

**IN THE DISTRICT COURT  
AT MANUKAU**

**CRI-2016-092-009983  
[2017] NZDC 10680**

**NEW ZEALAND POLICE**  
Prosecutor

v

**BILLY TIHIKA ZACHAN**  
Defendant

Hearing: 23 May 2017

Appearances: A Alcock for the Prosecutor  
A Singh on behalf of H Leabourn for the Defendant

Judgment: 23 May 2017

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**NOTES OF JUDGE J BERGSENG ON SENTENCING**

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[1] Mr Zachan, you appear for sentence today on two charges of burglary. The first of these occurred between 1.30 and 2.30 pm on 20 May. It was at a residential house in Papatoetoe. You approached the rear of the address. You used an item that was located in the area of the back door to smash the glass of the rear sliding door. You entered into the house and you began searching for property and in doing so you activated the alarm. You silenced that alarm by ripping it from the wall. You went into the bedroom and into a set of drawers. During the time of your effecting entry into the property you had cut yourself so you took two handkerchiefs which you used to try and stop the bleeding. You eventually left the property. You took with you the handkerchiefs.

[2] Shortly thereafter it appears you went to a second property. Again you went to the rear of the address. You pulled open a window, then reached inside and

unlocked the rear door. You entered into the house. You then searched through the owner's belongings and you took two digital hard drives, an iPad and an iPad case. The property had a value of approximately \$950. During that burglary you dropped one of the handkerchief in the bedroom of the house. As a result of forensic examinations you were identified as the burglar.

[3] Pleas of guilty did not come at an early stage. You first appeared on 13 June. Pleas of not guilty were entered on 28 June. In respect of one charge you pleaded guilty at the case review hearing on 30 August and on the other it went through to 8 February this year for a Judge alone trial. You entered a plea of guilty on the morning of trial.

[4] One of the features of your offending is the sheer volume of previous convictions. I have counted up 52 previous convictions. The prosecution have counted up 53. Whether it is 52 or 53 the number of occasions when you have committed burglaries is massive.

[5] There is a Provision of Advice report. Not surprisingly you are seen as having a high risk of re-offending given the recidivist nature of your offending, your addiction to illicit substances and your ongoing drug use of methamphetamine. A sentence of imprisonment is recommended. It notes that you have been assessed and accepted into the Te Ara Hou programme. It is noted that you have been a patched member of the Black Power. You say you are no longer affiliated and you handed in your patch a number of years ago.

[6] Sentencing submissions have been made. The police submissions, after considering a number of cases, submit a starting point of between 24 and 30 months' imprisonment with an uplift of 12 months' to reflect your history and a 15 percent credit for your plea of guilty.

[7] Ms Singh, who appears on instructions from Mr Leabourn today, initially submitted that a sentence indication had been given. I have checked both files. There is no sign of any sentence indication at any stage having been given and when Mr Leabourn's written sentencing submissions are

considered he fails to make any reference to sentencing submissions. Accordingly, I proceed on the basis that there has not been any sentencing indication given.

[8] The summary of facts are noted as being accepted. Your counsel's submissions accept that in terms of the aggravating features they include that these are burglaries of residential premises. However, it is submitted that the offending is perhaps at the lower end of the scale given the value of the property taken. Mr Leabourn has submitted a credit for the plea of guilty should be at 20 percent and arose once all relevant disclosure material had been provided. Given that the primary evidence relied on by the police was the DNA analysis I am advised by counsel for the police that that was provided on 11 July 2016. So I do not accept the submission made by Mr Leabourn regarding the 20 percent reduction for the guilty plea.

[9] He submits that there was little by the way of pre-planning and this was not spree offending. He submits a starting point of between 18 and 24 months' imprisonment, an uplift of between eight to 12 months for your previous convictions and then when the 20 percent is taken off for the plea of guilty the end sentence should be in the range of 24 months' imprisonment. He submits that a short term of imprisonment, as that term is defined in the Sentencing Act 2002, would mean that you know for sure what your release date is and you can focus on your rehabilitation.

[10] I have available victim impact statements. One of the victims was 78 years old. She suffers from a neurological condition which affects her sense of balance. She believes that she was lucky not to be in the home at the time. They have had to pay a \$250 excess to their insurance company and, of course, the impact of your offending would be significant on them. The second victim makes the observation that he and his wife are hard working, they have a young family and simply cannot afford to replace the items that you stole. They also feel the intrusion into the sanctity of their home.

[11] In terms of the purposes of sentencing I have to impose a sentence that holds you accountable. Denunciation and deterrence are relevant factors and clearly protection of the community has to be considered. The sheer volume of your history

means that is a relevant consideration. I have to take into account as a principle the gravity of the offending, consistency with appropriate sentencing levels, the effect of the offending on your victims, but I must impose the least restrictive outcome that is appropriate in the circumstances.

[12] There is no tariff decision for burglary. The maximum sentence available is one of 10 years' imprisonment. What was noted in the decision of *R v Brewster*<sup>1</sup> when it came to residential burglaries the Court of Appeal noted:

Domestic burglary is and has always been regarded as a very serious offence. It may involve considerable loss to the victim. Even when it does not the victim may lose possessions of particular value to him or her. For those who are insured the receipt of financial compensation does not replace what is lost but many victims are uninsured because they may have fewer possessions. They are the more seriously injured by the loss of those they do have.

The loss of material possessions is, however, only part and often a minor part of the reason why domestic burglary is a serious offence. Most people perfectly legitimately attach importance to the privacy and security of their own homes. That an intruder should break in or enter for his own dishonest purpose leaves the victim with a sense of violation and insecurity. Even where the victim is unaware at the time that the burglar is in the house it can be a frightening experience to learn that a burglary has taken place, and it is all the more frightening if the victim confronts or hears the burglar. Generally speaking it is more frightening if the victim is in the house when the burglary takes place and if the intrusion takes place at night, but that does not mean that the offence is not serious if the victim returns to an empty house during the daytime to find it has been burgled.

[13] The Court of Appeal in *Arahanga v R*<sup>2</sup> noted that residential burglaries often have a starting point of between 18 months and two and a half years' imprisonment.

[14] I take the burglary of the first property as the more serious of the two. You used an item located at the rear door to break the ranch slider. When the alarm was set off you ripped it from the wall. The second burglary took place very shortly after. In that case some \$950 worth of property was taken.

[15] The starting point I adopt, considering what the Court of Appeal has previously said and considering what has been said in *Arahanga* to be one of

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<sup>1</sup> *R v Brewster* [1998] 1 Cr App 200 (cited in *Senior v Police* (2000) 18 CRNZ 340 (HC) at [18].

<sup>2</sup> *Arahanga v R* [2-12] NZCA 480.

32 months' imprisonment. That is for both offences on a global basis. The victim impact statement shows that the level of risk that you were prepared to undertake, given the possibility of the owner being present here involved searching through the houses, going into such private spaces as drawers and involved damage to the home as well.

[16] In terms of any personal mitigating factors it is hard to see any. The aggravating factor is your previous convictions.

[17] In 2009 you were sentenced by Judge Wade to a term of imprisonment of three years and seven months. That involved a burglary charge. You appealed against that sentence. Part of the appeal related to the uplift that was applied by Judge Wade. In the High Court your appeal was dealt with by Wylie J<sup>3</sup>. The uplift of 18 months was specifically considered by Wylie J at [18] and [19] of his decision. As at 2009 Wylie J was not prepared to hold that an uplift of 18 months was massively excessive. Since then you have carried on to offend. My view is that it is appropriate that there be a similar uplift. So from the starting point of 32 months' that gets me to 50 months' imprisonment. I am prepared to take off two months for your efforts to rehabilitate yourself while in prison.

[18] I have considered the letter that you have written. I cannot place any great weight on that letter because of the sheer volume of your previous burglaries. You simply, once you are released from prison, it appears that you return to the same old ways. I am prepared to reduce the starting point to give you credit for your plea of guilty. It will be a little bit more than 15 percent. I will reduce the starting point by eight months. That gets me to an end sentence of 40 months' imprisonment or three years and four months and that is the sentence that is imposed.

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<sup>3</sup> *Zachan v NZ Police* HC AK CRI-2009-404-000025 [18 March 2009].

[19] For completeness I add that I have considered that Mr Zachan was prepared to take part in restorative justice. I have also imposed reparation in the sum of \$250 for each of the victims. That is to be paid at the rate of \$10 per week. The first payment due 60 days after his release from jail.

J Bergseng  
District Court Judge