

[2] The offending took place over a period of 16 months, from September 2022 to January 2024. At the time Mr Cashell was aged between 18 years, eight months and 20 years old.

[3] On 2 July 2024, Judge K J Glubb sentenced Mr Cashell to nine years, two months' imprisonment for the offending.¹

[4] Mr Cashell appeals against sentence. Mr Yi submits that the Judge erred by giving insufficient discount for Mr Cashell's youth, background, cultural and psychological factors, or, alternatively, erred by imposing what is effectively a crushing sentence.

Background

[5] We take the summary of the offending from the Judge's comprehensive sentencing notes:

[2] The facts are that on 9 September 2022 a Subaru car was unlawfully taken over night. At about 1.20 am on 10 September you and four associates were driving on Royal Avenue in Mount Albert. You were being followed by a second vehicle, a Ford motor vehicle. You were driving the Subaru that had been unlawfully taken. Within that group while some kept look out, you smashed the left rear quarter light and gained access to a Toyota motor vehicle. The ignition was pulled from the barrel from the motor vehicle to steal it. Police arrived mid-incident and as a result you and your associates got back into your cars and fled.

[3] Still driving the Subaru, you left on Levida Road, together with the Ford, you turned left and then onto Richardson Road when a marked police unit came in behind you. Whilst your associate within the Ford maintained the normal speed, you immediately accelerated away at speed through the red light on Hendon Avenue. You went right into Stoddard Road and through the intersection of Maioro Street and then right into John Davis Road at excessive speed and through a red light.

[4] You stopped on John Davis Road and attempted to flee on foot, however, you were located by police and subsequently arrested. The Toyota car belonged to the victim and he did not give permission to anyone to enter that, nor did the owner of the Subaru.

[5] The Westfield Shopping Centre at St Lukes is a large mall and it consists of a large number of independent businesses that operate within that centre. One of those is Stewart Dawsons. Stewart Dawsons was equipped with a closed-circuit television system which records the events. At about

¹ *R v Cashell* [2024] NZDC 15522.

5.20 pm on 20 September 2022 Stewart Dawsons had been operating as normal and staff were just starting to close up due to the hour. They were cashing up the days taking and clearing the store. You and another named young person and other unknown individuals all associated were offenders in this matter, and using items brought into the mall for your purpose, you commenced smashing the glass display cabinets and removing jewellery.

[6] Your actions were observed by members of the public who were still shopping in the mall, some of whom moved towards you to confront you. One of the offenders responded to the threat by moving menacingly towards the witnesses. Having collected items of jewellery from the store, the offenders then left and ran back through the mall heading towards the motor vehicle in which they had arrived. Members of the public gave chase confronting the group as they attempted to enter the motor vehicles, including the driver of a forklift, who briefly managed to block the car from moving.

[7] During the ensuing melee three of the offenders were left at the scene and were forced to flee on foot, while the remaining offenders departed in the motor vehicle. The vehicle was observed to be a white Toyota car which was later determined to have been unlawfully taken. That car was discovered abandoned on Taylors Road, Mount Albert.

[8] You and the named young person and the other unknown individuals stole 322 items from the store to a value of \$374,305. None of that has been recovered.

[9] Between 10 pm on 21 September and 4.37 am on 22 September, a Toyota car was stolen from an address in Henderson. At about 4.37 am that day that vehicle arrived at the North West Shopping Centre situated on Fred Taylor Drive, Massey. Five individuals, which included you and a young person named, got out of the vehicle. The group smashed through the two glass entry doors and the security gate closest to the Michael Hill Jewellers. Once entry was gained in the shopping mall, they group split into two groups. Three individuals, including you, gained entry to the Michael Hill Jewellers store by pushing through the security grill and began to pry open the safes in the main area of the store.

[10] Two other individuals gained access to the Sunglass Hut where a number of pairs of sunglasses were taken from the drawer before they came to Michael Hill Jewellers to help you. The group then smashed their way through cabinetry where various jewellery items and merchandise were taken before leaving the store. The group then ran through the shopping centre towards the stolen vehicle, dropping jewellery along the way. They got back into the car and fled. Fingerprints located on the grill identified you, as it did the named young person.

[11] We do not have a value of the property taken at that time, so it is simply not available.

[12] Sometime between 6.30 am and 11.30 am on 25 September 2022, a Toyota Wish motor vehicle was taken from the roadside on Horne Street, Melville, Hamilton. The owner did not give any permission for that to be used or taken.

