* [2005] 3 NZLR 372. That requires the sentencer to fix a starting point that is appropriate for the offending on the basis that a defended hearing has taken place. Thereafter the sentencer may apply an uplift to reflect aggravating factors personal to the offender before applying a deduction in respect of any mitigating factors personal to the offender.

[8] Counsel refers as authority for this proposition to the judgment of the Court of Appeal in *R v Columbus* CA608/07, 27 June 2008. In *Columbus* the Court noted that the sentencing Judge had taken into account aggravating factors personal to the offender when fixing a starting point in relation to a charge of burglary. The Court noted that this was at variance with the approach espoused in *Taueki.* Being a Divisional Court, however, it did not propose to interfere in a practice that appears to be reasonably widespread in the District Court when fixing with the starting point to be applied on charges of burglary.

[9] Counsel for Mr Bowring submits that, if the *Taueki* approach is adopted, a starting point of no more than 12 months imprisonment was appropriate in relation to the burglary charge. Even making allowance for the aggravating factor of Mr Bowring's previous convictions, he submitted that the end starting point would not have been higher than 18 months imprisonment. On that basis he submits that the end sentence should have been around one year's imprisonment.

Decision

[10] Given the fact that the Court of Appeal has declined to advocate a different approach to that currently taken in the District Court, I do not propose to say anything about the way in which the Judge structured his sentencing. I take the

view, however, that the end result would be much the same no matter which approach is adopted.

[11] I consider that the circumstances of the present case are more serious than those in *Columbus*. In *Columbus*, the offender had forced open a garage door and had removed a mountain bike, together with some gardening tools and a toolbox. He then sold the bike but the police recovered it a short time later. Then a few days later he stole a lawnmower from a residential property.

[12] In the present case the Judge was dealing with an enterprise by three individuals who were working together. They gained access to the wrecker's yard and then stole a significant quantity of valuable property. It obviously took significant effort on their part to effect the theft and dispose of the scrap metal. I consider that if the starting point adopted in *Columbus* is taken as the benchmark, the appropriate starting point on the burglary charge in this case would be not less than 15 to 18 months imprisonment.

[13] Then it would be necessary to have regard to Mr Bowring's previous convictions. He is a relatively young man, being just 22 years of age. Notwithstanding this fact he has amassed a formidable array of previous convictions of all descriptions. Included in these is a series of burglary convictions entered in the Youth Court in 2000.

[14] I accept that, on their own, the burglary convictions may not have been of particular significance in the present case. Mr Bowring needs to understand, however, that his criminal history is now such that it is likely to be taken into account as an aggravating factor on any occasion on which he appears for sentence on criminal charges in the future. He can expect sentences to become longer and longer in the event that he continues to offend.

[15] I consider that an uplift of six to nine months would be required to reflect the previous convictions. That being the case, I arrive at the same end starting point as the Judge, namely one of two years imprisonment. The Judge then applied a full discount of 33 per cent to arrive at an end sentence of 16 months imprisonment on

the burglary charge. No objection is taken to that, and I agree that it was appropriate in the circumstances. No challenge is taken on appeal to the imposition of the cumulative sentence on the charge of assaulting a female either.

[16] I therefore reach the conclusion that, no matter how the sentence is structured, it cannot be said to be manifestly excessive.

Result

[17] The appeal against sentence is accordingly dismissed.

Lang J