IN THE COURT OF APPEAL OF NEW ZEALAND

CA58/2008
CA716/2009
CA398/2010
[2011] NZCA 503

BETWEEN	RONALD VAN WAKEREN Appellant
AND	THE QUEEN Respondent

Hearing: 30 August 2011

Court: Stevens, Ronald Young and Venning JJ

Counsel: G C Gotlieb and J D Pennick for Appellant
D A Bell and B D Tantrum for Respondent

Judgment: 3 October 2011 at 11.00 am

JUDGMENT OF THE COURT

A The appeal against conviction on the two money laundering counts is allowed. The convictions are quashed.

B The appeal against the total sentence of 13 years and three months imprisonment is allowed. We impose instead a total sentence of 12 years and three months imprisonment as follows:

(i) the sentence of six years imprisonment relating to the burglary of the National Army Museum is quashed and instead a sentence of five years imprisonment is imposed;

(ii) all other sentences are confirmed including their cumulative and concurrent effect.

C The minimum period of imprisonment of seven years imprisonment is quashed.

D We impose a total minimum period of imprisonment of six years imprisonment in the following way:

(i) a minimum period of imprisonment of three years and four months in relation to the five year sentence of imprisonment on the charge of burglary with respect to the National Army Museum, cumulative on;

(ii) a minimum period of imprisonment of two years and eight months imprisonment with respect to the four year sentence of imprisonment on the Operation Kea and Operation Prince (Part 1) charges.

REASONS OF THE COURT

(Given by Ronald Young J)

Introduction

[1] Arising from his convictions for over 70 offences committed between 2003 and 2007, Mr Van Wakeren was sentenced to a total of 13 years and three months imprisonment. On 1 February 2008 Judge Gittos sentenced the appellant to two years and three months imprisonment[1] and on 22 October 2009 Judge Hubble sentenced the appellant to a cumulative 11 years imprisonment.[2] He appeals against conviction on the two money laundering counts, which the Crown concedes. Otherwise, he says, some sentences which make up his total sentence are individually manifestly excessive and that the overall sentence failed properly to take into account the totality principle and, therefore, is manifestly excessive. Finally, he says that Judge Hubble in the District Court did not have jurisdiction to impose a minimum period of imprisonment (MPI) of seven years.

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1 *NZ Police v Van Wakeren* DC Auckland CRI-2004-004-21409, 1 February 2008.
2 *R v Van Wakeren* DC Auckland CRI-2006-114-9486, 22 October 2009.

[2] The Crown response to the sentence appeal is:

(a) with respect to the charge of burglary relating to the theft of medals from the National Army Museum at Waiouru there is justification for a further deduction from the appellant's start sentence;

(b) they accept that the Judge could not have imposed a minimum period of imprisonment of seven years but seek that alternative appropriate minimum periods of imprisonment be imposed on individual sentences which are cumulative;

(c) otherwise they oppose the sentence appeals.

Conviction appeal

[3] Mr Marsh, Mr Kapa and the appellant were co-accused and originally all convicted of burglary and money laundering offences arising from a police operation known as Operation Pokie. In *Marsh v R* this Court considered the conviction of the appellant's co-offenders, Mr Marsh and Mr Kapa, on the money laundering counts.[3]

[4] There, the Court said:

> [66] We return to the present case. The Crown led evidence that established a number of payments by the appellants into their personal bank accounts of substantial sums of money (sometimes consisting entirely of coins and at other times of unknown denominations) on dates that were proximate to preceding burglaries. It was therefore open to the jury to conclude that the appellants were thereby dealing in the proceeds of the burglaries.
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> [67] But the Crown was bound to go further and to show beyond reasonable doubt that the purpose of the bank deposits was that of concealment. It was not sufficient to show that the proceeds had been dealt with in a way which happened to involve concealment (in the sense for example that the bags of coins were removed from the appellant's house or car in order that they might be deposited in the bank and thereby taken beyond the reach of a potential search warrant).

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3 *Marsh v R* [2010] NZCA 130.

