IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA336/2023
[2023] NZCA 513

BETWEEN	KENDAL CHADWICK SULUSI Appellant
AND	THE KING Respondent

Hearing: 5 October 2023

Court: Mallon, Churchman and Osborne JJ

Counsel: H G de Groot and E J Burton for Appellant
P D Marshall and T C Didsbury for Respondent

Judgment: 25 October 2023 at 10 am

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal is allowed to the extent that the order made pursuant to s 86C(4) of the Sentencing Act 2002 is set aside. The sentence of five years and three months' imprisonment remains in place.

REASONS OF THE COURT

(Given by Churchman J)

Introduction

[1] Following a sentence indication, the appellant, Mr Kendal Sulusi pleaded guilty to two charges of aggravated robbery,[1] one charge of burglary,[2] two charges of theft of petrol,[3] and two charges of unlawfully taking a motor vehicle.[4] On 1 April 2020, Judge de Ridder in the District Court at Whangārei sentenced Mr Sulusi to five years and three months' imprisonment.[5] Because the aggravated robberies were "stage-2" offences, it was ordered that, pursuant to s 86C(4)(a) of the Sentencing Act 2002, the sentence be served without parole.[6]

[2] Mr Sulusi now applies for an extension of time to appeal against his sentence.[7] This application was heard together with the proposed appeal. Mr Sulusi submits that the order that his sentence be served without parole infringes the guarantee against disproportionately severe treatment or punishment in s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA).

Background to the offending

Mr Sulusi's first strike offence

[3] Mr Sulusi committed his first strike offence, a robbery, in 2014. The offending involved Mr Sulusi contacting a man who had been the victim of a burglary. Mr Sulusi claimed that he knew where the man's property was and offered to help him retrieve it.

[4] The victim reluctantly picked Mr Sulusi up in his car and drove him to New Lynn. Mr Sulusi instructed the victim to park the car. He then took the keys from the ignition and told the victim to let him drive or he would "smash [his] teeth into the back of [his] skull". Fearing for his safety, the victim complied. Mr Sulusi then drove to another street, where he told the victim to get out of the car. The victim

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1 Crimes Act 1961, s 235(c) — maximum penalty 14 years' imprisonment.
2 Section 231(1)(a) — maximum penalty 10 years' imprisonment.
3 Sections 219 and 223(d) — maximum penalty three months' imprisonment.
4 Section 226(1) — maximum penalty seven years' imprisonment.
5 *R v Sulusi* [2020] NZDC 5680 [sentencing notes].
6 Section 86C(4)(a) of the Sentencing Act 2002 has since been repealed by s 5 of the Three Strikes Legislation Repeal Act 2022.
7 The appeal was filed 753 working days out of time.

again reluctantly complied. At this point Mr Sulusi drove off and did not return the car. Four days later Mr Sulusi demanded $500, then later $1,500 to return the car.

[5] Mr Sulusi pleaded guilty to robbery and was given a first strike warning.[8] As an alternative to a sentence of 23 to 24 months' imprisonment, he agreed to enter the Alcohol and Other Drug Treatment Court (Alcohol and Drug Court).[9] While Mr Sulusi initially made good progress, he then disengaged with the Court and failed to present himself. He was arrested and sentenced on 25 August 2015, on seven charges, with robbery as the lead offence. Judge Tremewan in the District Court at Waitakere imposed a sentence of 24 months' imprisonment.[10]

Mr Sulusi's second strike offence

[6] Mr Sulusi committed his second strike offence late in the evening of 30 September 2019. Together with two co-offenders, he broke into the victim's home. Mr Sulusi and one of his co-offenders were carrying firearms. The two armed men ordered the victims to lie face down on the floor. Mr Sulusi threatened to shoot them if they did not hand over valuable items. A gold necklace was taken from the female victim and she was forced to hand over her wallet. Mr Sulusi also demanded that she provide online banking details and the password for her cell phone.

[7] To further intimidate the couple, Mr Sulusi's co-offender actioned his firearm, ejecting a live round onto the ground. He said to the male victim that if he rang the police, "the next one [would be] for [him]". He then picked up the live round and threw it at the victim, saying "[h]ere's a souvenir". Mr Sulusi also told the victims they would be killed if they contacted the police.

