IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA531/2024
[2024] NZCA 618

BETWEEN	NICHOLAS ALEXANDER MACDONALD Appellant
AND	THE KING Respondent

Hearing:	5 November 2024
Court:	Cooke, Fitzgerald and Jagose JJ
Counsel:	K J Beaton KC and D Steyn for Appellant C E Martyn and P J Brand for Respondent
Judgment:	26 November 2024 at 2.30 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Jagose J)

[1] Nicholas MacDonald appeals the 6 August 2024 decision of Judge M J Hunt in the District Court at Christchurch, sentencing him to five years and two months' imprisonment on his guilty pleas to a range of dishonesty, drug, aggravated burglary, and assault charges — the last including of persons in a family relationship, by strangulation, and with a weapon.[1]

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1 *R v MacDonald* [2024] NZDC 18451 [Judgment under appeal].

Background

[2] The primary victims were both in intimate relationships with Mr MacDonald, who was turning 22 and 23 years old at the time of his offending.

[3] In February 2022, the first victim said she wanted to end the relationship, and Mr MacDonald was physically and verbally abusive to her in response — throwing her around their bedroom; hitting her 15–20 times to her jaw and the side of her body; locking the bedroom door, saying "[t]his is going to be the longest hour and a half of your life"; punching her to her head and upper body some 10 times with both closed fists; continuing to beat her with punches and elbows; biting her; on a number of occasions, grabbing her around the throat to throttle her for a few seconds; and kneeing her in the ribs — all while she cried and pleaded for the assault to stop. For this admitted conduct, Mr MacDonald was convicted on one charge each of male assaults female and injuring with intent to injure.

[4] On a variety of occasions over January 2023, Mr MacDonald then hit, punched, slapped and strangled his subsequent partner. When she attempted to end their relationship, late in the evening of 23 January 2023, he broke into her house armed with a hammer, forcing open her bedroom window, and physically confronted her, hitting her with the hammer on her knee and holding it against her throat, grabbing her around the throat and squeezing her throat for a short time rendering her unable to breathe as he threatened to kill her and himself, twice punching her with a closed fist to the back of her head and hitting her across her face with his hand. His behaviour fluctuated between being calm and aggressive. He retrieved a 20-cm knife from the kitchen and threatened her with it, pulling her hair and saying he would "put her in the ground", he wanted to die and would take her with him, before repeatedly trying to slice his own head with the knife. For this admitted conduct, Mr MacDonald was convicted on one charge of aggravated burglary and two charges of assaults with a weapon (being the hammer and the knife), as well as one representative charge of strangulation, two representative charges of assault on a person in a family relationship and one representative charge of threatening to kill.

[5] Both victims escaped when Mr MacDonald ceased his assault of them. He told the first to "get the fuck out" and permitted her departure. The second coaxed Mr MacDonald into falling asleep on her bed, and she then took the opportunity to leave. Both were injured by Mr MacDonald: the first with bruising to her arms and a headache such that she was suspected to have sustained a concussion; the second with swelling, lumps, and bruising to her face, head, and throat. Their victim impact statements identify the extreme effect of his offending on them, leaving each profoundly destabilised in multiple central aspects of their personal, social, and working lives and leading both separately to leave their homes in New Zealand to avoid the risk of recurrence.

[6] A third victim was Mr MacDonald's grandmother, from whose bank account, using her card in breach of trust, Mr MacDonald stole $1,100 on 17 December 2022. She views his treatment of her as "elder abuse".

[7] On his arrest, Mr MacDonald was also charged with an offence against the Medicines Act 1981 in respect of two white pills found in his possession.

Judgment under appeal

[8] After recounting the facts,[2] the Judge noted Mr MacDonald's history of family violence aggression against a dysfunctional background of childhood neglect and physical and sexual abuse,[3] his later drug and alcohol abuse leading to his "clinically significant" impairment and distress,[4] with "profound" effects on his victims.[5]

[9] The Judge took a starting point of 28 months for Mr MacDonald's offending against the first victim, 30 months in respect of his earlier January 2023 offending against the second victim, and an additional 54 months for the 23 January 2023 offending also against her.[6] That was uplifted by four months for that offending occurring while he was on bail in relation to his then-alleged offending against the first

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2 At [5]–[19].
3 At [20]–[23].
4 At [24]–[25].
5 At [20]–[26].
6 At [27]–[28].

victim, leading to a starting point of 116 months' (or nine years and eight months') imprisonment.[7]

[10] The Judge considered no "further" adjustment was required for totality.[8] He applied a 20 per cent discount (rounded up to 24 months) for Mr MacDonald's personal background, an additional 10 per cent for his youth and remorse (rounded up to 12 months), and 15 per cent (rounded up to 18 months) for his guilty pleas, resulting in the Judge's end sentence of five years and two months' imprisonment.[9]

[11] For Mr MacDonald, Kerryn Beaton KC submits the Judge's "effective seven year" starting point for all of the January 2023 offending was too high, the Judge erred in not applying any totality reduction, and a substantially larger discount should have been allowed at least for the prospects of Mr MacDonald's rehabilitation in combination with his youth and remorse.

