

**IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY**

**CRI-2015-442-17
[2015] NZHC 2077**

BETWEEN MARK ANTHONY CROPP
Appellant

AND THE QUEEN
Respondent

Hearing: 28 August 2015

Counsel: S M Barclay for Appellant
E J Riddell for Respondent

Judgment: 28 August 2015

JUDGMENT OF BREWER J

Solicitors: Zindels (Nelson) for Appellant
Crown Solicitor (Nelson) for Respondent

Introduction

[1] Mr Cropp appeals against a sentence of two years and three months' imprisonment imposed by Judge Zohrab in the District Court at Nelson on 26 May 2015. Mr Cropp was sentenced on the following charges:

- (a) aggravated robbery;¹
- (b) escaping custody;²
- (c) assault with a weapon;³
- (d) intentional damage (x3);⁴
- (e) breach of community work;⁵ and
- (f) theft under \$500 (x2).⁶

[2] Mr Cropp appeals on the basis that:

- (a) the end sentence was manifestly excessive and should have been less than two years' imprisonment; and
- (b) home detention should have been imposed.

[3] Mr Cropp was 17 years old when he was sentenced. He turned 18 this month. His age is the critical point on appeal.

¹ Crimes Act 1961, ss 235(c) and 66. Maximum penalty of 14 years' imprisonment.

² Sections 120(1)(c) and 72. Maximum penalty of five years' imprisonment.

³ Section 202(c). Maximum penalty of five years' imprisonment.

⁴ Section 269(2)(a). Maximum penalty of seven years' imprisonment.

⁵ Sentencing Act 2002, s 71(1)(f). Maximum penalty of three months' imprisonment or fine of \$1,000.

⁶ Crimes Act 1961, ss 219 and 223(d). Maximum penalty of three months' imprisonment.

Background

Aggravated robbery

[4] Mr Cropp and his associate, Mr Glanville, were driving around the Nelson area attempting to sell fake cannabis 'tinnies' to tourists. The tourist who they tried to sell cannabis to is the victim in the aggravated robbery.

[5] On 2 April 2015 at about 7:30 pm, Mr Cropp and Mr Glanville approached the victim and offered to sell him a tinnie. The victim accepted but did not have any money on him. Mr Cropp and Mr Glanville gave the victim a ride to an ATM machine, from which the victim withdrew \$100. The three of them returned to a BP station where the victim had left his bags.

[6] After a discussion about the tinnies, the victim said he no longer wanted to buy one. Mr Cropp became angry and began to approach the victim with a knife in his hand. He was pointing the blade at the victim. Mr Cropp demanded the victim give him the money. Mr Glanville also approached the victim and told the victim to give Mr Cropp the money. The victim handed them the money.

Escapes custody, assault with a weapon and intentional damage charges

[7] On 4 April 2015 Mr Cropp was at the Nelson Police Station. He was permitted to speak to a visitor and was placed in a secure room.

[8] Mr Cropp saw a vent in the ceiling. He stood on a stool and broke off the wooden frame from around the vent. He removed a metal grill and placed nails and pieces of wood into his lunch bag. He then used pieces of the broken wood to pry at a window that separated him from the visitor. He pulled off the metal bar surrounding the window. He then used the metal bar to break the glass. He pushed his body through the glass into the visitor cubicle. Mr Cropp then used the metal bar to break another window leading into an office. He reached through the broken window and opened the visitors' door to let himself into the office.

[9] While he was standing in the office, a police officer entered the room. Mr Cropp raised the metal bar over his head and approached the officer saying he

wished to be let out. Mr Cropp appeared to be in a rage. Another officer entered the room and presented a Taser. The metal bar was taken from Mr Cropp and he was handcuffed.

Breach of community work and theft under \$500

[10] As to the breach of community work and the charges of theft, I have not seen summaries of fact for these charges, but I do not consider that they could have had any independent weight in this appeal.

Judge Zohrab's decision

[11] Mr Cropp pleaded guilty and came before Judge Zohrab on 26 May 2015.

[12] Judge Zohrab considered the charge of aggravated robbery as the lead charge. He adopted a starting point of two years' imprisonment, placing it within band 1 of *R v Mako* as a concerted street attack.⁷

[13] Judge Zohrab then adjusted the starting point by imposing an uplift of nine months' imprisonment to reflect totality of the offending associated with the aggravated robbery, as well as the escaping custody, assault with a weapon and intentional damage charges. He imposed a further uplift of three months to account for the breach of community work and two charges of theft. In total, Judge Zohrab reached a provisional starting point of three years' imprisonment.

[14] Next, Judge Zohrab considered Mr Cropp's age and previous history. Mr Cropp had already accumulated a significant criminal history (in the Youth Court) including convictions for violence and dishonesty. Judge Zohrab had regard to the principle for sentencing young offenders that the prospects for rehabilitation and reintegration should assume importance. However, he was concerned at the seriousness and frequency of Mr Cropp's offending.

⁷ *R v Mako* [2000] 2 NZLR 170.

[15] Instead of giving Mr Cropp a separate discount for his youth, Judge Zohrab considered that any discount to be given for age was balanced out by any uplift that would normally be imposed for a significant and relevant criminal history.

[16] Therefore, the only discount Mr Cropp received was a 25 per cent discount for an early guilty plea. This reduced the overall sentence to one of two years and three months' imprisonment. Judge Zohrab considered also that even if he had reached the two year threshold for consideration of home detention, it would not have been an appropriate commutation in Mr Cropp's circumstances.

Legal principles governing an appeal

[17] Section 250 of the Criminal Procedure Act 2011 governs sentence appeals from the District Court to the High Court. I must allow the appeal if I am satisfied that, for any reason, there is an error in the sentence imposed on conviction and a different sentence should be imposed. I will not interfere with the Judge's sentence unless I feel it is manifestly excessive or wrong in principle.⁸ Whether a sentence is manifestly excessive is to be considered by reference to the sentence imposed rather than the process by which the sentence was reached.⁹

[18] Section 9(2)(a) of the Sentencing Act 2002 ("the Act") allows an offender's age to be taken into account as a mitigating factor to the extent that it is applicable in the case. The reasons for youth to be given recognition as a mitigating factor in the sentencing process include:

- (a) the offence may be an act of immaturity or youthful indiscretion (i.e. an impulsive act or first offence by a youth with good prospects);¹⁰
- (b) young people are more vulnerable or susceptible to negative influences and outside pressures, and have greater difficulty regulating their behaviour and impulses;¹¹

⁸ *R v Brooks* [1950] NZLR 658 (CA) at 659; *R v Radich* [1954] NZLR 86 (CA) at 87.

⁹ *R v MacCulloch* [2005] 2 NZLR 665 (CA) at [50].

¹⁰ *R v Mahoni* (1998) 15 CRNZ 428 (CA) at 437; *M v Police* HC Wellington CRI-2011-485-72, 21 September 2011 at [19]; *Arahanga v R* [2014] NZCA 379 at [26].

¹¹ *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77]; *R v Slade* [2005] 2 NZLR 526 (CA) at [43].

- (c) an offender may, on account of youth and immaturity, not appreciate the full gravity of the offence, while at the same time knowing that it is wrong;¹²
- (d) young people have greater capacity for rehabilitation, giving rise to hope that criminal behaviour has not become so entrenched that they will not respond to rehabilitation;¹³ and
- (e) a sentence of imprisonment may have a harsher effect on an adolescent, especially the crushing effect of a long sentence.¹⁴

[19] It is also established case law that an offender's Youth Court history may be taken into account under s 9(4).¹⁵ It is within the sentencing Court's discretion as to how much weight is placed on the factors listed in s 9.

[20] The Court of Appeal has concluded that a defendant's prior history in the Youth Court may cancel out the benefit that can be given for youth.¹⁶ That may be appropriate even when the history is neither particularly relevant nor serious, or it can result in a partial negation of the effect of youth as a relevant factor. However, in Mr Cropp's case, his history is both serious and relevant to the present offending.

[21] Ms Barclay, in her submissions to me this morning, contrasted the approach Judge Zohrab took to the sentencing of Mr Cropp with the approach the Judge took to the sentencing of the co-offender, Mr Glanville. In Mr Glanville's case, the Judge arrived at a sentence of 10 months' imprisonment which he commuted to a sentence of five months' home detention. Judge Zohrab gave Mr Glanville discounts totalling 50 per cent from the starting point. One of the discounts was 15 per cent for youth, notwithstanding that Mr Glanville was a little bit older than Mr Cropp.

