IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2009-404-000261
CRI 2009-404-000282

TAHI COOPER
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 9 November 2009

Appearances: K L McQuinlan for the Appellant
K Wendt for the Respondent

Judgment: 16 November 2009 at 5:15pm

JUDGMENT OF WYLIE J
[Appeal against sentence]

This judgment was delivered by Justice Wylie
on 16 November 2009 at 5:15pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
K L McQuinlan, P O Box 177, Albany Village, North Shore 0755
Crown Solicitor, P O Box 2213, Auckland 1140

[1] Mr Cooper appeals against a sentence of 2 years and 2 months' imprisonment imposed on him on 3 August 2009 by His Honour Judge C S Moore in the District Court at Waitakere.

[2] Mr Cooper had earlier been charged with a number of the offences. He had failed to appeal, and a warrant had been issued for his arrest. On 4 May 2005, he made a voluntary appearance before the Court, and entered guilty pleas to nine charges. Details are as follows:

a) Breach of Court release conditions. This is an offence pursuant to s 96(1) of the Sentencing Act 2002. It is punishable by a term of imprisonment not exceeding 1 year or by a fine not exceeding $2,000.

b) Breach of Court release conditions.

c) Disorderly behaviour. This is an offence pursuant to s 3 of the Summary Offences Act 1981, and it is punishable by a term of imprisonment not exceeding 3 months, or a fine not exceeding $2,000.

d) Assaulting the Police. This is an offence pursuant to s 10 of the Summary Offences Act 1981, and is punishable by a term of imprisonment not exceeding 6 months, or a fine not exceeding $4,000.

e) Assaulting the Police.

f) Failure to answer District Court bail. This is an offence pursuant to s 37 of the Bail Act 2000, and it is punishable by a term of imprisonment not exceeding 1 year, or a fine not exceeding $2,000.

g) Breach of community work. This is an offence pursuant to s 71(1)(a) of the Sentencing Act 2002, and is punishable by a term of imprisonment not exceeding 3 months, or a fine not exceeding $1,000.

h) Burglary. This is an offence pursuant to s 231 of the Crimes Act 1961, and is punishable by a maximum term of imprisonment of 10 years.

i) Theft. This is an offence pursuant to s 223 of the Crimes Act 1961. Where the value of the property stolen does not exceed $500, it is punishable by a term of imprisonment not exceeding 3 months.

Relevant facts

[3] Mr Cooper had been sentenced to a term of imprisonment of 1 year and 2 months at the Whangarei District Court on 17 August 2007 on various charges. He was released from prison on 17 March 2008. He was then subject to post release conditions which had been imposed by the Court.

[4] On 15 October 2008, Mr Cooper breached one of the conditions of his release. He moved to a new residential address in another probation area without the written consent of the Probation Service. Further, on 16 December 2008, Mr Cooper breached another of the conditions of his release. He was instructed by the Otahuhu Community Probation and Psychological Services to report to the Mt Eden Community Probation and Psychological Services on 23 December 2008. He failed to do so.

[5] On 20 January 2009, Mr Cooper was found in an intoxicated state on Karangahape Road. He was having a heated dispute with his partner, and he came to the attention of both members of the public and the Police. When the Police arrived, Mr Cooper refused to calm down. He responded to Police intervention by shouting obscenities and verbal abuse at the Police Constables who were present. He was arrested, handcuffed, and escorted to a waiting Police patrol vehicle. When he was placed in the vehicle, he kicked out with both feet at one of the Constables who was present. He kicked the Constable in the chest several times. Another Constable attempted to assist. He was also kicked in the lower body by Mr Cooper. Mr Cooper gave no explanation for his actions.

[6] Mr Cooper was given bail in relation to these matters on 21 January 2009. He failed to surrender his bail on 11 February 2009 and a warrant was issued for his arrest.

[7] Mr Cooper was sentenced to 100 hours community work on 21 October 2008 in the Waitakere District Court following conviction for another offence – driving with excess blood alcohol. He attended a centre induction, and was advised as to his obligations concerning his sentence of community work. He received instructions to report to the New Lynn Community Work Centre on Saturdays commencing 15 November 2008, and to continue reporting on Saturdays until his sentence of community work was completed. Mr Cooper failed to report on 24 January 2009. As at that date, he had completed 27.5 hours of his sentence, leaving a balance of 72.5 hours outstanding.

