

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA36/2025
[2025] NZCA 101**

BETWEEN	BRIAN HERBERT WARU Appellant
AND	THE KING Respondent

Hearing:	3 April 2025
Court:	Collins, Muir and Isac JJ
Counsel:	A T Tupuola for Appellant I S Auld for Respondent
Judgment:	9 April 2025 at 10.30 am

JUDGMENT OF THE COURT

The application for bail pending the hearing of Mr Waru’s appeal against sentence is declined.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr Waru seeks bail pending the determination of his sentence appeal in respect of one charge of supplying cannabis to a person under 18, for which he was sentenced to 18 months’ imprisonment, and one charge of cruelty to a child, for which he was sentenced to 30 months’ imprisonment. The sentences are concurrent and were

imposed by Judge Rzepecky in the District Court at Whangārei on 19 December 2024.¹

Key legislative provisions

Section 54(2)(c) of Bail Act 2000 confers discretion on this Court to grant bail to Mr Waru. That discretion must be exercised in accordance with s 14 of the Bail Act, which provides that the onus is on Mr Waru to “show cause why bail should be granted”.² The overriding consideration is whether it is in the interests of justice to grant bail.³ When considering where the interests of justice lie, the court may, instead of considering the usual s 8 factors (which apply to ordinary bail applications), take into account the following:⁴

- (a) the apparent strength of the grounds of appeal;
- (b) the length of the sentence that has been imposed on the appellant;
- (c) the likely length of time that will pass before the appeal is heard;
- (d) the personal circumstances of the appellant and the appellant’s immediate family; and
- (e) any other consideration that the court considers relevant.

¹ *R v Waru* [2024] NZDC 31583 [sentencing notes] at [49].

² Bail Act 2000, s 14(2).

³ Section 14(1A).

⁴ Section 14(3).

Background

[2] We adopt the facts of Mr Waru’s offending as set out by Judge Rzepecky at sentencing. Around 1995, Mr Waru commenced a relationship with Ms A. Ms A has two daughters, one of whom is daughter B, who was six years old when Mr Waru’s relationship with Ms A commenced.

[3] When B was approximately 11 or 12 years old she was introduced to cannabis by Mr Waru. Mr Waru was convicted of one representative charge of supplying cannabis to B when she was under 18. Her evidence, which the trial Judge had no hesitation in accepting, was that Mr Waru supplied B with cannabis, including in the form of cannabis plant and cannabis oil, on a regular basis.⁵ He taught her how to use a “bong” and how to “spot” cannabis oil.⁶

[4] At trial, Mr Waru argued that it was Ms A who introduced B to cannabis. The Judge found however “that the evidence established it was [Mr Waru] who supplied [B] with cannabis and generally encouraged her to use it ... for a prolonged period of time from when she was around 11 or 12”.⁷

[5] B outlined a number of matters that led to Mr Waru being convicted of cruelty to B. That evidence was summarised by the Judge in the following way:

[9] ... There was regular violence against her mother which she witnessed, including punching, pulling hair, headbutting, kicking, and throwing things at her mother. On one occasion, [B] heard her mother scream and thought that [Mr Waru] had killed her. [B] said that [Mr Waru] would punch holes in the wall next to their heads. [Mr Waru] would chase them and do anything which would make them feel intimidated.

[10] One of the most serious allegations was the way that [Mr Waru] treated their family pets to upset [B] and her sister. She said in evidence that [he] would smash their family dog with fishing rods, kick them, and severely beat them. On one occasion, she recalls that the dog had had puppies. [Mr Waru] lined [B] and her sister up on the veranda and then cut the heads off the puppies at a wooden chopping block which [he] had at the back of the house in front of them so that they were forced to watch. As young children, they had no option.

⁵ Sentencing notes, above n 1, at [4].

⁶ At [4].

⁷ At [7].

