IN THE HIGH COURT OF NEW ZEALAND
WHANGANUI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGANUI ROHE

CRI-2018-483-1
[2018] NZHC 770

BETWEEN	RUBEN HAWEA Appellant
AND	THE QUEEN Respondent

Hearing: 17 April 2018

Appearances: S Burlace for the Appellant
C Middleton and H Mallalieu for the Respondent

Judgment: 23 April 2018

JUDGMENT OF CULL J

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[1] Mr Hawea pleaded guilty to one charge of male assaults female.[1] On 15 January 2018, Mr Hawea was sentenced to 100 hours community work.[2]

[2] Mr Hawea appeals his sentence on the basis that the sentence is manifestly excessive; the Judge erred in treating a previous conviction for assault on a child as an aggravating feature; and the sentence imposed was not in accordance with an informal sentence indication.

[3] The Crown opposes the appeal and argues the sentence imposed was not manifestly excessive. The Crown submits the sentence was arguably below the appropriate range. The other matters raised on appeal, the Crown submits, do not alter the fact that the sentence was within the available range.

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1 Crimes Act 1961, s 194(b). Maximum penalty is two years' imprisonment.
2 *New Zealand Police v Hawea* [2018] NZDC 3397.

Factual background

[4] On 11 March 2017, the victim was hosting a party at her home which Mr Hawea attended with his partner and their two children. All the adults at the party were drinking. Mr Hawea left the party for an extended period of time and left his children there. While he was away, his children became abusive towards other people at the party.

[5] When Mr Hawea returned in the early hours of 12 March 2017 he was intoxicated. The victim confronted and yelled at Mr Hawea about the behaviour of his children and how he was not looking after them. Mr Hawea punched the victim in the face, just above her left eye. The punch caused the victim's contact lens to fall out and she suffered a minor bruise and swelling. She did not suffer any lasting injury. The incident led to a fight occurring between Mr Hawea and the other party goers, including the victim's husband.

Personal circumstances

[6] Mr Hawea was sentenced on 17 July 2017 for a conviction of assault on a child that occurred on 21 March 2017 (nine days after the incident subject to the present appeal). He received a sentence of nine months' supervision and 100 hours community work. Mr Hawea also has four other convictions for assault (committed in 2016 and 2007). He has 50 other convictions, all of which are for minor and unrelated offences.

Pre-sentence report

[7] The pre-sentence report identifies that this was Mr Hawea's second violent offence while being subject to release conditions for previous offending. The report commented that Mr Hawea was regretful of his latest offending, but that this was "due to the position he finds himself in, more than any remorse towards the victim."

[8] The report comments that Mr Hawea's criminal history and previous violent offences indicates that he has a high degree of propensity towards violence. He has a high risk of re-offending and of causing harm to others if he does re-offend. As he

only has five previous convictions for assault, the report does overstate Mr Hawea's conviction history as "extensive".

[9] In terms of rehabilitation, Mr Hawea has previously completed a family violence programme for domestic violence and is currently undertaking a programme for alcohol and other drug intervention, which he is participating in well. He is also on the waiting list for a parenting course. The report comments that little would be achieved by further rehabilitative sentences as he has been addressing his offending needs on his current sentence.

[10] The report recommended that a sentence of community work will hold Mr Hawea to account for his offending.

District Court decision

[11] In sentencing Mr Hawea, the Judge noted that he was serving a sentence of supervision and community work for a charge relating to an assault of a child when he committed this offence. The Judge commented that this indicated he was "someone who is prone to violence and violence is obviously something that is a significant factor in your day-to-day living."[3] The Judge was also concerned that Mr Hawea had pleaded guilty "to get this over and done with" and that he did not take his offending seriously.[4]

[12] In these circumstances, the Judge did not consider it was appropriate to convict Mr Hawea and order him to come up for sentence if called upon. Having regard to the purposes and principles of the Sentencing Act 2002, the Judge felt that the only appropriate sentence was 100 hours community work.

[13] The Judge gave Mr Hawea credit for his guilty plea, although the exact discount given was not specified.

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3 *Hawea*, above n 2, at [4].
4 At [5].

Approach to appeal

[14] This appeal is brought under s 250 of the Criminal Procedure Act 2011. An appeal against sentence is an appeal against a discretion. An appeal against sentence must be allowed if the Court is satisfied that, for any reason, there is an error in the sentence imposed and a different sentence should be imposed.[5] The focus is on the final sentence and whether that was in the available range, rather than the exact process by which it was reached.[6]

Mr Hawea's position

[15] Mr Hawea argues that the sentence of 100 hours community work is manifestly excessive and that a sentence of an order to come up for sentence if called upon (12 months) would be appropriate.[7] Mr Hawea submits the sentence is manifestly excessive in all the circumstances including his entering a guilty plea (albeit at a late stage) and the fact he was completing his sentence of supervision well.

[16] In support of this, Mr Hawea points to the exit report from the family violence programme he has completed. This document was before Judge Grace at sentencing. The report writer has reservations about whether Mr Hawea participated effectively in the programme, as his behaviour was antagonistic at times and this was his second attempt at the programme. However, the report is largely positive that the events in Mr Hawea's life, combined with the skills he has learnt, have encouraged him to change his behaviour. He has developed positive goals that the writer hopes he will meet in future.

[17] Mr Hawea submits the sentence imposed was not in accordance with an earlier informal sentence indication. On 15 August 2017, the District Court in Taihape indicated it would monitor the progress of Mr Hawea on supervision and that if he progressed well and completed those sentences the Court would look favourably at the end sentence. Counsel for Mr Hawea, Ms Goodlet, accepts this was not a formal sentence indication. However, Mr Hawea submits he understood that this would mean

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5 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482.
6 *Ripia v R* [2011] NZCA 101 at [15].
7 Sentencing Act 2002, s 110.

a sentence less than community work, if he performed well and completed his supervision.

[18] Further, Mr Hawea submits the Judge was wrong to consider that the male assaults female offending was aggravated because he was on sentence for assault on a child at the time. The male assaults female offending predated the assault on a child offending.[8] At the time Mr Hawea committed the male assaults female, he was on release conditions for the charges he was sentenced to on 16 May 2016 (driving with excess breath alcohol third or subsequent; assault with blunt instrument; assault with intent to use weapon; failed to stop when followed by police; possession of an offensive weapon; and driving in a dangerous manner).

Crown's position

[19] The Crown opposes the appeal and argues the sentence imposed was not manifestly excessive. The Crown submits the sentence was arguably below the appropriate range. The Crown submits a starting point of between four and six months' imprisonment would have been appropriate, when compared with other cases of similar offending.[9] As Mr Hawea entered his guilty plea on the first day of the scheduled Judge-alone trial, the Crown submits a discount of 15 per cent would be appropriate to acknowledge this.

[20] The Crown submits a final sentence of three months' imprisonment, or six weeks' home detention would be appropriate. Although the Crown accepts a sentence lower than home detention would be appropriate, a sentence to come up if called upon is an inadequate response to this offending.

[21] The Crown accepts the Judge erred by viewing the later offence of assault on a child as an aggravating feature of the present offending. However, as the Judge used this feature to establish that the defendant was prone to violence, the Crown submits

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8 The offence date for the male assault female was 11 March 2017. The assault on a child was committed after this, on 21 March 2017. However, Mr Hawea was sentenced for the charge of assault on a child on 17 July 2017, before the present sentence.

9 *Ogden v R* [2016] NZCA 214; *Police v Vuetaki* [2016] NZHC 2515; *Wawatai v Police* [2015] NZHC 406; *Poata v Police* HC Rotorua CRI-2010-470-23, 3 July 2010; *Yeo v Police* HC Auckland CRI-2006-404-283, 8 September 2006; *Penrose v Police* [2013] NZHC 2757; and *Ballantyne v Police* HC Hamilton CRI-2010-419-20, 22 April 2010.

this is a reasonable conclusion based on Mr Hawea's previous violent convictions and the comments in the pre-sentence report. As the appeal is focussed on the sentence imposed and not the end sentence, this sentence should not be disturbed.

[22] The Crown submits a sentence of community work is a merciful approach to a conviction for male assaults female. A lower sentence is not available. If anything, it is for the Court to determine whether a higher sentence would be appropriate on appeal.[10]

Relevant law

[23] There is no tariff case for the offence of male assaults female because the circumstances of its commission and of offenders can vary so greatly.[11]

[24] The Crown has referred to several cases to identify the appropriate starting point for Mr Hawea's offending. The following are more closely comparable to Mr Hawea's offending, where defendants received sentences for similar offending between 200 hours' community work and seven months' imprisonment:

(a) *Wawatai v Police*:[12] the offender was drunk and punched his partner in the face during an argument, causing swelling and a bleeding nose. A family member took him outside but he returned and attempted, unsuccessfully, to land further punches. Courtney J found a starting point of seven months' imprisonment was appropriate.

(b) *Poata v Police*:[13] a sentence of six months' imprisonment was upheld on appeal on a charge of male assaults female involving punches to the victim's abdomen. The offender's significant criminal history was also incorporated into this sentence.

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10 Criminal Procedure Act 2011, s 250.
11 *R v Reihana* CA143/03, 3 July 2003 at [43].
12 *Wawatai*, above n 9.
13 *Poata*, above n 9.

(c) *Penrose v Police*:[14] a sentence of 200 hours' community service was upheld on appeal for one charge of male assaults female (150 hours) and one charge of speaking threateningly (50 hours). The offender took the victim by the throat and said "watch yourself, you don't want to mess with me, I could snap your neck." The offender applied force to the area beneath her chin for 20 to 30 seconds. No injury was caused to the victim and the event took place within a short space of time. The offender's four previous convictions for violent offences were taken into account.

(d) *Ballantyne v Police*:[15] the offender pushed a female neighbour in the chest then punched her in the head. The offender then punched her husband two or three times in the head, causing bruising and a painful jaw. On appeal, Harrison J described the sentence of 220 hours' community work together with supervision for nine months as "merciful" but upheld it. Had the offender not been 56 years old and with a previous good character, a sentence of imprisonment would have been appropriate.

[25] The following are those that are more serious than Mr Hawea's offending and are not directly relevant. These cases received sentences between 130 hours' community work and 18 months' imprisonment:

(a) *Ogden v R*:[16] a sentence of 18 months' imprisonment was upheld on appeal for three charges of male assaults female. The offender assaulted his partner on three occasions, punching her in the face, kicking her in the ribs, stomping on the back of her head and punching her in the mouth causing her lip to split open. A starting point of six months' imprisonment was adopted for each of the charges, to be served cumulatively.

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14 *Penrose*, above n 9.
15 *Ballantyne*, above n 9.
16 *Ogden*, above n 9.

(b) *Police v Vuetaki*:[17] the offender was sentenced to 130 hours' community work for one count of male assaults female and one count of common assault. The offender got into an argument with his wife and forcefully pushed a wooden highchair over which struck his wife's feet, while she was holding their nine-month old daughter at the time. The offender then slapped the victim hard on her left check and ear, causing an ongoing hearing problem. He grabbed their daughter from the victim and when the victim walked away he clipped her on the back of the head with his open hand. Later, when the victim walked out of the house, he grabbed her by the wrist and pinned her into some bushes. the sentence of 130 hours' community work was seen as merciful by Gendall J on appeal but was upheld.

(c) *Yeo v Police*:[18] a 19 year old defendant grabbed his partner by the throat and held her head in his lap while driving. He pulled her hair, ripped her shirt and punched her once in the face. He had no history of violent offending. On appeal, the starting point was set at eight months' imprisonment. A final sentence of five months' imprisonment was imposed, taking into account the offender's youth and lack of relevant previous convictions, with leave granted to apply for home detention.

Discussion

[26] As Mr Hawea submits, the Judge did err in taking into account the later conviction of assault on a child as an aggravating feature of this offending. The assault on a child occurred later in time. However, in light of Mr Hawea's other violent convictions and his past tendency to violent behaviour, those factors are relevant to his sentence for the present offending. Although the Judge made an error, I do not consider it is one that makes the sentence manifestly excessive.

[27] Secondly, I do not consider there is any merit in Mr Hawea's submission that the Judge failed to follow his informal sentence indication. This was not a formal

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17 *Vuetaki*, above n 9.
18 *Yeo*, above n 9.

sentence indication: it was not recorded by the Court and it does not appear that the parties were given an opportunity to be heard on the matter.[19] The Court is not bound to follow any informal indication given.

[28] Finally, the sentence imposed was not manifestly excessive. Indeed, it may be seen as lenient. When compared with other cases, Mr Hawea's sentence is within the available range that was open to the Judge.[20] The Judge fairly took into account Mr Hawea's circumstances and those of his offending, including his completion of his previous community work and his guilty plea. The offending was serious, especially in light of the fact Mr Hawea was serving a sentence of supervision and community work for two 2016 assault charges at the time it was committed. A sentence to come up if called would not meet the sentencing purposes and principles of denunciation and holding the offender accountable.[21]

[29] Equally, I do not consider a harsher sentence should be imposed. While Mr Hawea does have a large number of previous convictions, the majority of these are minor and not relevant to the current offending. He has displayed violent tendencies in previous and the present offending, but has participated well in the recent family violence programmes he has attended.

[30] At the hearing, a work reference from Mr Hawea's work gang supervisor and a progress report from the Mokai Patea Services were produced, both complimentary of Mr Hawea's progress in undertaking courses and gaining qualifications in work skills. There are other areas in which Mokai Patea Services are offering professional help to Mr Hawea and his son. Such positive steps for future training should be encouraged and facilitated within Mr Hawea's sentence of community work.

[31] Section 66A(2) of the Sentencing Act enables a probation officer to direct that a specified number of hours of work, not exceeding 20 per cent of the total sentence of community work, be spent in training in basic work and living skills. It would be

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19 Criminal Procedure Act 2011, s 62(1) and (3).

20 In particular, *Ballantyne*, above n 9 (where a slightly higher sentence was given for similar assaults against two victims); and *Vuetaki*, above n 9 (where a similar sentence was given for more serious offending that Mr Hawea's).

21 Sentencing Act 2002, s 7.

a very productive outcome of both Mr Hawea's sentence and his efforts to date, if such a provision could be utilised to positively assist Mr Hawea in looking after his son and furthering his life skills.

[32] Although the Judge did err in treating the conviction for assault on a child as an aggravating factor, I am not satisfied that the sentence imposed was manifestly excessive or that a different sentence should be imposed. Although lenient, the sentence imposed was within the available range and with the help of Mr Hawea's probation officer, may result in a productive acquisition of further training and life skills.

Result

[33] The appeal is dismissed.

Cull J

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