[8] On 24 January 2009, Mr Cooper, along with three others, was travelling towards Pataua North in a motor vehicle. They stopped at an address on Pataua Road and one of Mr Cooper's associates got out of the vehicle. He walked towards the address. He was confronted by a neighbour. The associate said that he was looking for an aunty. He then got back into the vehicle with his co-offenders and they hurriedly drove away. At about 2.35pm on the same day, the vehicle stopped at another address in Pataua North Road. One of the persons in the motor vehicle got out and removed a work bag from another vehicle which was parked near a house. The bag contained personal work effects. After taking the bag, one of the occupants in the motor vehicle knocked on the door to the house. He was greeted shortly thereafter by the occupier. The associate again claimed to be looking for an aunty, and he left in the vehicle with his co-offenders. The stolen work bag was located in the vehicle soon afterwards. Later, on the same day, Mr Cooper and his associates travelled in the motor vehicle to an unoccupied beach house on Pataua North Road. The four offenders smashed a large glass window at the front of the property but failed to gain entry. They then climbed onto a deck and forced the ranch slider open and gained entry to the property. They stole a large television, a telescope on a tripod, wine, beer, and a blanket. An audible alarm was activated, and they then drove away from the address. Shortly thereafter they were stopped, and the vehicle was searched. The property was discovered in the rear of the vehicle hidden under a

blanket. Neither Mr Cooper, nor any of his associates, could offer any explanation for their actions.

[9] Mr Cooper has an appalling criminal history. Between 2000 and May 2009, he was convicted of some 38 charges. His record includes prior convictions for assaulting with intent to injure, assaulting the Police, failure to comply with Court orders, theft from a car, conversion of a motor vehicle, burglary, disorderly behaviour, failure to answer bail, and the like. Eight of the prior convictions are for dishonesty related offending, including three in 2002 for burglary.

Judge Moore's sentencing notes

[10] His Honour Judge Moore referred to the probation report which he had received. He noted that the report was not complete and that the Probation Officer who wrote the report was only aware of some of the offences which Mr Cooper had pleaded guilty to. He noted that counsel had submitted that the matter could be dealt by way of home detention, so that Mr Cooper could stay in the community and accept financial responsibility for his partner and the child that she is carrying. His Honour commented that Mr Cooper's history did not give him any sense that he was going to suddenly change his ways. He noted Mr Cooper's previous convictions for burglary and his earlier convictions for violence and for dishonesty. He recorded that Mr Cooper had had a lot of trouble with alcohol over the years.

[11] Judge Moore noted that the burglary at the dwelling in Pataua North occurred in an isolated area. He observed that dwelling house burglary is a major problem, particularly in the north where holiday homes are targeted. He considered that it was quite clear that Mr Cooper and his associates were "just going around looking for places to burgle".

[12] His Honour observed that Mr Cooper is a recidivist burglar, and that he was looking at a starting point for sentence of "up towards 3 years", given his criminal history. He noted that Mr Cooper had pleaded guilty, and that that entitled him to a significant discount. He observed that at the time of the burglary Mr Cooper was facing charges. He referred to the "dust up" in Karangahape Road, and to the

assaults on the Police officers. His Honour considered that it was necessary that Mr Cooper should be sentenced to a custodial sentence, to mark his history of breaching Court imposed orders.

[13] Judge Moore sentenced Mr Cooper to 1 months' imprisonment on each of the charges of breaching Court orders, breach of community work orders, and breach of bail and made the sentences concurrent on each other, but cumulative on the sentence for the burglary. On the charge of disorderly behaviour on Karangahape Road, he stated that it was a "fine only" offence, and he convicted and discharged Mr Cooper. In relation to the two charges of assaulting Police, he imposed a sentence of 1 months' imprisonment, again on a concurrent basis with each other, but cumulative on the sentence for the burglary. In relation to the theft from the motor vehicle, His Honour noted that this offence was a prelude to the burglary, and he sentenced Mr Cooper to 1 months' imprisonment. He noted that it was "mean offending" by "a group of guys who were just out to pillage anything they [could] find". He treated this sentence as being concurrent on the sentence for the burglary, on the basis that it was part of the "exercises" for that day. He treated the burglary conviction as the lead offence, and sentenced Mr Cooper to 2 years' imprisonment on that offence. He noted that the sentence ought to be a little longer, but he recorded that he had to keep in mind the total sentence imposed, which was 2 years and 2 months' imprisonment.

