

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA708/2022  
[2023] NZCA 104**

BETWEEN DANIEL RAWIRI  
Appellant  
AND THE KING  
Respondent

Court: French, Dunningham and Cull JJ

Counsel: A Y H Young for Appellant  
N J Wynne for Respondent

Judgment: 12 April 2023 at 10 am  
(On the papers)

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal is granted.**  
**B The appeal is to be allocated an urgent oral hearing before a divisional court in Wellington on 1 May 2023.**
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**REASONS OF THE COURT**

(Given by French J)

**Introduction**

[1] Mr Rawiri was convicted in the District Court of three charges of breaching a sentence of intensive supervision as well as several driving and firearm offences. He was sentenced to a term of imprisonment of 27 months.<sup>1</sup>

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<sup>1</sup> *New Zealand Police v Daniel Rawiri* [2022] NZDC 12444.

[2] He now seeks leave to appeal his sentence. Leave is required because the proposed appeal would be a second appeal, Mr Rawiri having already unsuccessfully appealed to the High Court.<sup>2</sup>

[3] In a minute dated 3 February 2023, Collins J directed that the issue of leave should be determined separately from the proposed substantive leave and on the papers.

[4] The Crown opposes the application for leave.

### **Background**

[5] On 4 November 2020, Mr Rawiri was sentenced to 18 months' intensive supervision and a term of community work. He was also disqualified from driving for 18 months. He breached the sentence of intensive supervision between January 2021 and March 2021 by failing to report on two separate occasions and by changing addresses without prior approval.

[6] On 9 June 2021 Mr Rawiri was involved in a police chase after failing to stop while driving a stolen car. He weaved in and out of traffic and drove on the wrong side of the road. He was charged with various offences arising out of this incident and was granted bail.

[7] While on bail, he committed further offending.

[8] First on 15 July 2021, he discharged a sawn-off shotgun into the floor of a bedroom at his partner's house. There were children present elsewhere in the house. Mr Rawiri was the only one in the bedroom and told other occupants that it was an accident.

[9] Then on 19 July 2021 he was found as a passenger in another stolen car which also failed to stop when required by police. Mr Rawiri was aware he should not have been there.

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<sup>2</sup> *Rawiri v Police* [2022] NZHC 2466.

[10] A week later, he arrived at his partner’s home and told her to pack her baby daughter’s belongings as he considered the house wasn’t safe for the baby and he wanted to take her away with him. When the partner refused and other family members began to protest, Mr Rawiri threatened to kill them all. He also threatened to shoot his partner. At the time he made these threats, he did not have the shotgun with him. Subsequently, the police visited the home and found the shotgun and two rounds of ammunition.

[11] In total there were 11 charges arising out of these events as usefully summarised in the High Court decision in the following table:

| Date of offending     | Charge                                 |
|-----------------------|--|
| January to March 2021 | Breach intensive supervision (x 3)     |
|                       | Breach of community work               |
| 1 – 9 June 2021       | Unlawfully takes a motor vehicle       |
|                       | Dangerous driving                      |
|                       | Driving while disqualified             |
|                       | Failing to stop for Police             |
| 19 July 2021          | Unlawfully gets into a motor vehicle   |
| 15 – 29 July 2021     | Reckless discharge of a firearm        |
|                       | Threatening to do grievous bodily harm |
|                       | Unlawful possession of a firearm       |
|                       | Unlawful possession of ammunition      |

[12] Mr Rawiri pleaded guilty to all charges on 8 April 2022 and was sentenced on 30 June 2022 by Judge Field.

### **District Court sentencing**

[13] At sentencing, Judge Field adopted a global starting point of 43 months’ imprisonment (three years and seven months) calculated on the following basis:

- (a) four months' imprisonment for the breaches of intensive supervision to run concurrently with three months for breach of community work;
- (b) three months' imprisonment for the offending on 9 June 2021;
- (c) three months' imprisonment on the charge of unlawfully getting into a motor vehicle;
- (d) 18 months' for the reckless discharge of the firearm;
- (e) six months' on the threatening to kill charge; and
- (f) nine months' imprisonment for possession of the gun and the ammunition.

