IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA727/2024
[2025] NZCA 272

BETWEEN	TE RAUTI HAUPAPA COOPER Appellant
AND	THE KING Respondent

Hearing: 19 May 2025

Court: Hinton, van Bohemen and Cull JJ

Counsel: G H Vear and N Reive for Appellant
H D L Steele and M S Chiraagh for Respondent

Judgment: 25 June 2025 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of six years and four months' imprisonment is set aside and a sentence of five years and seven months' imprisonment is imposed.

REASONS OF THE COURT

(Given by Cull J)

Introduction

[1] Mr Cooper appeals his sentence of six years and four months' imprisonment.[1] He pleaded guilty to one charge of wounding with intent to cause grievous bodily harm.[2]

[2] He contends that the sentence is manifestly excessive for three reasons. First, he says that the Judge adopted a starting point that was too high. Second, he submits the Judge failed to adequately reflect the impact of his background under s 27 of the Sentencing Act 2002. Lastly, the Judge imposed an excessive uplift for prior convictions.

Background to the offending

[3] On 17 November 2023, Mr Cooper took a loaded firearm to retrieve a debt, and parked outside the victim's accommodation.[3] He acknowledges he was under the influence of methamphetamine and MDMA at the time. As the victim emerged from the building, Mr Cooper got out of the car, approached him and demanded his bag.[4] The victim ran. Mr Cooper gave chase, raised his firearm, and shot the victim in the back.[5] He then fled the scene.

[4] The shooting occurred in the presence of a nearby schoolchild and passing traffic.[6] The victim survived the shooting but was in hospital for five days receiving treatment for his gunshot wound.[7] He required a chest drain and had bullet fragments that could not be removed.

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1 *R v Cooper* [2024] NZDC 24674 [sentencing notes].
2 Crimes Act 1961, s 188(1); maximum penalty 14 years' imprisonment.
3 Sentencing notes, above n 1, at [2].
4 At [2].
5 At [2].
6 At [3].
7 At [3].

Sentencing decision

[5] The Judge determined, and counsel agreed, that the offending sat near the top of the second band in *R v Taueki*.[8] The Judge noted the following features which made the offending serious:[9]

(a) the use of a dangerous weapon;

(b) the serious injury caused; and

(c) premeditation, in that Mr Cooper brought a weapon with him for a confrontation.

[6] Noting that cases in the second *Taueki* band should attract starting points of between five and 10 years' imprisonment, the Judge adopted a starting point of eight years' imprisonment.[10] He observed that, if multiple offenders had been involved, Mr Cooper's offending would have involved a starting point in the low to middle part of band three.[11]

[7] For Mr Cooper's previous convictions for violence, the Judge imposed a five per cent increase, stating that he kept "that recognition as low as [he could] because [Mr Cooper has] already served those sentences".[12] He allowed a 15 per cent reduction for Mr Cooper's guilty plea.[13] He recorded that although Mr Cooper had signalled a willingness to plead before case review, he did not do so for a period thereafter for remand status reasons.[14] A five per cent allowance was made in recognition that Mr Cooper was "genuinely remorseful".[15] Neither of these allowances is contested on appeal.

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8 At [8], citing *R v Taueki* [2005] 3 NZLR 372 (CA).
9 Sentencing notes, above n 1, at [5]–[7].
10 At [8].
11 At [8].
12 At [9].
13 At [10].
14 At [10].
15 At [11].

[8] For Mr Cooper's background and personal factors, the Judge considered a six per cent reduction was appropriate.[16] In doing so, he relied on the case of *Carroll v Police* where the Court stated:[17]

> [29] If some level of discount was justified for Mr Carroll's reduced agency because of his background, it should have been at a rate that was lesser than his previous discount, to reflect the heightened need to denounce his conduct, and to protect the community, and to recognise the lower likelihood of rehabilitation. A discount in the range of zero to eight per cent may have been appropriate.