Submissions

[14] Ms McQuinlin appearing on behalf of Mr Cooper advanced the appeal on three grounds:

a) That Judge Moore failed to give adequate consideration to parity of sentencing with Mr Cooper's co-accused.

b) That Judge Moore erred in failing to grant a remand so that an alternative address for home detention could be investigated.

c) That the sentence of 2 years' imprisonment for burglary and 2 months' imprisonment on the charges of breach of Court orders and assaulting Police officers was manifestly excessive in the circumstances of the case.

[15] Ms McQuinlan accepted that the charge of burglary was the lead offence. She noted Judge Moore's comments in relation to Mr Cooper's criminal history. She submitted that the Judge placed undue emphasis on Mr Cooper's past dishonesty convictions in fixing the starting point. She submitted that the sentence imposed was effectively a punishment against Mr Cooper for his previous offending. She submitted that the Judge failed to give Mr Cooper sufficient discount for his early guilty plea, and that he failed to recognise that a single charge of burglary was involved. She pointed out that all of the stolen property was recovered. She submitted that Judge Moore failed to take into account that Mr Cooper has only three previous convictions for burglary, all committed some six years ago. She submitted that the burglary was at the low end of the scale, and that it was in effect an opportunistic crime.

[16] Ms Wendt for the Crown acknowledged that even where a sentence might otherwise be appropriate, it can be altered on appeal if there is a disparity with sentences received by co-offenders. She submitted, however, that the Court should only intervene on disparity grounds where the disparity is "unjustifiable and gross". She submitted that the fact that sentences are different is not of itself a sufficient basis on which to uphold an appeal, and that any discrepancies may be explicable in terms of relevant involvement and mitigating and aggravating factors.

[17] In relation to the argument that Judge Moore should have allowed an alternative address to be investigated for home detention purposes, Ms McQuinlan submitted that home detention was inappropriate. She referred to the pre-sentence report which made that comment and to the decision of *R v Columbus* [2008] NZCA 192. She also noted Mr Cooper's record in failing to comply with Court orders, and the fact that he had pleaded guilty to two charges of breaching the conditions of his release from jail, together with the disorderly behaviour, assault, and breach of

community work charges. She submitted that Judge Moore was entitled to conclude that home detention was not appropriate in the circumstances.

[18] In regard to the assertion that the sentence was manifestly excessive, Ms McQuinlan submitted that the overall end sentence of 2 years and 2 months' imprisonment is consistent with authorities, including *Tawharu v New Zealand Police* HC PN CRI 2004-454-1, 6 April 2005, Wild J, *R v Columbus* and *Senior v Police* (2000) 18 CRNZ 340. She submitted that there were various aggravating features – including that the offending involved unlawful entry into a dwelling house, that damage was caused to the house which was burgled, and that at the time of the burglary, Mr Cooper was facing two charges of having breached the conditions of his release from prison, together with disorderly behaviour, assault, and breach of community work charges. She also referred to Mr Cooper's extensive criminal history. She submitted that the totality principle was relevant in the present case, and that Judge Moore was mindful of the same. She submitted that the two 1 month sentences imposed on a cumulative basis were appropriate, and referred to s 84 of the Sentencing Act 2002 in this regard. She submitted that in light of the series and separate nature of the offending, the principles and purposes of sentencing and the maximum penalties involved in the offences, the total sentence was within the range available to Judge Moore, and was not manifestly excessive or disproportionate to the offending.

Analysis

[19] This is an appeal against sentence under s 115 of the Summary Proceedings Act 1957. Section 121 of that Act confers power on the Court to determine such appeals. Relevantly it provides as follows:

> (1) The [High Court] shall hear and determine every general appeal and make such order in relation to it as the Court thinks fit, and, without limiting the generality of the power conferred by this subsection, may exercise any of the powers referred to in the succeeding provisions of this section.
>
> (2) ...

