IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA518/2025
[2026] NZCA 56

BETWEEN	MURTAJA SIJAD HANI ALBNAYAN Appellant
AND	THE KING Respondent

Hearing: 16 February 2026

Court: Campbell, Peters and Dunningham JJ

Counsel: J P Miller for Appellant
R G Buckman for Respondent

Judgment: 5 March 2026 at 11.00 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Dunningham J)

[1] Mr Albnayan was found guilty by a jury on charges of causing grievous bodily harm with intent to cause grievous bodily harm[1] and assault with a weapon.[2] Judge Nicholls sentenced him to four years and four months' imprisonment.[3] Mr Albnayan appeals his sentence.

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1 Crimes Act 1961, ss 66(1) and 188(1): maximum penalty of 14 years' imprisonment.
2 Section 202C(1)(a): maximum penalty of five years' imprisonment.
3 *R v Albnayan* [2025] NZDC 16676 [sentencing notes].

[2] The grounds of appeal are:

(a) the starting point was too high because of an incorrect assessment of the *R v Taueki* factors;[4]

(b) there should have been adjustments to the starting point of one year each for excessive self-defence and provocation; and

(c) the six-month uplift for the assault with a weapon charge should have been an uplift of only three months.

Factual background

[3] We adopt the sentencing Judge's description of the offending.[5]

[4] On the afternoon of 31 May 2023, Mr Albnayan was in the carpark of a dance centre in Newtown, Wellington, with at least two other men. One of these men, Mr Sheck, pleaded guilty to his involvement in the attack that ensued. The other associate remains unidentified.

[5] Mr Albnayan was sitting in his car when the victim, Mr Smith, approached him. There was an argument and Mr Smith threatened Mr Albnayan with a shotgun. Mr Albnayan responded by getting out of the car and chasing Mr Smith, armed with a knife, and accompanied by his associates.

[6] Mr Albnayan caught up with Mr Smith, and a struggle ensued during which the firearm was discharged. At some point during the struggle Mr Albnayan stabbed Mr Smith in the shoulder with his knife.

[7] Despite Mr Smith having been disarmed, Mr Albnayan and his associates continued to assault him. They hit him with either the shotgun or a large stick (or both) and punched and kicked him in the head. Mr Smith was left unconscious at the end of the assault. He suffered a traumatic brain injury and fractures to his skull

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4 *R v Taueki* [2005] 3 NZLR 372 (CA) at [31].
5 Sentencing notes, above n 3, at [4]–[8].

and face. He was on life support from 31 May to 3 June 2023 and remained in intensive care until 6 June 2023.

[8] The timing of events was not in dispute as Mr Albnayan was filming the altercation on his cell phone as he left his car, although the cell phone was dropped at an early stage in the altercation and so did not capture all the events visually. However, Mr Albnayan went to pick it up after Mr Smith had lost possession of the shotgun. Mr Albnayan then returned to Mr Smith, who was lying unconscious on the ground, and recorded him. He moved Mr Smith's hood to record Mr Smith's injured face and called him a "cunt". He then sent that video to associates. The phone record shows the altercation was over in less than one and a half minutes.

[9] Following a jury trial at which Mr Albnayan gave evidence claiming he acted in self-defence, he was found guilty on both charges.

[10] For completeness, we also note that Mr Albnayan and his co-defendant, Mr Sheck, sought a sentence indication prior to trial. The sentence indication was given by a different Judge. He indicated a starting point of six years for the grievous bodily harm offending and an uplift of three months for the assault with a weapon, accepting excessive self-defence could not be ruled out in relation to that charge.

Sentencing decision

[11] In sentencing Mr Albnayan, the Judge observed:

> [6] In finding you guilty on these charges the jury rejected your defence of self-defence, and so must have concluded that at the time you stabbed Mr Smith, and at the time that you participated in beating him unconscious, that you were either using excessive force or Mr Smith no longer posed a threat to you.

[12] The Judge identified six aggravating features of the grievous bodily harm offending, being:[6]

(a) the level of violence and the fact the offending involved sustained attacks to the head;

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6 At [11]–[14].

(b) the use of weapons;

(c) the seriousness of the injuries inflicted;

(d) the fact the assault involved at least three attackers;

(e) the vulnerability of the victim, his having been disarmed, stabbed and brought to the ground; and

(f) the fact the victim was videoed by Mr Albnayan "as some kind of trophy" and the video then distributed.[7]

[13] In relation to this charge the Judge rejected the argument that he should have regard to provocation or excessive self-defence, saying:

> [16] However, you then gave chase armed with a knife and supported by two other men, and the jury decided you were not acting reasonably in self-defence. I will come back to the act of stabbing Mr Smith and the charge of assault with a weapon, but when considering the group assault, which happened after Mr Smith had been disarmed and stabbed and involved beating him on the ground until he was unconscious, in my view, any consideration of provocation or excessive self-defence had completely evaporated.

[14] The Judge adopted a starting point of seven and a half years' imprisonment[8] and uplifted it by six months to reflect the assault with a weapon charge, noting:

> [19] … I am also mindful that this assault with a knife happened earlier in the struggle with Mr Smith, around the time when the shotgun went off and you were disarming him. While I agree with the jury that you were not acting in self-defence, nevertheless considerations of provocation and excessive self-defence are more relevant here, and so I will add six months to reflect this offence …

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7 At [14].
8 At [17].

[15] From an overall starting point of eight years' imprisonment the Judge adopted the following deductions for personal mitigating factors:

(a) 25 per cent for Mr Albnayan's post-traumatic stress disorder (PTSD), which the Judge accepted impacted his decision-making when presented with a threat.[9]

(b) 10 per cent to reflect that imprisonment may have a disproportionate impact due to Mr Albnayan's mental health.[10]

(c) 10 per cent for the impact Mr Albnayan's imprisonment would have on his wife and child.[11]

[16] This resulted in an end sentence of four years and four months' imprisonment.[12]

Approach on appeal

[17] We may only allow an appeal against sentence if there is an error in the sentence and a different sentence should be imposed.[13] A different sentence is only required if the original sentence is manifestly excessive.[14]

Submissions for the appellant

Starting point

[18] Mr Miller submits that in the present case only four *Taueki* aggravating features are present, being attacks to the head, the use of weapons, serious injury and multiple attackers. When one compares the circumstances of this case to those in *Diaz v R* (being the comparator case relied on by the Crown at sentencing), Mr Miller submits *Diaz* was a more serious case, involving at least five *Taueki* aggravating factors.[15]

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9 At [22] and [25].
10 At [23] and [25].
11 At [28].
12 At [30].
13 Criminal Procedure Act 2011, s 250(2).
14 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [35].
15 *Diaz v R* [2021] NZCA 426.

[19] In any event, Mr Miller submits that in assessing the *Taueki* factors, the following points are relevant:

(a) Mr Albnayan was the only one threatened with a shotgun and he was only joined by the others during the confrontation; he was not participating in a group attack from the start.

(b) Mr Albnayan was not present for a number of the blows to Mr Smith while he was on the ground, as these continued while Mr Albnayan went to pick his cell phone up off the ground some 15 metres away (as evidenced by the sounds recorded by the cell phone).

(c) While there was general evidence from witnesses of Mr Albnayan kicking Mr Smith's head and body as he was lying on the ground, it was Mr Sheck who bragged afterwards about stomping on the victim's head, not Mr Albnayan.

[20] Having regard to the *Taueki* factors present, Mr Miller says an initial seven-year starting point was appropriate (being the same as the starting point adopted by the sentencing Judge in *Diaz* before questions of provocation and excessive self-defence were considered).[16]

Excessive self-defence and provocation

[21] Mr Miller's primary submission is that there should have been deductions from the starting point of one year each for excessive self-defence and provocation.

[22] In submitting that the starting point should be lower to reflect excessive self-defence, Mr Miller cites *Taueki*, in which this Court identified two situations involving lesser culpability and so resulting in a lower starting point:[17]

(a) *Provocation*: Where the offender has been provoked, that may justify a lower starting point. It is not enough simply to claim to have been incensed by the actions of the victim or another: rather, the sentencing Judge will need to be satisfied that there was serious provocation

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16 At [10].
17 *R v Taueki*, above n 4, at [32].

> which was an operative cause of the violence inflicted by the offender, and which remained an operative cause throughout the commission of the offence.
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> (b) *Excessive self defence*: Similarly, where a party has acted out of self-defence but has gone too far, the fact that the attack initially commenced as an effort to defend himself or herself (or another) may be seen as reducing the seriousness of the offending.

[23] In terms of self-defence, Mr Miller relies on the one-year deduction to the starting point applied in *Diaz* as supporting the same level of deduction here. That deduction was not disturbed on appeal, with this Court noting:[18]

> The Judge was prepared to accept that, at least initially, Mr Diaz thought that the victim may have a knife. It is clear that Mr Diaz went too far in his response, but we accept the Judge's view that Mr Diaz's attack may have commenced in an effort to defend himself.

[24] Mr Miller points out that unlike in *Diaz* (where the "knife" was actually a pen), the victim here actually had a weapon, a loaded shotgun. Furthermore, the victim in *Diaz* was similarly struck while on his feet before he ended on the ground where he suffered his most serious injuries from multiple attackers.

[25] A similar level of discount was given by the High Court in *R v Couper*, where a deduction of nine months was made from a five-year starting point to reflect excessive self-defence.[19]

[26] Mr Miller argues that, having regard to these cases, the Judge should not have held that considerations of excessive self-defence had evaporated once Mr Smith had been disarmed, and a similar discount of one year should have been applied to the starting point for this factor.

[27] In respect of provocation, Mr Miller acknowledges this Court's observation in *Diaz* that provocation:[20]

> … could serve to reduce the starting point sentence, but only if there was serious provocation, it was an operative cause of the violence inflicted and it remained an operative cause throughout the commission of the offence.

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18 *Diaz v R*, above n 15, at [28(c)] (footnote omitted).
19 *R v Couper* [2024] NZHC 1454, at [29].
20 *Diaz v R*, above n 15, at [28(a)] (footnote omitted).

[28] In *Diaz* that threshold was not considered to be reached.[21] However, Mr Miller argues it is in this case because:

(a) the original threat in *Diaz* was a verbal altercation followed by a punch from the victim, which is far less serious than the original threat here, being the presentation of a loaded firearm;

(b) the victim here was a large individual and a patched gang member who remained physically capable of reacquiring the firearm at any point, even when faced with three attackers, whereas the victim in *Diaz* was set upon by more attackers and there was no suggestion he was used to violence;

(c) this was a fast-moving situation that was over in a short period of time, whereas in *Diaz* there was a far more prolonged assault which had elements of premeditation.

For these reasons, Mr Miller submits this is a case where an additional deduction of one year for a high level of provocation should apply.

Uplift for assault with a weapon

[29] In terms of the uplift for the assault with a weapon, Mr Miller accepts that the sentencing Judge appeared to allow for both excessive self-defence and provocation when sentencing on this charge. However, he points out that the Judge who gave the earlier sentence indication considered that no more than three months should be added to reflect this offending. Mr Miller says a "consistent judicial approach is desirable on largely identical facts".

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21 At [28(a)].

Submissions for the respondent

Starting point

[30] Ms Buckman, for the Crown, submits the starting point for the lead charge was within range. She says Mr Albnayan's offending is similar to the "street attack" examples described in *Taueki*. For street attacks in band two, the Court gave the following description:[22]

> *Concerted street attack*: For a street attack in which a victim is set upon by a group of attackers and in an attack involving the use of weapons found at the scene, a starting point at the lower end of band two would be indicated. If the attack involves blows to the head or other serious injuries are caused, or there is premeditation, then a starting point higher in the band two spectrum would be required.

[31] Here, the blows to the head and serious injuries inflicted support a starting point in the middle of band two, which is what the Judge adopted. A starting point in the middle of band two was also warranted given the serious aggravating features present, being:

(a) the level of violence, including the attacks to the head;

(b) the use of weapons — both sticks and the shotgun;

(c) the vulnerability of the victim at the point the most serious assault occurred, his having been disarmed, stabbed and knocked to the ground, and his being outnumbered;

(d) the fact there were multiple attackers, with the video showing at least three attackers; and

(e) the videoing of the offending.

[32] While counsel for Mr Albnayan makes much of comparisons with *Diaz*, where a starting point of seven years was adopted, Ms Buckman points out that this Court in *Diaz* said the starting point for Mr Diaz was "broadly consistent with or even slightly

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22 *R v Taueki*, above n 4, at [39(a)].

lower than" that in similar cases.[23] That case involved an altercation which broke out while trying to get the victim to leave a house. The victim resisted leaving for some time. Eventually, he tried to run away but was struck by a car and ended up on the ground. Mr Diaz and other attackers then resumed their assault, punching, kicking and using branches to hit the victim, who suffered broken ribs and a collapsed lung as a consequence. Counsel points out that a key difference between *Diaz* and the present case is the absence of attacks to the head in *Diaz*.

[33] The Crown also relies on *R v Connelly* as supporting the appropriateness of the seven-and-a-half-year starting point.[24] There, the two appellants attacked a lifeguard who had intervened when they were causing problems at the beach. They attacked him, punching him many times in the face one after the other and knocking him to the ground. The victim suffered significant injuries, including a fracture to his vertebrae, memory loss and speech and communication issues. A nine-year starting point was accepted as within range by this Court.[25]

Excessive self-defence and provocation

[34] In terms of whether there should be a deduction for excessive self-defence and provocation, the Crown submits that this Court should be hesitant to interfere with the Judge's assessment of the facts, including his finding that any element of provocation or excessive self-defence had "completely evaporated" at the time of the grievous bodily harm offending, because he had the benefit of seeing all the evidence at trial.[26]

[35] The Crown accepts that provocation can be a factor that reduces culpability, noting that this Court has observed that the relevant factors in assessing whether a sentence should be reduced to reflect provocation include:[27]

> … the nature, duration and gravity of the alleged provocative conduct; the timing of any response by the offender; whether the response was proportionate to the nature, duration and gravity of the provocation; whether the provocation was (or remained) an operative cause of the offender's

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23 *Diaz v R*, above n 15, at [30].
24 *R v Connelly* [2008] NZCA 550.
25 At [36].
26 Sentencing notes, above n 3, at [16].
27 *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [62].

> response; and whether the provocative conduct was such as to reduce the offender's culpability in all the circumstances. We stress that these factors should not be treated as an exhaustive list and that a flexible approach is required.

[36] Here, Ms Buckman submits that at the time of the grievous bodily harm offending the victim was on the ground and had been stabbed in the shoulder. He was no longer in possession of the shotgun and had no other weapon. What Mr Albnayan did next was to exact retribution. That is clear not just from the nature of the attack, but also in the way Mr Albnayan returned to film the victim's injuries and swear at him in his unconscious state. The same reasons which were relied on to say excessive self-defence was no longer operative also support the Judge's finding that any elements of provocation had evaporated at this point.

[37] Finally, although the Judge did not adjust the starting point for excessive self-defence or provocation, Ms Buckman points out that he did afford a 25 per cent discount for how Mr Albnayan's PTSD may have affected his perception of danger and his ability to modulate his response. This was, she says, a generous two-year adjustment to the sentence, meaning the end sentence was not manifestly excessive.

Uplift for assault with a weapon

[38] In terms of the uplift for the assault with a weapon charge, Ms Buckman says that, on its own, offending of this nature would justify a starting point of at least two years' imprisonment.[28] She says this starting point is confirmed by reference to the bands in *Nuku v R,* with the stabbing falling within band two of that methodology and so attracting a starting point of up to three years' imprisonment.[29]

[39] Having regard to the Judge's view that some element of provocation and/or excessive self-defence was operative, she submits the six-month uplift was in range. There was no obligation on the Judge to adopt the uplift proposed by another Judge at the time of the sentence indication. Mr Albnayan rejected that indication and the Judge was not bound by the sentence indication.

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28 Citing *Singh v Police* [2017] NZHC 3064 at [20]; and *Tipuna v R* [2020] NZHC 1883 at [11].
29 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39 at [38(b)].

[40] For these reasons, the Crown submits the end sentence of four years and four months' imprisonment was not manifestly excessive and so the appeal should be dismissed.

Discussion

Starting point

[41] We accept that the aggravating factors identified by the Judge meant the grievous bodily harm offending readily fell within band 2 of *Taueki*. A starting point of seven and a half years' imprisonment was within range.

Excessive self-defence and provocation

[42] The key issue is whether the starting point should be lowered to reflect the assertion that Mr Albnayan was provoked or used excessive self-defence. This is an intensely fact-dependent assessment. Here, the Judge recognised that the initial altercation and the stabbing did engage elements of excessive self-defence and set the uplift for the assault with a weapon charge to reflect this finding. However, he was satisfied there was no basis for saying the attack which occurred while the victim was disarmed and on the ground was less culpable due to provocation or a continuing element of excessive self-defence.

[43] We consider that conclusion was open on the facts, and we are not prepared to revisit the Judge's assessment. What happened at this stage was simply gratuitous violence enacted in retribution for what had gone before, rendering the victim unconscious and leaving him with a traumatic brain injury and a fractured skull. Mr Albnayan's further act of filming the unconscious victim and swearing at him, then sending the video to associates, confirms this motivation.

[44] In terms of the uplift for the charge of assault with a weapon, the Judge recognised that considerations of provocation and excessive self-defence were relevant at this stage of the altercation and reflected that in the relatively modest uplift in sentence on that charge. The Judge was not bound to adopt the same uplift as the Judge who gave the sentence indication, noting he had the benefit of hearing

the evidence at trial whereas the Judge giving the sentence indication did not. The six-month uplift was within range and reflected Mr Albnayan's reduced culpability on this charge given the circumstances of the offending.

[45] Finally, we accept the Crown submission that the 25 per cent discount for how Mr Albnayan's PTSD may have affected his perception of danger and his ability to modulate his response, was generous. In practical terms, this deduction recognised that, as a consequence of his history of trauma and subsequent PTSD, Mr Albnayan had a heightened perception of danger and an impaired ability to modulate his response to a threatening situation. Thus, while the Judge did not assess excessive self-defence and/or provocation to be operative once the victim was disarmed and on the ground, he nevertheless recognised, through a generous deduction, that Mr Albnayan's history and PTSD causally contributed to his offending and mitigated his culpability.

[46] In all the circumstances, we are satisfied that the end sentence of four years and four months' imprisonment was appropriate and was not manifestly excessive.

Result

[47] The appeal against sentence is dismissed.

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