



THE QUEEN

v.

MICHAEL SHANE MOANANUI C.A. 103/83
DAVID RAWIRI KUKA C.A. 70/83
ERNEST KIRIKAU MITCHELL
BROWN POI C.A. 71/83

Referred [1983] NZLR 587

Coram: Cooke J. (presiding)
Richardson J.
Casey J.

Hearing: 7 October 1983

Counsel: J.R.F. Fardell for Crown
S.E. Gifford for Moananui
I.M. Antunovic for Kuka and Poi

Judgment: 17 October 1983

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

These are applications by the Solicitor-General for leave to appeal against sentences of imprisonment for two years nine months, two years and one year, imposed respectively on Moananui (aged 22), Poi (aged 20) and Kuka (aged 17) for their parts in an aggravated robbery at a service station. Each pleaded guilty in a District Court without depositions and was committed to the High Court for sentence.

Moananui has a long list of previous convictions, Poi a considerable list and Kuka a much shorter one. None of the three has previously had a conviction for an offence as serious as this. They are associated with the Black Power

group, Moananui being a senior member. They are young Maoris, initially from North Island provincial areas, who became friendly with one another in Wellington. Moananui had a Valiant motor car in which they travelled about together.

The facts of the offence are to be collected from a police summary and separate signed statements taken by the police from each defendant. These accounts do not tally in all particulars, but for the purposes of dealing with the applications we think that the following summary can safely be taken as substantially correct.

On the day in question, Monday 14 February 1983, the three drove into Wellington from Petone. Moananui made some attempt to see the Prime Minister in connection with a suggestion of setting up a work co-operative or trust for Black Power members and others, but apparently did not actually see him. At some stage of their movements later in the day they stopped at the service station known as the Hutt Road Motor Centre. Moananui bought some petrol in a can and ascertained that the station closed at midnight. Either before or after this he proposed to the other two that they commit a robbery that night. In his police statement he said that the reason was that they had no money and he wanted to get back to Christchurch. Moananui, accompanied by Kuka, picked up a .303 rifle from where it had been hidden by Moananui in the former Black Power

headquarters in Kensington Street. Poi may not have been with them at that stage but admits to having seen the gun in the car later before the robbery was committed.

There appears to have been some reconnoitring of a service station near the Wellington Railway Station, but ultimately Moananui decided that it was the Hutt Road one that they would rob. Towards midnight they drove past the station and could see that the attendant was alone. Moananui arranged for Kuka to take over the driving of the car and act as the getaway driver. The car was parked near the northern exit from the station to the Hutt Road. Moananui provided balaclavas, which he had previously made up from old jerseys, for himself and Poi; and wearing these disguises those two went into the station, Moananui carrying the rifle and Poi carrying a large skinning knife which belonged to Kuka. Moananui cocked the rifle, demanded the money and required the attendant to lie down, which he did. Moananui eventually found the money in a bag in a drawer or on a shelf. The police summary states that he had difficulty in finding it at first and returned to put the muzzle of the rifle against the attendant's head; that incident is denied by Moananui, but we regard it as a matter of detail of no great importance. The threat was there throughout on any view.

Poi asked the attendant where the telephones were and ripped them out. Poi then made off for the car. He heard a crack and thought that Moananui might have shot the attendant, but this was not so. Moananui followed him to the car and Kuka drove off, but very soon they ran out of petrol - a sign of poor planning - and had to abandon the car and take to the beach. Moananui jettisoned the cheques (apparently amounting to about \$1200) from the bag and the bag itself, retaining the cash which he says amounted to about \$2400. He claims that he threw the gun away a little later. Evidently it was not recovered.

