IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CRI-2009-419-000057

ROPATI SHORTLAND
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 8 December 2009

Appearances: G Walsh for the appellant
S Cameron for the respondent

Judgment: 8 December 2009

(ORAL) JUDGMENT OF STEVENS J

Solicitors/Counsel:
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Introduction

[1] This is an appeal against sentence by Ropati Shortland (the appellant) on a number of charges under the Crimes Act 1961. The offending relates to four different sets of offending. The appellant pleaded guilty to all charges and was sentenced on 3 August 2009 by Judge A M Harland in the District Court at Hamilton to a total sentence of two years and eleven months' imprisonment.

[2] The appellant submitted that that the sentence was wrong in fact and law, did not take into account the totality principle and was manifestly excessive.

[3] Let me say at the outset that I agree with the observations of Judge Harland when she said that this was serious offending that needs to be met by a strong response. She was right when she said that members of the public are sick and tired of drunken young men committing acts of violence on innocent members of the public.

[4] Quite frankly, the three sets of violent offending were in their own respects appalling and the appellant's counsel was correct when he acknowledged that imprisonment was the only option. The essential question concerns the length of the term of imprisonment.

Factual background

[5] The first set of offending occurred on 28 December 2008. The charges that resulted were assault and obtaining by deception. The District Court Judge described the facts as follows:

> [7] In relation to 28 December 2008 at about 3.30 am in the morning, you were on Victoria Street. You got into a taxi and there were other people in the taxi with you. When the taxi stopped the other passengers quickly jumped out of the taxi and told the taxi driver that you were going to pay. When you were asked for the taxi fare by the driver, you became aggressive and abused him. You got out of the taxi and started to run away towards Western Heights Drive. The taxi driver followed you and asked for his fare. You told him to come and get his money. When he approached you, you punched him on the right side of his face and then ran off towards your home. The driver suffered a swollen right cheek from the assault. You said,

> in explanation to the police, that you told the taxi driver not to touch you. You said that you had the money but you had lost your wallet in the taxi...

[6] The second set of offending occurred on 16 January 2009 when the appellant was on bail for the first set of offending. The second set of offending resulted in one charge of assault with intent to injure and one charge of common assault. The offending was summarised as follows:

> [8] Then on 16 January … at 3.55am in the morning, a Friday night - you and another associate of yours approached two males who were on Norton Road, minding their own business. You and your friend yelled out rude remarks to them about one of their t-shirts and then you approached them trying to engage them in a fight by inviting them to come into the park area. They tried to walk away but you were not going to let that happen. You approached the first victim and punched him with a closed fist to his face, which was completely unprovoked. As a result of the force of the punch he fell backwards over a small concrete barrier, on to the footpath and on to the ground. Then you viciously kicked him in the face. It then seems your mate became involved and kicked the victim four times in his back. Then the other victim tried to come in to help his friend, you asked him whether he wanted some action as well and then you punched him below the right eye. Then you and your friend both walked off.

[7] The third set of offending resulted in one charge of injuring with intent to injure and two charges of assault. Again, the appellant was on bail, not just for the first but also for the second set of offending. The offending was described by the Judge as follows:

> [10] …on 18 April 2009 - again the early hours of the morning, a Saturday night at 4.15am. You were in Ward Street. You were extremely intoxicated and you were with other people. There was a verbal argument with one of the victims. You became angry and started to punch the victim continuously in his head with a closed fist and he fell to the ground. You then proceeded to stomp on his head approximately six times. Again, the victim is very fortunate that he did not get more severe injuries as a result of your actions. He suffered a swollen left eye, swellings to the right side of his head with many lacerations, that is cuts around the same area. When his friend went to help him, you with the help of one of your mates, punched that person to the head causing them to fall to the ground. Then when he was on the ground, you kicked him with one of your legs to the shoulder. That particular victim received a bleeding left ear and grazing to the left side of his head. Then a third victim tried to come to the aid of his friends to help, and you punched him in the head about three times with a closed fist. He received a large bump above his left eye, to the left side of his jaw and a piercing above his left eye started to bleed. The first victim, that is the one that was originally assaulted by you, received medical treatment.

[8] There was a further charge relating to a breach of Court bail on 23 March 2009.

District Court decision

[9] The Judge treated all of the charges as having had early guilty pleas entered. The Judge convicted and discharged the appellant on the charge of breach of Court bail, as it was minor compared to the rest of the offending. The Judge considered the most serious charge to be injuring with intent to injure. She noted that there had been two previous convictions for assault, both in 2007, for which you received a sentence of supervision and community work for one charge and community work for the other.

[10] The Judge then characterised the offending as within band three of *R v Harris* [2008] NZCA 528. She said that:

> [14] In my view the offending, and I am talking about the last set of offending on 18 April 2009, involved gratuitous violence - attacks to people's head area, which has always got to be viewed seriously, kicking on the ground and is aggravated by the fact that there were three assaults on three different victims. I am of the view that your offending falls in band 3 and not band 2.

[11] The Judge then considered that a starting point of two years and three months' imprisonment was justified for the injuring with intent charge. Incidentally, the Judge did not expressly deal with a potentially aggravating feature, namely, the fact that the offending had been committed whilst on bail for the two previous sets of offending. The Judge then turned to consider the mitigating factors:

> [17] When I look then at mitigating matters, I consider the pre-sentence report and I am going to spend some time talking about that now. You are a young man who has had significant opportunities. You have attended a good school. You have very good parents who are good supportive role models; and who are employed in caring professions; and who clearly have given you the best start in life that was able to be given. You are described by your mother as being a person, when you are not in employment, as lacking in motivation and having low self-esteem. That may be the case, but you must always be at your age, accountable for your actions and in this regard I think it is time that you really grew up and accepted the obvious problems with alcohol and violence that you have. You show little insight into your problems. You are described in the pre-sentence report as thinking that you

> do not have propensity for violence and you do not consider that you have a problem with alcohol, as you do not drink regularly. It is very clear to me that you have problems with both and you are probably violent when you drink but may be not when you do not. You are described as having a medium risk of re-offending but you are assessed as not being highly motivated to address the contributing factors of alcohol abuse and violence propensity.
>
> [18] As to remorse, the probation officer said that you did not have any, but I accept from your counsel that perhaps you did not express it in a proper way. But, I do accept that there is remorse and I think that I can rely on your parents' assessment of that, because they are good people and I do not think they would lie to cover up for you. But, I think that bearing all of those matters in mind, the mitigation is not to be hugely significant because I think you personally need to front up to your problem before any difference can be made.
>
> [19] Bearing in mind all of these matters, with full credit for guilty plea, some account being taken of remorse and the fact that you are still reasonably young, in my view a term of 17 months' imprisonment is warranted on the injuring with intent to injure. In respect of those matters, for the other two victims there will be a term of imprisonment of six months on each.

[12] On the charge of assault with intent to injure, the Judge held that a cumulative sentence was warranted. She adopted a starting point of two years' imprisonment, again without referring to an additional aggravating factor that this offending occurred while the appellant was on bail. The Judge took into account the appellant's early guilty plea and other mitigating factors and imposed a final sentence of 15 months' imprisonment. For the assault charge, the Judge determined that a concurrent sentence of six months' imprisonment was appropriate.

[13] In relation to the assault on the taxi driver, the Judge held that a cumulative sentence was appropriate. A starting point of six months was chosen and reduced to three months for mitigating factors. Finally, the Judge held that home detention was not possible because the total sentence was over two years' imprisonment.

Approach on appeal

[14] A defendant has a general right of appeal against conviction or sentence pursuant to s 115 of the Summary Proceedings Act 1957. A general appeal is by way of rehearing. The powers of the High Court on appeal are outlined in s 121 of the Summary Proceedings Act.

