IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA467/2023
[2024] NZCA 142

BETWEEN	LUKE PAUL SAMUEL RICHARDS Appellant
AND	THE KING Respondent

Hearing:	16 April 2024
Court:	Wylie, Mander and Jagose JJ
Counsel:	C J Bernhardt and J G Jones for Appellant H G Clark for Respondent
Judgment:	1 May 2024 at 11.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Jagose J)

[1] Luke Richards appeals the 8 August 2023 decision of Judge Edwards in the District Court at Palmerston North,[1] sentencing him to six years and four months' imprisonment on his guilty pleas to aggravated robbery[2] and breaches of post-detention conditions requiring liaison with his probation officer.[3]

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1 *R v Richards* [2023] NZDC 16494 [sentencing notes] at [37].
2 Crimes Act 1961, s 235(a). Maximum penalty of 14 years' imprisonment.
3 Sentencing Act 2002, s 80(U). Maximum penalty of six months' imprisonment or $1,500 fine.

Background

[2] Mr Richards, pretending to be his own girlfriend, arranged to have the victim meet "her" at a carpark in Feilding at about sunset on Saturday, 26 November 2022. Mr Richards and another man were driven to the carpark by the girlfriend and got out at its entrance. The girlfriend continued to drive into the carpark and parked immediately in front of the victim's car, blocking it from driving away.

[3] Followed on foot by the other man, Mr Richards approached the victim's car from behind and smashed its front driver-side window with a hammer. He then used the hammer to strike the victim in his face and, when the victim leaned forward, to the back of his head. The victim managed to get out of his car and escape on foot. One of Mr Richards' accomplices then drove the victim's car away, following Mr Richards and the girlfriend in the first car, to Feilding's outskirts. They gave the victim's car to another person to settle a debt.

[4] The victim was badly injured, suffering multiple complex fractures to his right eye orbit and requiring surgical insertion of a titanium plate. His right eye permanently and irreversibly lost central vision, which led to the loss of his 10-year employment as a trade-qualified metal fabricator and welder, his only trained skill. He also suffered other physical and psychological damage with ongoing and comprehensive impacts on his life.

[5] At the time of the offending, Mr Richards was subject to standard post-detention conditions arising on conclusion of his prior home detention sentence.[4]

Judgment under appeal

[6] Having regard for guideline judgments of this Court, *R v Mako* and *R v Taueki*,[5] Judge Edwards noted overlapping aggravating factors of extreme violence, premeditation, serious injury, use of a weapon, attacking the head and facilitation of another crime (theft of the car).[6] The Judge acknowledged theft of the car was not the

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4 Sentencing Act, s 80N.
5 *R v Mako* [2000] 2 NZLR 170 (CA); and *R v Taueki* [2005] 3 NZLR 372, [2005] 3 NZLR 372.
6 Sentencing notes, above n 1, at [15].

motivation for the attack, but its consequence.[7] She was drawn by another decision of this Court, *Hutchinson v R*,[8] involving a group's hammer attack on a car's driver but there to steal the car, resulting in a nine-year starting point. While she considered Mr Richards' attack was more serious,[9] its lack of other objective resulted in the Judge taking a starting point of eight years and six months' imprisonment.[10]

[7] With express regard for proportionality, the Judge then uplifted the starting point by some 15 per cent or 16 months for Mr Richards' previous conviction history, especially prior convictions for violence, and his being "subject to and in breach of … post-detention conditions at the time [he] committed this offence".[11] She allowed a 25 per cent or 26-month discount to her starting point for Mr Richards' guilty pleas.[12] And she discounted Mr Richards' sentence by 15 per cent or 16 months to reflect trauma and abuse in his background causatively linked to his offending, "tempered by concerns about how ready" he was to address them.[13] That led the Judge to a sentence of six years and four months' imprisonment.[14]

Submissions on appeal

[8] For Mr Richards, Mr Bernhardt contended the Judge's sentence was manifestly excessive, arguing the Judge erred by adopting too high a starting point and uplift while applying an insufficient discount for Mr Richards' background. In particular, the Judge did not expressly apply this Court's guidelines,[15] and the case on which she particularly relied was not comparable because it incorporated both that offending's additional criminal objective and a further charge, of wounding with intent to cause grievous bodily harm,[16] neither replicated for Mr Richards.

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7 At [10].
8 *Hutchinson v R* [2013] NZCA 16.
9 Sentencing notes, above n 1, at [18].
10 At [19].
11 At [21].
12 At [22].
13 At [29].
14 At [31]. For the conviction of aggravated robbery, Mr Richards was sentenced to six years and four months' imprisonment (at [37]). He was sentenced to one month's imprisonment on the other charges, to be served concurrently (at [38]).
15 *R v Mako*, above n 5; and *R v Taueki*, above n 5.
16 *Hutchinson v R*, above n 8.

