IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA55/2018
[2019] NZCA 172

BETWEEN	DOMINIQUE KEREHOMA RACHAEL CARROLL Appellant
AND	THE QUEEN Respondent

Hearing: 9 April 2019

Court: Miller, Collins and Toogood JJ

Counsel: M E Goodwin and E I Haronga for Appellant
E J Hoskin for Respondent

Judgment: 21 May 2019 at 11.00 am

JUDGMENT OF THE COURT

A The application to adduce fresh evidence is granted.

B The appeal is allowed.

C The sentences are quashed and concurrent sentences of 10 years and six months' imprisonment are substituted.

REASONS OF THE COURT

(Given by Miller J)

[1] Ms Carroll was convicted at trial on one charge of wounding with intent to cause grievous bodily harm and another of aggravated burglary. She was sentenced to 12 years' imprisonment for each charge, to be served concurrently, with no

minimum period. She has abandoned an appeal against conviction but maintains one against sentence.

The facts

[2] The facts as found by Judge Adeane, who presided over the trial, were as follows:[1]

> [2] It is clear enough now that, acting in concert with a 17 year old girl, Ms Carroll went to the Hastings home of the 77 year old male victim. By way of background, he had been the landlord of a young male friend of your accomplice and she had recently spent a night at the house and thereby become aware of the old man's circumstances and, of course, of his vulnerability. Her friend had since left the house and he was living alone.
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> [3] The two of you hatched a plan to rob him and you went to his home late at night. You had armed yourself with a ball peen or engineer's hammer and when you were denied entry to the house you used this, first of all, to smash open glass so that you could unlock the front door to the house and make entry. Inside, the elderly occupant was immediately attacked with blows and kicks, including blows with this hammer. Even when he had been rendered unconscious, a piece of firewood was procured and he was struck about the head with it. There is some dispute about who was immediately responsible for that, but it was used at the very least in the course of a joint combined attack on him.
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> [4] Little more needs to be said about the savagery of this attack than that it resulted in three weeks of hospitalisation, extensive lacerations to the head and face requiring remedial stitching, three operations to repair complex fractures to one hand and all the obvious physical and emotional drama resulting from an attack of this kind in these circumstances.
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> [5] It is also clear enough that you were the principal dispenser of the violence and you were the individual employing the hammer for that purpose.
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> [6] Once this violence had overcome all resistance, the two of you then again jointly plundered the home of any of its modest contents that you could carry off.

The sentencing

[3] When sentencing Ms Carroll's 17-year-old female co-offender, who pleaded guilty before trial, Judge Rea stated that an appropriate starting point for the principal offender, Ms Carroll, would be 12 years.[2] Judge Adeane adopted the same starting point when sentencing Ms Carroll, stating that it recognised an abundance of

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1 *R v Carroll* [2017] NZDC 28906 [Sentencing decision].

2 Sentencing decision, above n 1, at [8] citing *R v Allen* [2017] NZDC 1741 at [25].

aggravating features: premeditation, the use of a weapon, attack to the head, extreme violence, home invasion, facilitation of theft, vulnerability of the victim and serious injury and associated adverse effects for him.[3]

[4] The Judge noted personal aggravating features: Ms Carroll, who is 31, has a history of drug abuse and "an acknowledged anger problem" with an evident growing propensity for violence reflected in her recent criminal history.[4] He stated that that history is "replete not only with violent offending, but with earlier dishonesty offending also".[5]

[5] The Judge considered that Ms Carroll presents a high risk of harm to others; she continued to deny any part in the offending despite compelling evidence to the contrary, the offending was "coldblooded and merciless", and she presented with no acknowledgment or remorse and no apparent willingness to confront and address the underlying causes of her offending.[6] He noted that she has four children but stated there was nothing in her personal circumstances that would warrant an adjustment. He also noted that she had spent a period on EM bail but he did not make any allowance for it, stating that "bail was not a foregone conclusion by any means" given the gravity of her offending.[7]

The appeal

[6] Mr Goodwin, who appeared as Ms Carroll's assigned counsel on appeal and did not represent her at trial, argued that the Judge had erred by sentencing her on facts not proved at trial, by adopting a starting point that was too high, and by giving no discount for a long period on EM bail.

[7] Mr Goodwin also submitted that an allowance ought to be made for cultural factors. To that end he sought to adduce fresh evidence on appeal,[8] in the form of a cultural report prepared under s 27 of the Sentencing Act 2002. He submitted that the

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3 Sentencing decision, above n 1, at [10].
4 At [12].
5 At [12].
6 At [13].
7 At [9].
8 See *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [103]; and *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [125].

report established a causal connection between adverse formative circumstances and the offending and this merited a discount of up to 25 per cent.

The s 27 report

[8] The Crown did not oppose admission of the cultural report on appeal. We observe that such reports should not be produced for the first time on appeal. The questions whether a cultural report justifies any allowance in the sentence, and if so how much, are best answered by the trial judge. Where the opportunity to produce such a report has not been taken at first instance and it appears to this Court that the report may make a difference, the proper course may be to remit the matter to the trial judge for re-sentencing. In this case, however, neither party wanted us to do that.

