IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2023-404-000327
[2023] NZHC 2378

BETWEEN	KARA NEIHANA POMPEY Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 21 August 2023

Appearances: K C Leung for Appellant
J L Gibson for Respondent

Judgment: 30 August 2023

JUDGMENT OF ANDREW J

This judgment was delivered by Justice Andrew
on 30 August 2023 at 2.00 pm
pursuant to r 11.5 of the High Court Rules 2016

Registrar / Deputy Registrar

Date 30.08.23

A. Tila-Muagututia
Deputy Registrar
High Court

Introduction

[1] The appellant, Mr Kara Pompey, pleaded guilty in the Auckland District Court to six charges of burglary.[1] He was sentenced by Judge B A Gibson to six years' imprisonment.[2] He appeals to this Court, contending that the end sentence was manifestly excessive.

[2] Mr Leung, on behalf of Mr Pompey, submits that an end sentence of 19 months' imprisonment or less is appropriate and that the Court should consider imposing a sentence of home detention instead of imprisonment.

[3] There are two principal grounds of appeal:

(a) The starting point was manifestly excessive;

(b) The sentencing Judge failed to place sufficient weight on mitigating factors.

[4] The Police oppose the appeal.

Background facts

[5] Mr Pompey's charges relate to six distinct burglaries at various commercial premises between January and August 2022. Four of the burglaries occurred in Auckland and two in New Plymouth. He managed to flee the scene successfully after the first five burglaries but was caught by Police after the final burglary.

[6] The first burglary, on 5 January 2022, was committed at George Harrison, a high-end clothing store in central Auckland. Mr Pompey and two others went to the store at night after it had closed; they entered the mall in which it was located via the automatic door. Mr Pompey proceeded to throw a large concrete slab through the window of George Harrison, causing it to smash. He entered the store and began taking garments from the racks while his two co-offenders remained at the broken

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1 Crimes Act 1961, s 231(1)(a); maximum penalty 10 years' imprisonment.
2 *Police v Pompey* [2023] NZDC 13238.

window, reaching through it to take garments from the window display. After Mr Pompey had filled his arms with garments, he left the store through the same window. The total value of the property stolen was $25,796.

[7] Mr Pompey returned to the same location in the early hours of 22 January 2022, accompanied by three co-offenders. The automatic door to the mall was locked on this occasion, so one of Mr Pompey's co-offenders threw a medium sized rock through it, shattering the glass. The four offenders then entered the mall and approached the George Harrison store. Both Mr Pompey and one of his co-offenders then threw a rock through the front window of George Harrison, causing it to smash. All four offenders entered the store through this smashed window and uplifted various garments. The total value of the property stolen was $13,350.30.

[8] On 15 May 2022, Mr Pompey was again involved in similar offending. This occurred at a different high-end store in central Auckland, T Galleria by DFS. Two co-offenders smashed a store window and Mr Pompey entered the store. One of Mr Pompey's co-offenders retrieved a shopping trolley and positioned it outside the smashed window. After retrieving a number of garments, Mr Pompey passed them to his co-offenders, who then loaded them into the trolley. He repeated this process a further three times. One co-offender fled the scene with the trolley, while Mr Pompey and the other man each carried a bundle of clothing. The value of the property stolen was $51,035.

[9] Mr Pompey attended the same store on 27 May 2022 with three co-offenders. The facts of the offending are markedly similar to the burglary on 15 May. On this occasion, the stolen items were valued at $81,049, made up of $79,665 from the Moncler section of the store and $1,384 from the Gucci section.

[10] The final two burglaries occurred in New Plymouth. On 29 July 2022, Mr Pompey and one co-offender burgled a jewellery store. Mr Pompey shattered the front window of the store, before reaching through the security screen to smash a display case. He uplifted four watches with a combined value of $2,324. On 8 August 2022, he went to a different jewellery store and took in excess of $11,000 of rings and necklaces. He entered the store alone after smashing the front window, and after

Police arrived, attempted to smash his way out of the locked fire escape. He was then apprehended by Police.

[11] In explanation, Mr Pompey stated "it is what it is, I am just trying to keep up with the boys up North".

[12] The total value of the property stolen across the four Auckland burglaries was $171,230.30, plus $13,324 in New Plymouth. These figures do not include the damage caused to the targeted stores.

