IN THE COURT OF APPEAL OF NEW ZEALAND

CA577/2009
[2010] NZCA 360

BETWEEN	GUY NICHOLAS WILSON Appellant
AND	THE QUEEN Respondent

Hearing: 24 June 2010

Court: Chambers, O'Regan and Randerson JJ

Counsel: M Pecotic for Appellant
H W Ebersohn and B J Horsley for Respondent

Judgment: 9 August 2010 at 11.30 a.m.

JUDGMENT OF THE COURT

A The appeal against sentence is allowed.

B The sentence of preventive detention on the charge of assault with intent to rob is quashed.

C A sentence of eight years imprisonment is substituted on that charge with a minimum period of imprisonment of five years.

REASONS OF THE COURT

(Given by Randerson J)

[1] The appellant was convicted after jury trial on one count of murder and one count of assault with intent to rob. He was sentenced by Winkelmann J to life imprisonment on the charge of murder and preventive detention on the charge of assault with intent to rob.[1] In each case, a minimum period of imprisonment of 17 years was imposed.

[2] Initially, Mr Wilson appealed against both conviction and sentence. However, the appeal against conviction has not been advanced and his appeal against sentence is limited to the sentence imposed on the charge of assault with intent to rob. He accepts the sentence imposed on the murder charge.

[3] Counsel on each side accepted that, to an extent, the appeal against sentence on the charge of assault with intent to rob was academic given the sentence imposed on the murder charge. However, the appellant is entitled to challenge his sentence and we proceed accordingly.

The facts

[4] The facts are not in dispute. The appellant and two co-offenders went to the male victim's address at night with the intent of using stand-over tactics to commit a robbery. Their target was money and possibly drugs. The appellant had taken steps to disguise himself, wore gloves and was armed with a knife. He took with him a roll of duct tape with the intention of binding the victim. When they arrived, the male victim, his wife and young daughter were at home. The appellant forced his way in. The victim's wife was able to run upstairs and locked herself in her daughter's bedroom from where she was able to call the police on her mobile phone.

[5] A struggle took place downstairs with the male victim. The Judge found that the appellant took the lead in the struggle. The victim fought back but was subdued after an intense fight. He was then bound with duct tape with his arms behind his back. His eyes and mouth were taped with the same material. During the struggle he was bruised and was stabbed once in the arm.

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1 *R v Wilson* HC Auckland CRI-2006-092-16632, 19 August 2009.

[6] During the altercation, the victim ceased breathing and died of asphyxia. The Judge found as a fact that the appellant had applied pressure to the victim's chest thereby restricting his neck and airflow. While the victim was left dead or dying on the lounge floor, the appellant and the two co-offenders looked around the house for items to take. While they were doing that the police arrived and the offenders were captured shortly afterwards.

The Judge's approach to sentencing

[7] The appellant was 38 years of age at the date of sentencing. Since 1985 he had amassed some 104 convictions, approximately half of which were for dishonesty offences including burglary, theft and receiving. He had a number of convictions for violence in various forms which we will detail later. Prior to the subject offending on 18 November 2006, his most recent convictions for violent offending were for robbery in December 2003 (for which he was sentenced to 15 months imprisonment) and male assaults female in July 2004 (for which he received a four month sentence).

[8] The Judge identified deterrence and the protection of the community as the most significant factors for the appellant's offending. She regarded the appellant as the most culpable of the three offenders. He took the lead role in planning and executing the offending including the attack on the male victim. The Judge acknowledged that the Crown's case had relied on recklessness rather than an intention to kill. She observed that the appellant simply did not care whether the victim lived or died.

[9] The Judge identified the aggravating factors as the premeditated nature of the offending; the fact that the murder was convicted in the course of a serious criminal offence; the forced entry into a dwelling place where the victim's partner and child lived; and the intention to use significant violence to subdue and restrain the victim.

[10] In relation to the sentence for murder, Mr Wilson's counsel accepted that the 17 year minimum period of imprisonment was appropriate having regard to s 104 of the Sentencing Act 2002. It was accepted that two of the factors identified in s 104

were engaged: the unlawful entry into a dwelling place[2] and the committing of the murder in the course of another serious offence.[3] The Judge was satisfied that it would not be manifestly unjust to impose the 17 year minimum period of imprisonment otherwise mandated by s 104.

[11] In approaching the sentence on the count of assault with intent to rob, the Judge accepted counsel's submission that care needed to be taken not to double-count aggravating factors given the potential overlap with aggravating factors considered in relation to the murder charge. We consider this is a particularly important feature of the present case where both charges arose from the same series of events.

[12] The Judge had before her four reports from health assessors on the issue of preventive detention. Two were obtained at the Crown's request and two by the defence. The Judge analysed these reports with great care. Features common to all reports were that Mr Wilson had an abusive childhood and that drug abuse was a factor in his offending. He was not considered to be mentally disordered but he had displayed a range of anti-social features which at least one of the report writers considered to amount to a personality disorder. Only one (the psychologist Ms Visser) identified the personality disorder as being at the level of the prototypical psychopath. Ms Visser expressed concern about Mr Wilson's entrenched attitude in regard to anti-social behaviour and violence and what she saw as his lack of motivation to make the changes necessary to modify his behaviour. As noted by all report writers, the question of risk of violence over a long term is difficult to predict, but Ms Visser considered Mr Wilson presented a high risk of future violent behaviour which would remain unless he was motivated to change and made the strenuous efforts needed to achieve that.

[13] The psychiatrist, Dr Wyness, identified a number of risk factors which would exacerbate the likelihood of reoffending. These included the pattern of past offending, the lack of any employment history, his failure to change his behaviour after previous terms of imprisonment, the lack of any feasible plans for his future

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2 Section 104(1)(c).
3 Section 104(1)(d).

and his failure to accept full responsibility for the offending. He considered that Mr Wilson's history did not "bode well for the future".

[14] The view of the psychiatrist, Dr Goodwin, is best summarised in his conclusions:

> The court will be aware of the limitations in predicting the likelihood of the recurrence of any particular behaviour, particularly at an indeterminate point in the future. I do note that Mr Wilson has previously reoffended in a number of ways following release from previous episodes of incarceration. His risk of reoffending (in *some* way) if released from prison at this time is high. His risk of reoffending in a *similar* way (i.e. serious violence and or murder) at an indeterminate point in the future cannot be stated with accuracy. However it does seem apparent in applying appropriate structured professional judgement tools, such as the HCR20, to Mr Wilson's case, that his risk of such future offending is moderate to high.
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> Mr Wilson openly admits he has attended numerous programmes and courses in prison designed to address reoffending. On release however he has tended to rapidly resume offending, usually as part of gang related criminal activity. His responses to my questioning around the basis for his offending seem to indicate a strong component of peer pressure and loyalty to others is important in understanding his recurrent offending.

[15] The final report was from the psychiatrist, Professor Simpson. In common with the other report writers, Professor Simpson identified Mr Wilson's connections with the drug and gang underworld as being a factor in his offending. It does not appear to have been in dispute that Mr Wilson, by virtue of his imposing physical presence, was used as an enforcer in the drug world. His explanation for the subject offending was part of that pattern.

[16] Professor Simpson considered it was likely Mr Wilson would be at high risk of general recidivism but it was not so clear that he was at a very high risk of serious violent recidivism. In Professor Simpson's view, if Mr Wilson were not used by anti-social gangs to impose authority on others, his most likely violent risk would be domestic violence. Factors that might reduce his high actuarial reoffending risk included his links to cultural identity, his increasing age and his desire to be a father to his children. However, his drug misuse, anti-social networks and long-standing behavioural patterns were considered to argue against those positive factors. Engagement in specific anti-violence and culture-based programmes while he was in prison would be essential if his pattern of offending were to change.

[17] The Judge then expressed her conclusions on the prospect of preventive detention including the principle that a lengthy determinate sentence was preferable:[4]

> I think it is fair to say that all of the report writers would assess you as being at high risk of future offending, although there is less clarity in the reports of Dr Goodwin and Professor Simpson that this will necessarily be serious offending if suitable structures are put in place for you when you are released from prison.
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> Another factor I must consider is the absence or failure of efforts by you to address the causes of your offending. As has been observed, you have attended programmes in prison, yet you continue to offend.
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> I also have to consider the principle that a lengthy determinative sentence is preferable. You are in early middle age, but you are still dangerous. Seventeen years is a lengthy period of time but the material before me establishes that you have a serious history of offending involving serious harm to victims, and the only cessation to that is when you are in prison. Prison has not then been an effective deterrent to date. You have not been able to avail yourself of any of the programmes to address the offending when in prison, and there is nothing to suggest that you have an achievable, realistic desire to change your behaviour. Also relevant to my assessment is the clear sense emerging from the material that you do not have much of a sense of right or wrong. It seems that you are often used by others as their enforcer, and the reality for you now is that criminal behaviour is the only behaviour you really know as a way of earning a living or a way of life when you are out of prison. You are simply reckless as to the effect of your actions on others and in the past you have inflicted serious violence. On this occasion, as we know, your criminal and reckless conduct has caused a person's death.

[18] The Judge was satisfied that a sentence of preventive detention was appropriate and imposed that sentence on the charge of assault with intent to rob. She also imposed a minimum period of imprisonment of 17 years, although without expressing the reasons for doing so.

Mr Wilson's previous convictions

[19] It is often said, with some justification, that the best predictor of future behaviour is an offender's previous history of offending. This is one of the factors which the Court must take into account when considering whether to impose a sentence of preventive detention under s 87 of the Sentencing Act.[5] There can be no question that Mr Wilson has an unenviable record of previous offending extending over a 20 year period since 1985. As the Judge noted, about half of these offences

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4 At [60] – [62].

5 Sentencing Act 2002, s 87(4)(a).

were for dishonesty. There have also been a number of convictions for violence, some of which are qualifying offences for the purposes of s 87.

[20] The most serious offending occurred in 1987 for which he was sentenced to ten years imprisonment in 1989. This offending included rape, abduction and aggravated injury. At the time, Mr Wilson was only 17 years of age so this offending is not a qualifying offence.[6] Nevertheless, it is properly regarded as part of his overall history which may be taken into account in considering an appropriate sentence. He has not since been convicted of any sexual offending, but there have been subsequent convictions for violent offending:

Year	**Offence**	**Sentence**
1996	Kidnapping and related offences	2 years, 6 months
1997	Injuring with intent to injure	18 months
1999	Common assault	6 weeks
2003	Common assault	3 weeks
2003	Robbery (by assault)	15 months
2004	Male assaults female	4 months

[21] While this history clearly indicates an ongoing pattern of violence, there are two features which are relevant for present purposes. First, since the very serious offending in 1987, the sentences imposed for Mr Wilson's violent offending have been relatively short. Secondly, his history of violent offending does not suggest an escalation in terms of violence. If anything, the level of seriousness has reduced until the subject offending. The 1996 offending, for which he was sentenced to two and a half years imprisonment, involved Mr Wilson bursting into a house during daylight hours and using stand-over tactics to collect a debt. There was no violence used on this occasion although the sentencing Judge in the District Court expressed the view that, if there had been violence involved, he would probably have been asked to send the case to the High Court for a sentence of preventive detention to be imposed.

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6 Section 87(2)(b).