> [68] The Crown was obliged to establish the concealment was the very purpose of the making of the deposits. But at trial, the Crown relied simply on the deposits themselves. No other concealment was identified. We were told from the bar (without objection from Mr Raftery) that the appellants simply took the cash (including on occasion heavy bags of coins) into a geographically convenient bank branch, and there deposited the sums concerned into their existing bank accounts, the intention being to meet ordinary living expenses and to "pay the bills" as Mr Marsh put it.
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> [69] Although these deposits no doubt constituted a "dealing" for the purposes of s 243, the purpose of concealment was in our view absent. Instead, the appellants' purpose appears to have been to facilitate the subsequent use of the funds.
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> [70] We consider therefore that there was no evidence of "concealment" for the purpose of s 243(4), and that the money laundering counts ought not to have been left to the jury. It follows that the appeals against the money laundering convictions must be allowed.

[5] The Crown accepts this principle applies to the evidence against the appellant on the two charges of money laundering of which he was convicted. We agree. We quash his conviction for the reasons identified by this Court in *Marsh* on the two offences.

[6] We note the appellant was given a concurrent sentence with regard to this offending. The appellant submits, however, the associated sentence for burglaries arising from Operation Pokie should be reduced to reflect this acquittal. We consider that submission in the sentence appeal.

Sentence appeal

[7] The appellant's convictions and sentencing arose from seven different police operations. It is convenient to use the police terminology involving particular operations to identify the grouping of convictions and sentencing of the appellant and the appeal grounds.

[8] The appellant's sentence of 13 years and three months imprisonment was made up in this way:

(a) Operation Kea (five charges of dishonestly using a document for a pecuniary advantage, 12 charges of using an altered document with

intent to deceive) and Operation Prince (Part 1) (three charges of accessing a computer system for a dishonest purpose and seven of using an altered document with intent to deceive, alongside 12 further counts of the latter crime) – four years imprisonment on each set of offending concurrent with each other but cumulative on;[4]

(b) Operation Post Office Box (forgery) – a sentence of two years and three months imprisonment, cumulative on;

(c) Operation Pokie (two charges of burglary and two charges of money laundering) – a sentence of one year imprisonment cumulative on;[5]

(d) Operation Valour (burglary) – six years imprisonment concurrent with;[6]

(e) Operation IRD (three charges of dishonestly using a document for pecuniary advantage and 22 of accessing a computer system for dishonest purposes) – two years imprisonment concurrent with;[7]

(f) Operation Prince (Part 2) (three counts of accessing a computer system for dishonest purposes and six counts of using an altered document with intent to deceive) – four years and eight months imprisonment.[8]

[9] First, we consider the facts relating to each set of offending.

Operation Kea and Operation Prince (Part 1 and Part 2)

[10] Operation Kea involved mortgage frauds between October 2004 and September 2005. The appellant was the "mastermind" behind this scheme. The

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4 *R v Van Wakeren* DC Auckland CRI-2006-114-9486, 22 October 2009 at [51]–[52].
5 At [54].
6 At [58].
7 At [53].
8 *R v Kapa* DC Auckland CRI-2008-004-5302, 4 June 2010 at [97].

legitimate personal details of a number of persons were obtained. Associates of the appellant then used this "stolen" information to carry out a number of fraudulent transactions under the appellant's directions. As a result bank accounts were opened and loans fraudulently registered as mortgages against individual properties. The money obtained from the mortgage advances was then transferred to these false accounts in other banks and the cash then withdrawn. There were five major frauds involving a loss of approximately $882,000 to various banks.

[11] In Operation Prince (Part 1 and Part 2), the appellant was convicted of charges relating to his actions in late 2006 and 2007 together with two co-offenders, Mr Kapa and Ms Malam, relating to a textile company that employed Ms Malam.

[12] The appellant pleaded guilty to part of the offending (Operation Prince, Part 1) and was sentenced in October 2009 by Judge Hubble. He elected trial by jury on the other matters but shortly before trial he pleaded guilty to nine further counts. He was subsequently sentenced by Judge Joyce QC on 4 June 2010 to four years, eight months imprisonment,[9] concurrent with his then existing sentences of 13 years and three months imprisonment.

[13] The offending relating to Operation Prince began with the appellant providing false identity documents to Mr Kapa and Ms Malam to open bank accounts with Kiwibank. Mr Kapa and Ms Malam then went to her place of employment and copied passwords to the company's computer system.

