IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA243/2023
[2023] NZCA 417

BETWEEN	PENE AMENE TE AO KAPUA HURIWAKA SWEENEY (AKA BENJAMIN SWEENEY) Appellant
AND	THE KING Respondent

Hearing: 27 July 2023

Court: Mallon, Moore, and Palmer JJ

Counsel: N P Chisnall KC for Appellant
M R L Davie for Respondent

Judgment: 4 September 2023 at 3 pm

JUDGMENT OF THE COURT

A Leave is granted to adduce further evidence.

B The appeal is allowed. The sentence of two years and two months' imprisonment is quashed and substituted with a sentence of one year and 11 months' imprisonment.

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] Mr Benjamin Sweeney, the appellant, was found guilty of assault with intent to injure and assault with a weapon, and acquitted of manslaughter, arising from a

brawl at a petrol station in Ōtorohanga in October 2021. He was sentenced by Downs J in the High Court on 9 May 2023 to two years and two months' imprisonment.[1] Mr Sweeney appeals on three grounds. We consider it was open to the Judge not to provide a discount for Mr Sweeney's expressions of remorse which were focussed on the death of one of Mr Sweeney's opponents in the brawl, as opposed to being focussed on his offending. We consider that the law, applied to Mr Sweeney's circumstances, means that there should have been a discount to his sentence for the interests of his two young children, and their effect on his rehabilitative prospects. However, we are satisfied that the interests of the children in this case do not tip the balance far enough to make home detention the least restrictive sentence that is appropriate in the circumstances of this serious violent offending. We allow the appeal and substitute the sentence with a sentence of one year and 11 months' imprisonment.

What happened?

[2] In his sentencing remarks, the Judge outlined the offending of Mr Sweeney and of his cousin, Mr Frank Sweeney:

> [3] On 2 October 2021, you, Benjamin Sweeney, you, Frank Sweeney, and a third man, stopped your car on the main road in Ōtorohanga outside the service station. It was about 6.15 in the evening. It was still light.
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> [4] Almost immediately, Anthony Bell and his two brothers, Ethan Tumai and Victor Tumai, pulled up behind your car. Anthony Bell and Ethan Tumai had been drinking.
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> [5] Both of you and the third man rushed the victims' car as they were getting out. Benjamin Sweeney, you were initially holding a beer bottle.
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> [6] Sadly, everyone wanted to fight. I return to why shortly.
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> [7] Anthony Bell was initially holding a hammer. He dropped it and bent over. As he did so, you, Benjamin Sweeney, punched him to the head twice. Your blows were hard. They knocked Mr Bell to the ground. While he was on the ground, you punched him to the head, kicked him to the head, and as he was getting up, stomped his head. You also punched his body. This violence reflects the first charge of assault with intent to injure, which carries a maximum penalty of three years' imprisonment.
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> [8] Victor Tumai was fighting the third man from your car. Benjamin Sweeney, you picked up the hammer from the ground, ran to Victor Tumai and struck him, using the hammer, to the back. You then ran back to Mr Bell; then

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1 *R v Sweeney* [2023] NZHC 1095. These offences are punishable by maximum penalties of three and five years' imprisonment respectively: Crimes Act 1961, ss 193 and 202C(1).

> back again to Mr Tumai. You again hit him in the back with the hammer. This violence is captured by the assault with a weapon charge, which carries a maximum penalty of five years' imprisonment. Victor Tumai sustained swelling, bruises and grazes to various parts of his body.
>
> [9] Frank Sweeney, you squared off with Ethan Tumai. He was holding a small screwdriver or small knife. He ran away from you. You chased him across the road. You then ran back to where Mr Bell was standing in the forecourt of the service station. You then delivered a *very* powerful blow, either to Mr Bell's head or upper body. I cannot stress enough its forcefulness. It knocked Mr Bell backwards onto the ground. He died because of brain injury in consequence of your assault. You and Benjamin Sweeney fled.
>
> [10] You did not know the victims. You had encountered them, by chance, a little earlier on the main road leading into Ōtorohanga.
>
> [11] What happened on the road between the two groups was a matter of contention at trial. The entire sequence cannot be reconstructed. However, I have no doubt that you, the Sweeneys, were the initial aggressors on the road. I am sure you were initially following the victims' car and that you then tailgated it. I am also sure you passed the victims' car at some point. A motorist driving the other way saw someone in your car making a Mongrel Mob gesture out of the window at the victims' car. I do not doubt those in the victims' car returned your aggression in some way or ways. By the time the two cars arrived at the service station, everyone wanted to fight because of what had happened on the road.
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> [12] The case went to trial. Both of you claimed you were acting in self-defence. Indeed, both said you were terrified of the victims and worried they would cause you serious bodily harm—or worse. Much of your testimony was exaggeration or outright fabrication. I have no doubt that both of you wanted to fight the victims, just as they, initially at least, wanted to fight you. That was apparent from the closed-circuit television footage from the service station. Indeed, almost everything that occurred was captured on closed-circuit television.
>
> [13] The jury found both of you guilty, save you Benjamin Sweeney in relation to Mr Bell's death. The jury were not sure that you helped [or] encouraged Frank Sweeney commit manslaughter.
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> (Footnotes omitted)

