IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA35/2023
[2023] NZCA 327

BETWEEN	MAHUTA TE AO Appellant
AND	THE KING Respondent

CA42/2023

BETWEEN	DESMOND PARATA Appellant
AND	THE KING Respondent

Hearing:	13 June 2023
Court:	Wylie, Thomas and Brewer JJ
Counsel:	A J D Bamford for Appellant in CA35/2023 E J Riddell for Appellant in CA42/2023 J M Webber for Respondent
Judgment:	27 July 2023 at 10 am

JUDGMENT OF THE COURT

A Mr Te Ao's appeal against sentence is dismissed.

B Mr Parata's appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Mr Te Ao and Mr Parata each pleaded guilty to two charges of aggravated robbery.[1] On 16 December 2022, McQueen J sentenced Mr Te Ao to two years and four months' imprisonment and Mr Parata to two years and two months' imprisonment.[2] They now appeal their sentences. They contend they are manifestly excessive.

[2] A first appeal court must allow an appeal against sentence if it is satisfied that there is an error in the sentence and a different sentence should be imposed.[3] A manifestly excessive sentence is an error which will result in the appeal court imposing a different sentence.

Background

[3] Mr Te Ao and Mr Parata were sentenced with a third offender, Mr Thompson. We reproduce McQueen J's summary of their offending:

> [4] All three of you were known to the flatmates of the victim. On an earlier visit to one of those flatmates at the property, about a month before the offending, Mr Thompson and Mr Te Ao, you acted to intimidate the victim at the property. By coincidence, the police attended the property to speak with the victim's flatmate. However, Mr Te Ao, you believed the victim had called the police on you.
>
> [5] On 25 July 2020, Mr Te Ao and Mr Parata, you went to the flat with the purpose of visiting another of the victim's flatmates known to you. You sat in the lounge with the victim, and both smoked some methamphetamine with his flatmate. During this time, Mr Te Ao, you became agitated. You started to insult and berate the victim, particularly for "calling the police" on you during your last visit. You told the victim he now owed you $100 as compensation. During this time, Mr Parata, you took out a black BB gun (being an imitation firearm) from an inside jacket pocket and gestured towards the victim in a shooting motion, saying "pow pow". Mr Te Ao, you continued to threaten the victim that he would be shot or you would cut his throat if he went to the police again. You said you would take his cellphone as collateral,

---

1 Crimes Act 1961, s 235(b) — maximum penalty 14 years' imprisonment.
2 *R v Parata* [2022] NZHC 3503.
3 Criminal Procedure Act 2011, s 250.

> returning it only once the $100 was paid. The victim believed he would be seriously harmed or killed if he did not comply, and he did so.
>
> [6] The second aggravated robbery occurred four days later on 29 July 2020 and involved all three of you. You entered the victim's flat in the afternoon, and his bedroom, where he was sleeping. You asked the victim if he had your money. He said he only had $40 in his account. You instructed him to come with you in your vehicle to an ATM to withdraw the money. The victim, fearing for his safety, complied. He got into the car with you all. Mr Thompson, you were driving, despite being disqualified. Once at the ATM, the victim removed the money from the ATM and gave it to Mr Te Ao. You then drove him back to his flat.

The sentencing

[4] Justice McQueen applied the guideline judgment of this Court, *R v Mako*.[4] The Judge considered the second incident to be the more serious and adopted a starting point of three years and six months' imprisonment, which she increased by one year to account for the first incident.[5] The overall starting point for both appellants was, therefore, four years and six months' imprisonment.

[5] The Judge then adjusted the starting point for each appellant having regard to their individual circumstances:[6]

(a) *Mr Te Ao:*

(i) an uplift of two months' imprisonment because he was on bail at the time of the offending;

(ii) a 15 per cent (eight month) discount for youth;

(iii) a 20 per cent (11 month) discount for his personal circumstances;

(iv) a 15 per cent (eight month) discount for the pleas of guilty; and

(v) a reduction of one month for time spent on bail.

---

4 *R v Mako* [2000] 2 NZLR 170 (CA).
5 *R v Parata*, above n 2, at [18].
6 At [23]–[50].

This resulted in the end sentence of two years and four months' imprisonment.

(b) Mr Parata:

(i) an uplift of three months' imprisonment because of previous convictions;

(ii) a 10 per cent (five months) discount for youth;

(iii) a 25 per cent (14 months) discount for personal circumstances;

(iv) a 15 per cent (eight months) discount for the pleas of guilty; and

(v) a reduction of four months for time spent on EM bail.

This resulted in the end sentence of two years and two months' imprisonment.

The appeals

Mr Te Ao

[6] Mr Te Ao submits that his sentence is manifestly excessive because the one month reduction for the time he spent on bail was insufficient to compensate him for the restrictions he was under. He submits that he should have been given a credit of at least five months.

[7] Mr Te Ao was 18 years old at the time of the offending. He spent around 12 months on bail subject to a 24-hour curfew. Subsequently, the curfew was reduced to 7 pm to 7 am daily. He was not compliant with his bail thereafter.

[8] Mr Bamford, for Mr Te Ao, recognises that because Mr Te Ao was not on electronically monitored (EM) bail he does not have a statutory right for his period on bail to be taken into account on sentencing.[7] However, as this Court said in

[7] Section 9(2)(h) of the Sentencing Act 2002 provides that on sentencing the court must take into account as a mitigating factor to the extent applicable that the offender spent time on bail with an EM condition. Section 9(3A) prescribes factors the court must consider.

Kreegher v R,[8] discounts may be given for time spent on bail simpliciter. Mr Bamford points out that in *Kreegher* the Court held a six month discount was appropriate where the defendant had spent three years subject to a 7 pm to 7 am curfew without breach.

[9] Mr Bamford submits there is little practical difference between EM bail and bail simpliciter with a 24-hour curfew from the perspective of the defendant. Indeed, the latter is arguably more restrictive given the random bail checks carried out by the police.

[10] Mr Te Ao's failure to comply with his bail once his curfew was reduced should not be held against him, Mr Bamford submits. Mr Te Ao's bail address had changed to his parents' address which was not as supportive an address as his previous ones.

Mr Parata

[11] Mr Parata submits that his sentence is manifestly excessive because the four months reduction for time he spent on EM bail was insufficient to compensate him for the restrictions he was under. He submits he should have been given a credit of at least 50 per cent of the almost 13 months he spent on EM bail; say, six-and-a-half months.

[12] Ms Riddell, for Mr Parata, accepts that he was not confined to the EM bail address on a 24-hour basis. McQueen J put it this way:

> [35] You spent 13 months on EM bail. During that time, you were largely compliant (with one uncertified breach for your battery of your tracker going flat). You were permitted absences for work, exercise, a work function and a holiday over the Christmas period. In the circumstances, I consider a four month reduction from the time spent on EM bail (30 per cent of the time spent) is appropriate in the circumstances.

[13] Ms Riddell submits the Judge should have been more generous. Mr Parata was admitted to EM bail on 27 August 2020. Thereafter:

(a) He was permitted to vote on 17 October 2020 in the General Election.

---

8 *Kreegher v R* [2021] NZCA 22 at [49].

(b) From 4 November 2020 he was permitted to go to the gym on Mondays and Thursdays between 5:30 pm and 7 pm. As from 1 December 2020 he also had an exemption to go to the Nayland Pool on Saturdays between 12 pm and 3 pm if he was accompanied by his partner or a member of her whānau.

(c) He was permitted to go camping at Pelorus Bridge with his partner's whānau at the end of 2020 between 29 December 2020 and 3 January 2021. He complied with all conditions asked of him on that trip.

(d) In late January 2021, he had an exemption allowing him to go to Nayland Pool on Fridays between 12 pm and 3 pm was added. Again, he had to be accompanied by his partner or a member of her whānau.

