IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CRI 2009-463-73

	BETWEEN	RICHARD CONRAD FAATAAPE Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing: 30 November 2009

Appearances: Max Simpkins for Appellant
Laura Owen for Respondent

Judgment: 30 November 2009

JUDGMENT OF HARRISON J

SOLICITORS
Lance Lawson (Rotorua) for Appellant
Gordon Pilditch (Rotorua) for Respondent

Introduction

[1] Mr Richard Faataape appeals against a sentence of two years and four months imprisonment imposed upon him in the District Court at Rotorua on 25 August 2009 following his pleas of guilty to four charges: one charge each of possession of cannabis for supply and related equipment and one charge each of unlawful possession of a firearm and explosives.

[2] The sentence comprised cumulative penalties of 12 months imprisonment for the drug dealing and 16 months for the firearms charges. There can be no challenge to two factors: first, the component of the sentence representing drug dealing and, second, the imposition of cumulative sentences. The only issue is whether the firearms component was excessive.

Facts

[3] The material facts are not in dispute. On 17 February 2009 the police executed a search warrant on Mr Faataape's property at Murupara. Inside a single storey dwelling they found equipment for growing cannabis. Included were growing trays, wool pots, numerous cannabis seeds, lighting, high wattage bulbs, fertilisers and a generator. Also found were electronic scales, a bag of cannabis crumbs (365 grams), a bag of cannabis plant material, and 22 tin foil bullets, or tinnies, each containing just under two grams of cannabis.

[4] The police also discovered a loaded .270 bolt action rifle in a motor vehicle parked at the house. Loose ammunition was found at various locations. Some related to the rifle and others to different firearms. Mr Faataape did not hold a firearms licence.

[5] At the time of sentencing Mr Faataape was 35 years of age. Materially he had previous convictions for assault with intent to injure in 2001, assault in 2007, and assault with intent to injure in 2008. He had been sentenced to community work or periodic detention on those charges. Accordingly I assume that they were not at the high end of the scale of seriousness.

[6] It appears also that Mr Faataape was what is called a patched member of the Mongrel Mob. He told the probation officer that he was attempting to cut his ties with that group. The Judge was conscious that at the time of Mr Faataape's sentencing there were or had been violence between gang members in Murupara leading to the death of a local teenager.

Decision

[7] In the District Court the Crown submitted that an appropriate starting point for the cannabis offending was two years imprisonment. This posed, as Judge Weir pointed out, a jurisdictional difficulty. His power in the summary jurisdiction when dealing with the cannabis offending was limited to imposing a maximum of one years imprisonment: s 6(3) Misuse of Drugs Act 1975. By contrast, if Mr Faataape had been dealt with on indictment he faced a maximum of eight years.

[8] The Judge accepted jurisdiction (counsel advise that he took this step after careful consideration). I interpolate that if the Judge's jurisdiction had been indictable, a starting point for the drug offending in the vicinity of two years may have been appropriate. However, recognising his statutory limitations, the Judge adopted a starting point of 18 months, reduced to 12 months for Mr Faataape's plea of guilty. As I have noted, no criticism can be made of that approach.

[9] The Judge imposed a cumulative sentence of 16 months imprisonment on the firearms and related charge. He adopted a starting point for that offending of two years imprisonment but again made an appropriate reduction for Mr Faataape's pleas of guilty. That is the element of his decision which is under challenge.

[10] The Judge was particularly influenced by the decision of Tipping J in *Roberts v Police* (1993) 10 CRNZ 451. In that case the appellant was sentenced to 18 months imprisonment in the District Court following his pleas of guilty to possession of two loaded pistols. They were found upon execution of a search warrant at the headquarters of the Epitaph Riders gang in Christchurch. The search occurred, as Tipping J noted, in an atmosphere of concern about gang violence in Christchurch. The Judge was entitled to draw an analogy with events in Murupara.

[11] In *Roberts* the weapons were hidden under the bar in the pool room of the gang's headquarters. One was a .38 calibre six shot revolver loaded with six live rounds. The other was a double barrelled .22 calibre Derringer look-alike pistol with live rounds in both barrels.

