IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2023-409-128
[2023] NZHC 2530

BETWEEN	JOSHUA THOMAS HORN Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 7 September 2023

Appearances: J D Lucas for the Appellant
C M Hallaway for the Respondent

Judgment: 8 September 2023

JUDGMENT OF HARLAND J

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[1] Joshua Horn appeals against the sentence imposed by Judge A Couch on 9 June 2023.[1] The grounds for his appeal are discrete and relate solely to deductions he contends ought to have been allowed as mitigating matters which, if they had, would have resulted in him being eligible for a term of home detention rather than imprisonment. Ultimately, he asks the Court to impose a sentence of home detention if it agrees.

[2] The Crown does not oppose the appeal but counsel disagree as to the extent of the deductions available. On either counsel's assessment, if I agree with them, the end sentence is one to which home detention could apply. The Crown does not oppose an end sentence of home detention, given that this was what was recommended in the pre-sentence report.

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1 *Police v Horn* [2023] NZDC 11833.

[3] The key question on appeal is whether I agree with counsel, which would result in the appeal being allowed.

[4] I have decided to allow the appeal and impose a sentence of home detention on Mr Horn rather than a sentence of imprisonment. This judgment sets out my reasons for reaching that decision.

District Court judgment

[5] The appellant was charged with three charges of burglary,[2] five charges of theft,[3] two charges of receiving,[4] two charges of unlawfully taking a motor vehicle,[5] two charges of driving while suspended,[6] two charges of dishonestly using a document,[7] unlawfully possessing knives[8] and a small quantity of methamphetamine.[9]

[6] The offending occurred between 27 July and 21 November 2022 when the appellant was arrested by the Police. It involved a spree of dishonesty offending over the course of several months, including the burglaries of residential properties, the unlawful taking of motor vehicles, theft of small property, being found in possession of a knife and methamphetamine, and driving while suspended. The Judge in the District Court addressed the facts in detail in his sentencing remarks at paras [2] to [10]. It is not necessary to address them further here given that no issue is taken with the starting point adopted or uplifts for the various tranches of offending, leading to an adjusted starting point of four years or 48 months' imprisonment, bearing in mind totality.

[7] Neither is there a dispute that the Judge was correct to apply an uplift of five per cent to reflect that one of the burglaries, the two charges of unlawfully taking motor vehicles, one of the thefts and the possession of knives and methamphetamine were all committed while on bail.

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2 Crimes Act 1961, s 231(1)(a); maximum penalty 10 years' imprisonment.
3 Sections 219 and 223(d); maximum penalty three years' imprisonment.
4 Sections 246 and 247(c); maximum penalty three months' imprisonment.
5 Section 226(1); maximum penalty seven years' imprisonment.
6 Land Transport Act 1998, s 32(1)(c) and 32(3); maximum penalty three months' imprisonment.
7 Crimes Act, s 228(1)(a); maximum penalty seven years' imprisonment.
8 Summary Offences Act 1981, s 13A; maximum penalty three months' imprisonment.
9 Misuse of Drugs Act 1975, s 7(1)(a) and 7(2); maximum penalty six months' imprisonment.

[8] The Judge discounted the sentence by 18 per cent for guilty pleas and 10 per cent for remorse. No issue was taken with these deductions. However, the Judge allowed a further five per cent discount for the fact that the appellant had begun addressing his addiction issues. He allowed no deduction to reflect the fact that, at the age of 34, the appellant appeared before the Court for the first time.

[9] The reduction the Judge gave to reflect the appellant's time spent on electronically monitored (EM) bail of three and a half months was not challenged on appeal but it was acknowledged by Mr Lucas, on behalf of the appellant, that this deduction was generous as it effectively matched the time actually spent on EM bail.

[10] In the end, the sentence the Judge imposed was one of 31 months' imprisonment. Because of this, the appellant was not eligible to be considered for home detention, which had been the recommendation in the Provision of Advice to Courts (PAC) report.

