IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA229/2022
[2023] NZCA 444

BETWEEN	WILLIAM TAWHAI Appellant
AND	THE KING Respondent

Hearing: 18 July 2023

Court: Gilbert, Lang and Woolford JJ

Counsel: A C Cresswell for Appellant
M J Lillico for Respondent

Judgment: 14 September 2023 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of preventive detention with a minimum period of imprisonment of five years is set aside. A sentence of three years' imprisonment with a minimum period of imprisonment of two years is substituted.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Mr Tawhai, now aged 56, pleaded guilty to two charges of assault on a person in a family relationship (his former partner) and one charge of wounding with intent to injure her. Peters J considered that the appropriate finite sentence for this offending would be three years' imprisonment with a two-year minimum period of imprisonment

(MPI).[1] However, the Judge concluded that in order to protect the community from Mr Tawhai a sentence of preventive detention should be imposed with an MPI of five years.[2]

[2] Mr Tawhai now appeals against his sentence.

The facts

[3] The Judge summarised the facts of the offending as follows:

> [6] … At about 7 pm on 8 November 2020, [Mr Tawhai] and [the complainant] were in her car. [Mr Tawhai and the complainant] had been in a relationship for about a year, but apparently had recently separated. [Mr Tawhai was] driving, and [he] asked [the complainant] to go for a walk to talk about [their] relationship and why it had cooled. [The complainant] did not wish to and asked to be driven home.
>
> [7] Unhappy with this response, [Mr Tawhai] drove off at speed. [The complainant] asked to get out but [Mr Tawhai] began punching her arms and shoulders whilst [he was] driving. [Mr Tawhai] also began abusing [the complainant] verbally. When she tried to get out of the car, [Mr Tawhai] grabbed her clothing, around the neck, to stop her.
>
> [8] [Mr Tawhai] then drove on and parked and dragged [the complainant] out of the car. When she managed to get back into the car, [Mr Tawhai] leaned in and punched her repeatedly in the face with a clenched fist, at least six or seven times. [Mr Tawhai] did this with such force that one of her teeth fell out. When she again tried to get out of the car, [Mr Tawhai] grabbed her by her hair and pulled her out. Eventually [Mr Tawhai] stopped [his] attack and drove [the complainant] home.
>
> [9] The result of all of this physical violence was that [the complainant] lost a tooth and, in her victim impact statement, she says that several of her top teeth were pushed up into her gums and she is having ongoing dental treatment. She was terrified, her right eye socket and left finger were fractured, she suffered bruising to her head and torso, and she had a swollen and black right eye.

Criminal history

[4] Mr Tawhai has a number of convictions for violent offending against women with whom he has been in an intimate relationship. He was first imprisoned as an adult at the age of 22, receiving three months for common assault. Successive terms

---

1 *R v Tawhai* [2022] NZHC 998 [Sentencing judgment] at [38]–[39].
2 At [84].

of imprisonment for violent offending have been imposed over the years. His age at the date of sentencing is shown below:

(a) Age 29 — two years for male assaults female (x 3).

(b) Age 30 — two years for assault with intent to injure (x 2).

(c) Age 37 — five years for multiple offences committed over the period from February 2002 to December 2004, including common assault, male assaults female (x 2), contravening a protection order (x 3), assault with a blunt instrument, threatening to kill/cause grievous bodily harm (x 2), aggravated assault, assaulting police and wounding with intent to cause grievous bodily harm.

(d) Age 41 — 10 years for rape.

(e) Age 51 — 13 and a half months for assault on a person in a family relationship and contravening a protection order.

Sentencing judgment

[5] The Judge considered there were four aggravating features of the offending:[3]

(a) It involved a prolonged and unprovoked attack.

(b) The serious injuries inflicted, including to the complainant's head.

(c) The complainant's comparative vulnerability because she was no physical match for Mr Tawhai.

(d) The serious adverse impact on the complainant, both physically and mentally.

---

3 At [24].

[6] Taking these factors into account, the Judge considered that an appropriate starting point for a finite sentence would be between three years and nine months' and four years' imprisonment.[4] The Judge would have applied an uplift of nine months for prior offending.[5] From that starting point, the Judge would have allowed a 15 per cent discount for personal mitigating factors outlined in a detailed cultural report.[6] The Judge would have allowed a further discount of 20 per cent for the guilty pleas.[7] Applying these discounts, the Judge stated that the indicative finite sentence would have been three years' imprisonment and she would have imposed a two-year MPI.[8]

[7] The Judge then turned to consider whether a sentence of preventive detention was required. She acknowledged this was "an extremely difficult decision".[9]