(e) He was allowed to go clothes shopping for 2.5 hours on 7 March 2021.

(f) On 13 May 2021 his exercise absences were changed to remove the swimming absences given it was Winter. He was then permitted to go to the gym for 1.5 hours each Monday, Wednesday, Thursday and Sunday.

(g) Mr Parata gained work at Talley's Motueka for the Tuna season in February 2021.[9]

(h) He was permitted to attend one work function (under the supervision of his manager) at Talley's for the end of season celebration on 22 May 2021 between 4 pm and 9 pm. His employment at Talley's ended in around June 2021.

(i) He was allowed to go clothes shopping on 19 June 2021 for 2 hours.

---

[9] He had a condition allowing him to work with the approval of the EM bail team, so counsel was not directly involved with varying bail to enable him to work — this date is approximate based on what he and his partner can recall.

(j) He obtained work at Asphalt & General in around early August 2021. This involved attending different work sites, mostly local.

[14] Mr Parata's EM bail ended on 20 September 2021 because his trial was delayed due to COVID-19 related issues.

[15] Ms Riddell submits that although Mr Parata was allowed to work for about half the time he spent on EM bail, this should not be held against him. It is to his credit that he continued to comply with the terms of his bail, even when absent from the bail address.

Discussion

[16] Both appeals miss the point of an appeal against sentence. It is the end sentence which must be shown to be manifestly excessive. It is the end sentence which will be the Court's focus. Where one component of a sentence is criticised, the Court's inquiry, if the criticism is found justified, will be whether the end sentence is nevertheless within the range available to the sentencing Judge.[10]

[17] We use the term "range" advisedly. Determining a sentence is not a mathematical exercise. It is a judicial evaluation. Different judges could quite properly weigh factors relevant to a sentence differently.

[18] A sentence might lie in a range from lenient to stern and be unimpeachable.

[19] For a sentence to be manifestly excessive it must be beyond the upper end of the range available to the sentencing Judge. In other words, it will be significantly more severe than it ought to have been having regard to the seriousness of the offence and the culpability of the defendant.

[20] In this case, McQueen J adopted an overall starting point of four years and six months' imprisonment for both of the aggravated robberies. We accept that was

---

[10] *Tutakangahau v R* [2014] NZCA 279, [2014] NZLR 482 at [39], citing *Green v Police* [2014] NZHC 444 at [21].

within range. But we accept also the Crown's submission that it could have been higher.

[21] The 29 July 2020 offending involved intrusion into the victim's bedroom when he was sleeping. He was then coerced to go with the appellants, to withdraw money from an ATM and hand it over.

[22] In *R v Mako*, this Court considered that a street robbery where offenders acting together enforced a demand for money, although there was no actual violence, warranted a starting point between 18 months and three years.[11] But, the Court also considered entry to a private house to be a significant aggravating feature.[12] Here, where there was entry to the victim's bedroom where he was sleeping, and the coerced travel and withdrawal of money, a starting point of four years would be within range.

[23] Similarly, the robbery of 25 July 2020, involving the presentation of an imitation firearm (which the victim believed to be real) coupled with threats to shoot the victim and to cut his throat, would have justified a starting point of three years on a standalone basis. The Judge's decision to uplift the starting point of three years and six months for the 29 July 2020 offending by 12 months to account for totality was within range, but could have been more.

[24] On our assessment, it was open to the Judge to adopt a total starting point of around five years' imprisonment.

[25] We turn now to the adjustments to the starting point for each appellant.

Mr Te Ao

[26] Mr Te Ao committed the offences while he was on bail for another offence. The uplift of two months (3.7 per cent) was modest. Another Judge might have allocated more.

---

11 *R v Mako*, above n 4, at [59].
12 At [58].

[27] We consider the 15 per cent discount for youth and the 20 per cent discount for personal circumstances to be within range and it is not necessary for us to comment on them.

[28] Mr Te Ao received a 15 per cent discount for his pleas of guilty. This was generous. Mr Te Ao was charged on 31 July 2020 and pleaded guilty a week before his trial, on 5 October 2022. This was the result of negotiations between the Crown and Mr Te Ao's counsel.

[29] A Judge should be careful in determining a discount for a late plea of guilty following negotiations between the parties to ensure that a double benefit is not conferred. In *Hessell v R*,[13] the Supreme Court said:

> [62] Guilty pleas are often the result of understandings reached by accused and prosecutors on the charges faced and facts admitted. To give the same percentage credit invariably for an early guilty plea in sentencing without regard to the circumstances can amount to giving a double benefit. For example if the Crown agrees to accept a plea to manslaughter and drops a charge of murder in relation to offending, the acceptance of the plea can be a concession in itself. If the full credit for an early plea is then also given, the sentence may not properly reflect the offending. The only way in which the many variable circumstances of individual cases which are relevant to a guilty plea can properly be identified is by requiring their evaluation by the sentencing judge, and allowing that judge scope in light of the conclusion he or she reaches to give the most appropriate recognition of the guilty plea in fixing the sentence.

[30] In this case there was no early acceptance by Mr Te Ao that he took part in two aggravated robberies. The deal struck with the Crown benefited Mr Te Ao principally by removing a charge of kidnapping laid in respect of the 29 July 2020 robbery. Having regard to all the circumstances, as the Supreme Court requires, another Judge might have, properly, given a discount of 10 per cent or less.

[31] Which brings us to the discount which is the sole ground of appeal: the one month reduction for Mr Te Ao's 12 months on bail.

[32] The Judge does not explain why she allowed a one month discount. It might be that the Judge had the overall sentence in mind. In our view, another Judge might

---

[13] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

properly have allowed Mr Te Ao a greater discount, perhaps even in the three months to five months range.

[33] However, even if an increased discount was, on a full analysis, required, it could not make Mr Te Ao's end sentence manifestly excessive. On our analysis, an end sentence of around two years and eight months' imprisonment would have been within the range available to the Judge. A reduction of even five months for the time spent on restrictive bail conditions would still have the Judge's sentence within range.

[34] Accordingly, Mr Te Ao's appeal cannot succeed.

Mr Parata

[35] Mr Parata's starting point was increased by three months (5.5 per cent) because of his criminal record. He had (relevantly) convictions for burglary and violence, the most recent of the latter occurring on 16 March 2020. He was sentenced to one years' supervision and fined $300 for this offending on 17 July 2020, just eight days before the first of the aggravated robberies. In our view, the uplift was within the range available to the Judge and it is not necessary for us to comment further.

[36] The discounts of 10 per cent for youth and 25 per cent for personal circumstances were also within the range available to the Judge and further comment is unnecessary.

[37] As with Mr Te Ao, we consider the 15 per cent discount for pleas of guilty to be generous. Mr Parata was charged on 31 July 2020 and pleaded guilty a week before his trial, on 5 October 2022, as a result of negotiations with the Crown.

[38] As with Mr Te Ao, the charges of aggravated robbery had always been present. Mr Parata gained some benefit from the negotiations but the core allegations remained. Another Judge might have, properly, given a discount of 10 per cent or less.

[39] As to the time spent on EM bail, s 9(3A) of the Sentencing Act 2002 requires a sentencing Judge to consider the duration of the EM bail, its relative restrictiveness — particularly the frequency and duration of authorised absences, and the offender's

compliance. The Judge did that and allowed 31 per cent of the time Mr Parata spent on EM bail by way of reduction of sentence. That is within the range of allowance commonly given and, when the absences set out at [12] are considered, entirely reasonable.

[40] Mr Parata's sentence could have been higher. The discount he received for the time he spent on EM bail was appropriate.

Decision

[41] Mr Te Ao's appeal against sentence is dismissed.

[42] Mr Parata's appeal against sentence is dismissed.

Solicitors:
Crown Solicitor, Nelson for Respondent