[9] The report was written by Ms Shelley Turner. It records Ms Carroll's disadvantaged background. She identifies as Māori but does not know all her iwi affiliations. She was raised as the whāngai child of her maternal grandmother because both parents had substance abuse issues. She experienced a low standard of living, severe physical discipline, and sexual abuse at the hands of a partner of her grandmother. She had no early childhood education and was often truant at high school. Misconduct led to her changing schools and she withdrew from the education system after the fourth form with no formal qualifications. In 2006 she was sentenced to six months' imprisonment for driving offences and a spate of offences of dishonesty. She then settled into steady employment in a shearing gang and met the father of her children. Unfortunately he was deported as an overstayer in 2014 and this appears to have had a serious impact upon her. She became involved with the Mongrel Mob. Concern about her drug use led to her children being removed from her care in 2015.

[10] Ms Turner considers that there is a causal link between her cultural background and her offending, for several reasons: her limited knowledge of her whakapapa and culture evidences inter-generational displacement; she is a whāngai child raised in circumstances of family violence and abuse, with substance abuse issues and limited education which have led her to offend as a young person and limited her employment opportunities; and she sought refuge in gang culture after losing her partner and

children. Ms Turner also reports that Ms Carroll has some whānau support from her grandmother and younger brother. She acknowledges that she should not have maintained her not-guilty plea, which precluded restorative justice processes. She is now remorseful for her offending and wants to parent her children. She is strongly motivated to change and will benefit from drug counselling and parenting courses.

[11] We accept that information in the report was not before the sentencing Judge and is material to sentence. It sufficiently establishes a causal connection between cultural circumstances and offending, it identifies mitigating circumstances, and it points to genuine prospects of rehabilitation. We admit it accordingly.

Sentenced on evidence not proved at trial?

[12] Mr Goodwin submitted that the Judge relied on evidence not proved at trial when he referred to a piece of firewood used as a weapon to attack the elderly victim. This was in issue at trial, with the evidence establishing that DNA recovered from blood on the piece of firewood belonged to the victim. He submitted that evidence as to how the blood ended up on the piece of wood was equivocal and it might have happened through transference. Ms Carroll gave evidence at trial and the prosecutor did not put to her that she struck the victim with the piece of wood.

[13] We do not think there is anything in this point. The Judge did not find that Ms Carroll had struck the victim with the piece of wood and during sentencing he acknowledged a dispute about who was immediately responsible for that. He concluded rather that the firewood was used at the very least in the course of a joint combined attack. That finding of fact was open to him.

The starting point

[14] Mr Goodwin submitted that the Judge failed to properly identify the aggravating features and erred in his overall evaluation of the seriousness of the offending. This was not a case of extreme violence and serious injury. Nor was the victim overly vulnerable. He acknowledged that there was an element of premeditation, that a weapon (a hammer) was used, that violence was used to incapacitate the victim and steal property from him, that there were two attackers and

the victim was attacked in his home. However, the offending properly falls between the top of band two and bottom of band three in *R v Taueki*.[9]

[15] The starting point may have been stern, but it was within the available range. We agree with Ms Hoskin that the offending plainly falls within band three. A large number of aggravating factors were present in serious degree. Notably, the offenders used extreme violence in a premeditated way to facilitate a burglary, a weapon was used to attack the victim's head, and the Judge's description of the victim's injuries (see [2] above) was accurate. The victim, who was aged 77, was vulnerable and he was attacked in his home.

Mitigating and aggravating factors

[16] As noted, Judge Adeane stated that Ms Carroll has an acknowledged anger problem with an evident growing propensity for violence reflected in her recent criminal history. He stated that her history is replete with violent offending. We do not share this view. Ms Carroll has many convictions for offences of dishonesty, but very few for violence. She only has convictions in 2014 and 2015 for assault. The Judge did not uplift the starting point for previous criminal history, but we consider that this error has a bearing on his view that Ms Carroll presents a reoffending risk.

[17] Ms Carroll spent 10 months on EM bail with one breach. It is well established that while EM bail is a mitigating factor,[10] there is no rule as to how much discount, if any, should be given.[11] In this case, however, it is common ground that the Judge erred by declining credit for EM bail on the ground that she was lucky to get bail in the first place.[12] In the circumstances, we consider that a modest allowance was appropriate.

[18] That brings us to the s 27 report. For the reasons given above we consider that it is relevant. It paints a picture of Ms Carroll that detracts somewhat from her

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9 *R v Taueki* [2005] 3 NZLR 372 (CA).
10 Sentencing Act 2002, s 9(2)(h).
11 *Chea v R* [2016] NZCA 207 at [110] citing *R v Faisandier* CA185/00, 12 October 2000 at [28]; *R v Tamou* [2008] NZCA 88 at [19]; *Baillie v R* [2010] NZCA 507 at [18]; *Keown v R* [2010] NZCA 492 at [12]; and *Rangi v R* [2014] NZCA 524.
12 See *O'Connor v R* [2014] NZCA 328, (2014) 27 CRNZ 302 at [44].

culpability and points to prospects of rehabilitation. Denunciation and accountability are important sentencing considerations in this case. They make a long sentence inevitable. However, they do not preclude any allowance for cultural factors.[13]

[19] In the circumstances we will make a global allowance of 18 months for EM bail and the factors mentioned in the s 27 report.

Result

[20] The application to adduce fresh evidence is granted.

[21] The appeal is allowed.

[22] We quash the sentences of 12 years' imprisonment on the charges of wounding with intent to cause grievous bodily harm and aggravated burglary and substitute concurrent sentences of 10 years and six months' imprisonment.

Solicitors:
Crown Law Office, Wellington for Respondent

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13 See *Arona v R* [2018] NZCA 427.