The sentence imposed

[13] After outlining the circumstances of each burglary, Judge Gibson referred to Mr Pompey's explanation of his offending, as stated at [11] above, considering that it showed a "cavalier and arrogant attitude that permeates through all of [his] offending".[3] The Judge explained that "trying to keep up with the boys up North" was reference to gang activity involving inner city burglaries being shown on television at that time.[4]

[14] Judge Gibson referred to Mr Pompey's extensive prior convictions, considering that he had displayed disregard for conditions of sentence by reoffending while serving community-based sentences.[5] He also noted that Mr Pompey's risk of reoffending had been assessed as high by the PAC report writer and that he had been a prospect of the Killer Beez gang. Judge Gibson did not consider Mr Pompey's claims that he wanted to distance himself from the gang, nor his apology, to be genuine, noting that if he was truly remorseful, he would not have acquired such a high number of convictions.[6] The Judge stated:

> [14] As the report notes, at this time a sentence of imprisonment is required to recognise your recidivist offending behaviour and your inability to make amends by payment of reparation, which of course plainly is out of the question in terms of the amount of property that was taken by you.

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3 *Police v Pompey*, above n 2, at [9].
4 *Police v Pompey*, above n 2, at [11].
5 *Police v Pompey*, above n 2, at [12].
6 *Police v Pompey*, above n 2, at [13].

[15] In addressing the starting point for Mr Pompey's offending, Judge Gibson referred to various cases, including *Ormsby v R*, where a seven-year starting point was adopted.[7] He noted that in that case however, the offending involved residential burglaries, which are "generally treated more harshly than burglaries of commercial premises."[8] Mr Ormsby also had 52 previous convictions.

[16] Judge Gibson also referred to the case *R v Nguyen*, where the defendant was the leader of a burglary ring comprised of young people which targeted commercial premises.[9] Judge Gibson accepted that the offending here was spree offending in terms of the analysis in *Senior v R*.[10] He also referred to the guidance given by *R v Andrian* in terms of the starting point.[11]

[17] Judge Gibson considered that the following culpability factors were present in Mr Pompey's offending: multiple high-value premises were targeted (some more than once), the burglaries were planned and premeditated, the losses were substantial, and Mr Pompey was not acting alone and, in fact, appeared to be the leader.[12] He emphasised that the impact of such burglaries are far-reaching, resulting in increased insurance premiums, the cost of which would be passed onto consumers, and angst and concern within the community.[13]

[18] As a result, Judge Gibson considered the starting point for the Auckland burglaries to be seven years' imprisonment, with an uplift of one year to account for the New Plymouth burglaries.[14] He imposed a further uplift of six months to reflect Mr Pompey's five previous burglary convictions and other prior dishonesty offending. This resulted in an overall starting point of eight and a half years' imprisonment.[15] He then gave a 20 per cent discount for Mr Pompey's guilty pleas, noting that he had

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7 *Ormsby v R* [2017] NZHC 2508.
8 *Police v Pompey,* above n 2, at [18].
9 *R v Nguyen* CA110/01, 2 July 2001.
10 *Senior v R* (2000) 18 CRNZ 340 (HC).
11 *R v Andrian* (1996) 13 CRNZ 449 (CA).
12 *Police v Pompey,* above n 2, at [21] and [19].
13 *Police v Pompey*, above n 2, at [19].
14 *Police v Pompey*, above n 2, at [23].
15 In the District Court, the Police contended for a starting point of four years' imprisonment. That involved 24 months with respect to the Auckland charges, 12 months for the New Plymouth charges and a further uplift of 12 months for the fact that the offending occurred while subject to bail conditions and the defendant's previous burglary convictions.

pleaded guilty relatively quickly but not at the first reasonably opportunity. He also allowed eight per cent for s 27 cultural factors (a total discount of approximately 28 per cent).[16] Although Judge Gibson considered that Mr Pompey had essentially criminalised himself by his associations at school and afterwards, this discount was warranted by other factors set out in the s 27 report.

