IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA262/2018
[2019] NZCA 104

BETWEEN	THE QUEEN Appellant
AND	DYLAN COSSEY Respondent

Hearing: 12 March 2019

Court: Cooper, Clifford and Williams JJ

Counsel: C A Brook for Appellant
P J Morgan QC and M L Jepson for Respondent

Judgment: 10 April 2019 at 3 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] A tragic motor accident near Hamilton airport on the evening of 24 June 2016 resulted in the death of four people, and critical injuries to a fifth. Following that accident, the respondent, Dylan Cossey, faced four charges of manslaughter, one charge of racing causing injury and one charge of failing to stop and ascertain injury after an accident.

[2] The charges Mr Cossey faced were based on the central proposition that immediately prior to the accident — which did not involve the car Mr Cossey was driving — he had for some time been racing with another vehicle. It was that other vehicle which, having just overtaken Mr Cossey's vehicle, collided with an oncoming van. It was the four occupants of that vehicle — including its driver — who were killed, and the driver of that van who was critically injured. At the time of the accident Mr Cossey was 18 years old. He turned 19 the following September. In breach of his restricted licence, he was driving unsupervised with passengers.

[3] Mr Cossey pleaded not guilty to all of the charges he faced. Following a jury trial, he was found guilty on all counts. Mr Cossey was later sentenced by the trial Judge, Hinton J, to 12 months' home detention, 400 hours community work and was disqualified from holding a driver's licence for seven years.[1]

[4] One of Mr Cossey's passengers, Mr Jones, was jointly charged with Mr Cossey on the six charges Mr Cossey was found guilty on, and on a seventh of attempting to pervert the course of justice. The Crown's case was that, as reflected particularly by his action in video recording some 38 seconds of the "race", he had encouraged Mr Cossey's offending. The additional charge he faced of attempting to pervert the course of justice was based on the fact that, after the accident, Mr Jones edited the original video down to one of 13 seconds in length. The jury found Mr Jones not guilty on the manslaughter and causing injury charges but guilty on the charge of failing to stop and also guilty on the charge of attempting to pervert the course of justice. Mr Jones was subsequently sentenced by Hinton J to eight months' home detention and disqualified from holding a driver's licence for one year.[2] There is no challenge to that sentence. Accordingly, it is only necessary for us to refer to Mr Jones' involvement as that relates to the Solicitor-General's appeal.

[5] The Solicitor-General now appeals. She does so on the basis that Mr Cossey's sentence was manifestly inadequate and wrong in principle. She says that Mr Cossey should have been sentenced to at least five years' imprisonment. Given, however, Mr Cossey has now served almost all of his sentence of home detention and the

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1 *R v Cossey* [2018] NZHC 887.
2 *R v Jones* [2018] NZHC 984.

principles that apply to Solicitor-General appeals generally, the Solicitor-General says the sentence that this Court should now impose on appeal is one of three and a half years' imprisonment.

Mr Cossey's offending — the facts

[6] Given the basis of the Solicitor-General's appeal, it is necessary for us to set out the facts of Mr Cossey's offending in some detail.

[7] On the evening of 24 June 2016 Mr Cossey was driving his Honda Integra on Ohaupo Road in the Waikato. Ohaupo Road joins Te Awamutu and Hamilton. It is a two-lane state highway, with — as relevant here — a number of passing lanes in the Te Awamutu–Hamilton direction. It has a permanently posted speed limit of 100 kph, apart from the township of Ohaupo, which has a lower speed limit.

[8] There were two passengers in Mr Cossey's car: Stephen Jones, in the front seat and another associate, Patrick Hickey, whom Mr Cossey and Mr Jones had picked up in Kihikihi, in the back seat.

[9] Around about the same time a Nissan Skyline vehicle, driven by Lance Robinson, was travelling from Te Awamutu to Hamilton along Ohaupo Road. There were three passengers in Mr Robinson's Nissan Skyline: Paul De Silva, Jason Ross and Hannah Strickett-Craze.