[8] Mr Sulusi demanded firearms and drugs from the female victim, which she did not have. The offenders located the male victim's vehicle keys, and Mr Sulusi tried to start the vehicle unsuccessfully. All three offenders then left the address, having told the victims to remain lying face down on the floor.

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8 He also pleaded guilty to six other charges but robbery was the lead charge.
9 *Police v Sulusi* DC Waitakere CRI-2015-090-001734, 26 March 2015.
10 *Police v Sulusi* [2015] NZDC 17014.

Sentencing decision

[9] A sentencing indication was given on 17 February 2020. Judge de Ridder focused on the aggravated robberies, adopting a starting point of seven and a half years.[11] The Judge applied an uplift of one year for Mr Sulusi's significant criminal history and indicated an adjustment of 25 per cent for his guilty pleas, calculating an end sentence of six years and three months' imprisonment.[12] The possibility of further adjustments was left open.[13]

[10] The sentencing indication was accepted, and Mr Sulusi was sentenced on 1 April 2020.[14] In sentencing Mr Sulusi, the Judge noted there was some slight mathematical imprecision in the indicated sentence (the correct calculation was six years and five months' imprisonment).[15] However, the oral indication of six years and three months' imprisonment was maintained.[16] The Judge acknowledged Mr Sulusi's "very tough road" growing up and consequent drug addiction.[17] Mr Sulusi had an "appalling offending record" but the Judge was "quite satisfied" that this history, together with his descent into drug addiction (which in turn led to offending to support his habit) was clearly related, at least in part, to the matters raised in the probation report.[18] A discount of around 15 per cent was applied, leading to an end sentence of five years, three months' imprisonment.[19]

[11] Because this was second strike offending, Mr Sulusi was required to serve the full term without parole.[20]

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11 *R v Sulusi* DC Whangārei CIR-2019-088-003289, 17 February 2020 at [9]. The Judge noted there would be lesser sentences imposed on the other charges, but they would be served at the same time.

12 At [11]–[12]. The Judge's written sentencing indication notes record five years and eight months' imprisonment, but this was an error. As the Judge explained when sentencing Mr Sulusi, the Judge had orally indicated six years and three months' imprisonment and the written record was an error. However, as the Judge also said when sentencing Mr Sulusi, the correct calculation was six years and five months' imprisonment.

13 At [13].

14 Sentencing notes, above n 5.

15 At [8].

16 At [8].

17 At [10] and [12].

18 At [10]–[13].

19 At [13].

20 Sentencing Act, s 86C.

Relevant law

[12] Eligibility for parole is governed by the Parole Act 2002. An offender such as Mr Sulusi who has been sentenced to a fixed term of imprisonment of more than two years is generally eligible for parole consideration after serving one third of that sentence.[21] If, however, an offender committed a stage-2 offence, s 86C(4) of the Sentencing Act provided they must serve the sentence without parole.[22] Section 86C(6) provided that if, but for the application of this section, the court would have ordered, under s 86, that the offender serve a minimum period of imprisonment (MPI), the court must state, with reasons, the period that it would have imposed.

[13] In *Fitzgerald v R* the Supreme Court considered the implications of NZBORA for sentencing on conviction for a third strike offence under s 86D of the Sentencing Act.[23] Mr Fitzgerald had been convicted of indecent assault. The offending was at the bottom end of the range for an indecent assault and, leaving aside any aggravating features of the offending, would not have attracted a term of imprisonment.[24] But, because it was a third strike offence, Mr Fitzgerald was sentenced In the High Court to the maximum sentence for indecent assault of seven years' imprisonment.