[8] The Judge received reports from Dr Sharma, a clinical psychologist, and Dr Jacques, a forensic psychiatrist. Taking account of these reports and Mr Tawhai's criminal history of violence, the Judge was satisfied he would be likely to commit another qualifying violent offence if he was released at the expiry date of the finite sentence that would otherwise be imposed.[10] She found that Mr Tawhai's criminal history disclosed a clear pattern of serious offending, particularly violence against women with whom he is in a relationship.[11]

[9] The Judge noted the efforts Mr Tawhai had made to address the causes of his offending — a six-month violence treatment group course in April 1999, a medium intensity rehabilitation programme in 2007, a three-month drug and alcohol course in 2016, a Man Up programme at the time he was remanded in custody for the index offending, and he was receiving individual counselling sessions provided through Accident Compensation Corporation at the time of sentencing.[12]

---

4 At [24].
5 At [25].
6 At [34].
7 At [37].
8 At [38] and [39].
9 At [43].
10 At [51].
11 At [64].
12 At [69]–[73].

[10] However, the Judge also noted that Mr Tawhai had failed to take up other rehabilitative opportunities that had been offered to him. In particular, the sentencing remarks of Judge Crosbie in 2008 recorded that Mr Tawhai had refused to undertake a violence prevention programme at Rimutaka Prison and an intensive rehabilitation programme at Moana House in Dunedin.[13]

[11] The Judge observed that the only course Mr Tawhai participated in after he was imprisoned for rape in 2008 until he was released in 2018 was the drug and alcohol course in 2016. The Judge considered it revealing that this three-month course was all Mr Tawhai did to address the causes of his offending in that 10-year period.[14]

[12] This was pivotal to the Judge's decision to impose a sentence of preventive detention rather than a finite sentence. Although the Judge accepted that Mr Tawhai wishes to change and should be given assistance to do so, she said that preventive detention would not preclude this. On the contrary, preventive detention would be more likely to incentivise Mr Tawhai to confront and change his behaviour than a finite sentence. The Judge was concerned that if she imposed a finite sentence, Mr Tawhai would simply wait it out as he had done before, and nothing would change.[15] The Judge acknowledged the principle in s 87(4)(e) of the Sentencing Act 2002 that a lengthy, determinate sentence is preferable if this provides adequate protection for society.[16] However, the offending was not sufficiently serious to attract a lengthy determinate sentence and so that was not an option.[17]

[13] The Judge concluded that Mr Tawhai will continue to pose a significant and ongoing risk to the safety of the community until he changes his "response to events or people who displease [him]". She did not consider change would be likely to occur with a finite sentence, even allowing for the possibility of an Extended Supervision Order (ESO).[18]

---

13 At [75].
14 At [76].
15 At [78].
16 At [79].
17 At [80].
18 At [82].

Submissions

[14] Ms Cresswell, for Mr Tawhai, submits that the Judge erred in concluding that Mr Tawhai would simply wait out any finite sentence and nothing would change. This does not align with the Judge's acceptance of the views expressed by the experts and the s 27 report writer that Mr Tawhai is motivated to change. Ms Cresswell argues that there was very little information before the Court as to why Mr Tawhai had declined to participate in other programmes and the Judge should not have placed so much weight on this factor based on comments made by Judge Crosbie in his sentencing remarks 15 years ago. She submits that those comments are not reflective of Mr Tawhai's motivation to change at the time of sentencing for the index offending.

[15] Ms Cresswell says that Mr Tawhai's case can be distinguished from those where the offenders exhibit a total lack of remorse or insight, or who have gone onto offend despite having received appropriate treatment, or who simply refuse to attend treatment programmes. She notes that Dr Jacques considered Mr Tawhai was likely to engage in offence related therapy and treatment for his own trauma and abuse.

[16] Ms Cresswell emphasises that Mr Tawhai has had no prior warning about the imposition of preventive detention if he were to reoffend. This has been an important factor in other cases such as *R v Parahi* and *R v Nicholls*.[19]

[17] Further, Ms Cresswell argues that the Judge gave insufficient consideration to the prospect that an ESO could provide adequate protection for the community. She referred to other cases where the prospect of an ESO being imposed on suitable terms was an influential, if not decisive, factor in declining to impose preventive detention.[20]

[18] Mr Lillico, for the Crown, emphasised that it is not for this Court to re-make the sentencing decision; in the absence of error, the Court cannot interfere. He emphasised the pattern of intimate partner violence, which he described as entrenched. Each time he was released after serving a finite sentence, Mr Tawhai very

---

19 *R v Parahi* [2005] 3 NZLR 356 (CA) at [77]; and *R v Nicholls* [2020] NZHC 824 at [46].

20 Referring to *R v Underson* [2022] NZHC 141 at [112]–[113] and *R v Parker* [2021] NZHC 439 at [50].

shortly offended again. Mr Lillico notes that the rape occurred on 13 October 2007, when Mr Tawhai was on day release while serving a lengthy sentence of imprisonment imposed in December 2004. Mr Tawhai served the entirety of his 10-year sentence for the rape offending. He was released on 28 May 2018 and was subject to post-release conditions until 27 November 2018. He offended again in February 2019 by assaulting his new partner. He was sentenced to 13 and a half months' imprisonment for this offending and was released in September 2019. He then formed a relationship with the complainant and committed the index offending a little over a year later, in November 2020.

