IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA273/2024
[2024] NZCA 494

BETWEEN	KOHI ROLLESTON Appellant
AND	THE KING Respondent

Hearing: 27 August 2024

Court: Cooke, Peters and Grice JJ

Counsel: C G Nolan for Appellant
I L M Archibald for Respondent

Judgment: 30 September 2024 at 2.30 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Grice J)

Introduction

[1] Mr Rolleston was convicted following a guilty plea on one charge of robbery.[1] He was also convicted on one charge of assault with intent to injure, and one charge of driving while disqualified.

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[1] As explained below, the guilty plea in respect of this charge was entered part way through the jury trial.

[2] On 10 April 2024, Mr Rolleston was sentenced in the District Court to five years and one month's imprisonment.[2] He was also disqualified from driving for 12 months from the date of the sentencing judgment.[3]

[3] Mr Rolleston appeals his sentence on the basis that the Judge erred in imposing a starting point that was too high, resulting in an end sentence that was manifestly excessive.

Summary of the offending

[4] The offending took place on 29 August 2022. Late in the evening, Mr Rolleston and his associate knocked on the door of a unit that Ms Williams was visiting. The offenders were unknown to the two victims. When Ms Williams answered the door, they asked her to drive them somewhere, and she refused. Mr Rolleston and his associate left, before returning a few minutes later. Mr Sloane, who was the occupant of the unit, opened the door, and Mr Rolleston punched him multiple times in the head, causing him to fall to the ground. When Ms Williams refused demands to hand over the keys to her car which was parked outside, Mr Rolleston punched her several times in the face and she fell. There was a struggle as Mr Rolleston and his associate tried to take her handbag. The offenders ran outside, followed by Ms Williams. Mr Rolleston then chased her as she tried to call the police. He took Ms Williams phone and threw it to the ground, and there was a further physical altercation. The offenders left with the handbag containing her keys, cash, and other items of value.

[5] The Crown Summary of Facts (SOF) also notes that Mr Rolleston's associate was standing next the vehicle holding a large knife when Ms Williams followed them out of the address. According to the SOF, when the associate saw her come outside, he held up the knife and said: "you better fuck off bitch".

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2 *R v Rolleston* [2024] NZDC 7811 [Sentencing notes] at [62].
3 At [65].

Decision on appeal

[6] The Judge noted that the guideline judgment for aggravated robbery is *R v Mako*, which can be adapted for sentencing on robbery charges.[4]

[7] The Judge identified a number of aggravating features of the offending, namely: planning and premeditation, use of a weapon (threat with a large knife); multiple offenders, unlawful entry into a person's home at night, physical violence (including to the head) resulting in injuries to two victims, and property taken.[5]

[8] In terms of the driving while disqualified charge, the Judge noted that Mr Rolleston had first been suspended or disqualified in February 2022, and then in July 2022, when he was convicted twice.[6] This was the first time he had appeared for a charge of driving while disqualified in the aggravated form.

[9] The Judge reached a starting point of five years and six months' imprisonment for the robbery charge.[7] He then applied an uplift of nine months for Mr Rolleston's criminal history, involving other robberies and assault causing bodily harm, and four months for the charge of driving while disqualified.[8] That came to a total of six years and seven months' imprisonment.

[10] The Judge then applied a discount of 10 per cent for Mr Rolleston's guilty plea, which was entered after the trial had begun, and 15 per cent for cultural and background factors described in his s 27 report.[9]

[11] This brought Mr Rolleston's end sentence to five years and one month's imprisonment.[10] A concurrent sentence of four months was imposed for the driving while disqualified charge, along with a concurrent sentence of 18 months for the assault with intent to injure charge.[11]

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4 At [49], citing *R v Mako* [2000] 2 NZLR 170 (CA).
5 Sentencing notes, above n 2, at [45]–[47], [49] and [53].
6 At [16].
7 At [57].
8 At [58].
9 At [59] and [60].
10 At [60].
11 At [61].

Approach on appeal

[12] A first appeal against sentence may be brought as of right pursuant to s 244 of the Criminal Procedure Act 2011 (the CPA). This Court must allow the appeal only if it is satisfied that there is an error in the sentence imposed by the District Court and that a different sentence should be imposed.[12] In the vast majority of cases, the Court "will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles".[13] A sentence appeal "will almost always turn on a consideration of whether the final outcome is manifestly excessive", rather than the "route by which the judge reached that outcome".[14]

The Judge's assessment of the facts

[13] The sentencing Judge had presided over the jury trial in which Mr Rolleston had been facing a charge of aggravated robbery. Part way through the evidence of Ms Williams, the Crown agreed to withdraw the aggravated robbery charge, and Mr Rolleston entered a guilty plea to a substituted lesser charge of robbery. The sentencing proceeded on the basis of an agreed SOF.

[14] The SOF further describes the injuries to the victims. It documents that Mr Sloane suffered cuts to his face and arms, and his left eye was bruised and bleeding. He was taken to the hospital for medical treatment. Ms Williams received cuts to her face and hands, her left eye was bruised and bleeding, and she had a cut across her left eyebrow.

Submissions on appeal

[15] Mr Nolan, for the appellant, says that the Judge went beyond the information in the SOF in his description of the harm caused to the victims. Mr Nolan points to the following comments of the Judge:[15]

> [13] As I have said, this was a not insignificant beating. I heard from her, but I have also saw the photographs of both of them. Both were physically

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12 Criminal Procedure Act 2011, s 250.

13 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36], citing *Tutakangahau v R* [2014] NZHC 556 at [10].

14 At [36]; and *Ripia v R* [2011] NZCA 101 at [15].

15 Sentencing notes, above n 2.

> scarred and injured, Mr Sloane significantly so from what I have seen. There is no doubt from the photographs that this was a significant beating to both of them.

[16] The Judge also refers to having seen the victims' injuries, noting the physical effect as well as the evidence showing "an emotional effect on [Ms Williams]".[16]

[17] Mr Nolan says that the Judge's assessment of the violence inflicted on the victims and the likely harm caused to them based on the photographs was not relevant, given that Mr Rolleston had accepted the SOF. He notes that there is no reference in the SOF to scarring, ongoing physical injuries, or emotional impact on the victims. He contends that any factor relied upon by the Judge that was not set out in the SOF required a disputed facts hearing. As this did not occur, Mr Nolan submits that the sentence appeal should be conducted solely by reference to the facts outlined in the SOF.

[18] Mr Nolan relies on the observations of Lang J in *Waiapu v R*, that sentencing must proceed on an agreed summary of facts, and if the sentencing Judge intends to take into account an aggravating factor that is not apparent from the summary of facts, the Judge must indicate the weight likely to be given to the factor and the defendant is entitled to contest it at a disputed facts hearing.[17]

[19] Mr Nolan also refers to the case of *Arahanga v R*, in which this Court held that the sentencing Judge was not entitled to rely on the presence of a knife during several burglaries as an aggravating factor.[18] The appellant had not been charged with aggravated burglary, and the presence of a knife had not been raised as an issue at trial, nor had the Crown relied on it in their sentencing submissions.[19] However, the Judge referred to the knife as an aggravating factor at sentencing. This Court held that the Judge was required to indicate that the knife would be treated as an aggravating factor and give the appellants the opportunity to dispute that fact prior to sentencing.[20]

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16 At [47].

17 *Waiapu v R* [2016] NZHC 2491, [2016] NZAR 1561 at [14], citing *v Apostolakis* (1997) 14 CRNZ 492 (CA); *R v Whiunui* CA 212/05, 9 November 2005 at [4]; *Pokai v R* [2014] NZCA 356 at [30]; and *Arahanga v R* [2012] NZCA 480, [2013] 1 NZLR 189 at [75].

18 *Arahanga v R*, above n 17, at [75].

19 At [74].

20 At [75].

[20] Ms Archibald, for the Crown, contends that, having presided over the trial before the resolution was reached, the Judge was entitled to sentence with reference to any fact disclosed by the evidence which he accepted as proved, in addition to the agreed SOF. She noted that, as the Judge saw the photographs of the victims' injuries and heard Ms Williams' evidence as to the emotional impact of the offending on her during the trial, he was entitled to reach conclusions on that evidence and rely on it in sentencing Mr Rolleston.

Analysis

[21] Under s 24 of the Sentencing Act 2002, the Judge "must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt".[21] The Judge also "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".[22] That section then provides a specific process to be followed if the Judge is to take account of any disputed facts that are not implicit in a finding of guilt.[23]

[22] When guilty pleas are entered during the course of the trial it may be important for the court to understand the basis of those guilty pleas. If the pleas are entered on the basis of the facts agreed between the prosecution and defence as recorded in a summary of facts, then this will likely provide the factual basis for sentencing under s 24. When that occurs it would be wrong for the court to take into account aggravating factors that may have emerged from evidence that are not referred to in the summary in determining the sentence, at least without providing an opportunity to follow the disputed fact procedure in s 24. This may be particularly important when the charges and/or the summary of facts have been negotiated between prosecution and defence leading to the guilty plea.

[23] In *Arahanga v R*, the Court held that it was inappropriate for the sentencing Judge to rely on an aggravating factor that had not been relied on by the Crown without the defendant having the opportunity to address its significance by the s 24 process.[24]

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21 Section 24(1)(b).
22 Section 24(1)(a).
23 Section 24(2).
24 *Arahanga v R*, above n 17, at [71]–[77].

Sentencing judges are nevertheless entitled to draw inferences from a summary of facts so long as they are grounded in objective facts.[25] Sentencing judges may also take into account evidence they have heard prior to the plea being entered, provided it is consistent with the summary of fact to which the plea has been entered. The key consideration emerging from s 24 is procedural fairness.

[24] Here, the Judge recorded that the evidence he had heard was consistent with the SOF with the exception of one matter which he determined in Mr Rolleston's favour — that he did not kick Ms Williams in the crotch as the SOF stated.[26] We consider that this was an appropriate approach.

[25] We do not accept that the Judge otherwise unfairly departed from the SOF when addressing the offending. The Judge's comments that the beating was "not insignificant" and that it was a "significant beating" were amply justified by the description in the SOF. Both victims were confronted by strangers when they opened the door, and then punched in the head with such force that they fell to the ground, resulting in cuts to their face and arms or hands, and bruises and bleeding to their eyes. Ms Williams also received kicks to her legs and was threatened with a large knife. Mr Sloane required hospital treatment.

[26] The Judge described Ms Williams and Mr Sloane as being "physically scarred and injured".[27] While scarring usually refers to marks on the skin due to a past injury, we consider the Judge used the word "scarred" to emphasise that the attack was serious and involved cuts to the skin. The Judge's reference to physical scarring and injury was an available inference based on the material in the SOF. In addition, the reference to the "emotional impact" on Ms Williams was also an available inference from the description of the offending set out in the SOF.

[27] The characterisation of the injuries as described by the Judge is distinguishable from *Arahanga v R*, where the presence of the knife inferred by the Judge in sentencing

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25 *R v Kinghorn* [2014] NZCA 168 at [18] and [31]. See also *Gebhardt v R* [2024] NZCA 332 at [48], citing *Zagros v R* [2023] NZCA 334 at [28].

26 Sentencing notes, above n 4, at [3] and [11].

27 At [13].

was a distinct and significant aggravating factor. It had not been addressed at trial nor was it relied upon by the Crown in sentencing.

[28] There is no material difference between the Judge's comments and the SOF. We are satisfied that the comments of the Judge were amply justified on the basis of the SOF and the inferences able to be drawn from those facts. The evidence he took into account was consistent with the SOF. A disputed facts hearing was not required. The factual basis for the Judge's comments in his sentencing notes as to the injuries and impact on the victims is consistent with the description of the injuries in the SOF. There was no procedural unfairness.

[29] The Judge made no error in referring to the victims' injuries and the emotional impact on the victims as he did.

Starting point

[30] The second argument advanced on appeal is that the starting point was too high when compared with other comparable cases. Mr Nolan submits the starting point of five years and six months' imprisonment was manifestly excessive. He contends that a starting point of four years' imprisonment would have been appropriate.

[31] The Crown's position is that the starting point was within the available range. Ms Archibald submits that the aggravating factors of Mr Rolleston's offending included premeditation, unlawful entry to the victim's address, the extent of violence used, the presence of two offenders, the use of a weapon by Mr Rolleston's co-offender, and the harm caused to the victims. It is also noted that the offending was for the purpose of "taxing" or enforcement of a gang debt.

Analysis

[32] Aggravated robbery carries a maximum penalty of 14 years' imprisonment, compared to 10 years imprisonment for robbery.[28] In *King v R*, this Court made the

[28] Crimes Act 1961, ss 234(2) and 235.

following observation regarding the use of the *Mako* guidelines in sentencing for charges of robbery:[29]

> …we accept that while the guidelines in *R v Mako* should not be applied strictly to cases involving robbery, they can be adapted for use in such cases "so long as arithmetical adjustments are not made mechanically to fit the differing maximum penalties".

[33] The relevant features referred to in *Mako* which are to be considered in setting the starting point include:

(a) the degree of planning and preparation;

(b) the number of participants and their deployment;

(c) disguises;

(d) the number and types of weapons and how they are brandished, and whether any firearms are unloaded;

(e) the target premises or persons, relevant to the potential gain, and the number of members of the public who are affected;

(f) the specific provisions of the Crimes (Home Invasion) Amendment Act 1999;

(g) the vulnerability of the victims;

(h) the need for deterrence of certain types of activity in view of their frequency or prevalence in a particular area;

(i) the use of violence;

(j) the presence of threats and intimidation;

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[29] *King v R* [2019] NZCA 413 at [19], citing *Heteraka v R* [2013] NZCA 339 at [24]; and *R v Mako*, above n 4.

(k) the property stolen and the extent of any recovery;

(l) associated offending such as vehicle conversion, detention, or abduction of victims and hostage-taking;

(m) the impact on victims;

(n) evidence of there being gang activity; and

(o) multiple offending.

[34] Mr Nolan suggests that the change of plea was based on a significant change in the prosecution allegations, evidenced by the reduction of the charge from aggravated robbery to that of robbery. He says that negotiations had been undertaken before trial, but it was not until the Crown had rehearsed the evidence at trial that it had changed its position on the charge. However, as Ms Archibald for the Crown points out, the SOF was not amended and the presence of the knife as well as the description of the violence and the injuries were accepted by Mr Rolleston.

[35] Mr Nolan referred to a number of cases and argued that the current sentence was inconsistent with them.

[36] First, Mr Nolan refers to the case of *R v Ha'apai*, in which a starting point of six years' imprisonment was adopted on one charge of robbery and upheld on appeal.[30] He notes that the sentencing Judge considered that the "worst aggravating feature" was the vulnerability of the victim, who was an 85-year-old woman.[31] The defendant had seen the victim obtaining traveller's cheques at the bank and then followed her and her son to the victim's home. The defendant pushed the victim onto the concrete path as she made her way towards the house, while her son was parking the car in the garage. The defendant made off with the victim's handbag containing the traveller's cheques. She sustained substantial injuries as a result of the fall and later died of unrelated causes while in hospital recovering from the injuries. We agree with the

30 *R v Ha'apai* CA294/05, 2 May 2006 at [29].
31 At [8].

sentencing Judge who noted that the vulnerability of the very elderly victim makes that case more serious, despite the fact that in the present case two offenders and a knife were involved.

