

IN THE COURT OF APPEAL OF NEW ZEALAND

CA686/2013
[2014] NZCA 93

BETWEEN KARL MURRAY BROWN
 Appellant

AND THE QUEEN
 Respondent

Hearing: 18 February 2014

Court: Ellen France, MacKenzie and Mallon JJ

Counsel: A J Holland for Appellant
 J M O'Sullivan for Respondent

Judgment: 26 March 2014 at 10.30 am

JUDGMENT OF THE COURT

The appeal against sentence is allowed. The sentence of two years and eight months' imprisonment is quashed and a sentence of two years and two months' imprisonment is substituted.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] Mr Brown pleaded guilty to a charge of injuring with intent to injure.¹ He was sentenced to two years and eight months' imprisonment.² He appeals against that sentence. Four errors are said to have been made in arriving at that sentence, leading to an end sentence which is said to be manifestly excessive.

¹ Crimes Act 1961, s 189(2).

² *R v Brown* DC Auckland CRI-2013-044-2041, 27 September 2013.

Background

[2] The charges arose in respect of an incident involving Mr Brown's former partner (the complainant), who is also the mother of his children. On the evening of 1 March 2013 Mr Brown was drinking alcohol with an associate at an address in Wellsford. The complainant later joined them. Shortly before midnight all three went on a drive to visit associates in Whangaparaoa. On the way Mr Brown subjected the complainant to a sustained assault. He first punched the complainant in the face. He continued the assault, punching the complainant around the head and face several times, placing his knee on her chest which caused her to have difficulty breathing, and pulling clumps of hair from her head which caused injuries to her scalp. Mr Brown and his associate made comments which caused the complainant concern about what might happen to her. She sent a series of text messages to a friend. The police were contacted and they responded. They located the car and stopped it. They found the complainant bleeding, bruised and in a distressed state. Mr Brown and the associate were arrested. The complainant was taken by ambulance to the hospital where she received treatment and was discharged some hours later.

[3] Mr Brown was sentenced in the District Court by Judge Collins.³ The Judge adopted a starting point of two years and eight months' imprisonment. He applied an uplift of eight months for previous offending and because this offending occurred while Mr Brown was subject to a sentence of supervision. He applied a discount of eight months for Mr Brown's guilty plea. This left an end sentence of two years and eight months' imprisonment.

Starting point

[4] The first alleged error is that the Judge's starting point was too high. The guideline judgment is *Nuku v R*.⁴ It is accepted that the offending fell within band two of that guideline judgment. That band applies where three or fewer aggravating factors are present.⁵ The District Court Judge correctly identified three aggravating

³ *R v Brown*, above n 2.

⁴ *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39.

⁵ At [38(b)].

factors: the complainant's confinement in a moving vehicle,⁶ the sustained nature of the violence, and attacks to the head. The Judge considered that the offending was "squarely within band 2".⁷ The guideline for band two offending is a starting point of up to three years' imprisonment.⁸ The Judge's starting point of two years and eight months was squarely within that guideline.

[5] Counsel for Mr Brown submits that the starting point was too high when compared with three cases.⁹ Of those three cases, only one of them (*Cavanagh v Police*) was referred to the Judge at the time of sentencing.¹⁰ That case was released close in time to *Nuku v R* and did not refer to it.¹¹ The Judge referred to counsel's submission that *Cavanagh v Police* was more serious than the facts of the present case but noted that this kind of offending was now governed by *Nuku v R*.

[6] Guideline judgments are intended to minimise the need to trawl through other cases to obtain guidance as to an appropriate starting point. The Judge was correct to view the aggravating factors that were present as putting this offending towards the higher end of band two and to not embark on a comparison with the case relied on by counsel. Moreover, the other two cases relied on by counsel on this appeal did not involve a sustained attack as was the case here. Our assessment is that the starting point adopted was stern but not inappropriately so.

Provocation

[7] The second alleged error concerned the absence of a discount for provocation. The basis for the provocation was comments made by the complainant at a restorative justice meeting and a letter from the complainant to the Court.