[19] Mr Lillico says that the treatment Mr Tawhai has received has either been ineffectual or he has refused it. He drew particular attention to the following passage in the report from Dr Jacques:

> Having reviewed the work [Mr Tawhai] has completed through the Department of Corrections it is notable that his attitudes towards interventions have been negative at times and he has chosen to prioritise other activity over offence related work. He seemed more amenable to working on his anger and relationship programmes, but these were through controversial programmes such as Man Up. According to the available information and [Mr Tawhai's] self-report, he has not completed any work on his own trauma and difficulties. These are important areas of intervention and of relevance in his own offending against women. He demonstrated long standing victim blaming, and no victim empathy, and he linked this to being abused and exploited by women in the past. He lacks trust in women.

[20] Mr Lillico submits that an ESO will only make a difference in borderline cases. He contends that the relationship counselling Mr Tawhai is receiving will not address the problems he has and an ESO would not be effective to keep possible future partners safe.

Assessment

[21] A sentence of preventive detention, where an offender is imprisoned indefinitely, sits at the top of the sentencing hierarchy. The greatest care should be exercised in determining whether to impose such a sentence. In particular, the sentencing judge must be satisfied by cogent evidence that a compelling case has been made that no less restrictive means are available to adequately protect the public from the risk posed by the offender, other than by indefinite deprivation of their liberty.

[22] Section 87(4) of the Sentencing Act requires the court, when considering whether to impose a sentence of preventive detention, to take into account the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society. This provision, taken together with the requirement in s 89 that an MPI of at least five years must be imposed, suggests that Parliament did not intend that sentences of preventive detention would generally be an appropriate response to offending that is not sufficiently serious to justify a lengthy determinate sentence of imprisonment, and even less so when the entire term of the finite sentence would be significantly less than the minimum five-year MPI requirement.

[23] We have some reservations about the appropriateness of attempting to justify imposing preventive detention, certainly not without cogent evidence, on the assumed basis that it will act as an incentive for the offender to undertake or submit to treatment. There is no mention of this as a relevant consideration in the Sentencing Act.

[24] Mr Tawhai is of Ngāti Maniapoto and Ngāpuhi descent. A consistent theme that emerges from all of the reports is that Mr Tawhai had a seriously disadvantaged background. Extreme violence and serious alcohol abuse were normalised throughout his formative years. He suffered regular and significant physical abuse at the hands of his father from an early age. At times he was unable to attend school because of his injuries. He also witnessed his father giving his mother regular beatings. From the age of about seven he was sexually abused by more than one perpetrator.

[25] Mr Tawhai first ran away from home at the age of eight. He was placed in a boys home at the age of 10 or 11 where he says he suffered further physical and sexual abuse. Mr Tawhai ran away from home for the last time and left school at the age of 13. He then lived on the streets with a group of other children and adults and started drinking alcohol and using cannabis. He was only 14 when he received his first conviction, which was for burglary. His criminal pathway was sadly predictable.

[26] The expert reports confirm that Mr Tawhai's history of violent offending and his difficulty maintaining normal, healthy intimate relationships were causally contributed to by the significant abuse he suffered and witnessed during his upbringing and the resultant trauma which remains largely unresolved.

[27] However, there is some cause for optimism. From all accounts, Mr Tawhai now has some insight into his offending, and he has expressed remorse for his actions. Dr Sharma states that Mr Tawhai recognises his need for professional help to cope with his traumatic experiences and wishes to engage in treatment. She considers he has the intellectual capacity to respond to appropriate treatment. Dr Jacques was of a similar view, expressing the opinion that Mr Tawhai is likely to engage in appropriate offence-related therapy and treatment to address his own trauma and abuse.

[28] The Judge said she had no doubt that if a finite sentence was imposed, Mr Tawhai would simply wait it out, not engage in any rehabilitative treatment, and nothing would change.[21] We are not quite so pessimistic. The Judge's concern needs to be considered in the light of the expert views of both Dr Sharma and Dr Jacques that Mr Tawhai is willing to engage in appropriate treatment and is likely to do so. Further, Mr Tawhai has in fact taken a number of positive rehabilitative steps while incarcerated. He has gained qualifications in painting and cooking and has expressed interest in eventually starting his own business. He has also participated in cultural programmes and become proficient in te reo. This has apparently given him a sense of purpose as a grandfather and father (he has four children). Dr Sharma explained that this gives Mr Tawhai hope and increased motivation to make positive changes:

> On the positive side, Mr Tawhai has the intellectual capacity to respond to treatment. During the course of his incarceration he has participated in cultural programs and has become fluent in Te Reo. This has allowed him to feel that he has purpose as a grandfather and father and [he] would like to impart his knowledge about his Tikanga to the younger generation. At this point his children and grandchildren are the key emotional anchors which motivate him to want to change. It is possible that him being supported to maintain regular contact with his children and grandchildren might increase his hope and motivation to make positive changes in his life.

