

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

**CRI 2009-483-41**

**SELWYN LUCAS PHILLIPS**

v

**NEW ZEALAND POLICE**

Hearing: 6 November 2009  
Counsel: J M Woodcock for Appellant  
J A Younger for Respondent  
Judgment: 9 November 2009

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**JUDGMENT OF SIMON FRANCE J  
(Appeal against Sentence)**

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[1] Mr Phillips appeals an effective sentence of eleven months' imprisonment. They were imposed in relation to:

- a) assault (four months);
- b) breach of release conditions (one month cumulative);
- c) using a document (six months cumulative).

[2] The three charges are unrelated. The first in time is the breach of release conditions. Mr Phillips had recently finished serving a term of imprisonment. He

was subject to conditions of release. They included reporting to a probation officer. Mr Phillips on 21 May 2009 omitted to do this, he being out of town with a work crew.

[3] As regards the assault, Mr Phillips punched a man who was visiting his house. The context appears to be a belief that the man had been seeking sexual activity with Mr Phillips wife. Mr Phillips says that his wife told him and his father that the victim had attempted to rape Mr Phillips wife. In her submissions, Ms Younger says that the father wrote a letter confirming this, and it was provided at sentencing to the District Court. The assault itself consisted of about ten punches of considerable force to the head and upper body of the victim in the kitchen area of Mr Phillips' house. The victim then managed to escape.

[4] The using a document charge concerns a cheque which Mr Phillips says he won over a game of pool. He says he appreciated that it was probably stolen. He went to a motel and registered for the night, and obtained the difference between the face value of the cheque and the room accommodation in cash. The sum involved was \$110. Unsurprisingly, the cheque was not honoured when presented.

### **Sentencing**

[5] The District Court Judge discussed the sentencing in general terms, noting the circumstances in relation to the offending and the difficulty posed by Mr Phillips previous record of offending. The Judge had earlier in the sentencing exercise noted that the guilty pleas were somewhat delayed but that a credit of between 20 – 30% was justified. No specific starting points, uplifts, or credits for mitigating factors were identified. The Judge concluded by saying that he considered that the total sentence was somewhere between eighteen months and two years, but giving credit for the matters earlier discussed, he imposed the sentences which were recorded at the beginning of this judgment. As noted, the end result was eleven months.

## **Submissions**

[6] Counsel for the appellant begins by explaining the circumstances of the pleas which involved successful representations for a change in the offences charged. When the changes were effected, pleas were entered. The purpose of this submission is to propose that a full one third discount is appropriate. I observe that even taking the lowest figure that the Judge identified, namely eighteen months, the end sentence of eleven months is greater than a one third discount.

[7] The essential submission is that the final sentence of eleven months is manifestly excessive given the circumstances of each charge. The mitigating factor in relation to the assault was the appellant's belief, based on information provided to him by both his wife and father-in-law, that the victim had attempted to rape his wife.

[8] The cheque fraud is submitted to be at the lower end of the scale. Likewise, the breach of release conditions was not to be ignored occurred on one occasion and was at least the product of Mr Phillips seeking to keep employment he had obtained.

[9] The Crown responds that the sentence as a whole is not manifestly excessive. The assault involves several punches to the head and upper body area delivered with force. Within the context of a charge of assault, it is submitted that a penalty of six months is not excessive.

[10] Concerning the cheque fraud, it is noted that in February 2009 Mr Phillips had been sentenced to ten months' imprisonment on forty charges of using a document for a pecuniary advantage. This offending occurred relatively close to the time of his release from such offending and that was a factor that had to be taken account in fixing the sentence.

## **Decision**

[11] The four month sentence on the assault implies a starting point of six months. I am satisfied that such a starting point adequately has regard to the mitigating

circumstances. I do regard the information that Mr Phillips was provided with, whether true or not, amounts to mitigation that can be taken into account although it is always necessary to reinforce the need for discipline and that it is not permitted to take the law into one's own hands. It is also to be remembered that a large number of punches are captured within the single assault charge.

[12] Concerning the cheque fraud, counsel agree there is no tariff. Isolated cases can be found that gives support to the Judge's sentencing levels. For myself I consider it is the most that could be given in the circumstances but not necessarily unavailable. However, I am of the view that the effect of cumulating all three sentences has been to produce a sentence that is manifestly excessive. I accept that given his past record, and the proximity of this offending to his recent release from prison, it was important that there be an element of individual deterrence and a return to prison was inevitable and proper. However, I believe that the offending as a whole merited a lesser term which would still nevertheless achieve the goals that underlay the Judge's sentencing.

[13] Accordingly, I amend the sentence by:

- a) reducing the sentence on the use of a document charge to four months' imprisonment; and
- b) making the breach of conditions sentence concurrent rather than cumulative.

[14] The end result is that the final sentence is eight months.

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Simon France J

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