IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE

CRI 2023-488-28
[2023] NZHC 1358

BETWEEN	SHARMA SAILI JACOBSON Appellant
AND	THE CROWN Respondent

Hearing: 25 May 2023

Appearances: M J Taylor-Cyphers for the appellant
R Annandale and P Hamber for the Crown

Judgment: 31 May 2023

JUDGMENT OF CAMPBELL J
[Appeal against Sentence]

This judgment was delivered by me on 31 May 2023at 4.00 pm

~~Registrar~~/Deputy Registrar

A. Tila-Muagututia
Deputy Registrar
High Court

Background

[1] Mr Jacobson pleaded guilty to 17 charges, being possession and supply of cannabis, ecstasy and LSD, possession of firearms and ammunition and a failure to carry out obligations in relation to a computer search. On 7 December 2022, Judge G Tomlinson sentenced him to three years and eight months' imprisonment.[1]

[2] Mr Jacobson appeals. He says the Judge erred by adopting a starting point that was too high (because of a failure to consider totality) and by allowing inadequate discounts from the starting point. He says the end sentence should have been two years and four months' imprisonment.

The offending

[3] Mr Jacobson dealt in class A, B and C drugs (respectively LSD, MDMA (ecstasy) and cannabis) from March to July 2021. Police executed a search warrant at his home in Parahaki, Whangarei, on 2 August 2021. There, Mr Jacobson was in possession of LSD, ecstasy and cannabis. Later that day, Police executed a search warrant at a storage locker in Onerahi, Whangarei, where they found firearms and ammunition.

[4] More specifically, Mr Jacobson:

(a) was in possession of 70 tabs of LSD, supplied 73 tabs on 11 occasions and offered to supply 60 tabs on ten other occasions;

(b) supplied, offered to supply or was in possession of a total of 27 grams of ecstasy;

(c) supplied, offered to supply or was in possession of a total of about 10 kilograms of cannabis; and

(d) unlawfully possessed two rifles, 273 rounds of ammunition and a prohibited magazine.

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1 *R v Jacobson* [2022] NZDC 26111.

District Court sentencing

[5] Judge Tomlinson recorded that both Crown and defence agreed that he should reach a starting point for each set of offending, add those starting points together, reach a final point and then apply reductions as appropriate.[2]

[6] The Judge took a starting point of three years for the LSD offending, two years and six months for the ecstasy offending and three years for the cannabis offending.[3] As I explain below, these starting points were on a standalone basis for each set of drug offending. The Judge then applied an uplift of six months for the firearms and ammunition offending. This, the Judge said, took him to a high point of nine years.[4]

[7] The Judge then turned to discounts. He considered a 20 per cent reduction for Mr Jacobson's guilty pleas was appropriate.[5] He applied a combined reduction of 25 per cent for Mr Jacobson's relative youth, lack of prior convictions and previous good character and high prospects of rehabilitation. In doing so, his Honour said that "But for the early introduction to drugs and the subsequent normalisation of them, I do not think you would be here."[6]

[8] Applying total discounts of 45 per cent led to a sentence of four years and 11 months' imprisonment. Judge Tomlinson then made a final reduction of 15 months for the 15 months that Mr Jacobson had spent "without a blemish" on electronically monitored (EM) bail.[7] This gave an end sentence of three years and eight months' imprisonment.

[9] The Judge then stood back and considered totality. He considered the end sentence at which he had arrived was "an appropriate sentence on a totality basis to reflect the very serious nature of your offending".[8]

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2 At [21].
3 At [23]–[32].
4 At [33].
5 At [34].
6 At [35]–[36].
7 At [39].
8 At [41].

Principles governing sentence appeals

[10] Under s 250 of the Criminal Procedure Act 2011, a court must allow a sentence appeal if satisfied that there is an error in the sentence and that a different sentence should be imposed. In any other case, the appeal must be dismissed.

[11] The Court of Appeal has confirmed that, under s 250, for a sentencing appeal to succeed the sentence generally must be shown to be manifestly excessive or wrong in principle.[9] The Court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles. Whether a sentence is manifestly excessive generally depends on the end sentence imposed, rather than the process by which it was reached.[10]

Grounds of appeal

[12] Ms Taylor-Cyphers, for Mr Jacobson, advanced two grounds of appeal. The first was that the Judge's overall starting point of nine years was too high owing to a failure to take totality into account. The second was that the 25 per cent discount to reflect a range of mitigating factors was inadequate.

Did the Judge err by adopting an overall starting point that was too high?

[13] Ms Taylor-Cyphers did not challenge the standalone starting points that the Judge adopted for each set of offending. She merely submitted that the Judge should have taken totality into account when reaching the overall starting point for all the offending.

[14] I acknowledge that the Judge did consider totality at the end of the sentencing process, after he had reduced the overall starting point to allow for Mr Jacobson's guilty plea, personal circumstances and time on EM bail. But I respectfully consider it was an error to consider totality only at that point. Totality should be considered before personal mitigating (or aggravating) factors are taken into account.[11] The totality principle is that the overall starting point should not be wholly out

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9 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [26]–[27] and [31]–[35].
10 At [36].
11 *Polaapau v R* [2020] NZCA 227 at [44].

of proportion to the gravity of the overall offending,[12] whereas adjustments to the overall starting point reflect factors personal to the offender. If totality is considered only after allowances have been made for personal factors, there is a risk that the totality assessment is influenced by factors that are irrelevant to the gravity of the offending.

