IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA282/2024
[2024] NZCA 511

BETWEEN	SHANE DAVE POMANA Appellant
AND	THE KING Respondent

Hearing: 2 September 2024

Court: Thomas, Whata and Grice JJ

Counsel: J H C Waugh for Appellant
T R Simpson for Respondent

Judgment: 11 October 2024 at 9.30 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Grice J)

Introduction

[1] Shane Pomana was convicted following a jury trial on charges of assault with intent to rob,[1] attempted aggravated robbery,[2] and aggravated robbery.[3] He was acquitted on a further charge of aggravated robbery, as well as charges of wounding

1 Crimes Act 1961, ss 66(2) and 236(1)(c) — maximum penalty 14 years' imprisonment.
2 Sections 235(b) and 311(1) — maximum penalty seven years' imprisonment.
3 Sections 66(2) and 235(c) — maximum penalty 14 years' imprisonment.

with intent to injure, dishonestly using a document, and unlawful possession of a pistol.

[2] On 19 April 2024, Mr Pomana was sentenced to six years' imprisonment on the charge of aggravated robbery, with concurrent sentences of three years' imprisonment and 18 months' imprisonment imposed for the charges of attempted aggravated robbery and assault with intent to rob respectively.[4] He now appeals that sentence on the basis that it is manifestly excessive.

Background

[3] Mr Pomana's offending took place over the course of an evening at three different petrol stations in Whanganui and Feilding.

[4] On the evening of 17 April 2022, Mr Pomana and at least two others were driving around Whanganui in a ute that had been stolen earlier that evening. The front number plate of the ute had been removed, and another number plate had been put on the dash.

Challenge service station — assault with intent to rob

[5] At around 8.05 pm, Mr Pomana and his associates pulled into the forecourt of the Challenge service station in Castlecliff. Mr Pomana got out of the ute, wearing a baseball hat and black gloves, with his hood pulled up and holding a black shopping bag. He approached the service station attendant, who was on the forecourt. Mr Pomana grabbed the attendant, who broke free and ran away. He then chased the attendant for a short period of time, before giving up and returning to the ute. Mr Pomana's intent was clearly to rob.[5]

Z service station — attempted aggravated robbery

[6] Mr Pomana and his co-offenders then made their way to the Z service station on Dublin Street, arriving at around 8.30 pm. An attendant was working there alone.

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4 *R v Pomana* [2024] NZDC 8867 [sentencing notes].
5 At [4].

Mr Pomana got out of the ute, with his hood up and hat on, still wearing black gloves and holding a black bag. He also had a blue mask covering his face.

[7] Mr Pomana ran into the store and made his way to the counter. The attendant had seen him approaching and had locked herself in the back office. Mr Pomana jumped over the counter, and was soon joined by his co-offender. He then attempted to kick the office door down, but was unsuccessful. At that point, fog cannons were activated and Mr Pomana and his co-offender left the scene.

Caltex service station — aggravated robbery

[8] Having been unsuccessful in their previous attempts, Mr Pomana and his co-offenders went to a Caltex service station in Feilding. They arrived there at around 10.18 pm. The driver parked the ute opposite the service station, and Mr Pomana and his co-offender got out and made their way inside. There was one attendant working behind the counter. Mr Pomana was dressed as he had been during the previous attempts, however this time he was also carrying a pistol. Mr Pomana confronted the attendant, moving around to her side of the counter. He then pointed the pistol directly at her and took the cash drawers and cigarette trays, passing them to his co-offender. The co-offender took the items outside to the ute, which had pulled into the forecourt. The robbery took around three minutes. The attendant stood with her hands up for most of that time.

[9] Mr Pomana was arrested in the early hours of 18 April 2022. He was located in a different vehicle from the one used in the offending. A loaded pistol and cigarettes taken in the robbery as well as ammunition were found located in the front footwell of the passenger seat where Mr Pomana had been sitting. Cash was located on Mr Pomana.

[10] Mr Pomana was charged with unlawful possession of a firearm, but was acquitted by the jury on that charge. He was also acquitted on a charge of aggravated robbery in respect of the stolen ute used in the offending.

