IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CRI 2009-488-27
CRI 2009-488-28
CRI 2009-488-31

JESSE REGAN BAGLEY
AARON BAGLEY
Appellants

v

POLICE
Respondent

Hearing: 14 July 2009

Appearances: C Muston for Jesse Bagley
N Leader for Aaron Bagley
A Patterson for respondent

Judgment: 23 July 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.00 pm on Thursday 23 July 2009

Solicitors:
N Leader, Whangarei
C Muston Whangarei
Crown Solicitor Whangarei

[1] This is an appeal against a sentence of three and a half years imprisonment imposed on each appellant by Judge Harvey in the Whangarei District Court on 1 May 2009. The appellants had earlier pleaded guilty to joint charges of aggravated burglary, injuring with intent to injure, intentional damage, injuring with intent to cause grievous bodily harm and assault with intent to injure. All charges arose from the same incident which may be briefly described.

Background

[2] On 5 September 2008, a Mr Salter received from a young woman a text message which indicated that their former relationship had come to an end. The young woman concerned had formed a relationship with Jesse Bagley. That evening, Mr Salter and his friends, having consumed a quantity of alcohol, went to Jesse's residence. He was not home, but they forced their way into the property, terrorised a young woman who was there, and substantially damaged a motor vehicle owned by Aaron Bagley as they left.

[3] The appellants arrived home at about 3 am. Having been made aware of what had occurred, they drove to Mr Salter's address with two associates. During the journey there appears to have been some discussion about the group's intention to inflict physical and property damage upon those at Mr Salter's home.

[4] Upon arrival, the party tried but failed to kick open the front door. Aaron was carrying a wheel brace which he had found in the van in which they had travelled. He used the wheel brace to smash two windowpanes, and so the party was able to gain entry. Bevan Perkinson was in the hallway. He ran into his bedroom and got into bed. Each of the appellants punched him about the head and body, demanding to know where Mr Salter was. The appellants' associates were in the house, but not in Bevan's room. In all, Bevan Perkinson was struck at least five times by the appellants.

[5] In a second bedroom the appellants found Mr Salter and Adam Perkinson. They were both asleep. Aaron woke Adam Perkinson and demanded to know where Mr Salter was. During the course of the ensuing altercation, Aaron struck Adam Perkinson once on the forehead with the wheel brace, and having pulled Adam out of bed, struck him a second time with the wheel brace on the back of his head. Adam also received one blow from a fist. The blow to the forehead caused a large laceration and extensive bleeding. The blow to the back of the head caused a second laceration. Adam Perkinson became semi-conscious.

[6] Jesse confronted Mr Salter in his bed. Mr Salter was punched about the head and upper body. To some degree he was able to retaliate, but in the course of doing so received a number of blows from one of the appellants' associates. Mr Salter was warned in graphic terms to leave Jesse's girlfriend alone.

[7] Subsequently, in the hallway, Aaron struck Bevan Perkinson on the side of the face, and then in the lounge smashed a cabinet and a set of glasses belonging to Mr Salter. He used the wheel brace for that purpose.

[8] In the garage, Aaron caused substantial damage to Bevan Perkinson's motor vehicle. As the group departed, Jesse attempted unsuccessfully to kick in the front passenger window of another motor vehicle.

[9] Police and ambulance staff were called. Mr Salter and Adam Perkinson required hospital attention. Adam's wounds required stitches. He also received a number of bruises and other lacerations. Mr Salter received bruises and a swollen jaw. Bevan Perkinson received a graze and reddening to the face, together with discolouration to the back of his knee.

[10] The appellants readily accepted responsibility for their actions and pleaded guilty at an early stage. The appellants' group caused damage totalling $2,305.

Sentencing

[11] Judge Harvey labelled the offending " … a disgraceful and potentially lethal episode." He concluded that each of the appellants was equally responsible for what happened, and that the ultimate sentence must reflect the community's revulsion at serious, random and mindless violence. The Judge identified a number of the aggravating factors discussed in *R v Taueki* [2005] 3 NZLR 372. They included the fact that this was a home invasion at night, that there were multiple attackers, that a weapon was carried and used, that there were attacks to the head using fists and in one case the wheel brace, that the attack was sustained and premeditated, that the victims were vulnerable in the sense that they were not expecting the attack and some were asleep, and the fact that, in effect, this was vigilante behaviour.