[3] Mr Chisnall KC, for Mr Sweeney, submits that the Judge's finding at paragraph [11] of his sentencing, and another observation that the fight commenced by "tacit agreement",[2] downplayed the undisputed evidence that the deceased and his brothers doggedly pursued Mr Sweeney and his companions. The Judge's remarks were focussed on what had precipitated the assault, namely that the Sweeneys were the initial aggressors on the road and that everyone wanted to fight when the two cars

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2 At [17].

arrived at the service station. Those remarks were not inconsistent with evidence that the victim and his brothers doggedly pursued the Sweeneys. It was open to the Judge, as trial judge, to form the views he expressed in this part of his sentencing remarks. There is no error in this respect.

[4] The Judge identified three aggravating factors of Mr Sweeney's offending: attacking Mr Bell to the head with significant force; administering blows while he was defenceless on the ground; and using a weapon against Victor Tumai.[3] He considered the offending was plainly serious, though it fell just short of extreme violence.[4] He adopted a global starting point of two years and nine months' imprisonment, saying:[5]

> I also record the obvious: this violence occurred in daylight, in a main street, under the gaze of closed-circuit television and people at the service station. Violence in a public place has a ripple effect. It makes those in the community feel unsafe, it compromises trust, and it contributes to a sense of lawlessness in a post-pandemic world.

[5] The Judge uplifted Mr Sweeney's sentence by three months' imprisonment for his history of recent violence — a conviction for injuring with intent or reckless disregard in August 2017 and for assault in a family violence context in January 2018.[6] The Judge considered discounts to the adjusted starting point of three years' imprisonment. As explained further below, he:

(a) made no deduction for remorse;[7]

(b) allowed a five-month (approximately 14 per cent) discount for Mr Sweeney's personal circumstances set out in a pre-sentence report and cultural report;[8]

(c) deducted five months for Mr Sweeney's 14 months on electronically-monitored (EM) bail before the trial;[9]

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3 At [14].
4 At [15].
5 At [17].
6 At [18].
7 At [21].
8 At [24].
9 At [25].

(d) did not make a deduction for Mr Sweeney's role as caregiver to his children;[10] and

(e) stated that, even if home detention were available, he would not have imposed it.[11]

[6] Mr Sweeney's end sentence was two years and two months' imprisonment. Mr Frank Sweeney was sentenced to four years' imprisonment for the manslaughter of Mr Bell.

Appeal

[7] Mr Sweeney appeals his sentence on the grounds that he should have discounts for remorse and for being a solo parent to his young children and, accordingly, should have been sentenced to home detention instead of imprisonment.

[8] Under s 250 of the Criminal Procedure Act 2011, we must allow the appeal if satisfied that there is an error in the sentence imposed and a different sentence should be imposed instead.[12] Otherwise, we must dismiss the appeal. The Court will only intervene, and substitute its own view on appeal, if the sentence is manifestly excessive.[13] The focus is on whether the end sentence is within the available range.[14]

[9] Mr Sweeney seeks leave to adduce an affirmation about adverse aspects of the Department of Corrections' pre-sentence report, as well as evidence of completing an anger management course. Mr Chisnall, for Mr Sweeney, submits there was no meaningful opportunity for Mr Sweeney to respond to the inaccuracies in the report because it was only made available to Mr Sweeney's counsel two working days before sentencing. Mr Davie, for the Crown, observes that Mr Sweeney had an opportunity to discuss the pre-sentence report with his lawyer prior to sentencing and his lawyer expressed Mr Sweeney's views to the Judge. But the Crown abides the Court's decision on admissibility.

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10 At [27].
11 At [45].
12 Criminal Procedure Act 2011, s 250(2).
13 *Ripia v R* [2011] NZCA 101 at [15].
14 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [32]–[36].

