IN THE COURT OF APPEAL OF NEW ZEALAND

CA25/2012
[2012] NZCA 204

BETWEEN	E (CA25/2012) Appellant
AND	THE QUEEN Respondent

Hearing: 14 May 2012

Court: O'Regan P, Venning and Miller JJ

Counsel: M W Newell for Appellant
M E Ball for Respondent

Judgment: 22 May 2012 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of imprisonment for four years imprisonment that was imposed in the District Court for the charge of assault with a weapon committed on 26 December 2010 is quashed and a sentence of imprisonment for three years and five months imprisonment for that offence is substituted. All other sentences imposed in the District Court are confirmed. The end result is that the total sentence imposed on the appellant is reduced from four years and seven months imprisonment to four years imprisonment.

REASONS OF THE COURT

(Given by O'Regan P)

Introduction

[1] The appellant appeals against a total sentence of four years seven months imprisonment imposed on him by Judge O'Driscoll for a variety of offences committed over a five year period.[1] The principal offending arose from an incident in which a man thought to have raped the appellant's sister was assaulted and injured on 26 December 2010. The appellant's sister, whom we will call Ms E, was also involved in that assault.

Grounds of appeal

[2] One of the grounds of appeal is that there was an unwarranted disparity between the sentence imposed on Ms E and that imposed on the appellant. The other grounds of appeal are that the starting point for the lead offence was manifestly excessive, the cumulative sentence imposed for the 2006 burglary was manifestly excessive and that the overall sentence was out of proportion to the totality of the offending.

[3] Before dealing with these issues, we will briefly set out the offences for which the appellant was sentenced and the factual background to the principal offending, the assault on 26 December 2010.

Offences

[4] The counts to which the appellant pleaded guilty in relation to the assault on 26 December were as follows:

(a) assault with intent to injure;

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1 *R v [E]* DC Dunedin CRI-2011-005-100, 19 December 2011.

(b) assault with a weapon (a pool cue);

(c) assault (three counts); and

(d) threat to do grievous bodily harm.

[5] The other charges for which the appellant was sentenced were:

(a) burglary (in 2006);

(b) three counts of theft (involving property having a value in total of about $170);

(c) trespass in the service station from which the three thefts occurred;

(d) possession of utensils for the purpose of commission of an offence against the Misuse of Drugs Act;

(e) breach of community work; and

(f) driving while forbidden.

26 December 2010 — Assault

[6] The Sentencing Judge, Judge O'Driscoll, undertook a disputed fact hearing about aspects of the events on 26 December. Having issued a decision setting out his finding in relation to the disputed facts on 16 November 2011,[2] the Judge then sentenced the appellant on 19 December 2011. In his sentencing notes, he summarised the offending in these terms:

> [5] By way of background, the counts in the indictment relate to an incident involving the victim [...]. He was aged 20 at the time. It was alleged that he had sexually violated your sister. You are the older brother of the complainant in that case. You and others located the victim [...]. The assault with intent to injure charge involved you punching the victim in the face and head and kicking him in the head and body. At the time you were

[2] *R v [E]* DC Dunedin CRI-2011-005-321, 16 November 2011.

wearing jandals. The victim was pulled over a fence and punched again by you. He was put into a motor vehicle and again assaulted with you putting your elbow into his head while the two of you were in the car. He was pulled out of the car and was punched by you as he was led to a garage where there were a number of other people. The victim was assaulted by a variety of people. He was assaulted by you using a pool cue.

[6] You did not dispute than an assault with a pool cue occurred. What you disputed was the nature and extent of that assault and the specifics that were set out in the police summary of facts. I found that you did use a pool cue to assault the victim. I found that you hit the victim a number of times with the pool cue. There was also another person present who used a pool cue. I could not say how many times you hit the victim. I could not say exactly where the pool cue landed, except that I was able to say it landed in the upper body region.

[7] In addition to the assault, you also threatened to cut off the victim's penis. That forms the basis of the threatening to do grievous bodily harm charge. Even when he was leaving the garage, you continued to assault the victim. You threw him into a side door of the garage, pulled him towards the car and punched him again.

[8] The violence that was meted out by you was not the only violence suffered by the victim. The others were also charged and pleaded guilty to their involvement in the incident in the garage. The others punched the victim in the head, kicked him in the genitals, struck him with a fold-up chair, him with a pool cue and smashed his head into the ground.

[9] The summary of facts indicated that the victim had a wound to his head, a bruised eye with swelling, lacerations to his lips, multiple bruises to his back and shoulder and a fracture of the jaw. That fracture required surgery to insert a metal plate in his jaw with four screws to align the jaw. The photographs that were produced to the Court at the disputed fact hearing indicated at least eight circular-type bruises to the victim's left shoulder, left arm and back.