[14] The Supreme Court held that the sentence was so disproportionately severe that it breached s 9 of NZBORA.[25] The majority held that Parliament did not intend, in enacting the three strikes regime, to require judges to impose sentences that breached s 9 of NZBORA and New Zealand's international obligations.[26] It was therefore possible and necessary to interpret s 86D(2) so that it did not require the imposition of sentences that would breach s 9.[27] The majority held that, in the rare cases where the maximum sentence produced by s 86D(2) would breach s 9 of the

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21 Parole Act 2002, ss 20 and 84.
22 See also s 20(5) of the Parole Act.
23 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.
24 *R v Fitzgerald* [2018] NZHC 1015 at [21].
25 *Fitzgerald v R*, above n 23, at [79]–[81] per Winkelmann CJ, [239] per Glazebrook J, [167] per O'Regan and Arnold JJ and [283] per William Young J.
26 At [123] and [128]–[130] per Winkelmann CJ, [247] per Glazebrook J and [203] per O'Regan and Arnold JJ. The majority also considered this right was not subject to any reasonable limitation under s 5 of NZBORA. See at [38] and [78] per Winkelmann CJ, [241] per Glazebrook J and [160] per O'Regan and Arnold JJ.
27 At [139] per Winkelmann CJ, [250] per Glazebrook J and [219] per O'Regan and Arnold JJ.

NZBORA, an offender was to be sentenced in accordance with ordinary sentencing principles.[28]

[15] This Court in *Matara v R* considered s 86C(4) was framed as a direction to the sentencing Judge to make an order that the sentence be served without parole.[29] It followed inexorably from *Fitzgerald* that this direction must be read subject to the same unexpressed qualification that it is subject to s 9 of the NZBORA.[30] The reasoning of the majority of the Supreme Court in *Fitzgerald* in relation to third strike sentencing was equally applicable to second strike sentencing.[31] There was no express provision in s 86C, or elsewhere in the third strike regime, to require judges to impose sentences inconsistent with s 9 of the NZBORA.[32] The interpretative direction in s 6 of the NZBORA, the principle of legality, and the presumption of consistency with international obligations all applied with equal force to s 86C(4).[33] Very clear language would be needed before reading s 86C as a direction by Parliament to the judicial branch that it should impose sentences inconsistent with the NZBORA and New Zealand's international obligations.[34] In the absence of such language, s 86C(4) was not to be read as requiring the judicial branch to apply such sentences.[35]

[16] The threshold for a sentence to be inconsistent with s 9 is a high one, which has been expressed as requiring a result "so excessive as to outrage contemporary standards of decency", or "treatment grossly disproportionate to the circumstances or such as to shock the national conscience".[36]

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28 At [252] per Glazebrook J and [231] per O'Regan and Arnold J. Winklemann J at [137]–[138] agreed that ordinary sentencing principles were to apply but considered that recidivism by those caught by the regime was to be viewed as very serious and worthy of a stern sentencing response, and the regime incorporated an additional sentencing principle of recidivism. The rest of the majority did not agree. See [231] per O'Regan and Arnold JJ and [252], n 366 per Glazebrook J.

29 *Matara v R* [2021] NZCA 692 at [57].

30 At [58].

31 At [59].

32 At [59].

33 At [59].

34 At [59].

35 At [59].

36 At [72], citing *Fitzgerald*, above n 23, at [163]–[166] per O'Regan and Arnold JJ, referring to the approaches adopted by the Supreme Court in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [91]–[92] per Elias CJ, [176] per Blanchard J and [288] per Tipping J.

Appellant's submissions

[17] No issue is taken with the construction of the sentence. Mr de Groot, for Mr Sulusi, submits that the order that the sentence be served without parole infringes the guarantee against disproportionately severe treatment or punishment in s 9 of the NZBORA. Mr de Groot seeks that the appeal be allowed to the extent that the order under s 86C(4)(a) is set aside.

Extension of time to bring appeal

[18] The appeal was filed on 26 June 2023, approximately three years and two months out of time. However, Mr de Groot submits the delay is adequately explained by the circumstances. The s 9 argument was only brought into focus by *Fitzgerald*, which was delivered in October 2021.[37] Mr Sulusi became aware of the repeal of the three strikes regime in 2022 and sought advice, which did not lead to further steps being taken. He later spoke to Mr Matara, whose stage-2 appeal had been allowed.[38] Mr Sulusi sought further advice and engaged counsel. Mr de Groot submits that outside the s 9 context, long extensions of five to six years have been recently granted to appeal orders imposed due to underexamined sentencing practices.[39] It is submitted that a potential s 9 breach is of greater significance than a sentence which is simply manifestly excessive, and if established, would require correction.

Basis for the appeal — s 9 breach

[19] Mr de Groot submits that the s 9 breach in this case arises from an evaluation of the stage-1 offence, a comparison with the outcome that would result on ordinary sentencing principles, the effect on Mr Sulusi in his particular circumstances, and a comparison with this Court's recent decision in *Tamiefuna v R*.[40]

[20] The stage-1 offence was a non-aggravated robbery committed in 2014. Mr de Groot submits that, while there was some seriousness about the offending, it

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37 *Fitzgerald v R*, above n 23.
38 *Matara v R*, above n 29.
39 For example, in respect of a minimum period of imprisonment imposed for methamphetamine offending under the guideline judgment of *R v Fatu* [2006] 2 NZLR 72 (CA), see *Rogers v R* [2022] NZCA 39 and *Hura v R* [2023] NZCA 7.
40 *Tamiefuna v R* [2023] NZCA 163.

did not involve violence or the targeting of high-value property. Although it was perhaps not a case of "inadvertent capture", it was not the sort of offending the regime was aimed at. Different charging decisions could have been made, such as charging Mr Sulusi with demanding with menaces, or simple theft. Judge Tremewan was sensitive to Mr Sulusi's personal difficulties and invited him into the Alcohol and Drug Court.

[21] Mr de Groot submits there is no indication the Judge would have imposed an MPI in the ordinary sentencing context. As such, the stage-2 order requires Mr Sulusi to serve three times as long in mandatory custody, or an increase of 200 per cent, as to what would ordinarily be required if no MPI was imposed. This means an additional 42 months' (three and a half years') imprisonment, whereas in the ordinary course Mr Sulusi would appear before the Parole Board after 21 months. It is submitted that the sentence crosses into the territory of gross disproportion. This is particularly so when there were complex disadvantages in Mr Sulusi's background that are linked to the offending.

[22] The Provision of Advice to Courts report noted Mr Sulusi had been born into gang culture and had not been provided any security or stability as a child. He had been physically and sexually abused. In the lead-up to the offending, Mr Sulusi's relationship had broken down and his eight-year-old daughter had died. He had fallen back into drinking, methamphetamine abuse and gang association. These factors go some way to explaining the offending, in terms of *Berkland v R*.[41]

[23] Mr de Groot submits the stage-2 order is also disproportionate in that it deprives Mr Sulusi of further rehabilitative opportunities in custody. Mr Sulusi has completed several programmes which have been positive to him and has connected to his Māori side.[42] However, he is restricted from other reintegrative activities such as "return to work".[43]

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41 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [109].
42 Malu Aiga and STUVO programmes.
43 This is as a consequence of reg 26 of the Corrections Regulations 2005.

[24] Mr de Groot refers to *Tamiefuna*,[44] where, like Mr Sulusi, Mr Tamiefuna was sentenced for aggravated robbery as a stage-2 offence. Mr Tamifuna and his co-offender broke into a residential address in the early hours of the morning. They entered the elderly victim's room and demanded his property. The victim was struck on the shoulder with an open hand. Small personal items were stolen, along with the victim's car, valued at $47,000. The victim was badly affected. This Court found that the 200 per cent increase on what was otherwise appropriate triggered s 9. While aspects of the offending in the present case were more serious, Mr de Groot submits that Mr Sulusi's role in the offending was comparable overall to the offending in *Tamiefuna*, and the gravity of his stage-1 offence should be borne in mind (Mr Tamiefuna's first strike offence was an aggravated robbery, a more serious offence than Mr Sulusi's first strike offence).

Respondent's submissions

Extension of time

[25] Mr Marshall, counsel for the Crown, submits that the time delay is greater than in other three-strike appeals this Court has heard since *Fitzgerald*. Changes in the law are not generally sufficient to justify an extension of time to bring an appeal. Instead, "special circumstances" demonstrating an extension is in the interests of justice are required.[45]

[26] The Crown nevertheless acknowledges that if Mr Sulusi can demonstrate that his sentence is inconsistent with s 9 of the NZBORA, this would weigh heavily and perhaps decisively in favour of this Court extending time. The Crown acknowledges that this Court has previously granted extensions of time in cases bought on the basis of *Fitzgerald*. While those appeals required shorter extensions, the Crown acknowledges that approximately a year of the present delay appears attributable to

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44 *Tamiefuna v R*, above n 40.

45 *R v Knight* [1998] 1 NZLR 583 (CA) at 588 quoting *Alofa v Department of Labour* [1980] 1 NZLR 139 at 146. Counsel refer to the approach taken in England and Wales to the effect that the fact that there has been a change in the law brought about by correcting the wrong is, in itself, insufficient. If a person was properly convicted on the law as it then stood, the court will not grant leave without it being demonstrated that a substantial injustice would otherwise be done: see for example *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 WLR 104 at [12]–[15].

the fact that neither *Fitzgerald* nor *Matara* were brought to Mr Sulusi's attention when he sought advice in mid-2022.

The appeal

[27] The Crown refers to *Phillips v R*.[46] In that case, this Court listed three factors likely to play a significant role in determining whether a sentence imposed pursuant to s 86D(2) of the Sentencing Act breaches s 9 of the NZBORA:[47]

> (a) any difference between the nature of the sentence that would otherwise have been imposed and the fact a prison sentence was imposed;
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> (b) the difference between any prison sentence that would have been imposed but for the three strikes regime and the one imposed pursuant to s 86D(2); and
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> (c) the nature of the offending, which requires an assessment of whether or not the defendant is plainly an inadvertent and unforeseen casualty of the three strikes regime.

[28] We note that in *Gemmell v R*, this Court acknowledged that there were none of the factors identified in *Phillips*, but disagreed that the absence of the *Phillips* factors supported the Crown's contention that Mr Gemmell's sentence was not disproportionately severe.[48] In *Phillips* it was made it clear that the categories set out were intended by way of example only and the list was not exhaustive.[49] Moreover, the Supreme Court has made it clear that imposing limits on s 9 cannot reasonably be justified.[50] *Phillips* also pre-dated the repeal of s 86.[51]

[29] The Crown says it is well settled that s 9 sets a high threshold. It submits that, unlike Mr Fitzgerald, Mr Sulusi's status as a second strike offender did not change the

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46 *Phillips v R* [2021] NZCA 651, [2022] 2 NZLR 661.
47 At [28].
48 *Gemmell v R* [2023] NZCA 420 at [60].
49 At [60].
50 At [60].
51 At [60].

nature of the sentence. The only appropriate response was a substantial term of imprisonment.

[30] The Crown acknowledges that no consideration appears to have been given to whether an MPI would have been imposed but for s 86C.[52] However, in the Crown's submission, an MPI of approximately 50 per cent would have been available, given comparable decisions of this Court.[53] While MPIs have not been considered necessary in other cases,[54] the Crown submits that given the serious aggravating features of Mr Sulusi's offending (namely, a night-time home invasion involving multiple offenders, use of loaded firearm and threats to kill), parole eligibility after only 21 months would have been insufficient to satisfy the statutory purposes of accountability, denunciation, deterrence and community protection.

[31] On this basis, the Crown submits Mr Sulusi would have been eligible for parole after serving between one third and one half of his sentence but for the three strikes legislation. This represents a multiplier of between two (with MPI) and three (with no MPI) and an actual difference of between three years and six months and two years and seven months. The Crown accepts that this disparity is disproportionate, but suggests that other decisions of this Court demonstrate that it is not so grossly disproportionate as to breach s 9.

[32] The Crown refers to *Allen v R*, where this Court held that a difference in parole eligibility of 2.3 times (one year as compared to two years and four months) for a third strike offender did not reach the high threshold set by s 9.[55] The Court referred to *Mitai-Ngatai v R* where it was considered that a 3.5 times disparity in was "very close" to not infringing s 9.[56] In *Waitokia v R*, this Court found no breach of s 9 in the imposition of a seven-year sentence, despite that sentence being five years, or

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52 See s 86C(6) of the Sentencing Act, which provided that if the Court would otherwise have imposed an MPI, the Court must state, with reasons, the period it would have imposed.

53 See *Pomare v R* [2011] NZCA 83; *Tereora v R* [2015] NZCA 120; and *R v Hanna* CA201/04, 7 October 2004.

54 For example *Tipene v R* [2021] NZCA 565 at [29]–[31] (holding an MPI did not properly take into account the appellant's rehabilitative prospects and absence of similar past offending); and *Poi v R* [2020] NZCA 312 at [54]–[55] (holding that the appellant's personal mitigating factors and rehabilitative prospects weighed against the imposition of MPIs).

55 *Allen v R* [2022] NZCA 630 at [36].

56 At [27], referring to *Mitai-Ngatai v R* [2021] NZCA 695 at [28]–[30].

3.5 times, longer than the sentence of two years that would otherwise have been imposed.[57] In so holding, it distinguished *Mitai-Ngatai*, which involved a similar level of disproportionality, on the basis that it involved significantly less serious offending and an offender with a history of psychiatric illness, major depression and anxiety disorders.[58]

[33] In *Matara,* this Court found that a no-parole order on a sentence of 10 years and two months' imprisonment would breach s 9.[59] The MPI would have been 40 per cent and the resulting disparity was six years or a multiplier of 2.5. A primary factor in the Court's analysis was Mr Matara's probable acute psychosis at the time of his offending. In *Crowley-Lewis v R*, this Court held that a no-parole order on a sentence of eight and a half years' imprisonment would breach s 9 and instead imposed a 50 per cent MPI.[60] The disparity avoided was four years and three months or a multiplier of two. Central to the Court's analysis was the fact the appellant's first strike offence occurred when he was 18 and involved him and a friend demanding a 16-year-old boy's iPod, wallet and backpack. The Court observed that such offending could well have been charged as demanding with menaces, which would not have resulted in a first strike.[61]

[34] While the Crown accepts a disparity of two to three times is harsh and may approach the s 9 threshold, it submits Mr Sulusi's position is more comparable to that of the appellants in *Allen*, *Waitokia* and *Gemmell*,[62] than those in *Tamiefuna* and *Crowley-Lewis*. This is principally because the seriousness of Mr Sulusi's offending exceeds that in *Tamiefuna*, his first strike offending was more serious than in *Crowley-Lewis*, and his personal mitigating factors are less compelling than those in *Matara*.

[35] The Crown submits Mr Sulusi's personal circumstances are not sufficiently mitigating to render his sentence in breach of s 9. Nothing in the material before the

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57 *Waitokia v R* [2023] NZCA 224 at [48].
58 At [49]–[51].
59 *Matara v R*, above n 29.
60 *Crowley-Lewis v R* [2022] NZCA 235.
61 At [33].
62 *Gemmell v R*, above n 48. The appeal was primarily allowed to enable parity between Mr Gemmell and his co-offender, who was sentenced after the repeal of three strikes.

Court suggests he did not understand, or was incapable of acting on, the first warning he received.[63] He has not been diagnosed with any causative mental health issues, which were significant factors in *Matara* and *Fitzgerald.* While the pre-sentence report identifies alcohol and drug use as contributing to his offending, it goes on to conclude that, unless he addresses these issues, his risk of serious reoffending is high. Given one of the central purposes of the three strikes regime was to protect the community "by incapacitating … offenders for longer periods", the Crown suggests this factor tends to cut both ways.[64]

[36] The Crown observes that the without parole order does not appear to have deprived Mr Sulusi of significant rehabilitative opportunities within prison. He deposes to having completed several programmes and is currently housed in a self-care unit.

Analysis

[37] As the Crown acknowledges, whether or not an extension should be granted in this case turns largely on the merits of the appeal. We consider the appeal has merit. The delay is also explicable and does not result from a default by the appellant. An extension of time is granted.

[38] We do not think that it is appropriate for this Court to speculate on whether a 50 per cent MPI might have been imposed in this case. Section 86C(6) clearly states that, if the Court would otherwise have ordered the offender serve an MPI, the Court must say so and provide reasons for the period it would have imposed. The Judge did not do this. Indeed, he did not discuss an MPI at all. So based on s 86C(6) we must conclude that the Judge would not have imposed an MPI if s 86C did not apply. Therefore, the correct multiplier is three. In other words, Mr Sulusi would serve 200 per cent as compared with what would ordinarily be required as a minimum. It does not appear, based on other cases, that this number is in itself determinative. Rather, the multiplier, the particular facts of the case and the particular characteristics

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63 In *Liai v R* [2023] NZCA 326 at [44] this Court considered Mr Liai's understanding the warning as relevant in finding that the non-parole order was not disproportionate.

64 Sentencing and Parole Reform Bill 2009 (17-7) (explanatory note) at 1. See also *Fitzgerald v R,* above n 23, at [122] per Winkelmann CJ.

of the offender must all be taken into account. In saying that, this number is comparable to other cases where a breach of s 9 has been found.[65]

[39] As the Crown acknowledges, the absence of mental health issues is not decisive to the s 9 inquiry.[66] In *Tamiefuna*, Mr Tamiefuna had not been diagnosed with any mental health issues, which were an important consideration in *Fitzgerald* and *Matara*. This Court noted that there was also no suggestion that the appellant in *Crowley-Lewis* had been diagnosed with any mental health issue. It was nevertheless the case that Mr Tamiefuna came from a disadvantaged background which contributed to his offending. As a young person he had been cared for by foster parents and was introduced to cannabis by his foster father at the age of 13. He used drugs and alcohol, which use was exacerbated when his brother and foster father died in the same year. He joined a gang at age 16 and became institutionalised in the prison system.

[40] We do not accept the Crown's submission that Mr Sulusi's personal circumstances are not sufficiently mitigating, in combination with the multiplier and the facts of the offending, to render his sentence in breach of s 9. As disclosed in the pre-sentence report, Mr Sulusi has similar, if not more serious, personal factors to Mr Tamiefuna. Mr Sulusi had an unstable family life at a young age, and has been exposed to a gang lifestyle since he was a child. He reports that he was subjected to violence by family members and was sexually abused at age six. He has had issues with drug and alcohol use for a long time. Mr Sulusi attributes his offending to the breakdown of his relationship and the death of his eight-year-old daughter from pneumonia and meningococcal disease. At the time, he had been working up to 70 hours a week as a scaffolder, but after the death of his daughter he began drinking and using methamphetamine, and became involved with the gang. At sentencing, the Judge was satisfied that Mr Sulusi's personal history, as raised in the report, could be clearly connected to his offending, as well as his descent into drug addiction.[67]

[41] Overall, we conclude that this case is broadly comparable with *Tamiefuna*. The offending was more serious in some respects, in that weapons were used, but in

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65 See for example *Tamiefuna*, above n 40, (multiplier of three); *Matara*, above n 29, (multiplier of 2.5); and *Crowley-Lewis*, above n 60, (multiplier of two).

66 *Tamiefuna*, above n 40, at [120].

67 Sentencing notes, above n 5, at [10]–[13].

Tamiefuna, the victim was actually struck by one of the offenders with an open hand, whereas in this case it does not appear that the victims were physically assaulted. It could also be argued that the disparity in the seriousness of the offending is somewhat accounted for by the fact that Mr Sulusi received a sentence that was four months higher than Mr Tamiefuna, being five years and three months' imprisonment, compared to four years and 11 months' imprisonment. However, Mr Tamiefuna's strike-1 offending was more serious than Mr Sulusi's, being aggravated robbery rather than robbery. Moreover, the offending in *Crowley-Lewis* (where the appeal against sentence was allowed) was more serious than both of these cases and involved charges of rape and unlawful sexual connection, both of which carry a maximum term of 20 years' imprisonment.

[42] Mr Sulusi would be required to serve a sentence three times higher (200 per cent more) than the minimum period he would serve under ordinary sentencing principles, and he has a significantly disadvantaged background, which the sentencing Judge acknowledged was related to his offending. On balance, we conclude that the disparity resulting from the s 86C(4)(a) order that the sentence be served without parole is sufficiently great to render the sentence disproportionately severe in breach of s 9 of the NZBORA. Given that the facts of this case are comparable to those of *Tamiefuna*, a decision of the permanent bench of this Court that quashed a no-parole order, we conclude that consistency requires a similar result here.

Result

[43] The application for an extension of time to bring an appeal is granted.

[44] The appeal is allowed to the extent that the order made pursuant to s 86C(4) of the Sentencing Act 2002 is set aside. The sentence of five years and three months' imprisonment remains in place.

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