¹² *R v Accused (CA265/88)* [1989] 1 NZLR 643 (CA) at 655; *R v Alletson* [2009] NZCA 205 at [66]; *Overton v R* [2011] NZCA 648.

¹³ *Churchward v R*, above n 11, at [77]; *Overton v R*, above n 12; *R v Wilson* [1989] 2 NZLR 308, (1989) 5 CRNZ 165 (CA).

¹⁴ *R v Chankau* [2007] NZCA 587 at [26]; *R v Slade*, above n 11, at [43].

¹⁵ *Selfe-Brennan v Police* [2012] NZHC 220; *Kohere v Police* (1994) 11 CRNZ 442 at 222.

¹⁶ *R v Putt* [2009] NZCA 38 at [19].

[22] Ms Riddell for the Crown responds that there is no disparity of sentence once Mr Glanville's background is understood. Further, Ms Riddell's submission is that the sentencing of Mr Glanville demonstrates Judge Zohrab's understanding of the youth justice principles and the reasons why it can be appropriate for significant reductions to be made from starting points.

[23] For my part, I am satisfied there is no disparity. Mr Glanville was for sentence on a charge of possession of a knife without reasonable excuse, punishable by a maximum penalty of three months' imprisonment and/or a fine, as well as the charges he faced jointly with Mr Cropp relating to the aggravated robbery. On those charges, the Judge adopted for Mr Glanville the same starting point as he adopted for Mr Cropp. However, Mr Glanville had no previous convictions and he did not face the other charges which were faced by Mr Cropp. The Judge was able then to emphasise the prospects of rehabilitation which he did not feel able to do in Mr Cropp's case.

[24] I can see no error in the approach Judge Zohrab took to Mr Cropp for the following reasons:

- (a) Mr Cropp's present offending cannot, even generously, be classed as acts of immaturity, youthful indiscretions, impulsive acts or, of course, first offending. Mr Cropp's criminal history and the violent nature of his present offending speak for themselves. It was Mr Cropp who had the knife.
- (b) In terms of the lead offence of aggravated robbery, Mr Cropp and Mr Glanville are essentially the same age. This is not a case of Mr Cropp being led astray to commit the present offending by an older associate.
- (c) I accept that Mr Cropp may not appreciate the full gravity of his escalating criminal behaviour. However, his lack of appreciation cannot override the public interest of keeping the community safe from his behaviour.

- (d) I also accept the principle that young persons have a greater capacity for rehabilitation. However, in Mr Cropp's circumstances I regard his attitude toward addressing his drug and alcohol issues, in addition to his criminal behaviour, to be worrying. His affidavit filed in support shows extremely poor insight into his behaviour, his responsibilities as a new parent and his drug and alcohol addiction. That said, I accept Ms Barclay's submission that the certificates of achievement filed with the submissions in support of the appeal against sentence show cause for hope. These courses, which have been completed while Mr Cropp has been in custody, do show that he is prepared to make an effort. Encouragingly, one of the courses is the preliminary course for addressing drug and alcohol issues.
- (e) The sentence Judge Zohrab imposed on Mr Cropp is his first sentence of imprisonment. However, repeated criminal behaviour will eventually result in a first sentence of imprisonment. The seriousness of Mr Cropp's offending cannot justify a non-custodial sentence or a shorter prison sentence.

[25] In my assessment, Judge Zohrab carefully considered Mr Cropp's youth, and was entitled to reach the conclusion that any discount for his age outweighing his previous history would be inappropriate in the circumstances. The appeal must be dismissed.

Home Detention

[26] Even if I had been persuaded that the sentence of two years and three months' imprisonment was unjustified, it would not necessarily follow that Mr Cropp should have been granted home detention. There is not presently an identified home detention address which, by itself, means little; but the addresses that would otherwise have been available, namely at his mother's address or at his partner's address, are not available because of the seriousness of his previous offending and concerns about the vulnerability of persons at those addresses. Those concerns speak for themselves.

[27] In any event, I have concluded that because of the seriousness of his previous offending and the overall seriousness of the present offending, home detention would not have been an appropriate sentence in this case.

Decision

[28] Accordingly, the appeal is dismissed.

Brewer J