Principles on appeal

[11] Appeals against sentence are allowed as of right by s 244 of the Criminal Procedure Act 2011 and must be determined in accordance with s 250 of that Act. An appeal against sentence may only be allowed by this Court if it is satisfied that there has been an error in the imposition of the sentence and that a different sentence should be imposed.[10] As the Court of Appeal mentioned in *Tutakangahau v R*, quoting the lower court's decision, a "court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles".[11] It is only appropriate for this Court to intervene and substitute its own views if the sentence being appealed is "manifestly excessive" and not justified by the relevant sentencing principles.[12]

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10 Criminal Procedure Act 2011, ss 250(2) and 250(3).
11 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
12 *Ripia v R* [2011] NZCA 101 at [15].

Discussion

Deduction for addiction

[12] I first deal with the deduction allowed to reflect the appellant's drug addiction. The PAC report addressed this and provided some context to it, as did the restorative justice report, the letter from the Ashburton Community Alcohol and Drug Service, and the appellant's letter to the Judge, all of which were summarised in Mr Lucas' written submissions which he provided on sentencing.

[13] In summary, the point is that drug use was an issue for the appellant, and it was submitted largely the reason for his offending. It appears that the appellant developed an addiction to methamphetamine following a difficult phase in his life during which his business failed, his family and friends distanced themselves from him, and he became homeless.

[14] After being arrested, the appellant was granted EM bail and began actively engaging with the Community Alcohol and Drug Service in Ashburton. He self-referred to that agency and began attending weekly counselling sessions, expressing through counsel his plan to continue seeking support in the community.

[15] Although he accepted that methamphetamine played a significant role in the appellant's offending, the Judge did not consider it to be a mitigating factor. He referred to s 9(3) of the Sentencing Act which provides that, to the extent the offending is related to the effects of alcohol or drugs which have voluntarily been taken, that cannot be regarded as a mitigating factor.

[16] The Judge concluded that the appellant was taking methamphetamine and the offending was the result of its effect on him, not that he was committing crimes to support his habit.[13] The Judge did however allow a five per cent discount to recognise the steps the appellant had taken to deal with his addiction to methamphetamine.

[17] The appellant submits and the Crown accepts that, on the evidence before the Judge, there was sufficient background for him to infer that there was a causative link

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[13] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

between the appellant's addiction and his offending. I agree. The Judge erred in this respect.

[18] The strength of the causative connection influences the discount applied in sentencing.[14] The difference between counsel is the percentage deduction each submits should apply, with Mr Lucas for the appellant submitting it ought to be 30 per cent, and Ms Hallaway for the Crown submitting that a discount in the vicinity of 20 per cent was appropriate.

[19] As noted in *Berkland v R,* it is sufficient for background factors to have a causative contribution as opposed to being the operative cause.[15] I agree with Mr Lucas that it is of "real relevance" that Mr Horn used drugs in his youth to attempt to combat traumatic home events. I note Mr Berkland received a 10% discount for his background which involved sexual abuse amongst multiple other criminogenic factors as well as ten per cent for his efforts at rehabilitation, leading to a total discount of 20 per cent.[16]

[20] I have also reviewed *Hughes v R* as submitted by the Crown. In her submissions, Ms Hallaway submitted a 20 per cent deduction was credited to Mr Hughes for "childhood trauma and resulting addiction combined with positive rehabilitation prospects". In fact, ten per cent credit was granted for Mr Hughes' genuine remorse and payment of reparation and ten per cent credit was granted for childhood trauma, addiction and positive rehabilitative prospects.[17]

[21] While the appellant experienced some deprivation early on in his life and he had difficulties at school, in my view, he nonetheless managed to overcome these matters to an extent, as is evidenced by the pro-social life he was leading before this offending. In my view, there is nothing present in the appellant's background to justify a discount any greater than that granted to the appellant in *Berkland* (ten per cent for background and ten per cent for rehabilitative efforts).[18] In my view, a 20 per cent

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14 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [108]–[109].
15 At [109].
16 At [151]–[162].
17 *Hughes v R* [2022] NZHC 2835 at [37]
18 *Berkland,* above n 14, at [162].

discount for background matters, addiction and rehabilitative efforts and prospects, is appropriate. To be clear, this includes and therefore replaces the five per cent adopted by the Judge for rehabilitative prospects.