[19] The end sentence imposed was therefore six years' imprisonment, i.e. six years for the Auckland burglaries and one year concurrent imprisonment for the New Plymouth burglaries. Judge Gibson also noted that he had thought about imposing a minimum period of imprisonment (MPI) but decided not to do so "by a very narrow margin".[17]

Legal principles

[20] Mr Pompey has an appeal as of right under s 244 of the Criminal Procedure Act 2011.[18]

[21] Section 250 of the CPA sets out how a court is to determine a sentence appeal. An appeal must be allowed if the Court is satisfied that there is an error in the imposed sentence and that a different sentence should be imposed.

[22] The Court of Appeal in *Palmer v R* outlined the position with respect to sentence appeals, stating that:[19]

> [17] ... the standard of appellate review in sentence appeals ... requires that the appellant show a material error was made and satisfy the appellate court that a different sentence ought to be imposed. Sentencing is not a science and an appellate court will not ordinarily interfere unless the end sentence was outside the range available to the sentencing judge. For that reason it is not an error to describe sentencing decisions as discretionary, so long as it is clear that "discretion" means only that the sentencer enjoys an appropriate margin of appreciation.

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16 *Police v Pompey*, above n 2, at [24].
17 *Police v Pompey*, above n 2, at [26].
18 CPA.
19 *Palmer v R* [2016] NZCA 541 at [17] (footnotes omitted).

[23] In *Tutakangahau v R*, the Court of Appeal said that the concept of "manifestly excessive" continues to apply to appeals against sentence.[20] The Court held that the appellate court's focus is on the sentence imposed rather than the process by which it was reached.[21] A Judge on appeal should not intervene where the sentence imposed was within the range that could be properly justified by accepted sentencing principles.[22]

Analysis and decision

[24] There are two critical issues for determination: whether the starting point adopted by the Judge was too high and whether he failed to provide an adequate discount for mitigating factors.

Issue (a) – the starting point

[25] I begin by noting that there is no tariff decision for burglary, as correctly recognised by Judge Gibson.[23] A helpful analysis was undertaken by Muir J in *Gorgus v Police* of the relevant factors set out in earlier decisions.[24] I, as Osborne J did in *Lenihan v R*,[25] respectfully adopt part of this analysis below:[26]

> [34] There is no tariff decision which governs sentencing for burglary offending. In *Senior v Police*, which predates the sentencing methodology laid down in *Hessell v R* and *R v Taueki*, the Full Bench of the High Court identified factors which had historically been regarded as aggravating in burglary offending, including behaviour which involves actual danger of confrontation with occupiers, behaviour which makes a victim feel targeted, wanton destruction of property, theft of high value or sentimental items, sophisticated planning, and offending while on bail, parole, or in close proximity to other burglary charges.
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> [35] In *R v Nguyen* the Court of Appeal drew on the factors identified in *R v Mako* (the aggravated robbery tariff case) in assessing the seriousness of burglary charges. It considered that the factors which were relevant to the criminality of the offending included the degree of planning and sophistication in the offending, the nature of the premises entered, the nature and value of property stolen, damage done, the impact and potential impact upon occupants

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20 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [35].
21 *Tutakangahau v R*, above n 20, at [36].
22 *Tutakangahau v R*, above n 20, at [36], citing *Tutakangahau v R* [2014] NZHC 556 at [10].
23 *Police v Pompey,* above n 2, at [17].
24 *Gorgus v Police* [2015] NZHC 3127.
25 *Lenihan v R* [2015] NZHC 3127 at [26].
26 *Gorgus v Police,* above n 24, at [34]–[36] (footnotes omitted).

or owners of property, and the extent of the offending where multiple burglaries were involved.

[36] In *Arahanga v R*, the Court of Appeal stated that burglary of a domestic residence is a significantly aggravating feature at sentencing due to the heightened risk of confrontation with the occupants. The Court also stated that dwelling house burglaries at the relatively minor end of the scale tend to attract starting points of between 18 months' to two and a half years' imprisonment.