Approach on appeal

[11] Mr Pomana appeals his sentence under s 244 of the Criminal Procedure Act 2011. This Court must allow the appeal only if it is satisfied that there was an error in the sentence and that a different sentence should be imposed.[6] Generally, the court "will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles".[7] In most cases, a sentence appeal will "turn on a consideration of whether the final outcome is manifestly excessive", rather than the "route by which the judge reached that outcome".[8]

District Court decision

[12] In determining the appropriate starting point, Judge Marinovich referred to the guideline judgment *R v Mako* for aggravated robbery.[9] He noted that the following aggravating features were present: a degree of planning and preparation; at least three participants; the use of disguises; the use of a serious weapon (being a loaded cutdown .22 pistol); the targeting of a service station, which is a common target of such offending; and stolen property consisting of cigarettes, tobacco, and cash totalling $8,473.25.[10]

[13] The Judge considered two examples given in *Mako* as useful guides in the context of the present offending, noting they overlapped somewhat.[11] The first was of a robbery of commercial premises where members of the public could be expected to be present, involving serious aggravating factors such as the presence of a lethal weapon. The second was a robbery of a small retail shop, where the offenders had ensured no members of the public were present, but a number of aggravating factors were involved. The commercial robbery would attract a starting point of six or perhaps more years, and where firearms were loaded or the danger of harm was increased in other ways, or if actual violence was used, the starting point would be eight years or

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6 Criminal Procedure Act 2011, s 250(2).
7 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36], quoting with approval *Tutakangahau v R* [2014] NZHC 556 at [10].
8 *Ripia v R* [2011] NZCA 101 at [15].
9 Sentencing notes, above n 4, at [17]; and *R v Mako* [2000] 2 NZLR 170 (CA).
10 Sentencing notes, above n 4, at [19].
11 At [21]–[23], citing *R v Mako*, above n 9, at [54] and [56]. .

more. In the example of the small retail shop robbery, the starting point ranged from four years to six years depending on the aggravating factors.[12]

[14] The Judge also considered several other comparable cases. He concluded that, taking into account Mr Pomana's culpability and the presence of the relevant aggravating factors, a starting point of six years' imprisonment for the Feilding aggravated robbery was appropriate.[13] He then adjusted for totality, applying uplifts of 12 months for the attempted aggravated robbery, and six months for the assault with intent to rob.[14] This amounted to an overall starting point of seven and a half years' imprisonment.[15]

[15] The Judge applied an uplift of five per cent (four and a half months) for Mr Pomana's previous convictions, which included burglary and low-level violent offending.[16] In terms of personal mitigating factors, the Judge applied a 15 per cent discount for personal background factors, and 10 per cent for his offer to plead guilty to two of the charges.[17]

[16] This brought the Judge to an overall sentence of six years' imprisonment.

The appeal

[17] Mr Waugh, for the appellant, contends that the Judge was not entitled to take into account the pistol being loaded as an aggravating feature of the offending. He says that the Judge failed to indicate to the parties the weight that would likely be attached to this fact, or propose a disputed facts hearing, as required by s 24 of the Sentencing Act 2002. The Judge also did not specifically find it proven beyond reasonable doubt that the pistol was loaded, rather, he relied on a "strong inference" of that fact.[18] Mr Waugh submits that the Judge was not entitled to find that fact proven beyond reasonable doubt, because the question of whether the pistol was loaded was not an issue at trial, as it was not an element of any offence charged. Furthermore,

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12 *R v Mako*, above n 9, at [54] and [56].
13 Sentencing notes, above n 4, at [33].
14 At [34] and [35].
15 At [36].
16 At [38].
17 At [43] and [45].
18 At [10] and [19(d)].

there was no evidence that the pistol used in the aggravated robbery was the same pistol that was found, nor that it was loaded at the time it was wielded by Mr Pomana. Finally, Mr Waugh contends that, in any event, the sentence was manifestly excessive as the starting point was too high.

[18] Ms Simpson, for the Crown, submits that the evidence was available upon which the Judge was entitled to find "without any doubt" that the pistol used in the robbery was that found in the car. She further submits that the starting point of six years was available even without the finding that the pistol was loaded, and the sentence was not manifestly excessive.

Was the Judge entitled to make the inference that the pistol was loaded?

[19] Section 24 of the Sentencing Act deals with the proof of facts at sentencing, and relevantly provides:

> **24 Proof of facts**
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> (1) In determining a sentence or other disposition of the case, a court—
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> (a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and
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> (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.
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> (2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—
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> (a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:
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> (b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:
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> (c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact …
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> …
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> (e) either party may cross-examine any witness called by the other party.