(3) In the case of an appeal against sentence, the [High Court] may—

(a) Confirm the sentence; or

(b) If the sentence (either in whole or in part) is one which the Court imposing it had no jurisdiction to impose, or is one which is clearly excessive or inadequate or inappropriate, or if the [High Court] is satisfied that substantial facts relating to the offence or to the offender's character or personal history were not before the Court imposing sentence, or that those facts were not substantially as placed before or found by that Court, either—

(i) Quash the sentence and either pass such other sentence warranted in law (whether more or less severe) in substitution therefor as the [High Court] thinks ought to have been passed or deal with the offender in any other way that the Court imposing sentence could have dealt with him on the conviction; or

(ii) Quash any invalid part of the sentence that is severable from the residue; or

(iii) Vary, within the limits warranted in law, the sentence or any part of it or any condition imposed in it.

(4) ...

(5) ...

(6) In any case, the [High Court] may exercise any power that the Court whose decision is appealed against might have exercised.

(7) Subject to the provisions of section 144 of this Act, the decision of the [High Court] on any general appeal shall be final.

[20] Here there is no suggestion that Judge Moore lacked jurisdiction, or that substantial facts relating to the offences or to Mr Cooper were not before the Court. It follows that the appeal against sentence should only be allowed if the sentence imposed was manifestly excessive – see *R v A* [2007] 2 NZLR 218.

[21] It is common ground that the lead offence for sentencing purposes was the conviction for burglary.

[22] There is no strict tariff decision for the offence of burglary although *Senior* is often referred to in this context. That decision does not however provide sentencing bands or strict guidelines. As the Court of Appeal noted in *R v Southon* (2003) 20 CRNZ 104, *Senior* merely useful as a discussion of historical sentencing patterns. I note the Court of Appeal's observations in [12] to [14] of *Southon* as follows:

> [12] The seriousness of burglary is not to be underrated. Although the nature and risks of intrusion into private dwellings are obvious, with their sinister implications for privacy and their potential for grave offences against the person, such risks are not entirely absent in the case of the burglary of commercial premises. There is always the possibility of an encounter with someone lawfully on commercial premises. The potential for property loss goes without saying.
>
> [13] Nor should *Senior* be regarded as more than a very helpful analysis of historic sentencing patterns in this area, being thereby conducive to consistency in respect of similar offenders committing similar offences in similar circumstances, as mandated by s8(e) of the Sentencing Act 2002. As recent decisions of this Court demonstrate, recidivist burglars cannot assume that *Senior* may be relied upon to limit their sentences to three years imprisonment.
>
> [14] In our view, the most significant sentencing purposes in relation to this habitual burglar are deterrence and community protection. We need not repeat his regrettable record, but we place particular emphasis on the inadequate deterrence of previous terms of imprisonment and the severely aggravating feature of offending whilst on bail for a like crime. The circumstances called for a firm sentence and that is what the appellant received. We do not find it manifestly excessive.

[23] In *Southon* the appellant had robbed a pharmacy by attempting to disrupt the alarm and breaking through the roof, only a few months after being released from prison. The alarm worked, and he was arrested in the store. He caused little loss. While on bail, he committed another burglary. He had 15 prior convictions. The Judge took a starting point of six years, and discounted the sentence to 4.5 years. The Court of Appeal dismissed the appeal.

[24] Burglary is rightly regarded as a serious offence and in *Senior* the Court discusses some of the aggravating features which can be relevant to this type of offending. Some of those aggravating features are present in Mr Cooper's case.

a) The offence was committed while Mr Cooper was facing Court appearances in relation to other charges. This is a factor referred to in *Senior* and in the Sentencing Act 2002 – s 9(1)(c).

b) Mr Cooper was a recidivist burglar. He falls into Category 2 identified in *Senior*. He has a number of dishonesty related convictions, including three convictions for burglary. Although the burglary convictions were some time ago, there are more recent

dishonesty related offences, including receiving and unlawfully taking a motor vehicle on two occasions.

c) There was unlawful entry into a dwelling house – this is an aggravating feature required to be taken into account by the Sentencing Act – s 9(1)(b).

d) Damage was caused to the house which was burgled. Again, this is an aggravating factor – s 9(1)(d).

[25] In my judgment the starting point discussed by Judge Moore – "up towards" 3 years for burglary – was not manifestly excessive when compared to the starting point for other recidivist burglars. Indeed a starting point in that vicinity is recognised as being appropriate in *Senior*.

