**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA69/2018**
**[2018] NZCA 151**

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| BETWEEN | EE KUOH LAU<br>Appellant |
| AND | THE QUEEN<br>Respondent |

Hearing: 16 April 2018

Court: Cooper, Dobson and Toogood JJ

Counsel: A S R Kashyap for Appellant
A J Ewing for Respondent

Judgment: 16 May 2018 at 10 am

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**JUDGMENT OF THE COURT**

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**A The appeal against sentence is dismissed.**

**B The appellant is to surrender himself to the Registrar at the Auckland District Court (Criminal Counter, Level 1, 65–69 Albert Street) no later than 10.00 am on Friday 18 May 2018 to resume his sentence of imprisonment.**

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**REASONS OF THE COURT**

(Given by Toogood J)

[1] Ee Kuoh Lau (also known as Augustine Lau) is a property developer and the sole director of a company which had a lease over the rural property at 18 Weranui Road, Waiwera. The property features areas of pasture and substantial areas of regenerating and remnant coastal forest said to be of significant ecological value. Mr Lau appeals against a sentence of two months and two weeks'

imprisonment imposed by Judge Kellar in the District Court at Auckland on 24 January 2018[1] after he had pleaded guilty to a charge that he had contravened or permitted a contravention of the Resource Management Act 1991 (the Act) by damaging six pōhutukawa trees and one tōtara tree on the site.[2]

[2] At first sight, a sentence of imprisonment for any period in response to the destruction of seven trees may seem unjustifiably heavy-handed, particularly given the availability of alternatives to imprisonment in community-based sentences such as community service, community detention and home detention. And, as sentencing judges and counsel involved in criminal cases well know, an important sentencing principle requires the court to "impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders" set out in the Sentencing Act 2002.[3] As is invariably the case, however, an understanding of the sentence imposed and the issues arising on the appeal from it requires attention to the details of the offending and the offender.

[3] The procedural history of the case is somewhat unusual in that Mr Lau was on trial by a jury for the offending when he pleaded guilty just as Judge Kellar was about to sum up to the jury. As a result, the Judge had a good understanding of the facts and we draw on his account in summarising them.

[4] Between March 2013 and June 2014 Auckland Council officers visited the site over 20 times to inspect site works being managed by Mr Lau. They told him on numerous occasions to stop felling native trees at the site. A resource consent to fell some of the trees was applied for but never granted and tree felling works continued. In February 2014, Mr Lau lodged a submission on the proposed Auckland Unitary Plan requesting the removal of protections that the Unitary Plan afforded to the trees which are the subject of the offending. It included a plan depicting intended building platforms for new dwellings in the location of those trees.

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1 *[R] v Lau* [2018] NZDC 1133.
2 Resource Management Act 1991, ss 9(2), 9(3) and 338(1)(a).
3 Sentencing Act, ss 8(g) and 10A.

[5] In June 2014, shortly after a storm, Mr Lau arranged for a contractor to carry out site works using a digger. At the site, Mr Lau greeted the digger operator, who is deaf and mute, and took him to the location of the trees. Pointing to seven specific native trees, he made a hand gesture for the operator to push them over. On Mr Lau's instructions the trunks of three of the pōhutukawa trees and the tōtara tree were broken and a number of large branches of three other pōhutukawa trees were damaged. All of the trees were protected by the Operative Auckland Council District Plan and five of them were also protected by the Auckland Unitary Plan. A member of the public complained and two Council officers visited immediately. They saw Mr Lau supervising the operator's attempt to knock down one of the pōhutukawa trees on which branches had been broken. The operator ceased the work immediately when one of the Council officers signalled him to do so.

[6] Mr Lau claimed in explanation that the trees were being felled because they had been damaged by a recent storm and were unsafe. The Judge said, however, that storm damage to the trees was confined to some small limbs and did not present any immediate risk to people or property.[4]

[7] Identifying the aggravating factors of the offending, the Judge said that this was a very attractive coastal site containing vegetation, including the seven damaged trees, of high amenity and ecological value.[5] The Judge recalled evidence given by an expert during the trial that some of the trees would be upwards of 100 years old. Four of the affected trees suffered what the Judge described as "brutal" damage: evidence was given by the Council's ecologist that it was likely that all of those trees would die as a result of the unlawful works. The Judge said that the other three trees also suffered serious damage, with the expert indicating that the long-term viability was at risk of potential dieback and decay of affected stumps and branches. The Judge concluded that the harm caused to the seven protected trees was so significant as to be terminal.[6]

[8] Judge Kellar held there was no element of recklessness and that it was "hard to imagine a more deliberate case."[7] The Judge concluded that Mr Lau's purpose in

