IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA672/2018
[2019] NZCA 394

BETWEEN	PHILLIP RICHARD JOE Appellant
AND	THE QUEEN Respondent

Hearing: 29 July 2019 (Further submissions received on 21 August 2019)

Court: French, Mallon and Moore JJ

Counsel: A J Bailey for Appellant
M N Zarifeh and S J Mallett for Respondent

Judgment: 29 August 2019 at 11.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] On 20 July 2018, in the District Court at Nelson, a jury found Phillip Richard Joe guilty of four charges arising out of events on 28 February 2017 and 13 May 2017.

[2] The charges were:

(a) male assaults female (x 2);[1]

(b) kidnapping;[2] and

(c) threatening to do grievous bodily harm.[3]

[3] On 18 July 2018, the morning his trial commenced, Mr Joe pleaded guilty to driving while disqualified.[4] On appeal, there was some dispute as to whether this charge was in its aggravated form, that is driving whilst disqualified (third or subsequent)[5] or a charge of driving while disqualified simpliciter.[6] We address that issue more fully below.

[4] On 19 September 2018 Judge S J O'Driscoll sentenced Mr Joe to a term of four years and six months' imprisonment.[7] He also disqualified Mr Joe from holding or obtaining a driver's license for a period of 18 months.

[5] Mr Joe now appeals his sentence.

The offending

[6] Mr Joe was in an intermittent relationship with the victim, R, for approximately 18 months. The offending against R related to two separate events occurring on 28 February 2017 and 13 May 2017.

Male assaults female – 28 February 2017

[7] That morning R was asleep on a couch at her home. Mr Joe entered without R knowing. She woke up to find him there. Quite what led Mr Joe to assault R is unclear, but he picked her up by the arms and legs "… like a baby …" and dropped her onto a

---

1 Crimes Act 1961, s 194(b); the maximum penalty is two years' imprisonment.
2 Section 209; the maximum penalty is 14 years' imprisonment.
3 Section 306(1)(a); the maximum penalty is seven years' imprisonment.
4 Land Transport Act 1998, s 32(1)(a).
5 Section 32(4); the maximum penalty is two years' imprisonment or a fine of $6,000.
6 Section 32(3); the maximum penalty is three months' imprisonment or a fine of $4,500.
7 *R v Joe* [2018] NZDC 22723.

coffee table. She ended up on the floor between the coffee table and the couch. The assault aggravated a pre-existing back condition.

[8] The jury acquitted Mr Joe of three other related charges connected to the events of this day.

Kidnapping – male assaults female, threatening to do grievous bodily harm and driving whilst disqualified – 13 May 2017

[9] Mr Joe faced 10 charges relating to the events on 13 May 2017. He was convicted of the three referred to above. The Judge discharged him on one charge, he pleaded guilty to the driving charge and the jury acquitted him on the remaining five. The circumstances relative to the convictions are described below.

[10] On 13 May 2017 R was again asleep on the couch in her home. She awoke to find Mr Joe asleep on another couch. He had not been invited. An argument developed leading R to ask Mr Joe to leave. He did, but then attempted to take her vehicle. R went outside in an attempt to stop him. He responded by grabbing her by the hair and pulling her onto the front seat of the car, leaving her legs outside. She managed to pull her legs back as he pushed her head down. She was unable to see where he was driving.

[11] The evidence is unclear how long R was restrained in this way before the car stopped at the Wakapuaka Cemetery. Counsel described this as being just a few kilometres away from where R was then living.

[12] Once at the cemetery, Mr Joe threatened R. As she sat on a bench he approached her wielding a large wrench. In her evidence, R said Mr Joe was armed with a wrench in one hand and what was described as a steering column in the other. Mr Joe struck the back of the wooden bench on either side of where R was seated. This was with sufficient force to leave indentations on the wood which are plainly visible in the photographs later taken at the scene. Mr Joe told R not to run away. He threatened that if she did he would break her legs.