The three were not caught that night, but later Poi was located in Lower Hutt and Moananui and Kuka in Christchurch. In his police statement Moananui claimed that he spent almost all the money taking 'all the boys' to a concert and buying food, beer and drugs. After the arrest of Moananui and Kuka in Christchurch, an attempt at escape was made on their arrival at the District Court. Moananui did escape but was found again four days later. That episode resulted in several charges against him for which on 25 March 1983 he was sentenced in the Christchurch District Court to imprisonment for a total term of nine months. The sentence for the Hutt Road robbery was imposed on him in the High Court in Wellington on 20 May 1983 and was to commence on the expiry of the District Court sentence. Poi and Kuka had been sentenced for the Hutt Road robbery in the High Court in Wellington by the same Judge on an earlier date, 15 April 1983.

These are not cases in which it has been or could be contended that the sentencing Judge in the High Court failed to take into account any relevant consideration. He rightly referred to the seriousness of the offence of aggravated robbery, especially where weapons are used, its unfortunate prominence in this country, and the relative roles played by the three; and he gave what weight he could to any mitigating factors, such as their pleas of guilty and some favourable points in their personal histories and circumstances which, despite their records of offending, could be extracted from the probation reports.

In his argument in support of the applications to this Court, Crown counsel raised some points about the factual assumptions on which the sentences were passed. We will refer to that matter later. But Mr Fardell's basic argument was to the effect that the sentences were manifestly below established sentencing levels in New Zealand for this type of offence. He did not submit that the prevailing levels should be increased: simply that these sentences fell below them.

Counsel for the respondents did not venture any submission that the prevailing levels should be reduced, but argued that the sentences were not so markedly below them as to warrant this Court in interfering on appeal by the Crown. They stressed that a manifest inadequacy is required before this Court will increase a sentence on appeal and that

generally a rather stronger case is required on appeal to justify an increase than a reduction. We are satisfied, however, that the argument for the Crown is right. The following typical cases, many of them cited to us by Mr Fardell, confirm that the sentences under challenge are well below the appropriate level. The selection is not of course exhaustive. In particular we have not included cases where lower sentences have not been disturbed on appeal by the persons sentenced and where no general observations of any importance have been made. When the Crown has not sought leave to appeal, such cases can be of little help in defining the acceptable range.

The aggravated robbery now in question falls within a broad spectrum of offences. It is not in the most serious class of these offences, but we list some of these in the interests of perspective. They are cases in which planned armed robberies are carried out in premises such as banks so as to endanger the safety of considerable numbers of people. These cases usually attract sentences of six to eight years though both the upper and lower limits must obviously be regarded as flexible in the light of the particular facts. Examples include:

Rameka [1973] 2 N.Z.L.R. 592. Eight years upheld for bank robbery in which three men participated. Appellant carried a loaded rifle, struck a customer over the head with it and in doing so discharged it. \$16,081 taken.

Applegren and Taramoera (C.A.187/76, 154/76; judgment 9 December 1976). Eight years upheld for bank robbery (and preliminary crimes) in which three men participated. One appellant carried a loaded shotgun, the other a loaded .303 rifle. Bank officers chained up, a customer struck. Nearly \$20,000 taken.

Bradley [1979] 2 N.Z.L.R. 262. Appellant sentenced both for sales of heroin and for robbery in central Auckland post office in which \$278,346 taken; also preliminary crimes; appellant had fully loaded pistol with silencer, companion had baseball bat with which a guard was struck. On a purely arithmetical approach this Court accepted that a total of 16 years for the drug dealing and the robbery was not inconsistent with sentencing levels. Sentence reduced to 12 years on totality principle.

Waenga (C.A.187/79; judgment 3 December 1979). The confederate of Bradley. Sentence increased on appeal from five to seven years; lesser part but deeply implicated in execution of large-scale planned crime.

Coffey (C.A.13/77; judgment 3 May 1977). Bank robbery in which \$14,000 taken by appellant, acting alone; loaded shotgun. Effectively first offender, stolen motor cycle, disguise, but amateurish and easily caught. Ten years reduced to seven on appeal.