[15] The Supreme Court in *Austin Nichols & Co Ltd v Stichting Lodestar* [2008] 2 NZLR 141 considered the principles applicable to general appeals. Giving the judgment of the Court, Elias CJ stated at [16] that:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[16] In a general appeal, the appellant has the onus of satisfying the appellate court that it should differ from the original decision. But the appellate court must come to its own view on the merits: see *Austin Nichols* at [3]-[5]. An appeal against sentence involves an appeal against the exercise of a discretion. There is some debate as to whether the Supreme Court's decision in *Austin Nichols* on the proper approach for an appellate court to take in general appeals is applicable to appeals against discretion. The focus of this debate is over the interpretation of [17] of the decision, which provides:

> In the present appeal there was no basis for caution in differing from the assessment of the tribunal appealed from. The case entailed no question of credibility. It turned on a judgment of fact and degree, not the exercise of discretion entrusted to the tribunal. We are of the view that the Court of Appeal was not correct to suggest that, because the decision turned on a value judgment apparently open to the Assistant Commissioner, "the High Court Judge ought not to have embarked on a reconsideration of the issue without considering, and giving weight to, the Assistant Commissioner's conclusion". The High Court Judge was obliged to reconsider the issue. He was entitled to use the reasons of the Assistant Commissioner to assist him in reaching his own conclusion, but the weight he placed on them was a matter for him.

[17] In *D v Police* HC TAU CRI 2008-470-22 9 September 2008, Heath J considered that there is nothing to indicate that *Austin Nichols* was intended to apply to appeals against sentence. I agree. Therefore, I consider that *Austin Nichols* has not changed the appellate approach to sentencing. Section 121(3) of the Summary Proceedings Act allows the High Court to intervene on appeal where a sentence is clearly excessive or inadequate or inappropriate. This indicates that the Court will

not intervene where the sentence is within a range that can be justified by accepted sentencing principles. I propose to adopt this approach.

Submissions for the appellant

[18] Mr Walsh filed helpful and comprehensive written submissions. He accepted, rightly, that it was open to the Judge to sentence on a cumulative basis. Mr Walsh also accepted that the aggravating features included the appellant's previous convictions, that there was offending whilst on bail and the use of actual violence. He referred to the mitigating factors as being the guilty pleas that were entered at a relatively early stage, the fact that the appellant was motivated to change and undertake rehabilitative programmes, that he was remorseful and had support from a solid family base. Indeed, Mr Walsh confirmed that such support extended to presence in court today.

[19] Mr Walsh submitted that the sentence imposed for the assault with intent to injure was manifestly excessive. He submitted, correctly, that there is no tariff decision for this type of offending and cited the case of *Minhinnick v Police* HC WN AP205-99 19 August 1999. That was a case where a person was kicked unconscious by a person of similar age and a sentence in the range of six to twelve months' imprisonment was appropriate.

[20] Counsel submitted that the Judge did not apply the totality principle. He referred to the need to consider the totality principle under s 85 of the Sentencing Act and submitted that a sentence closer to two years' imprisonment would have been appropriate, therefore making the sentence of two years and eleven months' imprisonment manifestly excessive.

[21] In conclusion, he emphasised the appellant's age, family support and such remorse as was shown through the guilty pleas.

Submissions for the respondent

[22] Ms Cameron for the respondent submitted that when viewed in totality, the sentence imposed by the Judge was not manifestly excessive. She accepted that the Judge had not expressly referred to the totality principle, but had plainly given anxious consideration to whether cumulative sentences should be imposed.

[23] In approaching the sentence task, Ms Cameron submitted that it was not straight forward. This was because there were four sets of offending, each being distinct in various ways, meaning that the sentencing Judge had to consider each of the component parts separately. However, in the end the totality principle in s 85 of the Sentencing Act needed to be met: see *R v Xie* [2007] 2 NZLR 240 and *R v Clarke* CA128/06 6 June 2006.

[24] Ms Cameron emphasised that the second and third set of offending occurred whilst on bail and that the nature of the violence was escalating from the first to the third incidents. In the first incident there was one victim, the taxi driver. In the second incident, there were two. Then the third incident involved three victims and the most extreme violence. She submitted that this was brazen street violence of an escalating and disturbing nature.

