

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA40/2025
[2026] NZCA 106**

BETWEEN SHANE DOUGLAS MCNALLY
Appellant
AND THE KING
Respondent

Hearing: 25 March 2026
Court: Collins, Mander and Becroft JJ
Counsel: M G Robinson and A M Nicoloff for Appellant
R G Buckman for Respondent
Judgment: 9 April 2026 at 11 am

JUDGMENT OF THE COURT

- A The application to adduce fresh evidence is granted.**
B The appeal against sentence is allowed.
C We set aside the sentence imposed in the District Court and substitute it with one of two years and 11 months' imprisonment.
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REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr McNally appeals a sentence of three years and 11 months' imprisonment imposed by Judge Hastings in the District Court on 8 November 2024.¹ The sentence was imposed after Mr McNally pleaded guilty to 63 charges comprising:²

- (a) Five charges of breaching community-based sentences.
- (b) Five driving charges.
- (c) Four theft charges.
- (d) One charge of failing to answer court bail.
- (e) One charge of attempted unlawful taking of a motor vehicle.
- (f) One charge of unlawfully taking a motor vehicle.
- (g) One charge of unlawful interference with a motor vehicle.
- (h) One charge of receiving property.
- (i) Two drug-related charges.
- (j) 42 charges of fraud.

[2] Mr McNally's case has had a protracted history:

- (a) The first of the fraud charges were laid on 13 October 2020.
- (b) By 28 July 2021, 38 fraud charges had been laid against Mr McNally. 21 of those charges also related to his co-accused, Mr McBride.

¹ *Police v McNally* [2024] NZDC 29197 [Mr McNally sentencing notes] at [32].

² See at [2] and [18]. Mr McNally was also resentenced on five additional fraud charges and one burglary charge after Judge Hastings granted an application brought by the Department of Corrections to cancel a sentence of community work imposed on 15 March 2024: see at [5].

- (c) On 28 July 2021, Judge Sainsbury provided Mr McNally with a sentence indication. That indication involved a starting point of 36 months' imprisonment for the fraud offending on the assumption that Mr McNally and Mr McBride were equally culpable.
- (d) The sentence indication was not accepted by Mr McNally.
- (e) Mr McNally pleaded guilty to the 38 fraud charges on 29 July 2022. He came before Judge Becroft for sentencing on 4 November 2022. The Judge declined to sentence Mr McNally because there was a dispute about the role Mr McNally played in the offending.
- (f) An application to vacate the guilty pleas was filed on 3 March 2023.
- (g) The application to vacate the guilty pleas was abandoned and Mr McNally eventually came before Judge Hastings for sentencing on 8 November 2024.

[3] By the time he was sentenced, Mr McNally had been represented by five separate lawyers. His case was the oldest outstanding criminal matter in the District Court at Porirua. His appeal in this Court has also not proceeded smoothly. The appeal was first set down for hearing last year but was adjourned because Mr McNally wished to file “fresh” evidence.

[4] As noted in paragraph [2(e)], Judge Becroft (as he then was) dealt with an aspect of Mr McNally's case in the District Court. Judge Becroft made no decisions that were adverse to Mr McNally. Counsel before us agreed that there was no reason for Judge Becroft to recuse himself from hearing this appeal.

[5] The focus of the sentence appeal is on the fraud charges. We explain those charges at [7]–[15]. Judge Hastings adopted a three-year starting point in relation to those matters.³ As with Judge Sainsbury's sentence indication, the starting point for the fraud convictions was underpinned by the assumption that Mr McNally and

³ At [16].

Mr McBride were equally culpable. Mr McBride was subsequently sentenced to home detention.⁴ Although it is not entirely clear, it seems that the Judge who sentenced Mr McBride adopted a starting point of two years' imprisonment in relation to the fraud and other offending, which we will explain at [21].

[6] Mr McNally's appeal can be distilled to two points:

- (a) Mr McBride was the principal offender who was responsible for setting up the fraudulent schemes. Mr McBride received significantly more than Mr McNally from the proceeds of their frauds.
- (b) The principle of parity when sentencing co-offenders required a lower starting point for Mr McNally.

The fraud offending

[7] The fraud offending fell into two categories:

- (a) Claims under the Small Business Cashflow (Loan) Scheme (SBCS);
and
- (b) Claims under the Wage Subsidy Scheme.

Claims under the SBCS

[8] In April 2020, the Government announced the SBCS, which would be administered by the Inland Revenue Department (IRD) to support small businesses that were adversely affected by the COVID-19 pandemic. The scheme was created under urgency and was based upon the IRD exercising a high degree of trust when processing applications.

