IN THE COURT OF APPEAL OF NEW ZEALAND

CA349/2017
[2017] NZCA 545

BETWEEN	AKOSITA VAEAFISI Appellant
AND	THE QUEEN Respondent

Hearing:	13 November 2017
Court:	Harrison, Lang and Ellis JJ
Counsel:	N P Chisnall for Appellant JEL Carruthers for Respondent
Judgment:	24 November 2017 at 2.30 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Lang J)

[1] Akosita Vaeafisi pleaded guilty in the District Court at Manukau to six charges of aggravated robbery and one charge of burglary. On 14 June 2017 Judge Andrée Wiltens sentenced Ms Vaeafisi to six years and nine months' imprisonment on all charges.[1]

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1 *R v Waitai* [2017] NZDC 12651.

[2] Ms Vaeafisi appeals against sentence. She does not contend the end sentence was manifestly excessive having regard to her overall culpability. Rather, she argues that it needs to be reduced further to achieve parity with a sentence of five years and six months' imprisonment that was imposed on her sister and co-offender, Alavinya Vaeafisi (referred to by her first name in this judgment).[2]

The charges

[3] The charges were laid after the police established that Alavinya and Ms Vaeafisi had planned and executed a series of aggravated robberies in South Auckland between 10 February and 16 March 2015. They arranged for other members of their family to participate in these activities. The offending involved the robbery of occupants of private dwellings, together with street robberies and the robbery of dairies and a takeaway shop. In each case several members of the group would carry out the robbery whilst others would act as lookouts or getaway drivers.

[4] In total, the group committed eight separate aggravated robberies, one attempted aggravated robbery, a burglary and theft. All of the group shared in the proceeds of the offending. This generally comprised cigarettes and small quantities of cash. The exception was the robbery of a dairy in which cash, cigarettes and a cellphone to a total value of approximately $10,000 were taken.

The procedural background to the appeal

[5] To understand properly the issues raised by the appeal, it is necessary to have regard to its procedural background. This relates to the sentences imposed on Alavinya and Ms Vaeafisi.

Alavinya's original sentence

[6] Like Ms Vaeafisi, Alavinya planned and coordinated the robberies. On occasions she provided advice by cellphone whilst the offending was in progress, and she also acted as a lookout and getaway driver in two of the robberies.

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2 *R v Kirk* [2017] NZHC 673 at [87].

[7] Alavinya pleaded guilty after accepting a sentence indication given by Judge McNaughton in the District Court. The Judge took a starting point of seven years' imprisonment on the lead offence, and then increased that to ten years' imprisonment to reflect the totality of the offending. He considered Alavinya's reduced physical role in the offending warranted a reduction of one year from the starting point, but offset that by an uplift of the same amount to reflect the fact that Alavinya had three previous convictions for aggravated robbery. She had received a sentence of five years' imprisonment for that offending in 2005. The Judge then indicated he would apply a discount of 25 per cent to reflect guilty pleas if they were entered promptly.

[8] Following her acceptance of the sentence indication, Alavinya improved her position further by making a statement to the police in which she acknowledged her role in the offending and identified the roles played by other family members in the crimes committed by the group. She also confirmed she would give evidence for the Crown at the trial of those persons.

[9] When he sentenced Alavinya on 21 December 2016, Judge McNaughton adopted the overall starting point of ten years' imprisonment he had earlier selected to reflect Alavinya's culpability in relation to all offending.[3] He then applied a 25-per-cent discount, as previously indicated, to reflect guilty pleas. From the resulting sentence of seven years and six months' imprisonment he applied a further discount of two years and six months to reflect the fact that Alavinya had agreed to cooperate with the Crown and give evidence against her co-offenders. He also reduced the sentence by one year to reflect remorse that Alavinya had expressed her willingness to attend a restorative justice conference and rehabilitative steps she had undertaken whilst in custody. This produced an end sentence of four years' imprisonment that the Judge imposed on all charges concurrently.

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3 *R v Vaeafisi* [2016] NZDC 26230.

The Solicitor-General's appeal

[10] The Solicitor-General appealed against the sentence imposed on Alavinya and another of her co-offenders, Sammie-Jo Kirk.[4] In a judgment delivered on 10 April 2017, Toogood J allowed the appeal.[5] He considered that Alavinya's offending warranted a starting point of not less than 13 years' imprisonment.[6] Toogood J also considered that Judge McNaughton had erred in reducing the starting point by a year to reflect the reduced physical role she had played in the offending.[7] He considered that Alavinya was a full participant in the overall enterprise, and the fact that she had not physically carried out the robberies did not justify any reduction in the starting point.

[11] Toogood J accepted that an uplift of one year was appropriate to reflect Alavinya's failure to respond positively to previous convictions for similar offending.[8] He also agreed that, although they were generous, the discounts allowed by the Judge for guilty pleas and the offer to provide assistance to the Crown were within the available range.[9] Toogood J considered, however, that the Judge had erred in applying these discounts. He observed:

> [76] The Judge's principal error, however, lay [in] the way in which he used the guilty plea and assistance discounts in calculating the end sentence. It is clear from the authorities such as *Hessell*, *Taueki* and *Hadfield* that the guilty plea discount must be applied at the end of the analysis, after the starting point and any other adjustments for personal aggravating or personal mitigating factors are taken into account. Applying the discount directly to the adjusted starting point, as the Judge did in this case, inflates the significance of the discount. Here the generous allowance of 50 per cent, deducted from the adjusted starting point of 10 years the Judge adopted, had the effect of reducing the sentence by five years. Had the Judge applied it at the correct stage of the analysis, the adjustment would have been four years and six months.
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> [77] The end result of a principled approach to sentencing Ms Vaeafisi consistently with authority should have produced a sentence in the range of six to seven years. Instead, the compound effect of the Judge's errors resulted in an end sentence of only four years' imprisonment. It is clear that was manifestly inadequate.

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4 *R v Kirk* [2012] NZDC 26280.
5 *R v Kirk*, above n 2.
6 At [67].
7 At [68]–[70].
8 At [73].
9 At [75].

(Footnote omitted.)

[12] Having concluded that Alavinya ought to have received an end sentence within the range of six to seven years, the Judge allowed the appeal and increased Alavinya's sentence to one of five years and six months' imprisonment.[10] He did so to reflect the well-established principle that any successful appeal by the Solicitor-General should result in an increased sentence at the bottom of the available range.[11]

The sentence imposed on Ms Vaeafisi

[13] Judge Andrée Wiltens sentenced Ms Vaeafisi after Toogood J had delivered his decision allowing the appeal against the sentence imposed on Alavinya. He was therefore aware of the observations Toogood J had made regarding the appropriate starting points and end sentence in respect of Alavinya's offending. Judge Andrée Wiltens said he found himself in "a very unsatisfactory situation" because of the extremely lenient sentence Alavinya had received.[12] Adopting the approach taken by Toogood J, the Judge applied a starting point of seven years' imprisonment to reflect the offence he selected as the lead offence.[13] He then increased that by six years to reflect Ms Vaeafisi's overall culpability in respect of the remaining charges.[14] This produced a starting point of 13 years' imprisonment before taking into account aggravating and mitigating factors.

[14] After pleading guilty Ms Vaeafisi had followed Alavinya's lead and agreed to give evidence for the Crown at the trial of her co-offenders. Judge Andrée Wiltens reduced the starting point by 35 per cent to reflect that fact, as well as her lack of previous convictions.[15] He then reduced the sentence by 12.5 per cent to reflect late guilty pleas.[16] This produced an end sentence of seven years and three months' imprisonment. The Judge considered this was too high to reflect adequately the requirement of parity having regard to the end sentence imposed on Alavinya.[17]

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10 At [77] and [86]–[87].
11 At [85].
12 *R v Waitai*, above n 1, at [1].
13 At [6].
14 At [7].
15 At [11].
16 At [12].
17 At [13].

He therefore reduced the sentence by a further six months. This resulted in concurrent sentences of six years and nine months' imprisonment on each charge.

The appeal

[15] On Ms Vaeafisi's behalf Mr Chisnall contends there is an unjustified disparity between the sentence of six years nine months' imprisonment that Ms Vaeafisi received and the sentence of five years and six months' imprisonment imposed on Alavinya. He points out that, unlike Alavinya, Ms Vaeafisi did not have any relevant previous convictions and, like Alavinya, she was able to call on mitigating factors that ought to have produced an end sentence no greater than that imposed on Alavinya. Mr Chisnall contends the disparity is so marked that it calls into question the integrity of the administration of justice.

Decision

[16] The only issue we are required to determine is whether the Judge ought to have reduced Ms Vaeafisi's end sentence of six years and nine months' imprisonment in order to bring it into line further with the sentence Toogood J imposed on Alavinya after allowing the Solicitor-General's appeal.

[17] We do not consider that to be appropriate for several reasons. First, Toogood J had identified the appropriate end sentence for Alavinya's offending as being within the range of six to seven years' imprisonment. We consider he was extremely generous in then imposing a sentence of five years and six months' imprisonment. If a sentence of six years' imprisonment was at the bottom of the available range, it is arguable that Toogood J ought to have imposed that sentence on Alavinya.

[18] Secondly, the end sentence that Alavinya received was, as Toogood J observed, the result of an appeal by the Solicitor-General. We do not consider the fact that a lower sentence has been imposed on one offender for that reason justifies the reduction of an otherwise proper sentence on a co-offender.

[19] Thirdly, the difference between the two end sentences is explicable in large part to the greater discount Alavinya received for her earlier guilty pleas.

[20] Fourthly, the desirability of consistency between sentences imposed on co-offenders who have committed similar offences rests on the proposition that any marked departure in sentencing levels without adequate reason "can result in injustice to an accused person and may raise doubts about the even-handed administration of justice".[18] Sometimes the test is described as being whether an independent and objective observer would consider the disparity between sentences imposed on co-offenders calls into question the administration of justice.[19]

[21] In the present case, we consider that an independent and objective observer would recognise that Judge Andrée Wiltens had applied the starting point of 13 years' imprisonment held to be appropriate by Toogood J. Such a person would also readily appreciate the reasons why in this particular case the end sentences were different. These included the fact that Alavinya's sentence was the result of a Solicitor-General's appeal and Alavinya had entered her guilty pleas earlier than Ms Vaeafisi.

[22] Furthermore, in a sentencing context, two wrongs do not make a right. We consider an independent and objective observer may well conclude that the administration of justice was called into question if it permitted Ms Vaeafisi to receive the same sentence as Alavinya. The observer would most likely be of the view that Ms Vaeafisi should not be entitled to share in the benefit of Judge McNaughton's error beyond the allowance Judge Andrée Wiltens has already given her.

[23] For these reasons we do not consider it appropriate to reduce the end sentence further to reflect parity principles.

Result

[24] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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18 *R v Morris* [1991] 3 NZLR 641 (CA) at 645.
19 *Singh v R* [2013] NZCA 245 at [35].