Scott (C.A.69/77; judgment 5 October 1977). Branch of Auckland Savings Bank. Appellant, accompanied by girl accomplice, carried a knife, seized woman member of staff and held it at her throat, coercing other staff to put \$3000 in bags. Under influence of drugs. Seven years upheld though 'severe'.

Allright (C.A.119/79; judgment 13 February 1981). \$30,000 taken from Auckland Railway Station by appellant and two others in carefully planned exercise. Shotgun, perhaps unloaded. Appellant a first offender aged 36, possibly led on by drinking associates. Six years upheld.

Lewis (C.A.277/80; judgment 13 March 1981). Palmerston North bank robbery; over \$15,000 taken. Co-offender carried loaded .303 rifle and principal planner, appellant collected money. Sentence on appellant of four years upheld as by no means severe. We comment that clearly it was a light sentence.

That class of offences shades into the class to which the present case belongs: aggravated robberies of smaller premises, involving less extensive risk of injury and sometimes the likelihood of smaller sums of money - premises such as suburban post offices, service stations, dairies. For these the upper and lower limits of the range of sentences tend to be somewhat lower:

Stepanicic (C.A.115/81; judgment 4 November 1981). Series of offences by 17-year old in company with others; including two robberies with violence, one of food bar (attendant knocked out, \$165 stolen), one of suburban post office (postmistress hit several times, unconscious, two days in hospital, \$1600 stolen). Seven years upheld despite age.

X Tapiki and Wati (C.A.297/80, 6/81; judgment 24 June 1981). Suburban post office, three teenagers, one carrying .303 rifle which Judge accepted unloaded. Two female staff threatened; \$5857 taken. Sundry other charges. Sentences of seven and a half years (including 18 months for car conversions) and six years upheld on 18 year-old appellants.

See (10-11) Atkinson and others (C.A.292/80 etc.; judgment 16 March 1981). Suburban post office. Elaborate scheme by four youths, including distracting attention of police by false alarm of robbery elsewhere. Stolen vehicles. Two women employees on duty threatened with .22 rifle; \$1300 taken. Judge accepted rifle unloaded. Sentences of six years on appellants aged 17 to 19 upheld.

Scott and Walker (C.A.182/79, 184/79; judgment 6 March 1980). Suburban post office, about \$280 taken. Young woman employee alone at time. Two men, one with gun, evidence as to loading equivocal. No sign of careful planning and no violence; amateurish. Effective sentences reduced on appeal from eight years to six.

Turnbull (C.A.85/78; judgment 4 December 1978). Suburban post office. Appellant alone, gas pistol, not loaded, presented at sole employee; \$1600 taken. No violence but woman distressed. Drug-money motivated, appellant also sentenced for attempted false pretences. Six years upheld as appropriate overall penalty.

Nesbit (C.A.10/82; judgment 24 June 1982). Raglan post office robbed of \$1544 by three men, appellant armed with loaded .22 rifle. Customers herded into corner, elderly man in poor health allowed to leave. Thoroughly planned. Appellant 26, no previous convictions but ringleader. Sentence of five years upheld.

McCosker (C.A.170/78; judgment 3 April 1979). Two ~~state~~ rate robberies of T.A.B. agencies. Shotgun in one, allegedly not loaded; .22 rifle in other, bullet found in breach later and three in magazine. About \$8500 taken. Aged 35, heavily addicted to heroin. Effective sentence of three and a half years increased on Crown appeal to five.

Taylor (C.A.221/81; judgment 8 February 1983). Suburban branch of Auckland Savings Bank robbed of \$3880 by appellant while on bail on burglary charge. Carried unloaded pistol, threatened to blow customer's brains out. Psychiatric problems. Four and a half years' imprisonment upheld as clearly within range.

Kemp (C.A.36/82; judgment 24 August 1982). Country post office. Woman in sole charge, struck several blows by principal offender, who also carried shotgun; a round in it, but knowledge not proved against appellant. Robbery thwarted by arrival of tradesmen. Principal offender sentenced to six years. Appellant's family circumstances some mitigation but for this class of offence not possible to allow major reductions on that account. Four years on appellant as lesser offender upheld.