[11] On another occasion [Mr Waru] hung one of the dogs up with a rope to a tree. The dog was called Patch and [B] said in evidence that she could remember it twisting on a rope. I distinctly remember her evidence on that point. [B] owned a personal pet dog which disappeared. Sometime later [Mr Waru] told her that [he] had shot the dog with two bullets: “The first one got him in the eye and then the other was to blow his fucking brains out” [he] told her.

[12] [Mr Waru was] also verbally abusive to [B], her mother, and her sister. [He] would call her a “fucking cunt” and say: “I’ll smash your fucking head in.” As [B] got older [he] even attempted to exercise some control over what clothing she wore. For example, somewhat bizarrely, [he] did not allow her to wear skirts.

[13] To some extent [Mr Waru] stopped her going out and socialising and [he] tried to prevent her from attending her friends’ parties. She said that she was constantly on guard. Every little noise, every little bang that she heard put her on guard and she always felt like she had to protect her mother, and that was the environment which [he] provided for her upbringing when she was a child, both the cannabis and the actions against her.

[6] Judge Rzepecky said he accepted B’s evidence on these matters and rejected a submission made on behalf of Mr Waru that B had embellished her evidence.⁸ The Judge also said it was “likely that the jury were similarly persuaded on those points” made by B in her evidence and relied upon by the Crown in its closing address.⁹

Grounds of application

[7] Ms Tupuola, counsel for Mr Waru, emphasised the following matters in support of the application.

[8] First, the evidence of Mr Waru having supplied cannabis to B and the instances of cruelty we have set out above, were firmly rejected by Mr Waru. Ms Tupuola submitted “[t]he axing of puppies[’] heads was strenuously rejected by Mr Waru as he loved his dogs”, and that “[t]he only act in respect of the ill-treatment acts stipulated by the Crown which was accepted by Mr Waru in cross-examination was verbal threats at times to [B]”. Ms Tupuola submitted those threats did not warrant a sentence of imprisonment.

⁸ At [15].

⁹ At [15].

[9] Secondly, the sentence imposed was manifestly excessive because the Judge adopted starting points that were too high and failed to allow sufficient credit for personal mitigating factors, particularly matters raised by a kaumātua who spoke at sentencing on behalf of Mr Waru pursuant to s 27 of the Sentencing Act 2002.

[10] Thirdly, there is likely to be a considerable delay before Mr Waru's appeal is heard during which time he will remain in custody unless bail is granted.

[11] Fourthly, the effect of imprisoning Mr Waru is that he will be separated from his ill 15-year-old daughter and partially deaf 10-year-old son. The Provision of Advice to Courts report says that he cares for those children.

Analysis

Strength of the appeal

[12] Mr Waru takes exception to the trial Judge's findings of fact. The difficulty with this argument is "[t]he Judge in a jury trial is effectively the thirteenth fact finder".¹⁰ The Judge's findings of fact were based upon his assessment of B and all of the surrounding evidence given at trial.

[13] We cannot accept on the basis of the material before us that the Judge's factual findings were unreasonable and not supported by the evidence. This in turn leads to the conclusion that the merits of the appeal against sentence are not compelling. On the basis of the facts as found by the trial Judge, the starting points appear to have been within the range that was reasonably available. Furthermore, the Crown may well be right when it submits that the deductions in sentence made in this case were generous.

Time to hearing of appeal

[14] Mr Waru's appeal can be heard in the week of 12 May 2025. Thus, the period from his sentence to the determination of his appeal is unlikely to be significant.

¹⁰ *R v Connelly* [2008] NZCA 550 at [14].

Personal circumstances

[15] The most compelling feature of Mr Waru's application is the impact of his sentence on his two children. It is for this reason that this Court is willing to hear his appeal much sooner than would normally be the case. This Court is willing to take this step in order to do what it can to assist Mr Waru's children.

Result

[16] The application for bail pending the hearing of Mr Waru's appeal against sentence is declined.

Solicitors:

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent