

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA444/2024
[2024] NZCA 646

BETWEEN DAVID RATA BAGLEY
Applicant
AND THE KING
Respondent

Court: Cooke, Fitzgerald and Jagose JJ
Counsel: D J Matthews for Appellant
J E Mildenhall and T Zhang for Respondent
Judgment: 9 December 2024 at 10.30 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for leave to adduce fresh evidence is granted.**
B The application for leave to bring a second appeal against sentence is declined.
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REASONS OF THE COURT

(Given by Fitzgerald J)

[1] On 20 February 2024, Judge M J Hunt sentenced Mr Bagley to two years and four months' imprisonment on a number of charges, including wilful damage, threatening to kill, assault on a person in a family relationship, and 11 charges of theft under \$500.¹ Mr Bagley subsequently appealed against his sentence to the High Court, and Robinson J allowed the appeal, reducing the sentence to two years

¹ *Police v Bagley* [2024] NZDC 3664 [District Court judgment].

and two months' imprisonment.² The appeal was allowed on the basis that an additional discount ought to be given to reflect Mr Bagley's time in state care, which Robinson J accepted had causatively contributed to Mr Bagley's history of offending.³

[2] In the High Court, Mr Bagley raised a new matter not raised in the District Court, namely that a further discount ought to be given to reflect the impact of his imprisonment on his children. Mr Bagley and his partner are parents to 11 children, aged between 18 months and 17 years of age. Having considered the materials before him relevant to that issue, Robinson J declined to give any further discount.

[3] Mr Bagley now seeks leave to bring a second appeal, on the basis that a discount for the impact of his imprisonment on his children should have been given. A second appeal may be brought by leave of the second appeal court only if the court is satisfied that:⁴

- (a) the appeal involves a matter of general or public importance; or
- (b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[4] In *McAllister v R*, this Court confirmed that the threshold for leave to be granted is high.⁵

[5] Mr Matthews, counsel for Mr Bagley, confirms that it is not suggested that the proposed appeal gives rise to a matter of general or public importance. Rather, he says that a miscarriage of justice may arise if the appeal is not heard, given if the appeal is allowed and Mr Bagley's sentence is reduced to one of two years' imprisonment, this would result in a short sentence of imprisonment. This would lead to Mr Bagley's immediate release, given he has already served more than one year in custody. As matters presently stand, his statutory release date is September 2025.⁶

² *Bagley v Police* [2024] NZHC 1518 [High Court judgment].

³ At [43]–[45], and [51].

⁴ Criminal Procedure Act 2011, s 253(3).

⁵ *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764 at [36]–[38].

⁶ See Parole Act 2002, s 86.

Background

[6] We gratefully adopt the summary of the background to the present application as set out by Robinson J in his judgment:⁷

[3] Mr Bagley is 43 years old. Between 1998 and July 2023 he accrued 163 convictions, including those that are the subject of the present proceeding. These show a history of dishonest offending including shoplifting. He has previous convictions for threatening to kill and assault on a person in a family relationship in 2020. These resulted in a concurrent sentence of one year and two months' imprisonment.

...

Offending

[6] Judge Hunt accurately outlined the [present] offending in regards to the threatening to kill, assault on a person in a family relationship, and wilful damage as follows:

[15] ... [At one] o'clock 30 June you called the victim because you had been in a relationship and were planning on continuing the relationship with your partner, but you called her asking her to pick you up from Hagley Park as you were sleeping rough. She agreed and picked you up. As soon as you got in the car, you yelled abuse at her. Because of the abuse, she stopped the vehicle and told you to get out, which you did.

[16] She returned home. The children said that you had called and were back at Hagley Park, so she went back to the park and searched for you for about an hour as you went at the same time to her address, but obviously without her knowledge. You entered the address as she was looking for you in the park and you threw multiple items around the house, trashing multiple rooms. You went to the landline; you ripped it out of the wall. You put the handset in the toilet. She returned to the address, and you stormed out the front door towards her. You started yelling at her. You made accusations about her. You demanded the car. She refused to do that and tightly gripped the keys. You threatened her. That is the threat to kill. "I'll stab you, give me the fucking keys or I'll stab you."

[17] At this stage, the children came out of the address to try and intervene. She ran away from you. You caught up to her. You grabbed her ponytail, ripped downwards, pulling her off her feet and onto the ground. You held her on the ground, holding her hair tightly with your fist pulling away from her scalp. The children were yelling at you to stop. You let her go and she stood up. You took a step away from her and kicked her once in the right-hand side of her body, and once to the right side of head while she lay on the ground.

⁷ High Court judgment, above n 2.

[18] She sustained swelling and bruising to the sides of her face and top of her head and abrasions to her forehead. You declined to comment. Reparation is sought for the damage.

[19] There is a victim impact report, Mr Bagley, that talks about those events at the relevant time, and it describes your partner's feelings. She says she puts up with a lot of stress. She does her best to try and stand by you and protect you. When you hit her, she cannot stand for that, and she has to get help from the police. She says you have violated her trust. She says you do not help with the children; you do not have a job and you contribute nothing to the family. She said she got a job but had to quit because you could not care for the children overnight.

[7] As for the theft-related offending, on 12 separate occasions between 10 February 2023 and 1 July 2023, Mr Bagley shoplifted from different shops in Christchurch. Many of the thefts were undertaken in the company of Mr Bagley's long-term on-and-off partner or their children, although he told the author of the PAC report they were unaware of his offending. One of the charges of theft relates to a jacket and beanie with a combined value of \$889.99, and the remaining thefts relate to grocery items. The PAC report records that Mr Bagley told the author that his offending arises out of his attempts to provide for his 11 children. That explanation has a ring of truth about it, but of course does not justify the offending.

[8] In relation to the breach of release conditions, Mr Bagley was released from prison on 4 May 2022 subject to six months of release conditions. He was inducted into his conditions. In December 2022 Mr Bagley was arrested and upon release issued with an instruction to report weekly from 22 December 2022 until advised otherwise. Despite attempts to contact Mr Bagley on his last known contact number and a home visit, Mr Bagley failed at the required times. He was charged with breach of release conditions on 26 January 2023. Mr Bagley's release conditions ended on 3 May 2023.

Application for leave to adduce new evidence

[7] Mr Bagley seeks leave to adduce new evidence on the application for leave to bring a second appeal, namely an affidavit from his partner which provides an update as to the ongoing impact of Mr Bagley's incarceration on his children. The affidavit explains that in March 2024, Mr Bagley was moved from Christchurch Men's Prison to the Otago Corrections Facility, which is a five-hour drive away from where Mr Bagley's partner and their children live. We pause to note that this information was not before Robinson J when determining Mr Bagley's appeal. The affidavit goes on to state that Mr Bagley's children have not been able to visit him because of the required distance and cost of travel, that they are missing their father deeply, and that his partner struggles to manage their children without his support.

[8] The approach to admissibility of new evidence on an appeal was addressed in *Lundy v R* in which the following test was set out:⁸

[120] ... If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on [the outcome of the appeal]. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the [outcome of the appeal]. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[9] There is no reason to question the credibility of the proposed new evidence. However, the evidence about Mr Bagley's move to the Otago Corrections Facility is not fresh, in the sense it is evidence which could have been obtained at the time of the High Court appeal. Mr Bagley's transfer was in March, and the hearing before Robinson J was not until June 2024.

[10] Nevertheless, we are of the view that the affidavit should be admitted on the application for leave to bring a second appeal. While the affidavit does address matters that were already before Robinson J (namely Mr Bagley's children missing their father), those matters are addressed in the affidavit in the slightly different context of Mr Bagley having been moved to the Otago Corrections Facility. There is no prejudice to the Crown as a result of the evidence being admitted. Whether the further evidence has any effect on the outcome of the application is addressed later in this judgment.

Arguments on application for leave

[11] As noted, the proposed second appeal would focus on whether Robinson J erred in not affording Mr Bagley an additional discount for the effect of his incarceration on his children.

[12] Mr Matthews emphasises Mr Bagley's partner's letter to the District Court Judge, in which she said that Mr Bagley is a "good partner and dad to all his children" and that "the time [he has] been in custody has taken a huge toll on [herself] as a

⁸ *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.

mother caring for such a large family on [her] own". She also stated that she needed Mr Bagley at home "helping with the children and [their] needs" and that the children need "[their] dad home helping them with [their] homework". Mr Matthews notes that a restorative justice conference took place between Mr Bagley and his partner, at which she expressed similar sentiments. Mr Matthews also refers to a letter written by Mr Bagley's parents, addressing how the children desperately missed their father and that he was "most certainly needed in the family home to help with getting them to school and being there for them and being a good [role] model".

[13] Mr Matthews further submits that the effect of Mr Bagley's imprisonment on his children is now exacerbated by his transfer to the Otago Corrections Facility. He says that in the worst case scenario, the children may not see their father in person until September 2025, which is of particular impact for the younger children. Mr Matthews further submits that a family of 11 children is an unusual situation, which takes this matter outside what might be considered the usual effects of incarceration on an offender's children.

[14] Mr Matthews acknowledges the contents of Mr Bagley's partner's victim impact statement which, as Robinson J noted, recorded her view that she cares for the children while Mr Bagley "contribute[s] nothing to [the] family." However, Mr Matthews notes that the victim impact statement was not signed by Mr Bagley's partner, but rather by a police officer signing on her behalf.

[15] Taking all of these matters into account, Mr Matthews says that it is obvious that Mr Bagley's incarceration is having a negative impact on his children, such that Robinson J erred in not giving an additional discount for this.

Discussion

[16] The approach to a discount to reflect the effect a sentence of imprisonment may have on an offender’s children was addressed by the Supreme Court in *Philip v R*,⁹ and by this Court in *Sweeney v R*,¹⁰ *Ah Tong v R*,¹¹ and *C (CA153/2023) v Police*.¹²

[17] In *Philip*, the Court emphasised that the provision for such discounts reflects s 8(h) and (i) of the Sentencing Act 2002, the former requiring the court to take into account circumstances of the offender that would mean an otherwise appropriate sentence would be disproportionately severe, and the latter directing the court to consider various personal circumstances, including the offender’s family/whānau when imposing a sentence with a partly or wholly rehabilitative purpose.¹³ The Court also stated that “a sentencing approach which recognises the importance to a child of the familial relationship is also supported by the United Nations Convention on the Rights of the Child”.¹⁴

[18] The Court observed that a discount for the effect of a sentence of imprisonment on an offender’s children ought not to be characterised as “rare”, or limited to circumstances in which the offender is the primary caregiver. Rather, “[w]hat is required is a consideration of all of the relevant circumstances which must include the child’s interests.”¹⁵ The Court went on to state:¹⁶

Those interests include, as our reference to the [United Nations Convention on the Rights of the Child] indicates, the importance for children of growing up in a familial environment. We accept that there may be other factors in this consideration which take primacy including, by way of example, issues of inter-familial violence; an absence of remorse and/or lack of any rehabilitative steps, but those factors are not relevant here.

⁹ *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571.

¹⁰ *Sweeney v R* [2023] NZCA 417.

¹¹ *Ah Tong v R* [2024] NZCA 144.

¹² *C (CA153/2023) v Police* [2024] NZCA 136.

¹³ *Philip v R*, above n 9, at [52].

¹⁴ At [52], citing Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990); and Francesca Maslin and Shona Minson “What about the children? Sentencing defendants who are parents of dependent children” [2022] NZLJ 367.

¹⁵ *Philip v R*, above n 9, at [56].

¹⁶ At [56] (footnotes omitted).

[19] In *Philip*, a discrete discount for the effect of Mr Philip’s sentence of imprisonment on his child was available given “Mr Philip was an important presence in his young child’s life” and there was expert evidence as to the child’s “secure attachment” to Mr Philip.¹⁷ There was also evidence that there was a very close relationship between Mr Philip’s rehabilitation and his relationship with his child.¹⁸

[20] In *Sweeney*, this Court found that it did not require an expert report to reach the conclusion that the interests of Mr Sweeney’s children warranted a discount.¹⁹ In that case, Mr Sweeney had assumed full-time responsibility for his four and six year-old children, following the death of their mother in a car accident.

[21] In *Ah Tong*, a 10 per cent discount was given to reflect the effect of Mr Ah Tong’s sentence on his 11-year-old daughter.²⁰ The Court took into account the child’s age, that the child’s mother was already in prison, and that the child was then in the care of Mr Ah Tong’s partner, with whom she had not lived before on a permanent basis.²¹ There was also evidence of the partner’s mental health difficulties.²²

[22] Returning to the present case, we are not persuaded that a miscarriage of justice may arise if leave to bring a second appeal is not granted.

[23] The question of whether a discrete discount ought to be given for the impact of Mr Bagley’s incarceration on his children was squarely addressed by Robinson J. The Judge considered the materials relevant to this issue and to which we have referred earlier in this judgment.²³ He noted the inconsistency between Mr Bagley’s partner’s correspondence to the Court and her victim impact statement. While we accept that the victim impact statement is signed by a police officer rather than Mr Bagley’s

¹⁷ At [53].

¹⁸ At [54].

¹⁹ *Sweeney v R*, above n 10, at [27]. Information about Mr Sweeney’s care for his children was available in the pre-sentence report, a cultural report provided to the Court pursuant to s 27 of the Sentencing Act 2002, and correspondence from Mr Sweeney and others provided to the Court.

²⁰ *Ah Tong v R*, above n 11, at [15].

²¹ At [14].

²² At [14(c)].

²³ At [11]–[14] above. See also High Court judgment, above n 2, at [46]–[50].

partner, there is nothing to suggest that the content of the statement represents anything other than Mr Bagley's partner's views at the time the statement was made.

[24] Moreover, there is no evidence or other material before us which suggests that Mr Bagley has played a primary, or constant, caregiving role in his children's lives. Rather, the only information available suggests that his partner has carried that primary burden, and that Mr Bagley had been less than fully engaged in his parental role prior to his offending. This no doubt partly reflects that Mr Bagley has been subject to a number of sentences of imprisonment over the years. We acknowledge that the children will be missing Mr Bagley. We also accept that *some* additional burden will fall on Mr Bagley's partner in looking after their children while he is in prison. Sadly, however, that is likely to be a consequence in most cases in which an offender with children is sentenced to imprisonment.

[25] We are not persuaded that the position is altered by Mr Bagley's more recent transfer to the Otago Corrections Facility. We accept that this may well mean regular visits are more difficult or potentially impossible. Nevertheless, there is nothing before us to suggest that the children were regularly visiting Mr Bagley while he was in custody in Christchurch, or how the position might have otherwise changed as a result of the transfer.

[26] For these reasons, there is nothing in the materials to suggest that Mr Bagley's present incarceration is having an undue impact on the interests of his children. For completeness, and while not of great significance in the conclusion we have reached, we also note that some of the other factors referred to by the Supreme Court in *Philip* and set out in the extract at [18] above are present in this case — namely inter-family violence, that was witnessed by at least some of Mr Bagley's children, and what appears to be some reluctance on Mr Bagley's part to engage in rehabilitative programmes which might strengthen his ongoing parental role.²⁴

[27] Standing back, we see this case as falling well below the high threshold which would justify this Court conducting a further review of Mr Bagley's sentence.

²⁴ District Court judgment, above n 1, at [24], in which Judge Hunt recorded the suggestion that Mr Bagley had been reluctant to engage in Stopping Violence courses, or parenting programmes.

Result

[28] The application for leave to adduce fresh evidence is granted.

[29] The application for leave to bring a second appeal against sentence is declined.

Solicitors:

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