[12] In mitigation he accepted in principle that there must be a substantial credit for pleas of guilty, that these offenders were very young, and that they were remorseful to the point of having taken part in a restorative justice meeting. Moreover, neither had been in any trouble before. Judge Harvey noted the availability of a supportive family, and that the appellants, fuelled by alcohol, appeared to have acted completely out of character.

[13] The Judge recorded counsel as being agreed that the starting point was to classify the case as towards the upper end of band 2 of the *Taueki* bands. In doing so, he ruled that although there had been provocation in the broad sense (arising from the victims' earlier raid on the appellants' house), provocation was not an operative cause throughout the offending. As is emphasised in *Taueki* it is not enough to have simply been incensed by the actions of the victims. The Judge believed that that was what had occurred here.

[14] Judge Harvey considered that, after making adjustments from *Taueki* in order to recognise the lesser offending charged in this case, the starting point could not be less than six years imprisonment. In reaching that conclusion, he paid special attention to certain authorities cited by counsel for the appellants on the topic of youth offenders and cited three passages from the authorities. It is sufficient to cite

by way of example a passage from *R v Chankau* [2007] NZCA 587 at [26] to which the Judge referred in the course of the sentencing hearing:

> [26] Anxiety always attends the prospect of sentencing a young person to a lengthy term of imprisonment, for two reasons. First, the court knows that the sentence could be crushing. A long sentence is a substantial proportion of the life the youth has already lived, and imprisonment often weighs heavily on the young. They may suffer high levels of depression, anxiety, suicidal ideation and self injurious behaviour, and victimisation from other inmates: *R v Slade* [2005] 2 NZLR 526 at [43] – [45] (CA). Second, the court wants to preserve any prospect of rehabilitation, and recognises that with young offenders there is frequently the hope that with maturity will soon come insight and a reduction in risk to the community.
>
> [27] Accordingly, a significantly reduced sentence for rehabilitative purposes may be appropriate where the youth is or should be treated as a first offender and appears genuinely motivated to reform …

[15] The Judge considered that, had the appellants been older, the offending could properly have been placed at the bottom of band 3 of *Taueki* (although youth is a factor to be discussed among mitigating features, rather than in the course of fixing a starting point). He then deducted two years six months from the starting point of six years imprisonment, so producing a term of imprisonment of three and a half years on the charge of injuring with intent to cause grievous bodily harm. Concurrent sentences were imposed on the other charges. Each appellant was also ordered to pay reparation of $576.25.

Appellants' submissions

[16] For Aaron Bagley, the principal point taken by Mr Leader is that the starting point selected by Judge Harvey was too high, bearing in mind the need to reflect the lower maximum penalty of ten years imprisonment available in this case, compared with the more serious offending discussed in *Taueki*. Mr Leader submits that the Judge must be taken to have overlooked the need, once aggravating factors are identified, to weigh the gravity of each factor – it is not simply a case of adopting an arithmetical approach by reference to the number of *Taueki* factors arising from the offending.

[17] Mr Leader also submits that although the Judge made a significant allowance for mitigating factors, even more should have been deducted in order to reflect Aaron's relative youth.

[18] Further, although stopping short of a suggestion that the case called for parity, Mr Leader pointed out that the appellants' co-offenders faced lesser charges and were dealt with by way of community based sentences.

[19] Mr Muston, for Jesse Bagley, adopted Mr Leader's submissions, but also contended that:

a) Jesse arguably played a lesser role in the overall offending than did his brother;

b) the Judge ought not to have regarded the other charges as aggravating features (as he appears to have done) because they are already included as *Taueki* aggravating factors;

c) insufficient allowance had been made for his client's youth.