Tua (C.A.65/72; judgment 22 November 1972). Turangi service station. Three men with .303 rifle. Appellant's involvement in violence towards attendant less than other men and he had no previous convictions for violence. His sentence reduced from six years to four.

Cook (C.A.137/78; judgment 21 March 1979). Service station; three men, appellant armed with gas pistol apparently unloaded; his brother had bamboo cane. More than \$4000 taken. Appellant also sentenced for minor burglary of same premises a few days earlier. Appellant 20, ringleader; drug-money motivation. Effective sentence of four years upheld as in no way excessive.

X Reiri (C.A.52/76; judgment 16 July 1976). Appellant and woman companion robbed elderly jeweller, alone in his shop, of about \$120; appellant struck him series of blows with claw hammer picked up on premises; serious headaches for some months. Four years upheld.

Williamson (C.A.86/77; judgment 9 December 1977). Suburban post office; two men, loaded sawn-off shotgun carried by principal offender. Sentence of three and a half years on appellant as lesser offender upheld; described as light.

Pihema (C.A.39/76; judgment 14 June 1976). Elderly woman alone in hat shop. Defendant acted alone, demanded money, obtained about \$12. Woman suffered bruising and broken wrist in scuffle, punched and possibly struck by stool, heavy steel object fell on arm. Eighteen months increased on Crown appeal to three years.

Taylor (C.A.44/78; judgment 8 September 1978). Country post office robbed by three men. Postmistress threatened with baseball bat. Telephone ripped out and other damage. Elements of drunken escapade but not spur-of-the-moment. Appellant drove getaway car and did not go into premises; virtually a first offender. Sentence on him of two and a half years upheld; described as lenient.

Wilson (C.A.270/81; judgment 11 March 1982). Appellant aged 18, committed shop burglaries and robbery of bank with associate who had much worse criminal record. \$3400 taken in burglaries, \$2091 from bank. Appellant pinned sole teller, a middle aged woman, against the wall. No weapons. Sentence of two and a half years undisturbed on appeal. We comment that this light sentence could only be justified by
* age and absence of weapons.

Comparable sentences are imposed for aggravated robberies involving intrusion into dwellinghouses, usually at night. Often the safety of fewer persons is at risk and the potential proceeds not so large, but as against those features there is the serious element of violation of domestic privacy. The following are examples of this class:

Tapsell (C.A.69/83; judgment 24 August 1983). Appellant, aged 30, sentenced for robbery and some lesser offences including burglary. At 6 a.m. got into home of elderly man, taking with him cricket bat. Disturbed at 11 a.m. Struck him blows with bat on head and face, robbed him of more than \$440, tied him up. Two hours later took him upstairs, tied him up again. Decamped at 5 pm., providing his pills first. Complainant in hospital for three days. Six years upheld.

Rangi (C.A.41/81; judgment 7 September 1981). Appellant aged 24 with 16 year-old confederate disturbed by householder while burgling; hit him on head with iron pipe and attacked him with fists; 12 days in hospital. Six years upheld although 'severe'.

Peers (C.A.103/80; judgment 6 August 1981). Three men forced way into city house in early hours of morning. Two elderly occupants asleep. Man tied up, \$228 cash, watch and ring stolen. Appellant discarded automatic pistol when chased; possibly it had not been taken into house. Several rounds in magazine, spent cartridge in breach, bullet lodged

in barrel. Age 35, many previous convictions. Denied touching householder, but 'unreal to make any fine distinctions as to the precise part which may have been played by each of them'. Six years for totality of offending upheld.

