IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2009-404-000413

GRAHAM STIPICH
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 10 December 2009

Appearances: M Kennedy for Appellant
F Cuncannon for Crown

Judgment: 10 December 2009

ORAL JUDGMENT OF VENNING J

Solicitors: Crown Solicitor, Auckland
Copy to: M Kennedy, Auckland

[1] On 7 December 2009 the appellant was sentenced to 28 days' imprisonment by Judge Everitt in the District Court at Auckland. The sentence was imposed following the appellant pleading guilty to breaching a condition of release under s 93 of the Sentencing Act and breaching a sentence of community work under s 71.

[2] The appeal was initially advanced on two grounds.

- first, the refusal of the District Court Judge to grant bail pending counsel researching the law and making further legal submissions; and

- second, that the sentence of 28 days' imprisonment was in any event manifestly excessive.

[3] During the course of submissions Ms Kennedy accepted that the first ground of appeal had really fallen by the way from a practical point of view. She had sought an adjournment before the District Court to research a Court of Appeal decision, which she wished to refer to the Judge but the Judge declined to adjourn the sentencing exercise. It follows of course he declined to grant bail and proceeded to sentence the appellant. Even if the Judge had been minded to adjourn the matter to allow counsel to research the law from the appellant's recent record of failing to attend Court it is inevitable bail would have been properly declined in any event.

[4] The real force and substance of the appeal, however, as advanced by Ms Kennedy is that the sentence of 28 days' imprisonment is manifestly excessive in the circumstances of the offending which led to the initial sentence of community service and the breaches of that sentence and the breach of the release condition.

[5] Ms Kennedy submitted forcefully on behalf of the appellant that when considering the sentence of 28 days' imprisonment it was necessary to consider it in the context of the offending which had led to the underlying sentence, particularly the sentence of community work. She noted that the appellant had been sentenced on 30 September 2008 on two shoplifting charges to 150 hours community work.

She submitted that on her instructions the appellant had shoplifted, in each case a window washing brush, which he then used to clean windows on cars. The later and additional sentence of 40 hours community work imposed on 13 July 2009 was apparently for a similar offence. She submitted that the result of a person in the position of the appellant, a homeless person, who had on her instructions completed about 75 or 79 hours community service, being sentenced to 28 days' imprisonment was something that the Court and society should not countenance in New Zealand today.

[6] Ms Kennedy placed a great deal of reliance during the course of her submissions on the Court of Appeal decision of *R v Morgan* [2008] NZCA 232. In that decision the Court of Appeal allowed an appeal against the sentence of the District Court Judge who had cancelled the sentence of community work and in its place imposed a sentence of eight months' imprisonment.

[7] In the course of allowing the appeal the Court observed:

> [13] As Heath J said in *White*, in re-sentencing under s 68(3)(c) the Judge is concerned to impose a sentence that could have been imposed on the offender originally. The substituted sentence should not include any element of sanction for the failure to comply with the community work sentence (see *R v Phillips* CA 379/90 22 May 1991 at 3, dealing with failure to complete a sentence of periodic detention). Section 71 of the Sentencing Act creates a specific offence of breach of a community work sentence, and this is the appropriate mechanism to deal with that issue.
>
> [14] Where imprisonment is imposed in substitution for a community-based sentence, there will inevitably be a greater degree of hardship for the offender. That is legitimate. In such a case, the offender will have had the benefit of a less restrictive alternative than imprisonment but will have failed to take advantage of it. The re-sentencing Judge is likely to weigh the various purposes and principles of sentencing in a way that is different to that which occurred on the first sentencing. For example, where the community based sentence was imposed because the sentencing Judge placed particular weight on the offender's rehabilitation, that factor may assume less weight on re-sentencing given the offender's failure to comply with the community-based sentence.

[8] In *Morgan*, after imposing the sentence of eight months' imprisonment in substitution the Judge at first instance had convicted and discharged the appellant on the charge of breaching the community work sentence.

[9] In allowing the appeal the Court substituted a sentence of three months' imprisonment on the initial offence and, in addition, imposed a sentence of two months' imprisonment on the charge of breach of community work, that to be cumulative.

[10] In the present case it is not entirely clear from the Judge's sentencing notes whether he had in mind in sentencing the appellant to 28 days' imprisonment to cancel the sentence of community work and to substitute the 28 days for the earlier sentence or whether which seems to be the case, that matter was not directly addressed and the 28 days was solely in relation to on the two charges to which the appellant had pleaded guilty, namely breach of release condition, and breach of community work. The Judge's notes as typed back at [8] do seem to be missing a complete record of what the Judge imposed the sentence for. It reads:

> The sentences of community work ... and you are sentenced on each of these charges concurrently, not cumulatively, to 28 days' imprisonment.

[11] Obviously something is missing. It is most likely to be, given the reference to concurrently, to be a reference to the breach of release condition and breach of community work.

[12] I deal with the matter on the basis that the Judge imposed the sentence of 28 days solely in relation to those two offences first. As the Court of Appeal observed in *Morgan* where there are specific offences for breach of community work (and, in this case breach of release condition), then those offences are the appropriate mechanism to deal with such breaches.

[13] The breach of the release condition carries a maximum term of imprisonment of one year or a fine of $2,000. The breach of community work carries a maximum term of three months' imprisonment or $1,000. The breach of release condition was a failure to report to the probation officer within 72 hours after release. On its own and on the face of it that may not appear to be a particularly serious breach, however, the need to attend on the probation officer is fundamental to the balance of the release conditions that may apply and does call for some sanction.

[14] The breach of the community work is more serious in this case. Ms Kennedy urged on the Court that the appellant had completed about half of the original 150 hours imposed. But the converse of that is he had failed to comply with one half of the sentence. He had one year to do so and failed to complete the sentence.

[15] Despite Ms Kennedy's submissions that the Court should have regard to the underlying offending which led to the sentence of community work on the basis the sentence of 28 days was imposed for the breach of release condition and breach of community work the issue for the Court is whether in the circumstances of those two specific offences the offending supported the 28 days imposed by the Judge or whether in the circumstances it could be said that the 28 days was manifestly excessive. In relation to that, as I have noted, the appellant had failed to comply with one half of the community work sentence at least and had failed to comply at all with the subsequent sentence of 40 hours community work. He had also failed to comply with the release condition.

[16] These were not the first such breaches. On 28 August 2008 the appellant breached a sentence of community work. On 2 February 2007 he breached a sentence of community work. On 13 February 2006 he breached a release condition. The appellant is apparently a homeless man. There were no other alternatives open to the Court to leave him within the community. It was clearly pointless to reimpose any community based sentence given his failure to respond to the sentences imposed and to the release condition.

[17] I note that in the decision of *Christie v Police* HC NAP AP47/95 25 September 1995 Doogue J considered an appeal against a sentence of six weeks' imprisonment for breach of a periodic detention order. The Judge noted that it was a second conviction for such an offence. Having regard to that previous offending the Judge was not prepared to accept that the six week period could be said to be manifestly excessive or appropriate.

[18] I also note that in *Morgan* the Court of Appeal substituted the two months' imprisonment for breach of 150 hours community work. Using that as a benchmark

the 28 days imposed in this case for breach of community work by the appellant given his previous history cannot be said to be manifestly excessive.

[19] In this case a sentence of imprisonment was required given the current and past offending by the appellant. Given the maximum terms that Parliament has provided for the offending and the appellant's past offending of a similar nature it cannot be said that a term of 28 days imprisonment is manifestly excessive.

[20] The position is even stronger if indeed the Judge imposed the sentence as part of an exercise of imposing a sentence in substitution for the existing sentence of community work. While the underlying offending might have been at a lower level of seriousness the offending still provided for a three month term of imprisonment as a maximum sentence and it is fair to categorise the appellant as a recidivist offender in that way. In *Morgan* the court imposed cumulative terms of imprisonment, one for the initial offending and one for the breach.

[21] For those reasons the appeal must be dismissed.

[22] In the event that the issue of the existing sentence of community service has not been addressed, and I invite counsel to make inquiries of the Court and relevant authorities in relation to that, then in my judgment that matter ought to be addressed. It seems that s 68(2) would apply and that a probation officer could apply for an order cancelling the sentence, given the appellant has been convicted of an offence punishable by imprisonment and indeed imprisoned. Alternatively the appellant, with the assistance of counsel, could make such an application for cancellation under s 68(1). Such application, if one is required, would have to be made to the District Court.

[23] The appeal is dismissed.

_____

Venning J