IN THE COURT OF APPEAL OF NEW ZEALAND

CA49/2017
[2017] NZCA 498

BETWEEN	CLAYTON KERR Appellant
AND	THE QUEEN Respondent

CA185/2017

BETWEEN	WAYNE JONES Appellant
AND	THE QUEEN Respondent

Hearing:	5 September 2017
Court:	French, Williams and Woolford JJ
Counsel:	H B Leabourn for Appellant in CA49/2017 W T Nabney for Appellant in CA185/2017 S K Barr for Respondent
Judgment:	2 November 2017 at 11.00 am

JUDGMENT OF THE COURT

A The appeal by Mr Jones against conviction is dismissed.

B The appeals by Mr Kerr and Mr Jones against sentence are allowed.

C Mr Kerr's sentence of 11 years and six months' imprisonment is quashed. Concurrent sentences of nine years and two months' imprisonment for

aggravated robbery, three months' imprisonment for robbery and six months' imprisonment for receiving are imposed. The other aspects of the sentence are confirmed.

D Mr Jones' sentence of 10 years' imprisonment is quashed. A sentence of eight years and six months' imprisonment is substituted.

REASONS OF THE COURT

(Given by Woolford J)

Introduction

[1] Following a jury trial before Judge Harding of four defendants in the Tauranga District Court between 3 and 10 October 2016, the first appellant, Clayton Kerr, was convicted of two charges of aggravated robbery,[1] one charge of robbery,[2] and one charge of receiving.[3] The second appellant, Wayne Jones, was convicted of the same two charges of aggravated robbery.[4] Judge Harding sentenced Mr Kerr to 11 years and six months' imprisonment,[5] while he sentenced Mr Jones to 10 years' imprisonment.[6] Mr Kerr now appeals against sentence only, while Mr Jones appeals against both conviction and sentence.

Facts

[2] The aggravated robbery charges related to two complainants who were present at a residential property in Tauranga, on the evening of 27 May 2015, when Mr Kerr arrived with Mr Jones. Both appellants entered the property. Two other persons initially remained in a car outside the property. On entry, Mr Kerr enquired about swapping a laptop for money or half a gram of methamphetamine. He was advised by the householder (PT) that he had no methamphetamine, but his wife (CT) had money

---

1 Crimes Act 1961, s 235(b).
2 Section 234(1).
3 Section 246(1).
4 Section 235(b).
5 *R v Kerr* [2017] NZDC 1041 at [20].
6 *R v Jones* [2017] NZDC 3662 at [12].

and she would be returning home shortly from shopping. Mr Kerr and Mr Jones said they would return in an hour and left the property.

[3] When the two returned half an hour later, Mr Kerr became agitated that CT had still not returned.[7] He pulled out a machete, commenting on its sharpness. Mr Kerr then told Mr Jones to get the other two men who had remained in the car outside the property. When the three of them returned, the other two men had scarves around their lower faces. Mr Kerr instructed them to grab everything and load up the car.

[4] When Mr Kerr saw a guest (KK) in a bedroom at the property on her phone, he demanded she give him the phone and pushed her out of the bedroom into the lounge. Mr Kerr said that he owned the town. When KK laughed, Mr Kerr called her a "big mouth bitch" and hit her in the face with the laptop with such force that it broke, splitting KK's nose. KK said that Mr Jones then punched her in the head. Mr Kerr threatened KK with the machete, saying she was going to die. Mr Kerr also threatened PT, saying that if anyone "narked" he would chop them up.

[5] KK said that Mr Jones demanded her car keys. She lied and said she did not have her car there. She also said that Mr Kerr demanded PT's car keys. He gave them to him. The men then took a number of household items from the property and loaded them into their car. Mr Kerr also demanded KK's jewellery and PT's watch. KK's two cellphones were also taken from the bedroom. The men left when disturbed by a neighbour.

[6] PT lost his BMW motor vehicle and other property valued at $9,000, which included a stereo system, computer equipment, martial arts equipment and jewellery. KK lost two cellphones and jewellery valued at $1,500.

[7] On 22 July 2015, Mr Kerr committed a separate robbery. He went to a property and, having being allowed entry, demanded cash before taking a visitor's cellphone valued at $150. He left that property after being told to do so by a male occupant.

