**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CRI-2009-485-26**

**JOSEPH VA'ALEPU**
Appellant

v

**NEW ZEALAND POLICE**
Respondent

Hearing: 28 April 2009

Counsel: M Lillico for appellant
K S Grau for respondent

Judgment: 30 April 2009 at 4.15pm

I direct the Registrar to endorse this judgment with a delivery time of 4.15pm on the 30th day of April 2009.

---

**RESERVED JUDGMENT OF MACKENZIE J**

---

[1] The appellant pleaded guilty in the District Court in Porirua to one count of robbery. He was sentenced to a term of two years and two months imprisonment by Judge Kelly. He appeals against that sentence on the ground that it is manifestly excessive.

[2] The facts were described by Judge Kelly in these terms;

> [2] I sentence having regard to the following facts. On 7 September 2008 at about 9pm, you went to a small store in Porirua, essentially a small liquor store. You asked the shop assistant, who was alone in the store at the time, for a bottle of vodka. As the assistant got that and placed it on the shop counter, you then pushed the victim in his chest forcing him backwards. While you were holding him against a wall, you grabbed a bottle of bourbon valued at $37. You then fled from the store towards a car waiting nearby.
>
> [3] The victim gave chase and caught up with you. You turned around and punched in the face with a closed fist causing him to fall to the ground. As a result of the punch, the victim received a bloodied nose, bruising to his right eye and cheek. It was necessary for him to seek medical treatment. You got into the passenger seat of the vehicle and were driven away.

[3] The sentencing Judge noted the extent of the concern in the community about this type of offending in Porirua. She referred to the pre-sentence report and noted a concern as to the appellant's serious alcohol addiction. She also noted as of concern the appellant's previous convictions. The Judge, in fixing a starting point, had regard to the starting point identified in *R v Mako* [2000] 2 NZLR 170 for an aggravated robbery of a dairy or small liquor store of four years. For the lesser offence of robbery, she adopted a comparable starting point of two years and six months. To that starting point she added an uplift of nine months for aggravating personal factors, namely the previous convictions. She gave a discount for the guilty plea of 13 months. That left an end point sentence of two years and two months. She noted that home detention was not available but that she would not in any event have considered the appellant suitable for home detention.

[4] Mr Lillico for the appellant submits that the uplift of 30% to reflect previous convictions was excessive. He further submits that the Judge placed no weight on mitigating factors other than the guilty plea, namely the expression of remorse and cooperation with police.

[5] Ms Grau for the Crown submits that the end sentence was well within the available range. She submits that a starting point of two years and six months was appropriate; that the express uplift to reflect the appellant's criminal history was appropriate and that the 13 months discount for the guilty plea was generous in that the appellant had no realistic defence, as his photograph was displayed in a local newspaper and a member of the public had identified him. She submits that the

sentencing Judge was entitled to conclude that home detention would have been inappropriate even if the sentence had been less than two years, because of the appellant's previous breach of conditions of home detention and breach of bail for consuming alcohol. She submits that there was no error in the approach taken in the sentencing exercise.

[6] The starting point of two years six months, having regard to the circumstances of the offending, is not challenged and it is clearly within the available range. As far as the uplift for previous convictions is concerned, Mr Lillico recognises that sentencing Courts may reflect previous convictions in an increase in sentence but submits that this must be balanced against the law's distate for punishing an offender again for earlier offences. He submits that the significant uplift for a previous conviction in the present case offends against the rule against double jeopardy and is out of proportion with the extent of the previous offending.

[7] In having regard to previous convictions as an aggravating personal factor, the Court must reconcile two principles: the acceptance of the preventive and deterrent purpose of punishment, and the need to avoid punishing an offender again for earlier offences: *R v Ward* [1976] 1 NZLR 588 (CA). The reconciliation of these competing considerations is achieved by having regard to previous convictions in establishing the character of the offender. They are relevant to predicting future behaviour, and as preventing the reliance on previous good behaviour as a mitigating factor: *R v Howe* [1982] 1 NZLR 618 (CA).

[8] The extent to which an uplift is justified for previous convictions involves an assessment by the sentencing Judge. Judge Kelly in this case attached particular importance to a previous conviction for aggravated robbery in June 2005, for which she had sentenced the appellant. She noted that he had been given credit because of the fact that he was young and his role was as a look out and there were much older people involved. She also noted of concern a previous conviction for breach of conditions of home detention and recent convictions which appeared to be alcohol related with the exception of a recent conviction of possession of a knife in a public place.

[9] There is, and can be, no tariff as to the extent of uplift which will be appropriate. The Court of Appeal has indicated that the uplift should not be considered purely in a mathematical way, and that the uplift should not make the sentence out of proporition with the overall gravity of the offending: *R v Wakeren* [2008] NZCA 492. In that case, and in *R v Piper* CA345/05 12 September 2006 uplifts of 50% were involved. In *R v Kawerau* [2009] NZCA 75 an uplift of six months or 30% for six previous convictions for drug offences was described as stern. In *R v Harris* [2008] NZCA 528, an uplift of six months or 30% was upheld for eight previous convictions for violence. In *R v Filo* CA408/06 an uplift of three months on a sentence of two years nine months was upheld against a background of four previous convictions for violence. That brief survey of some of the cases assists, but the exercise is not one of counting the number of previous convictions and applying a percentage uplift.

[10] In this case, it was open to the sentencing Judge to take the view that a deterrent sentence was required given the similarity of the present offending with that for which the appellant had been sentenced in 2005. There was no error in principle in her adoption of that approach. The uplift of nine months was stern, but it was not outside the available range. The starting point of two years six months was well within the available range. I consider that, when the starting point and the uplift are considered together, the three years and three months to reflect the circumstances of the offending and the personal aggravating features was within the available range.

[11] So far as the other mitigating factors are concerned, the extent of the remorse, and the extent, if any, to which it justified a reduction in sentence, was a matter for the assessment of the Judge. The pre-sentence report noted that the appellant stated that he was “sorry” for what he did and will accept whatever punishment the Court imposes. The weight to be attached to that was a matter for the Judge, and it cannot be said to be a factor which necessarily had to be the subject of an explicit allowance over and above the allowance for the guilty plea. The materials do not indicate any degree of cooperation with police which would have called for a specific allowance. I do not consider that the fact that neither of these factors was the subject of a

reduction involves an error in principle. The reduction on account of the guilty plea was a sufficient recognition of all available mitigating factors.

[12] For these reasons I do not consider any error in principle in the sentence has been demonstrated. As to whether it was manifestly excessive, the important point is the end sentence, rather than the process by which it has been reached. A sentence of two years two months after a guilty plea for this offender for what was a serious robbery cannot be said to be manifestly excessive.

[13] For these reasons the appeal is dismissed.

**"A D MacKenzie J"**

Solicitors: Luke Cunningham & Clere for respondent
Ord Lillico for appellant