[9] On this basis, the Judge noted that Mr Cooper would not get a significant reduction for his background "if [he kept] using it to get a lesser sentence".[18] He emphasised that Mr Cooper had the benefit of a s 27 report on previous convictions, leading to "a lenient sentence".[19] Given that Mr Cooper's offending was more serious than his previous offending, the Judge considered that the:[20]

> pattern of offending … requires us to think more about protecting people, more about denouncing your conduct, deterring your conduct, than it does to recognise those background features that we have already looked at before.

[10] The Crown's application for a firearm prohibition order with standard conditions was granted.[21] That order is not contested on appeal.

Approach on appeal

[11] Mr Cooper's right of first appeal against sentence arises under s 244 of the Criminal Procedure Act 2011. An appeal against sentence is an appeal against the Judge's discretion.[22]

[12] To succeed, Mr Cooper must show that there was an error in the sentence reached and that a different sentence should have been imposed.[23] The Court will generally not intervene where the sentence is within the range available to the

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16 At [13].
17 *Carroll v Police* [2023] NZHC 3293 at [29].
18 Sentencing notes, above n 1, at [12].
19 At [12].
20 At [12].
21 At [15].
22 *Filivao v R* [2024] NZCA 103 at [30].
23 Criminal Procedure Act 2011, s 250(2).

sentencing judge.[24] The Court will intervene only if the end sentence is manifestly excessive.[25]

The starting point

[13] The parties agree that Mr Cooper's offending fell within band two of *Taueki* and that the three aggravating factors of premeditation, serious injury, and use of the firearm were present.[26] For Mr Cooper, Ms Vear submits however, that the eight-year starting point was at the upper end of the available range. She relies on this Court's statement in *Stehlin v R*, that "a starting point of approximately seven years' imprisonment could not have been criticised" for offending inflicting similar or more serious injury.[27]

[14] In *Stehlin*, a starting point of eight years was adopted for a mistaken but impulsive shooting of a man whom the offender thought was attacking the man's partner. The offending involved extreme violence with a dangerous weapon, life threatening injury and premeditation.[28]

[15] We accept the Crown's submission that compared to *Stehlin*, the degree of premeditation in Mr Cooper's offending is demonstrably higher. Mr Cooper carried a loaded firearm to retrieve a debt from the victim and shot him in the back when the victim retreated, causing serious injury requiring surgery and hospitalisation. The spontaneous offending in *Stehlin* is not comparable.

[16] While we consider that it was open to the Judge to determine that a marginally lower starting point was available, the starting point of eight years was within the available range. It is also relevant that in *Stehlin*, this Court on appeal upheld the starting point of eight years' imprisonment.

[17] We find against this ground of appeal.

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24 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
25 *Kumar v R* [2015] NZCA 460 at [81].
26 *R v Taueki*, above n 8, at [31]; and sentencing notes, above n 1, at [5]–[7].
27 *Stehlin v R* [2022] NZCA 453 at [40].
28 At [36].

The reduction for personal circumstances

[18] The principal challenge in Mr Cooper's appeal was the minimal six per cent reduction for Mr Cooper's background factors, and the Judge's reliance on the High Court's decision in *Carroll*.[29]

[19] Ms Vear submits that the Judge erred in his application of *Carroll*, for two reasons. First, *Carroll* was of limited application due to Mr Cooper's limited *relevant* criminal history and his remorse, which indicate he has rehabilitative potential. Secondly, the authorities support an individualised analysis of the offending and offender in cases of repeat offenders seeking a discount for their background.[30]

[20] The issue here is whether the maximum range suggested in *Carroll* of a deduction of zero to eight per cent for background factors where there is repeat offending, should be applied. It is relevant therefore, to review the facts in *Carroll* as a comparator.

Carroll v Police*: the comparator*

[21] Mr Carroll pleaded guilty to 13 charges relating to a series of family violence incidents. Those charges included assault with a weapon, assault on a person in a family relationship, and nine offences of breaching a protection order (the subject offences).[31] All of the charges arose out of interactions between Mr Carroll and his then partner in 2022.[32] At the time of this offending, he was subject to a protection order.[33] He committed the subject offences within two months of his release from prison for similar offending against the same complainant.[34] He was sentenced to three years and four months' imprisonment, which he appealed.[35]

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29 *Carroll v Police*, above n 17.
30 *Smith v Police* [2024] NZHC 858 at [22]; *Edwards v R* [2024] NZHC 1762 at [28]; and *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [94].
31 *Carroll v Police*, above n 17, at [1(a)–(b)].
32 At [2].
33 At [3].
34 At [5].
35 At [6].

[22] Mr Carroll had previously been sentenced to 13 months' imprisonment on different family violence charges relating to the same complainant in May 2022.[36] In the May 2022 sentencing, the Judge had regard to the same s 27 report that was before the Court for the subject offences under appeal. The Judge allowed a 15 per cent reduction for Mr Carroll's personal factors in the May 2022 offending.[37] In the subsequent sentencing for the subject offences, no allowance was made for his background factors.[38]

[23] On appeal, Palmer J accepted there was a clear causal link between Mr Carroll's childhood experience of physical and sexual abuse, and his offending, described in the s 27 report.[39] The 15 per cent reduction for his personal circumstances in May 2022 reflected Mr Carroll's reduced agency — his lessened ability to rationally choose optimal and pro-social behaviour.[40] It also reflected what the sentencing Judge saw as demonstrated remorse, offering the prospect of rehabilitation.[41]

[24] In relation to the subsequent offending, Palmer J considered the sentencing purposes of denunciation, community protection and protection of the victim in particular were now heightened.[42] These purposes were invoked by Mr Carroll's repeated domestic violence offending and re-offending just under two months after his release from prison, against the same complainant. The prospect of Mr Carroll's rehabilitation was remote.[43] Against this background, Palmer J proposed that if some level of discount was justified for Mr Carroll's reduced agency because of his background, it should have been at a rate that was lesser than his previous discount.[44] This shifting emphasis reflected the heightened need to denounce his conduct, to protect the community, and to recognise the lower likelihood of rehabilitation. He considered such a discount in the range of zero to eight per cent may have been appropriate.[45]

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36 At [4(c)]–[5].
37 At [5].
38 At [6(d)].
39 At [26].
40 At [26].
41 At [26].
42 At [28].
43 At [28].
44 At [29].
45 At [29].

[25] Mr Carroll's appeal was unsuccessful. The sentence imposed was within the range available and was not manifestly excessive, "even if a full eight per cent discount should have been made for personal circumstances".[46]

Mr Cooper's background

[26] Here, both parties accept that Mr Cooper's background has a causal connection to his offending. Mr Cooper's s 27 report, prepared in 2020, details a difficult background, including witnessing the extremely distressing death of his mother and the murder of two of his cousins as a child. His substance abuse and previous gang affiliation are proximately connected with those childhood experiences, as well as his exposure to physical violence, criminal activity, and alcohol and other drug misuse at a young age. The report makes for very sobering reading.

[27] We consider the facts in Mr Cooper's case are distinguishable from *Carroll*. While Mr Cooper has an adult criminal history dating back to 2012, much of his offending is at a lower level than Mr Carroll's. His relevant convictions include unlawfully carrying a firearm, aggravated robbery and a kidnapping in 2018, combined with several domestic violence related convictions in 2015. Prior to the offending that is the subject of this appeal, there had been no further violent offending since the 2018 offending. We do not agree that there is a discernible "pattern of offending starting to develop" in Mr Cooper's case as the Judge described.[47] There was a gap of five years between the aggravated robbery and kidnapping offending in 2018 and his offending in 2023.