[37] Mr Nolan refers to the decision in *Norman v R*, which was also considered by the sentencing Judge.[32] He submits that the aggravating features present in *Norman* are similar to those in the present case, including that there were two offenders, unlawful entry, actual violence, an attack to the head, and property taken. The Judge in that case adopted a starting point of two years and 10 months' imprisonment for a charge of robbery which was not challenged on appeal.[33] The defendant, who knew the victim and her partner, visited the victim's home. The defendant asked the victim if she had any gear or cash, and the victim responded that she did not. The victim asked them to leave and attempted to call the police. The defendant lunged at the victim, grabbed her hair, and pulled her to the ground in the living room. The victim's three children were present as the defendant stomped on the victim's body, face, and back, before taking the victim's cell phone and purse. The victim sustained bruising to her body and face. On appeal, the starting point was said to be at the "upper level of the appropriate range", but it did not lead to a sentence that was manifestly excessive.[34] We agree with the Crown that there are significant differences between the present case and *Norman*, where the entry was not unlawful, the violence inflicted was more limited was against one victim, and there was no weapon involved.

[38] Mr Nolan also points to *Taia v R*, where the defendant faced a charge of robbery, alongside charges of injuring with intent to injure, threatening to kill, assault with intent to rob, and two charges of kidnapping.[35] It involved an attack on the victim by a number of gang members, resulting in the complainant receiving an extensive beating (including with a wrench and a hammer), being detained for a day, being subject to threats, and being directed to withdraw money from an ATM. The global starting point of six years imprisonment was upheld by this Court.[36] We consider that the present case was more serious than *Taia*, in which the starting point of six years

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32 Sentencing notes, above n 2, at [41] ,citing *Norman v Police* [2022] NZHC 808.
33 *Norman v Police*, above n 32, at [16].
34 At [30] and [53].
35 *Taia v R* [2023] NZCA 330.
36 At [17].

was not disturbed by this Court and had been described by the sentencing Judge as "the bare minimum that would be appropriate."[37]

[39] The sentencing Judge also considered the present case to be more serious than the case of *Heteraka v R*, where a starting point of five years' imprisonment was adopted.[38] The aggravating features of that case were: premeditation, unlawful entry into private property (a backpackers hostel) and then into a private room, the offending occurring at night, a female victim who was alone and vulnerable, actual violence and the appellant claiming to have a knife, threatening to kill, and significant ongoing emotional harm to the victim, albeit her injuries were relatively minor.[39] No knife was actually involved. While *Heteraka* involved a threat to kill, a vulnerable victim, and significant ongoing emotional harm, Mr Rolleston's offending involved premeditation, actual violence, and injury to two victims. Furthermore, unlike that in *Heteraka*, the present offending involved two offenders who forced their way into a house at night, and threats made by a co-offender whilst holding a knife. We agree with the sentencing Judge that this case is more serious than *Heteraka*.

[40] We consider that the starting point of five and a half years was within the range available to the sentencing Judge having regard to these cases albeit at the high end of the range.

[41] We also agree with the Crown that the 10 per cent discount given for the guilty plea was generous given that the plea was entered after the trial, in light of the Supreme Court's observation in *Hessell v R* that real justification is required before any allowance is made after trial has commenced.[40]

[42] The Crown also points out that that there appear to be several calculation errors in Mr Rolleston's sentence. The Judge applied an uplift for Mr Rolleston's previous convictions at stage one of the sentencing process, as opposed to stage two in terms of the *Moses v R* methodology.[41] There is also a minor miscalculation applying the

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37 *R v Taia* [2022] NZDC 25267 at [15].
38 Sentencing notes, above n 2, at [53], citing *Heteraka v R*, above n 29.
39 *Heteraka,* above n 29, at [26].
40 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [76].
41 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.

discounts for personal factors. Following the *Moses* methodology, the end sentence reached is five years, one month and two weeks' imprisonment. Therefore, the end sentence is more favourable to Mr Rolleston by two weeks.

[43] It is the end sentence that is the focus. We conclude that the end sentence of five years and one month's imprisonment is not manifestly excessive in the circumstances.

Result

[44] The appeal against sentence is dismissed.

Solicitors:
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