Previous good character / lack of previous convictions

[22] An offender's good character will usually amount to a mitigating factor at sentencing. The Court of Appeal has held that a clean record is, in itself, evidence of previous good character and worthy of some recognition.[19] However, in the absence of evidence of a positive contribution to the community, the credit will be limited.[20] A failure to take into account evidence of previous good character at sentencing, or to regard the lack of previous convictions as the absence of an aggravating factor rather than a specific mitigating factor, will amount to an error in principle.[21]

[23] The appellant is 34 years of age and has no previous convictions. He has operated a business and had a family, all of which indicates his life prior to this offending was pro-social.

[24] Ms Hallaway, for the Crown, referred to *Quinlan v R*, *Chai v R*, *Singh v R* and *Faiyum v R*.[22]

[25] In *Chai v R*, the defendant undertook numerous courses to improve themselves and gain better insight into their offending, as well as working "with some distinction" within the prison kitchen system. This was viewed as evidence of good character and "ability to contribute in a meaningful way to society beyond criminality".[23] A 10 per cent deduction was given in this case. The Crown cited *Singh* and *Faiyum* as two other Court of Appeal cases where appellants had no record of prior offending in serious drug offending conviction cases, and received 10 per cent good character deductions.[24] In *Quinlan*, a 15 per cent discount was adopted on appeal for good character and

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19 *R v Hockley* [2009] NZCA 74 at [30]; *Manawaiti v R* [2013] NZCA 88; *Quinlan v R* [2013] NZCA 634.

20 *Manawaiti v R*, above n 19, at [19]; *Rana v R* [2014] NZCA 468 at [17]; *Britow v R* [2017] NZCA 339 at [11].

21 *Manawaiti v R*, above n 19; *Rana v R*, above n 20.

22 *Quinlan v R*, above n 19; *Chai v R* [2020] NZCA 202; *Singh v R* [2020] NZCA 211; *Faiyum v R* [2020] NZCA 523.

23 *Chai v R*, above n 22, at [30].

24 *Singh v R*, above n 22; *Faiyum v R*, above n 22.

remorse, which was not interfered with on appeal. Overall, the Crown submitted that a 10 per cent discount for previous convictions is appropriate. Mr Lucas submitted 15 per cent was justified.

[26] A deduction to reflect the appellant's previous good is required. The Judge erred by not adopting a deduction for this. In my view, five per cent is appropriate and more in line with the authorities than the 15 per cent submitted by Mr Lucas.

Conclusion

[27] I have retained Judge Couch's four year starting point and his five per cent uplift as well as his 18 per cent guilty plea discount and 10 per cent remorse discount. I have replaced his five per cent rehabilitation discount with a 20 per cent discount for addiction and rehabilitation prospects and also apply a five per cent good character per cent. That creates a total discount of 48 per cent. That creates an end sentence of 25 months' imprisonment, rounded up.

Home detention

[28] The end term of imprisonment as a result of the further deductions mean that this sentence comes within the realms of consideration for home detention. The Crown did not oppose that as the appropriate sentencing outcome. I agree. In terms of usual principles, the end term of home detention would comprise half of the end sentence. Consideration needs to be given however to the time the appellant has spent remanded in custody. Mr Lucas advised that Mr Horn was remanded in custody from 22 November 2022 to 7 March 2023 and from the date of sentence on 9 June 2023 until today's date. In round figures, Mr Lucas submitted that this amounted to some six months. The Judge allowed a deduction for EM bail which encompasses the three and a half month period. This deduction was generous. Nonetheless, I am satisfied that a deduction is required to reflect time served.

[29] Judge Couch's EM bail credit was generous. I have chosen to partially retain that credit at three months. That takes the sentence down to 22 months' imprisonment. I then recognise the roughly three months the appellant spent in custody by granting a

one for one credit off the halved home detention sentence of 11 months' home detention to lead to an overall end sentence of eight months' home detention.

[30] I impose a term of home detention of eight months, with conditions as they appear in the pre-sentence report dated 29 May 2023 to apply.

Result

[31] The appeal is granted. The appellant is sentenced to eight months' home detention.

Harland J

Solicitors:
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