[13] At one point, while R was seated on the park bench, Mr Joe delivered what R described as a "round house kick" to her head.[8] In her evidence R described how this happened. She said Mr Joe stood in front of her. He swung his leg around, striking her head with his foot above her right ear.

[14] At some point during the detention R attempted to escape. Pursued by Mr Joe she ran up through the cemetery before falling over an embankment and landing on her back on the road below fracturing her coccyx, or tail bone. Mr Joe caught her and returned her to where the couple had been.

[15] The detention ended when Mr Joe told R to get back in the car. He said he would drop her off, adding "… ride or die we're in this together", a reference which R understood to be to Bonnie and Clyde. R got into the car but their way was blocked by a Corrections van driven by an officer who was supervising a gang of community workers. The supervisor approached the car driven by Mr Joe. Mr Joe was holding what appeared to be a large wrench. R unsuccessfully attempted to wrest it from Mr Joe. The supervisor called 111 and a short time later the police arrived.

[16] R was taken to the Nelson Public Hospital's emergency department for treatment. The attending doctor described superficial scratches to the front of her neck, tenderness and bruising around the base of her neck and the right side of her chest. An x-ray confirmed the fracture of her coccyx.

Sentencing decision

[17] The Judge took the kidnapping as the lead charge.[9] He accepted that the kidnapping was not premeditated in the sense it occurred only after R had attempted to prevent Mr Joe from taking her car. Despite the domestic context he found there was no breach of trust due to the "utterly dysfunctional" state of

---

8 We note that Judge O'Driscoll at in *R v Joe*, above n 7, at [16] sentenced Mr Joe on the basis that he was acquitted of this charge and instead convicted of a different male assaults female charge (Charge 9), which alleged that he punched her to the head. But the annotated Crown Charge List records that Mr Joe was acquitted of Charge 9 and found guilty of Charge 11, which was the roundhouse kick. We do not consider the discrepancy affected the Judge's sentence in a material way, but proceed to consider Mr Joe's appeal on the basis that he should have been sentenced for Charge 11.

9 *R v Joe*, above n 7, at [17].

the relationship.[10] However, the Judge accepted there was an element of "pursuit and recapture" which aggravated the offending.[11] Further aggravating factors listed by the Judge were the use of a weapon and the violence and threats reflected in the other charges.[12]

[18] After referring to a number of other cases, the Judge adopted a starting point of three years' imprisonment for the kidnapping and related convictions.[13] He then made the following uplifts:

(a) six months for the male assaults female offending in February;[14]

(b) nine months for driving while disqualified (being a 12-month starting point reduced by three months to reflect the guilty plea);[15] and

(c) three months for Mr Joe's previous convictions, particularly those involving domestic violence, albeit with a different victim.[16]

[19] In respect of the driving whilst disqualified, the Judge accepted that the driving aspect formed part of the whole incident. He noted that Mr Joe had 14 or 15 previous convictions for the same offence and eight for other driving-related driving offences.

Appellant's submissions

[20] Mr Bailey, for Mr Joe, made three primary submissions.

[21] First, he submitted the three year starting point for the kidnapping and related offending was "right at the very upper range available". In support of that submission

---

10 At [25].
11 At [21].
12 At [17] and [26].
13 At [19]–[27] citing *R v Wharton* (2003) 20 CRNZ 109 (CA); *Heke v R* [2016] NZCA 38; *Trainor v R* [2015] NZHC 921; *R v Wereta* [2017] NZHC 935; *Moffatt v R* [2015] NZHC 107; and *R v Davis* HC Hamilton CRI-2009-019-6062, 15 September 2009.
14 *R v Joe*, above n 7, at [27].
15 At [29].
16 At [27]. We note that in 2016 Mr Joe was convicted of two charges of contravening a protection order, common assault and causing harm by posting a digital communication, all in the family violence context; in 2015 he was convicted of common assault and contravening a protection order. Mr Joe also has historical convictions for male assaults female, indecent assault, contravening a protection order, injuring with intent and burglary.

he relied on this Court's decision in *Heke v R* where a starting point of two years and four months' imprisonment was upheld for kidnapping, threatening to kill, male assaults female and breach of a protection order.[17] Mr Heke had broken into a house where his former partner was staying. After waking her he demanded she leave with him. When she refused he dragged her by the hair to the front door and threatened to kill her. Mr Heke fled after the police were called. A starting point of two years and four months was described by this Court as "well within the available range".[18]

[22] On this authority Mr Bailey submitted that anything more than a three year starting point for Mr Joe's offending was excessive. Although R was detained for a longer period, the offending in *Heke* was premeditated, involved a home invasion element and was aggravated by the breach of the protection order.

[23] Secondly, Mr Bailey submitted that in sentencing Mr Joe to nine months' imprisonment on the driving while disqualified charge, the Judge had imposed a sentence greater than the statutory maximum. According to Mr Bailey this arose from Mr Joe pleading guilty to the charge in its simple and unaggravated form which carries a maximum penalty of three months' imprisonment.[19] However, the Judge sentenced Mr Joe on the basis he had been convicted of driving while disqualified, being his third or subsequent conviction which carries a maximum penalty of two years' imprisonment. Mr Joe has some 14 or 15 previous convictions for driving while disqualified as well as eight other driving-related matters. For these reasons Mr Bailey submitted that the sentence imposed was not only without jurisdiction but was excessive when viewed in the context of the whole of the offending.

[24] Finally, Mr Bailey submitted that the six month uplift for the February male assaults female offending was excessive. In support he referred us to *Wawatai v Police*.[20] Mr Wawatai was convicted of punching his partner once in the face causing a blood nose and swelling. Justice Courtney held that a seven month

---

17 *Heke v R*, above n 13.
18 At [11].
19 Land Transport Act, s 32(3)(a).
20 *Wawatai v Police* [2015] NZHC 406.

starting point would have been appropriate, noting that comparable cases reveal a range of between five and nine months' imprisonment.[21]

[25] Thus Mr Bailey said that the combination of "top-end (or higher)" sentences resulted in a final sentence which was manifestly excessive. The Judge failed to remedy this imbalance in his totality analysis.

Discussion

Did the sentence for disqualified driving exceed the maximum penalty and/or was it excessive?

[26] Much of the argument before us was focused on the nature of the disqualified driving charge which Mr Joe pleaded guilty to; was it in its simple form or was it the aggravated form? Given the difference in the maximum penalty the distinction is an important one.

[27] It is unnecessary to traverse the competing arguments other than to note that based on the information contained on the Court file it could be argued either way. For that reason we caused a search to be made of the FTR audio record and, in particular, the discussions counsel had with the trial Judge on the morning of Mr Joe's trial.

[28] That record reveals the prosecutor advised the Judge he would amend the Crown charge list in respect of Charge 7, the driving while disqualified charge. He said he would:

> … take out third and subsequent even though the defendant had indicated he would plead guilty to that charge … to conform with the usual practice.

[29] When the Judge inquired of defence counsel whether there was anything he wished to add, Mr Vesty confirmed that his client would plead guilty to Charge 7:

> But knowing that it is in the aggravated form just so as to remove the issue about prior convictions from the jury's mind.

---

21 At [4].

[30] The Crown charge list was amended. Charge 7 was expressed in its non-aggravated form. Consistent with the audio record, the document on the Court file records a plea of guilty was entered.

[31] An amendment of this sort is consistent with the usual procedure where a charge contains an allegation of a previous conviction or convictions. Prior to the passing of the Criminal Procedure Act 2011 ("the CPA") the practice involved the use of a "dummy indictment" to avoid the potential prejudice of a jury learning the defendant has prior convictions. The process is analogous to that when recidivist drink drivers are charged with a third or subsequent offence,[22] as discussed by this Court in *R v Morunga*.[23] It is also consistent with s 108 of the CPA which provides that if a charge contains an allegation that the defendant has been previously convicted the allegation must not be mentioned to the jury when the defendant is given in charge to them.