[29] It appears Mr Tawhai may now be able to look forward to the prospect of reconnecting with his whānau and receiving some support, particularly from his eldest son and daughter. Both expressed willingness to reconnect with their father and assist with his rehabilitation. Mr Tawhai has apparently also been offered accommodation and support from a friend, a 79-year-old kaumātua, who wishes to help him.

---

21 Sentencing judgment, above n 1, at [78].

[30] Another relevant factor is Dr Jacques' opinion that the particular risk Mr Tawhai poses is likely to reduce as he ages. As noted, he is now aged 56.

[31] The Judge mentioned the possibility of an ESO, but she was satisfied that this would not mitigate the risk Mr Tawhai poses to the safety of the community. However, the Judge received little assistance on this issue and did not explain why an ESO would not be effective to mitigate the risk, irrespective of the terms that could be imposed:

> [81] I could impose a finite sentence, in which case the Department of Corrections might well seek an [ESO] on your release.
>
> [82] However, having taken into account all of the relevant matters, I do not propose to do so. I am satisfied that you will continue to pose a significant and ongoing risk to the safety of the community until you change your response to events or people who displease you. I do not consider this likely to occur with a finite sentence, even with the possibility of an [ESO].

[32] Dr Sharma did not address the question of whether an appropriately structured ESO could adequately mitigate the risk Mr Tawhai poses to the community. She simply stated that "the community would be best protected if Mr Tawhai serves an indeterminate sentence, whereby he would have the benefit of ongoing supervision for the rest of his life". That may be so, but the imposition of an indeterminate sentence of preventive detention cannot be justified merely on the basis it would provide the "best" protection for the community.

[33] Dr Jacques briefly addressed whether an ESO could mitigate the relevant risk and appears to have considered that this would be a viable and effective option. He stated that an ESO "alongside careful multiagency release planning may offer protection of potential victims upon release".

[34] We intend no criticism of Dr Sharma or Dr Jacques in making the observation that it is unfortunate that the Judge was not given greater assistance as to whether the less restrictive option of a finite sentence coupled with the likelihood of an ESO on suitable terms would not sufficiently mitigate Mr Tawhai's risk. In *Chisnall v Attorney-General*, the evidence of Ms Rachel Leota, the National Commissioner of the Department of Corrections, was recorded as being that rates of reoffending of a serious nature for those subject to an ESO were "generally low", as is borne out by the

statistics collected by the Department over a number of years and set out in the judgment.[22] Given the potential scope and nature of the conditions that can be imposed with an ESO, it is not clear to us why this less restrictive measure could not adequately mitigate the risk Mr Tawhai poses, assuming this risk remains sufficiently elevated to justify an ESO at the time of his release after serving a finite sentence.

[35] We have come to the conclusion that there is an error in the sentence and a different sentence should be imposed.[23]

[36] In summary, the Judge imposed preventive detention for three reasons. First, she was concerned Mr Tawhai would not otherwise engage in rehabilitative treatment and it was necessary to impose preventive detention to incentivise him to do so. Secondly, the index offending was not sufficiently serious to justify the imposition of a lengthy determinate sentence. Thirdly, an ESO would not sufficiently mitigate the risk, irrespective of the conditions that might be imposed.

[37] For the reasons already given, we have come to a different view on whether a sentence of preventive detention is required to incentivise Mr Tawhai to engage in the treatment he needs. We agree with the Judge that a lengthy determinate sentence is not available because the offending is not sufficiently serious, even with the significant uplift applied for prior offending. However, this tells against the imposition of a sentence of indefinite duration. The selection of an indeterminate sentence and an MPI of five years in preference to a finite sentence of three years and an MPI of two years raises a concern that the sentence may be viewed as being disproportionately severe. As to the third reason, the limited evidence available suggests that appropriately tailored conditions of an ESO ought to be effective in mitigating the risk Mr Tawhai poses to the safety of the community. There is in fact no evidence to show that this less restrictive outcome must be rejected in favour of an indeterminate sentence.

---

22 *Chisnall v Attorney-General* [2021] NZCA 616, [2021] 2 NZLR 484 at [47].

23 Criminal Procedure Act 2011, s 250.

Result

[38] The appeal is allowed.

[39] The sentence of preventive detention with an MPI of five years is set aside. A sentence of three years' imprisonment with an MPI of two years is substituted.

Solicitors:
Crown Solicitor, Whangārei for Respondent