**IN THE HIGH COURT OF NEW ZEALAND**
**WANGANUI REGISTRY**

**CRI 2009-483-43**

**KIWA MATTHEW TANGAROA**

v

**NEW ZEALAND POLICE**

Hearing: 5 November 2009

Counsel: R Leith for Appellant
H C Mallalieu for Respondent

Judgment: 9 November 2009

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**JUDGMENT OF SIMON FRANCE J**
**(Appeal against Sentence)**

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[1] Mr Tangaroa appeals a total sentence of thirteen months imposed for:

a) unlawful interference with a motor vehicle (one year);

b) possession of a disabling substance (one year);

c) possession of instruments for conversion (six months);

d) receiving (under $500) (one month);

e) possession of cannabis (one month);

f) possession of utensils for cannabis (one month).

[2] The receiving and cannabis sentences were concurrent with each other but cumulative on the unlawfully interfering with a car.

[3] The construction of the sentence was:

a) eight months for the car offence;

b) three months uplift for disabling substance (pepper spray);

c) eight months for uplift for previous offending;

d) one third discount for plea, calculated leaving a final outcome of thirteen months.

[4] The primary appeal grounds are that the eight months for the car offence was excessive, as were the two uplifts.

**Facts**

[5] Mr Tangaroa attempted to enter a car in a public car park in Wanganui. The summary of facts records that he had attempted to get into several vehicles. He achieved entry into a van but it had an alarm which went off. Mr Tangaroa left the scene. He was located a short distance from the car park.

[6] In his own vehicle under the front passenger seat there were numerous burglary and car conversion instruments, as well as a police scanner and a canister of pepper spray.

[7] At some point a search warrant of Mr Tangaroa's house was executed. Found at the house was a ski jacket with a value of $220; that is the subject of the receiving charge. Also found was a small amount of cannabis.

**Submissions**

[8] Concerning the facts, Mr Leith notes that no damage was caused to the van nor was anything taken from it. He also notes that the tools and the pepper spray were found under the passenger seat of Mr Tangaroa's car; the point Mr Leith makes that is that Mr Tangaroa was not armed with either when he attempted to get into the van.

[9] Mr Tangaroa says that he found the pepper spray in the street. He had picked it up that evening and put it in the car. At the time he was not even sure if it was useable as it had clearly been run over. Mr Leith notes that this explanation was proffered at sentencing and the police did not dispute it.

[10] By reference to other cases Mr Leith submits that the eight month starting point for the entry into vehicle was out of line with other authority, given that the vehicle was not taken, nor was anything taken from it, nor was any damage caused to it. He refers to what he considers to be comparable cases where a six month term of imprisonment was imposed.

[11] On this point the Crown refers to *Jackson* v *New Zealand Police* HC WN, CRI 2007-485-62, 20 August 2007, Mallon J. There, a number of cases were reviewed. It shows that there have been sentences around twelve to fifteen months, but in those cases property or the car itself was taken. Alternatively in one case there was an assault on the owner.

[12] The submission made by Mr Leith in relation to the uplift for previous convictions is the one that might be expected. It is submitted that an uplift which is the equivalent of the starting point for the primary offence is excessive. It is noted that Mr Tangaroa has not received a prison sentence since 2003 (although I observe that that was a three sentence so some of the time will have been taken up with incarceration). Mr Tangaroa has a considerable list of previous offences, which it is accepted required an increase. However, it is submitted adding eight months was excessive.

[13] For the Crown it is submitted that Mr Tangaroa has shown himself to be a recidivist offender in relation to property and dishonesty. The Judge's label of an "appalling" previous record of dishonesty is supported by Mr Tangaroa's record. It is submitted that the uplift was available to the Judge given the extensive list of previous convictions.

[14] Finally, in relation to the cumulative penalties, Mr Leith submits that the three months for the pepper spray was excessive given the circumstances in which Mr Tangaroa came by it. The Crown's position in relation to this and the other points is that standing back from the totality of the offending it cannot be said that the final outcome is manifestly excessive. It is well established that the particular balance within the sentence is less important in the overall outcome.

**Decision**

[15] When one considers the cases identified by Mallon J in the *Jackson* decision, in my view a starting point of eight months for the car offending was within the available range. The summary of facts records that it was a public car park and that Mr Tangaroa had attempted to obtain entry to other vehicles before managing to gain access to the van. Mr Tangaroa has also pleaded to possession of instruments clearly designed to assist with car conversion and in those circumstances a starting point of eight months cannot be criticised.

[16] Mr Tangaroa's past record makes unappealing reading. However it is to be noted that the ten fraud offences for which he was sentenced in November 2007 appear to represent ten uses on the same day of the same improperly obtained credit card. The sentence imposed was 200 hours community work.

[17] Much more serious is that in 2003 Mr Tangaroa was sentenced to three years' imprisonment in relation to several burglary and fraud offences. That is a significant term of imprisonment and itself followed on a suspended sentence in 2000 for similar offending. The possession of the conversion instruments, when added to the fact of attempts to break into several cars, creates a situation where individual deterrence was an appropriate sentencing consideration. However, I consider the

point made by Mr Leith must be correct. An eight month uplift for individual deterrence based on the past record means that the total sentence in relation to the conversion offence is excessive. I accept the submission that half of the uplift would have been acceptable, and accordingly adjust that figure by four months.

[18] The only other point of substance concerns the pepper spray. Mr Tangaroa pleaded guilty to possession of it. That necessarily carries the implication that he knew what it was. Although one must view his explanation with a healthy degree of sceptism, it matters little. Knowing that it was pepper spray Mr Tangaroa kept it. He obviously wanted to have it, and presumably he wanted to have it for a reason. He chose to store it with his tools of trade. The maximum penalty for this offence is two years, and I have no difficulty with a three month uplift in relation to it.

[19] The adjustment to the uplift for past offending produces a new starting point of fifteen months, less one third. The final sentence should therefore be ten months. I achieve that by reducing the sentence for unlawful inference with a motor vehicle, and the sentence for possession of a disabling substance to nine months for each, concurrent with each other.

[20] All other sentences remain unchanged which results in a final term of ten months.

Simon France J

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