⁶ It was Mr Brown's position that he and his associate did not want the complainant in the car and that they had tried to get her to get out. The first punch was inflicted when they stopped at a service station. However, as the Judge noted, once the journey resumed the assault continued.

⁷ *R v Brown*, above n 2, at [8].

⁸ *Nuku v R*, above n 4, at [38(b)].

⁹ *Cavanagh v Police* [2012] NZHC 3539; *Sheppard v R* [2013] NZCA 639; and *Tonihi v Police* [2013] NZHC 737.

¹⁰ *R v Brown*, above n 2, at [7].

¹¹ A results judgment in *R v Nuku* was issued earlier. The reasons were delivered on 13 December 2012, a few days before *Cavanagh v Police*, the reasons for which were released on 19 December 2012.

[8] The restorative justice report records the complainant as saying that she was angry and had been drinking for eight hours. It records that when she saw that the appellant had “hickies” on his neck, she was “even angrier and slapped him” and “told him that he would never see his children again”. The letter from the complainant to the Court was to similar effect. In that letter she said she was as much to blame for the events that led up to the assault, that she was extremely angry and hurt when she saw the appellant had hickies and “I knew what buttons to push to make him feel the pain I was feeling”.

[9] The Judge considered that this was not “anywhere near reaching a threshold of provocation which could in any way mitigate” an adult male punching the complainant in the face and continuing the assault.¹² We agree. Provocation in some circumstances may reduce the culpability of the offending. It will do so where there was “serious provocation which was an operative cause of the violence inflicted by the offender, and which remained an operative cause throughout the commission of the offence”.¹³ This was not that kind of situation. It was not a temporary loss of control explained by the complainant’s conduct. It was a sustained and serious assault on the complainant, disproportionate to the event said to have provoked it, such that it cannot be said to be, or to have remained, an operative cause of the assault.

Uplift

[10] The third alleged error concerned the eight month uplift. The Judge considered that this was appropriate because the appellant had two convictions for violence against the complainant and the present offending occurred when the appellant was subject to supervision for the most recent of those offences. The Judge considered that the close connection of those matters with the present offending warranted an uplift of 25 per cent on the starting point. He described this uplift as being generous to the appellant.

¹² *R v Brown*, above n 2, at [2].

¹³ *R v Taueki* [2005] 3 NZLR 372 (CA) at [32(a)].

[11] Counsel for Mr Brown submits that this uplift was disproportionate to the sentences imposed for the previous offending.¹⁴ The two offences the Judge relied on as justifying the uplift were a common assault on 19 February 2012 for which, together with an assault on a police officer, one year's supervision was imposed; and male assaults female on 26 July 2010 for which community work and supervision were imposed. Counsel says that it was wrong for the Judge to impose an uplift of eight months' imprisonment which was well in excess of the sentences imposed for this previous offending. That was also the case even if the appellant's older convictions for violence were taken into account.¹⁵

[12] Counsel for the respondent submits that the uplift was appropriate. She submits that the appellant's previous history of violent offending, particularly against the same victim, elevated the gravity of the offending and the appellant's culpability. In addition the offending occurred when Mr Brown was subject to a supervision sentence, he had a history of non-compliance with Court orders and sentences and he was assessed as at a high risk of violent re-offending and causing harm. She submits that the personal aggravating factors were serious and the uplift was not disproportionate to the sentence overall.

[13] In our view the uplift was excessive. An additional eight months' imprisonment was disproportionate to a starting point of two years and eight months.¹⁶ Effectively it put the sentence for this offending outside band two. Mr Brown had served his sentences for his past offending. That Mr Brown was continuing to offend despite those previous sentences indicated that individual deterrence was an important sentencing purpose.¹⁷ Protection of the public

¹⁴ He refers to *Julian v R* [2012] NZCA 453 at [17]. In that case, it was said that an uplift that was one and a half times the original sentence served for the similar previous offending could not be supported.

¹⁵ These were male assaults female on 20 December 2008 (14 days imprisonment); assault on a police officer on 20 December 2008 (conviction and discharge); and assault with a blunt instrument on 22 May 2006 (nine months imprisonment, but this offence was imposed in conjunction with sentences for driving while disqualified, driving with excess breath alcohol, wilful damage and wilful trespass). Mr Brown has a number of other convictions for offending which are different in kind.

¹⁶ *R v Ward* [1976] 1 NZLR 588 (CA). The Court held that "a reasonable relationship to the penalty justified by the gravity of the offence must be maintained": at 591. See also *Beckham v R* [2012] NZCA 290 at [84].

¹⁷ *Beckham v R*, above n 16, at [84].

(particularly the complainant) was also an important consideration.¹⁸ A stern sentence, that is a sentence higher than that which might otherwise have been imposed, was warranted. But to add eight months' imprisonment to what would otherwise have been the appropriate sentence (subject to mitigating factors), because of past offending which was not of that level of seriousness, was too stern.

Remorse and rehabilitation

[14] The fourth alleged error was the Judge's view that no discount should be allowed for remorse and rehabilitation. Counsel for Mr Brown says that he demonstrated his genuine remorse through a letter of apology, actively engaging in a restorative justice process, entering his guilty plea at the first opportunity after the charges were amended, observations of a prison guard who had noticed positive changes in his attitude, engaging in rehabilitation programmes while remanded in custody, a letter of support from the complainant and comments by the pre-sentence report writer that Mr Brown regretted the harm caused to the complainant and wished to apologise. It is said that it is difficult to see what else Mr Brown could have done to demonstrate his remorse and his willingness to rehabilitate.

[15] The Judge had concerns about the restorative justice conference which had taken place with the complainant. He considered that the facilitator may have been well intentioned but it was inappropriate to hold the conference without any support person for the complainant. He went on to say that the only offer to make amends to the complainant was Mr Brown's apology. He said that this had to be seen "in very limited light given that [the complainant] has previously been a victim of yours and that you were serving a sentence of supervision for violence on her at the time this offending occurred".¹⁹ The Judge considered that the only mitigating factor was Mr Brown's guilty plea and that a discount of 20 per cent was appropriate for that.

[16] Counsel for the respondent submits that the Judge's assessment of these matters was open to him. The guilty plea discount was arguably generous (because the plea was made after committal and when another charge was withdrawn), the information before the Judge indicated that Mr Brown was still blaming the

¹⁸ *The King v Casey* [1931] NZLR 594 (CA) at 597; *Beckham v R*, above n 16, at [84].

¹⁹ *R v Brown*, above n 2, at [10].

complainant and making excuses, and Mr Brown's efforts at rehabilitation came late, were limited and were not shown to have yet borne fruit.

[17] We consider that the allowance of 20 per cent for the guilty plea was not especially generous. As counsel for Mr Brown explained, an offer to plead guilty as soon as a charge of kidnapping was withdrawn was made at the outset. It was rejected by the police. The offer was made again after committal. This time it was accepted and the guilty plea on the charge of injuring with intent to injure was then entered. The kidnapping charge had difficulties because there was evidence that Mr Brown wanted the complainant to get out of the vehicle when they were at the service station but she would not. Although Mr Brown could have entered a guilty plea on the injuring with intent to injure charge immediately he had indicated from the outset that he would do so. Whilst the Judge was not wrong to make no allowance for remorse and rehabilitation, it was open to the Judge to have made a small allowance for these matters. Even if the Judge was rightly cynical about these matters, they did at least show some efforts by Mr Brown to accept responsibility for his actions.

End sentence

[18] Overall we are satisfied that the end sentence was manifestly excessive. The starting point was at the higher end of the available range. The uplift for personal aggravating factors was too great. An allowance could have been made for remorse and rehabilitation. Taking the Judge's starting point of two years and eight months, adding two months because of Mr Brown's recent relevant convictions and that the offending occurred when he was subject to a sentence of supervision, and then allowing a discount of 25 per cent for Mr Brown's guilty plea, remorse and rehabilitation efforts would mean an end sentence (rounded up) of 26 months' imprisonment.

Result

[19] The appeal is allowed. The sentence of two years and eight months' imprisonment is quashed. In its place we impose a sentence of two years and two months' imprisonment.

Solicitors:
Public Defence Service, Auckland for Appellant
Crown Law Office, Wellington for Respondent