[12] Judge Weir cited and relied upon Tipping J's observation in *Roberts* in dismissing the appeal that:

> Events have not stood still over the intervening time and I think it is fair to say that the public concern that now exists in this country over the use and possession of firearms, let alone loaded firearms, has become significantly greater than it may have been a few years ago. The maximum penalty for possession of a firearm unlawfully in circumstances applicable to this sort of case is three years' imprisonment.
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> ... in my judgment the time has fully arrived when the Courts have a public duty to make it clear to all citizens that the possession of firearms, particularly loaded and operative firearms, is a very serious matter indeed.

[13] When *Roberts* was decided in 1993 the maximum sentence of imprisonment for possession of a firearm was three years. It has since been increased to four years, demonstrating greater public concern about this type of offending. While *Roberts* does not describe the starting point (sentencing was not then as structured as it is presently), it can be reconstructed in the vicinity of two years imprisonment.

[14] In my judgment *Roberts* is distinguishable on two grounds. First, as Tipping J emphasised, the offending embraced possession of two highly sophisticated and loaded weapons; if Mr Roberts had faced one charge, it can be assumed that his sentence would have been somewhat less, probably in the region of nine to 12 months. Second, the firearms were found within the gang headquarters leading to the inference that they were to be used by the group for its violent activities. By comparison, as Mr Simpkins points out, Mr Faataape's gun was found physically removed from his possession in his motor vehicle. While Judge Weir rightly rejected a submission that the firearm and the bullets were for hunting purposes, the inference is equally open in the absence of evidence to the contrary that the purpose of possession was related to Mr Faataape's drug dealing, not necessarily to gang related activities.

[15] Judge Weir referred to *R v Hall* HC PMN CRI 2005-054-3898 6 December 2005. In that case Mr Hall appeared for sentence for possession of methamphetamine for supply, a range of cannabis dealing charges together with possession of ecstasy and precursor substances, as well as receiving and unlawful possession of a pistol. That was a .22 calibre firearm loaded with seven rounds found on a table within arm's reach of Mr Hall when the police executed a search warrant. Wild J observed that in the context of drug dealing, sentencing for firearms charges is frequently reflected by imposing a cumulative sentence of about six months imprisonment: at [13].

[16] Judge Weir distinguished Wild J's comments on the ground that they were made in the context of the totality of the offending where the lead sentence was one of six-and-a-half years imprisonment for possession of methamphetamine. With respect to the Judge, I do not read Wild J's statement in the same way. In my judgment his statement about the appropriate duration of a cumulative term for possession of a firearm applies equally to all drug dealing offending, regardless of its severity.

[17] I accept Mr Simpkins' submission that Judge Weir erred in fixing a starting point of two years imprisonment for the firearms offending. In my judgment an appropriate starting point, bearing in mind the result in *Roberts* and Wild J's observations in *Hall*, was in the vicinity of 12-15 months. Allowing for a plea of guilty, the appropriate end sentence for each of the firearms charges was nine months imprisonment concurrently. This sentence is also consistent with the totality principles.

[18] Accordingly I allow Mr Faataape's appeal on the charges of unlawful possession of a firearm and unlawful possession of explosives. The sentences of 16 months imprisonment are quashed. Each is replaced by concurrent sentences of nine months imprisonment, cumulative on the sentence of 12 months imposed on the Misuse of Drugs Act charges. The total sentence is now one year and nine months imprisonment. I dismiss Mr Simpkins' application for a substitute sentence of home detention.

[19] I should add that Mr Faataape's success is the result of an anomaly in the Misuse of Drugs Act. I repeat what I said earlier. If Judge Weir had declined jurisdiction, thereby imposing a heavier sentencing burden on this Court, an appropriate starting point for the cannabis offending would have been two years imprisonment. The end sentence would have been 16 months. Added to the nine months imprisonment imposed on the firearms charges, the total sentence would have been within the range arrived at by Judge Weir. I trust that Parliament takes appropriate steps to repeal this unsatisfactory limitation on a District Court's sentencing powers. Otherwise further anomalies will arise.

[20] I wish to thank both Mr Simpkins and Ms Owen for their constructive submissions.

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Rhys Harrison J