[10] There is a victim impact report which has been updated and which sets out both the physical and emotional consequences. He has had to put his studies on hold. He suffers from anxiety and nervousness. He spent five days in hospital. He suffered a fractured jaw and a fractured eye socket. He required dental reconstruction and, as I have said, surgery to insert the metal plate to align his jaw.

Co-offenders

[7] The others who were involved in the assault on 26 December were the appellant's sister (and the alleged rape victim), Ms E, the appellant's girlfriend (who

we will call Ms W), and an associate (who we will call Mr T). They were sentenced together.[3] Their sentencing Judge was also Judge O'Driscoll.

Ms E

[8] Ms E was charged with assault with a weapon. As already mentioned, she alleged that the victim raped her on the night before the assault. We were told that, since the District Court sentencing, the victim has been found not guilty of raping her.

[9] The summary of facts on which Ms E's guilty plea was based indicated that she struck the victim with a fold-up chair and also struck him with a pool cue during the altercation that took place at the garage. The Judge considered that the assault by Ms E came after the involvement of the appellant and he proceeded on the basis that a large number of the injuries received by the victim were at the hands of the appellant, rather than Ms E. Ms E had two previous convictions for assault in 2002 and 2006. The Judge sentenced her to four months community detention and 200 hours community work.

Ms W

[10] Ms W was sentenced for her part in the attack on 26 December, but was also sentenced on a number of dishonesty charges for which she was on bail when the 26 December incident took place. While on bail for the latter charges, she contacted the District Court at Balclutha and said a bomb was due to explode and this led to her facing a charge under the Telecommunications Act 2001. She was also under a sentence of community work when the 26 December offences took place and had previous convictions for dishonesty.

[11] The Judge proceeded on the basis that the charge relating to the 26 December incident, assault with intent to injure, related to two kicks by Ms W to the genital area of the victim. The Judge accepted that no injuries resulted, even though the kicks were made with intention to cause injury.

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[3] *R v [W]* DC Dunedin CRI-2011-005-95, 31 October 2011.

[12] Looking at the offending on a totality basis, the Judge took a starting point of eight months imprisonment for the count of assault with intent to injury. He reduced that by three months to take account of Ms W's guilty plea leaving a sentence of five months imprisonment. He imposed cumulative sentences of five months imprisonment for the dishonesty offending and two months imprisonment for the Telecommunications Act charge. So the total sentence was 12 months imprisonment. The Judge did not consider that home detention would be appropriate.

Mr T

[13] Mr T pleaded guilty to a charge of assault. It was accepted that he was a secondary party, and that he at one stage tried to convince the other offenders to stop the assault. However, he was the driver of the vehicle which took the victim to the garage where the main assault took place. He was sentenced to 100 hours community work. Mr T also faced other charges but was sentenced on a concurrent basis, so the total sentence was 100 hours community work.

The appellant's sentencing

[14] As noted earlier, the sentencing of the appellant took place after the sentencing of his three co-offenders and after the disputed facts hearing. Ms E gave evidence at the disputed facts hearing, which took place after she had been sentenced. In the course of her evidence she took responsibility for a greater part in the assault on the victim in the garage than had been attributed to her in the summary of facts to which she pleaded guilty. As she had been sentenced before the disputed facts hearing took place, there was no detriment to her in claiming that greater role.

[15] Judge O'Driscoll said he regarded the appellant as having a higher degree of culpability than the others involved in the 26 December 2010 offending. He described the incident as "a vigilante response", and said the matter should have been left to the police. He noted that the victim had been detained, had been set upon by a pack and that all parties had intended to inflict pain and injury, and had used weapons. He noted that the appellant had been responsible for taking the

victim back to the garage. He had assaulted him prior to his entry into the garage. He had assaulted him again in the garage. He had also assaulted him as he was leaving the garage.

[16] The Judge noted a number of aggravating factors including:

(a) the nature and extent of the assaults carried out;

(b) the duration of the incident;

(c) the threats made;

(d) the detention of the victim;

(e) the number of people involved in the attack;

(f) the physical and emotional consequences for the victim;

(g) the fact that the incident amounted to vigilante action;

(h) the vulnerability of the victim when he was detained in the garage and assaulted by a number of people armed with weapons.

[17] The Judge also noted that there were a number of personal aggravating features. In particular, the appellant had 57 previous convictions and had been assessed in the pre-sentence report as having a high risk of reoffending. He was also subject to community detention and community work when the 26 December assault occurred. The principal mitigating factor was the guilty plea. The Judge rejected the submission made by the Crown that little credit should be given for this because the victim was required to give evidence at the disputed facts hearing. The Judge accepted that, as a result of the disputed facts hearing, the facts against which the sentencing occurred were more favourable from the appellant's point of view than those set out in the police summary of facts, so that he had had a measure of success.

