IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CRI-2009-442-24

SIMON DARRYL BRYANT
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 14 December 2009

Appearances: S Zindel for the appellant
H Boyd-Wilson for the respondent

Judgment: 17 December 2009

JUDGMENT OF CLIFFORD J

Introduction

[1] Between 29 May and 9 August 2009 Mr Bryant, then 18 and 19 years old, committed a rash of serious and not so serious property offending. Mr Bryant subsequently pleaded guilty to some 29 charges, including two of arson (s 267(1)(b) Crimes Act 1961; maximum 14 years' imprisonment), five of burglary (s 231 Crimes Act 1961; maximum 10 years' imprisonment), two of receiving property over $1,000 (ss 246 and 247 Crimes Act 1961; maximum 7 years' imprisonment) and seven of unlawfully taking a motor vehicle (s 226(1) Crimes Act 1961; maximum 7 years'

imprisonment). He was sentenced to three years' imprisonment in the District Court on 16 October 2009.

[2] Mr Bryant now appeals against that sentence.

Background

[3] In sentencing Mr Bryant the Judge did not, as was his normal practice, read through the summaries of facts and victim impact statements relating to Mr Bryant's various offending. To have done so, he estimated, would have taken three-quarters of an hour because, in his words, "your offending has been so large in volume and the impact upon the victims has been significant". The Judge, understandably in my view, in what was no doubt a busy sentencing list, would appear to have concluded he did not have the time to follow his normal practice.

[4] As Mr Bryant appeals on the ground that his sentence is manifestly excessive, I think it is appropriate to now record the detail of his offending in some detail. I do so in chronological order by reference to the dates of Mr Bryant's offending and the discrete charges that arose as a result of the separate incidents. The detail is taken from the various statements of fact to which his guilty pleas were entered.

a) 29 May – 5 June 2009 – arson and unlawful taking of a motor vehicle:

On the evening of Friday, 29 May 2009 Mr Bryant and three associates stole a Toyota Prado 4-wheel drive vehicle (valued at $20,000) from a residential address in Stoke. They subsequently drove the vehicle on and off for about a week. In the early hours of Friday 5 June, having driven the vehicle around forestry roads, they parked the vehicle on a disused forestry skid site. They then set it on fire (by pouring diesel all over and through it, and lighting it with a cigarette lighter). The total financial loss was $21,584.69.

b) 12 July 2009 – theft (x 2), burglary (x 3):

These charges relate to a "joy" ride Mr Bryant and five associates took from Nelson to Geraldine. During that "joy" ride they stopped at various places, unlawfully entered premises and stole fuel valued at approximately $110.

c) 19 July 2009 – theft (x 2):

Mr Bryant took the front registration plates, worth $14.45 each, from two separate vehicles.

d) 28 – 29 July 2009 – burglary (x 1):

Mr Bryant and associates went to Nelson College. Two associates kicked in the door to the College Kiosk. Mr Bryant entered and stole biscuits and confectionary worth approximately $250.

e) 30 July 2009 – receiving (x 2):

Mr Bryant was a passenger in a car stopped by the Police. Property from two separate burglaries (a nail gun and assorted tools) was located in the car. In respect of each charge, the property received was valued at over $1,000.

f) 31 July 2009 – wilful damage (x 2):

In the early hours of Friday 31 July Mr Bryant set two different real estate agents' signs on fire with a cigarette lighter. Both the signs, valued at $25 and $10, were destroyed.

g) 4 – 6 August 2009 – arson; unlawful taking of a motor vehicle (x 6); unlawful interference with a motor vehicle (x 3); and wilful damage:

Between 4 and 6 August 2009 Mr Bryant committed a spate of offences in relation to motor vehicles in and around Nelson.

In the late evening of 4 August Mr Bryant unlawfully interfered with a Subaru Ace, entering it and ripping off the plastic surrounding the ignition. He left a flat headed screwdriver in the vehicle (which he was going to use in the ignition). Then, in the early hours of 5 August, with two associates, Mr Bryant entered a Toyota Corolla, hotwired the ignition and assisted in stealing it. At 12.20am he was seen driving the vehicle at Nayland College, accelerating heavily, causing the wheels to spin and rip up grass. Mr Bryant then left that vehicle with his associates. At approximately 2.20am that morning he and an associate broke into and hotwired a Ford Laser. The vehicle was driven to Miazu Gardens and – as earlier that morning with the Toyota Corolla – used to rip up the grass. Mr Bryant then set the vehicle on fire, destroying it, and fled the scene. Later that same morning Mr Bryant unlawfully took a third vehicle (a Mazda 323) which, after a Police pursuit, was later located crashed in Franklyn Street, Nelson. It had suffered extensive frontal damage. It was worth $800.

On 6 August Mr Bryant unlawfully took another motor vehicle, a Mitsubishi L200 utility, valued at $6,000. It was later recovered – without Mr Bryant's assistance – missing the rear tailgate, after having been lent to associates and used to commit other offences. On the same day, Mr Bryant unlawfully entered a farm shed on a property he used to work at. While there, he stole a quad bike valued at $2,000, a trail bike valued at $4,000, and a second trail bike valued at $1,000. The two trail bikes have not been recovered. Mr Bryant refused to provide details of the whereabouts of those motorbikes.

h) 9 August 2009 – unlawful interference with motor vehicle; wilful damage; unlawfully being in enclosed yard:

An associate of Mr Bryant sole a Mazda 323 (valued at $1,800) from an address in Nelson. Mr Bryant and two accomplices got into the vehicle and drove it to Okiwi Bay in the Marlborough Sounds, and

> back to Nelson over the Mangatapu trail. At the time Mr Bryant was on a Court-imposed curfew for similar offending. As Mr Bryant and his associates drove they discarded the owner's property. The vehicle became stuck in mud. Mr Bryant and his associates then smashed its windows with rocks, removed the stereo and threw away the registration plates. At the same time, they scattered various items belonging to the owner around the surrounding area. In this way the owner lost valuable possessions, including study notes and study equipment. They then walked to a remote residence. Mr Bryant acted as a lookout while an associate went into the carport where the resident's ute was parked. Mr Bryant and his associates were disturbed and ran from the scene.

[5] Taken overall, then, Mr Bryant pleaded guilty to stealing and subsequently burning out two vehicles (the Prado and the Toyota Corolla); to stealing three other cars; to burglary involving a quad bike and two trail bikes; and to a number of other (lesser) property and motor vehicle offences. The losses caused by this offending totalled just over $30,000.

This appeal

[6] Mr Bryant appeals on the basis that his sentence is manifestly excessive. He says that the starting point adopted by the Judge (four and a half years' imprisonment) was too high. He says further that he was not given any discount for his youth, and should have been.

Discussion

[7] At Mr Bryant's sentencing hearing, both the Crown and the defence agreed that a starting point in the range of three to four years would be appropriate. In identifying a starting point of four and a half years' imprisonment, the Judge commented on a number of aspects of Mr Bryant's offending. In particular, he referred to the two serious arson charges, noted the not insignificant value in the

property involved overall, and also noted the impact that Mr Bryant's offending had had on a number of his victims.

[8] The Judge identified, as a particularly concerning matter, the fact that Mr Bryant had attended a restorative justice meeting on 13 May for earlier offending involving theft of a motor vehicle. Notwithstanding that exposure to the consequences of his offending, Mr Bryant had gone out barely 16 days later, stolen the Toyota Prado 4-wheel drive, and subsequently destroyed it. Mr Bryant was, understandably in my view, assessed by the Judge as being "a person with no empathy".

[9] For Mr Bryant, Mr Zindel advanced this appeal by reference to case authority which he submitted supported the conclusion that the Judge's starting point was too high. He principally referred to sentencing cases for arson and burglary.

[10] The courts have not attempted to formulate tariffs for arson, as this type of offending widely varies in scope and severity, and subjective factors will often play an important role. As was said in *R v Z* CA 138/00, 27 June 2000 at [6]:

> Each case will depend on its own facts, which will involve a consideration of the property damaged, danger to life both of occupants and firefighters, and often the mental state of the offender will be of significance. Sentences vary from substantial prison terms to non-custodial sentences with an emphasis on rehabilitation.