Lang (C.A.211/80; judgment 1 December 1980). Burglary of dwellinghouse and aggravated wounding. Breaking in by four men with a view to stealing \$2000. Adult son (deaf mute, but not to knowledge of appellant) disturbed; appellant struck him several times with crowbar. Last time because thought he had seen him and would recognise him. Fracture of skull, hospital for 12 days. Two and a half years increased on Crown appeal to five years.

Haddon (C.A.92/77; judgment 17 October 1977). Retired farmer and wife awoken by two youths. Appellant (aged 18) with knife, demanding money, struck woman near eye. Pricked husband's forehead three times when threatening him. Obtained \$50. Cut telephone wires. 'Rather spur of moment affair' on way home after football function. Four years upheld despite age.

Ryan (C.A.47/80; judgment 20 August 1980). Appellant with piece of wood, another man with bottle, entered apartment at midnight demanding whereabouts of alleged debtor. Took \$7, radio cassette recorder and speaker. Tore telephone from wall. Physical threats to occupants. Appellant 20, record increasing in seriousness, time for stern reaction. Four years upheld.

Returning to the facts of the present case, we note that on the sentencing of Moananui his counsel informed the Judge that his instructions were that the rifle was not held against the attendant's head and - more importantly - was not loaded. The Judge granted an adjournment to enable the Crown to decide whether it wished to call evidence on these points. The attendant's evidence might have been available on the first; and possibly Poi (who was already serving his sentence) could have been called on the second, for parts of his police statement suggested that the gun was loaded. However, counsel then appearing for the Crown elected to call no evidence, being satisfied with acceptance on behalf of Moananui that his was 'the essential role in the actual commission of the offences'. The Judge accordingly sentenced him on the assumption that the rifle was not so held and was unloaded.

As a matter of fairness this Court should also approach this particular case in that way. But we should point out that a sentencing Judge, faced with the common and easily-made claim that a weapon used in such a robbery was not loaded, is not bound to accept an unsworn assertion by the accused to that effect. The circumstances of cases vary, but we think that the Judge will often be entitled to draw the inference intended by the accused to be drawn at the time by the person threatened, namely that the weapon was loaded, unless the accused or some other witness gives

evidence to the contrary. An opportunity for oral evidence on the point should be afforded to the accused as well as the prosecution: see generally D.A. Thomas, Principles of Sentencing, 2nd ed., 366-72; R. v. Bryant [1980] 1 N.Z.L.R. 264. If there is conflicting evidence the Judge will have to make his own assessment of the facts, giving the benefit of any reasonable doubt to the accused.

If the weapon was loaded a longer sentence is appropriate because of the risks involved. In the present case we assume, however, in Moananui's favour that the rifle was not loaded. /The fact remains that it was a premeditated robbery with weapons by three men acting in concert. Moananui was the ringleader and took all the proceeds. to his background, he has been a regular offender and has experienced the range of penalties available to the Courts. Such interest as he has shown in establishing a work co-operative or trust is in his favour, but he seems to have achieved little in that direction and indeed has spent five of the seven years since 1976 in penal institutions. Having regard to the sentencing levels already reviewed, we think that his sentence should be increased to imprisonment for five years, to commence from the expiry of the District Court sentence.

The other two were lesser offenders and we accept that they were led on by Moananui. They received none of the proceeds. But Poi took a knife and for all he knew the

rifle was loaded. His sentence will be increased to three and a half years' imprisonment.

Kuka is significantly younger than the others. He has only minor previous offences and has not previously received a custodial sentence. The probation report speaks of some positive personal qualities, talent as a carver and an association with a marae work scheme. The driver of a getaway car does not necessarily receive a lighter sentence, but in this instance a considerable difference is justified. Kuka's sentence will be increased to eighteen months' imprisonment.

Leave to appeal is granted and the three sentences altered accordingly.

R. B. Coote J.

Solicitors:

Crown Law Office, Wellington, for Crown

Craig Bell & Bond, Wellington, for Moananui

Jeffries & Murphy, Welling , for Poi and Kuka

