

POLICE

v

DAVID TONORIO

Hearing date: 25 August 2020

Counsel: Ms J Epati for the Crown
Mr N George for the Defendant

Sentence: 25 August 2020

**SENTENCING NOTES
OF THE HONOURABLE JUSTICE DAME JUDITH POTTER**

[01:27:27]

[1] David Tonorio is before the Court for sentence on a number of charges:

- a) One charge of burglary which carries a maximum penalty of 10 years imprisonment;
- b) Three charges of theft, each with a maximum of 5 years imprisonment;
- c) Three charges of wilful damage, again with a maximum of 5 years imprisonment; and
- d) One charge of contempt of Court, where the penalty is \$100 or 6 months imprisonment.

[2] When the offending, which gave rise to these convictions, occurred, Mr Tonorio was on probation and bail following conviction and sentence for three burglaries in September 2018 and conviction following trial by jury on three charges of arson.

[3] He was sentenced by Justice Doherty on 9 August 2019¹ to 8½ years imprisonment on the arson charges. His sentence was upheld by the Court of Appeal very recently on 23rd June 2020².

[4] On 29th July this year³, Chief Justice Williams gave a sentencing indication at the urging of counsel. I will refer further to this decision later in my sentencing.

Facts

[5] It is necessary that I traverse the facts giving rise to these offences to all of which Mr Tonorio has pleaded guilty.

[6] The lead burglary charge arose from events on 13 July 2019 where the defendant with an associate entered the Tex Mart Store in Arorangi and took cash of \$200 from the till and \$1,727 from the safe, together with cigarettes and alcohol with a value of \$2,389, the total amounting to \$4,316. To enter the store they cut the lock with a bolt-cutter.

[7] As to the thefts and wilful damage charges, on the 5 January 2019 at the Roadhouse in Arorangi, a window was broken of a Toyota Jeep which was parked in the yard, by throwing a rock at the passenger window. The backpack inside the Jeep was taken.

[8] The second theft, and the third theft, were both from rental cars an obvious focus being the tourist trade in Rarotonga. On 19th June 2019 the theft took place at the Golf Range Course. The window of a Nissan rental car was smashed and two bags were taken. They contained \$2,200 cash and various items. The total value being close to \$3,000.

¹ *R v Tonorio* [2019] CKHC16; CR 59/2018; (9 August 2019).

² *Tonorio v R* [2020] CKCA, CA2/2019; (23 June 2020).

³ *Police v Tonorio*; CRs 503/19, 37-39/19, 509/19, 560-561/19; (29 July 2020).

[9] On 4th August 2019, at the Raemaru carpark, a Toyota rental car was smashed through the small passenger window and a mobile phone went missing. When Mr Tonorio was confronted about this theft, he denied it but subsequently a google search revealed the change of name on the phone to David Tonorio.

Purposes and Principles

[10] I must take into account the principles and purposes of sentencing in the Sentencing Act 2002 (NZ). Primarily relevant here are deterrence, accountability and importantly the youth of Mr Tonorio, he being now 19, aged 17 to 18 at the time of offending.

Aggravating Factors

[11] The Crown has referred to a number of aggravating factors of the offending. The Tex Mart burglary was committed at the same store to which the offender wilfully set fire in June 2018 and subsequently convicted and sentenced for arson. There was premeditation and planning involved with his two co-offenders in this burglary and significant value of cash and items taken.

[12] In relation to the thefts which the Crown describes as smash and grabs, reference is made to the significant value of the items taken, and that of particular concern is the theft and wilful damage occurred while the very trial was underway when Mr Tonorio was found guilty of three charges of arson.

[13] The Crown notes the youth of the offender but submits that this was not offending that could be attributed to youthful indiscretion. All offences occurred while Mr Tonorio was either subject to a sentence or on bail.

Probation Report

[14] The pre-sentence report notes that Mr Tonorio expressed regret. It recommends a custodial sentence for this offending but that it be served concurrently with the current term of imprisonment.

Mitigating Factors of the offender

[15] As to mitigating factors also referred to in the probation report, are the youth of Mr Tonorio but it cannot be overlooked that he is serving a lengthy prison term for serious offending and must today be sentenced for further serious offending. He is indeed a recidivist offender having something like seven theft and burglary convictions since mid-2018.

Submissions

[16] I have been referred to relevant authorities but most relevant is the sentencing indication given by Chief Justice Williams, which no doubt has been helpful to all concerned, and following which Mr Tonorio entered his guilty pleas.

[17] The Chief Justice having traversed relevant factors gave an indication that an additional sentence in the range of 6 to 12 months imprisonment could be appropriately imposed. The Crown adopts that indication.

[18] Mr George for Mr Tonorio submits that the 8½ year sentence for arson is sufficient to meet the requirement for deterrence and the principle of denunciation; that adding further months to the sentence is totally unnecessary and would do nothing for Mr Tonorio who has a life ahead of him. He seeks a concurrent sentence of 12 months which he notes would be consistent with the recommendation of the pre-sentence report.

[19] In his decision on the sentencing indication Chief Justice Williams noted at paragraph 4 the need for the formulation of a set of rules governing the practice for sentence indications, probably similar to those now in force under the Criminal Procedure Act in New Zealand. I endorse that recommendation.

[20] Sentencing indications can be very helpful but they need to be made on the basis of full information and there needs to be procedures in place if the sentencing Judge finds it necessary to depart from the indication given. That is not a situation which arises in this case.

Sentencing

[21] Chief Justice Williams, at paragraph 11, defined the essential question: What would the sentence have looked like if these additional convictions had been before Justice Doherty when he sentenced for arson? Justice Williams said that a starting point of 11 to 12 years would then have been appropriate, whereas Justice Doherty adopted a start point of 10 years. The Court of Appeal commented that was probably a light starting point but the Court of Appeal would have allowed a greater discount for youth.

[22] It is essential I consider the totality of the offending, and that is referred to at paragraph 21 of Chief Justice Williams' decision. The seriousness of the offending, which must be reflected in the sentence I impose today, persuades me that a concurrent sentence is inappropriate and inadequate.

[23] Nevertheless, bearing in mind the necessity to look at the totality of the offending and the totality of the sentence imposed, I err on the lower side of the indication given by Chief Justice Williams and impose a sentence of 6 months imprisonment to be cumulative on the sentence of 8½ years imposed by Justice Doherty on the 9th August 2019. This results in a total sentence of 9 years imprisonment.

[24] That is the sentence imposed, Mr Tonorio. You may stand down.



Judith Potter, J