[11] *R v Gilchrist* CA 429/90, 15 April 1991 is recognised as a leading appellate judgment on arson. The Court of Appeal commented (at 3):

> …sentences in this area vary greatly because of the great differences in the circumstances of particular cases, and in the motives behind the offending. Arson is always serious. It is easy to commit but difficult to sheet home and has the potential to place lives in danger. It may be planned or committed on the spur of the moment. In some cases there may be a psychiatric background. The offender may have a sinister motive.

[12] It was submitted by the Crown, and accepted by the Judge, that the arson involved here was committed to destroy evidence.

[13] As for burglary, *Senior v Police* (2000) 18 CRNZ 340 identifies three categories of burglars — the first-time, the recidivist and the spree burglar. Again,

there is no guideline or tariff case for burglary, due to the wide range of circumstances in which the offence can be committed: *R v Nguyen* CA 110/01, 2 July 2001. Relevant factors may be, however, the degree of planning and sophistication in the offending, the nature of the premises entered, the kind and value of the property stolen, damage done, the impact and potential impact upon occupants or owners of the property and the extent of the offending where multiple burglaries are involved. Domestic and commercial burglaries may be equally serious: entry into private homes generally will have an emotional impact giving rise to a sense of violation and insecurity for the owners that may not arise in the case of commercial premises, whereas, the value of goods stolen from commercial premises may be higher.

[14] In my view, the Judge appropriately sentenced Mr Bryant on a totality basis. The "starting point" of four and a half years' imprisonment was, in my judgment, within the available range given the number of the offences overall; the two serious arson offences which were committed for the aggravating purpose of destroying evidence; the relatively serious nature of the burglary of the quad and trail bikes; the "spree" nature of the offending; and the value of the property involved. In reaching that conclusion, I not only considered the *Gilchrist* and *Senior* decisions, but also other cases including *R v Manson* [2009] NZCA 158, *R v Mohi* [2007] NZCA 139 and *Lye v Police*; *Purcell v Police* HC Christchurch CRI-2005-409-200, 8 December 2005.

[15] That "starting point" is also be seen in the context of the factors of Mr Bryant's very recent conviction for similar offending (namely theft (ex car), unlawful interference with a motor vehicle (x 10), and unlawful taking of a motor vehicle); that he had not been deterred from such offending; that he was subject to a sentence of community work at the time of this offending; and that he was also on bail at the time of some of this offending.

[16] In my judgment, the starting point identified by the Judge is a stern – but understandable in the circumstances – response to the criminality represented by Mr Bryant's offending.

[17] In addition to drawing my attention to comparable cases, Mr Zindel criticised the Judge's identification of the circumstances of the very recent restorative justice meeting, and Mr Bryant's apparent lack of reaction to it, as an aggravating factor. In my judgment, however, that is an aggravating factor relating to Mr Bryant's personal circumstances that the Judge was well entitled to take account of. Mr Bryant has failed to take up the opportunity for rehabilitation and to gain an insight into his offending, and has shown that a deterrent sentence is necessary to persuade him not to re-offend and to protect the community from his offending.

[18] Taken overall, I do not consider that the starting point of four and half years can by itself be considered to be excessive.

[19] I turn to the question of discount. On appeal the Crown accepted – by reference to *R v Hessell* [2009] NZCA 450 – that Mr Bryant would have been entitled to a 33 per cent discount by reference to his early guilty pleas alone. The Crown accepted, furthermore, that the Judge would appear to have intended to have given Mr Bryant some, albeit limited, credit for his relative youth. In terms, however, of the Court of Appeal's very recent decision in *Hessell*, the Judge would not appear in fact to have done so.

[20] Youth is a mitigating factor under s 9(2)(a) of the Sentencing Act 2002: *R v Walker* [2009] NZCA 56. Having regard to that consideration, and on the basis that the Judge concluded that some leniency was appropriate on account of Mr Bryant's youth, I think it is appropriate in this appeal to allow for that factor. In my view a discount of three months is sufficient in the circumstances.

[21] I therefore allow this appeal and substitute an end sentence of two years and nine months.

"Clifford J"

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