[14] Later, they returned to the company premises and after accessing the company's computer system transferred $161,427.83 to one of the false accounts. They returned the next evening and transferred $133,212.36 and then $155,743.81. When for a third time they attempted to access the company's computer system, but failed, they severed the company's fibre optic cables to delay detection. Before the theft was discovered and the false accounts frozen, the appellant and his co-offenders had transferred $160,000 overseas and had withdrawn $5,000 in cash.

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9 *R v Kapa* DC Auckland CRI-2008-004-5302, 4 June 2010.

[15] The second part of the Operation Prince offending relating to the same textile company continued with the opening of further false bank accounts. Mr Kapa and Ms Malam again entered the textile company premises. They stole $10,000 in cash, the company deposit book and other company information. Pursuant to the appellant's instructions an EFTPOS machine was then purchased using a false name. The appellant then used the EFTPOS machine for a number of transactions using the credit card numbers stolen from the textile company. Approximately $99,000 was withdrawn in cash in this way.

[16] Finally, the textile company was again broken into and further customer credit card details obtained. Another EFTPOS machine was purchased and used to obtain a further $27,027.78. The total loss to the victims exceeded $100,000.

Operation Post Office Box

[17] Judge Gittos sentenced the appellant to two years and three months imprisonment with respect to this offending in the District Court in February 2008. This was the first sentencing of this group of offending. The appellant had pleaded guilty to one charge of forgery. The forgery arose from the false opening of a post office box in October 2003 in the name of the complainants.

[18] As the Judge, at sentencing noted, at [4]:

> Others associated with you were impersonating Mr Mann [the complainant] with the object of falsely completing a loan application and obtaining funds on a mortgage, which was to be falsely raised against Mr Mann's property without his knowledge.

Operation Pokie

[19] The appellant, together with Mr Kapa and Mr Marsh, burgled a number of premises which had pokie machines and stole the money in the machines. After the second burglary the appellant was sentenced to prison. Upon his release some months later he began offending, again committing a further similar burglary to steal money from pokie machines. In the two burglaries for the which the appellant was

convicted following trial by jury about $24,000 was taken and considerable damage caused to the premises housing the pokie machines.

Operation Valour

[20] The appellant and Mr Kapa planned to break into the National Army Museum and steal valour war medals displayed there. On the evening of 1 December 2007 they drove from Auckland to Wairouru. When they entered the Museum in the early hours of 2 December by smashing a window in a door and opening a push bar on the door they activated the alarm. They went straight to the Valour Alcove where medals of significant historic value were kept. They smashed the display cases and stole 96 medals with an estimated value of over $5 million. The medals included Victoria Crosses, George Crosses and Albert Medals. Also stolen was the Victoria Cross with a Bar awarded to Charles Upham in World War II.

[21] Two rewards, one of $200,000 and another of $100,000, were offered for the return of the medals. An Auckland lawyer returned the medals to the police in January 2008. The circumstances in which the lawyer came into possession of the medals was not then known to the police. We were told by counsel for the respondent that police later learned that the return of the medals was a collaborative exercise between the appellant and Mr Kapa in respect of which they shared the reward of $200,000. Although the appellant received his half of the reward, he later arranged for its return.

Operation IRD

[22] This offending involved fraudulently obtaining GST reimbursement from the IRD. The offending occurred in 2007. The appellant incorporated 106 companies using the names of 22 people as shareholders and directors of the companies. The 22 people were unaware their names had been used in this way. The appellant obtained IRD numbers for the companies and ultimately was able to make false GST returns to IRD. GST refunds totalling over $29,000 were then paid to bank accounts set up for that purpose. A further unsuccessful attempt was made to obtain over $21,000 in GST refunds.

This appeal

[23] The main challenge by the appellant is to the appropriateness of the sentence in Operation Valour together with challenges to some individual sentences and the overall sentence of 13 years and three months imprisonment, and to the minimum period of imprisonment.

