NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANT UNDER THE AGE OF 18 YEARS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA429/2014
[2014] NZCA 614

BETWEEN	REBEL WAITOHI Appellant
AND	THE QUEEN Respondent

Hearing: 18 November 2014

Court: French, Asher and Clifford JJ

Counsel: N P Chisnall and M J Inwood for Appellant
M G Wilkinson for Respondent

Judgment: 15 December 2014 at 2.30 pm

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Waitohi was found guilty by a High Court jury of one count of wounding with reckless disregard and one count of injuring with reckless disregard. The victim was his 27 day old baby daughter.

[2] The trial Judge, Lang J, sentenced Mr Waitohi to a term of imprisonment of six and a half years.[1]

[3] Mr Waitohi now appeals his sentence on the ground that it was manifestly excessive. The appeal was filed approximately 12 weeks out of time. However, as the Crown accepts, the delay has not occasioned any prejudice. Accordingly an extension of time is granted.

Background

[4] On 8 February 2013 the victim was rushed to hospital when she started bleeding profusely from the mouth. On closer examination, it was discovered that she had a large 4 cm by 1 cm vertical tear to the back of her throat. The injury was described by doctors as life-threatening. In evidence, one doctor said that for a four week old baby the laceration was "massive".

[5] Later X-ray examination revealed the victim also had two fractured ribs likely to have been caused at around the same time as the laceration to her throat.

[6] Mr Waitohi had been alone with the baby just before the bleeding started. The Crown case was that the tear had been caused by him jamming an object – most likely his finger – down her throat with considerable force. That was the basis of the charge of wounding with reckless disregard. The charge of injuring with reckless disregard related to the fractured ribs, which the Crown alleged Mr Waitohi had also inflicted, most likely by squeezing the baby around the chest.

[7] The baby was hospitalised for three weeks. The injury to her throat caused trauma to the pharynx, preventing her from being able to suck and swallow properly.

---

1 *R v Waitohi* [2014] NZHC 1018.

For two months after her discharge from hospital, she could only feed through a tube.

Sentencing in the High Court

[8] Justice Lang first addressed the wounding charge. He identified the key aggravating features of the offending as being the fact the injury was inflicted by means of considerable force to a vulnerable part of the body, the fact the baby was completely defenceless, and the abuse of trust.[2] Having regard to those aggravating factors, the Judge said the appropriate starting point was a period of imprisonment of four and a half years.[3] He then added a further six months on account of Mr Waitohi's previous convictions.[4]

[9] As regards the injuring charge, Lang J said that because it was separate offending he had decided to impose a cumulative sentence. In his view, ordinarily the offending would easily attract a starting point of two and a half years' imprisonment, but he considered that should be reduced by one year on account of totality.[5]

[10] The upshot was a sentence of five years' imprisonment on the wounding charge with a cumulative sentence of one year six months' imprisonment on the injuring charge, making a total period of six and a half years.

Grounds of appeal

[11] In submitting that the sentence was manifestly excessive, counsel Ms Inwood advanced three grounds of appeal:

(a) The Judge wrongly relied on *Nuku v R* in setting the starting point.[6]

(b) The total sentence was out of proportion to the gravity of the offending.

---

2 At [10].
3 At [11].
4 At [14].
5 At [12].
6 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39.

(c) The uplift of six months for the previous convictions was excessive.

Analysis

The Judge's reference to Nuku when setting the starting point on the lead offence

[12] Immediately before identifying the aggravating factors of the wounding offence, the Judge said:[7]

> Counsel for the Crown has filed helpful submissions outlining the authorities that apply for sentencings in this area. They are governed by a decision of the Court of Appeal called *Nuku v R*, which applies principles enunciated by the Court of Appeal in another case called *R v Taueki*. In short, the Court is required to look at the aggravating factors relating to the offending in order to establish where the starting point for this sentence should lie.

[13] We accept that the Judge was wrong when he stated that the authorities that apply for sentencing in this area are governed by *Nuku*.

[14] The correct position is as follows.

