IN THE COURT OF APPEAL OF NEW ZEALAND

CA706/2015
[2016] NZCA 508

BETWEEN	ASHOR GORGUS Appellant
AND	THE QUEEN Respondent

Hearing: 21 September 2016

Court: Harrison, Brown and Brewer JJ

Counsel: D M Goodlet for Appellant
K S Grau for Respondent

Judgment: 19 October 2016 at 10 am

JUDGMENT OF THE COURT

The application for leave to bring a second appeal is declined.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] Ashor Gorgus applies for leave to appeal against his sentence of imprisonment imposed by Judge N R Dawson in the Auckland District Court following conviction for a range of associated dishonesty and drug offences.[1] The sentence was upheld on appeal to the High Court by Muir J.[2] Mr Gorgus now

1 *R v* Gorgus [2015] NZDC 20428 [Sentencing notes].
2 *Gorgus v Police* [2015] NZHC 3127 [First appeal].

seeks a second appeal in this Court, relying on the ground that a miscarriage of justice might otherwise occur.[3]

Background

[2] Mr Gorgus pleaded guilty in the District Court to three separate sets of offending. The first was in September 2014 when he committed the offence of possession of utensils for methamphetamine.[4] The second was in the Auckland region in October 2014 when he committed the offences of unlawfully taking a motor vehicle, burglary, theft, possession of a utensil for methamphetamine use and offensive behaviour.[5] The third was in the Huntly area in May 2015 when he committed the offences of wilful damage, unlawfully being in an enclosed yard, unlawfully taking a motor vehicle and burglary.[6]

[3] At the time he pleaded guilty Mr Gorgus was aged 29 years; he was sentenced shortly after his thirtieth birthday. He had over 100 previous convictions, many for burglary and other dishonesty offences.

[4] Judge Dawson sentenced Mr Gorgus to a total term of four years and one months' imprisonment.[7] He first considered the Auckland offending, treating the burglary charge as the lead offence. Mr Gorgus had gained entry to a residential property by smashing a window and stole a laptop and jewellery, valued at $1,500 and $800 respectively.[8] He also stole a wallet containing cash of $500 and a cell phone.[9]

[5] The Judge adopted a starting point of two years' imprisonment.[10] He applied an uplift of 18 months to reflect the other Auckland offending and a 15 per cent discount for the guilty pleas. The Judge imposed an end sentence of three years' imprisonment together with a cumulative sentence of one month imprisonment on

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3 Criminal Procedure Act 2011, s 253(3)(b).
4 Sentencing notes, above n 1, at [9].
5 At [5]–[8].
6 At [10]–[12].
7 At [33].
8 At [7].
9 At [6].
10 At [22].

the separate charge of possessing utensils.[11] He then added an extra year for the burglary at Huntly — where Mr Gorgus had broken into a residential address but was disturbed before he could steal anything — and concurrent sentences for the other charges committed there.[12] It was also relevant that Mr Gorgus offended while on bail.[13] Finally, the Judge remitted Mr Gorgus' outstanding fines and reparation.[14]

[6] In the High Court Mr Gorgus raised numerous grounds of appeal against his sentence, principally that the starting point adopted for the Auckland burglary was too high.[15] Muir J carefully considered the leading authorities in this Court and the High Court on burglary sentences.[16] After noting that there was no tariff decision, Muir J concluded that Judge Dawson did not err in fixing a starting point for the Auckland offending of two years imprisonment and applying an uplift of 18 months for the other offending.[17]

[7] Muir J found an error, however, in Judge Dawson's failure to identify a starting point for the lead burglary charge at Huntly.[18] He said that if he was re-sentencing Mr Gorgus he would have adopted a starting point of between 18 months and two years' imprisonment for that offending. On that basis the ultimate sentence imposed would have been higher. Nevertheless, Muir J did not interfere with the end sentence.

Decision

[8] The threshold for granting leave is high.[19] The applicant must identify a reasonably available argument that the lower Courts were in error where he or she relies on the ground of a miscarriage of justice.[20] In support of Mr Gorgus' application for leave to appeal, Ms Goodlet submitted that the threshold for granting leave was satisfied in this case.

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11 At [23] and [28].
12 At [29].
13 At [17].
14 At [34].
15 First appeal, above n 2, at [16].
16 At [34]–[43].
17 At [50]–[52].
18 At [54].
19 *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764; *Hohipa v R* [2015] NZCA 73.
20 *McAllister*, above n 19 at [37].

[9] In particular Ms Goodlet submitted that (a) the sentencing process went awry, causing an incorrect end point sentence; (b) the fundamental cause of the process misfiring was Judge Dawson's adoption of an incorrect and excessive starting point for the Auckland burglary charge and failure to adopt a starting point for the Huntly burglary charge, including a double counting for Mr Gorgus' previous history; and (c) a correct sentencing approach would have been to group the Auckland and Huntly charges together and determine whether concurrent and totality sentences would have resulted in a fairer end-point sentence.

[10] Ms Goodlet's primary focus was on the starting point adopted for the burglary sentences. We cannot identify any error in Judge Dawson's approach or in Muir J's careful endorsement of it. While no two factual situations are the same, Mr Gorgus' Auckland offending bore a close similarity to the facts of *R v Columbus* where this Court approved a base starting point of 12 months for an opportunistic burglary involving goods to a similar value as those taken by Mr Gorgus.[21] An uplift of 12 months was justified on account for Mr Columbus' previous dishonesty offences, including 13 for burglary and another 34 for property related offences.[22] Based on that authority, Judge Dawson did not err in adopting an adjusted starting point for the burglary charge of two years' imprisonment. His approach was also consistent with *Arahanga v R*, where this Court observed that a starting point above 18 months was justified for a burglary of a dwelling house at the relatively minor end of the scale on a range up to two and a half years' imprisonment.[23]

[11] Ms Goodlet cited a number of sentences in the High Court which she submitted mandated a lower starting point. We simply note that, to the extent that the approach adopted by the High Court in those cases might differ from the approach approved in *Columbus* and *Arahanga*, those decisions should not be followed.

[12] We also note that Mr Gorgus was the beneficiary of a relatively generous sentence of 12 months' imprisonment for the Huntly offending, as Muir J noted,

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21 *R v Columbus* [2008] NZCA 192 at [16].
22 At [18].
23 *Arahanga v R* [2012] NZCA 480, [2013] 1 NZLR 189 at [78].

especially given that his offending occurred while on bail. It cannot be said that the process went awry.

[13] Judge Dawson's discrete treatment of the offending at Auckland and Huntly was in accordance with settled sentencing principles. The offending was sufficiently separated by time, place and circumstances to justify separate sentencing consideration, subject of course to applying the totality principle. Cumulative sentences were inevitable and the Judge's approach was orthodox and correct in applying the concurrence, cumulative and totality principles. Moreover, as Muir J found, the end sentence was well within the available range.

[14] We are not satisfied that Mr Gorgus' application reaches the threshold for granting leave to appeal.

Result

[15] The application for leave to bring a second appeal is declined.

Solicitors:
Crown Law Office, Wellington for Respondent