



found guilty of three counts of aggravated robbery, an attempted aggravated robbery, theft of a motor vehicle, conversion of a motor vehicle and theft of registration plates. The sentence of nine years was imposed cumulatively on an existing term of four years imposed on the appellant by Priestley J on 3 July 2008, following the appellant's guilty pleas to six drug related charges.

### **The basis of the appeal**

[2] No issue is taken by the appellant with the sentence of four years imposed by Priestley J on the drug offending. Nor is any issue taken, in principle, with the sentence of nine years for the aggravated robbery and associated offending, standing alone. The challenge is to the ultimate effective length of imprisonment of 13 years. It is submitted that the total length of sentence of 13 years is out of proportion to the gravity of the overall offending so that it is manifestly excessive.

[3] Mr Petherick submitted that the Judge fell into error in the sentencing process by either:

- making the sentence of aggravated robbery cumulative on the drug offending as opposed to concurrent; or
- failing to have regard to the totality principle in imposing the nine year cumulative sentence.

### **Background**

[4] The drug offending occurred on 18 April 2008. Having pleaded guilty, the appellant was sentenced by Priestley J to four years' imprisonment on the most serious charges of possession of the class A drug methamphetamine for supply and sale of methamphetamine on 3 July 2008. At the same time he was sentenced to concurrent terms of imprisonment for offending in relation to the supply of cannabis and for the possession of a pistol and ammunition.

[5] The aggravated robbery and associated offending involved two separate incidents in October 2007. The first was the attempted robbery of a Chubb security depot in Napier. The appellant and his co-offender seized two women employees in the early morning and forced them to access the building with threats reinforced by a pistol and a hammer. When they were not able to gain access to the Chubb building, the appellant and his co-offender robbed both women of their handbags and contents. While ultimately unsuccessful, Dobson J categorised the attempted robbery of the Chubb building as relatively well planned over a period of time. He found that the appellant was the prime mover in the planning and execution of the attempted robbery.

[6] The second aggravated robbery was committed at the Taradale branch of the Westpac bank, two days after the attempted robbery at Chubb. Although the appellant was the getaway driver of the vehicle, leaving it to others to go into the bank, the trial Judge considered that to describe Mr Wilson's role as simply that of getaway driver would be to seriously understate his involvement in the robbery. Dobson J found that the appellant was involved in the planning of the robbery and noted that he supplied the pistol and, in fact, encouraged the co-accused to use it in relation to the offending.

[7] In imposing the sentence of nine years, Dobson J adopted a starting point for the Westpac robbery of between seven and a half and eight years with an uplift to take account of the other attempted aggravated robbery at Chubb and the robberies of the Chubb workers. This led to a starting point for sentence of nine years. The Judge considered there were no personal mitigating factors. He imposed a minimum non-parole period of five years on both the appellant and his co-offender to reflect the need to punish, deter and denounce offending of such seriousness. Dobson J then dealt with the issue of concurrent or cumulative sentences as follows:

[34] A final consideration in relation to you, Mr Wilson, is whether these present sentences imposed today can be served concurrently with the sentence of four years imposed in July 2008 by this Court for drugs and Arms Act convictions. Section 83(1) of the Act gives the Court the same discretion as I have had to consider in deciding whether the present convictions should be the subject of concurrent or cumulative sentences. However, I have come to the opposite conclusion in relation to the sentence for the previous convictions on which you were sentenced a year ago. They

are distinct in terms of their nature and the circumstances of the offending and I have not had regard to the sentence imposed on those convictions in setting the period of imprisonment appropriate on the current convictions. I am therefore satisfied that the convictions imposed today should be cumulative on the sentence you are already serving. That means that the five year minimum term I am imposing today will commence when you complete the sentence you are presently serving.

## **Decision**

[8] Mr Petherick submitted the aggravated robbery offending was driven by the appellant's drug addiction. But even accepting that explanation for the offending, it does not support the imposition of concurrent sentences in this case. The offending was quite different in nature and occurred six months apart. Having regard to s 84(1) of the Sentencing Act 2002, the Judge was plainly correct to impose cumulative sentences for the aggravated robbery and associated offending on the previous sentence of four years for the drug related offending.

[9] The real issue is whether, having regard to the totality of the offending, the sentence of 13 years imprisonment is wholly out of proportion to the gravity of the overall offending: s 85(2).

[10] In *R v Johansen*<sup>1</sup> this Court discussed the application of the totality principle in circumstances where a prisoner is subject to an existing sentence and accepted that, where a long sentence may have to be imposed cumulatively on top of an already long sentence of which only a relatively small proportion has been served, the totality principle should apply. The principle has been applied by this Court following the enactment of the Sentencing Act. *R v Tate*<sup>2</sup> is an example of one such case.

[11] The sentence of 13 years in this case cannot be characterised as totally out of proportion to the gravity of the appellant's overall offending. The drug offending

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<sup>1</sup> *R v Johansen* (1997) 15 CRNZ 111 (CA).

<sup>2</sup> *R v Tate* CA28/06, 15 September 2006.

was serious enough. The appellant had a number of previous convictions for drug offending. But the aggravated robbery and associated offending was particularly serious. It involved two separate incidents a few days apart. Both incidents involved a degree of planning. The appellant did not act alone. The appellant and his co-accused used weapons to overcome resistance. The firearm in each case was used or supplied by the appellant. While the Judge did not expressly refer to totality, any allowance for totality in the case of the appellant would have been modest. In the circumstances of this offending, the Judge's starting point of nine years (which was also his end point) for the aggravated robbery and associated offending could be seen as lenient. Given the existence of a number of the features identified as aggravating in *R v Mako*,<sup>3</sup> a starting point of up to 12 years could have been sustained in the case of the appellant. The resulting cumulative sentence of 16 years may have been too harsh to have been sustained. But a cumulative sentence of 13 years in the circumstances of the appellant's offending in this case is not out of proportion to the gravity of the drug and, quite separate, aggravated robbery offending.

[12] Mr Petherick did not challenge the minimum non-parole period imposed. It was open to the Judge in the circumstances of this case.

## **Result**

[13] The appeal against sentence is dismissed.

Solicitors:  
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<sup>3</sup> *R v Mako* [2000] 2 NZLR 170 (CA).