[26] The only mitigating feature to the offending was the relatively early guilty plea entered by Mr Cooper to the burglary charge. This was recognised and allowed for by Judge Moore. The discount given – 1 year – was consistent with the Court of Appeal's recent guideline decision – *R v Hessell* [2009] NZCA 450.

[27] In my view, it cannot be said that Judge Moore adopted a starting point which was manifestly excessive, or that he arrived at an end sentence for the burglary which was manifestly excessive. The sentence imposed for the lead offence of burglary was well within the range open to the Judge. Deterrence and community protection are the primary considerations in such cases and Mr Cooper's criminal record reinforced the need for a meaningful sentence.

[28] One of Mr Cooper's co-offenders has been sentenced for his role in the burglary. He was sentenced to 100 hours community work and reparation of $250. In relation to the theft from the motor vehicle, he was sentenced to 100 hours community work and ordered to pay reparation of $101.87. As far as I can glean from the offender's criminal and traffic history which has been made available to me, the sentences were cumulative.

[29] The other offenders have pleaded not guilty and have not as yet been sentenced.

[30] There is certainly a significant discrepancy in the two sentences imposed to date. If sentences are manifestly disproportionate, and the disparity is unjustifiable or gross, then it can be appropriate to intervene on appeal – see e.g. *R v Lawson* [1982] 2 NZLR 219; *R v Rameka* [1973] 2 NZLR 592.

[31] There are, however, differences here between the two offenders. The other offender was slightly younger than Mr Cooper. He has a criminal record, but it is nowhere near as serious as Mr Cooper's criminal record. At the time of the offending the co-offender had 10 other convictions – all for relatively minor matters. Some were dishonesty related – he had five convictions for shoplifting. Significantly he had no prior convictions for burglary. Although I gave the parties the opportunity to glean further material in relation to the co-offender and to make it available to me, I do not have much detail. I do not know the extent of his involvement in the offending. I do not know if there were any other mitigating circumstances personal to him. I do not have the sentencing notes or even the benefit of any recollection from the Police prosecutor or defence counsel.

[32] In my view, the disparity cannot, on the limited materials before me, be said to be unjustifiable or gross. The sentences are certainly disparate and it may be that the sentence given to the co-offender was distinctly light. I do not have significant material before me to enable me to make that conclusion. I do observe that even on the material before me, there were aggravating circumstances personal to Mr Cooper which do not seem to have existed in relation to the co-offender. In particular, the co-offender could not be said to be a recidivist burglar. As is noted in *R v Columbus*, recidivist burglary is regarded very seriously by the Courts. Moreover, Mr Cooper was being sentenced for a range of offences all committed at or around the same time. This does not seem to have been the case with the co-offender. The onus was on Mr Cooper to establish that a reasonable minded observer, aware of all the circumstances of the offences and the offenders, might think that something had gone wrong with the administration of justice and that the disparity was unjustifiable

or gross. I do not have significant information before me to enable me to reach that conclusion.

[33] Nor in my view can Mr Cooper complain that cumulative sentences were imposed by the Judge for breach of the Court orders and for assaulting the Police officers. Those offences were unrelated in point of time; they were not part of a connected series of offences. I refer to s 84 of the Sentencing Act.

[34] I accept that the totality principle has importance in such situations and that with multiple offending, the overall sentence must reflect the totality of the offending and the overall criminality of the offending and the offender – see e.g. *R v Barker* CA 57/01, 30 July 2001.

[35] Judge Moore clearly had the totality principle in mind. In my view, given the totality of Mr Cooper's offending, the end sentence imposed was not manifestly excessive. Mr Cooper was being sentenced in relation to nine charges. The charges had varying degrees of seriousness. Many of the charges were different in kind. Given the seriousness of the lead offence, and the separate and distinct nature of many of the charges, in my view the total sentence imposed was within the range available to Judge Moore. It was not manifestly excessive; nor was it disproportionate.

[36] In the circumstances, issues of home detention do not arise. The end sentence imposed exceeds the applicable two year limit which dictates when home detention can be considered. Further and in any event, I agree with Judge Moore that home detention was manifestly inappropriate for Mr Cooper. His criminal record, and his extensive history of flouting Court orders, counted against him in that regard. The community would have been rightly affronted had Mr Cooper been granted home detention.

[37] The appeal is dismissed.

Wylie J