Issues on appeal

[25] This appeal raises the following issues:

- Was the sentence for the assault with intent to injure manifestly excessive? and

- Was the overall sentence imposed one that met the totality principles?

Discussion

[26] I first consider the sentence for the charge of assault with intent to injure. I have considered the approach of the Court of Appeal in *R v Bisschop* [2008] NZCA 229 together with the case of *R v McRoy* CA261/06 CA265/06 12 October 2006. I agree with the submission of Ms Cameron that the approach in *Minhinnick* cited on behalf of the appellant is somewhat out of date.

[27] The Court of Appeal decisions, just referred to, indicate that the sentence of 15 months' imprisonment was stern. I accept that the starting point of two years' imprisonment was on the high side, but just within the range available to the Judge. I note that the Judge did not, as she could have, expressly uplift for the appellant's previous convictions. Further, she did not fix an uplift for the fact that the second offending was committed whilst on bail. The discount of nine months for the guilty pleas and the other mitigating factors was appropriate. So, although this sentence is stern, I am unable to conclude that as a separate exercise the sentence was manifestly excessive.

[28] In any event, to so conclude is not the end of the analysis. Where there is multiple offending and cumulative sentences, the totality principle must also be considered.

[29] In relation to totality, Mr Walsh is correct that the Judge did not expressly discuss the application of the totality principle. Section 85 of the Sentencing Act requires that where cumulative sentences are imposed, they must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending. As the Court of Appeal summarised in *Xie*, the key principles are:

a) With multiple offences the sentence must reflect the totality of the offending;

b) In respect of multiple offences, the Court will not insist that the total sentence be arrived at in any particular way; and

c) The total sentence must represent the overall criminality of the offending and the offender.

[30] With respect to offending on a totality basis, I refer to the case of *Clarke*. That was a case involving multiple acts of violence inflicted on a female victim. The Court of Appeal stated at [14]:

> [14] Cumulative sentences for the acts of violence inflicted upon the victim were fully justified. Those who inflict serious violence upon females, whether partners or not, at different times and different places cannot expect as a general course for sentences of imprisonment to be concurrent. A "concession" for multiple offending cannot be expected by such offenders. In addition, it may be a proper ground for making a sentence cumulative if it was committed after the grant of bail; see *R v Wallace* [1983] NZLR 758 (CA) and *R v Young* [1973] Crim LR 585. Of course, the totality principle requires that the effective sentence not be out of proportion to the overall culpability of the offender but established authority is clear that the totality principle is not a discount for bulk offending; *R v Lucky* (1974) 12 SASR 136; *R v Knight* (1981) 26 SASR 573; *R v Goodhew* CA128/81 16 November 1981.

[31] In dealing with the totality principle, it is important to emphasise that the Judge was dealing with three sets of offending involving escalating violence. Moreover, in each case the violence was largely unprovoked. One of the victims of the third attack provided a victim impact statement in which he stated:

> I have never seen this kind of attack before; I have never been in that situation. It was by far the scariest incident I have ever seen. I just can't understand how someone could attack another person like that using such violence… The force that was being used was so intense that I actually thought he was going to be killed.

[32] I have also had the advantage of considering the victim impact statement from the victim involved in the first incident (the taxi driver) and one from a second victim in the third incident. Although such information has added to the overall picture which this Court has, it has not changed my view of the overall seriousness of this offending.

[33] Applying the totality principle, I take into account the three sets of violent offending, the various features of such offending including the escalating nature of the violence over the three incidents (including the fact that the appellant was on bail when the second and third sets of offending occurred), together with the mitigating

and aggravating features referred to in the appellant's submissions. In the end, I must stand back and assess the total sentence in the light of all the circumstances. In so doing, I do not consider that the total sentence of two years and eleven months' imprisonment is outside the range available, having regard to the overall criminality of the offending and the offender.

[34] The appeal, therefore, is dismissed.

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Stevens J