[14] The Judge then adjusted that starting point downwards by allowing a discount of 25 per cent for the guilty pleas and a further discount of “a little over” 10 per cent for mitigating factors identified in a cultural report, arriving at an end sentence of 27 months. He also disqualified Mr Rawiri from driving for two years.

### **The High Court appeal**

[15] On appeal, Downs J held the District Court's global starting point of three years and seven months' imprisonment was too high. Having regard to comparator cases in relation to the firearms offending<sup>3</sup> and taking account of the fact that the breaches of the Court orders occurred at around the same time, Downs J considered a more appropriate starting point was three years' imprisonment.

[16] Despite this, he was not however persuaded that the end sentence was manifestly excessive.

[17] That was because in his view the District Court Judge had been overly generous in giving Mr Rawiri the maximum credit available for the guilty plea. Downs J noted that the full credit of 25 per cent is usually reserved for a defendant

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<sup>3</sup> *R v Taikato* [2018] NZHC 77 and *Blair v Police* HC Dunedin CRI-2010-412-10, 13 May 2010.

who pleads guilty at the earliest possible opportunity and even then other factors such as the strength of the Crown case and whether the defendant has benefited from any plea arrangement are taken into account. In the circumstances of Mr Rawiri's case, the Judge considered that the orthodox credit would have been only 15 per cent. Had that been applied, the end sentence would have been the same.

[18] In coming to this conclusion, Downs J also rejected an argument that a discount should have been allowed on account of Mr Rawiri's age (24 years at the time of the offending) noting that any discount for youth would be offset by Mr Rawiri's extensive criminal history.

[19] The appeal was accordingly dismissed.

### **The application for leave to appeal to this Court**

[20] The test for obtaining leave to bring a second appeal is a high one. We are however persuaded that it has been met in this case on the basis that a miscarriage of justice may have occurred.<sup>4</sup>

[21] We say that for two reasons.

[22] First it is arguable that, contrary to the finding in the High Court, a full discount for the guilty plea or something approaching a full discount was available to Mr Rawiri, despite the long delay between the charges being laid and his guilty plea. We say that because it appears the proceeding was significantly disrupted by the Covid pandemic. There were various adjournments, difficulties in counsel being able to communicate with Mr Rawiri and significant delays in the prosecution providing disclosure. As Mr Rawiri's counsel Mr Young points out, those factors were beyond the control of Mr Rawiri and this was implicitly acknowledged by the respondent in both the District Court and the High Court when it supported a full discount.

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<sup>4</sup> Contrary to a submission made on behalf of Mr Rawiri, we do not accept that the proposed appeal raises any issue of general or public importance, that being the other ground on which leave may be granted.

[23] The second reason is that Mr Rawiri was never given any discount for the approximately 10 months he spent on electronically monitored bail (EM bail) without incident. This was never raised by counsel in either the District Court or High Court. Unfortunately, it was wrongly assumed that the time spent on EM bail had been taken into account. This assumption was a result of advice given by the Department of Corrections about the length of the final sentence. It was only realised that this was not the case when Mr Rawiri made inquiries about his eligibility for parole after the High Court appeal.

[24] Raising an issue for the first time on appeal, especially a second appeal, is problematic and seldom allowed. However, it is not automatically fatal to the granting of leave. Given that in this case it concerns an objectively verifiable fact and an oversight by someone other than the applicant himself, we consider it should not be a barrier to leave. The overriding test must always be the interests of justice.

[25] The Crown does not take issue with the High Court's reduced starting point of three years' imprisonment. The reduced starting point when combined with a 25 per cent or close to 25 per cent discount for the guilty plea and a discount for EM bail means there is in our view an argument worthy of ventilation on appeal that the end sentence was manifestly excessive.

[26] We have therefore decided to grant leave to appeal.

### **Outcome**

[27] The application for leave to appeal is granted.

[28] The appeal is to be allocated an urgent oral hearing before a divisional court in Wellington on 1 May 2023.

Solicitors:  
Crown Law Office, Wellington for Respondent