[10] The principles for assessing the admissibility of new evidence on appeal is well settled. It must be credible and fresh. Being fresh requires an assessment of whether it could have been presented to the sentencing Judge with reasonable diligence. If it is credible and fresh, it should be admitted unless the appellate court is satisfied it would have no impact on the sentence.[15] Mr Sweeney received the pre-sentence report 20 minutes before his sentencing and had little time to talk with his lawyers about it on the morning of the sentencing. The Judge is unlikely to have known that. But such a period is not a sufficient opportunity in the circumstances of this case, in terms of the principles of natural justice, for Mr Sweeney to respond to the adverse information in the report that was relevant to his sentencing. The evidence Mr Sweeney now seeks to adduce is a response to the report and is relevant to issues on appeal. As in *Betteridge v R*, it is fresh in the relevant sense and, in certain key respects, both cogent and credible.[16] We grant leave to adduce the affirmation and evidence of the anger management course.

Issue 1: Remorse

Indications of remorse

[11] Mr Sweeney's remorse was canvassed in four documents. First, in a letter to the Judge before his sentencing, Mr Sweeney expressed his sympathy for those who had lost Mr Bell and explained he had also suffered traumatic loss of his partner. Among other things, he said:

> I write this letter to express my sincere regret and genuine remorse for my behaviour and actions, and any way in which I contributed to what happened on that day. My remorse comes from a genuine and heartfelt place of experience as I too have felt deep, traumatic loss. This letter comes from the heart, with compassion, sorrow, and deep regret.

[12] Second, the Department of Corrections pre-sentence report stated, relevantly:

> At the start of the interview, Mr Sweeney presented as defensive, and focused entirely on getting out of prison the fastest way possible. He was even considering seeking an adjournment of his sentencing and applying for EM Bail to achieve this.

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15 *Mark v R* [2019] NZCA 121 at [16] applying the principles established in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

16 *Betteridge v R* [2019] NZCA 513 at [23]–[24].

…

… [H]owever, by the end of the interview, Mr Sweeney had acknowledged the enormity of the offending, and seemed to be exhibiting genuine remorse and empathy. He explained that his initial presentation was due to a lack of trust of the interviewer, and a preconceived idea that they were only out to "make the offending gang-related and recommend the harshest sentence possible".

…

He stated he "did an anger management course once upon a time" and "doesn't want to be thrown in with Toms, Dicks and criminals" to do another one "just to tick a box". Mr Sweeney has made his children his focus and would attend a parenting course, but not a specific rehabilitative intervention for his own benefit. …

Although Mr Sweeney, has expressed remorse for the victim's whanau, his unwillingness to undertake any form of rehabilitation, means any sentence imposed will be of a punitive nature only; unless Mr Sweeney has a change of heart.

…

Mr Sweeney has had the experience of losing a loved one in tragic circumstances and said he wouldn't want anyone else to experience that pain. Although he had a Restorative Justice Conference with the person "who killed his partner", where he was able to "get a lot off his chest", Mr Sweeney is continuing on "a long, lonely, sad road of healing". He said this has given him an understanding of what the victim's children are going through. Accordingly, he has "written a lovely remorse letter", and added that in the scheme of things, it doesn't carry much weight. Eventually he would like to sit down with the victim's whanau as part of their healing ("that hui has to go down"). He thought he might organise that with his Kaumatua in a couple of years time.

[13] Third, in response to the pre-sentence report, Mr Sweeney says in his affirmation:

(a) He was resisting his co-offender's application for a sentencing adjournment and was contemplating an EM bail application if there was an adjournment out of concern for his children's welfare. This was put to the Judge in a memorandum before the sentencing.

(b) He has always been willing to do a course that addresses his violent behaviour if it is meaningful, as demonstrated by his meaningful completion of the anger management course and his wish to do a parenting course.

[14] Fourth, Ms Shelley Turner's pre-sentence cultural report on Mr Sweeney's personal circumstances touches on his remorse. Ms Turner outlined that Mr Sweeney maintained his innocence but accepts he was found guilty and expressed remorse from the loss of life that resulted from the offending. Mr Sweeney said to Ms Turner:

> My heart goes out to them, the family, his parents, his partner, his kids, his whole whānau. Just to lose somebody is a huge blow for anyone. My heart goes out to his whānau first and foremost.
>
> …
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> If I could turn back time, I would. If I could apologise for my whānau, I would happily do so. … This was an accident. I didn't wake up one day thinking I wanted to do this to anybody.
>
> …
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> If I do get a chance to rectify whatever, or ever get a chance to meet them, … I will. Whether it's a year from now or ten years from now, that's all tikanga.

High Court decision on remorse

[15] The Judge said:[17]

> [21] I am not persuaded you are genuinely remorseful. You were right next to Frank Sweeney when he struck Mr Bell. You knew Mr Bell had fallen to the ground. Yet you fled the scene with Frank Sweeney. You defended the charges. Much of your evidence was, as I have said, exaggeration or outright fabrication. Your portrayal of the victims at trial was inconsistent with remorse. Your offer to attend a restorative justice conference struck me as made for forensic advantage. I, therefore, make no deduction under this head.

Submissions

[16] Mr Chisnall submits, as an ancillary ground of appeal, that the Judge erred by not accepting that Mr Sweeney is genuinely remorseful and a discount of about five per cent is commensurate, because:

(a) Mr Sweeney's acquittal of the manslaughter charge vindicated his decision to go to trial.

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17 *R v Sweeney*, above n 1.

(b) It is difficult to conceive how Mr Sweeney's physical proximity to his cousin at the time the latter assaulted Mr Bell bears on Mr Sweeney's remorse.

(c) The Sweeneys' departure after Mr Bell was knocked to the ground, when they were not aware of the extent of his injuries, does not counteract his stated contrition.

(d) Mr Sweeney's portrayal of the victims as the aggressors does not mean he was not genuinely remorseful for the consequence of his actions, the tragic death of a family man.

(e) The Judge's conclusion, that Mr Sweeney feigned remorse for advantage, clashes with the pre-sentence report and it was wrong to treat Mr Sweeney's offer to attend restorative justice as worthy of condemnation.

[17] Mr Davie submits the Judge was right to decline a discount for remorse. Mr Sweeney continues to maintain his innocence, falsely saying he acted in self-defence. He is sorry about Mr Bell's death, but never suggested he felt bad about what he did. He could have pleaded guilty to the offences of which he was found guilty. Even his letter was equivocal about why he felt remorse.

Should there have been a discount for remorse?

[18] It is well-established that genuine remorse for offending can be reflected in a discount to a sentence.[18] Genuine remorse, identified as a mitigating factor in s 9(2)(f) of the Sentencing Act 2002, increases the prospect of rehabilitation. Assessment of remorse is necessarily evaluative.

[19] Here, Mr Sweeney was convicted of injuring Mr Bell with intent to injure him, by punching him in the head including while he was defenceless on the ground, as well as kicking him in the head, stomping his head, and punching his body.

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[18] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64]; and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [24].

Mr Sweeney was convicted of assault with a weapon on Mr Tumai, hitting him in the back with the hammer. Mr Sweeney apparently still maintains that the wider context that led to the brawl means that he and his cousin were defending themselves. But the jury found that the defence of self-defence was not available to him. If they did consider he was defending himself, they must have considered he used more force than was necessary in the circumstances as he believed them to be. Even the brief account above illustrates why they may have reached that conclusion.

[20] When examined carefully, Mr Sweeney's statements of remorse were primarily oriented to his sympathy for the effect of Mr Bell's death on Mr Bell's whānau. Mr Sweeney is able to empathise with this, given his loss of his partner in 2019. But he was acquitted of manslaughter. Sympathy for Mr Bell's death is not the same as remorse for the offences of which Mr Sweeney was convicted. His expressions of remorse have said nothing about his attacks on Mr Bell or on Mr Tumai. We do not share the Judge's view that fleeing the scene or defending the charges necessarily count against Mr Sweeney's later remorse. And we do not have a view on whether Mr Sweeney's offer to attend restorative justice was genuine. But Mr Sweeney appears to continue to hold to the view that his actions in the offending were justified and has not expressed remorse for the offences of which he was convicted. Given this, we do not consider that the Judge erred in declining to discount Mr Sweeney's sentence for remorse.

Issue 2: The interests of the children and the end sentence

Law regarding the interests of the children

[21] The principles of sentencing set out in s 8 of the Sentencing Act require that a sentencing court:

> …
>
> (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
>
> (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other

> means of dealing with the offender with a partly or wholly rehabilitative purpose;
>
> …

[22] In *Philip v R*, the Supreme Court stated the principles relevant to discounting a sentence to mitigate the effect on a child.[19] The Court stated:[20]

> [50] The Court of Appeal in *Campbell v R* stated that it was "uncontroversial" to say that the impact imprisonment has on the offender's children is a relevant factor in considering the appellant's personal circumstances.[21] The Court also observed that, the "weight to be accorded that factor depends on the circumstances. The relevant circumstances include the type of the offending and the circumstances of the child or children".[22]
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> [51] That approach is consistent with the earlier judgment of the Court of Appeal in *R v Harlen*.[23] It is helpful to briefly refer to *Harlen* as this Court in *R v Jarden*[24] cited the passage from *Harlen* set out below. To put the excerpt in context, the Court in *Harlen* was responding in part to another decision in which the Court of Appeal had indicated the importance of deterring offenders from thinking that a substantial prison sentence will not be imposed where they have young children and of discouraging the idea there might be an advantage in using women to undertake drug activities to avoid an appropriate sentence.[25] In *Harlen* the Court said this:
>
> > It is an error to read this passage as suggesting that New Zealand Courts do not take the welfare of affected children into account in the sentencing process. The family situation of a convicted person, including where applicable the wellbeing of an offender's children, will always be among the personal circumstances to which regard is had by a sentencing Judge. … What however must be recognised is that the family situation of an offender, including the wellbeing of the offender's children, is only one of a number of relevant factors. How much weight it can be accorded in any particular case depends on its circumstances. …
>
> [52] The provision for such discounts reflects both s 8(h) and (i) of the Sentencing Act. Section 8(h) requires the court to take into account circumstances of the offender that would mean an otherwise appropriate sentence "would, in the particular instance, be disproportionately severe". Section 8(i) directs the court to consider various personal circumstances, namely, "the offender's personal, family, whanau, community, and cultural background in imposing a sentence … with a partly or wholly rehabilitative purpose". A sentencing approach which recognises the importance to a child of the familial relationship is also supported by the United Nations Convention

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19 *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571.
20 Footnotes in original.
21 *Campbell v R* [2020] NZCA 356 at [41].
22 At [41] (footnote omitted).
23 *R v Harlen* (2001) 18 CRNZ 582 (CA).
24 *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612 at [13].
25 *R v Harlen*, above n 23, at [22].

> on the Rights of the Child (Children's Convention).[26] The Children's Convention emphasises the importance for children of growing up in a family environment and imposes an obligation on courts to treat the best interests of children as a "primary consideration".[27]

[23] The Court agreed that a discrete discount was available "given Mr Philip was an important presence in his young child's life" and cited the expert evidence about the child's attachment and the pre-sentence report.[28] It held that "there was such a close relationship between Mr Philip's rehabilitation and his relationship with the child as to warrant the [10 per cent] discount allowed" by the High Court.[29] The Court stated:[30]

> We do not find it helpful to characterise such discounts as "rare" or to emphasise, to the exclusion of other factors, whether the defendant is the primary caregiver or the seriousness of the offending. What is required is a consideration of all of the relevant circumstances which must include the child's interests. Those interests include, as our reference to the Children's Convention indicates, the importance for children of growing up in a familial environment.[31] We accept that there may be other factors in this consideration take primacy including, by way of example, issues of inter-familial violence;[32] an absence of remorse and/or lack of any rehabilitative steps,[33] but those factors are not relevant here.

Mr Sweeney's circumstances

[24] Mr Sweeney's partner died in a car accident in February 2019, in which his then-infant son was also injured. Mr Sweeney assumed full-time responsibility for his son, now aged four, and daughter, now aged six. Relevant information about this is contained in several sources:

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26 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990). See Francesca Maslin and Shona Minson "What about the children? Sentencing defendants who are parents of dependent children" [2022] NZLJ 367.

27 Preamble and art 3. The Court in *Harlen*, above n 23, did not consider art 3 was relevant to the interpretation of ss 6 and 7 of the then in force Criminal Justice Act 1985: at [28]. There is sufficient support in the Sentencing Act for our view regarding discounts for children but we see the Convention as affirming this.

28 *Philip v R*, above n 19, at [53].

29 At [54].

30 At [56].

31 See the discussion in *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [116] on the correlation between offending in later life and environmental factors affecting children such as the lack of prosocial familial support and connection, and having a caregiver who is, or has been, in prison.

32 As in *Mau v R* [2021] NZCA 106.

33 As in *Fukofuka* [2019] NZCA 290.

(a) Corrections' pre-sentence report notes Mr Sweeney's concern that the routine he created for his children was no longer there. Mr Sweeney was living with his children at his late partner's parents' address while he was on EM bail. The children are still there. He acknowledges his proposed address for home detention would be challenging for his children in adjusting to a small-town country lifestyle in Matatā. But he wants to dedicate his change over the next 10 years to his children. The report writer says that Mr Sweeney needs to understand that the restrictions of EM bail differ from those of home detention, where after hours requests are for emergencies only.

(b) Ms Shelley Turner's report about Mr Sweeney's personal circumstances quotes him saying, after losing his partner:

> I've still got my kids. My kids got a lot of trauma from it. I had to stop everything and just do my kids and prioritise the kids. And I did that. I've done that ever since she died.
>
> …
>
> I went out looking for grief counselling for my children, especially my son. To this day I've been out looking for grief counselling for him, too. Right from the get-go, I could see the fear in my son's eyes of losing his mum or losing me. … Those sorts of traumas, even me being in [prison], if I don't get it together when I get out, it will bite my kids in the arse later on in life. That's where I've gotta be a better man.

Ms Turner also notes that Mr Sweeney's whānau report that his children "really fret" when he's not there.

(c) Mr Sweeney's letter to the Judge, which starts:

> My name is Benjamin Sweeney, and I am a 32-year-old solo, stay at home father, raising my 6-year-old boy and 4-year-old girl full-time after losing my partner and the mother to my kids in a tragic accident 4 years ago.

(d) A letter from Judy Wood of "Seasons for Growth" attesting to Mr Sweeney contacting them about grief counselling for his son. However, that did not prove possible. She says saying that a Dad's constancy, calmness, and clear communication are especially important

> for children, who are often pretty anxious about the loss of another parent, having lost one already.

Submissions

[25] Mr Chisnall submits that the primary ground of appeal is that the Judge erred by declining to provide credit to recognise Mr Sweeney is a solo parent and the primary caregiver to his two young children. Ms Turner's report cogently outlined the reasons why the Court should be satisfied that Mr Sweeney's rehabilitative prospects are genuine, as a man with a proven employment track record who has dedicated himself to his children following his partner's death. He relies on *Philip* in submitting that s 8(h) of the Sentencing Act does not require hardship to be suffered by the offender directly so a sentence may be disproportionately severe if it affects the welfare of others. He submits, as in *Philip*, Mr Sweeney's rehabilitative prospects are inextricably linked to his childcare responsibilities. He submits a 10 per cent discount, matching that in *Philip*, is commensurate.

[26] Mr Davie submits the Judge did not err. The court should consider children when sentencing, on the basis that the sentence may harm the children or that keeping the offender with their children may promote the offender's rehabilitation. But a discount is not required in every case. These children are being well-cared for by their maternal grandparents. Unlike the case of *Philip*, there is no expert evidence as to the degree of attachment between Mr Sweeney and his children or the harm caused them by his absence. Mr Sweeney chose to run the risk he might be imprisoned even though previous sentences have kept him away from his children. The absence of remorse also counts against a discount.

Should there be a discount for the interests of the children?

[27] The law as stated in *Philip* is that the court must take the welfare of the children into account as part of the personal circumstances which are relevant to sentencing Mr Sweeney. That is required by s 8(h) and (i) of the Sentencing Act and is consistent with the United Nations Convention on the Rights of the Child. It is only one of a number of relevant factors. But, like Mr Philip, Mr Sweeney is clearly an important presence in his young children's lives. It is in their best interests to grow up in a

familial environment. And the material before the Court indicates there is a close relationship between Mr Sweeney's rehabilitation and his relationship with his children. He assumed full-time responsibility for his young children in 2019 and has focussed on parenting. Given the material before the Court, we do not require expert reports to come to the conclusion that the interests of the children, and their effect on the rehabilitative prospects of Mr Sweeney, indicate a discount is justified. We consider that the law as stated in *Philip*, applied to Mr Sweeney's circumstances, means that there should have been a discount to his sentence of imprisonment. We would have allowed a discount of 10 per cent.

Should a different sentence be imposed?

[28] Not making a discount when it should have been made is an error. But it does not necessarily mean the end sentence was out of the range available to the sentencing judge and another sentence should be imposed.

[29] The starting point for the offences of assault with intent to injure and assault with a weapon can be confirmed by reference to *Nuku v R*.[34] We agree with the Judge that attacking the head, use of a weapon, and the victim being vulnerable on the ground were aggravating factors. This was not the kind of case where excessive self-defence was a mitigating factor. As noted earlier, the Sweeney's were the initial aggressors on the road and both groups were looking for a fight when they reached the service station. We agree that, with three aggravating features, the offending lies in band three of *Nuku*, where the starting point is from two years up to the statutory maximum. The starting point he adopted, of two years and nine months' imprisonment, was available. As the Judge said, the violent offending was serious, if not quite extreme.

[30] Responsibly, Mr Chisnall does not contend that the Judge's starting point is outside the available range. But he does argue against a sterner starting point being feasible. Having regard to comparable cases decided by this Court, we agree. The cases of *M (CA78/2022) v R* and *C (CA155/2014) v R* involved more offences and

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[34] *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39. See the application of *Nuku* to charges of injuring with intent to injure and assault with a weapon in *M (CA78/2022) v R* [2023] NZCA 151 at [17].

more aggravating factors and adopted starting points of three years and two years and eight months' imprisonment respectively.[35]

[31] In relation to other discounts, Mr Chisnall submits:

(a) The reduction of 14 per cent for personal factors, rather than the 15 per cent submitted by counsel, was inexplicable. We consider it is explicable by the fact that the discount given was five months the Judge explained was approximately 14 per cent.

(b) Mr Sweeney was given a five-month reduction for the 434 days on EM bail without breach, rather than the seven months counsel sought. That was on the basis of remaining proportionate to the seriousness of the offending and because Mr Sweeney did not follow the required procedures of EM bail and was difficult.[36] We do not share the Judge's concerns about Mr Sweeney being "difficult" on EM bail. There were no breaches of bail conditions recorded even if he annoyed the EM bail team with his requests, which he says were related to meeting the needs of his children. But we do not consider five months was an inappropriate discount given the exemptions for Mr Sweeney's curfew while on EM bail.

[32] Overall, we agree the starting point was appropriate and should not have been higher. We agree with the discounts given. We consider it was an error not to give a discount in relation to Mr Sweeney's children, of around 10 per cent. We would have given a discount of three months' imprisonment. That sort of discount, on a sentence of two years and two months' imprisonment, is not mere tinkering, particularly when it brings the end sentence with the range where home detention is potentially available.[37] Accordingly, we consider a sentence of one year and 11 months' imprisonment should be imposed.

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35 *M (CA78/2022) v R*, above n 34; and *C (CA155/2014) v R* [2015] NZCA 33.
36 *R v Sweeney*, above n 1, at [25].
37 *R v Gledhill* [2009] NZCA 415 at [32].

Issue 3: Home detention

Law of home detention

[33] Whether a short-term sentence of imprisonment is to be commuted to home detention involves the exercise of a discretion in a way that gives effect to the purposes and principles of sentencing as set out in ss 7 and 8 of the Sentencing Act.[38] Section 7 includes deterrence, denunciation, accountability, promoting a sense of responsibility, providing for the interests of the victims, protection of the community and the offender's rehabilitation. In addition to the provisions quoted above at [21], s 8(g) requires a sentencing court to impose "the least restrictive outcome that is appropriate in the circumstances". Section 16 provides, relevantly:

> **16 Sentence of imprisonment**
>
> (1) When considering the imposition of a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.
>
> (2) The court must not impose a sentence of imprisonment unless it is satisfied that,—
>
> (a) a sentence is being imposed for all or any of the purposes in section 7(1)(a) to (c), (e), (f), or (g); and
>
> (b) those purposes cannot be achieved by a sentence other than imprisonment; and
>
> (c) no other sentence would be consistent with the application of the principles in section 8 to the particular case.
>
> …

[34] This Court's judgment in *Zhang v R* endorsed passages from a judgment of the Court of Appeal of England and Wales in *R v Petherick*, in which we include a further paragraph:[39]

> … a criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected it will take it into consideration. It will ask whether the sentence

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38 *Manikpersadh v R* [2011] NZCA 452 at [14]–[16]; and *Osman v R* [2010] NZCA 199 at [20], citing William Young P's dissent, with approval, in *R v Vhavha* [2009] NZCA 588 at [29]. *Manikpersadh* also approved the President's reasons at [14].

39 *R v Petherick* [2012] EWCA Crim 2214 at [20]–[24] cited with approval in *Zhang v R* [2022] NZCA 267 at [67] (footnotes omitted and emphasis added).

> contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve. ...
>
> … [I]n a criminal sentencing exercise the legitimate aims of sentencing which have to be balanced against the effect of a sentence often inevitably has on the family life of others, include the need of society to punish serious crime, the interest of victims that punishment should constitute just desserts, the needs of society for appropriate deterrence … and the requirement that there ought not to be unjustified disparity between different defendants convicted of similar crimes. … It also needs to be remembered that just as a sentence may affect the family life of the defendant and of his/her innocent family, so the crime will very often have involved the infringement of other people's family life. … This present case is also one in which … rights are affected not only in the defendant and her child but in the deceased and his family.
>
> … [I]t will be especially where the *case stands on the cusp of custody* that the balance is likely to be a fine one. In that kind of case the interference with the family life of one or more entirely innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate.
>
> … [T]he likelihood, however, of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver … .
>
> … [I]n a case where custody cannot proportionately be avoided, the effect on children or other family members *might* [emphasis in original] afford grounds for mitigating the length of sentence, but it may not do so. If it does, it is quite clear that there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges.