[32] Plainly this is what counsel and the Judge were referring to in their pre-trial discussions.

[33] By way of a post-hearing minute we brought the contents of the FTR record to counsel's attention and invited further submissions.[24] Further submissions were received on 20 and 21 August 2019. Both accept the record confirms Mr Joe entered his plea of guilty to the driving while disqualified charge in the knowledge and understanding it was in its aggravated form and he was thus liable to a maximum term of imprisonment of two years. However, despite this concession, Mr Bailey maintains the overall sentence was nonetheless manifestly excessive.

Was the starting point too high?

[34] We are satisfied that the starting point of three years for the kidnapping and related charges was not too high. Our reasons follow.

---

22 Land Transport Act, s 57A(3).

23 *R v Morunga* [2009] NZCA 292 at [4]. See also *R v Livingston* [2001] 1 NZLR 167 (CA); and *R v MacLeod* (2002) 19 CRNZ 513 (CA).

24 *Joe v R* CA672/2018, 19 August 2019.

[35] The offending in the present case was considerably more serious than that in *Heke*. On the evidence before the jury, R was detained against her will for at least one and three quarter hours. She was dragged from her home by her hair to the car, forced inside and her head pushed down. She was driven to a cemetery. Other aggravating factors not present in *Heke* include her desperate, but ultimately unsuccessful, attempt to flee and the injuries she suffered as a result. And, unlike *Heke*, Mr Joe threatened R with a weapon or weapons in the form of a heavy implement or implements as she sat on the park bench. Adding to these factors is the "round house" kick to R's head as she sat on the park bench.

[36] It is also more serious than the offending in *Moffatt v R*, referred to by the Judge and the Crown. In *Moffatt* the victim got out of a car following an argument with the offender. When she tried to call the police he chased her and threw her back into the car. He took her phone and locked the doors of the car before driving off. When she tried to press the horn, he grabbed her by the back of the head ripping out hair extensions. She managed to escape when the car stopped at the offender's home. Justice Dunningham described the starting point of two years and nine month as "entirely appropriate".[25]

[37] Although *Moffatt* involved an element of recapture and the making of threats, the violence and the length of the detention in the present case was considerably greater. As for the recapture in the present case it involved a pursuit which ended after R fell over a bank and injured herself. That is plainly quite different from what appears to have happened in *Moffatt* where the pursuit was a good deal less sustained.

[38] Further, as the Crown observed, the six month uplift for the February offending sits comfortably within the range of starting points discussed by Courtney J in *Wawatai*. In our view there is no practical distinction between a single punch to the face and deliberately dropping someone with a pre-existing injury onto a coffee table.

[39] Furthermore, Mr Joe's lamentable driving-related offending means that the 12 month starting point for the driving while disqualified charge, given

---

[25] *Moffatt v R*, above n 13, at [28].

the two year maximum penalty, could not be described as excessive. The effective 25 per cent guilty plea discount is properly described as generous given it was entered on the morning of the trial.

[40] Finally, it would have been open to the Judge to have given a greater uplift than the three months he did to reflect Mr Joe's previous convictions. His criminal history runs to 14 pages. While many of his previous convictions relate to driving matters and were thus considered in relation to the driving while disqualified uplift, there are seven for violence of which at least four involved domestic assaults or assaults on women, and 10 convictions for contravening protection orders.

[41] On the question of totality, we do not consider any adjustment was required. The end sentence of four years and six months' imprisonment properly reflects Mr Joe's culpability given the range of offending and his previous criminal history.

Result

[42] The appeal is dismissed.

Solicitor:
Crown Solicitor, Christchurch for Respondent