---

7 The sequence of subsequent events differs somewhat in the different witness accounts.

[8] When the police eventually executed a search warrant at Mr Kerr's address, they found a further $5,000 of stolen property from an unrelated burglary of a residential address in May 2015.

Appeal against conviction

[9] The appeal against conviction is brought by Mr Jones. Mr Jones' defence at trial was that although he was present at the property when the aggravated robbery took place, he was not an active participant but merely in the wrong place at the wrong time. His counsel argued that KK was mistaken when she said it was Mr Jones who punched her in the head. He also argued that she was dazed by the assault and confused about who demanded her car keys. By their verdicts of guilty, however, the jury obviously found that Mr Jones was not a bystander, but an active participant in the aggravated robberies.

[10] Mr Jones now appeals on the ground that there has been a miscarriage of justice because the police statements of three witnesses, who were declared hostile by the trial Judge, were admitted as evidence in the trial.

Hostile witnesses — the events at trial

[11] The three witnesses were PT, CT and a second guest (ED), who was not a complainant in the aggravated robbery.

[12] On the evening in question, the police were summoned by a neighbour. CT had not returned, while KK had left the property and returned home. PT refused to make a complaint, as did ED, who gave the police a false name. The police spoke with PT again on 4 and 5 August 2015 and asked him to make a statement. He said he would speak with his family because he was concerned about the safety of himself and his wife. He did, however, give police KK's name as being the other person present during the robbery. Then on 12 August 2015, PT chose to make a comprehensive 12 page statement about the events of the evening in question. CT made a seven page statement the next day, 13 August 2015. ED also made a six page statement on the same day, 13 August 2015.

[13] The appellants were subsequently charged with aggravated robbery. They pleaded not guilty and were remanded for trial. At trial, the first witness was KK, who gave comprehensive evidence and was cross-examined in some detail by counsel. The next witness to be called was PT. He was sworn and answered a number of questions about the BMW motor vehicle and the layout of the property, but then he declined to answer any further questions because of fear of retaliation.

[14] On the prosecutor's application under s 94 of the Evidence Act 2006, the trial Judge ruled that PT was hostile and gave permission to the prosecutor to cross-examine him. The prosecutor then put PT's written statement to him and asked him to confirm that it was his. PT refused to do so.

[15] Counsel for Mr Jones tried to cross-examine PT, suggesting that it was Mr Kerr who punched KK rather than Mr Jones. PT refused to answer any such questions. The prosecutor then called the Detective Sergeant who took PT's statement, who produced the statement as evidence in the trial. PT was then recalled for further cross-examination, but, again, refused to answer any questions.

[16] ED failed to answer his summons and was therefore arrested and brought to court. After being sworn, ED acknowledged his identity and said that he knew CT and had been to the property. He said, however, that he could not remember going there on 27 May 2015. Because he said he was unable to remember, he was shown his statement dated 13 August 2015, but he refused to acknowledge that it was his statement, even going so far as to say the signature on it was not his. Again, on the application of the prosecutor, ED was declared hostile. The statement was again shown to him by the prosecutor and this time he acknowledged signing it and initialling each page. ED continued to maintain, however, that he did not remember anything about the events on the evening in question. The statement was eventually produced as evidence.

[17] Again, ED was cross-examined by defence counsel. He told counsel that he had been pressured by the police to make the statement, but acknowledged going to the property on a regular basis once a week to buy drugs.

[18] CT was also called to give evidence. After being sworn, she acknowledged her identity, but when asked about the events on the evening in question she declined to answer any questions for fear of retaliation. Again, she was declared hostile on the prosecutor's application and was referred to her statement. She acknowledged her initials and signature on the statement and then was subject to some cross-examination. She did not give any useful evidence for the defence. The detective who took the statement from CT was then called and he read the statement to the court.

Submissions

[19] Counsel for Mr Jones submits that the statements made by PT, CT and ED were inadmissible because:

(a) the prosecution should not have been permitted to call knowingly hostile witnesses for the purpose of getting their unsworn statements before the jury;

(b) they were not "witnesses"; and

(c) the cumulative effect of their evidence was to create unfair prejudice to Mr Jones' defence.

Knowingly hostile witnesses

[20] As to the knowledge and intent of the prosecution about the witnesses' hostility, the first point is that all three witnesses had earlier co-operated with the police in giving comprehensive statements. At trial, PT answered several preliminary questions, but in respect of all questions of substance from both the prosecution and defence, he declined to answer. The trial Judge, in ruling that PT's statement could be produced through the interviewing police officer, considered the statement was voluntary and that it was not possible to conclude that the prosecution in calling the witness must have known he was hostile.

[21] While CT acknowledged her identity and accepted the statement she made to the police as her own, she also declined to answer all questions of substance. Having being stood down, but not excused, CT was reported to have had a panic attack for which she required medical attention. The prosecution could not have foreseen that occurrence.

[22] While ED was also declared hostile after being arrested by the police and brought to court, when he first arrived at court the trial Judge arranged for him to see the duty solicitor. The trial Judge then spoke with ED in the absence of the jury and advised him that if he was concerned about giving evidence, he could do so orally that day or potentially by means of CCTV the next day. ED then took further advice from the duty solicitor and told the trial Judge that he would give evidence orally that day. The jury were then asked to return to court and ED was invited to give evidence. In those circumstances, it cannot be said that the prosecution was calling a knowingly hostile witness for the purpose of getting his unsworn statement before the jury. He had expressed a willingness to the trial Judge to give oral evidence.

[23] Regardless, we query the validity of the point on appeal. Even if it were proven that the prosecution knew they were calling hostile witnesses, PT, CT and ED were all eligible and compellable witnesses.[8] We were not directed to any legal basis which would support the proposition that they could not be called. The policy behind admitting previous inconsistent statements in relation to hostile witnesses is designed for situations such as these.

Witnesses

[24] A witness is defined in s 4 of the Evidence Act as meaning "a person who gives evidence and is able to be cross-examined in a proceeding".

[25] Counsel for Mr Jones argues that PT, CT and ED could not be regarded as "witnesses" as defined in the Act. He submits that because PT, CT and ED refused to answer any questions in cross-examination, they were in effect unavailable for cross-examination and were not "witnesses". Accordingly, the trial Judge had no power to

---

8 Evidence Act 2006, s 7(1).

declare the three persons hostile as s 94 of the Evidence Act only permits "witnesses" to be declared hostile.

[26] Counsel specifically referred to an obiter comment of Elias CJ in *Morgan v R* where she stated:[9]

> [11] … Similarly, no consideration seems to have been given to whether, in circumstances where the witness refused to answer questions about the statement and no effective cross-examination of him by the defence was possible to test it, the maker of the statement was indeed a "witness" within the definition in the Act ("a person who gives evidence and is able to be cross-examined in a proceeding") and for the purpose of the hearsay definition. This point too has not been developed in argument on the appeal and, again, it is unnecessary to consider it as a stand-alone question. But whether the legislative policy behind relaxation of the definition of hearsay was met in circumstances where effective cross-examination was not possible is highly relevant to the question of prejudice in the admission of the statement.

[27] With respect, we are of the view that PT, CT and ED were in fact witnesses in the trial. Each of them entered the witness box and was sworn or affirmed. Each of them was asked a number of questions, both by the prosecution and the defence, and each of them answered some questions. They were then "able to be cross-examined in a proceeding", but were equally hostile to both the prosecution and defence. There is no substantive requirement in the definition concerning the content of a witness' answers or the effectiveness of such cross-examination.

[28] We do, however, agree with Elias CJ that the question of whether the legislative policy behind relaxation of the definition of hearsay was met in circumstances where effective cross-examination was not possible is highly relevant to the question of prejudice in the admission of the statement. It is to the issue of prejudice we now turn.

Unfair prejudice

[29] Counsel for Mr Jones submits that the cumulative effect of the evidence of PT, CT and ED was to create an unfair prejudice to Mr Jones' defence.

