IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA717/2024
[2025] NZCA 290

BETWEEN	CODY MORRIS STEWART Appellant
AND	THE KING Respondent

Hearing: 14 May 2025

Court: Woolford, Jagose and Powell JJ

Counsel: M J English and K R Borich for Appellant
K S Li for Respondent

Judgment: 2 July 2025 at 2 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Jagose J)

[1] Cody Stewart appeals the 22 October 2024 decision of Judge S Bonnar KC in the District Court at Auckland,[1] sentencing him to six years' imprisonment concurrently on charges of aggravated robbery (six years),[2] receiving property (one year),[3] assaulting police (one year),[4] unlawfully getting into a vehicle

1 *R v Stewart* [2024] NZDC 27733 [sentencing notes].
2 Crimes Act 1961, s 235(a). Maximum penalty: 14 years' imprisonment.
3 Sections 246 and 247(a). Maximum penalty: seven years' imprisonment.
4 Section 192(2). Maximum penalty: three years' imprisonment.

(six months)[5] and third or subsequent driving while suspended (x 2) (six months).[6] The Judge also imposed a firearms prohibition order[7] and disqualified Mr Stewart from driving for two years.[8]

Background

[2] Among a long list of past convictions, Mr Stewart previously was sentenced in July 2019 to five years' imprisonment for an October 2017 aggravated robbery committed while he was remanded on bail. At that time, having driven to the scene in a car Mr Stewart stole, he and a co-offender—both wearing balaclavas, the co-offender armed with a shotgun—robbed a bar near midnight when only two staff remained on the premises, using the shotgun's presence to obtain the workers' compliance.[9]

[3] While again on bail for the lesser present index offences and awaiting assessment for admission to the Alcohol and Other Drug Treatment Court, Mr Stewart and a co-offender, driving a vehicle Mr Stewart stole the previous day, robbed a members-only sports bar and snooker hall (to which access only was obtainable by private swipe card) in Auckland's Glen Eden on 23 October 2023.[10]

[4] At about 11.30 pm, Mr Stewart and his co-offender—both wearing balaclavas and gloves, the co-offender carrying a shotgun—pushed past the last departing patrons to enter the premises.[11] Mr Stewart jumped onto the bar behind which a staff member was working (and talking to a friend seated at the other side of the bar) and demanded money. When the worker said she could not open a time-locked safe, Mr Stewart told his co-offender "just shoot the bitch" and the co-offender fired a shot into the air causing a window to shatter, then repeatedly pointed the shotgun at the worker.[12] Mr Stewart took bank notes from a till the worker opened at his instruction and uplifted a second unopened till which the co-offender took away, obtaining at least $2,500.[13]

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5 Section 226(2). Maximum penalty: two years' imprisonment.
6 Land Transport Act 1998, s 32(1)(c) and (4). Maximum penalty: two years' imprisonment and mandatory licence disqualification.
7 Arms Act 1983, s 39A.
8 Sentencing notices, above n 1, at [45]–[46].
9 *R v Stewart* [2019] NZDC 14852 [2019 sentencing notes].
10 Sentencing notes, above n 1, at [8]–[10].
11 At [11]–[12].
12 At [13].
13 At [14]–[15].

Judgment under appeal

[5] The Judge noted the "significant" and "ongoing" psychological harm Mr Stewart caused to the victims,[14] as well as his near-100 previous convictions (including for the previous aggravated robbery).[15]

[6] Having regard for a guideline judgment of this Court, *R v Mako*,[16] the Judge assessed the aggravating factors of the robbery were "effectively forced entry" to the premises, in "planned and premeditated" theft of a substantial sum of money by both men, using "actual violence" in discharging the loaded shotgun and affecting the two victims.[17] Expressing concern for the 'disturbingly similar' repetition of Mr Stewart's earlier offending,[18] the Judge considered such engaged *Mako*'s example of "[f]orced entry to premises at night by a number of offenders seeking money, drugs or other property, violence against victims, where weapons are brandished even if no serious injuries are inflicted", requiring a starting point of seven years or more,[19] but took the lower six years and six months' starting point as contended for by the Crown,[20] which he uplifted by 12 months on account of the other offending.[21]