[15] I consider that risk manifested itself here. The Judge should have asked whether his overall starting point of nine years' imprisonment reflected the gravity of the overall offending. Instead, he asked whether a sentence of three years and eight months' imprisonment (reached after significant allowances for Mr Jacobson's guilty plea, personal circumstances and time on EM bail) reflected the gravity of the overall offending. It was much easier to reach an affirmative answer to the latter than to the former question.

[16] Further, in my respectful view the overall starting point of nine years' imprisonment was wholly out of proportion to the gravity of the overall offending. On this appeal, neither party took issue with the standalone starting points reached by the Judge for each set of drugs charges (three years for the LSD, two and half years for the ecstasy and three years for the cannabis, a total of eight and a half years) and I consider all were in range. In reaching an overall starting point, some adjustment for totality needed to be made to these standalone starting points. In the District Court, this was acknowledged by the Crown, which proposed standalone sentences for the drug offending that totalled 14 years' imprisonment yet submitted that totality adjustments were required and proposed an overall starting point for the drug offending of ten years' imprisonment.

[17] In my view, an appropriate overall starting point for the drug offending was five and a half years' imprisonment. Three years was appropriate for the LSD offending. Making totality adjustments, one year was an appropriate uplift for the ecstasy offending (against a standalone sentence of two and a half years) and one and a half years an appropriate uplift for the cannabis offending (against a standalone three years).

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[12] Sentencing Act 2002, s 85(2).

[18] There also needed to be an uplift for the firearms offending. The Judge allowed six months. Mr Annandale, counsel for the Crown, submitted that this was generous. I agree it was at the generous end of possible uplifts. However, I would not disturb it. The modest uplift is explained by the fact that the firearms and ammunition were in a storage locker away from where Mr Jacobson was living and dealing drugs.

[19] In my view, therefore, the overall starting point should have been six years' imprisonment.

Did the Judge err by making an inadequate allowance for personal mitigating factors?

[20] Ms Taylor-Cyphers submitted that the Judge's global allowance of 25 per cent for all mitigating factors (other than the guilty plea allowance, which she did not challenge) was too low. She said the Judge should have considered the mitigating factors discretely. Had he done so, she submitted, allowances were available of ten per cent for causative addiction, ten per cent for youth, five per cent for previous good character, five per cent for remorse and five per cent for rehabilitation. These would total 35 per cent.

[21] The Judge referred to Mr Jacobson's youth, his lack of convictions and previous good character and his significant ability to rehabilitate. The Judge also said that but for Mr Jacobson's early introduction to drugs and the subsequent normalisation of them "I do not think you would be here".[13] He made a reduction for all those factors of 25 per cent.

[22] I see no error in this assessment. Any allowance for youth would have to be very modest, much less than the ten per cent sought by Ms Taylor-Cyphers, as Mr Jacobson was 23 at the time of his offending. Similarly, any allowance for Mr Jacobson's early introduction to drugs would be very modest. At best, that was a minor contributing factor to the offending. Mr Jacobson's own statements to the writer of a s 27 report make it clear that his offending was not caused by addiction. Having read the s 27 report and the many letters written in support of Mr Jacobson,

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13 *R v Jacobson* [2022] NZDC 26111 at [35].

I consider it was proper to make substantial allowances for his previous good character, remorse and prospects for rehabilitation. I consider the Judge's 25 per cent allowance for all these factors to be appropriate.

[23] The Judge also made an allowance of 15 months for the time Mr Jacobson had spent on EM bail. In my view, this was excessively generous. The amount of credit for EM bail depends on the relative restrictiveness of the bail conditions, compliance with those conditions and the time on EM bail.[14] Even with relatively restrictive EM bail conditions and perfect compliance, it is unusual for the credit to exceed much more than 50 per cent of the time spent on EM bail. Here the Judge made a one-for-one allowance.

[24] Mr Annandale provided me with a copy of Mr Jacobson's EM bail conditions. These show that for significant periods Mr Jacobson had conditions allowing him to leave his bail address to attend work and some other matters. I accept that this would generally indicate a lower credit than might otherwise be the case. In this case, however, there are some special circumstances, in that the conditions were largely directed at allowing Mr Jacobson to further his work in benefitting the community. I consider an allowance of seven and a half months is appropriate.

Should a different sentence be imposed?

[25] Against an overall starting point of six years' imprisonment I would make allowances of 20 per cent for Mr Jacobson's guilty plea, 25 per cent for other personal mitigating factors, and seven and a half moths for time spent on EM bail. This gives and end sentence of two years and eight months' imprisonment. I therefore consider that the Judge's sentence of three years and eight months' imprisonment was manifestly excessive.

Result

[26] The appeal is allowed.

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[14] Sentencing Act 2002, s 9(3A).

[27] The sentence of three years and eight months' imprisonment is quashed and substituted with a sentence of two years and eight months' imprisonment.

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Campbell J