IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA600/2022
[2023] NZCA 420

BETWEEN	NUKA GEMMELL Appellant
AND	THE KING Respondent

Hearing:	1 May 2023 Further submissions received 29 May 2023
Court:	Courtney, Hinton and Churchman JJ
Counsel:	E P Priest for Appellant L J Sullivan for Respondent
Judgment:	5 September 2023 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal out of time is granted.

B The application for leave to adduce new evidence is declined.

C The appeal against sentence is allowed.

D The sentence imposed in the High Court of four years and two months' imprisonment is set aside. A sentence of three years and five months' imprisonment is substituted.

E The order that Mr Gemmell serve his sentence without parole is set aside.

REASONS OF THE COURT

(Given by Hinton J)

Introduction

[1] On 10 May 2022, after pleading guilty to charges of aggravated robbery[1] and kidnapping,[2] Nuka Gemmell was sentenced by Davison J in the Auckland High Court to four years and two months' imprisonment.[3] As both charges were second strike offences, a non-parole order was made under s 86C(4)(a) of the Sentencing Act 2002 (the Act).

[2] Mr Gemmell seeks leave to appeal his sentence, on the ground that it is manifestly excessive. His initial appeal grounds were that the starting point was too high for his level of involvement, the uplift for the kidnapping charge was too high and the Judge did not allow adequate discounts to reflect his background, bipolar diagnosis, or time spent on electronically monitored (EM) bail.

[3] An additional and significant appeal point was raised for the first time in oral submissions at the hearing. Mr Gemmell's co-offender, Mr Te Pou, who was the lead offender, was not sentenced until after the repeal of the three strikes legislation. He was accordingly eligible for parole despite also being a second strike offender. Mr Gemmell says the consequent discordant result between the sentences is disproportionately severe, such that, like Mr Te Pou, he should be eligible for parole. We received further written submissions post-hearing on this issue.

Leave to appeal out of time

[4] Sentence appeals must be brought within 20 days after the date of the sentence appealed against.[4] Mr Gemmell's appeal was filed on 3 November 2022 — almost five months late.[5] Leave is not opposed. There is no prejudice to the Crown and the appeal raises an important issue. We grant leave to appeal out of time.

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1 Crimes Act 1961, s 235(b); maximum penalty 14 years' imprisonment.
2 Section 209; maximum penalty 14 years' imprisonment.
3 *R v Gemmell* [2022] NZHC 1014.
4 Criminal Procedure Act 2011, s 248(2).
5 The due date for filing the Notice of Appeal was 8 June 2022.

Leave to adduce fresh evidence

[5] Mr Gemmell seeks to adduce new evidence, being a report of Dr van Rensburg, a clinical psychologist. The key purpose of adducing the report is to support a submission that Mr Gemmell's culpability was reduced by virtue of his compliant disposition and susceptibility to suggestion, these arising out of his bipolar condition.

[6] The principles relating to the admission of fresh evidence on appeal are well established.[6] The overriding test as to whether the evidence should be admitted is if it is in the interests of justice to do so.[7] It will be in the interests of justice to admit the evidence if the evidence is fresh, cogent and credible in relation to the appeal.[8] If the evidence is fresh and credible it should be admitted unless the Court is satisfied that it would have had no effect on the sentence.

[7] For evidence to be deemed "fresh", it ordinarily cannot, with reasonable diligence, have been able to be called at the trial.[9] Although this is not an immutable rule, the public interest in preserving the finality of jury verdicts means that those accused of crimes must put their best case at trial.[10] The second criterion — credibility — requires an assessment of contextual and inherent credibility.[11]

[8] The Crown submit that Dr van Rensburg's report should not be admitted. We agree. Putting to one side that it could have been provided at sentencing, there are doubts about the report's credibility. Its findings appear to be based almost solely on information supplied by Mr Gemmell who has not provided evidence in support. But in any event admission of the report would not have impacted the sentencing process. In a disputed facts hearing, Mr Gemmell claimed he acted under compulsion from his co-offender, Mr Te Pou. The Judge found that "entirely implausible" and said it was clear Mr Gemmell was "an active and willing participant" in the offending.[12] Mr Gemmell has given Dr van Rensburg an alternative version of events where he claims he acted out of fear of Mr Te Pou and could not refuse his instructions. That

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6 Mathew Downs (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [CPA335.02].
7 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [119].
8 *R v Bain* [2004] 1 NZLR 638 (CA) at [26] as endorsed in *Noble v R* [2010] NZSC 85 at [2].
9 *R v Bain*, above n 8, at [22].
10 At [22].
11 At [23].
12 *R v Gemmell* [2022] NZHC 928 at [20] and [22].

either directly contradicts or is inconsistent with the Judge's findings. We consider the interests of justice do not justify admission of the report and, in line with *Reddy v R,*[13] we decline leave.

Offending

[9] As it is necessary in respect of several of the points on appeal to contrast Mr Gemmell's offending with that of Mr Te Pou, we set out the facts of the offending in some detail.

[10] At around 3.30 pm on 18 November 2019 Mr Kumar, a courier driver and victim of the offending, stopped his van in the driveway of a residential address in West Auckland to deliver a package. As he was getting out of the van with the package to be delivered, Mr Te Pou, driving a stolen Hyundai vehicle, pulled up and stopped close behind Mr Kumar, blocking his vehicle in the driveway. Mr Gemmell was a passenger in the stolen vehicle.

[11] Mr Gemmell exited the Hyundai and approached Mr Kumar. Wearing a hoodie drawn over his head, he wrestled briefly with Mr Kumar in an apparent attempt to take a parcel from him, and he tried to take the keys to the van from the ignition, but Mr Kumar resisted. Fearing for his safety, Mr Kumar got back into his van and locked himself inside.

[12] At this point, Mr Gemmell returned to the vehicle to speak to Mr Te Pou. Mr Te Pou then exited the vehicle. Armed with a screwdriver, he approached the passenger side of the van, smashed the passenger window and told Mr Kumar, "don't do anything, I have a gun". Mr Kumar immediately got out of his van on the driver's side and Mr Te Pou moved around the van and tackled him to the ground. Mr Te Pou then pushed Mr Kumar into the Hyundai. While Mr Te Pou pushed Mr Kumar into the Hyundai, Mr Gemmell got into the driver's seat of the courier van.

[13] Mr Te Pou drove off with Mr Kumar still in the Hyundai. Mr Gemmell followed in the courier van. Sometime later, both vehicles stopped on the side of the

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[13] *Reddy v R* [2020] NZCA 16 at [21]–[27].

road at which point Mr Gemmell and Mr Te Pou searched the van for a particular package. Once this was located, they took Mr Kumar's wallet out of the courier van, both got into the Hyundai with Mr Kumar still in the back seat and drove to several locations around West Auckland in an attempt to use his bank card to get money. They collected over $100 which Mr Te Pou spent, albeit sharing some KFC with Mr Gemmell.

[14] Later that day, Mr Gemmell and Mr Te Pou returned Mr Kumar to his van, but Mr Te Pou retained Mr Kumar's cell phone.

Sentencing in the High Court

[15] In setting the starting point, the Judge considered the following aggravating features:

(a) the offending involved two offenders acting in a coordinated manner to intimidate and overpower the victim who, as a courier driver alone in an otherwise quiet street, was vulnerable;

(b) Mr Te Pou's use of a weapon (the screwdriver);

(c) Mr Te Pou's threat that he had a gun and telling Mr Kumar to do as he was told;

(d) Mr Gemmell and Mr Te Pou's use of physical force, although Mr Gemmell was not as violent as Mr Te Pou, Mr Gemmell nevertheless used physical contact that showed he was willing to use his physical strength to overpower Mr Kumar who was a much smaller person;

(e) Mr Gemmell and Mr Te Pou worked together in a joint enterprise to achieve the objective of detaining Mr Kumar, removing him from his van into the Hyundai and taking his van. This required two people;

(f) Mr Gemmell was wearing a hoodie with the intention of being intimidating and frightening at the moment in which he first encountered Mr Kumar (though his face thereafter was not covered);

(g) the taking of the van and detention of Mr Kumar occurred over an extended period in which attempts were made to use his bank card; and

(h) Mr Gemmell and Mr Te Pou took Mr Kumar's bank card, and it was used by Mr Te Pou to purchase $100 worth of KFC, and spent at a TAB.

[16] The Judge considered this Court's guideline judgment of *R v Mako*[14] as well as the comparable cases of *Hewitt v R,*[15] *Hoko v R,*[16] and *R v Zhang*.[17] He said that Mr Gemmell's aggravated robbery offending was less serious than that in *Zhang* (where a starting point of six years' imprisonment was adopted) and close to but somewhat less serious than that in *Hewitt* (where a starting point of six years' imprisonment was adopted) and *Hoko* (where a starting point of six years' imprisonment was adopted). He described Mr Gemmell's offending as opportunistic rather than carefully pre-meditated and he noted that Mr Gemmell had no knowledge that Mr Te Pou was going to say what he did about having a weapon with him.[18] However, as Mr Gemmell acted in concert with Mr Te Pou, the Judge considered he should be responsible for Mr Te Pou's actions as they were foreseeable.[19] The Judge therefore adopted a starting point of four years and six months' imprisonment.[20]

[17] The Judge then set an uplift of 18 months for the kidnapping, noting again the taking of the van and detention of Mr Kumar over an extended period during which he said Mr Kumar was "obviously intimidated and made no attempt to escape".[21] This led to a global starting point of six years.

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14 *R v Mako* [2000] 2 NZLR 170 (CA).
15 *Hewitt v R* [2018] NZCA 374.
16 *Hoko v R* [2017] NZCA 484.
17 *R v Zhang* CA56/05, 24 May 2005.
18 *R v Gemmell,* above n 3, at [30].
19 At [31].
20 At [32].
21 At [32].

[18] The Judge declined to uplift the starting point on account of Mr Gemmell's prior offending because Mr Gemmell would not be eligible for possible parole by operation of the (now repealed) three strikes regime.[22]

[19] As to the guilty plea, the Judge said he would ordinarily have allowed a discount of 15 per cent, but given Mr Gemmell entered "guilty pleas on the basis of an entirely implausible claim subsequently advanced at the disputed facts hearing" that he was compelled to offend by Mr Te Pou, the Judge concluded a discount of 10 per cent was appropriate.[23]

[20] The Judge declined to allow a discount for the time Mr Gemmell spent on EM bail — close to a year from 24 July 2020 to 5 June 2021 — stating:[24]

> … Having regard to [your] history of non-compliance, I do not consider that your EM bail restrictions and any observance of them warrants recognition by way of a discount from your sentence.

[21] The Judge acknowledged the factors disclosed in Mr Gemmell's s 27 report, most notably Mr Gemmell's disrupted childhood,[25] experimentation with marijuana and alcohol from a young age,[26] and subsequent truancy and drug use throughout his secondary school years.[27] The Judge also noted Mr Gemmell's success as a boxer and his 2015 marriage to his "childhood sweetheart". It was the demise of this relationship combined with the end of his boxing career that led Mr Gemmell to the "world of drugs and alcohol".[28] The Judge also referred to Mr Gemmell's admission to the Mason Clinic and recent diagnosis of bipolar disorder.[29] He considered that a discount of 10 per cent was appropriate for these factors which, particularly with regard to Mr Gemmell's exposure to drug and alcohol use from a young age, "go some way to explaining [his] readiness to become involved in the present offending and … which to an extent at least do mitigate [his] criminal responsibility".[30]

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22 At [33].
23 At [35].
24 At [36].
25 At [38].
26 At [40].
27 At [42].
28 At [45].
29 At [45].
30 At [48].

[22] The Judge allowed a further discount of 10 per cent to recognise Mr Gemmell's remorse, prospects of rehabilitation and bipolar diagnosis.[31] While there was no evidence of any causative effect of the bipolar condition, he considered it was a factor that would make a sentence of imprisonment more difficult and thus justified a discount.[32]

[23] These discounts totalled 30 per cent. The final sentence thus amounted to four years and two months' imprisonment.

[24] As already noted, the Judge ordered that Mr Gemmell serve his sentence without parole under s 86C(4)(a) of the Act. He recorded that, but for s 86C, he would have imposed a minimum period of imprisonment (MPI) of half the sentence reached, that is, an MPI of two years, one month.[33]

Analysis

Starting point

[25] The appellant's argument that the starting point was too high was based largely on the affidavit evidence of Dr van Rensburg which we have declined to admit. Nonetheless, while the Crown submits that the starting point adopted was available to the Judge in light of the existing case law, we consider that it was too high.

[26] The Judge acknowledged that Mr Gemmell's offending was less serious than Mr Te Pou's. But on the basis that Mr Gemmell had to share responsibility with Mr Te Pou, he then took account of *all* the aggravating factors, set out at [15] above, including aggravating factors relating solely or principally to Mr Te Pou and also factors relating to the kidnapping charge, and adopted a starting point of four years and six months' imprisonment.

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31 At [52].
32 At [52].
33 At [55].

[27] We note that in sentencing Mr Te Pou in December 2022, Brewer J also adopted a starting point of four years and six months (and an overall starting point of six years). The Crown does not contend that sentence was too low.

[28] While we agree that Mr Gemmell acted in a joint enterprise with Mr Te Pou and that this must bear upon the starting point, we do not agree with the Crown that this means he should be treated as having the same level of culpability as Mr Te Pou. Although the Judge made a firm finding that Mr Gemmell was not compelled by Mr Te Pou, that does not obviate the need to assess their relative roles. As the Supreme Court said in *Berkland v R*:[34]

> [63] In any offending, the role of the offender (what they actually did) is a fundamental component of the gravity and culpability assessment. …

[29] Mr Gemmell must be taken as a willing participant in the offending, however, Mr Te Pou took the lead role, particularly in the aggravated robbery. We consider this is clear on the face of the sentencing decision. For example, although it was Mr Gemmell who initially approached Mr Kumar, once Mr Kumar blocked his efforts, Mr Gemmell returned to the Hyundai to obtain instructions from Mr Te Pou. Mr Te Pou took action from there: threatening to use a weapon and engaging in a significant degree of forceful physical conduct and violence towards Mr Kumar. Mr Gemmell did not.[35] Nor was he the recipient of any of the items that were stolen. The Judge also accepted there was only a minor degree of pre-meditation on Mr Gemmell's part.

[30] Based on our assessment of Mr Gemmell's comparatively lesser role in the aggravated robbery, and excluding the factors relating to the kidnapping, we consider that the starting point adopted of four years, six months was too high, and that a starting point of four years was appropriate in this case. Four years recognises that Mr Gemmell, as the secondary participant in the aggravated robbery, was far less culpable than the defendants in *Hoko*, *Hewitt* and *Zhang*, and in our view is in line with this Court's guidance in *Mako.*

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[34] *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 (footnote omitted) citing the Sentencing Act 2002, s 8(a) and *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [110].

[35] Mr Gemmell's violent involvement was limited to what the Judge described as "wrestling briefly" with Mr Kumar.

[31] Our conclusion on the starting point is strengthened by the consideration that for Mr Gemmell to have the same starting point as Mr Te Pou is clearly inconsistent with the parity principle. The parity principle requires that like cases be treated alike, and others with regard for relative differences.[36] A starting point of four years for Mr Gemmell reflects the different severity of Mr Gemmell's and Mr Te Pou's offending. We discuss the parity principle further at [55].

Uplift for kidnapping charge

[32] The Judge applied an 18-month uplift for the kidnapping charge, resulting in a combined starting point of six years. We consider that this uplift, while at the high end, was within range, which brings us to an overall starting point of five years and six months.

Discounts

Time spent on EM bail

[33] Section 9(2)(h) of the Act requires the Court to consider the time spent on EM bail while awaiting conviction. The Court must consider, among other things, the offender's compliance with the bail conditions "during the period of bail" with an EM condition.[37] The language used in the Act suggests the focus is on compliance with this particular instance of EM bail rather than general or historical compliance.

[34] While time spent on EM bail is a mandatory consideration, the appropriate reduction is not a matter of arithmetical formula.[38] Discounts of 30 to 50 per cent are within the normal range, and discounts in the upper end of this range are not uncommon.[39] As the Judge said, significant non-compliance with EM bail conditions can be a reason not to award a discount.[40]

[35] In *R v Bishop*, this Court considered it was appropriate not to give a discount for four and a half months spent on EM bail on the grounds that bail was breached on

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36 *R v K (CA345/02)* (2003) 20 CRNZ 62 (CA) at [20].
37 Sentencing Act, s 9(3A).
38 *Longman v Police* [2017] NZHC 2928 at [6].
39 *Shramka v R* [2022] NZCA 299, [2022] 3 NZLR 348 at [62].
40 *R v Gemmell*, above n 3, at [36].

four occasions.[41] This Court held that the Judge "was correct not to grant the appellant a discount for time spent on bail conditions with which she did not comply."[42] Similarly, in *R v Bidois*, this Court considered it appropriate not to provide a discount for nine months spent on EM bail with a 24-hour curfew due to non-compliance through four breaches.[43] However, in *Agar v R*, this Court allowed a discount of 10 per cent for time spent on EM bail despite Mr Agar's relatively poor compliance with his EM bail conditions.[44]

[36] Mr Gemmell's breaches are not as frequent or pervasive as those in *Bishop, Bidois* or *Agar.* Mr Gemmell was on EM bail for over 10 months — between 24 July 2020 and 5 June 2021. He was subject to a 24-hour curfew which was relaxed only on 27 April 2021 when he was permitted to exercise for one hour three times per week. During this time, he was largely compliant, with the exception of two breaches in the last six weeks — one on 13 April 2021 and one on 5 June 2021. The first breach involved Mr Gemmell crossing the road. The second was more serious, resulting in Mr Gemmell being remanded in custody. The Crown submits that these breaches rendered it open for the Judge to decline to give any discount for the time Mr Gemmell spent on EM bail.

[37] However, we note that Mr Gemmell spent the first nine months on very restrictive bail conditions without any breach. That is a long time on EM bail, nearly as long as the maximum home detention sentence. We can reasonably assume that such conditions would be particularly onerous on someone with a bipolar condition and that this might go a considerable way to explaining the breaches that occurred late in the bail period. We note that Mr Gemmell's bipolar disorder was diagnosed only two months after the second breach when he had a complete breakdown and was admitted to the Mason Clinic. This point, which we consider very material, does not seem to have been raised with the Judge in this context.

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41 *R v Bishop* [2009] NZCA 265.
42 At [13].
43 *R v Bidois* [2009] NZCA 426 at [15]. See also *Murray-MacGregor v R* [2011] NZCA 66; and *Gage v R* [2014] NZCA 140.
44 *Agar v R* [2021] NZCA 350 at [49].

[38] For these reasons, and focusing on this particular period of EM bail, we accept Ms Priest's submission that Mr Gemmell is entitled to a discount for the time spent on EM bail. We note that although the Crown argued to the contrary on appeal, at sentencing the Crown accepted he should get a discount for restrictive bail conditions.[45] The Crown now submits that any deficiency in a discount for time spent on EM bail is offset by the "generous guilty plea discount" given by the Judge. However, as we discuss at [63], we do not accept the Crown's characterisation of the guilty plea discount as generous, nor do we accept that no discount is appropriate here.

[39] Ordinarily a period of over 10 months on restrictive EM bail conditions with a 24-hour curfew would entitle Mr Gemmell to a discount close to 50 per cent of the time spent. In these circumstances, we have decided to put to one side the two occasions of non-compliance and allow a discount of five months.

Section 27 factors

[40] We now turn to the submission that the Judge should have placed greater weight on the factors identified in Mr Gemmell's s 27 report. Background factors such as personal circumstances or mental illness may justify a discount if they contributed causatively to the offending.[46]

[41] Mr Gemmell has a history with drugs and alcohol stemming from childhood which has no doubt causatively contributed to his offending. The same can be said for his addiction to methamphetamine and unresolved grief over the dissolution of his marriage. The Judge also noted Mr Gemmell's mental illness, though finding that there was no evidence of causative effect. These factors were, however, appropriately recognised in the discount of 10 per cent provided by the Judge. Such a discount is comparable to analogous cases,[47] and cannot be faulted. We consider the Judge made a very thorough analysis of the s 27 report and related information.

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45 *R v Gemmell*, above n 3, at [14].

46 *Carr v R* [2020] NZCA 357 at [65] as endorsed in *Berkland v R*, above n 34, at [109].

47 *Berkland v R,* above n 34, where 10 per cent was given to Mr Berkland to reflect his disadvantaged background and drug addiction; *Brown v R* [2022] NZCA 586 where a 10 per cent discount was appropriate; and *Aramoana v R* [2021] NZCA 558 where a 10 per cent discount was appropriate.

Remorse, rehabilitation, and bipolar diagnosis

[42] The Judge allowed a discount of 10 per cent to account for Mr Gemmell's remorse, rehabilitative prospects, and bipolar condition. Genuine remorse alone, supported by tangible evidence, generally attracts a discount of between five and eight per cent.[48] Given Mr Gemmell's late guilty plea and attempt to limit responsibility in the disputed facts hearing, any discount for remorse should fall towards the lower end of this scale. We have not overlooked that Mr Gemmell did write a letter of apology to the victim and he sought restorative justice.

[43] Ms Priest says that the Judge did not take into account what she submitted would be the severe impact of imprisonment on someone with a bipolar condition. In fact though, the Judge expressly took that factor into account.[49] That led to his rounding the discount under this head up to 10 per cent. In any event, the evidence in support of the argument is not strong. Mr Gemmell was admitted to the Mason Clinic in August 2021, being when he was first diagnosed. His condition responded to treatment after a month and on 5 October 2021 his treating psychiatrist advised that Mr Gemmell was in a stable mental state and should continue to remain so as long as he is adherent to treatment and remains abstinent from alcohol and drugs.

[44] Ms Priest makes the additional submission that the impact of COVID-19 on someone in prison who has a mental illness is severe. She advises that Mr Gemmell has not seen his whānau in person for 20 months. We agree that this combination of factors would have had an impact on Mr Gemmell. However, standing back and considering the Judge's careful analysis, we are not prepared to disturb the discounts allowed which, including the guilty plea discount, total 30 per cent.

Section 9 of New Zealand Bill of Rights Act 1990 (NZBORA)

[45] With the adjustments made above, Mr Gemmell's end sentence would be three years and five months' imprisonment.

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48 *Salt v R* [2022] NZCA 611 at [43].
49 *R v Gemmell*, above n 3, at [52].

[46] Initially Ms Priest invited us to allow a six-month reduction on account of the fact that Mr Gemmell will be required to serve his sentence without parole. She relied on the totality principle, which is not applicable in this context.

[47] As noted above, at the hearing Ms Priest raised the more significant point that Mr Gemmell's co-offender and lead offender, Mr Te Pou, was not subject to the three strikes legislation, as his sentencing fell after the Three Strikes Legislation Repeal Act 2022 (Repeal Act). Further, in sentencing Mr Te Pou, Brewer J did not consider it appropriate to impose an MPI. Ms Priest argued that Mr Gemmell's punishment is consequently disproportionately severe in terms of s 9 of NZBORA, to which, as the Supreme Court held in *Fitzgerald v R*,[50] the three strikes regime is subject. On the unusual facts of this case we agree.

[48] As stated by this Court in *Matara v R*:[51]

> A Judge is not required to order that a second strike sentence be served without parole if making such an order would be inconsistent with s 9 of NZBORA because it would result in a punishment that is disproportionately severe.

[49] Section 9 of NZBORA provides:

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or *disproportionately severe* treatment or punishment.
>
> (Emphasis added.)

[50] In *Taunoa v Attorney-General*, Blanchard J described disproportionately severe as:[52]

> … behaviour which does not inflict suffering in a manner or degree which could be described as cruel, and cannot be said to be degrading in its effect, but which New Zealanders would nevertheless regard as so out of proportion to the particular circumstances as to cause shock and revulsion.

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50 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.
51 *Matara v R* [2021] NZCA 692, (2021) 12 HRNZ 944 at [4].
52 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [172].

[51] In that same case, Elias CJ considered that the test of disproportionately severe was "whether the punishment prescribed is so excessive as to outrage standards of decency".[53]

[52] Mr Te Pou will be eligible to apply for parole after serving one-third of his sentence, while Mr Gemmell will have to serve the whole of his. If it were just a matter of two defendants being sentenced for similar offending on each side of the repeal date of the legislation, there could be no arguable ground for appeal. That is the standard consequence of the three strikes legislation and the non-retrospective application of the Repeal Act. As Ms Sullivan stressed on behalf of the Crown, it was Parliament's very clear intention that the Repeal Act not have retrospective effect.

[53] However, in this case Mr Gemmell and Mr Te Pou were co-defendants in the same set of offending, Mr Te Pou was clearly the lead offender, and Mr Te Pou pleaded guilty significantly later than Mr Gemmell. Indeed, it was only because of his much later plea that Mr Te Pou gained the benefit of the repeal.

[54] Mr Te Pou was sentenced in all to eight years and one month of imprisonment for both this *and* unrelated offending. Eliminating his unrelated offending and uplifts, Mr Te Pou would have been subject to a final sentence of four years and six months' imprisonment and would be eligible for parole after one year and six months. Mr Gemmell will not be eligible for release until the completion of the entirety of his sentence.

[55] In circumstances where two co-defendants engage in the same set of offending, it would cause "shock" and "outrage standards of decency" if, by sole reason of the sentencing date, the lead defendant (and defendant who pleaded guilty much later) was subject to a sentence materially less severe than that of the secondary participant. Such an outcome appears contradictory to all standards of justice and consistency in sentencing. It falls seriously foul of the parity principle and involves such a marked difference in the sentences imposed that it risks bringing the administration of justice

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53 At [92].

into disrepute.[54] As they currently stand, the end result of the sentencings is to the opposite effect of the parity principle.

[56] In light of Mr Te Pou's eligibility for parole, the application of s 86C to Mr Gemmell is, in our view, disproportionately severe and contrary to s 9 of NZBORA. In order for Mr Gemmell's s 9 right to be upheld, he must be entitled to serve his sentence with the possibility for parole.

[57] We do not overlook that eligibility for parole is not necessarily equivalent to a lesser sentence. A prisoner may be unsuccessful in one or more applications for parole and may serve the full sentence. But the opportunity for parole is a material factor in sentencing and one that is removed only in the most serious cases, hence the three strikes regime and the imposition of MPIs. We therefore consider for Mr Te Pou to have that opportunity, when Mr Gemmell does not, is disproportionately severe in its effect on Mr Gemmell.

[58] We disagree with the Crown submission, and the Judge's indication, that Mr Gemmell would have been subject to an MPI in any event. Clearly Brewer J took a different view regarding Mr Te Pou, and we see no sound basis for distinguishing between the two on the issue of an MPI. The Crown say no MPI was justified in Mr Te Pou's case because of his particular circumstances, including the fact he was already serving a lengthy existing sentence and he had taken "very impressive steps" to rehabilitate himself. However, the fact Mr Te Pou was already serving a lengthy sentence is clearly not a point in his favour: to the contrary. With regard to relative prospects of rehabilitation, our assessment based on the limited information available to the Court is that Mr Gemmell has a higher chance of rehabilitation than his co-offender, and in any event has good prospects for rehabilitation. First, he had no criminal record until the age of 25. After that age he sank into the mire of a separation, depression, methamphetamine use and more latterly a bipolar diagnosis. His most serious crime before the present offending resulted in a sentence of one year and three months' imprisonment. Mr Gemmell says he has not used methamphetamine for some time and he is now receiving treatment for his bipolar illness. He also has skills and

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54 *R v Lawson* [1982] 2 NZLR 219 (CA) at 223.

experience that could stand him in good stead and a good job offer from his brother. His brother and father attended the hearing before us, further indicating strong family support. We see no justification for the proposition that Mr Gemmell would have been subject to an MPI in any event. Indeed, the information before us suggests the contrary.