[28] This is in stark contrast to *Carroll*, where the appellant had received three sentences for family violence offending against the same complainant across 2021 and 2022.[48] Protection of that victim was one of the heightened sentencing considerations taken into account, against the backdrop of 27 convictions relating to family harm since 2004.[49]

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46 At [30].
47 Sentencing notes, above n 1, at [12].
48 *Carroll v Police*, above n 17, at [27].
49 At [18] and [28].

[29] The Judge's proposed deduction range in *Carroll* for background factors when there is repeat offending must be read in the context of the facts in that case. It was informed by the heightened need to denounce Mr Carroll's repeated violent conduct and to protect the victim. We agree with and endorse the observations made in other decisions that the deduction range proposed in *Carroll* does not express a general legal sentencing principle.[50] That decision must be seen in the specific context and facts to which it relates; it does not fix a tariff for reduced agency deductions for repeat offenders.[51]

Addressing repetitive offending

[30] In *Berkland v R*, the Supreme Court addressed the issue of an offender's background in sentencing for repetitive offending:[52]

> … a question also arises as to the impact of background in sentencing for repetitive offending. While this is not a matter before us we acknowledge that it may raise similar issues. Again, the focus must be on the facts of the offence and the offender. On the one hand criminogenic background factors tend to be reflected in repeat offending. Sentencing judges generally understand this and the need for patience. But we accept that at some point other sentencing principles however will take over.

[31] This Court has previously observed that a background of deprivation and disadvantage "may leave its mark on a person throughout life" in the context of repeat offending.[53]

[32] It is correct, as the Crown submits, that Mr Cooper's s 27 report has already formed the basis for a 20 per cent allowance for his previous sentence for the 2018 charges.[54] Nonetheless, reducing the allowance to only six per cent for background factors for this sentence because the s 27 report is part-spent is severe.

[33] We accept Ms Vear's contention that reducing the allowance for an offender's personal circumstances, because those factors have played a role in prior offending,

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50 *Edwards v R*, above n 30, at [28]–[29], citing *Smith v Police*, above n 30, at [21].
51 *Smith v Police,* above n 30, at [21].
52 *Berkland v R*, above n 30, at [94], n 105.
53 *Poi v R* [2020] NZCA 312 at [37], quoting *Bugmy v R* [2013] HCA 37, (2013) 249 CLR 571 at [43].
54 *R v Cooper* [2021] NZDC 548 at [10].

while imposing an uplift for previous convictions, has the appearance of a double penalty. In this case, the uplift of five per cent for Mr Cooper's previous convictions offsets the six per cent allowance for his background factors, that allowance already having been reduced because of his previous convictions.

[34] There are two factors which we consider meant that Mr Cooper's allowance for his background factors should not have been reduced, or not to the extent applied by the Judge. The first is the absence of an increased pattern in his violent offending. Second, Mr Cooper has taken a significant step towards his rehabilitation into the community. In addition to his letter of remorse to the Judge for which he was given a five per cent allowance, he is no longer a member of a gang. He has distanced himself from those connections, even while in prison. He is also making efforts to remain drug free.

[35] We find that a reduction of 15 per cent for his background factors is appropriate, given the causal connection between Mr Cooper's background and the offending, together with his remorse and the rehabilitative steps he has undertaken.

Uplift for previous convictions

[36] We have already noted Ms Vear's submission that the five per cent uplift for Mr Cooper's prior convictions for violence offset the minimal discount of six per cent for his background, despite his absence of a pattern of violent offending. She suggests a three-month uplift may have been in range ordinarily.

[37] While we accept that Mr Cooper's relevant convictions are dated back to 2018, they include unlawfully carrying a firearm, aggravated robbery and kidnapping. This 2023 offending was serious and could have easily resulted in a fatality. The uplift of five per cent marks deterrence for repeat violent offending while avoiding the risk of double punishment for previous sentences already served.

[38] We make no adjustment to the five per cent uplift.

Result

[39] The appeal is allowed.

[40] The sentence of six years and four months' imprisonment is set aside, and a sentence of five years and seven months' imprisonment is imposed.

Solicitors:
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