⁴ *Inland Revenue Department v McBride* [2021] NZDC 25930 [Mr McBride sentencing notes] at [15].

[9] Each SBCS loan application confirmed, among other matters, that the applicant:

- (a) had a viable business;
- (b) had traded prior to 1 April 2020;
- (c) had predicted or experienced a minimum decline of 30 per cent of revenue; and
- (d) would use the SBCS loan only for business operating expenses.

[10] The IRD received 21 SBCS applications between 13 May 2020 and 19 June 2020 which, as it later transpired, were linked back to either Mr McNally and or Mr McBride. Seven of those applications were accepted and resulted in IRD paying \$70,800 to Mr McNally's bank account. This represented six payments of \$11,800. Another loan for \$11,800 was paid to Mr McBride's bank account.

[11] Fourteen applications, seeking loans totalling \$141,600 were rejected by the IRD.

[12] An examination of Mr McNally's bank accounts shows that while \$70,800 was paid directly to Mr McNally's account, approximately \$53,000 was transferred to Mr McBride's bank account and it is also likely that some cash withdrawals made by Mr McNally upon receiving some of the SBCS loan payments were also paid to Mr McBride.

Claims under the Wage Subsidy Scheme

[13] The COVID-19 Wage Subsidy Scheme was administered by the Ministry of Social Development (MSD) and was established to assist employers and sole-traders who were adversely affected by loss of revenue and employee unavailability due to COVID-19 lockdowns.

[14] Mr McNally made 17 applications for Wage Subsidy payments. Only one of those applications succeeded, resulting in the MSD paying \$7,029.60 into Mr McNally's bank account on 29 April 2020.

[15] It is now accepted that all claims by Mr McNally and Mr McBride under the schemes we have summarised were fraudulent.

Other offending

[16] Although not the focus of the appeal before us, Judge Hastings also sentenced Mr McNally in relation to serious driving offences and the remaining dishonesty charges.⁵

Sentencing decision

[17] Judge Hastings treated the fraud offending as being the lead offences for the purposes of sentencing and adopted the same 36-month starting point that Judge Sainsbury had considered appropriate when giving Mr McNally a sentence indication.⁶ Judge Hastings then imposed uplifts of 12 months' imprisonment for the driving offending and a further 15 months' imprisonment for all other charges.⁷ The Judge made further increases to the starting point namely four months' imprisonment to reflect Mr McNally's history of fraud and other dishonesty and driving offending and three months' imprisonment to reflect the fact some of his offending occurred when he was on bail. The overall starting point was therefore 70 months' imprisonment.⁸

⁵ Mr McNally sentencing notes, above n 1, at [17]–[18].

⁶ At [10] and [16].

⁷ At [17]–[18].

⁸ At [20].

[18] The deductions made by the Judge to reflect personal mitigating factors comprised:

- (a) 10 months' imprisonment (15 per cent) in response to Mr McNally's guilty pleas;⁹ and
- (b) 13 months' imprisonment (20 per cent) to reflect Mr McNally's remorse, matters referred to in a s 27 cultural report, an alcohol and drug report and a psychological report, his willingness to engage in rehabilitation and the effect of his incarceration on his young child.¹⁰

[19] These deductions resulted in an end sentence of three years and 11 months' imprisonment.¹¹

[20] When sentencing Mr McNally, Judge Hastings accepted the Crown submission that Mr McNally's sentence had to be higher than Mr McBride's because:¹²

- (a) Mr McBride did not offend against the MSD;
- (b) Mr McBride entered guilty pleas at the earliest opportunity; and
- (c) Mr McBride had successfully completed a residential rehabilitation programme.

Mr McBride's sentence

[21] We have had the benefit of reading two sentencing decisions concerning Mr McBride. The first was delivered by Judge Butler on 20 December 2021. That decision covered three charges of taking a motor vehicle, one charge of theft, five charges of burglary, one charge of using a credit card dishonestly, two charges of obtaining by deception and two charges of using a document dishonestly. The latter two charges related to offending against the IRD and included a representative charge

⁹ At [21].

¹⁰ At [22]–[28].

¹¹ At [32].

¹² At [31].

which related to 21 specific instances of fraud.¹³ We infer, as did Ms Buckman for the Crown, that these 21 instances of fraud were the same matters that Mr McNally faced in relation to the SBCS loan applications.