Crown submissions

[20] For the Crown, Ms Patterson made the following points:

a) There was no disparity between the appellants on the one hand and their co-offenders on the other, since the role of the others in the group was much more limited than that of the appellants;

b) The Court must be careful to avoid double counting of discounts for both the diminished gravity of aggravating factors, and the fact that the offending charged was less serious than that in *Taueki*;

c) Where there were disputed issues of fact, the Judge had elected to adopt the view most favourable to the appellants, rather than to conduct a disputed facts hearing;

d) Contrary to the suggestion made in passing by counsel for the appellants, this was a true case of vigilante action. Ms Patterson noted that the victims of the present offending were the subject of police charges arising out of their earlier raid on the appellants' residence;

e) Numerous *Taueki* factors were present. The Judge would have been justified in placing this case at the bottom of band 3 of *Taueki* rather than towards the upper end of band 2; and

f) There was no room for differentiation between the appellants. Jesse was in the same room as Aaron Bagley when the wheel brace was used as a weapon, and is caught by the ordinary principles relating to co-offenders who have embarked upon a joint enterprise of this sort.

Discussion

[21] Although the sentencing Judge did not set out in detail his reasons for choosing a starting point of six years imprisonment, there can be no doubt in my opinion that the chosen starting point was within the available range. Counsel had agreed that the case fell within the upper reaches of band 2 of *Taueki,* so it called for a starting point of perhaps eight years imprisonment against a notional maximum term of 14 years imprisonment. After the necessary deductions to take into account the lesser offences charged here, a starting point of six years imprisonment could not properly be criticised.

[22] Of course great care is needed in the application of the *Taueki* guidelines to less serious offending. As was said by the Court of Appeal in *R v Brown* [2009] NZCA 288 at [15]:

> The need for caution in the application of the *Taueki* guidelines assumes particular importance if an attempt is made to equate offending for less serious violence to the bands described at [36] to [41] of *Taueki*. The descriptions given of conduct falling within those bands are referable only to the categories of serious violence with which *Taueki* is directly concerned. That categorisation cannot be directly applied to the less serious levels of violence involved in other offending. *Taueki* is more properly applied, in such cases, by an appropriately adjusted application of the general statements of principle than by an adjusted application of the particular bands.

[23] *Brown* was a case of wounding with reckless disregard for the safety of others, a less serious charge than arises here. So the case for departure from the *Taueki* guidelines was stronger there.

[24] But irrespective of the *Taueki* guidelines, it cannot properly be said that a six year starting point is out of line, having regard to the totality of the offending charged here. In other words, this offending was towards the upper end of the range of behaviour properly caught by the charges laid. So a starting point of six years imprisonment is consistent with a maximum available penalty of ten years imprisonment. I reject Mr Muston's submission that this offending ought to have been the subject of less serious charges. It is in my opinion arguable that what occurred might have justified more serious charges carrying a 14 year maximum term.

[25] Mr Leader submits that the Court is required to adopt a flexible approach: *Taueki* at [43]. I agree that the Court must not adopt an inflexible quasi-mathematical approach: *R v D* [2008] NZCA 267 at [43].

[26] He further argues that the Court " … could legitimately arrive at a starting point well below six years". With respect, on appeal that is not the proper inquiry. Rather, this Court must consider whether the selection of a starting point of six years imprisonment was within the range available to the sentencing Judge. In my opinion it was.

[27] Mr Leader's argument is based upon the contention that, while a number of aggravating *Taueki* factors were present here, some were of limited significance because they were not seriously aggravating. For example, he argues that although

in their house in the middle of the night, the victims could not be said to be truly vulnerable, in that, although in their home in the middle of the night, they must have been expecting retaliation of some sort, having regard to the raid they had themselves carried out earlier in the evening. Likewise, he submits that the Judge was wrong to characterise this as a sustained attack because the raid was relatively brief, and not as prolonged as in some comparable cases. He also argues that the premeditation factor was given too much weight by the sentencing Judge, in that this was not a carefully planned, sophisticated raid; rather, it was more of a spontaneous reaction to what had occurred earlier.

[28] Further, Mr Leader says, the injuries suffered by the victims were not such as to cause long term or permanent disability impacting on their quality of life. Mr Leader suggests also that, although the use of a wheel brace was a serious aggravating factor, it is necessary to bear in mind that it was simply found in the vehicle on the way to the scene of the incident, and was not selected prior to that as a weapon with which to attack the intended victims. He maintains that, although there were multiple attackers, that factor ought to have been accorded minimal weight, because there was no great disparity between the numbers of attackers and the numbers in the house.

[29] I have simply recorded these contentions without commenting on them. There may be some limited substance in certain of the points Mr Leader makes. The difficulty for the appellants is that the aggravating factors here are so numerous that the totality of the offending had of necessity to be recognised by a starting point at or about the level selected by Judge Harvey.

[30] I turn to Mr Muston's argument that a distinction ought to be drawn between Aaron and Jesse. I accept Ms Patterson's submission that there is no room for differentiation between the two appellants. Although it was Aaron who carried the wheel brace and used it as a weapon, he and Jesse were in the same room when the weapon was used, and there was nothing to suggest that Jesse was unaware that Aaron was carrying it. After all, a wheel brace is a tool of some size. But even if the weapon had been secreted in some fashion, the ordinary principles relating to the

criminal liability of co-offenders as parties is sufficient to expose Jesse to the same sentencing consequences as Aaron.

[31] The other primary challenge advanced by counsel for the appellants relates to the extent of the discount from the starting point. The Judge deducted two years six months, or approximately 42%. He took into account a number of mitigating factors; the first was the youth of the appellants. At the time of the offending, Aaron was 19 years old and Jesse a little under 18 years. Then there were the guilty pleas entered at the appropriate time, together with a measure of co-operation with the police. There was significant remorse on the part of each appellant, reflected in part by their participation in the restorative justice programme. There was also the fact they were each effectively first offenders.

[32] As the Court of Appeal reminded sentencing Judges in *R v Mako* [2000] 2 NZLR 170 at [66]:

> … where the offender is a youth who is in relevant respects a first offender and appears genuinely motivated to reform, there may be benefit both to the offender and society in a significantly reduced sentence.

[33] Defence counsel responsibly acknowledge that Judge Harvey's discount of 42% was generous. Nevertheless, they argue there was room for even greater leniency.

[34] Ms Patterson referred to several appellate judgments in which discounts of the order of 35-42% were given, where there was a combination of mitigating factors including youth. One example is the recent decision of the Court of Appeal in *R v Putt* [2009] NZCA 38, where the appellant, then aged 18 years, had stabbed his father in the back following a fight in which the appellant had been for a time left unconscious. The Court of Appeal allowed the appeal and substituted for the initial sentence of five and a half years imprisonment, a term of three and a half years. A discount of 35% was allowed for youth, remorse, participation in a restorative justice programme and the guilty plea. But there, the appellant had a history of notings in the Youth Court, which the Court of Appeal expressly took into account.

[35] The appellants were indeed entitled to a very significant discount to reflect all of the mitigating factors identified by their counsel. The question is whether the discount allowed was sufficient in the circumstances. After some reflection I have concluded that it was.

[36] In this area, the jurisdiction of the sentencing Judge is essentially discretionary but there are certain well established principles. A guilty plea at a relatively early stage is generally recognised by a discount of about 33%. Then there is a need to reflect thereafter three separate mitigating factors. The first is the youth of these appellants. The *Mako* approach is relevant in that respect. Next there is their undoubted remorse, evidenced in part by their participation in a restorative justice programme. Finally, there is the fact that these appellants are first offenders. They are entitled to express recognition of that. The Judge has effectively deducted an additional 9% to reflect the totality of these factors. It is not possible to say that this allowance was insufficient.

[37] There remains the appellants' argument that there was a degree of impermissible disparity with the sentences imposed upon their co-offenders. The co-offenders clearly played a less culpable role in the overall offending and faced less serious charges than the appellants. They were not present in the room when the wheel brace was used; however one of them did strike at least one of the victims several times with his fists.

[38] The co-offenders were charged with common assault and burglary, and at an earlier time were sentenced to 12 months supervision on terms that included special conditions. They were also sentenced to 250 hours community work and ordered to make the same reparation payment as the appellants. One of the co-offenders was dealt with in the Youth Court.

[39] I am satisfied Ms Patterson is right when she submits that the appellants' offending was in an altogether different class from that of their associates. The latter were not directly involved in any of the violence until after the wheel brace had been used, and subsequent to the worst of the assaults by the appellants. They were in another part of the house at that time. Indeed, Mr Leader himself accepts the

primacy of the appellants' role in the attack. In his written synopsis he says: "It appears that the appellant and his brother were the main attackers, the other two associates playing a minimal part".

[40] In those circumstances it would not be proper to entertain an argument that the appellants were entitled to be sentenced on the same footing as their associates.

Result

[41] For the foregoing reasons the appeals are dismissed.

C J Allan J