IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA810/2023
[2024] NZCA 358

BETWEEN	SIMON DUDLEY JONES Applicant
AND	NEW ZEALAND POLICE Respondent

Court: Mallon, Fitzgerald and Jagose JJ

Counsel: A R Laurenson for Applicant
M J R Blaschke and O A Boivin for Respondent

Judgment: (On the papers) 1 August 2024 at 11 am

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS OF THE COURT

(Given by Jagose J)

[1] Simon Jones seeks leave to bring a second appeal against the 17 November 2023 decision of Judge Hikaka in the District Court at New Plymouth,[1] sentencing him to two years and two months' imprisonment on his guilty pleas to five charges of possessing objectionable publications (child exploitation material) with knowledge or

1 *Police v Jones* [2023] NZDC 25679 [District Court judgment].

reasonable cause to believe the publications are objectionable.[2] McQueen J dismissed Mr Jones' appeal against sentence.[3]

[2] Mr Jones would argue on the proposed second appeal that Judge Hikaka's "inadequate" deduction for Mr Jones' previous good character and offer of amends was "wrong in principle".[4] The Judge allowed "25 per cent for [Mr Jones'] guilty plea, 10 per cent for remorse and rehabilitation efforts and one per cent for [his] good character",[5] effectively rounded up to a total 38 per cent deduction from his 42-month starting point to arrive at the Judge's 26-month end sentence.

[3] The Judge explained, in relation to the discount for Mr Jones' good character, he felt "constrained to go to the full five per cent that [his] counsel has referred to",[6] given the extended undisclosed course of Mr Jones' offending over a period of years.[7] As to the proposed offer of amends by way of a $10,000 payment to charity (an offer made but not at that time paid), the Judge acknowledged it may have been motivated by remorse but was concerned at its possible appearance as "paying for a reduction in an end sentence".[8] Mr Jones subsequently made such payment in advance of his first appeal,[9] and would challenge the Judge's latter perspective as "cynical".

[4] We may not grant leave for a second appeal unless satisfied the appeal involves a matter of general or public importance, or a miscarriage of justice may have occurred or may occur unless the appeal is heard.[10]

[5] There is nothing in Mr Jones' proposed appeal involving any matter of general or public importance. It was for the Judge to assess any mitigating factor in Mr Jones'

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2 Films, Videos and Publications Classification Act 1993, s 131A(1): maximum penalty, 10 years' imprisonment or a $50,000 fine.
3 *Jones v Police* [2023] NZHC 3730 [High Court judgment].
4 In reply submissions, Mr Jones indicates a further ground of appeal, contending the Judge erred in his misdescription of category five from *R v Zhu* [2007] NZCA 470. That was not the basis on which leave to bring a second appeal was sought and has not, in any event, been the subject of a first appeal, and we therefore disregard it.
5 District Court judgment, above n 1, at [33].
6 At [33].
7 At [29].
8 At [32].
9 High Court judgment, above n 3, at [18].
10 Criminal Procedure Act 2011, s 253(3).

particular circumstances; the assessment is "necessarily evaluative".[11] That precisely is what the Judge did, as McQueen J found on Mr Jones' first appeal.[12]

[6] Further, the threshold for successful appeal against sentence is that the sentence imposed be "manifestly excessive".[13] It cannot be said any marginal shortfall in Mr Jones' discount for good character, even if the appellant was in possession of this material for no more than two years rather than the seven years the Judge referred to,[14] has resulted in a manifestly excessive sentence. Any suggested shortfall largely is accommodated by the Judge's rounding in applying the discounts actually awarded,[15] given they would have led to an end sentence of 27 months (based on a 36 per cent discount), leaving only a two per cent difference from what had been sought at sentencing.

[7] If anything, particularly in circumstances of Mr Jones then indicated but unmade offer of amends, the Judge's 10 per cent discount for remorse and rehabilitation might be thought generous. As this Court recently has explained:[16]

> It is now well established that a discrete discount for remorse will be appropriate where a "proper and robust evaluation of all the circumstances" demonstrates that an offender is remorseful. Remorse need not be extraordinary, although it must be genuine. The onus is on the defendant to show it is so. This Court has previously stated that it will look for "tangible evidence, such as engagement in restorative justice processes". Other examples include the voluntary payment of reparation, and efforts to remedy harm to the community. Where established, remorse tends to attract a discrete discount of between five and 15 per cent.

[8] In this case, the "offer of amends" was a payment that had not actually been made but, even if it had been, the 10 per cent discount would have been well within range for the remorse Mr Jones expressed and the tangible expression of that remorse through that payment and his engagement with a clinical psychologist and counselling.

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11 *Sweeney v R* [2023] NZCA 417 at [18].
12 High Court judgment, above n 3, at [32] and [37].
13 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [32]–[35].
14 Mr Jones says he was aware that this material could be downloaded for approximately seven years but says he did not download it. He says he was in possession of it for no longer than two years.
15 At [2] above.
16 *Kohu v R* [2023] NZCA 343 at [40] (footnotes omitted).

[9] Finally, even had the Judge also allowed "the full five per cent" sought for good character,[17] the consequent discount still would not result in a short-term sentence such as may be substituted by a sentence of home detention.[18] And there would remain a significant question, in any event, whether home detention was the appropriate sentence. Accordingly, there is no real risk of any more favourable outcome for Mr Jones on appeal.

Result

[10] The application for leave to appeal is declined.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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17 At [3] above.
18 Sentencing Act 2002, s 80I.