IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA669/2024
[2025] NZCA 232

BETWEEN	ROSS GEMMEL FITZGERALD Appellant
AND	THE KING Respondent

Hearing:	27 March 2025
Court:	Palmer, Brewer and Gault JJ
Counsel:	T J Jackson for Appellant S M H McManus and N Girgis for Respondent
Judgment:	12 June 2025 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Mr Fitzgerald must surrender himself to the Prison Director at Christchurch Men's Prison (or such location as may be directed by Ara Poutama Aotearoa | the Department of Corrections in writing) by 10 am within two days from the release of this judgment to complete the sentence of imprisonment imposed by Judge Savage.

REASONS OF THE COURT

(Given by Gault J)

[1] Mr Fitzgerald appeals a sentence of three years and three months' imprisonment imposed by Judge C D Savage in the District Court at Timaru on

4 October 2024,[1] following conviction by a jury on one charge of theft by a person in a special relationship,[2] three charges of using a document with intent to obtain a pecuniary advantage,[3] and one charge of theft.[4]

[2] We must allow the appeal if there is an error in the sentence imposed and we find that a different sentence should be imposed.[5]

What happened?

[3] We adopt the Judge's summary of the offending at sentencing:

> [2] The theft [by] a person in a special relationship relates to the relationship you had with the victim of your offending, a man who suffers from multiple sclerosis and is bedridden in his horse float. You attended upon him and, at his request, you withdrew money from his bank account using his bank card and his PIN. The evidence at trial was that you were the only person entrusted with that bank card and with that PIN, with the inference being that all the money was withdrawn by you. The Crown case was put on the basis that you were withdrawing funds at the victim's request, that you had an obligation to account to him for the funds that were withdrawn, but you failed to do so. The Crown point to $155,000 being withdrawn from that account using that card during the period that the charges relate to.
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> [3] In addition, you have been found guilty on three charges of using a document to obtain a pecuniary advantage, and that is using the victim's card to make purchases at various retail outlets in Timaru, the items purchased being electrical goods, like a television, a vacuum cleaner, and a washing machine.
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> [4] The final charge is one of theft, with the allegation being that you took a black bag from the victim's horse float that contained $32,000.

Grounds of appeal

[4] The primary ground of appeal is that the Judge was wrong to sentence on the basis that the amount stolen by Mr Fitzgerald was $162,460, made up of:

(a) $123,000 from the ATM withdrawals (theft by a person in a special relationship charge);

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1 *R v Fitzgerald* [2024] NZDC 24259 [sentencing decision] at [15].
2 Crimes Act 1961, ss 220 and 223(a). Maximum penalty 7 years' imprisonment.
3 Section 228(1)(b). Maximum penalty 7 years' imprisonment.
4 Sections 219 and 223(b). Maximum penalty 7 years' imprisonment.
5 Criminal Procedure Act 2011, s 250(2).

(b) $7,460 in unauthorised retail purchases (use of document charges); and

(c) $32,000 taken from a safe in the victim's room (theft charge).

[5] Mr Jackson, for Mr Fitzgerald, submitted that $162,460 was a higher amount than the evidence could support.

[6] The defence at trial was that all the money the appellant withdrew had been given to the victim and was, at the time of a robbery on 5 July 2022, with the victim.

[7] That defence was not accepted by the jury. But Mr Fitzgerald was found not guilty of the robbery.

[8] At sentencing it was submitted Mr Fitzgerald's dishonesty could not properly be quantified at more than the retail spending ($7,460) and possibly some unknown quantity of cash held back from the withdrawals, and that the bulk of the money he had withdrawn for the victim had in fact been given to him—counted out in front of him.

[9] In relation to the theft by a person in a special relationship charge, the sentencing Judge was sure that the proper amount was $123,000.[6] The Crown case was that was the $155,000 withdrawn less $32,000 counted out in front of the victim. Mr Fitzgerald was convicted.[7] In relation to the using a document charges, the dollar values were not in dispute because there were receipts for the goods purchased, amounting to $7,460.[8] In relation to the theft charge:[9]

> … the Crown case was put on the basis that the $32,000 that [Mr Fitzgerald] had accounted to the victim for was stolen in June of that year, and there was evidence at trial to support it.

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6 Sentencing decision, above n 1, at [6].
7 At [5].
8 At [7].
9 At [8].

[10] The Judge saw "no risk of that $32,000 being mixed up with other funds that may or may not have been stolen in the course of a robbery".[10] There was no double counting. We find there was no error in the Judge's assessment of the amount.

[11] Mr Jackson also submitted that the Judge overemphasised the breach of trust and the victim's vulnerability, and it was a mitigating factor that the victim was partly to blame for choosing to trust Mr Fitzgerald. We accept that some breach of trust is inherent in the lead charge, but the seriousness of that breach is relevant to assessment of the offending.[11] The Judge rightly characterised the breach of trust as significant and the victim as highly vulnerable. In those circumstances, we do not see choosing to trust Mr Fitzgerald as mitigating the offending. No issue can be taken with the Judge's starting point of three years' imprisonment on the lead charge of theft by a person in a special relationship.[12]

[12] No issue was taken with the uplift of three months for the theft charge which the Judge said was paying heed to the totality principle.[13] There was no uplift for the credit card offending.[14] We agree with Ms McManus, for the Crown, that the adjusted starting point of three years and three months was generous.

[13] Mr Jackson also submitted that a reduction of 10 to 15 per cent should have been given for Mr Fitzgerald's personal mitigating circumstances. We accept Mr Fitzgerald had not previously been sentenced to imprisonment, and the Provision of Advice to Courts (PAC) report assessed that he had a low risk of reoffending and recommended a rehabilitative sentence. However, there was no link between the offending and Mr Fitzgerald's earlier drug use, nor was there acceptance of the offending or remorse. We also do not see any need for a reduction on the basis that acquittal on the robbery and an assault charge indicated the defence had merit. A modest reduction may have been appropriate on rehabilitative grounds, but it would only offset the generous adjusted starting point.

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10 At [8].
11 See for example: *Varjan v R* CA97/03, 26 June 2003 at [22]; *McGregor v R* [2015] NZCA 565; and *Wilton v New Zealand Police* [2015] NZHC 427 at [21].
12 Sentencing decision, above n 1, at [12].
13 At [12].
14 At [13].

[14] We find there was no error in the end sentence imposed.

Result

[15] The appeal is dismissed.

[16] Mr Fitzgerald must surrender himself to the Prison Director at Christchurch Men's Prison (or such location as may be directed by Ara Poutama Aotearoa | the Department of Corrections in writing) by 10 am within two days from the release of this judgment to complete the sentence of imprisonment imposed by Judge Savage.

Solicitors:
JMJ Lawyers Ltd, Timaru for Appellant
Crown Solicitor, Timaru for Respondent