Approach on appeal

[12] We must allow Mr MacDonald's appeal only if satisfied there is both an error in the sentence, and a different sentence should be imposed.[10] In any other case, we must dismiss the appeal.[11] The measure of error is that the sentence is manifestly excessive, a principle well-engrained in the approach to sentencing appeals.[12] We will not intervene where the sentence is within a range properly justified by accepted sentencing principles.[13] Whether the sentence is manifestly excessive is to be assessed in terms of the sentence given; the process by which it is reached rarely will be decisive.[14]

Discussion

[13] Given the approach on appeal, we do not scrutinise the particular component of the Judge's sentence addressed to the January 2023 offending, or if the Judge's

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7 At [29]–[31].
8 At [27]–[33].
9 At [33].
10 Criminal Procedure Act 2011, s 250(2).
11 Section 250(3).
12 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [33] and [35].
13 At [36].
14 *Ripia v R* [2011] NZCA 101 at [15].

reference to totality is to be interpreted as meaning no adjustment was made on that count. The relatively light component for Mr MacDonald's earlier offending against the first victim, and omission of any component for his offending against the third victim or against the Medicines Act, may be thought to encompass implicit deductions for totality, meaning nothing "further" was required.

Overall starting point

[14] We note Mr MacDonald pleaded guilty in terms of a summary of facts which specified: "Between 1 and 23 January 2023, the defendant assaulted *and strangled* the [second] victim on numerous occasions" (emphasis added).

[15] We consider Mr MacDonald's overall offending against the victims clearly fell within this Court's classification of the "[h]ighest level s 189A offending" in *Shramka v R*.[15] It arose in response to the victims' assertion of their own agency, and it is offending bearing all the hallmarks of family violence's coercive and controlling behaviour.

[16] To varying and overlapping degrees, all but the last of *Shramka*'s eight "relevant aggravating factors" are present in Mr MacDonald's overall offending:[16]

(a) premeditation and planning in locking the first victim's bedroom door and breaking in through the second victim's bedroom window bringing a weapon with him;

(b) his strangulation of the second victim, and his history of strangling both victims was part of very serious domestic violence;

(c) the victims were vulnerable, having sought to address the ending of their relationships with Mr MacDonald; such circumstances additionally "enlarging the risk of injury and extending the psychological consequences" for them;

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15 *Shramka v R* [2022] NZCA 299, [2022] 3 NZLR 348 at [46]–[49].
16 At [42]. Harm to associated persons is not present.

(d) harming the victims where they lived;

(e) aggravated violence including repeated applications of force to the victims' throats;

(f) further aggravating threats to kill; and

(g) causing enduring psychological harm to the victims.

[17] The common thread of Mr MacDonald's use of strangulation — in conjunction with his other violent offending against, and the impact of all his offending on, each of the victims — elevates his offending to that "highest level".[17] Mr MacDonald's seemingly spontaneous and repeated resort to such violence in the context of his interactions with the victims put them at serious risk of fatal consequences. His progression from "throttling" the first victim through to multiple episodes of "strangling" of the second illustrates that risk.

[18] A six-year starting point thus was warranted for the 23 January 2023 offending alone.[18] Mr MacDonald's prior serious domestic violence offending against the victims warranted three- and four-year starting points, the latter uplifted by reason of its repetition of the offending against the first victim.[19] We consider such individual sentences reflect the seriousness of each group of offending.[20] Mr MacDonald relied on *R v Gore* and *R v Drewett* as more serious offending.[21] However, that does not take into account the subsequent enactment of s 189A, which informs relevant sentencing involving strangulation.[22]

[19] But the multiplicity of offences comprised by Mr MacDonald's violent attacks on the victims necessitates an evaluative, rather than arithmetic, approach to an overall starting point reflective of Mr MacDonald's overall culpability.[23] In *Parker v R*, this

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17 *Shramka v R*, above n 15, at [48].
18 At [47]–[48].
19 *Parker v R* [2023] NZCA 608 at [25].
20 Sentencing Act 2002, s 85(1).
21 *R v Gore* CA414/05, 2 March 2006; and *R v Drewett* [2007] NZCA 48.
22 *Shramka v R*, above n 15, at [14]–[29].
23 Sentencing Act, s 85(2).

Court held strangulation-led domestic violence offending over a year — with five-, four-, and three-year starting points for its constituent strangulation, injuring with intent to cause grievous bodily harm, and other serious violent offending (abduction, assault with intent to injure, and kidnapping) — should have resulted in "a total starting point of no more than 10 years' imprisonment".[24] We do not see the different offences in *Parker* to be materially distinguishing.

[20] If the shorter period of Mr MacDonald's comparable repetitive violent offending against the second victim may have justified a lesser starting point, that is obviated by the inclusion of his similar offending against the first victim, thus justifying the Judge's overall starting point of nine years and eight months' imprisonment. The Judge did not err in this respect.

Aggravating and mitigating factors personal to Mr MacDonald

[21] We note the Judge's starting point included a four-month uplift on account of Mr MacDonald's offending against the second victim while on bail in relation to his charged offending against the first victim. Such an uplift reflects an offender's disregard for Court process, as bail implicitly is granted on the basis the bailee "does not commit any offence while on bail".[25] No objection is taken to that uplift, or to the Judge's roughly 45 per cent discount for Mr MacDonald's guilty pleas, background, youth, and remorse.

[22] We have no difficulty with the Judge's discounts for Mr MacDonald's background's contribution to his constrained choice to avoid offending, or for his accepted genuine remorse. Although the latter discount was packaged with a discount for Mr MacDonald's youth, he is at the cusp for consideration of such a discount, which usually reflects the impulsivity of youth offending and greater prospects for rehabilitation.[26]

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24 *Parker v R*, above n 19, at [29].
25 Bail Act 2000, s 30(4)(c); and *Clunie v R* [2013] NZCA 110 at [22].
26 *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [76]–[87]; and *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77]–[78].

[23] However, we consider the Judge's end sentence should have incorporated a discrete discount for Mr MacDonald's rehabilitative steps and prospects, which were amply demonstrated in the material before the Judge.

[24] The Supreme Court in *Berkland v R* held: [27]

> [161] Sentencing judges should encourage offenders to take up the opportunities offered by rehabilitative programmes to make the necessary changes in their lives. One way to do this is by providing material sentencing discounts when the evidence suggests that is what an offender is genuinely willing to do. Such encouragement can be an inflection point in the life of a prisoner.

[25] Similarly, in *Fakaosilea v R*, this Court held the defendants' prospects for and efforts at rehabilitation "ought to have been positively recognised".[28] Rehabilitation is a key principle and purpose of sentencing, especially for someone who is relatively young.[29]

[26] Mr MacDonald's enforced abstinence from drugs and alcohol while remanded in custody brought him apparent insight into the causes of his offending and incentive to avoid their recurrence. He completed available alcohol and drug and tikanga courses, engaged in counselling with an ACC counsellor, completed a skills course for post-release tertiary study and worked in his unit as a cleaner. His potential was recognised by reservation of a place at a residential addiction facility. This is tangible indication of Mr MacDonald's self-starting rehabilitative and reintegrative promise, and justified a specific discount separately from those for his guilty pleas, background, and remorse.

[27] In our assessment, a total discount of 50 per cent would have better addressed all relevant mitigating factors personal to Mr MacDonald. The question remains, however, whether the sentence imposed was manifestly excessive as a consequence of the failure to give this discount.

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27 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509. Similarly, see *Kerr v R* [2017] NZCA 498 at [62]; and *Mallett v R* [2014] NZCA 39 at [6] and [11].

28 *Fakaosilea v R* [2024] NZCA 218 at [200] and [227].

29 Sentencing Act, ss 7(1)(h) and 8(i); and *Dickey v R*, above n 26, at [76]–[87].

Was the final sentence manifestly excessive?

[28] Applying a 50 per cent discount to the Judge's effective starting point of nine years and four months, with the four-month uplift, results in a final sentence of five years' imprisonment. That is only two months short of the Judge's end sentence, which he reached by rounding up the discounts given by nearly two months. An effective few days' additional allowance for Mr MacDonald's rehabilitation is impermissible "tinkering" with an in-range end sentence. The Judge's end sentence is not manifestly excessive.

Result

[29] The appeal against sentence is dismissed.

Solicitors:
Crown Solicitor, Christchurch for Respondent