[30] Section 8(1) of the Evidence Act states that the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will either have an

---

9 *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508.

unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding. The Judge must specifically take into account the right of the defendant to offer an effective defence.[10]

[31] In the *Morgan* case, the Court commented:[11]

> [40] … Trial Judges should be particularly vigilant in the case of a hostile witness to ensure that the evidence of the witness does not require exclusion under s 8. Now that a hostile witness's previous statement is evidence of the truth of the matters stated therein, even if it is not adopted by the witness, the Judge must be satisfied that leading evidence based on the statement, or its production, will not have an unfairly prejudicial effect on the proceeding. Issues of fairness may arise when a witness is expected to be hostile and is called for the purpose of getting the unsworn statement before the jury. Unfairness may be present or exacerbated if the hostility of the witness results in the accused being unable sensibly to cross-examine on the statement.
>
> [41] Parliament has legislated to make previous statements of a hostile witness admissible as proof of their contents without adoption, presumably on the basis that the witness will be subject to cross-examination. The reality of that premise may differ from case to case. Parliament's policy decision should not be undermined by too ready a resort to s 8. It certainly should not be undermined on any generic basis. The ultimate question will always be whether the evidence is unfairly prejudicial in all the particular circumstances of the case, of which opportunity for realistic cross-examination will always be important.

[32] Evidence can be prejudicial to a defendant. The ultimate issue is whether it is unfairly so in the circumstances of each case.

[33] CT was not present at the address when the events at issue took place. She does not and cannot say who was at the address and what role each of them played. Her statement is therefore not unfairly prejudicial to Mr Jones' defence. In any event, the trial Judge offered the opportunity to the defence to negotiate any proper redaction with the prosecution before the statement was admitted.

[34] On the other hand, PT was at the address and is named as a complainant in one of the aggravated robbery charges. He does not, however, identify Mr Jones as being present. In his statement he said:

---

10 Section 8(2).

11 *Morgan v R*, above n 9 (footnotes omitted).

> I know who the other three males who came with [Mr Kerr] are. As I said at the start of this statement this is not about the Mongrel Mob gang, this is about one man, [Mr Kerr]. He was the one who was angrily telling the others what to do. He was in control of everything that happened.

[35] Although he states that he knew who the other three men were, PT does not name them. Furthermore, he says nothing about Mr Jones punching KK in the head. He does describe Mr Kerr hitting KK in the face with the laptop and then states:

> He had the machete in one hand down low and a raised fist pulled back with the other hand yelling at her "I'll fucking kill you bitch, I'll fucking kill you bitch".
>
> [KK] was cringing back on the couch trying to cover her face, saying "No [Mr Kerr] no."

[36] PT also says nothing about Mr Jones demanding KK's car keys. PT's statement is therefore not unfairly prejudicial to Mr Jones' defence because he does not identify Mr Jones, nor does he corroborate KK's evidence that she was punched in the head by Mr Jones and that it was Mr Jones who demanded her car keys.

[37] The third statement, that of the second guest ED, does identify Mr Jones as accompanying Mr Kerr on the evening in question. ED had met Mr Jones about a year earlier when he was working as a bouncer in a nightclub. Contrary to the evidence of KK, ED says in his statement that it was Mr Kerr who punched KK in the head. He said:

> [Mr Kerr] then smacked her in the head with a laptop.
>
> He held it in a flat position and hit her in the face with the thin edge, he launched it at her, he threw it at her face and it hit her head, he then punched her in the head once and said anything in Tauranga belongs to me.

[38] Again, ED says nothing about Mr Jones demanding car keys from KK. He does, however, say that Mr Jones demanded car keys from PT. He says:

> [Mr Jones] told [PT] "give me the fucking keys to your car" so [PT] handed over the keys to his BMW car, he took those out of his pocket.[12]

---

[12] PT had not identified Mr Jones, but had said "One of the other three guys said to me "give me the car keys now".

[39] ED's statement is therefore prejudicial to Mr Jones' defence in that he identifies Mr Jones as demanding PT's car keys. On the other hand, he positively identifies Mr Kerr as punching KK in the head rather than Mr Jones. On balance, we are of the view that ED's statement is also not unfairly prejudicial.

[40] Counsel for Mr Jones submits that because PT, CT and ED were not able to be effectively cross-examined, their police statements should not have been admitted. The jury would then have been left with KK's evidence alone. KK was, however, clear in her evidence that Mr Jones both punched her in the head and demanded her car keys. None of the three statements identified Mr Jones as punching KK in the head and, in fact, ED's statement contradicted KK's evidence and identified Mr Kerr as the assailant, not Mr Jones. To that extent, the admission of the three statements could be seen to be of benefit to Mr Jones' defence. On the other hand, it is acknowledged that ED identified Mr Jones as demanding PT's car keys, although none of the statements corroborated KK's evidence that Mr Jones demanded her car keys.

[41] Counsel for Mr Jones also submits that he was unfairly prejudiced by the cumulative effect of the three witnesses being declared hostile and their obvious fear of retaliation. We accept that this might have initially impacted negatively on the jury's perception of Mr Jones, but the Judge was assiduous in directing the jury to put any views they may have on either gangs or drugs to one side. In particular, he directed the jury that there was simply no evidence that the witnesses' fear of retaliation was a result of any action of any of the defendants. There is, therefore, no basis for any concern that the jury may not have been able to assess the evidence independently.

[42] When looked at in terms of Mr Jones' defence at trial, we are of the view that the admission of the three statements from PT, CT and ED was not unfairly prejudicial to Mr Jones. Mr Jones was not identified in the statements of PT and CT and there were aspects of ED's statement that were both beneficial and prejudicial to Mr Jones' defence.

[43] Although Mr Jones' defence was that he was not an active participant in the aggravated robberies, there is no evidence of Mr Jones distancing or disassociating himself or withdrawing when he saw what was happening. Mr Jones was clearly able

to be convicted on KK's evidence alone because she was adamant that Mr Jones joined Mr Kerr in the infliction of violence on her and, by words and conduct, participated in the making of threats of violence.

[44] The appeal against conviction on the basis that the statements of PT, CT and ED were wrongly admitted as evidence is dismissed. They were not unfairly prejudicial to Mr Jones' defence and were therefore not wrongly admitted. There is no criticism of the trial Judge's directions as to how they might be used by the jury.

Appeals against sentence

[45] In the District Court sentencing, after referring to the tariff decision of *R v Mako*,[13] the Judge adopted a starting point for Mr Kerr of 10 years' imprisonment.[14] He took into account premeditation, violence, use of a weapon, multiple offenders, vulnerability of the victims, unlawful presence in a dwelling house and use of disguises.[15] Notably, the Judge considered that it was "highly likely" that the initial approach for methamphetamine was "simply a strategy" to effect the aggravated robbery.[16]

[46] The Judge then added a one year uplift for the robbery on 22 July 2015.[17] The Judge also added a six month uplift for the charge relating to receiving property.[18] Finally, the Judge added a one year uplift for previous convictions.[19] He then discounted the adjusted starting point by a year for Mr Kerr's attempts at rehabilitation while in prison and for totality.[20] He reached an end sentence of 11 years and six months' imprisonment.[21] The Judge also imposed concurrent sentences of one year's imprisonment for the robbery charge and a further 6 months' imprisonment for the receiving charge.[22]

---

13 *R v Mako* [2000] 2 NZLR 170 (CA).
14 *R v Kerr*, above n 5, at [14].
15 At [6] and [11].
16 At [13].
17 At [15].
18 At [16].
19 At [16].
20 At [19].
21 At [20].
22 At [21]–[22].

[47] The Judge reduced Mr Jones' starting point by six months compared to that of Mr Kerr to reflect Mr Jones' lesser role. To the effective starting point of nine years and six months' imprisonment, he added an uplift of six months' imprisonment to reflect Mr Jones' previous convictions, resulting in an end sentence of 10 years' imprisonment.[23]

[48] Counsel for Mr Kerr submits that the sentence imposed upon Mr Kerr was manifestly excessive because the Judge erred:

(a) in taking a starting point of 10 years, given the low level of violence and harm caused, the minimal planning and premeditation behind the charge and the lack of disguise worn by the Mr Kerr;

(b) in imposing an uplift of one year's imprisonment for the charge of robbery, given the value of the goods taken and the victim's evidence; and;

(c) in imposing an uplift of one year for Mr Kerr's previous convictions as this resulted in a starting point that was manifestly excessive.

[49] Counsel for Mr Jones submits that the sentence imposed on Mr Jones was manifestly excessive because the Judge erred in taking a starting point of nine years and six months' imprisonment. He emphasises, in particular, the lack of actual evidence of premeditation and the fact that Mr Jones was not disguised.

Starting point

[50] The Judge considered that it was highly likely that the initial offer of a laptop for half a gram of methamphetamine was simply a strategy to get into the property without trouble.[24] We have seen no evidence to persuade us that the Judge's assessment is wrong. Mr Kerr was clearly prepared for the prospect of violence. He brought a machete to the address and came with a number of associates. But this does not mean that the aggravated robbery was significantly planned in advance. KK

---

23 *R v Jones*, above n 6, at [12].
24 *R v Kerr*, above n 5, at [13].

described Mr Kerr as having a practice of standing over people: "[h]e'd be more in there, loud, obnoxious and take everything that he could". Mr Kerr obviously believed the property to be a place where he could get drugs, but he entered the property with more than an intention to buy methamphetamine. We are of the view, however, that there were elements of opportunism and reaction in the subsequent events.

[51] We also do not think that the use of disguises was a significant aggravating feature of the offending. Disguises and other means of concealing identity and facilitating flight may suggest premeditation and planning.[25] But they must be viewed in context. Here, Mr Kerr and Mr Jones did not enter the property wearing scarves. They quite clearly made no effort to conceal their identities from the occupants of the property. That their associates wore scarves that they were carrying with them when summoned by Mr Kerr is not in dispute. In the circumstances, however, this does not indicate premeditation of the particular crime. It is not a particularly aggravating factor for the two appellants.

[52] On that basis, we consider the Judge erred in his assessment of premeditation when setting the starting point.

[53] Counsel for Mr Kerr also referred us to this Court's decision in *K (CA79/2016) v R*.[26] In that case, three offenders broke into a private property and assaulted the victim by punching him repeatedly in the head. They stole approximately $7,000 in cash and left the victim in handcuffs with a broken arm. A starting point of 10 years' imprisonment was upheld.[27] We note the lower level of violence in this case by way of contrast.

[54] A lower starting point is therefore appropriate. This is more consistent with case law. In *R v Mako*, this Court relevantly observed:[28]

> [58] Forced entry to premises at night by a number of offenders seeking money, drugs or other property, violence against victims, where weapons are brandished even if no serious injuries are inflicted would require a starting point of seven years or more. Where a private house is entered the starting

---

25 *R v Mako*, above n 13 at [38].
26 *K (CA79/2016) v R* [2016] NZCA 297.
27 At [12].
28 *R v Mako*, above n 13.

> point would be increased under the home invasion provisions to around ten years.

[55] In sentencing Mr Jones, the Judge said "[t]his was in my view clearly akin to a home invasion of a dwelling house".[29] However, the definition of home invasion in the Crimes (Home Invasion) Amendment Act 1999 included as an essential element the breaking and entering of an occupied dwelling house.[30] This was, however, not an example of forced entry or home invasion. Mr Kerr and Mr Jones were permitted inside the property by the occupants, albeit perhaps uneasily. There was no clear premeditation. On the other hand, there was low level violence and threats, and a machete was brandished. A starting point of between the two starting points listed in *R v Mako* is appropriate.[31] The Judge noted that "[e]ven absent significant premeditation, the involvement of a group of four with gang overtones and disguises to the ready was a frightening prospect".[32] We agree. But a lower starting point taking into account that the attack was not significantly planned nor truly a home invasion reflects the seriousness of the offending.

[56] In *Kingi v R*, this Court did not disturb a starting point of eight years' imprisonment for a similar aggravated robbery.[33] The three offenders visited a property while looking for cannabis. When they were unable to find any, the offenders knocked on the door and forced their way past the occupant to gain entry. They then took turns sitting on the victim's chest and threatening her with a knife while demanding the keys to a vehicle outside. One offender also took an 18 month old child from a nearby room and held a knife to the baby's throat. When they were unable to obtain the keys, the offenders smashed a window to the vehicle, took cannabis from the vehicle worth about $800, and stole other items including cellphones and a laptop. Although that situation involved forced entry to a home and potentially more serious violence given the weapon was held to the occupant's throat, it is broadly similar to the current offending. On the other hand, less physical injury was inflicted.

---

29 *R v Jones*, above n 6, at [8].

30 We note that this legislation is now repealed. The unlawful entry or presence in a dwelling place is now a separate aggravating factor under s 9(1)(b) of the Sentencing Act 2002. The Judge recognised it as a relevant factor in this case.

31 *R v Mako*, above n 13, at [58] and [59].

32 *R v Jones*, above n 6, at [10].

33 *Kingi v R* [2013] NZCA 393.

[57] We consider a starting point of eight years and six months' imprisonment is appropriate for Mr Kerr as the lead offender.

[58] A slightly lower starting point of eight years imprisonment is appropriate for Mr Jones to reflect his lower culpability. Although he was an active participant in the offending, including punching KK in the head and demanding car keys, he was not the instigator nor was he the leader. Mr Kerr was both instigator and leader.

Factors specific to Mr Kerr

[59] The Judge adopted an uplift of one year's imprisonment for the robbery on 22 July 2015 of a cellphone worth $150.[34] Mr Kerr was on the property with permission and took the cellphone from a visitor to the property. We cannot accept Mr Kerr's submission that the victim was happy to allow him to take and use the cellphone, as it is inherent in Mr Kerr's conviction that the cellphone was taken without consent and with the intent to permanently deprive her of it. Quite clearly there was some fear involved on the part of the victim both at the time of the offending and subsequently. However, the robbery was minor in scale.

[60] In those circumstances, we are of the view that the uplift of one year's imprisonment was too long. A robbery of this kind and value would be unlikely to attract a sentence of that length as a stand-alone offence. However, Mr Kerr was also for sentence for receiving goods in excess of $1,000, for which the Judge gave a further uplift of six months.[35] Again, given the circumstances, this is a high uplift relative to the sentence that charge alone would have received. In our view, taking into account both sets of offending, a total uplift of six months' imprisonment is appropriate.

[61] The Judge then turned to Mr Kerr's previous convictions.[36] An uplift of one year's imprisonment is not itself objectionable for Mr Kerr's numerous previous convictions, including two for aggravated robbery and many others for violent offending. This would bring Mr Kerr's starting point to 10 years' imprisonment.

---

34 *R v Kerr*, above n 5, at [15].
35 At [16].
36 At [16].

[62] Turning to mitigating factors, the Judge reduced the sentence by one year, or about eight per cent, for the positive steps Mr Kerr had taken while in prison and the prospect of changes in Mr Kerr's attitude and behaviour. This is an appropriate discount. An eight per cent discount on the current starting point brings Mr Kerr's end sentence to nine years and two months' imprisonment.

[63] Mr Kerr was also ordered to pay reparation to his victims. There is no reason why this should be altered.

Factors specific to Mr Jones

[64] Mr Jones appeals only on starting point. As established, a starting point of eight years imprisonment is appropriate.

[65] The Judge imposed an uplift of six months' imprisonment for Mr Jones' previous convictions.[37] This is within range and appropriate relative to Mr Kerr's more extensive criminal history and larger uplift.

[66] There are no relevant mitigating factors to take into account in respect of Mr Jones.

[67] This brings Mr Jones' end sentence to eight years and six months' imprisonment.

Result

[68] The appeal by Mr Jones against conviction is dismissed.

[69] The appeals by Mr Kerr and Mr Jones against sentence are allowed.

[70] Mr Kerr's sentence of 11 years and six months' imprisonment is quashed. Concurrent sentences of nine years and two months' imprisonment for aggravated robbery, three months' imprisonment for robbery and six months' imprisonment for receiving are imposed. The other aspects of the sentence are confirmed.

---

37 *R v Jones*, above n 6, at [12].

[71] Mr Jones' sentence of 10 years' imprisonment is quashed and a sentence of eight years and six months' imprisonment is substituted.

Solicitors:
Crown Law Office, Wellington for Respondent