…

[20] The use of a firearm was an element of the offence of aggravated robbery, upon which Mr Pomana was convicted.[19] Therefore, in light of the jury's guilty verdict, the Judge was required by s 24(1)(b) to accept that a firearm was involved in the offending. The issue is whether the Judge was entitled to draw a "strong inference" that the firearm was loaded, and then rely on that inference as an aggravating factor, without giving the appellant the opportunity to dispute that fact at sentencing.[20]

[21] Mr Pomana relies on *Arahanga v R.*[21] In that case, the appellant had been convicted of burglary, among other charges, following a jury trial. The sentencing Judge concluded that the appellant had been armed with a knife during the burglary. The only evidence at trial as to the presence of a knife was from an officer, who said he had sighted a black handle in the defendant's waistband which he thought looked like a carving knife (although he could not be sure),[22] and the implication of the fact that the appellant's co-offender had threatened to stab the officer.[23] The presence of the knife was not at issue at trial, nor was it put forward by the Crown in their submissions at sentencing.[24] On appeal, this Court observed that if evidence is not led at trial "it cannot be the case that an accused, despite having no obligation to call evidence, is precluded from putting forward contrary evidence that is relevant to sentencing".[25] It held that in the circumstances of the case, the Judge could not assume the presence of the knife had been established without giving the parties an opportunity to hold a disputed facts hearing.

[22] However, in the present case we consider the inference made was available to the Judge. We accept the Crown's submission that the jury's acquittal on the charge of unlawful possession of a firearm is not inconsistent with the Judge's inference that the pistol used by Mr Pomana in the robbery was the same as that found in the car.

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19 Crimes Act, s 235(c).
20 Sentencing notes, above n 4, at [19(d)].
21 *Arahanga v R* [2012] NZCA 480, [2013] 1 NZLR 189.
22 At [69].
23 At [70].
24 At [72] and [74].
25 At [76].

[23] The charge of unlawful possession had been laid to reflect Mr Pomana's alleged possession of the pistol when he was stopped by police on 18 April 2022. Whether the jury could be sure it was Mr Pomana who possessed the pistol located in the vehicle or that such possession was unlawful, is not directly relevant to whether it was the same firearm as the one used by Mr Pomana in the robbery. Five hours after the robbery a loaded gun, of a similar description to the firearm that Mr Pomana had pointed at the station attendant, was found on top of a bag containing cigarettes taken in the robbery. It was sitting under a bag containing ammunition. These items were all found in the footwell of the passenger seat in which Mr Pomana had been sitting when the vehicle was stopped. During the search, Mr Pomana had also shown an interest in the bag under which the loaded pistol was found. This evidence provided a sufficient factual basis for the Judge to infer that the pistol had been loaded at the time of the offending. The Judge's conclusion in that regard did not require a finding that Mr Pomana had been in unlawful possession of the pistol when apprehended.

[24] In *Arahanga*, a key reason that a disputed facts hearing was required was that neither of the parties had referred to the presence of a knife in their submissions, nor was it an issue at trial. That contrasts with this case, where the Crown had clearly indicated in its submissions at sentencing that it relied on the inference that the pistol was loaded as an aggravating feature of the offending. The presence of the loaded firearm in the car with the stolen cigarettes had been the subject of evidence at trial. Mr Pomana had the opportunity to challenge that inference at sentencing, and did so in his submissions.

[25] In *R v Kinghorn*, this Court addressed the issue of when inferences may be drawn by judges, noting this will be permitted only when those inferences are grounded in objective facts.[26] The facts from which the Judge drew the inference that the pistol was loaded at the time of the robbery had been positively proved, and were not matters of "conjecture or speculation", which this Court warned against in *Kinghorn*. As this Court explained in *R v Aram:*[27]

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[26] *R v Kinghorn* [2014] NZCA 168 at [20], citing *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 (HL) at 169–170.

[27] *R v Aram* [2007] NZCA 328 at [71].

> Sentencing facts hearings are rarely necessary in cases where there has been a trial and the sentencing judge was the trial judge…. In those situations, it is for the sentencing judge to make up his or her mind as to the facts based on what he or she considers was proved at the trial: see s 24(1)(a) [of the Sentencing Act]. … The primary role of sentencing facts hearings is in cases where guilty pleas are entered but Crown and accused are not able to agree [on] some factual matters considered relevant to the sentencing exercise.

[26] The Judge in this case concluded that "without any doubt" the pistol located in the vehicle was the same pistol as the one used in the aggravated robbery.[28] We are satisfied that this "strong inference" was properly drawn based on facts proven beyond reasonable doubt.[29] The Judge made no error in taking into account the loaded firearm.

[27] In any event the focus on appeal is not the process followed but whether the sentence was manifestly excessive. Mr Pomana says the starting point adopted by the Judge was too high, resulting in a manifestly excessive sentence.

Was the starting point nevertheless excessive?

[28] The first case cited by Mr Waugh in support of his submission that an excessive starting point was taken is *Molia v R*.[30] In that case, the defendant and an associate went to a dairy wearing gloves, with their faces covered, and armed with a slug pistol. The defendant pointed the pistol at a member of the public outside the dairy and told him to stay where he was. Once inside the dairy, the defendant brandished the pistol at the dairy owner and told him to hand over the money in the cash register. The defendant and his associate then jumped over the service counter and told the owner to open the register, before taking cash and between 80 and 100 packets of cigarettes.[31] The aggravating features of the offending included the use of disguises, the fact that there were two offenders, the involvement of two members of the public, a moderate degree of preparation was involved and the taking of $6,000 worth of property.[32] This Court considered the starting point of five years adopted by the sentencing Judge was "a little high", but noted that this was balanced out by the fact that the Judge had not

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28 Sentencing notes, above n 4, at [10].
29 At [19(d)].
30 *Molia v R* [2013] NZCA 512.
31 At [2].
32 At [14]–[16].

accounted for the crime being committed while the defendant was subject to a sentence of supervision, which warranted an uplift as a personal aggravating factor.[33]

[29] Mr Waugh also cites *Solicitor-General v Singh*.[34] *Singh* involved two incidents of aggravated robbery taking place four days apart. The defendant drove two associates to a retail store. The associates entered the store, one punched the salesperson in the face, grabbed a plastic bag, and filled it with packets of synthetic cannabis. The two men then left the store and returned to the vehicle.[35] Four days later, the defendant drove the same associates to a different retail store. The associates went inside. One pointed a rifle at the shopkeeper, and demanded money from her. The shopkeeper took about $100 in cash from the till and gave it to them.[36] The defendant initially received a starting point of three-and-a-half years' imprisonment,[37] however this was appealed by the Crown and substituted with a starting point of six years by the High Court on appeal.[38] Lang J applied the example described in *Mako* involving a shopkeeper being confronted, multiple offenders, face coverings, and money being taken but with no actual violence involved, in which a starting point of around four years' imprisonment would be adopted.[39] However, the Judge observed that a higher starting point was warranted to account for the fact that there were two separate aggravated robberies, both of which involved premeditation, violence, firearms, and two other offenders.[40] This was an appeal by the Crown and we observe that an appellate court will traditionally take a conservative starting point in a sentence appeal brought by the Crown.[41]

[30] The above cases were discussed in the High Court decision of *Tribble v Police*, which was relied upon by the sentencing Judge.[42] In that case, the defendant and an associate robbed a dairy with a double-barrelled shotgun while wearing disguises. Upon finding no one present in the store, the defendant entered an attached hallway

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33 At [17].
34 *Solicitor-General v Singh* [2014] NZHC 3331.
35 At [2].
36 At [3].
37 At [6].
38 At [11].
39 At [8], citing *R v Mako*, above n 9, at [56].
40 *Solicitor-General v Singh*, above n 34, at [10] and [11].
41 See *McCaslin-Whitehead v R* [2023] NZCA 259 at [32].
42 Sentencing notes, above n 4, at [25], citing *Tribble v Police* [2016] NZHC 187.

into the victim's home and threatened her with the shotgun. Approximately $200 in cash and twenty packets of cigarettes were stolen.[43] On appeal, the starting point of seven years' imprisonment was substituted with a starting point of five years' imprisonment.[44] The Judge noted that there was only one offender involved and no actual violence, which was reflected in the lower starting point imposed on appeal.[45]

[31] Mr Waugh submits that, holistically viewed, Mr Pomana's culpability sits no higher than the offending in *Molia* and *Tribble*, and well below *Singh*. Therefore, a starting point of no more than five years' imprisonment should be imposed for the lead aggravated robbery offence.

[32] We refer back to the guideline scenarios in *Mako.* The Judge identified example comparators from that decision, as follows:[46]

> [54] … The robbery of commercial premises where members of the public can be expected to be present, targeting substantial sums in tills or a safe by a group, with a lethal weapon, disguises and other indications of preparation, should attract for adult perpetrators after a defended trial a starting point of six or perhaps more years. Where firearms are loaded or the danger of harm is increased in other ways, or if actual violence is used, the starting point would be eight years or more. …
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> …
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> [56] … a robbery of a small retail shop by demanding money from the till under threat of the use of a weapon such as a knife after ensuring no customers are present, with or without assistance from a lookout or an accomplice waiting to facilitate getaway. The shopkeeper is confronted by one person with the face covered. There is no actual violence. A small sum of money is taken. The starting point should be around four years. Should the shopkeeper be confined or assaulted, or confronted by multiple offenders, or if more money and other property is taken five years, and in bad cases six years, should be the starting point.

[33] We consider that the offending, even without taking into account that the firearm was loaded, fits within the scope of the first example but also could be described as being a more serious robbery of a small retail shop. This case involved a robbery of commercial premises (a service station), where members of the public could be expected to be present, targeting what could be substantial sums held on the

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43 *Tribble v Police,* above n 42, at [3]–[7].
44 At [40].
45 At [39].
46 *Mako*, above n 9.

premises. There were at least three offenders involved, one of whom waited in the vehicle. They used disguises, and Mr Pomana pointed a firearm — a lethal weapon — at the attendant and yelled at her in a demanding manner. There were clear indications of preparation. *Mako* suggests a starting point of six years is appropriate in those circumstances, increasing to an eight-year starting point where the weapon is loaded.

[34] We also note that in *Dearman v R*, cited by the Crown, a starting point of seven years' imprisonment was endorsed on appeal with respect to the defendant's charge of aggravated robbery of a pharmacy.[47] When the pharmacy was about to close, the defendant entered the premises wearing a balaclava and carrying a large knife. He made the staff members go into the back room and held them at knifepoint, ordering one to fill a plastic bag with controlled drugs from the pharmacy's safe. Before leaving, the defendant told the staff members he would stab anyone who tried to follow him.[48]

[35] Furthermore, in *Anderson v R* the appellant undertook an aggravated robbery of The Warehouse, with a co-offender who was armed with a .22 calibre rifle.[49] The Court observed there was no actual violence, the risk to the public was minimal, a weapon was brandished (by Mr Anderson's co-offender) but not used, and there was no evidence the weapon was loaded.[50] The starting point of seven years was upheld on appeal, this Court observing that it appropriately reflected the fact that the offending involved an element of detention (the staff having been bound during the robbery) and that property of a substantial value was not recovered.[51]

[36] The Judge also found a helpful comparator in the decision of *Newton*.[52] That case involved the robbery of a service station by two disguised offenders, one of whom pointed a firearm at the attendant on the forecourt. The third offender waited in the vehicle. They fled with about $200 in cash and 17-20 pouches of tobacco.[53]

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47 *Dearman v R* [2016] NZCA 143.
48 At [7]–[8].
49 *Anderson v R* [2019] NZCA 294 at [4]–[10].
50 At [42].
51 At [42]–[44].
52 Sentencing notes, above n 4, at [29]–[30], citing *Newton v R* [2021] NZHC 3370.
53 *Newton v R*, above n 52, at [2]–[5].

The High Court on appeal found that the starting point of five years' imprisonment was "well within range".[54] The additional factors which the Judge pointed to in relation to the present offending were the higher value of the property stolen (totalling $8,473.25 — although some was recovered),[55] and the high degree of premeditation involved (although that was present to a degree in *Newton*).[56]

[37] We consider that the Judge made no error in settling on six years as the starting point for the aggravated robbery. Similarly, the Judge's indication of a starting point of two years' imprisonment for the attempted aggravated robbery (of the Z service station in Whanganui), reduced to an uplift of 12 months for totality, and the further six-month uplift for the assault with intent to rob (in relation to the Challenge Service Station in Castlecliff) were also within range.

[38] We consider that the overall starting point of seven and a half years' imprisonment was within the appropriate range, and consequently the sentence was not manifestly excessive.

[39] No issue is taken with the uplift of five per cent (or approximately four months on the adjusted the starting point) for Mr Pomana's previous convictions. Nor is there any issue raised in relation to the 15 per cent discount allowed for personal mitigating factors or the 10 per cent discount for Mr Pomana's offer to plead guilty to two of the charges, leading to a total discount of 25 per cent on the adjusted starting point. We also consider those adjustments were appropriate. That resulted in a final sentence of six years' imprisonment.

Result

[40] The appeal against sentence is dismissed.

Solicitors:
Crowley Waugh, Whanganui for Appellant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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54 At [27].
55 At [19(f)].
56 At [19(a)].