[35] But the Court in *Zhang* identified a number of difficulties with giving further recognition to the impact of Ms Zhang's imprisonment on her children. They included that:

(a) the Court received no evidence that the baby was being adversely affected by the present circumstances;[40]

(b) her case did not stand on the cusp of custody because even with a further five per cent discount, home detention would not be even particularly close to being an option;[41] and

(c) overall, the discounts for personal factors were generous.[42]

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40 *Zhang v R*, above n 37, at [70].
41 At [71].
42 At [73].

High Court on home detention

[36] Here, in relation to home detention, the Judge stated, briefly:

> [45] I return to you Benjamin Sweeney. Your end point is two years and two months' imprisonment. Even if home detention were available, I would not have imposed it. Your pre-sentence report speaks firmly against home detention; it says you have been unwilling to undergo any form of rehabilitation and your propensity for violence remains a concern.
>
> [46] On your behalf, Mr Chisnall KC says I should not accept what the pre-sentence report says. I see no reason not to take it on its face. It presents as careful and considered.

Submissions

[37] Mr Chisnall submits that the end sentence that ought to have been reached justifies this Court substituting a sentence of home detention. Mr Sweeney was on EM bail for 434 days without breach. He dealt with Corrections proactively to secure temporary variations to benefit his children. That enhances rather than reduces his suitability for an EM sentence. Section 16 of the Sentencing Act clearly mandates a less restrictive outcome than imprisonment in this case. The Judge failed to squarely engage with the reasoning in *Philip* and *Zhang*. The case is on the cusp of a non-custodial sentence and Mr Sweeney's childcare responsibilities should tip the scales in his favour. Imprisonment is disproportionately severe. Home detention would also elevate Mr Sweeney's own redemptive prospects. The time on home detention would need to take account of Mr Sweeney's time on remand before and after the trial on a one for one basis. The proposed home detention address remains available.

[38] Mr Davie submits the Judge was right to say that home detention is not an appropriate sentence. Risk of non-compliance tells against home detention which can be difficult to serve. He would be living in a reasonably remote location as the sole caregiver of two young children. He is not well equipped for the challenges of solo parenting, having difficulties resolving inter-personal problems, exhibiting demanding behaviour and with an anger management problem. His recent anger management course was the second he has completed. The first did not prevent the offending here. The constraints on freedom in home detention are much more than on EM bail. He would not be able to go to the gym and do outdoor exercise to keep his anger under

control. He has a propensity for violence, including in a domestic context against his partner.

Home detention

[39] The interests of Mr Sweeney's children are clearly relevant to the question of whether a sentence of imprisonment or home detention should be imposed. As the Court said in *Petherick*, that is especially so where the case stands on the cusp of custody, as it does here. As it also said, the likelihood of interference with family life inherent in imprisonment being disproportionate is also inevitably progressively reduced the graver the offence. In the context of this case, that is reflected in the purposes of sentencing to hold the offender accountable for the harm done to the victim and community, to denounce his conduct, and to deter future such conduct.

[40] We consider the balance of these considerations is, by a fine but appreciable margin, tilted in favour of imprisonment. Mr Sweeney's offending entailed serious violence between two groups of men who did not know each other at a gas station. Mr Sweeney punched Mr Bell's head, kicked his head, stomped his head, and hit Mr Tumai in the back with a hammer. This behaviour warrants the accountability, denunciation, deterrence, and protection of the community that is afforded by imprisonment. Given the nature of the offending, it is only the interests of Mr Sweeney's children that make home detention a question.

[41] We do not need expert evidence to recognise the value of parental guidance for children. And, as we have said, we have no doubt the interests of the children would be enhanced by Mr Sweeney's presence. But there is no evidence the children are being adversely affected by their present circumstances of being cared for by their grandparents in the same home they were in when Mr Sweeney was with them on EM bail. We are satisfied that the interests of the children in this case do not tip the balance far enough to make home detention the least restrictive sentence that is appropriate in the circumstances of this serious violent offending.

Result

[42] Leave is granted to adduce further evidence.

[43] The appeal is allowed. The sentence of two years and two months' imprisonment is quashed and substituted with a sentence of one year and 11 months' imprisonment.

Solicitors:
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