[9] It was argued Mr Richards' offending was akin to low-level street robbery. The *Mako* guideline for low-level street robbery offers a starting point between 18 and 36 months.[17] Even from the top of that range, the Judge's increase in starting point by some five and half years for Mr Richards' violence was said to be excessive. The high end of *Mako*'s starting points at "eight years or more" for materially more serious robberies of commercial premises with the use of violence,[18] comparably with home invasion aggravated robbery sentences,[19] was illustrative. On the other hand, Mr Richards' intention to cause really serious harm was not materially aggravating under the *Taueki* guideline, but inherent in his violence conviction, meaning the Judge's inferred adoption of the top of band two of *Taueki* was also said to be excessive, Mr Richards getting "the worst end of both guidelines". And the after-thought nature of the vehicle's theft also made *Hutchinson*'s "stern" sentence an inappropriate comparator. Mr Bernhardt submitted the appropriate starting point was seven years and six months' imprisonment.

[10] Noting Mr Richards' aggravated robbery offending predated his breach of post-detention conditions (and therefore the Judge erred in uplifting for offending while in breach of those conditions), Mr Bernhardt also contended the Judge's approach of uplifting in percentage terms from a lengthy starting point risked double punishment of previous convictions. By reference to 10-year starting points for serious sexual offending,[20] he observed 12-month (or 10 per cent) uplifts commonly have been endorsed by this Court, and recommended the same here.

[11] Last, Mr Bernhardt argued the Judge's "tempering" of her acknowledgment of offence-causative factors in Mr Richards' background because of his indeterminate rehabilitation was improperly to diminish the former for "the absence of an additional (arguable) mitigating factor". In Mr Bernhardt's submission, Mr Richards' established causative background and mental health factors justified an additional 20 per cent discount.

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17 *R v Mako*, above n 5, at [59].
18 At [54].
19 *Namana v R* [2013] NZCA 640.
20 Referring to *R v Smith* [2009] NZCA 514; *D (CA197/14) v R* [2014] NZCA 373; *RS (CA21/14) v R* [2014] NZCA 484; *P (CA515/14) v R* [2015] NZCA 480; and *Matthews v R* [2017] NZCA 493.

[12] For the Crown, Ms Clark identified Mr Richards' use of actual violence in the aggravated robbery as far from any "low-level street robbery". None of *Mako*'s fact scenarios readily applied, and the Judge's reflection of *Hutchinson* was generous in light of Mr Richard's greater criminality in causing permanent disability to a more vulnerable victim premeditatively lured to a carpark. And the "vigilante intention" asserted for Mr Richards on sentencing offered further aggravation for a higher starting point. The Judge appropriately used *Taueki* to cross-check for consistency if Mr Richards was convicted of either aggravated robbery or grievous bodily harm offending.

[13] The Judge had explained Mr Richards' post-release conditions breach would not give rise to any uplift. She clearly meant she only considered the aggravated robbery in breach of those conditions. Mr Richards' 40-plus convictions over the preceding decade — increasingly of significant family and other violence, including firearms offending — well justified a 15 per cent uplift. The seriousness of his index offending allowed for limited reduction on account of his causative background factors,[21] for which a 15 per cent discount was in any event "much more usual".[22] Standing back, Ms Clark submitted Mr Richards' escalation in violent offending, despite previous rehabilitative sentences, generously was addressed by the Judge.

Approach on appeal

[14] We must allow Mr Richards' appeal only if satisfied both there is error in the sentence, and a different sentence should be imposed.[23] In any other case, we must dismiss the appeal.[24] The measure of error is the sentence be "manifestly excessive", a principle "well-engrained" in the approach to sentencing appeals.[25] The court will not intervene where the sentence is within a range properly justified by accepted sentencing principle. Whether the sentence is "manifestly excessive" is to be assessed

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21 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [111] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.
22 *McMillan v R* [2022] NZCA 128 at [148].
23 Criminal Procedure Act 2011, s 250(2).
24 Section 250(3).
25 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [33] and [35].

in terms of the sentence given; the process by which it is reached rarely will be decisive.[26]

Discussion

[15] This Court's *Mako* guideline judgment for application in sentencing for aggravated robbery offending predominantly is informed by the "widely variable" circumstances in which the offending occurs, requiring assessment of the instant combination of features to establish a starting point.[27] The particular factual scenarios identified by the Court merely reflect some common combinations of aggravating factors for comparison.

[16] Mr Richards' offending goes well beyond the "demanding with menaces" nature of so-called "street robbery", which attracts a starting point of between 18 and 36 months without any actual violence.[28] Critically, "actual violence … takes the conduct into another dimension and must attract a considerably higher rating in overall seriousness".[29] Use of "actual violence" in "robbery of commercial premises where members of the public can be expected to be present" justifies a starting point of "eight years or more".[30] In "bad cases" of aggravated robbery of a shopkeeper on their own in retail premises "six years … should be the starting point".[31] Aggravated robbery without serious injury of vulnerable taxi drivers justifies a starting point of four to five years.[32]

[17] But all is flexible guidance for adjustment according to the seriousness of the particular offending being assessed for sentencing,[33] which criminality "must be assessed by the particular combination of features of which it is composed … unconstrained by overemphasis on one feature such as the nature of the target premises".[34]

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26 *Ripia v R* [2011] NZCA 101 at [15].
27 *R v Mako*, above n 5, at [34].
28 At [59].
29 At [43].
30 At [54].
31 At [56].
32 At [57].
33 At [61].
34 At [52].

[18] Material considerations here are the planning and premeditation reflected in Mr Richards luring the victim to the carpark at the close of the day, where Mr Richards attended with associates who acted to prevent the victim's car's departure and otherwise was at least prospective reinforcement, and used a weapon repeatedly to inflict significant physical damage to the victim's head with ongoing psychological and permanent physical sequalae. In then taking the victim's car, it is very serious aggravated robbery conduct.

[19] Except for the victim's escape here, those features bear comparison with inferred materially higher starting points approved as indicated starting points in *Mako*.[35] From the perspective of *Taueki*'s guideline judgment for application in sentencing for grievous bodily harm offending (as on the facts Mr Richards alternatively could have been charged), those same features (counted as seven, if overlapping, of *Taueki*'s aggravating features) could establish his particularly grave offending as solidly within *Taueki*'s band three, of nine to 14-year starting points.[36]

[20] The Judge chose a lower starting point, informed by its consistency with *Hutchinson*, being factually comparable to the index offending. That arguably is generous to Mr Richards. It illustrates the desirability guidance principally be drawn from guideline judgments, rather than from others even if applying them.[37] In our assessment, a starting point of more than eight years and six months was open to the Judge by reference to *Mako* alone. Mr Richards was charged under s 235(a)'s variant of aggravated robbery, being to cause grievous bodily harm to any person in the course of a robbery. So the Judge's reference to *Taueki*'s aggravating factors entirely was appropriate. Although Mr Richards pleaded guilty to an amended version of the summary of facts, headed with s 235(c)'s variant of being armed with an offensive weapon or instrument, the summary nonetheless records "[h]e then struck the victim in the face with the hammer … As the victim [leaned] forward, the defendant struck the victim again, this time to the back of his head". It is incontestable Mr Richards caused grievous bodily harm.

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35 At [61] and the Schedule, in particular *R v Manoharan* CA287/98, 15 October 1998 (12-year starting point) and *R v Williams* CA392/97, 31 March 1998 (eight-year end sentence).

36 *R v Taueki*, above n 5, at [31(a)]–[31(f)] and [31(h)] (and, as to [31(h)], noting [42]), [34(c)] and [40].

37 *R v Mako*, above n 5, at [60]; and *R v Taueki*, above n 5, at [42].

[21] If the Judge erred in her expression of Mr Richards' offending also being "in breach of" his post-detention conditions, then it only was in expressing the otherwise implicit expectation he cease offending; the objective of post-detention conditions inferentially is to adequately reduce the risk of further offending.[38] The Judge expressly noted she would not uplift the starting point for the two breaches.[39]

[22] We acknowledge percentage uplifts from starting points in sentencing more serious offending risk over-penalising less serious prior offending. But we disagree the 16-month uplift here was doubly to punish Mr Richards' lengthy criminal history. Rather it recognised his index offending was an amplified continuation of prior violent offending, not materially deterred by past sentences. For deterrence, a meaningful uplift was necessary. Plainly the Judge thought so, in rounding her percentage calculation up to 16 months. Neither do we see Mr Richards' harsh and regrettable background now to make particularly significant contribution to the index offending. Again, it sufficiently was addressed by the Judge's 16-month discount. In our assessment, the Judge's effective equivalence of contribution by Mr Richards' aggravating criminal and mitigating personal history was not inappropriate.

[23] Thus, ultimately, the Judge's end sentence is an arguably generous application of the principles expressed in *Mako*. We find no fault with it. There is no question of any excess.

Result

[24] The appeal is dismissed.

Solicitors:
Public Defence Service, Waitākere for Appellant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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38 Sentencing Act, s 80P(1).
39 Sentencing notes, above n 1, at [20].