[18] In relation to the 26 December charges, the Judge took a starting point of four years imprisonment. This took account of the element of detention of the victim in the garage and the fact that the assault with the pool cue had occurred after Ms E had already assaulted him with the chair and the pool cue. The Judge gave an uplift of a further year to take into account the other assaults (i.e. those not involving the pool cue), the threats that were made, and the fact that the offending occurred while the appellant was on community detention and community work. From this uplifted starting point of five years imprisonment, the Judge made an allowance of 20 per cent for the guilty plea and remorse, giving an overall sentence of four years imprisonment for the 26 December assaults.

[19] The Judge then imposed a sentence of seven months imprisonment in respect of the 2006 burglary charge (he took a 10 month starting point and reduced it by three months for the guilty plea). That sentence was cumulative on the four year sentence for the 26 December 2010 offending.

[20] In relation to the other offending, the Judge considered that the totality principle required that he impose concurrent sentences. He imposed sentences of two months imprisonment in respect of each of the theft charges, the trespass charge, the possession of utensils charge and the breach of bail charge, and convicted and discharged the appellant on the charge of driving while forbidden. He cancelled the outstanding community work which had not been completed and remanded the appellant in relation to the outstanding fines matters.

Appeal grounds

[21] Although Mr Newell emphasised disparity as his principal argument, we intend to first deal with the starting point taken by the Judge for the 26 December 2010 offending, which we see as the determinative issue.

Starting point

[22] As indicated earlier,[4] the Judge took a starting point of four years for the lead offence, assault with a weapon, then applied an uplift of a further year to take into account the other offences relating to the 26 December 2010 incident. But, in coming to his four year starting point, he took into account factors that related to the totality of the 26 December 2010 offending: the extensive and prolonged violence, the injuries received by the victim as a result of the incident, the multiple attackers and the element of detention.

[23] Having done so, we consider that there is a danger that the Judge double-counted those factors when applying the one year uplift. In our view, a four year starting point was sufficient to reflect all of the appellant's offending on 26 December. That would have been sufficient in terms of this Court's decision in *R v Harris*,[5] which deals with assault with intent to injure, which we see as the lead offence. All that was required as an uplift was an allowance for the fact that the offending happened while the appellant was on community detention and community work.

Disparity

[24] Mr Newell pursued this point with vigour. He said the sentence imposed on Ms E (community detention and community work) was grossly disparate from that imposed on the appellant. We accept that the sentence imposed on Ms E was very lenient, perhaps reflecting that, on the facts before the Judge, she may well have been a victim of serious sexual offending perpetrated by the victim of the 26 December assaults. It should be noted too that she was sentenced on the basis of the summary of facts which expressed her role in more limited terms than the Judge ultimately found was the case in his disputed facts decision. It could be said therefore that she was fortunate.

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4 At [18] above.
5 *R v Harris* [2008] NZCA 528.

[25] But that does not mean that the appellant can claim disparity. His role was far more serious than that of Ms E: he was the ringleader, he was responsible for the victim being taken to the garage and detained there and he assaulted the victim on multiple occasions over a sustained period. The personal aggravating factors relating to him were far more serious than those relating to his sister. We do not consider that the disparity argument can succeed, especially in light of our comments above about the starting point and the impact that will have on the appellant's end sentence.

Cumulative sentences

[26] Mr Newell said the Judge was wrong to impose an additional seven months imprisonment for burglary. We disagree. The sentence itself was within range and the Judge was right to make it cumulative given that it was quite distinct offending. The Judge was mindful of the need to have regard to the totality principle. It should be noted that there were a considerable number of other offences for which concurrent sentences were imposed.

Manifestly excessive

[27] The only point on which we would differ from the Judge is the starting point he took for the 26 December 2010 offending. In our view it should have been four years imprisonment, not five. We see that as having led to an overall sentence that is manifestly excessive. We would otherwise endorse the Judge's approach.

Result

[28] We allow the appeal and quash the sentence of four years imprisonment imposed for the lead offence committed on 26 December 2010 (assault with a weapon). Instead, we take a starting point in that offence of four years imprisonment and add an uplift of three months imprisonment for the fact that the offending occurred while the appellant was on community detention and community work. That gives an adjusted starting point of four years three months. We apply the same discount as the Judge did for the appellant's guilty plea and remorse,

approximately 20 per cent, giving an end sentence in round terms of three years and five months imprisonment.

[29] The concurrent sentences imposed by the Judge for all the other offences committed on 26 December 2010 are confirmed. Likewise, the cumulative sentence of seven months imprisonment for the burglary remains, as do the concurrent sentences for all other offending. The end result is that the total sentence imposed on the appellant is reduced from four years and seven months imprisonment to four years imprisonment.

Solicitors:
Crown Law Office, Wellington for Respondent