ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF VICTIMS

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2009-404-70

BETWEEN	JASON LEE RICKARD Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 27 April 2009

Appearances: Stephanie Cowdell for Appellant
Sarah Pidgeon for Respondent

Judgment: 30 April 2009

JUDGMENT OF HARRISON J

In accordance with R11.5 I direct that the Registrar endorse this judgment with the delivery time of 9:00 am on 30 April 2009

SOLICITORS
Stephanie Cowdell (Manukau City) for Appellant
Meredith Connell (Auckland) for Respondent

Introduction

[1] Mr Jason Rickard appeals against a sentence of three-and-a-half years imprisonment imposed upon him in the District Court at Manukau on 13 February 2009 following his pleas of guilty to one charge of burglary, one charge of robbery, two charges of theft, two charges of using a document, and five of attempting to use a document. The burglary occurred on 30 September 2007; all the other offences took place on 29 and 30 August 2008. Mr Rickard admitted the existence of the burglary when apprehended on the later charges.

[2] Ms Stephanie Cowdell, who did not appear in the District Court, submits that the sentence on the lead charge of robbery of three-and-a-half years was manifestly excessive. Otherwise Mr Rickard does not challenge the concurrent sentences imposed on the other charges.

[3] I would have delivered a judgment orally at the conclusion of the argument, advanced very capably by Ms Cowdell and Ms Sarah Pidgeon for the Crown, but for my reservations arising from two decisions in this Court and Ms Cowdell's general submission that the sentence was disparate to other sentences imposed for violent offending at the Manukau District Court.

Facts

[4] The robbery occurred on 29 August 2008. Mr Rickard and his co-offenders (who have not been apprehended) were in the New World car park at Papakura. Mr Rickard was identified by a witness to whom he spoke twice near the supermarket entrance immediately before M, a 63 year old woman, was robbed. The witness noticed that he was apparently under the influence of alcohol or drugs M was pushed from behind causing her to fall on to the car. Her purse was taken including cash of $230, credit cards, driver's licence and identification cards. Mr Rickard admits to being one of the four offenders who participated in the robbery but denies that he was the principal party who assaulted the complainant.

[5] The first theft occurred the following afternoon, on 30 August 2008. Mr Rickard and a co-offender were in a vehicle in the Southgate shopping centre in Takanini. Mr Rickard left the vehicle and then physically grabbed a handbag from J, a woman standing nearby. In her handbag were cash of $35 and credit cards. Mr Rickard and his co-offender fled. Mr Rickard was originally and correctly charged with robbery for this offending but the police later substituted a charge of theft following Mr Rickard's participation in a restorative justice programme with the victim.

[6] Mr Rickard was able to use J's credit card in the succeeding hour to purchase alcohol to a total value of about $160. He failed on five other occasions in his attempts to use her cards to purchase other property.

[7] The second theft occurred in the evening on 31 August 2008. Mr Rickard parked his vehicle in the New World car park in Papakura alongside another vehicle. He then left his vehicle and opened the front door of the other vehicle, removing a handbag. He stole a credit card, cheque book and cash to a total value of $700.

District Court

[8] Judge Clapham took an openly stern view of Mr Rickard's offending. He was concerned with the predatory nature of Mr Rickard's crimes and his targeting of women who were perceived to be vulnerable. The Judge clearly intended to impose a sentence which both deterred and denounced the prevalence of these crimes in supermarket car parks in South Auckland. He gave particular weight to M's victim impact report – it was clear that she and J had suffered real emotional harm – and to the fact that the offending occurred while Mr Rickard was on parole.

[9] At one stage Judge Clapham asked rhetorically whether on the robbery charge he should impose the maximum term of imprisonment available in the summary jurisdiction of five years. He contemplated the prospect of taking this step in order to initiate a reconsideration of sentencing levels for robbery at the appellate level. However, the Judge settled on a starting point of four-and-a-half years imprisonment, by applying the totality principle. Then, by allowing a credit for

Mr Rickard's plea of guilty, his remorse, his attendance in a restorative justice programme and steps he had taken to obtain further education, he reduced the term by one year to three-and-a-half years.

Appeal

[10] Ms Cowdell advanced a forceful argument in support of Mr Rickard's appeal. She submits that the starting point adopted by Judge Clapham was excessive. In support she refers to a passage from *R v Mako* [2000] 2 NZLR 170 at [59] and two recent decisions in this Court: *Stewart v Police* HC AK CRI 2008-404-284 13 November 2008; *Prince v Police* HC AK CRI 2008-404-283 16 February 2009. She submits that the Judge should have adopted a base starting point of two years before taking account of aggravating factors. She also says that the Judge failed to make proper allowance for Mr Rickard's early guilty plea.

[11] Ms Pidgeon for the Crown accepts that a starting point of four-and-a-half years in isolation is excessive. However, she submits that that term is an adjusted starting point, designed to take proper account of the truly aggravating features of offending while on parole, the totality of Mr Rickard's crimes and his criminal propensity.

