NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA708/2020
[2023] NZCA 578

BETWEEN	PAUL ELVIS RAWIRI MCLEAN Applicant
AND	THE KING Respondent

Hearing:	26 September 2023
Court:	Cooper P, Palmer and Jagose JJ
Counsel:	J S Jefferson for Applicant I S Auld for Respondent
Judgment:	20 November 2023 at 11.00 am

JUDGMENT OF THE COURT

A The application to withdraw notice of abandonment of appeal against sentence is granted and the notice of abandonment of appeal against sentence is set aside.

B The appeal is reinstated for the purpose of taking into account submissions and evidence concerning personal mitigating circumstances able to be advanced by Mr McLean. We record Mr Jefferson's acknowledgement there will be no argument directed against the starting point adopted by the sentencing Judge.

REASONS OF THE COURT

(Given by Jagose J)

[1] Paul McLean seeks to withdraw the abandonment of his appeal against a sentence of 11 years' imprisonment imposed on him by Judge Cathcart in the District Court at Gisborne on 6 November 2020 in relation to a number of sexual offences.[1] Although he appealed against both his conviction and sentence, he did not pursue the sentence appeal. In dismissing the appeal, this Court observed that "[o]riginally the appeal was against conviction and sentence, but the sentence appeal is no longer being pursued."[2]

Grounds for application to withdraw abandonment of appeal

[2] In sentencing Mr McLean, the Judge took a starting point of 11 years' imprisonment. He then observed "I do not have any further information which allows me to properly reduce that sentence".[3] Although Mr McLean does not directly explain the circumstances, it appears he was advised in preparation for the appeal that no issue could be taken with the Judge's starting point and no information was provided to counsel on any personal mitigating factors that might have been relied on to challenge the sentence. Mr McLean now wishes to bring his alleged neglect and abuse in early childhood for consideration on sentencing as background under s 27 of the Sentencing Act 2002.

[3] For Mr McLean, Mr Jefferson submits it only was while in custody Mr McLean had opportunity to address the abuse he suffered during his early childhood in state care. Even so, his comprehension was slow in coming and not sufficiently crystallised even at the time of appeal. Subsequent consultation with his solicitors has given rise to procuring a s 27 report, identifying a basis on which to contend his background had a causative contribution to his offending.[4] Mr Jefferson

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1 *R v McLean* [2020] NZDC 23133 [sentencing decision]. There were two complainants: AB, aged 16, and CD, aged 11. With respect to AB, Mr McLean was convicted of two counts of indecent assault under s 135 of the Crimes Act 1961. With respect to CD, Mr Clean was convicted of two counts of indecent assault on a young person under 16 (s 134(3)) and two counts of unlawful sexual connection (ss 128(1)(b) and 128B).

2 *McLean v R* [2022] NZCA 114 at [2], n 4.

3 Sentencing decision, above n 1, at [18].

4 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [109].

argues the interests of justice favour reinstatement of Mr McLean's appeal against sentence for that reason alone.

[4] For the Crown, Mr Auld acknowledges both delayed disclosure of childhood abuse and its potential materiality to sentencing may have justified reduction of the sentence on appeal. But he says the delay now between sentencing and this application undermines the finality of criminal proceedings. Permitting belated sentence appeals on such bases as a matter of course would also be detrimental to the workload of this Court. He observes Mr McLean's continued denial of the offending means his background may limit any possible reduction in the sentence. He says, however, that the Crown would not take issue with the application if the Court finds there are truly exceptional circumstances here.

Governing principles

[5] Section 337 of the Criminal Procedure Act 2011 and r 35 of the Court of Appeal (Criminal) Rules 2001 enable abandonment of appeal by notice, expressly advising the appellant "does not intend further to prosecute the appeal; and … abandons all further proceedings concerning that appeal", authenticated or signed by the appellant or their lawyer.