[15] *Nuku* was a guideline decision of this Court. It set out starting point bands for offences involving intent to injure under ss 188(2), 189(2) and 191(2) of the Crimes Act 1961. The mens rea for the offences committed by Mr Waitohi is different from those offences. It does not include an actual intent to wound or injure. It only requires that the defendant have an actual and conscious appreciation of the danger of his or her actions to the safety of others, and that he or she proceed regardless of that risk. It was because of the different mens reas that in *Nuku* this Court expressly stated it was not commenting on "reckless disregard for safety" cases because "other considerations are likely to arise".[8]

[16] Counsel have argued in other cases that although *Nuku* does not apply to reckless disregard offending, it may nevertheless provide some useful guidance by analogy.[9] We make no comment on that approach other than to endorse the comment made in *Hannay v New Zealand Police* that if *Nuku* is applied by analogy to reckless

---

7 At [10] (footnotes omitted).
8 At [37], n 39.
9 *L (CA708/2013) v R* [2014] NZCA 41 at [10], n 6.

disregard offending, care must be taken to account for the different mental element and the effect this may have on the applicability of some of the *Nuku* factors.[10]

[17] In this case, while the Judge was wrong to rely on *Nuku*, on any view of it the aggravating factors he identified are aggravating features of offending with the mens rea of reckless disregard.

[18] Ms Inwood acknowledged this but submitted that nevertheless the Judge's reliance on *Nuku* did lead him into error because it resulted in a starting point out of kilter with other sentences imposed in reckless disregard cases involving child victims. In support of that submission, she referred us to a number of decisions including the decisions of this Court in *R v Brown* and *R v Wilson*.[11]

[19] In *Brown*, the Court undertook a review of five decisions dealing with offences under s 188(2) of the Crimes Act and found the starting points ranged between two years and three and a half years' imprisonment. *Wilson* – a Solicitor-General's appeal – was included in the review. In *Wilson*, in the context of drawing a distinction between serial violence and a single act of violence, the Court observed that the sentence of three and a half years' imprisonment imposed by the sentencing Judge was more appropriate for the latter category than the first.[12] In *Brown* itself, the offending involved at least two punches to the head of a 14 month old child, smacking on the leg and resisting police. The Court held that a starting point of five years was too high and replaced it with a starting point of three and a half years, which it described as being at the top of the available range.

[20] Ms Inwood accepted that some of the decisions she relied upon, including *Wilson* and *Brown,* predated the enactment of s 9A of the Sentencing Act 2002.[13] However, she submitted that s 9A was simply a statement of existing law and made no difference.

---

10 *Hannay v New Zealand Police* [2014] NZHC 2014.

11 *R v Brown* [2009] NZCA 288 and *R v Wilson* [2004] 3 NZLR 606 (CA).

12 *R v Wilson*, above n 11, at [58].

13 Section 9A of the Sentencing Act 2002 was inserted by s 4 of the Sentencing (Offences Against Children) Amendment Act 2008 and came into force on 17 December 2008. *Brown* was decided after that date but concerned offending that occurred prior to 17 December 2008. We assume that is why the decision does not refer to s 9A.

[21] We do not accept that submission. Section 9A states:

> **9A Cases involving violence against, or neglect of, child under 14 years**
>
> (1) This section applies if the court is sentencing or otherwise dealing with an offender in a case involving violence against, or neglect of, a child under the age of 14 years.
>
> (2) The court must take into account the following aggravating factors to the extent that they are applicable in the case:
>
> (a) the defencelessness of the victim:
>
> (b) in relation to any harm resulting from the offence, any serious or long-term physical or psychological effect on the victim:
>
> (c) the magnitude of the breach of any relationship of trust between the victim and the offender:
>
> (d) threats by the offender to prevent the victim reporting the offending:
>
> (e) deliberate concealment of the offending from authorities.
>
> (3) The factors in subsection (2) are in addition to any factors the court might take into account under section 9.
>
> (4) Nothing in this section implies that a factor referred to in subsection (2) must be given greater weight than any other factor that the court might take into account.

[22] In *R v Pene*, this Court stated that s 9A was enacted to emphasise Parliament's concern about cases involving violence against children and that it signalled tougher sentences might be required.[14]

[23] Those comments were repeated in the more recent decision of this Court in *R v Hall*.[15] *Hall* was another Solicitor-General's appeal. In allowing the appeal, the Court expressly stated that the enactment of s 9A meant that some earlier decisions for offending of this nature needed to be approached with caution.[16] The Court went on to note that the sentencing Judge had relied on pre-2008 cases without taking into account the significance of the enactment of s 9A. Significantly for present

---

14 *R v Pene* [2010] NZCA 387 at [13].
15 *R v Hall* [2012] NZCA 518.
16 At [18].

purposes, the two pre-2008 decisions relied on by the sentencing Judge in *Hall* were two of the cases included in the *Brown* review.

[24] Undaunted, Ms Inwood submitted that the only pre-2008 decisions that need to be treated with caution are those that, contrary to the then existing law, fail to take into account the factors now listed in s 9A. We do not consider the comments made in *Hall* are capable of that interpretation. Nor, contrary to a further submission, do we consider that the Court in *Hall* "endorsed" the sentencing range in *Brown* notwithstanding the enactment of s 9A. *Brown* is not mentioned in the decision other than in connection with a statement that "this Court has previously considered that a starting point of three and a half years would be appropriate for a single episode of violence against a young child".[17]

[25] In our view, the range identified in *Brown* will require reconsideration in light of s 9A. That is better left to another case. Suffice it to say that in sentencing Mr Waitohi, Lang J was not constrained by it.

[26] In any event, in our view the offending in this case was in a more serious category than the offending in *Brown*, serious though that was. The victim in *Brown* was a toddler, who was punched. The victim in this case was an even more vulnerable victim, a four week old baby – the most vulnerable victim possible. She was also subjected to a far more invasive act than the toddler in *Brown*. Further, her injuries were more serious. They were life-threatening and had been inflicted with significant force. An experienced paediatrician said in evidence that he had never seen anything like it before. Another doctor, who treated the baby on arrival at the hospital, said that he had been worried they might not be able to resuscitate her and that she would die. The victim was hospitalised for three weeks (as opposed to three nights in *Brown*) and even after discharge had to be fed through a tube for a considerable period.

[27] In our assessment, in all the circumstances a starting point of four and a half years' imprisonment was open to the Judge on the count of wounding with reckless disregard.

---

[17] At [20].

Totality and the overall starting point

[28] Under this head, Ms Inwood made three submissions.

[29] First, she took issue with the Judge's finding that the injuring count would on a standalone basis ordinarily attract a starting point of two and half years' imprisonment. In her submission, having regard to the nature of the injuries (two fractured ribs) and the lesser maximum penalty for the injuring count (five years as opposed to seven years) the starting point would be well below two years.

[30] Secondly, Ms Inwood contended that the Judge was wrong to impose a cumulative sentence and thirdly that in any event the overall starting point of six years was disproportionate to the gravity of the offending.

[31] We do not accept those submissions.

[32] In our view the Judge was entitled to impose a cumulative sentence. Under s 84(1) of the Sentencing Act, cumulative sentences may be imposed if offences are different in kind, whether or not they are part of a connected series of offences. While the breaking of the baby's ribs may have occurred at around the same time as the insertion of an object down her throat, it was not necessarily exactly the same time and it was a distinct physical act. It was not an incidence of inserting an object down her throat. In those circumstances, and having regard to the fact that Lang J was the trial Judge and heard all the evidence, we see no justification for interfering with his finding that this was "separate offending".[18]

[33] We also consider that Ms Inwood's submissions understate the seriousness of the offending relating to the injured ribs. Medical evidence was to the effect that contrary to what many people might assume, it is not easy to fracture a baby's ribs because of their flexibility. The squeezing would have had to be "very hard" and would have caused "great distress" to the baby.

[34] Insofar as Ms Inwood relied on the *Brown* decision to support her submissions about the range, we also reiterate the comments made above.

---

[18] *R v Waitohi*, above n 1, at [12].

[35] In our assessment, the cumulative sentence of one and a half years for the second offence was within range. We also agree with the Crown that the overall starting point of six years was not manifestly excessive in the circumstances of this offending.

Uplift for previous convictions

[36] Mr Waitohi was 25 years old at the time of these offences in 2013. His criminal history dates back to 2003, when he received notations in the Youth Court for aggravated robbery involving the use of a weapon and wounding with intent to cause grievous bodily harm. His convictions include two convictions for common assault and a conviction for aggravated robbery in 2009. On the latter occasion he was sentenced to two years six months' imprisonment.

[37] On appeal, Ms Inwood acknowledged that the previous violence convictions were relevant but submitted that only a modest uplift was justified. In her submission any uplift needed to reflect the fact that none of the previous offending involved crimes against children, the two most serious convictions were "relatively historic", the 2003 offending was dealt with in the Youth Court and the two assault convictions attracted a non-custodial sentence in one case and in the other only a short term of imprisonment. Having regard to all those factors, Ms Inwood contended the uplift should not have exceeded three months.

[38] We accept that an uplift of six months in the circumstances was stern.

[39] However in our view it was not so high as to render the overall end sentence out of balance with the gravity of the offending, which we assess as very serious.

[40] The appeal is accordingly dismissed.

Solicitors:
Public Defence Service, Wellington for Appellant
Crown Law Office, Wellington for Respondent