[24] We turn, therefore, to the appellant's challenge to the Operation Valour sentence. The appellant says:

(a) the starting point of nine years imprisonment was artificially inflated because the police charged the appellant with burglary rather than the more appropriate charge of theft;

(b) the Judge inappropriately applied precedent decisions;

(c) the Judge did not give a sufficient discount for mitigating factors:

(i) the discount for the return of the medals and the reward money was inadequate; and

(ii) the discount for the guilty plea and remorse was inadequate;

(d) the Judge misapprehended ss 8(c) and 8(d) of the Sentencing Act 2002 in setting the start point of nine years imprisonment and, in any event, insufficient reasons were given for the starting sentence of nine years;[10]

(e) the Judge should not have taken into account the victim impact statement of Colonel Seymour; and

(f) the Judge wrongly took into account the claim the appellant had been involved in previous criminal offending relating to: the theft of

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[10] Sentencing Act 2002, s 31.

poems by Colin McCahon, an ancient bible and a Goldie painting; that he had gang affiliations; and he had threatened to destroy the medals.

Maximum penalty artificially inflated

[25] The appellant submits that the police artificially inflated the maximum penalty for this offending by unfairly charging the appellant with burglary (with a maximum penalty of ten years imprisonment) rather than theft (with a maximum penalty of seven years imprisonment).

[26] The appellant's argument is that because the theft of the medals substantially overtook the seriousness of the burglary, then the proper course was to charge both burglary and theft, with the theft charge being the lead charge at sentencing. Thus, the police artificially inflated the maximum penalty and thereby the start sentence available to the Judge.

[27] We reject this approach. The appellant pleaded guilty to burglary. The crime committed clearly was burglary. The fact that the theft of the medals involved property of substantial value and importance does not change that fundamental point. We reject this submission.

Precedent decisions incorrectly applied

[28] The appellant's case was that Judge Hubble's reliance on cases such as *R v Genovese*[11] and *R v McEwen*[12] was wrong and inappropriately influential in determining the nine year starting point in relation to the burglary of the National Army Museum.

[29] The appellant submits that *Genovese* was a much more serious case involving aggravated robbery. The appellant accepts that there are similarities between this

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11 *R v Genovese* HC Auckland T982633, 24 September 1999.
12 *R v McEwen* CA459/00, 8 March 2001.

case and *McEwen*, but says the facts in *McEwen* were worse because the national treasure stolen there was never recovered.

[30] For reasons, which we will give when we assess the totality of the appellant's offending in this case, we are satisfied that the Judge's starting point of nine years imprisonment was correct.

[31] In the circumstances, therefore, we do not consider that the Judge incorrectly applied relevant authorities.

Insufficient discount given for mitigating factors

[32] The Judge gave a reduction of 33 per cent for the appellant's early guilty plea, the return of the medals and the reward money, and remorse. The appellant's case is that a greater overall discount should have been given for these three factors.

[33] As to the discount the Judge said:[13]

> … but you are of course entitled to a substantial deduction on that sentence [the start sentence] for your early guilty plea, the fact that you have returned the medals and the fact that you were stood up in Court and indicated your remorse and that you have returned the ransom. In my judgment it is appropriate to reduce an eight to nine year start point by three years and I find that six years is the appropriate term of imprisonment on that particular charge.

[34] As to the appellant's guilty plea, it was not entered at the earliest possible time. It was entered 11 months after the original charge was laid. The appellant had appeared in court on a number of occasions during that 11 month period.

[35] It seems that the appellant indicated to the police that he wished to plead guilty about a month before his ultimate plea of guilty. A deduction in the region of 20 per cent for the appellant's guilty plea made well after his original appearance but before committal proceedings would have adequately met the mitigation inherent in the timing of the plea.

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[13] At [58].

[36] The return of the medals also justified a reduction in sentence. However, that occurred in the context of the payment of a reward. Counsel for the appellant submitted to this Court that the appellant had not sought any reward. He said that he had not instructed his then counsel to seek a reward and the fact that his counsel had done so was not his decision and not one which he (the appellant) should be punished for.

[37] The Crown in their submissions filed before this hearing made it clear that if the appellant's case was that he had not sought a reward for the return of the medals and that this had been done by his counsel without instructions then he would need to provide a waiver of privilege and his previous counsel should then have the opportunity of responding to the appellant's claim.

[38] Mr Gotlieb before us accepted that this was the appropriate process and that it had not been undertaken in this case. However, he indicated that Mr Van Wakeren was prepared now to provide a waiver and an adjournment of the appeal would, therefore, be necessary. This offer was confirmed by Mr Gotlieb in his supplementary memorandum concerning disputed facts filed after the hearing. In this memorandum, counsel referred to Mr Van Wakeren's affidavit in which he deposed that he had no involvement in the negotiations and events leading up to the return of the medals or the obtainment of ransom money. The ransom was negotiated without his knowledge and Mr Van Wakeren had no interest in receiving any money for the medals.

[39] We do not think a further delay is necessary in the circumstances. We take the view that if the appellant had sought a reward for the return of the medals he had stolen then that would be an aggravating feature of his offending. The Judge did not take into account that the appellant had sought a reward as an aggravating feature of his sentencing.

[40] If, as the appellant claims, he had not sought the reward but simply returned the reward money then such a return would be a neutral factor at sentencing. The return of part of the reward could not be in mitigation, given that it was no more than the absence of an aggravating feature. Generously in this case the Judge treated the

return of the reward as a mitigating factor. The appellant could not hope to improve on this position at any disputed facts hearing regarding the reward.

[41] As to remorse, the appellant says that his remorse should have been reflected in a reduction of sentence. He says his remorse is illustrated by his willingness to co-operate with the police, his return of the reward money, his assistance in returning the medals and finally, his early guilty plea. The Judge accepted that there was remorse. Within the 33 per cent discount was an allowance for remorse. We do not consider that any further allowance could be justified for remorse.

Improper application of ss 8(c) and (d) of the Sentencing Act 2002 and failure to give reasons

[42] Sections 8(c) and (d) of the Sentencing Act provide as follows:

> **8 Principles of sentencing or otherwise dealing with offenders**
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> In sentencing or otherwise dealing with an offender the court—
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> ...
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> (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
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> (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

[43] As to this the Judge said:

> [57] Bearing in mind what we have heard today from the victims, the fact that these medals did have such a part in the heart of New Zealanders it is hard to escape that s 8(c) and (d) of the Sentencing Act would apply namely that is that this is within the most serious offending in its brackets.

[44] The appellant says that the Judge misapprehended the function of s 8(d) as giving guidance for the fixing of a starting point rather than a final sentence.

[45] This hardly assists the appellant. The Judge was simply reflecting the fact that this was some of the most serious offending that could be imagined. Therefore,

a start sentence of somewhere near the maximum was appropriate for the burglary of the Museum. This was the correct approach. The fact that the appellant was entitled to deductions that took the final sentence some distance from the maximum was to the appellant's advantage.

Victim impact statements

[46] The appellant complains about a victim impact statement from Colonel Raymond Seymour on behalf of the National Army Museum.

[47] The appellant's case is that Colonel Seymour was not a victim as defined by the Victims of Offences Act 1987 and, therefore, was not entitled to make such a statement.

[48] Colonel Seymour was the Director of the Museum. In his victim impact statement he gave the history of the medals stolen, described the effect of the burglary on the staff of the Museum and detailed the response of people from overseas and within New Zealand to the theft. We are satisfied that Colonel Seymour was "disadvantaged by [the] offence" and he was, therefore, entitled to complete the victim impact report and the Judge was entitled to take it into account at sentencing.[14] We reject this ground of appeal.

Irrelevant matters taken into account and treated as aggravating facts

[49] The appellant identified three aggravating features relating to the appellant which he says Judge Hubble took into account in reaching his final sentence and were factually inaccurate. The three matters were:

(a) the appellant's involvement in a burglary of Auckland University during which poems by Colin McCahon (a well known New Zealand painter), an ancient bible and a Goldie painting were stolen;

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[14] Victims' Rights Act 2002, s 20.

(b) that the appellant had gang affiliations; and

(c) that he was involved in threats to destroy the medals.

[50] As to the Auckland University matter, the Judge at sentencing said:

> [30] Mr Van Wakeren although you do not want me to mention it, I have checked, there is no restriction on me mentioning it, but when you faced sentence on the charge you are now in prison for you sought to bargain the three items. First of all some poems of Colin McCahon's, an ancient bible and a Goldie painting that was stolen from the University. The Bible was returned in a vastly damaged state some months later. The poems were also surrendered. At your sentencing you attempted to gain a reduction in sentence by indicating that you could return the Goldie painting.
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> [31] The police elected not to pursue any charges against you in respect of the university thefts if you did return the Goldie painting. You duly did so but it was not looked on kindly by the Court that you did this and it is an aggravating circumstance that here you are again stealing icons apparently with a view to obtaining a ransom or bargaining for lesser charges.

[51] In relation to the gang affiliation the Judge said:[15]

> I suppose what you could have done with these medals is handed them out one by one to your gang affiliated members and as each of them faced a future charge they would seek to bargain with the return of that medal. That sort of thing. Obviously that has got to be discouraged.

[52] And finally, as to the threats to destroy the medal, the Judge said:[16]

> There were threats that they would be destroyed or disposed of overseas if you were not paid …

[53] The appellant says that each of these so called aggravating facts were neither established nor asserted by the Crown at sentencing.

[54] The Crown accept that none of these three aggravating features could be established by the Crown and, therefore, the Judge was wrong to identify them in this way. We agree.

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15 At [32].
16 At [18].

[55] However, there is nothing to suggest that in fact these aggravating features increased the start sentence (for the offending plus any personal aggravating features) identified by the Judge. Without these aggravating features the start sentence of nine years imprisonment for the Museum burglary and the other start sentences were readily justified by the facts and cannot be criticised.

[56] Therefore, while the Judge should not have referred to these three factors as aggravating given they played no part in the determination of the sentence, there is no reason on appeal to adjust the appellant's sentence.

Individual sentences manifestly excessive

[57] The next ground of appeal is that the sentences of imprisonment for Operation Prince (Parts 1 and 2) and Operation Pokie were manifestly excessive. The appellant dealt with his submissions regarding Operation Prince in two distinct parts. However, the appropriate course is to look overall at the offending in Operation Prince to see whether the sentence overall is manifestly excessive for those charges.

[58] We accept that there may have been some confusion in Judge Hubble's sentencing when he appeared to sentence Mr Van Wakeren with respect to some of the matters to which he had pleaded not guilty and which ultimately were sentenced by Judge Joyce QC after the late change of plea in Operation Prince (Part 2).

[59] The Operation Prince offending was extremely serious.[17] The combined sentence of six years and three months imprisonment for the fraud offending, involving as it did not only Operation Prince, but also Operations Post Office Box and Kea, was well within the range available to the Judge.

[60] The offending occurred over an extended period of time. The appellant targeted banks and other institutions as well as individuals. The offending involved somewhere near $1.5 million of which almost $1 million has not been recovered. It

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[17] See [11]–[16] above.

was sophisticated offending for personal gain, repetitive and at the highest level of seriousness and sophistication. The sentences imposed for this offending were well within the range available to the Judge.

[61] As to Operation Pokie the appellant's complaint is that although he pleaded guilty to one charge, he was given no discount for his guilty plea and that he should have had a reduction in sentence to reflect his discharge on the money laundering counts, as Mr Marsh his co-offender, had received.

[62] The sentencing Judge for Operation Pokie, Judge Hubble, imposed one years imprisonment as the appropriate cumulative sentence.[18]

[63] Arising from Operation Pokie Mr Marsh was convicted by a jury on two counts of burglary, Mr Kapa on four counts of burglary and Mr Van Wakeren on two counts of burglary, having plead guilty earlier to a third. Mr Kapa was sentenced to three and a half years imprisonment and Mr Marsh originally two and a half years imprisonment, reduced to two years by this Court to reflect the discharge of the money laundering counts.

[64] Mr Van Wakeren's one year sentence, therefore, is well below that of his co-offenders. Given that the key issue in the appeal is the question of totality, we do not need to dwell on the reasons for such a sentence. No further reduction for his discharge on the money laundering counts could be justified. But the significantly lower sentence than his co-offenders no doubt reflected the fact that the Judge had one eye on totality when making only a one year prison sentence cumulative on other sentences.

Totality – overall sentence manifestly excessive

[65] We are satisfied that, subject to a further reduction of 12 months to reflect mitigating factors (discussed below) relating to the National Army Museum burglary, the overall sentence of 13 years, three months imprisonment was within the range

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[18] At [50].

available for this offending and was not out of proportion to the overall gravity of the total criminality. It is perhaps unfortunate that it fell to three different Judges to sentence the appellant for this offending. But that division resulted from the appellant's various delayed guilty pleas.

[66] This was remarkably serious offending right at the top of property offending by its sophistication, its breadth of offending, and its persistence, if not its proceeds. At times the offending involved crude burglaries causing substantial damage to commercial premises for modest returns. But by contrast it also involved sophisticated frauds which obtained money from banks and other innocent victims.

[67] It also involved the sophisticated theft of the identity of a number of citizens. Those who unknowingly had their properties mortgaged as a result of the appellant's frauds would no doubt have been significantly upset. The dishonesty comprising this offending involved over $1.5 million, of which $1 million remains unrecovered. In summary, therefore, this offending was sophisticated and pre-meditated netting large amounts of subsequently unrecovered money.

[68] This offending was serious enough but the burglary and theft of the 96 valour medals from the National Army Museum brought understandable outrage from New Zealanders and added a whole additional dimension to the offending. This was the theft of an important part of New Zealand's history and culture, as well as being the theft of items which had great monetary value at over $5 million. The nine year start sentence was appropriate.

[69] As the facts of the individual offending illustrates, this required the sternest response from the courts. In addition, there were a number of further aggravating features to the appellant's offending. The appellant offended at times when he was subject to bail. The appellant offended in Operation Pokie and then was imprisoned. Yet immediately upon his release from prison he offended again by a burglary and smashing open pokie machines. This serious offending occurred over many years. The appellant's past criminal record starts in 1986. He has offended virtually constantly since then. With such offending the appellant has over 200 convictions.

[70] It may be, as he claims, that he has now turned over a new leaf. It is to be hoped so. However, given the appellant's record of dishonesty he will have to show by what he does, rather than what he says, that he has indeed put his offending in the past.

Conclusion on sentence appeal

[71] We are satisfied that, subject only to a further deduction of 12 months imprisonment for additional mitigating factors personal to the appellant regarding the Museum burglary, all other sentences imposed were justified. A total sentence of twelve years and three months imprisonment is entirely appropriate having regard to the overall criminality of the various charges faced by the appellant. We, therefore, quash the sentence of six years imprisonment with respect to the Museum burglary and instead impose a sentence of five years imprisonment. This, in turn, reduces the overall sentence from 13 years and three months to 12 years and three months imprisonment.

Minimum period of imprisonment

[72] When Judge Hubble imposed his total sentence of 11 years imprisonment it was cumulative on Judge Gittos' two year and three month sentence. The total sentence imposed on the appellant was, therefore, 13 years and three months imprisonment.

[73] Judge Hubble then purported to impose a minimum period of imprisonment of seven years expressed to be with respect to the 13 year and three month sentence. The Crown accept, as we do, the appellant's appeal point that such an MPI could not have been imposed in law. Section 86 of the Sentencing Act requires that an MPI be imposed with respect to a particular sentence.[19] Here, the MPI was not imposed with respect to a particular sentence but in relation to the cumulative sentence imposed by the two Judges. The MPI, therefore, was not lawfully imposed and we quash it.

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[19] Sentencing Act 2002, s 86(1).

[74] The appropriate approach for us is to consider, first, whether this is a proper case for an MPI, challenged by the appellant, and secondly, if so, what that period should be. Further, a question arose in this Court as to whether we could impose cumulative MPIs on the prison sentences that were cumulative, should we decide an MPI was appropriate. As a result we provided counsel with the opportunity to consider these issues and file further submissions, which they have done.

[75] We are satisfied that this was a case which called for the imposition of the maximum MPI of two thirds of the relevant sentence on the burglary of the Museum and the Operation Kea and Operation Prince (Part 1) sentences. Both sets of offending were extremely serious sophisticated property offending involving very large sums of money or very valuable property. Deterrence and denunciation were vital aspects to this sentencing.

[76] The other relevant statutory aspect is the protection of the public. As we have noted, Mr Van Wakeren has over 200 convictions, primarily property convictions. He has been imprisoned many times. During the period of this offending he was regularly able to come up with new schemes to defraud members of the public and commercial enterprises. There were many innocent victims of his various scams. The protection of the public in this case, therefore, must be afforded very real significance.