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4 *[R] v Lau*, above n 1, at [5].
5 At [6].
6 At [7].
7 At [8].

deliberately removing the trees was to gain financially in the development of the property because the views from sites on the property would have been considerably enhanced by the removal. The Judge said Mr Lau had showed little respect to Council officers throughout the period of works at the site leading up to the offending and had shown flagrant disregard for the regime under the Resource Management Act, knowing that resource consent was required to cut down the trees and, worse, knowing that the resource consent applied for had not been granted.[8]

[9] Judge Kellar noted there was no attempt by Mr Lau to comply with his obligations and that any efforts at remediation had been undertaken only inadequately, and by others. The Judge referred also to a considerably belated offer to pay some $10,000–$15,000 in reparation by instalments over the course of a year.[9] Finally, the Judge referred to Mr Lau's motivation, saying that it was clear that he intended "to make building platforms available for new dwellings in what is a spectacular location with views to the sea."[10] The Judge observed that Mr Lau had engaged with the Council for over a year in trying to cut down the trees and that, given the overheated Auckland property market, "even gaining one building platform in this area as a result of felling the trees would lead to significant financial gain".[11] There were no mitigating factors in relation to the offending.

[10] Judge Kellar said he had considered a number of relevant cases in the absence of any guideline judgment which might assist him to fix a starting point in the sentencing process.[12] He identified that the overarching purpose of the Resource Management Act is the sustainable management of natural and physical resources and referred to the list of matters of national importance under the Act, including the protection of areas of significant indigenous vegetation.[13] The Judge also referred to s 7 of the Act regarding the maintenance and enhancement of amenity

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8 At [9].
9 At [10].
10 At [11].
11 At [11].
12 At [13].
13 At [14].

values, the intrinsic value of eco-systems and the maintenance and enhancement of the quality of the environment.[14]

[11] Judge Kellar referred to the usual sentencing purposes of accountability and denunciation and noted the need to deter Mr Lau from engaging "in similar flagrant and deliberate behaviour".[15] He also considered the need for general deterrence against those who might be minded to deliberately disobey environmental rules in carrying out developments for the purposes of gaining financially.[16] The Judge regarded the offending as serious but acknowledged the obligation to impose the least restrictive outcome in the hierarchy of sentences that is appropriate.[17]

[12] Turning to Mr Lau's personal circumstances, Judge Kellar said that Mr Lau had endeavoured to diminish his role and responsibility in the offending by telling the writer of the pre-sentence report that he was merely acting as an interpreter between the property owner and the property manager at the address where the offending occurred, and an arborist who was there to trim the trees. He said Mr Lau had suggested to the report writer that the deaf and mute digger operator had misunderstood his gestures. Mr Lau did not express any remorse for his part in the offending.[18] He declined to give his consent to consideration of electronically monitored sentences, informing the report writer that he needed to be available for the care of his children who he said reside in multiple households and of his mother who is in poor health. Mr Lau was born in Malaysia but is now a permanent resident of New Zealand having lived here since 1992. He told the report writer that he was unable to pay any reparation that might be sought but said that replacement trees had been planted as a means of offering amends for those that were cut down.[19] We observe that, while the remedial effects of the planting would take many years to adequately mitigate the devastating effect of the destruction of these mature trees, the perceived financial benefit of clearing the site for building works would be almost immediate.

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14 At [14].
15 At [16].
16 At [16].
17 At [17].
18 At [18].
19 At [19].

[13] The Judge noted that Mr Lau was said by a parish priest to be a person of good character and acknowledged expressions of responsibility, through counsel, albeit at a very late stage.[20] The Judge also noted the reparation offer[21] and an undertaking not to be involved in development work in the future.[22] Accepting that Mr Lau had no prior convictions, the Judge said that good character did not relate simply to a lack of prior convictions but can be assessed in the present case in terms of his past conduct in environmental matters.[23] The Judge stated:

> [24] In your case you have been issued with numerous abatement notices by the council and enforcement orders by the Environment Court in respect of breaches of the Resource Management Act at many different sites for which you have had, and may continue to have, responsibility. And these include an abatement notice, an interim enforcement order and an enforcement order relating to a property at Paremoremo Road in Auckland. That relates to unauthorised dwellings and wastewater discharges.
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> [25] You were also the subject of an enforcement order relating to a property on the Albany Highway regarding unauthorised dwellings, removal of vegetation from a significant ecological area and again wastewater discharges. Furthermore, there were two enforcement orders issued relating to 32 Weranui Road in Waiwera. The first regarded unauthorised removal of vegetation from a significant ecological area, earthworks and damage to archaeological sites. The Environment Court stated that the circumstances in that case, "Could only be described as some of the most serious the Court has seen." The second of the enforcement orders related to unauthorised dwellings.
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> [26] The next factor is interim enforcement orders and [an] enforcement order relating to a property in Fairburn Road, Otahuhu in Auckland regarding unauthorised … earthworks in a coastal management area, including the deposit of material containing asbestos. There was also an abatement notice, interim enforcement orders and an enforcement order in relation to a property in Ormiston Road in Flat Bush, Auckland, regarding unauthorised dwellings and wastewater disposal. There was an enforcement order issued in relation to a property at Mt Albert Road relating to unauthorised dwellings. Another enforcement order relating to a property in Memorial Avenue, Mt Roskill, Auckland, regarding unauthorised dwellings and excessive impermeable surfaces and, finally, an enforcement order relating to a property in Candia Road in Swanson regarding unauthorised dwellings. So far, and to the best of my information, you have not complied with any of the Environment Court's orders.

[14] The Judge then noted that Mr Lau was indebted to the Auckland Council in unpaid costs awards made against him totalling around $379,000 which he had made

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20 At [20].
21 At [21].
22 At [22].
23 At [23].

no attempt to pay. Mr Lau has no registered property interests and is subject to bankruptcy proceedings by both the Inland Revenue Department and Auckland Council.[24] The Judge considered that the offer to pay reparation was late, not tangible and not realistic.[25] In any event, the gravity of the offending was well beyond the imposition of a fine. He said, however, that Mr Lau's plea of guilty entitled him to some allowance but one which the Judge said had "to be so slight as to be negligible", given that the plea was entered just as he was about to sum up to the jury and that Mr Lau had "tried ... just about every trick in the book to delay the trial".[26] The Judge said, however, that his plea showed some acceptance or acknowledgement of responsibility.[27]

[15] Judge Kellar said that sentencing objectives would not be achieved by the imposition of a fine or of a sentence of community work: the offending was flagrant and deliberate for the purpose of achieving what would have been significant financial gains after unsuccessful attempts to remove the trees by legitimate means.[28]

[16] The Judge took a starting point of three months' imprisonment (against a statutory maximum of two years' imprisonment or a fine not exceeding $300,000)[29] and gave a discount of two weeks for the plea of guilty, leaving an end sentence of two months and two weeks' imprisonment.[30] Given Mr Lau's circumstances and the circumstances of his offending, the Judge did not consider that a sentence short of a sentence of imprisonment would meet the necessary objectives.[31]

**Approach on appeal**

[17] An appeal against sentence must be allowed only if the Court is satisfied that there has been an error in the sentence imposed for any reason and that a different sentence should be imposed.[32] A material error requiring correction will be established

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24 At [27].
25 At [28].
26 At [29].
27 At [29].
28 At [30].
29 Resource Management Act, s 339(1)(a).
30 *[R] v Lau*, above n 1, at [32].
31 At [33]–[34].
32 Criminal Procedure Act 2011, s 250.

if the sentence is manifestly excessive or wrong in principle, or if there are exceptional circumstances.[33] An appellate court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles. Whether a sentence is manifestly excessive is to be examined in terms of the sentence given, rather than the process by which the sentence is reached.[34]

**The argument on appeal**

[18] Mr Kashyap for the appellant focused his submissions on an argument that the sentence was wrong in principle and excessive because it was inconsistent with sentences imposed in other prosecutions under the Act for similar offending, relying particularly on those where sentences or penalties other than imprisonment were imposed. They include three tree removal cases referred to by Judge Kellar:

(a) *Queenstown Lakes District Council v Spijkerbosch*[35]

> The three defendants removed a 50-year-old 15–20 m eucalyptus tree from their property. The detrimental effect on the environment was that the tree was the last of its species in the area; its removal resulted in loss of amenity for users of the park which was adjacent to the property; and a resource consent for its removal would have been unlikely to succeed. Two of the defendants, who had assisted the principal offender, were discharged without conviction. On several occasions, the principal offender had been denied permission to remove the tree but he saw an article in a local paper stating, incorrectly, that all tree protections in Arrowtown had been removed. Relying on the article and ignoring specific advice from the relevant local authority, the offender cut down the tree. The Judge regarded it as deliberate and relatively serious. Because the offender did not have the means to pay a fine the Court substituted 180 hours' community work for the financial penalty.

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33 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30]–[31].
34 *Ripia v R* [2011] NZCA 101 at [15].
35 *Queenstown Lakes District Council v Spijkerbosch* DC Queenstown CRI-2010-059-335, 30 July 2010.

(b) *Auckland Council v Andrews Housemovers Ltd*[36]

The offender felled three pōhutukawa trees in the course of relocating a house onto a property. Restorative justice was undertaken and the offender was very remorseful, agreeing to replace the trees at a cost of over $27,000, paying costs of $3,000 to the Council and donating $3,000 to a tree-planting charity. The offender was discharged without conviction.

(c) *Tauranga City Council v Kent*[37]

The offender hired a handyman to remove 11 trees located on a reserve adjoining his property so as to obtain better views from his spa pool. The trees were pōhutukawa and tarata which were approximately 15 m in height. The Court considered the impact on the environment to be significant as the trees were reduced to stumps and it was unclear whether sprouting would be successful. The offender was reckless as to which trees in the reserve were cut down and knew that they were not on his land and were therefore protected, and that resource consent was required to alter them. The Court considered deterrence to be of particular importance and regarded the case as "very high or very serious". A fine of $45,500 was imposed and the offender was ordered to pay $5,000 for the reparation of the trees.

[19] Mr Kashyap also referred to the other cases summarised by Judge Kellar in an annexure to his sentencing notes. We have considered them but they do not assist and we do not need to summarise them here.

**Discussion**

[20] In arguing the appeal, Mr Kashyap faced the difficulty of identifying what realistic alternative sentence to imprisonment should have been imposed.

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[36] *Auckland Council v Andrews Housemovers Ltd* [2016] NZDC 780.
[37] *Tauranga City Council v Kent* DC Tauranga CRI-2012-070-4916, 18 March 2013.

The Probation Officer said that Mr Lau would not consent to an electronically monitored sentence because of child care responsibilities, although Mr Lau claimed at sentencing that his position had been misunderstood. Mr Kashyap suggested to us that a sentence of community work would have been appropriate. There is no doubt that Mr Lau was in no position to pay a fine of any amount.

[21] We accept Mr Kashyap's submission that consistency of sentencing between like cases is an important principle.[38] There is no guideline judgment to assist sentencing in this type of case, however, because the facts are infinitely variable. While sentencing judges should always be mindful of penalties imposed in other cases, the appropriate sentence will be one which takes into account factors such as the maximum penalty; the seriousness of the offending (bearing in mind aggravating and mitigating features); aggravating and mitigating personal factors; and the availability of discounts for guilty pleas, remorse and other matters.

[22] Adopting a conventional approach to the sentencing exercise, Judge Kellar took a starting point of three months' imprisonment. But this was very serious offending of its type and, having regard to the maximum penalty, we consider a somewhat higher starting point could not have been criticised. Although Judge Kellar professed to have allowed a discount for the very late guilty plea which was "so slight as to be negligible", taking two weeks off a sentence of three months' imprisonment amounted, in fact, to allowing a 15 percent discount. That, too, was very generous in the circumstances.

[23] We do not think Mr Lau was a suitable candidate for a community-based sentence such as community or home detention. He has demonstrated throughout a complete disregard for the law and the orders of regulatory authorities, and he has failed to display a genuine acceptance of his responsibility for the offending. Moreover, in considering the statutory obligation to impose the least restrictive sentence possible in the circumstances, we agree with Judge Kellar that alternatives to imprisonment would not adequately meet the sentencing objectives to be applied in this case.[39]

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38 Sentencing Act, s 8(e).
39 *[R] v Lau*, above n 1, at [33].

[24] The facts speak for themselves and Mr Kashyap did not dispute the sentencing Judge's analysis of the aggravating factors summarised in [7]-[9] above. The nature of the environmental destruction involved; the cynical and deliberate nature of the offending, carried out with full knowledge of its unlawfulness; and the absence of any mitigating factors such as genuine remorse, make a community-based sentence insufficient to meet the important principles of denunciation, accountability and personal and general deterrence. In cases such as this, involving deliberate, significant and financially motivated breaches of rules designed to protect the natural environment, anything short of a sentence incorporating some custodial element is unlikely to have the desired salutary effect.

[25] This case was far more serious than the *Spijkerbosch* and *Andrews Housemovers* cases discussed above, and also more serious than the *Kent* case, considering the gravity of the actual offending and the aggravating features of Mr Lau's conduct. The latter includes his apparent intent to profit by the offending and his track record of disdain for environmental rules. Overall, the short sentence of imprisonment was stern but justified.

**Conclusion and result**

[26] A sentence of imprisonment was properly available to the District Court Judge and, in our view, a longer term than that imposed would have been justifiable.

[27] The appeal against sentence is dismissed.

[28] The appellant is to surrender himself to the Registrar at the Auckland District Court (Criminal Counter, Level 1, 65–69 Albert Street) no later than 10.00 am on Friday 18 May 2018 to resume his sentence of imprisonment.

Solicitors:
Crown Law Office, Wellington for Respondent