

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

CRI 2008-404-000255

MICHAEL ALAN HINCE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 20 October 2009

Appearances: K Jones for the Appellant
L Farmer for the Respondent

Judgment: 20 October 2009

[ORAL] JUDGMENT OF WHITE J
[Appeal against sentence]

Solicitors:
K Jones, P O Box 721 092, Papakura
Crown Solicitor, P O Box 2213, Auckland 1140

[1] On 13 May 2009, the appellant, Mr Hince, pleaded guilty to three charges:

- a) one charge of wounding with intent to cause grievous bodily harm (s 188(1) of the Crimes Act 1961);
- b) one charge of possessing an offensive weapon (s 202A(4)(a)); and
- c) one charge of intentional damage (s 269(2)).

[2] The maximum penalty for the first charge was 14 years' imprisonment, for the second charge two years' imprisonment, and for the third charge seven years' imprisonment.

[3] On 28 July 2009, Mr Hince was sentenced by Judge McAuslan in the Papakura District Court to three years' imprisonment on the first count, and one year imprisonment on the second and third counts, to be served concurrently.

[4] Mr Hince now appeals against the sentence of three years' imprisonment. There is no challenge to:

- a) the starting point of five years' imprisonment;
- b) the District Court Judge's decision that sentencing should proceed on a totality basis and that concurrent sentences should be imposed; and
- c) the relevant mitigating factors that were identified by the Judge.

[5] The challenge is solely on the basis that the level of discount for the mitigating factors was insufficient and therefore the three year term of imprisonment was clearly erroneous.

Background

[6] The background facts are set out fully in the District Court judgment at [2] – [4]. In view of the limited nature of the appeal, it is unnecessary to repeat them,

except to note that the case involved a particularly violent and unprovoked attack with a spanner on the victim, which resulted in serious and permanent injuries to him.

[7] The relevant mitigating factors are also recorded in the District Court judgment and may be summarised as follows:

- a) the age and family situation of Mr Hince;
- b) his employment situation, history and prospects;
- c) the fact that he is a young man with a great deal of promise;
- d) his genuine regret and remorse;
- e) a positive pre-sentence report;
- f) guilty pleas, acceptance of responsibility and co-operation; and
- g) previous good character.

[8] The District Court Judge reduced the unchallenged starting point of five years' imprisonment by 40% for these mitigating factors and imposed a sentence of three years' imprisonment. Her Honour did not apportion the 40% between the various factors.

Argument on appeal

[9] The submission for the appellant is that decisions of the Court of Appeal as to the approach to the discount for mitigating factors mean that the discount should have been 48-50%, being 33% for the guilty plea, and between 5% and 30%, refined to 15-17%, for the other factors. A discount of 50% would have resulted in a term of imprisonment of 2½ years.

Argument for the Crown

[10] In its response, the Crown has submitted that a discount for the guilty plea of 30% would be appropriate and that the other mitigating factors support the increase in the discount to 40%. The total discount was in the range of what was appropriate, given the seriousness of the offence.

Decision on appeal

[11] The law is to be applied as set out in appellate authorities prior to the recent judgment of the Court of Appeal in *R v Hessel* [2009] NZCA 450 at [76]. At the same time, however, the Court of Appeal judgment in *Hessel* provides general guidance on the level of discount for guilty pleas and refers to existing authority on the question whether there should be a separate discount for “genuine remorse”.

[12] On the basis of *Hessel* at [15], an appropriate discount here where the guilty plea was entered on the fifth Court appearance would be between 33% and 20%. The Crown, in reliance on the decision in *R v Walker* [2009] NZCA 56, suggested a discount between 30% to 25%, but accepted that it would be close to 30% for the guilty plea.

[13] On the basis of the well-established Court of Appeal authorities referred to in *Hessel* at [24] – [25], there should be no separate discount for genuine remorse unless it amounted to “exceptional remorse”. I accept the Crown’s submission that the facts here do not support a finding of exceptional remorse.

[14] There is no tariff guideline for other personal mitigating factors. The Crown drew my attention to s 9(4)(b) of the Sentencing Act 2002 and also pointed out that while Mr Hince is young, he is not that young.

[15] I have given careful consideration to the submissions for Mr Hince, but have concluded that, putting genuine remorse to one side, the District Court Judge’s discount of at least 10% for other mitigating factors was entirely appropriate. It is

certainly not possible to say that her approach was wrong or showed an error on her part or was out of all proportion.

[16] The appeal against sentence in this case is therefore dismissed.

D. J. White J