

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA656/2009
[2010] NZCA 8**

BETWEEN ABRAHAM NEHO
Appellant
AND THE QUEEN
Respondent

Hearing: 11 February 2010
Court: Ellen France, Venning and Miller JJ
Counsel: R G Glover for Appellant
N P Chisnall and B P D Leslie for Respondent
Judgment: 15 February 2010 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] Mr Neho appeals against a sentence of two years, six months imprisonment imposed in the District Court at Christchurch on one count of injuring with intent to injure.¹

¹ *R v Neho* DC Christchurch CRI-2008-009-003634, 2 October 2009.

The facts

[2] On Tuesday 12 February 2008 the victim was seated by himself on a planter box in Cambridge Terrace, Christchurch. He was in Christchurch with his partner, who was undergoing treatment for cancer at Christchurch Hospital. Another man approached him and engaged him in conversation.

[3] The victim was then approached by the appellant and an associate. The summary of facts recorded that the appellant without provocation abused the victim, then attempted to grab tobacco and a beer bottle that the victim was holding. A short struggle ensued, but the appellant was pulled away by the man who had been speaking to the victim. The depositions evidence disclosed that that man assaulted the appellant, allegedly strangling him until he lost consciousness, then left the scene.

[4] The appellant swiftly recovered and returned to the victim, punching him once in the right eye with his left fist. After a short struggle the two men fell to the ground, with the appellant on top. There the appellant punched the victim about 10 to 12 times, causing him to lose consciousness temporarily. The victim suffered a heavily swollen and bruised right eye, temporarily blurred vision, a graze and swelling and bruising.

[5] The appellant elected trial, which was set down for 27 April 2009. Six days before trial he elected to plead guilty, saying that he wanted to take responsibility for his assault. He was sentenced on 2 October by Judge McElrea.

The sentencing

After reciting the facts the Judge referred to the victim impact statement, recording that it emphasised not only the physical nature of the injuries but also the fact that the victim's partner witnessed the attack and was distraught and in shock for weeks

as a result. Their relationship ended a few months later, and she told him that the assault and its impact on her was the beginning of the end of the relationship. The victim stated that he was on medication for depression and the appellant had had a permanent effect on his life.

[6] Having regard to aggravating features of the attack, the Judge took two years imprisonment as an appropriate starting point, citing *R v Harris*.² To that he added a one year uplift for the appellant's record of violence. The appellant has many previous convictions spanning the period from 1986 to 2007, including some 10 offences for violence.

[7] The Judge then deducted five months for the guilty plea, being about 14 per cent, and a further month for rounding. He acknowledged that the appellant initiated the guilty plea, indicating that he was prepared to take responsibility.

The appeal

[8] On appeal, Mr Glover accepts the aggravating features of the assault, but contends that the starting point of two years was too high because the psychological and relationship aspects of the assault could not properly be attributed to the appellant. He suggests that at the time of the attack the appellant himself had just been seriously assaulted by the man who had been talking to the victim. That assault appears to have caused him to lose consciousness and then to behave strangely.

[9] In his written submissions counsel suggested that the uplift of a year for previous convictions was also excessive, and further that allowance ought be made for the appellant having taken steps to deal with his alcohol problem and his intention to move to a family farm where he would live a different lifestyle. In argument, however, he acknowledged that the appeal stands or falls on selection of the starting point.

² *R v Harris* [2008] NZCA 528.

The Crown says that the sentence aptly reflects the overall criminality of the appellant's offending. It observes that he was sentenced on an agreed statement of facts, which recorded that he acted without provocation. The starting point was appropriate. The Court was required to consider the overall impact of the offending on the victim under s 8(f) of the Sentencing Act 2002 and s 17(1) of the Victims Rights Act 2002. Further, the appellant's previous criminal record was a significant aggravating factor, requiring a meaningful uplift. His most recent conviction for violence, in 2003, was for manslaughter resulting from punching and kicking the victim. The previous record reflected a propensity for violence, a lack of insight, and poor motivation to rehabilitate himself. The only mitigating factor was the guilty plea.

Discussion

[10] We consider that the starting point was available to the Judge. On the agreed summary of facts the assault was unprovoked, and in any event the other man's actions could not justify a renewed attack on the victim. He was punched repeatedly in the head while helpless on the ground, and suffered moderate injuries. The Judge was required to take the impact on the victim into account, and it does not follow from his accurate précis of the victim impact statement that he attributed the entirety of the victim's misfortunes to the appellant. It was reasonable to attach some weight to the victim's account, for an entirely unprovoked and violent assault may very well leave the victim with enduring psychological consequences.

[11] The uplift for previous convictions was also appropriate. The appellant has a history of violence, including the 2003 manslaughter conviction. The sentencing notes for that sentencing record that he attacked the victim's head after punching him to the ground.

[12] The credit attached to the guilty plea was appropriate, and it cannot be said that the further month was insufficient for the other mitigating factors identified at sentencing or before us.

Decision

[13] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent