IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA8/2019
[2019] NZCA 422

BETWEEN	CODY PAUL GRIFFIN Appellant
AND	THE QUEEN Respondent

Hearing:	8 August 2019
Court:	Kós P, Woolford and Dunningham JJ
Counsel:	J D Munro and J N Olsen for Appellant B F Fenton for Respondent
Judgment:	10 September 2019 at 11 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Kós P)

[1] An armed robbery that went badly wrong, as they so often do when a loaded firearm is used. As a result, one of the three robbers found himself convicted of murder. The second, the appellant, Mr Griffin, was convicted of manslaughter.

[2] Messrs Clarke, Griffin and Chase carried out an armed robbery at the home of a Mr Henry. He lived on a rural property near Taupo. Mr Griffin brought three firearms and ammunition to the scene. He was also the driver. He and Mr Chase picked up a female associate who knew where Mr Henry lived. All were aware that a

firearm was to be used in the robbery. Messrs Griffin and Clarke knew the firearm was loaded.

[3] The group arrived by night. The men wore disguises. Mr Clarke was holding one of Mr Griffin's shotguns. Mr Henry's partner was apprehended. They asked her where Mr Henry, money and drugs were. Mr Griffin grabbed Mr Henry's partner and pulled her to the ground. The Judge found he did so to prevent her alerting Mr Henry.

[4] At that point, however, Mr Henry appeared anyway. He was chased by Messrs Clarke and Chase. Mr Clarke shot him, in the chest, from a distance of between two and five metres. Messrs Clarke and Chase then located a bag containing drugs and money. The three men and the female associate left the scene.

[5] Mr Henry's partner found him, lying on the ground, dying. She ran to a neighbouring property for help but there was no-one there. In the meantime, Mr Henry's adult son arrived and found his father. He called emergency services and attempted to perform CPR, but Mr Henry by then had died.

Charges, trial and convictions

[6] The three male offenders were each charged with murder and aggravated robbery. Trial took place before Katz J and a jury. Mr Clarke alone was found guilty of murder. Mr Griffin was found guilty of manslaughter. All three were found guilty of aggravated robbery.

Sentencing

[7] The three defendants were sentenced together.[1] Mr Clarke was sentenced to life imprisonment with a minimum term of 17 years, and a concurrent sentence of nine years' imprisonment for aggravated robbery.[2]

[8] Mr Chase was sentenced to eight years and one month's imprisonment for aggravated robbery, with a minimum term of 50 per cent of the finite sentence.[3]

---

1 *R v Chase, Clarke and Griffin* [2018] NZHC 3332 [Sentencing notes].
2 At [105].
3 At [103].

[9] Mr Griffin was sentenced to 10 years and nine months' imprisonment for manslaughter, with a concurrent sentence of eight years and six months' imprisonment for the aggravated robbery. Because of his prior convictions, under the "three strikes" legislation Mr Griffin was ineligible for parole before the full term of his sentence.[4] But for that, the Judge would have imposed a minimum term of 50 per cent of the finite sentence.[5]

[10] In sentencing Mr Griffin, the Judge noted that the offending exhibited six of the aggravating features in *R v Taueki*:[6] premeditation, serious injury, use of weapons, facilitation of a crime, multiple attackers and home invasion.[7] The Judge observed:

> [75] … *[You did not] intend that Mr Henry be killed, or realise that a probable consequence of committing the armed robbery was that he would be shot and killed. …*
>
> [76] The starting point proposed by your lawyer, on the other hand, does not adequately address the seriousness of your conduct. You agreed to the plan to go and rob Mr Henry that night, and actively participated in it. You entered onto private property to carry out the plan. *The jury found that you knew, prior to the armed robbery commencing, that a probable consequence of proceeding with it was that Mr Henry would be shot and injured. You went ahead regardless.* The shotgun and ammunition used to kill Mr Henry belonged to you. You collected the gun prior to the robbery and provided it to Mr Clarke. You knew that the gun was loaded. You detained Mr Henry's partner to stop her from alerting Mr Henry to your group's arrival, while Mr Clarke and Mr Chase went to find him. Within a short period of time, no more than a minute or two and possibly only seconds, Mr Henry had been fatally shot.
>
> (emphasis added)

[11] Grievous bodily harm was an anticipated outcome,[8] but death was not an intended (or even anticipated) one. The Judge then reasoned the sentence by taking a 12 year starting point on the manslaughter offending, and applying a 10 per cent discount for a pre-trial offer to plead guilty to manslaughter.[9] No other credit was given.

---

4 At [104].
5 At [86].
6 *R v Taueki* [2005] 3 NZLR 372 (CA).
7 Sentencing notes, above n 1, at [71].
8 We refer to grievous bodily harm hereafter as GBH.
9 Sentencing notes, above n 1, at [77] and [83].

Submissions

[12] Mr Munro submitted that the Judge had adopted a starting point too high by comparison to similar and more serious cases.[10]

[13] Mr Munro also submitted that the Judge erred in treating the detention of Mr Henry's partner as an aggravating consideration. Rather, it was undertaken to protect her from seeing the confrontation between Mr Henry and Mr Griffin's associates. It was not to prevent the partner from informing Mr Henry; he was already aware of the invasion.