[13] At about 11.30 am that same day that Toyota Wish motor vehicle arrived at the northern entrance to The Base Shopping Centre in Hamilton. You got out of that vehicle with a named young person and seven other co-offenders who were all heavily disguised with face coverings. You all ran through the shopping centre brandishing various items, including hammers, crowbars, and tomahawks.

[14] The group ran into Michael Hill Jewellers situated in the Te Awa Mall. The store in question was adjacent to the food court. Being close to lunchtime on a Sunday the area was heavily populated at the time with many families and young children present.

[15] Staff and other customers inside Michael Hill Jewellers ran from the store in fear of you and your co-defendants wearing face coverings and bearing hammers and the like, and which were being used to smash the glass display cabinets. Members of the group were shouting to go away. One of the shop assistants was instructed to “move bitch, this is a ram raid.” No resistance was given by staff or security. The group then continued to smash the cabinets before taking various rings, necklaces, earrings that were stored within.

[16] Other shoppers from within the mall began to film the incident as it unfolded causing one of the members of the offending group to smash or knock the phone out of the member of the public’s hands. Some shoppers uplifted chairs from the food court in an attempt to distract or stall the group. However, these efforts were unsuccessful. Some shoppers were punched and pushed to the ground by other members of the group and you were seen to run towards members of the public as if to strike them with your elbow raised before side-stepping away as the group fled.

[17] That conduct was depicted in relevant excerpts of available footage which was to have been made available for sentencing purposes, regrettably it is not available, it simply has not arrived, and I have not seen it. I can well appreciate the incident.

[18] The incident lasted for about 40 seconds, following which the group ran back through the mall to the Toyota Wish. As they fled members of the public tried to stop them, but they were assaulted and pushed out of the way. One member of the public who tried to intervene suffered substantial bruising to his right shoulder.

[19] The group got into the Toyota Wish and fled from The Base Shopping Centre at speed. You were subsequently identified as being involved from DNA and a fingerprint lift at the entrance and on your arrest on 26 September several items of jewellery and watches were seized, some of which still had price tags attached.

[20] One of your associates was also identified as involved and those proceedings have gone to the Youth Court.

[21] Reparations are sought, and the sum of \$500,000 was the value of the property that was taken on that occasion.

[22] You were remanded in custody and whilst you were remanded in custody you and the victim in this further matter were both prisoners at the Mount Eden Correctional Facility. He was serving a term of imprisonment for

an unrelated matter. At about 9.30 am on 1 December, the victim and you were in the yard at the Mount Eden Prison. The victim was partaking in a one on one fight. The fight appeared to be pre-arranged and you were initially spectating. The fight between the two parties concluded.

[23] The victim was then engaged in another fight where he was knocked to the ground and stabbed multiple times. He was curled up on the ground trying to protect himself. You then approached the victim and you punched him multiple times to the body and the face. The victim was able to run away and the fracas concluded. During the multiple assaults you subjected him to, it is unclear to what extent that caused the harm to the victim. Nonetheless, he suffered multiple puncture wounds along with scratches, cuts, and bruises from the series of assaults that he was subjected to and he required hospital admittance.

[24] On 18 October 2023, you and your co-defendant, Mr Puia, were imprisoned at the Mount Eden Correctional Facility. The victim in this matter, Mr Thomsen, was also imprisoned at that facility. At about 10.18 am he was sitting at a table playing a game of cards with two associates in the day room at the unit.

[25] At about 10.19 am Mr Puia sat down at the table next to the victim and looked on as the group played cards. He then nodded his head towards you, and you approached the table where the victim was sitting. Simultaneously you and Mr Puia began assaulting the victim from behind. You used your left hand to hold the victim's head and repeatedly stab the victim to the right side of his neck with a shiv-like object.

[26] At the same time Mr Puia repeatedly punched the victim to the left side of his head with his right fist. The victim fell off his stool and slumped on the ground. You and Mr Puia continued to assault him. He then turned on his stomach to protect his head from attack. You then switched the shiv object from your left hand into your right, you held back his head, and stabbed him multiple times to the left side of his neck.

[27] Whilst the victim was lying on the ground, you and Mr Puia kicked him multiple times to the face, causing the victim to slump onto his back. You then threw the shiv-like object to the ground and the pair of you walked off together holding your hands in the air in a celebratory fashion before shaking hands and embracing in a hug.

[28] As a result, the victim suffered multiple puncture wounds to the right side of his neck, shoulder and bruising to his face.