Submissions

[22] In her submissions for Mr Wilson, Ms Pecotic focused her attention on the pattern of his offending[7] and the principle that a lengthy determinate sentence was preferable if this provided adequate protection for society.[8] She submitted that the pattern of previous offending did not support a sentence of preventive detention; the Judge had failed to take account of the effect of the sentence of life imprisonment as a protection for the community including the 17 year minimum period of imprisonment imposed on the murder charge; the imposition of preventive detention for the lesser charge of assault to rob breached the principle of totality and resulted in a final sentence that was manifestly excessive in the circumstances; a lengthy finite sentence was sufficient in the circumstances to protect the community; and the minimum period of imprisonment imposed on the charge of assault with intent to rob was disproportionate when considering the 14 year maximum term of imprisonment which could be imposed on that charge.

[23] It was submitted on behalf of the Crown that the Judge had adequately considered the factors set out in s 87(4) of the Sentencing Act and that a sentence of preventive detention was justified having regard to Mr Wilson's previous offending; the fact that prison had not been a deterrent to him in the past; his lack of motivation to address his offending; the high risk of future offending; and the seriousness of harm to the community.

[24] It was submitted that a finite sentence would not be adequate to protect the community and that the sentence of preventive detention would be a powerful incentive to reform by comparison to a prisoner subject to a finite term.

[25] It was accepted by the Crown that the Judge did not state any reasons for imposing the minimum period of imprisonment on the assault with intent to rob charge. It was acknowledged that a minimum period of imprisonment of 17 years was too high and it was submitted that the appropriate minimum period of imprisonment, having regard to the seriousness of the offending, was ten years.

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7 Section 87(4)(a).
8 Section 87(4)(e).

Discussion

[26] Sentencing in cases of this kind is not an easy exercise but we are satisfied that the appeal must be allowed. While there was undoubtedly jurisdiction to impose a sentence of preventive detention on the charge of assault with intent to rob, the case for doing so was not compelling, particularly in light of the sentence of life imprisonment with a minimum 17 year term imposed on the murder charge.

[27] While the pattern of Mr Wilson's violent offending was unattractive and previous periods of imprisonment had not deterred him, the level of his violent offending had not escalated and, other than the very long term imposed on him some 20 years earlier when he was 17, his sentences tended to be short-term reflecting their relative lack of seriousness. While we accept that his offending has, on a number of occasions, caused significant harm to the community, we do not consider his offending has been at such a level that the statutory preference for a lengthy determinate sentence should have been ruled out.

[28] Section 85 of the Sentencing Act requires the Court to consider totality. It also requires that, where concurrent sentences are to be imposed, the most serious offence must, subject to any maximum penalty provided for the offence, receive the penalty that is appropriate for the totality of the offending. Each of the lesser offences must then receive the penalty appropriate to that offence.

[29] Standing back, and viewing the totality of the offending, we consider that the overall sentence was manifestly excessive. There can be no doubt that the sentence imposed on the murder charge was entirely appropriate. The minimum term of 17 years imprisonment on that charge will give Mr Wilson ample opportunity to reflect and to undertake the programmes recommended by the report writers in relation to drug abuse and violence issues. He will not be released until the Parole Board is satisfied that he will not be an undue danger to the community and, for the remainder of his lifetime, he will be subject to recall in the event of further offending.

[30] There is a further factor relevant to the totality issue. The offending which gave rise to the charge of assault with intent to rob is essentially part and parcel of the events which led to the victim's death. In a real sense, the assault on the victim was subsumed in the murder charge. The intention to rob is an additional element but, as the Judge recognised, this was a factor in the imposition of the minimum term of 17 years imprisonment imposed on the murder charge.

[31] In the circumstances, we are satisfied that a lengthy determinate sentence on the charge of assault with intent to rob was sufficient to protect the community.

