

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA152/2024  
[2024] NZCA 533

BETWEEN MICHAEL ALEXANDER BRACEY  
Appellant  
AND THE KING  
Respondent

Hearing: 27 August 2024  
Court: Cooke, Peters and Grice JJ  
Counsel: A B Fairley and S A Pilkington for Appellant  
R B Annandale for Respondent  
Judgment: 21 October 2024 at 10.30 am

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JUDGMENT OF THE COURT

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- A The appeal against sentence is allowed.**
- B The sentence of eight years' imprisonment imposed in the District Court on the charge of wounding with intent to cause grievous bodily harm is set aside. A sentence of six years and six months' imprisonment is substituted.**
- C The concurrent sentence of nine months' imprisonment on the charge of possession of an offensive weapon remains.**
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REASONS OF THE COURT

(Given by Peters J)

[1] The appellant, Mr Bracey, appeals against a sentence of eight years' imprisonment imposed by Judge G Tomlinson on one charge of wounding with intent to cause grievous bodily harm.<sup>1</sup> There is no appeal against the Judge's sentence of nine months' imprisonment, to be served concurrently, on one charge of possession of an offensive weapon, being a knife.

[2] Mr Fairley, counsel for Mr Bracey submits that the sentence is manifestly excessive. In particular, Mr Fairley submits that the Judge's starting point of nine years' imprisonment on the wounding charge was too high, and that the Judge's eight-month discount for time spent on electronically-monitored (EM) bail was insufficient.

[3] The appeal is brought pursuant to s 244 of the Criminal Procedure Act 2011. This Court must allow the appeal if satisfied that, for any reason, there is an error in the sentence imposed, and that a different sentence should be imposed.<sup>2</sup> It must dismiss the appeal in any other case.<sup>3</sup>

## **Background**

[4] Prior to the offending, Mr Bracey had been in a relationship with Ms P. After that relationship ended, Ms P commenced a relationship with Mr A. Mr A was the victim of Mr Bracey's offending.

[5] On the evening in question, Mr Bracey knew that Ms P and Mr A were at a nearby campground. He approached their campsite on foot. Mr Bracey, who did his best to conceal his presence by wearing dark boots, gloves, and a face mask, was carrying a hammer and a knife.

[6] Approaching Mr A from behind, Mr Bracey struck Mr A with the hammer. Fortunately, Mr A moved just at the right time so that the blow did not strike him with full force but, rather, in the Judge's words, was a "glancing blow to his head".<sup>4</sup>

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<sup>1</sup> *R v Bracey* [2024] NZDC 6071 [Judgment under appeal].

<sup>2</sup> Criminal Procedure Act 2011, s 250(2).

<sup>3</sup> Section 250(3).

<sup>4</sup> Judgment under appeal, above n 1, at [9].

[7] A struggle ensued. Mr Bracey was ultimately restrained and the police were called. Mr A suffered rib fractures, a laceration to his forehead, and other injuries. Although these injuries were not of lasting effect, as the Judge said, the attack would have a psychological effect on Mr A.<sup>5</sup>

### **Sentencing**

[8] It was and is common ground that the wounding charge was the lead offence and that Mr Bracey should be sentenced in accordance with *R v Taueki*.<sup>6</sup>

[9] At sentencing, the Crown submitted that, having regard to the aggravating factors present and the degree to which they were present, the offending fell in the upper to middle of band two of the *Taueki* guidelines. Offending within band two will usually attract a starting point of between five and 10 years' imprisonment.<sup>7</sup> The Crown submitted a starting point of seven to eight years' imprisonment was required.

[10] For Mr Bracey, Mr Fairley submitted to the Judge that the offending was at the lowest end of band two of *Taueki*, and a starting point of five years was appropriate.

[11] The Judge identified the following aggravating features as being present to a high degree: premeditation, use of a weapon, attack to the head, and the vulnerability of the victim. The Judge also identified serious injury as present to a moderate degree.<sup>8</sup> He placed the offending in band three of *Taueki* which will usually attract a starting point of between nine and 14 years' imprisonment.<sup>9</sup> The Judge adopted a starting point of nine years' imprisonment.<sup>10</sup>

[12] The Judge did not uplift for the possession of a weapon charge, nor for Mr Bracey's limited criminal history. The Judge allowed an eight-month discount for the 25 months that Mr Bracey had spent on EM bail, and a four-month reduction for Mr Bracey's prior good character.<sup>11</sup>

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<sup>5</sup> At [15].