[7] The Judge then applied discounts of 15 per cent on account of each Mr Stewart's guilty pleas and other personal mitigating factors (being Mr Stewart's addictions, background, rehabilitation efforts, remorse and ill-health), while giving priority to community protection, and allowed a three-month credit for Mr Stewart's five months on electronically monitored bail, bringing the Judge to five years' imprisonment.[22] Finally, the Judge uplifted Mr Stewart's sentence by one year on account of his previous convictions, resulting in the six-year end sentence.[23] Notwithstanding Mr Stewart's history of aggravated robbery, but influenced by his

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14 At [17]–[18].
15 At [20]–[21].
16 *R v Mako* [2000] 2 NZLR 170 (CA).
17 Sentencing notes, above n 1, at [27]–[29].
18 At [22]–[23].
19 *R v Mako*, above n 16, at [58].
20 Sentencing notes, above n 1, at [32].
21 At [33].
22 At [34]–[43].
23 At [44]–[47].

"ongoing health issues", the Judge declined to impose any minimum period of imprisonment.[24]

Submissions on appeal

[8] For Mr Stewart, Mr English and Ms Borich contend the Judge's starting point was "too high" on the lead charge of aggravated robbery and his Honour gave "inadequate discount[s]" on each of the mitigating factors. They submit the Judge's balance—in favour of community protection, while limiting discounts based on Mr Stewart's criminal history—effectively was "double counting".

[9] Mr English argues contemporary cashless society requires revisiting *Mako*'s logic in distinguishing prospectively high and low value premises for aggravated robbery. For the subject premises, presumed to carry little cash, he prefers comparison with *Mako*'s four-year starting point for:[25]

> … robbery of a small retail shop by demanding money from the till under threat of the use of a weapon such as a knife after ensuring no customers are present, with or without assistance from a lookout or an accomplice waiting to facilitate getaway.

He acknowledges the aggravation here would engage a higher starting point of six years, as "marginally more serious" than the five and a half year starting point this Court allowed in *Koroheke v R*.[26]

[10] Otherwise, Mr English argues Mr Stewart's delayed guilty plea was justified by awaiting a pre-trial decision on his challenge to admissibility of automatic number plate recognition evidence,[27] to warrant a 20 per cent discount. Although made only the week before trial, the plea nonetheless came just days after the District Court's results decision dismissing the challenge. Another's guilty plea after unsuccessful pursuit of the same point did not disqualify that offender from discount

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24 At [48]–[49].
25 *R v Mako*, above n 16, at [56].
26 Citing *Koroheke v R* [2012] NZCA 368.
27 *R v Kake* [2024] NZDC 19381 (results) and *R v Kake* [2024] NZDC 24739 (reasons).

for a guilty plea comparably close to trial (albeit some two months after the admissibility challenge was dismissed).[28]

[11] Ms Borich argues a global assessment of Mr Stewart's materially contributive background should have attracted at least a 30 per cent discount. She points to standalone discounts of 10 per cent for Mr Stewart's dysfunctional background, 15 to 20 per cent for his addiction and rehabilitative steps, five to 10 per cent on account of his ill-health and five per cent for his remorse, compared to the average three per cent discounts for each comprising the Judge's 15 per cent.

[12] For the Crown, Ms Li responds the Judge's starting point was within a range referrable to *Mako*'s categories of a six to eight-year starting point in relation to robbery of commercial premises:[29]

> … where members of the public can be expected to be present, targeting substantial sums in tills or a safe by a group, with a lethal weapon, disguises and other indications of preparation, should attract for adult perpetrators after a defended trial a starting point of 6 or perhaps more years. Where firearms are loaded or the danger of harm is increased in other ways, or if actual violence is used, the starting point would be 8 years or more.

This Court in *Pomana*, in line with *Mako*, accepted a starting point of six years, noting a starting point of eight years would be available where the weapon was loaded.[30] Ms Li points out the co-offender's discharge of the shotgun and subsequent repeated presentation of it at the barworker, in combination with Mr Stewart's instruction, is significantly aggravating above even *Pomana*'s accepted six-year starting point.