[29] Your two co-accused are sentenced prisoners at the Auckland Prison, Paremoremo, and you were a remand prisoner at the Auckland Prison. The victim in this matter, Mr Telifone, was a sentenced prisoner at that prison too.

[30] At about 11.36 am on 1 January 2024, the four of you were in the day room of unit 13. Mr Telifone and your co-defendant, Mr Puia, were playing a game of chess at a table in the day room. You and Mr Lotoahea were standing in different areas of the day room behind Mr Telifone.

[31] You produced a sharpened shank from the waistband of your shorts. You then nodded to Mr Lotoahea. The pair of you then advanced towards Mr

Telifone from behind. You assaulted Mr Telifone by punching him to the back of his head as he attempted to shield his head. Mr Puia, who had been sitting there as well, then joined in the assault by punching Mr Telifone multiple times with a closed fist.

[32] Mr Telifone managed to push you away and he ran to the corner of the day room. The three of you then trapped him in the corner and continued swinging punches at him. Mr Telifone again pushed the three of you away and ran to the opposite side of the room where the three of you continued to pursue and assault Mr Telifone.

[33] You used the shank to stab Mr Telifone in the upper torso area close to his neck. The three of you again cornered Mr Telifone and prevented him from running away. Mr Telifone pushed Mr Lotoahea over as he attempted to flee. You then stabbed Mr Telifone multiple times in the back.

[34] After Mr Telifone and the three of you were removed from the day room, Corrections officers found a sharpened plastic tip wrapped in cloth. As a result of this offending, Mr Telifone sustained a large cut around his armpit area, seven puncture wounds to his back and upper torso area, multiple wounds to his head close to the ear and left neck area, and various scratches to his face and body.

[6] The Judge then referred to the impact on some of the victims, as evidenced by the victim impact statements:

[47] There is the impact on the victims and that is significant. I have victim impact statements, specifically in relation to the mall at St Lukes. The first victim impact statement is from one of the shop attendants. She said she was 70 years of age and that she was working because she needed the money. It was only her second week on the job. She says that:

It was a miracle that my colleagues weren't injured. ...: I didn't want to return to work, I was scared that this would continue to happen. I was given a few days off and handed in my resignation upon [my] return. ... [She] wants those responsible to be held accountable for their actions.

[48] She comments that you may be targeting these companies at these malls:

But it is us workers who are at the shops that are affected the most. I may not personally own the items that they stole, however, the fact that I witnessed the incident has changed my life forever.

[49] A second shop attendant at that mall says that she has never seen anything like this before it was a terrifying situation for her in essence. She said:

You do not care about the trauma you put the people through, the staff members coming to work, they are the ones they are scared to walk into the stores and they do not want to get out of bed as

they do not know whether it will happen again and they do not know how to deal with the trauma.

[50] Turning to the aggravated robbery at The Base, one of the employees there was a pregnant lady working at the time and could have been very seriously hurt. She asked the question, did they have any thoughts about this prior to ram-raiding the store? She says:

Personally I was in shock as I could not believe what I was seeing. These kids doing something like this, they would ruin their futures for something shiny. ... This is disgusting behaviour, it not only deserves punishment, but I also hope that these kids get the care and support they need.

[51] Another of the shop staff says:

Thankfully I wasn't hurt nor were my colleagues. She now has anxiety coming into work, I feel that I have changed in the sense where when I see a group of kids, I automatically look to see what they are wearing to ensure they are not on attack.

[52] And a third victim of this offending said:

I managed to go back to work after the incident, however, it has left me with trauma by being alert for all of Christmas. Thankfully none of us were hurt.

District Court sentence

[7] The Judge took the wounding with intent to cause grievous bodily harm as the lead offence and adopted a starting point of eight years. He uplifted that to take account of the other charges of violence which he considered would have attracted 40 months on their own but applied a 50 per cent totality discount to increase the starting point for all the violent offending to 116 months (nine years, eight months). For the aggravated robberies the Judge took The Base aggravated robbery as the lead offence, which he considered supported a starting point of six years. He then uplifted that to eight years to take account of the robbery at St Lukes. Having regard to the other dishonesty offending, the Judge arrived at the figure of nine years for the two aggravated robberies and vehicle-related offending. The Judge then adjusted it for totality by allowing a reduction of 50 per cent which brought it down to four and a half years. The Judge then noted that that would lead to an adjusted starting point for all offending of 170 months or a little over 14 years.²

² At [81]–[86].

[8] The Judge allowed 15 per cent for the guilty pleas. He then considered the psychological report and the reports under s 27 of the Sentencing Act 2002. The Judge allowed a reduction of 10 per cent for youth and 15 per cent for the factors disclosed in the psychological and cultural reports. Applying that discount of 40 per cent to the 170 months led to an adjusted sentence of 102 months or eight years, six months. Finally, the Judge then applied an uplift to take account that some of the offending occurred on bail or while on remand. Taking account of that, and Mr Cashell's previous history, the Judge uplifted the adjusted sentence by eight months to arrive at the ultimate end sentence of nine years, two months.³

[9] Judge Glubb declined the Crown's request to impose a minimum period of imprisonment. In declining that application he took account of Mr Cashell's youth.⁴ At the time of sentence, Mr Cashell was still only 20 years old.

Procedure on a sentence appeal

[10] Section 250(2) of the Criminal Procedure Act 2011 (the CPA) provides that on a sentence appeal under s 244 such as this, the Court must allow the appeal if satisfied that there is an error in the sentence imposed and a different sentence should be imposed. Otherwise, the Court must dismiss the appeal.⁵

[11] In *Tutakangahau v R* this Court confirmed that s 250 was not intended to change the approach formerly taken to sentence appeals.⁶ The focus remains on whether the end sentence imposed is within range rather than the process by which the sentence was reached.⁷ Further, while no express reference was made in the CPA to the concepts of a manifestly excessive or inadequate sentence, this Court accepted they were longstanding, were consistent with the statutory language and should continue to be utilised when considering s 250(2).⁸

³ At [87]–[90].

⁴ At [91]–[93].

⁵ Criminal Procedure Act 2011, s 250.

⁶ *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [28].

⁷ At [36].

⁸ At [33].

Submissions on appeal

[12] Mr Yi accepted the starting points for the offending were within range. He submitted succinctly that, while the discount of 10 per cent for youth and 15 per cent for Mr Cashell's troubled upbringing, psychological and cultural factors could be said to be within range taken discretely, as they were at the lower end of the available discount their combined total of 25 per cent was insufficient overall. Mr Yi noted that the reports disclosed Mr Cashell had no pro-social connections, had not experienced a settled lifestyle and had not had a chance to mature. The reports disclosed the death of a primary caregiver, separation from his mother, frequent changes in foster placement, and early exposure to violence and substance use. When those factors were combined with Mr Cashell's ADHD, conduct disorder, neuro-development difficulties, emerging complex personality structure and unhealthy coping strategies, they warranted a more substantial discount. Mr Yi argued for a discount of 30 to 35 per cent for youth, cultural and psychological background which would have led to an end sentence closer to eight years rather than the nine years, two months imposed.

[13] Alternatively, Mr Yi submitted that an end sentence of nine years, two months on a 20 year old was, in the circumstances, a crushing sentence.

[14] For those reasons he argued for an end sentence of eight years.

Analysis

[15] As noted, this Court has confirmed that the ultimate issue on a sentence appeal is whether the end sentence is within range rather than the process by which the sentence was reached. In this case the issue is whether the end sentence of nine years, two months (without a minimum non-parole period) can be said to be manifestly excessive having regard to the totality of the offending and Mr Cashell's personal circumstances.

[16] Given the number of offences Mr Cashell committed over a sustained period of time and the serious nature of those offences (which involved both violence and serious property offending), the purposes of deterrence, denunciation and particularly, protection of the public, were material considerations in the sentencing exercise in this

case. The serious aggravated robberies occurred while on bail and the serious violent offending occurred while he was in custody.

[17] In the circumstances, we are not persuaded that the end sentence of nine years, two months was manifestly excessive, even having full regard to Mr Cashell's very unfortunate background and personal circumstances.

[18] That is particularly so given the Judge's adjustment to the various starting points to take account of totality. Mr Cashell has had the benefit of a substantial credit of six years, two months for totality adjustments. Further, as Mr Steele observed, it would have been open to the Judge to have taken a higher starting point for the offending, even allowing for totality.

[19] As to the alternative submission the sentence was a "crushing" one, and to the extent that can be said to be a relevant consideration, we are satisfied the Judge also addressed it by taking into account Mr Cashell's youth and the effect of the sentence on him by declining to impose a minimum term of non-parole as sought by the Crown. The difference between Mr Cashell's eligibility for parole under the sentence imposed and the sentence Mr Yi argued for is only just over four months. It is not material.

Result

[20] The appeal against sentence is dismissed.

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