[26] In *Lenihan v R,* Osborne J proposed an alternative approach, putting into table form a range of factors identified in the case law divided as between aggravating and more or less neutral:[27]

(a) Nature of offending

Planned/Sophisticated	Opportunistic/Basic
Vandalism/Wantonness	Care in entry/nil damage
High value theft/ loss of sentimental items	Low value theft/ loss of non-sentimental items
Residential premises	Business premises
Actual danger to occupants	No confrontation
High risk of potential harm — Residence at night — Business during work hours — Property stolen eg Class A drugs	Low risk of potential harm — Residence at day — Business outside work hours — Stolen property unlikely to cause harm
Targeted	Random/untargeted
Premises where security is of public importance (eg Police Stations, Parliament)	Premises of no particular security significance

(b) Circumstances of offender

Recidivist offending	First-time offending
Bail offending	Offending while not subject to restrictions
Spree offending	Isolated offending

[27] Osborne J further held in *Lenihan v R* that a binary distinction between burglaries of commercial buildings and those of residential premises is likely to be unhelpful. While the Court of Appeal recognised in *Arahanga* that burglary of a domestic residence is a significant aggravating factor, a proper analysis flows from a

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27 *Lenihan v R,* above n 25, at [27].

consideration of all aggravating (and mitigating) factors relevant to gravity and not through any presumption arising from one particular feature such as the nature of the premises entered.[28]

[28] The culpability factors identified in *R v Nguyen* and the aggravating factors set out in the table above from *Lenihan v R* significantly overlap. I consider the most relevant features of Mr Pompey's offending to be the following:

(a) The degree of planning and premeditation: Mr Pompey and his co-offenders deliberately targeted high-end stores with high-value goods. They followed similar offending patterns in each burglary, working as a team to maximise the amount and value of goods taken.

(b) The value of the goods stolen: Mr Pompey and his co-offenders stole over $170,000 worth of goods in the four Auckland burglaries, plus over $13,000 in the New Plymouth ones. This has flow on effects to the business owners and the community, as referred to by Judge Gibson in the sentencing notes.[29]

(c) The damage done: Mr Pompey always operated at night and forcibly entered each address, smashing windows and display cabinets, rendering each business inoperable for a period of time.

[29] These factors were appropriately referred to by Judge Gibson; he did not err in identifying the culpability factors. However, after considering the relevant cases, including *Ormsby v R*, *R v Nguyen* and *R v Andrian* (as referred to by Judge Gibson), as well as others, I find that the starting point imposed for Mr Pompey's offending, namely a total of eight and a half years' imprisonment (including uplifts) was too high.

[30] I agree with the submission of Mr Leung that Mr Pompey's offending is less serious than the offending in *Ormsby v R*, where this Court did not disturb a starting point of seven years' imprisonment. In that case, Mr Ormsby was convicted of 10

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28 *Lenihan v R,* above n 25, at [28].
29 *Police v Pompey,* above n 2, at [19].

charges of burglary involving residential properties, one of which involved a confrontation with an owner.[30] These are aggravating features were not present in Mr Pompey's offending. Furthermore, Mr Ormsby had spent some 25 years out of the previous 27 years in prison for an extensive history of criminal offending, mostly involving burglary and receiving stolen property. Mr Pompey does not have a comparable criminal record (five previous District Court convictions for burglary). Despite this, some recognition must be given to the fact that Mr Pompey's offending involved a much higher total property value than in *Ormsby v R*, where a total value of approximately $15,000 was taken.

[31] As recognised by Judge Gibson, the starting point must be lower than that imposed in *R v Nguyen*.[31] In that case, there were 15 charges of burglary, a very high degree of sophistication and a higher monetary value (in excess of $400,000). The appeal was dismissed because the final sentence was in range. However, the Court of Appeal considered that an appropriate starting point would be no higher than eight years' imprisonment,[32] as opposed to the nine years imposed by the sentencing Judge.

[32] I find the *Sullivan v R* and *R v Burnie* decisions to be the most relevant.[33] In *Sullivan v R*, a starting point of six years' imprisonment was upheld in relation to a total of 16 charges, seven of which were burglary charges relating to commercial premises (the other charges included three involving unlawful possession of firearms and ammunition and three of unlawful use of motor vehicles). The aggravating factors of the burglary offending identified by the Court of Appeal bear similarities to the present case: the value of the goods taken in the burglary offending was significant (totalling $240,000), specific commercial premises were targeted, there was wanton damage inflicted during some of the burglaries, and the offending had considerable impact on the victims.[34]

[33] In *R v Burnie*, the Court of Appeal did not disturb the sentencing Judge's starting point of eight years' imprisonment for eight burglary charges and ten other

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30 See *Ormsby v R*, above n **Error! Bookmark not defined.**, at [6].
31 *R v Nguyen*, above n 9.
32 *R v Nguyen*, above n 9, at [25].
33 *Sullivan v R* [2016] NZCA 100; *R v Burnie* [2007] NZCA 54.
34 *Sullivan v R*, above n 333, at [16].

charges, including aggravated assault, assault with a weapon and various driving-related offences. In that case the offending was aggravated as it involved predatory and opportunistic burglaries of vulnerable elderly people and also involved the assault of two occupants.[35] Mr Pompey's offending is significantly less serious in this case, and he is not being sentenced for other non-burglary offences.

[34] Having regard to these cases and the aggravating features of Mr Pompey's offending, I find that the overall starting point, including both the Auckland and New Plymouth charges, should be six years' imprisonment. That includes a six-month uplift, as adopted by Judge Gibson, to reflect Mr Pompey's prior offending, namely five burglary convictions and other dishonesty offending. I note also that two of the Auckland burglaries were committed during the time that Mr Pompey was subject to an intensive supervision sentence imposed for a prior burglary conviction.

[35] I therefore conclude that the starting point imposed by the sentencing Judge of eight and a half years' imprisonment was manifestly excessive. The appropriate overall starting point was six years' imprisonment.

Issue (b) – discount for mitigating factors

[36] Mr Leung submits that Mr Pompey pleaded guilty at his earliest opportunity; he argues that any delays were solely due to disclosure and/or representation issues as a result of the number of charges and the fact that the charges are spread across New Plymouth and Auckland.

[37] Judge Gibson gave a substantial discount for the guilty pleas, namely 20 per cent. I find that there was no error in that approach.

[38] Mr Leung further submits that the eight per cent discount allowed for "other matters" in the s 27 report was inadequate. The Supreme Court in *Berkland v R* has recently provided analysis on when background factors of an offender, referred to by

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35 *R v Burnie*, above n 33, at [22].

the Court as "section 27 information" are required to be taken into account.[36] The Court stated:[37]

> [108] Where it can be established that background was an operative or proximate cause of the offending it is likely to be a potent sentencing factor.

[39] The s 27 report outlines Mr Pompey's somewhat transient upbringing, before his family settled in Auckland. It is when he attended high school in Auckland that Mr Pompey began mixing with the wrong crowd, beginning the life trajectory he now finds himself on. The report describes him leaving school early and following his brother's footsteps into a life of crime. It further notes that Mr Pompey had discussed an association with the Killer Beez gang, though it is unclear whether this is a continuing affiliation. The report also refers to some drug and alcohol use by Mr Pompey, including a methamphetamine addiction, though does not go into any specific detail on this or how it is linked to his offending.

[40] I further find that there was no error in the approach adopted by Judge Gibson of giving an eight per cent discount for matters addressed in the s 27 report. Like Judge Gibson, I note that the report is of a general nature and it is difficult to discern any real proximate link between Mr Pompey's background and his present offending; the report is not particularly helpful.

[41] I reject Mr Leung's submission that further discount should be available for Mr Pompey's remorse. As set out in the PAC Report, Mr Pompey's risk of reoffending is high, and he has continued to offend while serving community-based sentences. This shows a disregard for Court-imposed conditions, as well as a lack of remorse. Some of Mr Pompey's current charges were, as I have noted, committed while subject to a sentence of intensive supervision.

[42] I accept that Mr Pompey is young, only 25 years old, and is now the father of a young baby. I also acknowledge that having spent some time in custody he may have had the chance to reflect on his offending and now have some remorse. That is a positive development. However, those factors do not warrant any further discount.

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36 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [108].
37 *Berkland v R*, above n 36, at [108].

[43] I find that Judge Gibson did not err in the discounts he gave for mitigating factors.

Conclusion

[44] The appeal is allowed. I find that a starting point of six years' imprisonment is appropriate. Taken together with total discounts of 28 per cent, this results in an end sentence of four years and four months' imprisonment.

[45] This end sentence is not within the range in which the sentence of imprisonment could be commuted to one of home detention, therefore I do not need to consider whether a non-custodial sentence would be appropriate.[38]

[46] Mr Pompey's sentence of six years' imprisonment is quashed and replaced with one of four years and four months' imprisonment.

[47] Provision will be made for the time Mr Pompey has already served in prison in terms of future availability for parole, to be assessed by Corrections.

Andrew J

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38 Sentencing Act 2002, s 15A.