[22] Although it is not entirely clear from the sentencing notes, it appears Judge Butler adopted a starting point of 24 months' imprisonment for all of Mr McBride's offending. This was commuted to a provisional sentence of 12 months' home detention.¹⁴ From that provisional sentence, the Judge then made further deductions to reflect the time Mr McBride had spent in residential care programmes. The end result was a sentence of six weeks' home detention.¹⁵

[23] The second sentencing decision was delivered by Judge Harrop on 22 August 2024 and concerned 36 convictions for dishonesty offending.¹⁶ The relevance of that decision is that it sheds more light upon Mr McBride who was described by the Judge as being:¹⁷

... a young man of intelligence and ability [who] has gone off the rails while at university, but in response to childhood events that were [not his] fault ...

Further evidence

[24] Mr McNally has filed two affidavits in this Court and applied to adduce a number of documents including text messages between himself and Mr McBride.

[25] The principles that govern "fresh" evidence is well settled.¹⁸ The evidence in question is not fresh. It could have been located with reasonable diligence at the time Mr McNally was sentenced. It is nevertheless cogent, and it is in the overall interests of justice that it be omitted.

¹³ Mr McBride sentencing notes, above n 4, at [2]–[3]. Mr McBride was also resentenced on charges for which community detention was imposed: see at [4].

¹⁴ At [11].

¹⁵ At [12].

¹⁶ *Police v McBride* [2024] NZDC 20269 at [2].

¹⁷ At [1].

¹⁸ *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

Analysis

Nature of Mr McNally's role in the offending

[26] Significantly, in the first of his affidavits in this Court, Mr McNally explains that he and Mr McBride had been in a rehabilitation centre together. He says Mr McBride:

... asked me if I wanted to make some easy money. I said yes and asked what he had in mind. He explained that he simply needed to use my bank account to route some money through and I would get a small proportion that went through it. I did not know what he was doing at the time and just agreed as I was desperate. I am able to say that this was reckless, and I should have known crime was happening through my account. As a result of that I agree I was party to that offending and I accept that I was sentenced after pleading guilty. But the details do not seem to have been included properly in my sentencing.

We have carefully examined Mr McNally's bank accounts. Those bank accounts were exhibited to an affidavit from an investigator from the IRD, filed in the District Court in opposition to Mr McNally's application to vacate his guilty pleas.

[27] Mr McNally's bank accounts show that while \$70,800 was paid directly to Mr McNally's account pursuant to the SBCS, whenever a deposit was made from the IRD into Mr McNally's account, part of this sum would immediately be transferred to Mr McBride's bank account or accounts that he controlled. The total amount transferred to Mr McBride was approximately \$53,000. These transactions were referred to in the summary of facts filed in the District Court, but it does not appear to have been appreciated that Mr McBride was the principal beneficiary of the SBCS frauds.

[28] We have also examined text messages between Mr McBride and Mr McNally in which Mr McNally remonstrated with Mr McBride over the latter's failure to leave Mr McNally's share of one SBCS payment in his bank account. This evidence confirms Mr McNally's evidence that Mr McBride was controlling Mr McNally's bank accounts at this time.

[29] Having observed Mr McNally being cross-examined by Ms Buckman, we are very satisfied that whilst he is guilty of the frauds we have described at [8]–[15],

Mr McBride was likely the principal offender and beneficiary of that offending. While Mr McBride may have been an intelligent young man, the same cannot be said about Mr McNally, who struck us being a person whose addiction issues caused him to be easily led by Mr McBride.

Parity

[30] It is acknowledged by the Crown that, where possible, sentencing judges should strive to achieve parity between the sentences imposed on co-offenders. In this case, the starting point for the fraud offending that involved both Mr McBride and Mr McNally ended up with Mr McBride enjoying the benefit of a starting point of what we infer to have been 24 months' imprisonment whereas the starting point for Mr McNally was 36 months' imprisonment. We immediately acknowledge that the starting point for Mr McNally also included his offending against the MSD.

[31] Nevertheless, we are concerned that the disparity between the two co-offenders was significant, and an adjustment needs to be made to Mr McNally's sentence to recognise the gross disparity that has emerged. This is particularly so in light of the fact that Mr McBride was clearly the principal offender and beneficiary of the SBCS frauds.

[32] We accordingly set aside the sentence imposed upon Mr McNally and resentence him on the basis that the starting point for his fraud offending should have been 24 months' imprisonment. All other increases and deductions made by Judge Hastings are adopted by us.

[33] The end result is that Mr McNally's end sentence is now one of two years and 11 months' imprisonment.

Result

[34] The application to adduce fresh evidence is granted.

[35] The appeal against sentence is allowed.

[36] We set aside the sentence imposed in the District Court and substitute it with one of two years and 11 months' imprisonment.

Solicitors:

Robinson Legal, Wellington for Appellant

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