[14] In the circumstances Mr Munro submitted that a starting point in the range of eight years six months to nine years six months' imprisonment should have been adopted, rather than 12 years' imprisonment. That would then be subject to a 10 per cent discount for the guilty plea offer.

Discussion

[15] A sentence appeal will succeed only if there is an error in the sentence and a different sentence should be imposed.[11] The appellant must show that error was material. The Court is more concerned with the end sentence rather than the exact methodology. An appellate court will not ordinarily interfere unless the end sentence is outside the available range.[12]

[16] In *Everett v R* this Court discussed the approach to be taken to sentencing in manslaughter cases founded on an initial act involving GBH. We said:[13]

> [27] In *Ioata v R* this Court confirmed the appropriateness of the "counsel of perfection" suggested in *Tai* — a twin consideration of comparable manslaughter sentencing and *Taueki* principles — in a manslaughter case involving GBH offending resulting in death. We think that admonition correct. In manslaughter cases founded upon GBH offending — where really serious injury is an intended consequence — that twin approach is desirable if

---

10 The authorities referred to by counsel were *R v Maxwell* CA359/02, 31 March 2003; *Pahau v R* [2011] NZCA 147; *R v Moala* HC Auckland CRI-2006-092-461, 12 December 2007; *R v Wallace* HC Wellington CRI-2007-083-1608, 20 February 2009; *R v Chan Kee* HC Auckland CRI-2008-092-8864, 7 May 2010; and *R v Tafutu* [2014] NZHC 657.

11 Criminal Procedure Act 2011, s 250(2).

12 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30] and [36].

13 *Everett v R* [2019] NZCA 68, citing *Ioata v R* [2013] NZCA 235.

> (1) manslaughter sentencing is properly to reflect the additional and significant aggravation of death ensuing from GBH, and (2) GBH offending is not, in turn, to be over-sentenced.

[17] We consider, first, comparable manslaughter sentencing. We put to one side first instance High Court sentencing decisions referred to us by Mr Munro. With respect, such decisions are of little assistance to us on appeal.[14] Rather, we will look at the three most relevant appellate decisions cited by counsel.

[18] In *R v Rapira*, a group of young people set out to rob Mr Choy, a pizza delivery man. In the course of the robbery one member, armed with a baseball bat, set upon Mr Choy and killed him. The leader of the group, who was not armed, was given a 10 year starting point for manslaughter, uplifted three years for the aggravated robbery and an earlier attempted aggravated robbery. That sentence was confirmed by this Court.[15] The Court went on to observe:

> [132] Where the common aggravating features are worse (as where there is use of a fire-arm, torture, repetitive violence, or home invasion) a starting point of ten years is unlikely to be sufficient to reflect the gravity of the offending. …

[19] In *R v Challis* a group of Mongrel Mob associates fired a gun at a Black Power address in a drive-by shooting.[16] A baby was hit and killed. The appellants were members of the lead car in the convoy, sitting in the car from which the gun was fired. They knew that a firearm was being brought to the scene. Their car approached the rival address in darkness, with its lights off. An initial shot was fired; the car approached closer, and two more were fired. A 10 year starting point was upheld in that case.[17]

[20] In *Pahau v R* a group of Black Power gang members were gathered to confront a group of the rival Mongrel Mob gang.[18] One member of the group stabbed the victim, fatally. He was convicted of murder. A starting point of 13 years' imprisonment for manslaughter against the organiser of the attack was upheld.[19]

---

14 *Maulolo v R* [2014] NZCA 439 at [15].
15 *R v Rapira* [2003] 3 NZLR 794 (CA) at [131] and [142].
16 *R v Challis* [2008] NZCA 470.
17 At [22].
18 *Pahau v R*, above n 10.
19 At [80].

Starting points of 10 years' imprisonment were upheld against other members of the pack who had chased the victim.[20]

[21] In the present appeal Mr Griffin may be described as the joint leader of the attack. It involved a common plan, in which Mr Griffin was an instrumental leader, drove the group to the place of attack and in particular supplied the firearms and ammunition. Set against the starting points in the three cases discussed, a starting point of 12 years' imprisonment is not beyond the available range.

[22] Turning now to a *Taueki*-based GBH sentencing analysis by way of comparison or cross-check, no challenge was made to the Judge's analysis of the six aggravating factors identified at [10] above. In addition, the use of lethal weapons and fact that death ensued are seriously aggravating considerations.[21] On a GBH-sentencing basis, this was a serious band three case, with a starting point range of nine to 14 years.[22] By parity of reasoning, and given both the use of lethal weapons and ensuing death, a starting point of 12 years was plainly appropriate and within range.

[23] While the Judge appears to have erred as to the exact sequence of events concerning the detention of Mr Henry's partner, that consideration was not material to her *Taueki*-based sentencing analysis.

[24] It follows that we are not persuaded that the Judge erred in sentencing Mr Griffin. Nor are we persuaded that a different sentence should have been imposed.

Result

[25] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

---

20 At [87] and [93].
21 *R v Rapira*, above n 15, at [132]; and *Everett v R*, above n 13, at [37].
22 *R v Taueki*, above n 6, at [34] and [40].