[13] Ms Li observes *Mains v R* only allowed a 10 per cent discount and there in relation to an appellant who had long indicated his conditional preparedness to resolve issues. Comparatively, Mr Stewart had not previously indicated a guilty plea was achievable. Relying on this Court's decision in *Carr v R*,[31] she submits the recognition of background as context for the offending should not overcome sentencing purposes

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28 Citing *Mains v R* [2016] NZCA 290 at [25]–[29], referring to *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [61].

29 *R v Mako*, above n 16, at [54].

30 *Pomana v R* [2024] NZCA 511 at [32]–[33].

31 *Carr v R* [2020] NZCA 357 at [27].

of accountability and denunciation. The Judge's more limited discounts were as much as was required given Mr Stewart's history.

Approach on appeal

[14] We must allow Mr Stewart's appeal only if satisfied both there is error in the sentence, and a different sentence should be imposed.[32] In any other case, we must dismiss the appeal.[33] The measure of error is the sentence be "manifestly excessive", a principle "well-engrained" in the approach to sentencing appeals.[34] This Court will not intervene where the sentence is within a range properly justified by accepted sentencing principle. Whether the sentence is "manifestly excessive" is to be assessed in terms of the sentence given; the process by which it is reached rarely will be decisive.[35]

Discussion

—starting point

[15] This Court's *Mako* guideline judgment for application in sentencing for aggravated robbery offending predominantly is informed by the "widely variable" circumstances in which the offending occurs, requiring assessment of the instant combination of features to establish a starting point.[36]

[16] The particular factual scenarios identified in *Mako* merely reflect some common combinations of aggravating factors for comparison. They were noted also by the Judge sentencing Mr Stewart for the 2017 aggravated robbery, saying his then six-year starting point would have been: "More if the firearms are loaded. More if there is any actual violence."[37]

[17] Aggravated robbery without serious injury of vulnerable taxi drivers justifies a starting point of four to five years.[38] In "bad cases" of aggravated robbery of a

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32 Criminal Procedure Act 2011, s 250(2).
33 Section 250(3).
34 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [33] and [35].
35 *Ripia v R* [2011] NZCA 101 at [15].
36 *R v Mako*, above n 16, at [34].
37 2019 sentencing notes, above n 9, at [8].
38 *R v Mako*, above n 16, at [57].

shopkeeper on their own in retail premises "six years … should be the starting point".[39] "Forced entry to premises at night" bearing weapons requires "a starting point of seven years or more".[40] Critically, "actual violence … takes the conduct into another dimension and must attract a considerably higher rating in overall seriousness".[41] Use of "actual violence" in "robbery of commercial premises where members of the public can be expected to be present" justifies a starting point of "eight years or more".[42] Night-time offending also increases victims' vulnerability.[43]

[18] But all is flexible guidance for adjustment according to the seriousness of the particular offending being assessed for sentencing,[44] which criminality "must be assessed by the particular combination of features of which it is composed … unconstrained by over-emphasis on one feature such as the nature of the target premises".[45]

[19] Material considerations here are the moderate planning and premeditation reflected in obtaining late-night (but not after hours) armed access to secured licenced premises—including effectively by excluding patrons, to threaten the remaining vulnerable victims—where Mr Stewart attended in disguise with an associate who acted to enforce his instructions to "just kill the bitch" by graphic demonstration of their violent capability. In then taking the money and till, this is very serious aggravated robbery conduct.