[6] But the section and rule do not address abandonment's consequences. This Court accordingly has developed "the test to be applied when the Court is asked to set aside a notice of abandonment",[5] being:

(a) whether abandonment was a "nullity", that is "not the result of a deliberate and informed decision, in other words the mind of the appellant did not go with his act of abandonment";[6] or

(b) whether required by the interests of justice in exceptional circumstances, having regard to:[7]

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5 *R v Cramp* [2009] NZCA 90 at [20]–[26]. This test has been most recently applied in *Hayde v R* [2023] NZCA 323 at [8]; and *Utatao v R* [2023] NZCA 70 at [15].

6 *R v Cramp*, above n 5, at [21] referring to *R v MacKay* [1980] 2 NZLR 490 (CA) citing *R v Medway* [1976] QB 779 (CA) at 798.

7 At [26] referring to *R v Curtis* CA288/04, 17 February 2005 at [34]; and *Bridgeman v R* CA87/04, 10 November 2005 at [9].

(i) the importance of finality in criminal cases;

(ii) the circumstances in which the notice of abandonment was given; and

(iii) the necessity for an applicant for such an order to satisfy the Court the reasons for the application are of an exceptional nature.

[7] Exceptional circumstances are "circumstances which are unusual",[8] "not … unique or very rare but … truly an exception rather than the rule."[9] So far as "the importance of finality in criminal cases" is concerned, consideration of that factor is:[10]

> … underpinned by concerns about the interests of victims (including the family and friends of a deceased victim), witnesses, and the integrity of the court's processes which are put at risk if appeals are allowed to be reactivated after years of delay. It is also important not to deny other litigants from accessing the court's finite resources through the court needlessly revisiting earlier decisions.

Discussion

[8] In context, Mr Jefferson's written submissions on Mr McLean's unsuccessful appeal, advising "[t]he appellant does not pursue the appeal against sentence", meet the statutory requirement for an effective notice of abandonment of the appeal.

[9] We consider Mr McLean's late appreciation of his contended foundational early childhood abuse is unusual, explicable here by his "reasonable and practicable" custodial access to "rehabilitative programmes and other interventions intended to effectively assist the rehabilitation and reintegration of offenders into the community".[11] But for that access, Mr McLean's own assessment is that "[i]t was always something that I blocked out, that I hid. I was ashamed of it and too embarrassed to talk to anyone about it." Mr Jefferson confirms he was given no indication of any personal mitigating factors for Mr McLean's appeal against sentence.

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8 *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7 at [31]–[32] recasting *Wilkins & Field Ltd v Fortune* [1998] 2 ERNZ 70 (CA) at 76 and citing *R v Kelly* [1999] 2 All ER 13 (CA) at 20.

9 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [34] citing *Creedy v Commissioner of Police*, above n 8, at [31]–[32].

10 *Marteley v R* [2021] NZCA 636 at [37(b)].

11 Corrections Act 2004, s 6(1)(c)(i) and (h).

[10] The importance of finality in criminal cases has limited influence here. Any risk that other offenders similarly might seek to revisit sentencing is subject to the Court's grant of any necessary leave. Interests of those affected by Mr McLean's offending only are affected by knowledge that some relatively modest discount on a substantial sentence may be sought. Such an appeal would not revisit any aspect of this Court's prior considerations. The limited scope of any appeal against sentence as exclusively addressing s 27 factors means its demand on this Court's finite resources is light. And, even if "[f]inality is a good thing, … justice is a better".[12]

[11] Mr McLean's application essentially is in the interests of justice, to enable any causative aspects of his late-comprehended background to be taken into account on a reinstated appeal against sentence. His background may offer mitigating factors distinct from any other considered on Mr McLean's sentencing, such as his lack of remorse. Or it may not. But the interests of justice are understandably late-emerging factors of potential relevance to sentencing. They should not be excluded from consideration by that late emergence alone.

Result

[12] In the interests of justice, the application to withdraw notice of abandonment of appeal against sentence is granted. We set aside Mr McLean's notice of abandonment of his appeal against sentence.

[13] The appeal is reinstated for the purpose of taking into account submissions and evidence concerning personal mitigating circumstances able to be advanced by Mr McLean. We record Mr Jefferson's acknowledgement there will be no argument directed against the starting point adopted by the sentencing Judge.

Solicitors:
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12 *Lal v The King Emperor* [1933] All ER Rep 723 (PC) at 726 as cited in *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [199], n 206.