Decision

[12] The primary requirement is to determine the appropriate base starting point. That is the term of imprisonment which appropriately reflects Mr Rickard's culpability for the combination of features of the offending on the lead or index charge and including, where the offending is multiple, its totality. The Court is to undertake a proper assessment of the seriousness of the particular conduct: *R v Taueki* [2005] 3 NZLR 372 (CA) at [16]. The starting point is then to be adjusted upwards incrementally: first, for the existence of offending while on parole; and, second, for propensity, on the basis, as Ms Pidgeon submits, that it reflects the need for a greater deterrent response and indicates the risk of re-offending: see *Katapau v Police* HC AK CRI 2007-404-378 7 April 2008 at [12]-[13].

[13] The standard approach in a robbery case simpliciter is to resort to the guidelines from *Mako*, but at a discounted rate of 70% to recognise that the charge is not of aggravated robbery: see *Smeed v Police* HC WHA AP50/00 24 October 2004; *Stewart* at [13]-[15]. The appropriate passage from *Mako* is at [59] as follows:

> At the other end of the scale would be street robbery by demanding that the victim hand over money or property such as an item of clothing, where a knife or similar weapon is produced or where offenders acting together by bullying or menacing conduct enforce the demand though no actual violence occurs. Depending upon the circumstances the starting point would be between 18 months and three years. Actual physical enforcement might well require a higher starting point.

[14] However, I agree with Ms Pidgeon about the risks of a literalist application of the *Mako* sentencing principles. They are, as the Court acknowledged in that case, designed as guidelines, and the indicated starting points are to be used flexibly according to the particular factual situation: at [34] and [60]. Moreover, the Court observed: at [52]:

> What we have said about these features amply demonstrates that the criminality in any aggravated robbery offence must be assessed by the particular combination of features of which it is composed. That assessment must be made as a matter of judgment unconstrained by overemphasis on one feature such as the nature of the target premises.

[15] Ms Cowdell relies principally on *Stewart* and *Prince*. In *Stewart*, Woodhouse J allowed a sentence appeal on convictions for robbery. Relying in part on a concession by the Crown, the Judge adopted a starting point of two years for a woman who participated with two others in grabbing a handbag from a female victim. Her husband attempted to assist. The appellant's co-offender intervened and punched the victim's husband in the face on a number of occasions before prising the victim's handbag away and fleeing with the appellant to a waiting car. On another occasion, a month later, the appellant acting alone punched another woman about the head before making off with her handbag and cash. Woodhouse J treated *Mako* at [59] as prescribing a three year term as the upper limit for this type of offending, aggravated robbery, and reduced it to two years. In *Prince*, in the interests of consistency, Lang J applied the same starting point when sentencing the co-offender.

[16] With respect, I think the approach adopted in *Stewart* was generous. *Mako* at [59] was discussing a guideline for demanding or bullying conduct, or where offenders acted together, to coerce a party into committing a crime. The Court expressly acknowledged that a higher starting point than the range of 18 months to three years might be required where there was actual physical enforcement, such as occurred here. And, where the offending is committed by a group, there is no room for distinguishing culpability by reference to the roles played by individuals.

[17] While I accept that the offending in *Stewart* and *Prince* was worse than in this case, I am of the opinion that a base starting point of two-and-a-half years is necessary to reflect the use of force on a vulnerable, older victim, who was deliberately targeted for this reason. Premeditation and violence were prominent features. That term serves the needs of deterrence, denunciation and accountability. A further six months must be added for the totality of the offending, taking into account that it occurred over a short period of time. A further six months uplift is justified to recognise that this offending occurred while Mr Rickard was on parole and his propensity for dishonesty offending.

[18] Thus the adjusted starting point is three-and-a-half years imprisonment. Mr Rickard can count himself fortunate that the second robbery charge was reduced to one of theft, with a relatively low maximum sentence, in circumstances where in my judgment the evidence would have supported a conviction for robbery.

[19] I have not taken the burglary offending into account in this analysis. I accept Ms Cowdell's advice that it occurred at the same time as four other burglary offences for which Mr Rickard was sentenced to a term of two years imprisonment in the District Court at Papakura on 14 February 2008. On that occasion he confessed to his offences but omitted to disclose the crime committed on 30 September 2007. I am satisfied that he would have received the same sentence in February 2008 if this burglary had been included then.

[20] In my judgment an adjusted starting point of three-and-a-half years sends a stern message necessary for this type of offending. The physical force used was relatively minor and I proceed on the premise that it was inflicted by Mr Rickard's

co-offender. Nevertheless, as Judge Clapham said, the Courts must send a firm message to those who offend in this way.

[21] The Judge's discount for Mr Rickard's guilty pleas was inadequate. On Ms Cowdell's calculation it amounted to 22%. I accept that the pleas were entered relatively early. Mr Rickard is accordingly entitled to a credit of at least 33%. On my calculation that comes to 14 months.

[22] Accordingly, Mr Rickard's appeal is allowed. His sentence of three-and-a-half years imprisonment is quashed. A term of two-and-a-half years imprisonment on the charge of robbery is substituted.

[23] I wish to express my appreciation to both Ms Cowdell and Ms Pidgeon for the quality of their arguments, both written and oral.

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Rhys Harrison J