IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA113/2023
[2023] NZCA 454

BETWEEN	MATTHEW ALEXANDER CARTER Appellant
AND	THE KING Respondent

Hearing:	23 August 2023
Court:	Wylie, Ellis and van Bohemen JJ
Counsel:	S D Withers and V I Tava for Appellant R M A McCoubrey and R M Gibbs for Respondent
Judgment:	18 September 2023 at 12 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by van Bohemen J)

[1] Mr Carter appeals the sentence of 23 months' imprisonment imposed by Judge Lummis in the District Court,[1] after he was found guilty on a representative charge of blackmail,[2] and pleaded guilty to cannabis cultivation,[3] and to possession of the Class B drug, gamma-butyrolactone (fantasy).[4]

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1 *R v Carter* [2023] NZDC 3580 [judgment under appeal].
2 Crimes Act 1961, ss 237 and 238 (maximum penalty 14 years' imprisonment).
3 Misuse of Drugs Act 1975, s 9(1) (maximum penalty seven years' imprisonment).
4 Section s 7(1)(a) and (2) (maximum penalty three months' imprisonment and/or a fine not exceeding $500).

Relevant background

[2] In 2020, Mr Carter had an intimate relationship with a woman, NH. During the relationship, Mr Carter recorded two videos of NH and himself engaged in sexual activity.[5] NH consented to the recordings in the belief they would be kept private between the two of them.

[3] After the relationship ended, Mr Carter demanded that NH pay him sums of money for debts he claimed he was owed. His position at trial was that these were legitimate debts, comprised of legal fees, for which Mr Carter had borrowed money from his mother, and money owed for cannabis. Mr Carter considered that NH was responsible for the legal fees because she had introduced him to the lawyer. NH denied owing any money to Mr Carter.

[4] Over a period of three to four months Mr Carter made demands of NH and her new partner to pay the alleged debts. He also sent NH a text message alluding to the possibility that compromising photographs might be emailed to her employer. NH's partner paid Mr Carter $1,000 in the hope that would end the matter. It did not.

[5] On four occasions in January and February 2021, Mr Carter sent explicit images of NH to her, her partner, and some of her work colleagues. The images, which were taken from the videos, showed NH naked. Some showed NH engaged in explicit sexual activity with Mr Carter. The images were accompanied with messages demanding that NH pay her bills and warned that things would get worse if she did not. One message threatened to place life-sized images of NH in public places and on building sites. Four messages were not sent from Mr Carter's usual phone but rather from a burner phone.

[6] In March 2021, Police executed a search warrant of Mr Carter's property in relation to his blackmail messages. During the search, they found 33 cannabis plants

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5 It appears the District Court automatically suppressed the name of the complainant. The District Court has been unable to locate this order. Presumably, this order was made under s 203 of the Criminal Procedure Act 2011. It is arguable this was an error. However, the point was not argued before us and we take it no further.

in the surrounding garden area and 30 millilitres of fantasy on a coffee table in his lounge.

The sentencing decision

[7] The Judge took the blackmail charge as the lead offence and identified several aggravating features of the offending.[6] These included the high degree of premeditation (evident through the use of a burner phone and the research needed to obtain the numbers of NH's work colleagues),[7] the breach of NH's trust (the images were made in a consensual intimate relationship),[8] the persistence of the demands,[9] the considerable emotional distress caused to NH,[10] and that Mr Carter had followed through on his threat and had distributed explicit pictures of her.[11] The Judge considered this last factor to be the most significant aggravating feature and said it called for a "stern response".[12]

[8] The Judge adopted a starting point of two and a half years and applied an uplift of two months for the cannabis cultivation offending.[13] The Judge observed that, whether or not the cultivation was commercial, the number of plants found was significant.[14]

[9] The Judge declined to make any discount for remorse. She considered that Mr Carter's belated acceptance of responsibility appeared to be motivated by concerns about the sentence rather than genuine remorse.[15] The Judge also declined to make any discount for issues canvassed in a report submitted in accordance with s 27 of the Sentencing Act 2002. These included the absence of a father and male role model when Mr Carter was a child, disrupted schooling, alcohol and drug abuse and

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6 At [17].
7 At [22].
8 At [23].
9 At [25].
10 At [26].
11 At [27].
12 At [27].
13 At [27]–[28].
14 At [27]–[28].
15 At [29].

association with gangs.[16] However, the Judge did not consider there was any nexus between those factors and Mr Carter's blackmail offending.[17]

[10] The Judge considered that the only mitigating factor was the time Mr Carter had spent on electronically monitored (EM) bail but that was tempered by the fact there had been six bail breaches over that period.[18] The Judge discounted Mr Carter's sentence by eight months to take account of the 680 days he had spent on EM bail.[19] The Judge made a further discount of one month in recognition that Mr Carter would be away from his son while in prison.[20]

[11] The Judge was not prepared to sentence Mr Carter to home detention. Taking into consideration the fact there had been two bail breaches between trial and sentence, including a significant methamphetamine use breach two weeks before sentence, and the assessment in the pre-sentence report that Mr Carter was at medium risk of breaching future community-based sentences, the Judge was concerned that, if sentenced to home detention, Mr Carter would fail and she would be required to review the sentence within the next month or two.[21]

Mr Carter's appeal

[12] In his notice of appeal, Mr Carter said the Judge's starting point was too high, the discount for time spent on EM bail was inadequate and the Judge gave insufficient consideration to commuting his sentence to one of home detention.

[13] Mr Withers, counsel for Mr Carter, submitted the Judge should not have made any uplift for Mr Carter's drug offending and did not give sufficient consideration to the fact that Mr Carter's bail breaches were driven by his addiction to methamphetamine. Mr Withers said that Mr Carter should have been given credit for agreeing to appear at trial by VMR and, when his presence was required, for attending in person despite suffering from sciatica. Mr Withers also said that some account

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16 At [30]–[31].
17 At [32].
18 At [33].
19 At [33].
20 At [42].
21 At [34]–[36].

should have been taken of the Crown's late disclosure of evidence and of Mr Carter's guilty pleas to the drugs charges.

Submissions for the Crown

[14] Mr McCoubrey, Crown counsel, submitted that the starting point for the blackmail offending was within the available range and appropriately reflected the manipulative nature of the offending. Further, the uplift of two months' imprisonment in respect of the drug related charges was open to the Judge.

[15] Mr McCoubrey further submitted that the Judge did not err in her assessment of the cultural report and that the discounts given were appropriate. The Judge was well placed to consider the availability of discounts to reflect matters that occurred in relation to the trial, and, in any event, they were not of a nature that warranted a discrete discount. Mr McCoubrey submitted the Judge was correct to conclude an end sentence of imprisonment was appropriate.

Approach on appeal

[16] Under s 250(2) of the Criminal Procedure Act 2011, the Court must allow an appeal against sentence if it is satisfied that, for any reason, there was an error in the sentence and that a different sentence should be imposed. In any other case, it must dismiss the appeal.[22]

[17] It is well-established that an appeal against sentence will be successful only if the appellant can point to an error, either intrinsic to the Judge's reasoning, or as a result of materials submitted on the appeal, that is material to the exercise of the lower Court's sentencing discretion.[23] Unless there is a material error in the end sentence, the Court will not intervene.[24] The focus is on whether the end sentence is within the available range, rather than the process by which the sentence was reached.[25] Mere tinkering is not permitted.[26]

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22 Criminal Procedure Act 2011, s 250(3).
23 *R v Shipton* [2007] 2 NZLR 218 (CA) at [138]; *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30]; and *Tamihana v R* [2015] NZCA 169 at [14].
24 *Tamihana v R*, above n 23, at [14], citing *Te Aho v R* [2013] NZCA 47 at [30].
25 *Tamihana v R*, above n 23, at [14], citing *Tutakangahau v R*, above n 23, at [36].
26 See for example, *Cao v Police* [2022] NZHC 2034 at [19]; and *Maihi v R* [2013] NZCA 69 at [21].

Analysis

[18] The maximum sentence for blackmail is 14 years' imprisonment.[27] It is apparent that neither the starting point nor the end sentence were set by reference to that maximum.

[19] Mr Withers and Ms Gibbs, counsel for the Crown, referred us to four decisions where sentences had been imposed for blackmail, *R v Darbyshire,*[28] *Alkhafagi v R,*[29] *Kirby-Parker v R*[30] and *Blackwood v R*.[31] We understand these decisions were referred to in pre-sentence submissions. The starting points adopted in the decisions were 13 months, 20 months, two years and two years and six months respectively.

[20] Mr Withers submitted that the Judge's starting point of two and a half years was excessive in comparison to these decisions in which all but one involved demands for sexual activity. On the other hand, Ms Gibbs noted that, in *Darbyshire*, *Alkhafagi* and *Kirby-Parker*, no images of the victims had been distributed, despite threats to do so. Ms Gibbs also submitted that Mr Carter's offending was broadly analogous to the starting-point offending in *Blackwood v R*, given intimate photographs were shared on social media after repeated threats to the victim that the materials would be disseminated if the victim did not accede to the offender's demands.

[21] As this Court said in *Blackwood v R,* there are no guideline decisions for blackmail because of the widely varying circumstances in which it can arise.[32] As the Court said:[33]

> [34] … the cases show a wide range of different factual situations and accordingly a wide range of sentences. They do however also demonstrate that a starting point of up to two years' imprisonment has been considered appropriate in cases with one or two victims, including cases where the threat was not to make intimate pictures publicly available and where the threat was not actually carried out as it was in this case. …

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27 Crimes Act 1961, ss 237 and 238.
28 *R v Darbyshire* [2013] NZHC 2804.
29 *Alkhafagi v R* [2022] NZHC 1095.
30 *Kirby-Parker v R* [2017] NZHC 2548.
31 *Blackwood v R* [2018] NZCA 215.
32 At [33].
33 Footnote omitted.

[22] While the starting point adopted by the Judge for Mr Carter's offending was at the high end of the spectrum established by those earlier decisions, we are satisfied that it was available to the Judge. Having regard to the nature and seriousness of the offending, in particular its gross abuse of NH's trust, the intrusion into NH's privacy by the publication of deeply personal images and the threat to publish life-size images of NH in public places, we see no error in the Judge adopting a starting point of two and a half years.

[23] We also see no error in the uplift imposed for the cannabis cultivation. We agree that the number of plants found was significant. It suggests cultivation for more than just personal use. The fact that one of the alleged debts that Mr Carter claimed to be seeking to recover was related to cannabis reinforces that conclusion. Given that the uplift was only two months, we see little merit in the submission that a 25 per cent discount should be made for Mr Carter's guilty pleas on the drugs charges.

[24] Mr Carter does not challenge the Judge's refusal to grant discounts for remorse or for cultural factors and we see no reason to revisit those aspects of the Judge's decision. We also see no case for making discounts relating to Mr Carter's conduct and attendance at trial. Those matters do not bear on the purposes and principles of sentencing in ss 7 and 8 of the Sentencing Act.

[25] The Judge's discount of eight months for the 680 days Mr Carter spent on EM bail amounts to a discount of approximately 36 per cent of the time on EM bail. In *Paora v R*, this Court noted that there is no guideline about the discount which should be afforded to a defendant for time spent on EM bail, although percentages ranging between 30 and 50 per cent are often used.[34] It also explained that the assessment of credit is an evaluative decision to be made having regard to the restrictiveness and duration of EM bail conditions in each case.[35] Compliance with the conditions of bail is also a relevant consideration. In *Agar v R*, this Court said that where compliance was poor, any discount would be modest even for a lengthy period on EM bail.[36]

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34 *Paora v R* [2021] NZCA 559 at [53].
35 At [53].
36 *Agar v R* [2021] NZCA 350 at [49].

[26] Given that Mr Carter breached bail six times, a discount of the order of 36 per cent can be seen as generous, even if the breaches were driven by Mr Carter's asserted addiction to methamphetamine. Any lenience that might be offered on account of Mr Carter's addiction is more than counter-balanced by the fact the breaches involved further offending.

[27] We do not consider it appropriate to revisit the Judge's decision to give a discount of one month for Mr Carter's separation from his son. It is apparent from her decision that the Judge had only recently become aware of the Supreme Court's decision in *Philip v R*, where the Court upheld a 10 per cent discount made by the sentencing judge for the impact of the sentence on the appellant's young child.[37]

[28] In its decision, the Supreme Court emphasised that, when considering the circumstances of an offender:[38]

> [56] … What is required is a consideration of all of the relevant circumstances which must include the child's interests. Those interests include, as our reference to the Children's Convention indicates, the importance for children of growing up in a familial environment. …

[29] In Mr Carter's case, there was little specific information about Mr Carter's child and Mr Carter's relationship with his child before the Judge. That evidential lacuna was not remedied before us. The one month discount made by the Judge reflected the fact that the Judge was aware of the issue but had no sufficient basis to make more than a notional deduction to the sentence. In the circumstances before the Judge, we see no error in that aspect of her decision.

[30] It was apparent from Mr Withers' submissions that Mr Carter's primary objection to his sentence was that he was sentenced to imprisonment rather than home detention when home detention was an available option.

[31] When considering whether the sentence of imprisonment should have been commuted to a sentence of home detention, the Judge had specific regard to:[39]

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37 Judgment under appeal, above n 4, at [43]; see also *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [57]–[58].

38 Footnote omitted.

39 Judgment under appeal, above n 4, at [35]–[36].

(a) the fact that Mr Carter had applied to be admitted to the Bridge Programme for people affected by drug and alcohol use, but had only done so shortly before sentence and after the last bail breach, which the Judge considered to be "too little too late";

(b) the fact that Mr Carter had twice breached bail since trial, despite the clear warning by the Judge that the fact he was being admitted to bail pending sentence was not an indication that he would be sentenced to home detention and that Mr Carter needed to be "pretty strict" with his compliance;

(c) the assessment in the pre-sentence report that Mr Carter was at medium risk of breaching future community-based sentences; and

(d) the Judge's concern that, if Mr Carter was sentenced to home detention, he would fail and she would be required to review the sentence within the next month or two.

[32] Although the Judge did not explicitly reference s 7 of the Sentencing Act, it is apparent that, in taking these considerations into account, the Judge was having regard to the need to protect the community from Mr Carter, as provided for in s 7(1)(g), and from Mr Carter's demonstrated inability to comply with court-ordered conditions. In that respect, the Judge was acting consistently with s 16(2) of the Sentencing Act which requires the Court not to impose a sentence of imprisonment unless satisfied that the sentence was being imposed for all or any of the purposes in s 7(1)(a) to (c), (e), (f) or (g).

[33] In addition, as this Court observed in *Nassery v R*, s 16 cannot be applied to ignore or avoid what otherwise would be an appropriate end sentence of imprisonment.[40] We agree with the Judge that, in Mr Carter's case, a sentence of home detention was not appropriate because he had shown, including in the weeks before sentence, that he would not or could not comply with the conditions of EM bail. In

[40] *Nassery v R* [2022] NZCA 213 at [25].

these circumstances, it would not have been appropriate to sentence Mr Carter to home detention where he would have been subject to essentially similar conditions.

Result

[34] The appeal against sentence is dismissed.

Solicitors:
Crown Solicitor, Auckland for the Respondent