[59] The Crown submits that a finding that s 9 is engaged unfairly advantages offenders who had a co-offender sentenced after the repeal, over those who did not. We disagree. This submission ignores the fact that our conclusion does not turn solely on the fact of co-offending. Rather our conclusion is based both on the fact and nature of the co-offending. Mr Gemmell's sentence overall should be materially lighter than Mr Te Pou's, not significantly more onerous. For all of the reasons set out above, we consider Mr Gemmell not being eligible for parole when Mr Te Pou is, results in such a violation of the parity principle that the threshold of disproportionately severe is met. Further, in our view the finding in this case will affect a very discrete number of other cases, if any. We are aware of none to date. But to the extent there is any substance in the Crown's point that there might be others who are disadvantaged, it would not be appropriate to decline to give effect to Mr Gemmell's s 9 NZBORA right for that reason. As the majority held in *Fitzgerald*, the right contained in s 9 cannot be subject to any justifiable limits.[55]

[60] We acknowledge the Crown's submission that this case raises none of the factors identified in *Phillips v R* as likely to play a significant role in determining whether a sentence imposed pursuant to the three strikes regime breaches s 9.[56] However, we disagree that the absence of the *Phillips* factors supports the Crown's contention that Mr Gemmell's sentence was not disproportionately severe. First, in *Phillips* this Court made it clear that the categories set out were intended by way of example only — the list was not exhaustive. Second, as the Supreme Court has made clear, imposing limits on s 9 cannot reasonably be justified. Last, *Phillips* pre-dated the Repeal Act. Therefore, when providing examples of where disproportionality may arise, the Court could not and did not contemplate a case such as the present. Here the

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55 *Fitzgerald v R,* above n 50, at [78] per Winkelmann CJ, [160] per O'Regan and Arnold JJ, and [241] per Glazebrook J.

56 *Phillips v R* [2021] NZCA 651, [2022] 2 NZLR 661 at [28].

gross disproportionality arises from the combined application of the regime and the repeal, not just the regime itself.

[61] We repeat that our conclusion does not conflict with Parliament's express intention that the Repeal Act was not to have retrospective effect. Rather, it reflects the principle that the three strikes regime was subject to s 9 of NZBORA[57] and that the same must apply to the Repeal Act.

Manifestly excessive?

[62] Mr Gemmell has to satisfy us overall that the sentence is manifestly excessive.

[63] The Crown raised two points which have been somewhat dwarfed by our finding above. First, the Crown says a 10 per cent guilty plea discount was generous to Mr Gemmell because he pleaded late and then had a disputed facts hearing. However, the discount was carefully assessed by the Judge. We consider the discount was fair — not generous. A higher discount has been allowed in similar circumstances.[58] The same discount was also awarded to Mr Te Pou who pleaded guilty long after Mr Gemmell, albeit without a disputed facts hearing.

[64] The Crown also points out that because Mr Gemmell was subject to a non-parole condition, the Judge did not impose an uplift for prior convictions. However, as we have already said, Mr Gemmell's criminal history only commenced in 2015 when he was aged 25, and is not extensive. His highest previous sentence was one year and three months' imprisonment. We do not consider that in all the circumstances of this case any uplift would have been warranted regardless of the parole restriction.

[65] As discussed above, nor do we consider an MPI would have been appropriate.

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57 See *Tamiefuna v R* [2023] NZCA 163; *Crowley-Lewis v R* [2022] NZCA 235 and *Matara v R*, above n 51, where this Court, applying *Fitzgerald*, above n 50, set aside orders made under the three strikes regime requiring the appellants to serve their sentences without the possibility of parole.

58 *R v Elliott* [2023] NZHC 528.

[66] We conclude, particularly for reasons arising out of the later sentencing of Mr Te Pou, that the sentence imposed on Mr Gemmell is manifestly unjust and the application of the three strikes regime is disproportionately severe. The sentence of four years and two months' imprisonment is quashed, and a new sentence is imposed of three years and five months' imprisonment, with no restriction as to eligibility for parole.

Result

[67] The application for leave to appeal out of time is granted.

[68] The application for leave to adduce new evidence is declined.

[69] The appeal against sentence is allowed.

[70] The sentence imposed in the High Court of four years and two months' imprisonment is set aside. A sentence of three years and five months' imprisonment is substituted.

[71] The order that Mr Gemmell serve his sentence without parole is set aside.

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