[20] Those features bear comparison with inferred and actual higher starting points this Court approved as indicated starting points in *Mako*.[46] Even the Judge's original seven-year starting point might be thought generous (particularly in light of Mr Stewart's 2019 sentence's six-year starting point, absent either loaded firearms or actual violence). If his Honour's reduction to his actual starting point here was on

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39 At [56].
40 At [58].
41 At [43].
42 At [54].
43 At [57] and [58].
44 At [60].
45 At [52].
46 At [61], and the Schedule, in particular *R v Stevens* CA12/98, 23 February 1998 (seven-year sentence); and *R v Griffiths* CA 458/92, 31 March 1993 (seven-year sentence, eight-year starting point).

account of the Crown's reliance on *Mako*-derivative judgments, it illustrates the desirability guidance principally be drawn from guideline judgments, rather than from others even if applying them.[47]

[21] We note the consistency with which this Court has identified the conservatism of starting points adopted at first instance.[48] In our assessment, given the factors we have identified at [19] above—of actual violence using loaded firearms, in disguised night-time robbery of commercial premises, at which at least one member of the public remained present—an eight-year starting point would have been entirely within range, with headroom still before it justifiably could have been described as "stern". There is no challenge to the Judge's one-year uplifts for each Mr Stewart's other index and past offending. So an adjusted ten-year starting point was within range.

[22] For completeness, we do not accept Mr Stewart's relatively modest haul is particularly informative: he sought access to the bar's safe, and then took what was available to him. Had more been accessible, doubtless it too would have gone. Mr Stewart's ambition and expectation may have been of a substantially larger recovery. His actual recovery affords no justification for a reduced starting point. Neither does the prospect such premises now may carry less cash than previously. Such is true across retail and commercial premises, inferentially at least partially in response to security risks. It would be perverse if measures taken in part to deter robbery may be relied upon for such reduction when robbery nonetheless occurred.

—discounts for mitigating factors

[23] We endorse the Judge's recognition sentencing has multiple purposes.[49] Mitigating or aggravating factors cannot be allowed either to undermine or overwhelm any of those purposes' combined achievement. We accept Mr Stewart's unpromising background and especially his addiction were significantly motivating of his offending here, to obtain money to purchase more methamphetamine. But, notwithstanding both his reduced agency and subsequent remorse and rehabilitative steps, we cannot overlook that was offending with a very heightened risk to community safety and

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47 At [60].
48 For example, in *Koroheke v R*, above n 26, at [12]; *Pomana v R*, above n 30, at [29].
49 Sentencing Act 2002, s 7(1).

actual harm to the victims for which his and others' deterrence also is a significant factor. There is no evidence of any custodial hardship Mr Stewart may suffer by reason of his acknowledged ill-health.[50]

[24] Here, we consider the Judge's allowance of a 15 per cent guilty plea discount (by comparison with *Mains v R*, in which this Court increased the discount to 10 per cent, taking into account Mr Mains' early indication to plead guilty to amended charges, but also the benefit he obtained from that amendment and the lateness of his eventual plea),[51] and his global 15 per cent discount for other personal mitigating factors, together are adequate allowance for those factors falling in Mr Stewart's favour. Even if larger discount was justified, the Judge's acceptance of the Crown's lower proposed starting point was effectively to offer an additional 7.5 per cent discount on his preferred seven-year starting point; more, if the Judge had leaned further toward the available eight-year starting point. Globally assessed, subsuming the Judge's three-month EM bail credit, the Judge's effective discounts accordingly were something in the realm of 40 per cent.

—conclusion

[25] In our assessment, global discounts in the realm of 40 per cent are toward the upper end of what should be achievable in circumstances of Mr Stewart's offending. Given the seriousness of his offending's determined repetition, and the clear warning he was given on its original commission, any larger discount for the relatively unexceptional mitigating factors claimed for him risks diminishing sentencing's purposes unrelated to his personal circumstances. A global 40 per cent discount from an adjusted ten-year starting point results in a six-year end sentence. That is the Judge's end sentence.

[26] Mr Stewart's end sentence is not excessive, let alone 'manifestly' so. The Judge did not err.

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50 For the precarity of his health then (while "well-managed" and "stable"), Mr Stewart received a 10-month/12.5 per cent discount on the earlier Judge's adjusted six years and six months' starting point for his 2017 offending: 2019 sentencing notes, above n 9, at [11]. But it is not a tariff.

51 *Mains v R*, above n 28, at [26] and [28].

Result

[27] The appeal is dismissed.

Solicitors:
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Crown Solicitor, Auckland for Respondent