

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

**CRI-2009-404-242**

**JACOB KOMENE**  
Appellant

v

**NEW ZEALAND POLICE**  
Respondent

Hearing: 7 December 2009

Appearances: Mr J Sutton and Ms A Ting for Appellant  
Mr J Carruthers for Respondent

Judgment: 7 October 2009

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**(ORAL) JUDGMENT OF LANG J**  
**[on appeal against sentence]**

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Solicitors:  
Crown Solicitor, Auckland  
Counsel:  
Mr J Carruthers, Auckland

[1] Mr Komene pleaded guilty in the District Court to six separate charges, virtually all of which occurred as a result of separate and unrelated incidents. On 17 July 2009 His Honour Judge Treston sentenced him to an effective sentence of three years imprisonment on all charges. He now appeals to this Court against that sentence on the basis that it was manifestly excessive.

### **The offending**

[2] It is necessary to say something first about the circumstances that gave rise to the charges. I refer to these in chronological order.

1. *Possession of an offensive weapon on 1 October 2008*

[3] On the evening of 1 October 2008 the police were called to Henderson Park in Wiltshire Crescent, Henderson. They had received reports of youths fighting in the area. When the police approached the park, they found Mr Komene walking along the street with a wooden pole in his hand. The police noticed that he had blood on his shirt and a small cut to his bottom lip. When the police asked why he had the wooden pole in his possession, he said that he was angry.

2. *Trespass at Westgate Shopping Centre on 20 October 2008*

[4] On 1 August 2008 those responsible for administering the Westgate Shopping Centre issued a trespass notice against Mr Komene as a result of previous incidents that he had been involved in. The notice prohibited him from entering the shopping centre for a period of two years from that date.

[5] On the evening of 20 October 2008, the police saw Mr Komene in the precincts of the Westgate Shopping Centre with two associates. He was able to avoid apprehension at that time, but when the police spoke to him later he frankly admitted being within the precincts of the shopping centre on the earlier occasion. He had no explanation for his actions.

3. *Aggravated robbery on 18 January 2009*

[6] At about 10.15 pm on 18 January 2009, Mr Komene went to the Countdown Supermarket at the Westgate Shopping Centre. Whilst in the store he stole a paring knife. He then called for a taxi to take him home.

[7] The driver of the taxi was a 65 year old male. Mr Komene asked the taxi driver to take him to an address at Triangle Road in Massey. When the vehicle arrived in Massey Mr Komene told the taxi driver to stop. He then removed the knife that he had taken from the supermarket from his pocket and grabbed the taxi driver violently by the throat. Whilst pointing the knife at the taxi driver's head and holding him by the throat, Mr Komene demanded that the taxi driver give him money. The taxi driver told him that he only had a small amount of money but Mr Komene did not believe him. He then applied pressure to the taxi driver's throat, causing him to choke. Whilst doing that Mr Komene thrust the knife towards the taxi driver again and demanded to know where the rest of the money was. Fortunately, the taxi driver was able to grab Mr Komene's arm and fend him off. The taxi driver then told Mr Komene to take his purse containing \$170. Mr Komene told the taxi driver not to say anything to anyone and then ran away from the area with the purse. He was subsequently apprehended at his home which was nearby.

[8] When spoken to by the police, he admitted this offending and said that He said that he did not want to walk home and had taken the taxi for that reason. He said that he knew that he had no money to pay for the taxi when he initially called for it. He added that he had stolen the money from the taxi driver so that he could buy more alcohol.

4. *Trespass at Westgate Shopping Centre and possession of graffiti implements on 16 February 2009*

[9] These charges relate to another occasion when the police found Mr Komene within the precincts of the Westgate Shopping Centre.

[10] On this occasion he had been observed by a member of the public loitering in the public toilets of the Sky City cinema and writing on the wall using a marker pen. Security guards arrived and found Mr Komene leaving the toilets. They then called the police and restrained Mr Komene until the police arrived.

[11] When the police searched Mr Komene they found a black marker pen on his person. The security guards had also earlier removed a blue marker pen from him. Mr Komene frankly admitted that the marker pens belonged to him and that he used them to tag walls and other suitable surfaces.

5. *Theft of items on 22 March 2009*

[12] On the evening of Sunday 22 March 2009, Mr Komene went to a residential address situated not far from his home. He saw a 1995 Honda Odyssey motor vehicle parked adjacent to the driveway at the front of the property. He forced open the driver's window and climbed inside the vehicle. After searching the vehicle he stole a pair of Ray Ban sunglasses and two compact discs having a total value of \$360. When the owner of the vehicle approached him he ran away.

[13] The police were called and located Mr Komene a short time later inside a neighbouring address. He was unable to communicate with them, however, by virtue of his extreme level of intoxication.

**The Judge's approach to sentencing**

[14] Not surprisingly, the Judge took the lead, or most serious, charge as being the charge involving the aggravated robbery of the taxi driver. He selected a starting point of four and a half years in relation to that charge. Although his sentencing notes indicate that he added an uplift to that starting point, they do not record the extent of that uplift. The Judge then had regard to Mr Komene's age and to the guilty pleas that he had entered, although these had not occurred at the earliest stage.

[15] Having regard to those factors, the Judge settled on a final sentence of three years imprisonment on the charge of aggravated robbery. He imposed short concurrent sentences of imprisonment in relation to each of the other charges.

### **Grounds of appeal**

[16] Counsel for Mr Komene advances several grounds in support of his overall submission that the sentence that the Judge imposed was manifestly unjust. These are:

- a) The Judge selected a starting point that was too high.
- b) The Judge applied an uplift that was inappropriate in all the circumstances.
- c) The Judge failed to give Mr Komene a further discount to reflect the fact that he has significant mental impairment that affects his culpability in relation to these charges and also in relation to his earlier offending.

[17] I deal with each of these arguments in turn.

a) *The starting point*

[18] The Judge correctly noted that the leading judgment of the Court of Appeal in the field of aggravated robbery is *R v Mako* [2000] 2 NZLR 170. The Judge pointed out that the Court of Appeal had observed in *Mako* (at [57]) that taxi drivers are common and vulnerable targets. The aggravated robbery by an adult offender of a taxi driver will generally attract a starting point of between four and five years imprisonment in circumstances where a weapon is presented or actual violence is used.

[19] Counsel for Mr Komene says that the Judge was wrong to conclude that a starting point of four and a half years imprisonment was appropriate. He points out that the starting point identified in *Mako* is for adult offenders, and that Mr Komene

was aged only 17 years at the date of his offending. For this reason he submitted that the Judge ought to have adopted a lesser starting point.

[20] This submission cannot be sustained. The attack on the taxi driver involved a situation in which Mr Komene armed himself with the knife that he stole from the supermarket. He then called a taxi in circumstances where he knew that he had no money to pay the fare. From the outset he must have known that the end result would be an armed robbery of the taxi driver. When the taxi stopped, Mr Komene immediately presented the weapon and inflicted physical violence on the taxi driver by attempting to choke him. This led to what must have been a terrifying ordeal for the taxi driver, although the victim impact statements reveal that he has recovered well from it. Although the amount of money that Mr Komene stole was relatively small that is not surprising given the fact that it was a robbery of a taxi driver.

[21] I do not see how the Judge can be criticised for adopting a starting point of four and a half years imprisonment having regard to the overall circumstances of the offending. The fact that the starting point applies to an adult offender does not affect the validity of the starting point. The offender's age is not taken into account when setting the starting point. Rather, it may be a factor that operates to reduce the starting point that the sentencing Judge selects. I therefore reject the submission that the Judge adopted a starting point that was too high having regard to the circumstances.

*b) The Uplift*

[22] The Judge appears to have applied an uplift although, as I have already indicated, he did not indicate the extent to which he increased the starting point in doing so. I take this to be the case from the following passage in the Judge's sentencing notes:

[19] Having said all that I agree with the principles set out in *Mako*, which clearly govern this case. I consider that the appropriate starting point for the lead charge of aggravated robbery is indeed a sentence of imprisonment of four and a half years which in fact must be uplifted because of the other factors, not only your previous matters but also the other charges which surround this charge having occurred before and after the aggravated robbery.

[23] The Judge therefore identified the other offending for which Mr Komene was being sentenced as justifying an uplift. He also identified Mr Komene's previous offending.

[24] Mr Komene has only one conviction in the District Court. This is for a charge of assaulting a female. He was sentenced to one year's supervision on that charge on 12 November 2008.

[25] He also has, however, numerous notations in the Youth Court. These include notations for assaulting a person with a stabbing or cutting instrument, assaulting a person with a blunt instrument, assaulting police (x 2) and assaulting a female. In addition, he has numerous notations for escaping from and resisting the police, as well as for dishonesty in the form of burglary and shoplifting.

[26] Counsel for Mr Komene did not argue that some small uplift might be required to reflect the other offending for which Mr Komene was being sentenced. He submitted, however, that the Judge should not have taken into account the notations from Mr Komene's previous appearances before the Youth Court.

[27] The Crown properly pointed out that, although they are not convictions, nevertheless notations in the Youth Court are relevant to sentencing and may sometimes justify an uplift: *Kohere v Police* (1994) 11 CRNZ 442 and *R v Rongonui* [2009] CRNZ 279. In the present case the nature of Mr Komene's previous notations was such that I have no doubt that the Judge would have been entitled to apply an uplift. This reflects the fact that previous sentences of supervision have not deterred Mr Komene from continuing to offend in a violent way.

[28] There are two additional factors that I consider would also justify a degree of uplift. These are the fact that all of the current offences were committed while Mr Komene was subject to an existing sentence of supervision. Several of the offences, including the aggravated robbery, were also committed whilst Mr Komene was on bail.

[29] Viewing these factors overall, I have no doubt that the Judge would have been entitled to apply an uplift of at least six months imprisonment. This means that the end starting point would have been a sentence of imprisonment of approximately five years.

c) *Mr Komene's mental impairment*

[30] This leads to counsel for Mr Komene's principal point. It is that the Judge failed to have proper regard to mental difficulties that Mr Komene suffers from. These were outlined in a variety of reports that were before the sentencing Judge. They have been further amplified in reports prepared for the purposes of the appeal by Dr Valerie McGinn, a clinical neuropsychologist and Dr Craig Immelman, a psychiatrist. Both have interviewed Mr Komene and his mother at length, and have also reviewed the assessments that have been made of Mr Komene by health professionals in the past.

[31] The reports make it clear that Mr Komene suffers from Fetal Alcohol Syndrome. This has been exacerbated by the fact that he has been drinking large quantities of alcohol since he was 14 years of age. As a result, Mr Komene suffers from significant cognitive impairment. It means that he has difficulty in making appropriate decisions, and has little comprehension of the consequences of his actions. The only way in which his current condition is likely to improve is if he remains abstinent from alcohol for a significant period and can receive treatment that will assist him to ensure that he does not revert to his old lifestyle in the future.

[32] It is quite clear that Mr Komene's current problems stem principally from issues in his home environment. The consumption of alcohol by his mother was obviously a factor that led to mental impairment on his part. He has also been part of a very large family living in confined quarters. Violence appears to have been used in the home as a form of correction and it is obvious that Mr Komene began living on the streets with his friends from an early age. I have no doubt that, unless something is done soon to correct Mr Komene's lifestyle and his conduct he will inevitably reoffend shortly after his release from prison.



[33] The fact that Mr Komene suffers from mental impairment does not necessarily, however, mean that the starting point that the Judge selected needed to be reduced to reflect that fact. The Court of Appeal has made it clear that sentencing Judges must approach the sentencing of mentally impaired offenders with a degree of caution. In some cases mental impairment reduces culpability because it reflects the fact that the offender may have committed the offences without true appreciation of their consequences. Balanced against that, however, is the undoubted fact that in many cases the need to protect the public will be to the forefront.

[34] I have obtained significant guidance in this context from the recent judgment of the Court of Appeal in *R v Lucas-Edmonds* CA585/2008 21 May 2009. That case demonstrates the difficulties that can often arise in cases where the Court is required to sentence an offender who suffers from a form of mental impairment that is not sufficient to provide a defence of insanity or to lead to other formal consequences. In that case the Court of Appeal said:

[36] We do not consider it necessary to revisit or re-emphasise what this Court has previously said in sentencing appeals where the broad issue of diminished responsibility has been raised. In *R v Tuia* CA312/02 27 November 2002, the Court observed at [15]:

The less the moral capacity for constraint the lower the moral culpability in terms of the spectrum ending with the verdict of not guilty on the grounds of insanity.

Nonetheless, as recognised in *Clarke and Taueki*, the interface of public safety and diminished responsibility flowing from psychiatric or behavioural disorders requires caution. In *R v Tapueluelu* CA172/99 29 July 1999 at [15] this Court stressed that in some cases reduced moral responsibility might have to be countered by proper considerations of public safety.

[35] In *R v Wright* [2001] 3 NZLR 22 the Court of Appeal also said (at 26):

[Mental disorder] is a factor which will inform a just sentence having regard to the character of the disorder and the weight it ought to carry when balancing sentencing objectives. Its character may indicate a lesser degree of moral culpability or a greater subjective impact of the penalty. It may suggest a more or a less risk of a repetition of offending, so as to direct particular attention to issues of personal deterrence or public protection. And these considerations must be synthesised with the sentencing elements of denouncing the fact of violence in our society and acknowledging grievous effects on victims.

[36] Similarly, in *R v Abraham* (1993) 10 CRNZ 446 the Court of Appeal said (at 449):

In some cases proof of the existence of a mental disorder falling short of legal insanity, which nevertheless reduces an offender's ability to appreciate the true seriousness and culpability of his actions or makes him less than a totally free agent may be a significant mitigating factor. In other cases ... inability to appreciate the consequences of the offender's actions and to exercise independent self control, especially when that is combined with evidence of a continuing disorder and of drug dependency which is likely to exacerbate it and increase the risk of re-offending, may require the sentence, in the interests of the public at large, to put aside thoughts of discounting the penalty which the offence would otherwise warrant.

[37] The present case presents real difficulties. The Judge did not refer expressly to Mr Komene's mental impairment when discussing mitigating factors. He may, however, have had it in mind because it seems that he reduced the starting point by at least 40 per cent to reflect mitigating factors. He identified Mr Komene's guilty plea as warranting a reduction of one-third. This means that he must have applied a further discounting factor to arrive at the end sentence of three years imprisonment. Viewed realistically, the only other mitigating factors were Mr Komene's youth and the mental impairment from which he suffered as identified in the material before the Judge.

[38] I have reached the conclusion that the Judge was not required to give Mr Komene's mental impairment a further reduction than he did. Mr Komene presents as a sentencing conundrum because he clearly has little or no appreciation of the factors that drive him to offend. As the charge of aggravated robbery in the present case demonstrates, his offending is driven by immediate needs and without intervention it is likely that this trend will continue in the future. I agree that it is imperative that some form of treatment be provided to him but I do not consider that this particular factor warrants the sentence being reduced further. Were that to be the case, it would simply mean that Mr Komene would be out on the streets earlier than would otherwise be the case. If that was to occur he would inevitably regress to a pattern of further violent offending. If the present charges are anything to go by, future incidents of violence are likely to increase in severity as well as number.

[39] In sentencing a person such as Mr Komene it is necessary to ensure that the need to protect the public is given proper weight. It is not appropriate to approach the issue of sentence on the basis that the offender is entitled to an automatic discount from the sentence that would otherwise be appropriate because of his or her impairment. That type of approach is likely to be counterproductive to the interests of both Mr Komene and members of the public who come into contact with him in the future.

[40] For these reasons I do not accept that the sentence of three years imprisonment was manifestly excessive. It properly reflected the seriousness of his offending and also such mitigating factors as were available to him. I am therefore satisfied that the appeal cannot succeed and must be dismissed.

[41] In closing, however, I wish to reiterate that the reports make it clear that this may be the last chance to reverse Mr Komene's pattern of offending. He has never received a prison sentence before, and Dr Immelman's report makes it clear that that form of sentence is likely to be of little or no therapeutic value for Mr Komene.

[42] My own view, having regard to the material that counsel have provided me with, is that Mr Komene would undoubtedly benefit from an intensive period of residential therapeutic intervention in which abstinence from alcohol and other intoxicating substances can be guaranteed. If this is to occur, however, it will need to be as part of release conditions when he is ultimately released on parole.

[43] The Parole Board has wide powers under s 15 of the Parole Act 2002 to impose special conditions on an offender at the time of release. Special conditions may not be imposed unless they are designed to reduce the risks of re-offending by the offender or to facilitate and promote the rehabilitation and reintegration of the offender. In the present case I consider that both objectives would be amply met by a special condition requiring Mr Komene to attend some form of residential institution where his alcohol problems can be addressed in a meaningful manner. Without wishing to fetter the discretion of the Parole Board in any way, I would therefore hope that, when Mr Komene is considered for parole, the parole authorities are able to do what they can to ensure that that type of assistance is provided to him.

If it is not, the likelihood is that he will be before the courts again within a very short time after his release.

### **Result**

[44] The appeal against sentence is dismissed.

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Lang J