[77] As to what sentences the MPIs can attach to, Judge Gittos specifically did not impose an MPI on the two year and three months sentence on Operation Post Office Box. There was no challenge by the Crown to that refusal.

[78] Of the other sentences only the Operation Kea and Operation Prince sentences and the Operation Valour sentence were sentences of more than 24 months in respect of which minimum periods of imprisonment could be imposed.[20]

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[20] Sentencing Act 2002, s 86.

[79] We are satisfied that MPIs of two thirds of the five year sentence with respect to the burglary of the Museum and the four year sentence with respect to Operation Kea and Prince (Part 1) should be imposed.

[80] As we have noted an issue arose as to whether these minimum periods of imprisonment were able to be imposed cumulatively. We agree with the Crown that there is no specific statutory authority in the Sentencing Act regarding cumulative MPIs. Section 86 authorises the imposition of MPIs. The section restricts the circumstances under which an MPI can be imposed.[21] However, s 86 does not restrict the imposition of cumulative MPIs. We note this Court has accepted, without comment, cumulative MPIs,[22] and in allowing an appeal against sentence this Court has imposed a cumulative MPI.[23]

[81] We are satisfied that s 84 of the Parole Act 2002 requires that any minimum periods of imprisonment imposed be cumulative. Section 84 provides that where there are cumulative sentences of imprisonment imposed making up a "long term notional single sentence" then if minimum periods of imprisonment are imposed with respect to the individual sentences that make up the single notional sentence of imprisonment, they are also to be cumulative. We consider that s 86 of the Sentencing Act must be read in light of the meaning of s 84.

[82] Section 84 provides as follows:

> **84 Non-parole periods**
>
> (1) The non-parole period of a long-term determinate sentence is one-third of the length of the sentence, unless the sentence is one to which subsection (2) or subsection (4) applies.
>
> (2) The non-parole period of a sentence in respect of which the court has imposed a minimum term of imprisonment (whether under section 86, section 86D(4), section 86E(4), section 89, or section 103 of the Sentencing Act 2002) is the minimum term imposed.
>
> ...

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21 For example, s 86(1) provides that an MPI cannot be imposed on a determinate sentence of two years or less.

22 *R v Bennett* CA428/03, 11 May 2004.

23 *R v Mist* [2007] NZCA 352.

> (4) The non-parole period of a long-term notional single sentence is the total obtained by adding together all the non-parole periods of every sentence that makes up the notional single sentence.
>
> …

[83] Both "long-term sentence" and "notional single sentence" are defined in s 4 of the Parole Act 2002. A long-term sentence includes a notional single sentence of more than 24 months imprisonment. Section 4 provides:

> **notional single sentence** means the notional single sentence of imprisonment that is created when one determinate sentence is directed to be served cumulatively on another determinate sentence …

[84] Thus, under s 84(1), unless an MPI is imposed the non-parole period for a long term sentence is one third. Subsection (2) provides that where an MPI is imposed the non-parole period is the MPI imposed. The critical provision is subs (4), which provides that, to obtain a non-parole period for a long-term notional single sentence (one made up of cumulative prison sentences), the non-parole period of every sentence that makes up the total notional single sentence is to be added together.

[85] Where MPIs are imposed the non-parole period with respect to each single sentence is the MPI.[24] Subsection (4) requires that the individual MPIs be added together to identify the appropriate non-parole period.

[86] Where a Judge imposes MPIs on cumulative sentences of imprisonment, s 84(4) requires that those MPIs be added together to reach the correct non-parole period for the sentence imposed. The result is, therefore, that in such a situation as here it is not necessary for a Judge to declare that the MPIs are to be cumulative. Section 84(4) requires that they be cumulative.

[87] Accordingly, the non-parole period of three years and four months and two years and eight months are to be added together to reach a total non-parole period of six years imprisonment.

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[24] Parole Act 2002, s 84(2).

Conclusion on MPI

[88] In summary, therefore, the seven year MPI is quashed. We are satisfied that the maximum non-parole period should be imposed with respect to the sentences on Operation Valour and Operation Kea and Prince (Part 1), giving a total cumulative non-parole period of six years imprisonment.

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