[32] What sentence was appropriate on the charge of assault with intent to rob? This Court held in *R v Whata*[9] that the guidelines set out in *R v Mako*[10] have application to cases of assault with intent to rob. However, some tailoring is required and care must be taken in assessing culpability to have regard to any relevant points of distinction between the offences of assault with intent to rob and aggravated robbery.[11] One obvious point of distinction is that the actus reus for the charge of assault with intent to rob does not require proof of theft. Where an offender is convicted both of murder and assault with intent to rob (as in the present case) the fact that a killing occurred in the course of the assault must of course be excluded from consideration. Care must also be taken to avoid doubling up on factors taken into account in setting the sentence for murder. For example, in the present case, the Judge has already taken into account in fixing the 17 year minimum period of imprisonment on the murder charge the matters identified at [9] above.

[33] The following guidance provided in *R v Mako* is particularly relevant to the present case:[12]

> Forced entry to premises at night by a number of offenders seeking money, drugs or other property, violence against victims, where weapons are brandished even if no serious injuries are inflicted would require a starting point of seven years or more. Where a private house is entered the starting point would be increased under the home invasion provisions to around 10 years.

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9 *R v Whata* [2008] NZCA 204.
10 *R v Mako* [2000] 2 NZLR 170 (CA).
11 *R v Whata* at [17].
12 At [58].

[34] Despite the repeal by the Sentencing Act of the Crimes (Home Invasion Amendment) Act 1999 that was applied in *Mako*, s 9(1)(b) of the Sentencing Act lists home invasion as a specific aggravating factor. This Court has held that despite the repeal of the previous legislation on home invasion, the fact that a home invasion has occurred should continue to be reflected in increased sentences.[13]

[35] In the present case, the essential culpability on the charge of assault with intent to rob lies in the forced entry into the dwelling place with the intention to rob and the use of serious violence to subdue and restrain the victim. Other aggravating factors included the appellant being armed with a knife and the use of duct tape to bind the victim. On the other hand, the element of home invasion at night was taken into account as an aggravating factor in the sentence for murder. No money, drugs or other items were actually taken.

[36] In *R v Biddle*[14] two offenders were convicted of assault with intent to rob and sentenced to ten years in prison in circumstances similar to the present case. But for the double-counting element, we consider a sentence of ten years imprisonment would be appropriate in this case on the charge of assault with intent to rob. Taking into account the doubling-up factor, however, a reduction of two years is appropriate to arrive at an end sentence of eight years imprisonment.

[37] Since the hearing, we have become aware that the co-offenders were sentenced by the same Judge. Each had been convicted of manslaughter after trial. One of the co-offenders had pleaded guilty at the commencement of trial to one count of assault with intent to rob and the other was found guilty of that count. The co-offenders were sentenced to terms of imprisonment of nine years and eight years, six months respectively on the manslaughter counts and four years on the charges of assault with intent to rob.[15] No issue of disparity was raised before us but the sentences imposed on the co-offenders on the charge of assault with intent to rob do not give us any cause to consider that an eight year sentence on that charge is inappropriate for the appellant. Where a sentence is otherwise justified it does not

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13 *R v Fenton* [2008] NZCA 379 at [12].
14 *R v Biddle* CA142/01, 5 December 2001.
15 *R v Grace* HC Auckland CRI-2006-092-16632, 24 March 2009.

follow that it ought to be reduced on disparity grounds.[16] In any event, the term imposed on the appellant on this charge will be subsumed by the much longer sentence on the murder charge and will have no practical effect on the overall length of his imprisonment.

[38] The final issue is whether any minimum period of imprisonment should be imposed on the charge of assault with intent to rob. We consider that a minimum period of imprisonment of five years is appropriate having regard to the factors in s 86(2) of the Sentencing Act.

Result

[39] The appeal is allowed.

[40] The sentence of preventive detention imposed on the charge of assault with intent to rob is quashed. A sentence of eight years imprisonment on that charge is substituted with a minimum term of imprisonment of five years.

Solicitors:
Crown Law Office, Wellington for Respondent

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16 *R v Zhou* [2009] NZCA 365.