NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT/ PERSON UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS [OR NAMED WITNESS UNDER 18 YEARS OF AGE] PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA78/2022
[2023] NZCA 151

BETWEEN	M (CA78/2022) Appellant
AND	THE KING Respondent

Hearing:	30 March 2023
Court:	French, Dunningham and Cull JJ
Counsel:	C J Tennet and D E Maniapoto for Appellant P K Feltham and R G Buckman for Respondent
Judgment:	5 May 2023 at 11.30 am

JUDGMENT OF THE COURT

A The application to adduce further evidence on appeal is declined.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Dunningham J)

[1] On 27 January 2022, the appellant, M, was sentenced to three years and two months' imprisonment on the following charges:[1]

(a) injuring with intent to injure (two charges);

(b) assault with a weapon;

(c) ill treatment and neglect of a child; and

(d) attempting to pervert the course of justice (two charges).

[2] M appeals that sentence on the grounds the starting point was too high and the discounts were insufficient.

[3] In support of the second ground, M seeks to adduce fresh evidence in the form of a literature review which explains the disempowering impact of colonisation and intergenerational violence on wāhine Māori raised in violent gang life and their ability to care for whānau. The application to adduce that evidence is opposed, and we address that issue before dealing with the second ground of appeal.

Background

[4] On or about 22 June 2020, M inflicted beatings on her young daughter, T. At the time, T and her two sisters were subject to a custody order under s 101 of the Oranga Tamariki Act 1989 placing them under the care of Oranga Tamariki, although they were in M's day-to-day care. The assaults included hitting T repeatedly on her body, punching her repeatedly on her lip, and hitting her on the head with a hammer. After being assaulted, T was pushed outside where she went to sleep. The injuries suffered by T included extensive bruising from head to toe, a nasal bone fracture, lacerations on her face, a lacerated and swollen lower lip, and multiple abrasions.

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1 *R v [M]* [2022] NZDC 1233 [Sentencing notes].

[5] M did not seek medical treatment for her daughter. Instead, because the injuries were obvious, M contacted her sister and arranged for T to be sent to the South Island to stay with her.

[6] M put T on a flight to Christchurch on 24 June 2020, after making considerable efforts to cover the injuries. This included dressing T in a long-sleeved turtleneck top and applying thick face paint to all of T's face.

[7] Flight attendants noticed some of T's injuries, including her swollen and split lip. They sought T's permission to remove the paint. When the extent of her injuries was clear, arrangements were made for police and ambulance services to be at Christchurch airport when the flight landed.

[8] M's sister saw the police were at the plane when she was waiting to collect T and began communicating with M. M sent a series of text messages to her sister outlining a false story to tell the authorities, to the effect that T was clumsy and had hurt herself. M also sent her mother a false statement by text message and asked her mother to memorise it word for word and tell it to the authorities.

Conviction and sentence

[9] M was convicted on all charges following a jury trial in the District Court at Napier.

[10] The trial was not straightforward. There was an unsuccessful attempt by M shortly before the trial was to start to have the trial adjourned. There was then a further disruption during the trial when M presented to court security claiming to be unwell. She was sent away and subsequently did not arrive at Court. The trial was adjourned for the day. A doctor saw her but could not identify what was wrong with her, and she was directed to the hospital for further tests. M was initially reluctant to go to hospital. The Judge at that point reinstated a warrant for her arrest, having withdrawn a warrant earlier in the day. The trial was able to resume after she was remanded in custody overnight.

[11] Those incidents were referred to at the outset of sentencing with the Judge noting that, from the start, there was no defence to the charges but, nevertheless, M had been "as manipulative as [she] possibly could leading up to the trial and during the course of it".[2]

[12] The Judge considered a three-year starting point was appropriate for the violence offending. This was uplifted by six months for the neglect charge and a further six months for the perverting the course of justice charges. This resulted in an adjusted starting point of four years' imprisonment.

[13] A report was prepared for sentencing by Dr Alvina Edwards, in accordance with s 27 of the Sentencing Act 2002. The Judge accepted M had a disadvantaged background, including addictions and difficulties with relationships, which should be taken into account at sentencing. He gave a discount of 15 per cent for these matters. Despite defending the charges, M filed a letter of remorse prior to sentencing which the Judge described as "unique", in that it thanked all the participants in her prosecution including the police, the Judge and the prosecutor. While the Judge was sceptical of her expressed remorse, he granted a further five per cent discount for that. That resulted in an end sentence of three years and two months' imprisonment.

Was the starting point too high?

[14] Mr Tennet, for M, submits that the starting point and the uplifts were excessive. In arguing that the three-year starting point for the violence offending was too high, he refers to the decision in *EM (CA241/2013) v R*. In that case, the appellant was sentenced to 18 months' imprisonment on charges of assault and ill treatment of two children, imposed cumulatively on a sentence of two years and four months' imprisonment for two charges of abduction in relation to the same children.[3] Mr Tennet submits that while this was a cumulative sentence, it suggests a starting point of two years would have been more appropriate for the violence offending in this case.

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2 At [5].
3 *EM (CA241/2013) v R* [2015] NZCA 202.

[15] Mr Tennet then submits that the six-month uplift for the neglect charge was too high, and to separate that out from the violence was artificial. He also argued the six-month uplift for perverting the course of justice was wrong given the behaviour was at the lower end of the scale.

Discussion

[16] We do not consider the reference to the starting point adopted in *EM* demonstrates the starting point was in error. The cumulative sentence of 18 months for the violence offending was clearly adopted having regard to issues of totality. It is of no real assistance here where the violence offending is the primary offending for the purposes of setting a starting point. Furthermore, the Court of Appeal in *EM* observed that even having regard to the principle of totality, the Judge could have taken a starting point for the violence offending in the order of two years.[4]

[17] We accept the respondent's submissions that the appropriateness of the starting point can be confirmed by reference to *Nuku v R*, which provides guidance on sentencing for offences involving an intent to injure, as here.[5] Given the following aggravating features, there can be little doubt the offending falls within band three and may attract a starting point of two years up to the statutory maximum:

(a) an attack to the head;

(b) use of a weapon;

(c) vulnerability of the victim;

(d) breach of trust; and

(e) attempts at concealment.

The respondent's submissions also note the scale of the offending and the impact on the victim are aggravating features. We accept those aggravating features are also

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4 At [33].
5 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39.

present, albeit perhaps not materially beyond what might be expected given the charges involved.

[18] We also accept that the offending engages s 9A of the Sentencing Act. That section provides that when sentencing for violence against a child under the age of 14, the court must take into account the following aggravating factors to the extent they are applicable in the case:

(a) the defencelessness of the victim;

(b) in relation to any harm resulting from the offence, any serious or long term physical or psychological effect on the victim;

(c) the magnitude of the breach of any relationship of trust between the victim and the offender;

(d) threats by the offender to prevent the victim reporting the offending;

(e) deliberate concealment of the offending from the authorities.

[19] In this case, the defencelessness of the victim, the magnitude of the breach of trust, and the clear attempts to conceal the offending are all aggravating features.

[20] Having regard to the bands in *Nuku* and the aggravating features in this case, we are readily satisfied that the three-year starting point was appropriate.

[21] In terms of the challenges to the uplifts, we accept the period of neglect by failing to take the victim to a doctor was short, thanks largely to the intervention of staff on the Air New Zealand flight. However, it was a discrete charge, and the failure to obtain medical assistance, when T had suffered a nasal bone fracture and a split lip that needed significant treatment under anaesthesia, was a serious aspect of the offending. We are satisfied the six-month uplift for that charge was warranted.

[22] Similarly, the six-month uplift for the perverting the course of justice charges was clearly available. The courts have regularly recognised that such charges warrant

prioritising denunciation and deterrence because "any attempt to disturb the process of administration of justice is to be deplored and in all but the most exceptional circumstances, to be met with a moderately lengthy term of imprisonment".[6] While M's actions occurred before charges had been laid, she nevertheless engaged in a calculated course of conduct, creating stories for both her sister and mother to tell the authorities, in order to avoid prosecution. We are satisfied that a six-month uplift was well within range.

The application to admit fresh evidence

The evidence

[23] In support of the second aspect of the sentence appeal, Mr Tennet applies to admit the report of Bonnie Maihi, an academic with expertise in the study of Māori and indigenous development, as fresh evidence. The grounds on which the order is sought include that the report:

> … will elucidate and inform this Honourable Court on the difficulties faced by wāhine Māori from backgrounds of violence and abuse ,and in particular this Appellant (as detailed in the section 27 Report of Dr Alvina Edwards); …

[24] The application goes on to say:

> While a section 27 report may be sufficient in many cases, it is submitted that the Courts need to take cognisance of the established material that relates to wahine Māori who have come from disadvantaged backgrounds including the impact on them from such background, intergenerational trauma and other matters which woulds (sic) otherwise need to be the subject of expert evidence on a case-by-case basis.

[25] The application goes on to suggest that the report could constitute an expert review in a similar way to the expert reports which were provided to the Court in *Churchward v R* regarding cognitive development in young people.[7]

[26] The report reviews academic literature to establish a causal link between a violent, deprived background in the context of cultural disconnection, and violent responses to difficult or challenging situations. However, to the extent it draws any

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6 *M (CA469/2013) v R* [2013] NZCA 385 at [9].
7 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 466.

conclusions regarding M's circumstances, it relies entirely on the s 27 report provided by Dr Edwards.

The legal principles applying

[27] The criteria for admitting fresh evidence are well established. The principles governing the admission of new evidence on appeal were recently restated in *Mark v R* as follows:[8]

> [16] The principles for assessing the admissibility of fresh evidence for appeals against conviction are now well established. There is no reason why different principles should be engaged where an appellant wishes to adduce fresh evidence for an appeal against sentence. Thus, if the fresh evidence is not credible it should not be admitted. If it is credible, an assessment needs to be made as to whether or not it could have been presented to the sentencing Court with reasonable diligence. If the evidence is both credible and fresh it should be admitted unless the appellate court is satisfied it would have had no effect on the sentence. If the evidence is credible but not fresh, the appellate court should assess its strength and its potential impact on the sentence. If the appellate court considers that the sentence could be manifestly excessive if the evidence is excluded, then it should be admitted notwithstanding that it is not fresh.

Should the evidence be admitted?

[28] We accept the report is cogent insofar as it summarises literature on the impacts of colonisation which destroyed whānau and hapū structures and forced Māori woman into the pākehā model of the nuclear family, unnecessarily exposing them to intimate partner violence and harm.

[29] The report is not strictly fresh as it could have been prepared prior to sentencing, though this is not necessarily fatal to the application. However, our primary concern is that we are not satisfied the report is relevant or adds anything material to the sentencing for M.

[30] The evidence of the impact of colonisation on Māori has been acknowledged in recent decisions of the higher courts. In particular, the decision in *Solicitor-General v Heta* includes a detailed discussion on the effects of colonisation on Māori communities and discusses how systemic Māori deprivation should be taken account

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8 *Mark v R* [2019] NZCA 121. Footnote omitted.

of in sentencing.[9] However, *Heta* discourages lengthy discussions of such general evidence, saying:

> [50] The evidence of the presence of systemic deprivation (or social disadvantage more generally) on an offender need not be elaborate. The symptoms of systemic Māori deprivation are reasonably self-evident, including (among other things) intergenerational social and cultural dislocation of the whānau, poverty, alcohol and or drug abuse by whānau members and by the offender from an early age, whānau unemployment and educational underachievement, and violence in the home. Evidence from whānau about the offender's life is enough.

[31] Similarly, in *Berkland v R*, the Supreme Court discussed background factors that may have a causative contribution to offending.[10] These included historical dispossession of Māori. In that regard, the Court acknowledged Whata J's careful consideration of those matters in *Heta* and the discussion of the Court of Appeal in *Zhang v R*, where this Court said:[11]

> … ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability.

The Court in *Berkland* agreed that judges could assume that modern Māori "systemic" poverty was the result of colonial dispossession without the need to prove actual causation every time.[12]

[32] Importantly, though, when the Court went on to discuss s 27 reports, it recorded the following:[13]

> They must be case and offender focused. Generalised statements and templates are of no value and so will waste the courts' time and resources. For example, intergenerational background information, where relevant to sentencing principles and purposes, will be important, but long generalised historical dissertations will not help. Rather, what is required is succinct summaries focused on the experience of the offender's own community. … A connection must … be drawn between [the narratives of their hapū and iwi] and the offenders' lived experience.

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9 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.
10 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.
11 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [159].
12 Berkland, above n 10, at [123].
13 At [146].

[33] In our view, Ms Maihi's report does no more than provide a generalised historical dissertation on the effects of colonisation on Māori and, in particular, on wāhine Māori. However, those links are well understood by the Courts as recognised in *Heta*, *Zhang* and *Berkland*. In terms of what is truly relevant, which is the causative connection between colonisation, systemic deprivation, and M's offending, even Ms Maihi relies on the s 27 report. The s 27 report which was before the Court at sentencing was case and offender focused. It provided ample information regarding M's background and how it might have contributed causatively to her offending. The report covered intergenerational cultural and social dislocation and disconnection, and the continuing harmful effects of colonisation, along with other factors specific to M such as family instability and hardship, alcohol and drug abuse, and exposure to gang life. In our view, the literature review provided by Ms Maihi does not tell us any more about these factors in a way that is useful for sentencing M.

[34] Finally, we concur with the respondent's submissions that the report does not assist in the same way as the expert evidence did in *Churchward v R*. The scientific characteristics of adolescent brain development which was presented in that case was a matter of general application to young people, whereas the causative contribution of colonisation and systemic deprivation to offending must be assessed in light of an individual's particular lived experience.[14]

[35] For these reasons, we decline the application to admit fresh evidence.

Did the Judge err in allowing discounts for mitigating factors?

[36] We turn now to the issue of whether there was an error in the discounts given by the Judge for personal mitigating factors. The substance of M's submission is that there is a causal link between her background and her use of violence in parenting. She had experienced a disruptive education and was raised in violent gang life, which led to her using aggressive and violent behaviour to address challenges.

[37] However, all this is apparent from the s 27 report and was, albeit briefly, acknowledged in sentencing. The Judge recorded that the s 27 report spoke of M's

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[14] As recognised by Whata J in *Heta*, above n 9, at [49].

early difficulties, her addictions, and her difficulties with relationships and acknowledged that "in many ways you have been a victim yourself".[15] The report revealed she had a close relationship with her father, who was not violent towards her, but was violent to her mother and other family members, and was a patched member of Black Power. She had her first child not long after she started high school, but she completed qualifications through correspondence school and has held down employment as a hairdresser and then as a supervisor of seasonal workers in Hawke's Bay orchards. She has had three further children and has struggled financially all her life. A particularly traumatic event in her life was when the father of her two oldest girls committed suicide. She acknowledges being exposed to alcohol and drugs from an early age and using methamphetamine from when she was 15, although there does not appear to be addiction and her mother comments that she has never seen her daughter do drugs in front of her children, nor does her daughter drink heavily.

[38] In our view, the cultural report compellingly identifies factors which may have contributed causatively to her offending. These include the continuing harmful effects of colonisation, assimilation, and urbanisation, along with M's personal experiences including witnessing violence in her childhood and experiencing the trauma of losing the father of two of her children to suicide.

[39] That said, we are not persuaded that the Judge erred in allowing a 15 per cent discount for these factors. First, M was not as disadvantaged as many offenders. She was loved by her father in particular and was brought up speaking Te Reo through her enrolment at Kōhanga Reo and Kura Kaupapa. She was capable of acquiring tertiary qualifications and was a valued employee.

[40] Second, the offending was serious and, as acknowledged in *Berkland*, where offending is serious, the offender's background may have less impact on the sentence.[16]

[41] In our view, the 15 per cent discount fairly reflects the extent to which background factors contributed to M's offending while also recognising the offending

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15 Sentencing notes, above n 1, at [12].
16 *Berkland*, above n 10, at [94].

involved serious and unprovoked violence against a young child, making principles of deterrence and denunciation particularly relevant.

[42] Furthermore, we consider a five per cent discount for remorse was generous to M. M defended the charges at trial and continued to deny the offending until she abandoned her conviction appeal on 29 June 2022. The Judge clearly had reservations about the genuineness of her letter of remorse but nevertheless gave a five per cent discount in light of it.

[43] In our view, the discounts for matters raised in the s 27 report and for remorse were entirely appropriate and should not be disturbed on appeal.

Result

[44] The application to adduce further evidence on appeal is declined.

[45] The appeal against sentence is dismissed.

Solicitors:
Crown Solicitor, Wellington for Respondent