<sup>6</sup> *R v Taueki* [2005] 3 NZLR 372 (CA).

<sup>7</sup> At [34(b)].

<sup>8</sup> Judgment under appeal, above n 1, at [43]–[46].

<sup>9</sup> At [48]; and *R v Taueki*, above n 6, at [34(c)].

<sup>10</sup> Judgment under appeal, above n 1, at [51].

<sup>11</sup> At [53]–[55].

[13] These reductions gave an end sentence of eight years' imprisonment.<sup>12</sup>

### **Submissions on appeal**

[14] Mr Fairley submits that the Judge erred in his assessment of the aggravating features of the offending, resulting in a starting point that was too high. Mr Fairley submits that the aggravating features present were attack to the head (presumably to a high degree), use of a weapon, serious injury, and premeditation (to a moderate degree).

[15] Mr Fairley submits that Mr A was not "vulnerable" in the sense of *Taueki*, and certainly not to a high degree. Whilst Mr Fairley accepts the attack occurred in the dark and in a remote location, Mr Bracey and Mr A were evenly matched in age and size.

[16] Mr Fairley submits that the offending is akin to the following band two *Taueki* example involving the range of five to 10 years:<sup>13</sup>

*Premeditated domestic assault:* A domestic attack on the partner or former partner of the attacker which is premeditated and involves the inflicting of serious and lasting injury would require a starting point in band two. The appropriate point in that band would require evaluation of the seriousness of those factors. Where the attack involves the use of a weapon, particularly where it is brought to the scene, the starting point could be expected to be at the higher end of band two.

[17] Mr Fairley submits that an appropriate starting point would be between seven and eight years' imprisonment.

[18] Although Mr Fairley submits that an additional two months ought to be given for time spent on EM bail, we do not intend to take that point any further. Two months on a sentence of this length would be tinkering and, in any event, the reduction the Judge allowed was within range.<sup>14</sup>

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<sup>12</sup> At [56].

<sup>13</sup> *R v Taueki*, above n 6, at [39(c)].

<sup>14</sup> *A (CA736/2024) v R* [2024] NZCA 357 at [15], citing *Cao v Police* [2022] NZHC 2034 at [19]; and *Maihi v R* [2013] NZCA 69 at [21].

[19] The Crown submits there is no error in the Judge's starting point. It supports the Judge's assessment of the aggravating factors present. To the extent the starting point may have been too high, the Judge did not uplift for what was said to be Mr Bracey's prior violence against Ms P and gave a reduction for prior good character which another Judge might have declined. Given that, the end sentence was within range.

## **Discussion**

[20] There is no doubt that this offending was premeditated. That factor is present to a high degree. However, whilst Mr Bracey did use a weapon and sought to attack Mr A's head we do not consider these factors present to a high degree. Also, as indicated in *Taueki*, some factors, including use of a weapon and attack to the head, may overlap. Fortunately, Mr A suffered no lasting physical injuries so to the extent this could be described as a factor, it was present to a low to moderate degree only. It is in the nature of this offending that there has been a wounding.

[21] We also accept Mr Fairley's submission that Mr A was not vulnerable in the sense of *Taueki*. This Court said this factor applied to a "particularly vulnerable victim", such as a child, a victim attacked by a bigger or stronger person, and a victim subject to a disability or otherwise defenceless.<sup>15</sup> We do not consider this factor is engaged by the method of attack rather than characteristics of the victim, at least in the circumstances of this case.

[22] In assessing the starting point, we note that care must be taken not to double count the aggravating factors, and that categorising offending such as this is an evaluative exercise involving the exercise of judgement. We consider the starting point of nine years' imprisonment was too high and that in all the circumstances a starting point in the middle of band two was required, that is seven years and six months' imprisonment. Leaving in place the Judge's reductions for time spent on EM bail and prior good character, Mr Bracey's end sentence is six years and six months' imprisonment.

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<sup>15</sup> *R v Taueki*, above n 6, at [31(i)].

## **Result**

[23] The appeal against sentence is allowed.

[24] The sentence of eight years' imprisonment imposed in the District Court on the charge of wounding with intent to cause grievous bodily harm is set aside. A sentence of six years and six months' imprisonment is substituted.

[25] The concurrent sentence of nine months' imprisonment on the charge of possession of an offensive weapon remains.

Solicitors:

Thomson Wilson, Whangārei for Appellant

Crown Solicitor, Whangārei for Respondent