[10] The two vehicles, and their occupants, encountered one another on Ohaupo Road shortly after Mr Cossey's Honda had turned onto Ohaupo Road from Ngaroto Road south of Ohaupo, after picking up Mr Hickey in Kihikihi.

[11] Eyewitness evidence, principally from other drivers on Ohaupo Road at the time, established that thereafter and until the crash occurred the two vehicles were — save when driving through Ohaupo — racing each other.

[12] A Mr Haumaha, the driver of a white utility, had seen Mr Robinson's Skyline at a petrol station in Te Awamutu. Mr Haumaha knew Mr De Silva and had a brief exchange with him at the petrol station. Mr Haumaha gave evidence that he was

overtaken twice by two vehicles, one the Nissan Skyline and the other a white vehicle, once before Ohaupo and once afterwards.

[13] Mr Haumaha's largely unchallenged evidence was that on the first occasion he was travelling at approximately 120 kph when he was passed by the two vehicles. They were travelling close together, less than a car length apart, in the passing lane at a speed of "probably easy 140" kph.

[14] Driving through Ohaupo, Mr Haumaha saw both vehicles parked near a fish and chip shop at the side of the road.

[15] Then, some distance north of Ohaupo, when Mr Haumaha was in the right hand passing lane overtaking another vehicle, he was again passed by the two vehicles travelling together at a speed which, on this occasion, in his impression was between 180 and 200 kph. As the vehicles passed him, they were being driven down the median strip. They moved into the left-hand lane in front of him and he lost sight of them. Mr Haumaha did not see Mr Cossey's Honda again.

[16] A short while later Mr Haumaha drew up behind a red car driving relatively slowly. As he did so heard the impact of, and then saw the consequences of, Mr Robinson's Skyline colliding at right angles with a van travelling in the oncoming direction.

[17] Mr Haumaha stopped. The impact of the collision had torn the Nissan Skyline in two. All four occupants were deceased. The driver of the van was trapped by the van's crushed front and was being tended to by passers-by.

[18] A second driver, Natasi Emmett, gave evidence of driving along Ohaupo Road that evening, just past the intersection with Ngaroto Road, towards Ohaupo. On a stretch of the road with a passing lane she came up behind a blue utility and, as she did so, a white Skyline — Ms Emmett recognised the model — and another white car went "flying" past. Ms Emmett estimated the vehicles' speed at approximately 160 kph. The Skyline passed first and almost collided with the blue utility. Then the

white car passed her and the blue utility, and in turn the Skyline itself. She had then seen the two vehicles' tail lights in the distance.

[19] Ms Emmett was traveling with her cousin, Alya Malcolm-Marx. Ms Malcolm-Marx also gave evidence of the two cars overtaking them and disappearing down the road where she saw them continuing to pass other vehicles and each other. The first — a Skyline — almost "nicked" the ute and in her impression, was travelling at about 150 kph.

[20] The fourth and fifth eyewitnesses were Mereaina Eltringham and her daughter Simone, who were in the red Honda vehicle that Mr Haumaha pulled in behind as he approached the crash scene. Simone Eltringham (confirming her mother's evidence) spoke of two cars passing her mother's car in the passing lane "going pretty fast and as they went past they weren't, it didn't seem like they were speeding at the limit … they flew past us to the point where my Mum's car shook and she had to shake the steering wheel to get it back to normal".

[21] Ms Eltringham did not recognise the model of either car. As the cars passed, her mother commented to her that they must have been going "over 100 cos I'm only going 80". Once past their car, Ms Eltringham saw one car pull over into the left lane, and one remain in the passing lane, as they moved out of sight. Ms Eltringham did not see the cars again on the road. Ms Eltringham's mother stopped a short while later at the scene of the crash.

[22] The sixth eyewitness was heading away from Hamilton on Ohaupo Road. He saw the two cars travelling in the opposite direction, at speed and close together.

[23] There were two other witnesses to the Nissan Skyline and the Honda travelling on Ohaupo Road that evening. Those witnesses, sisters, live on Ohaupo Road, just before the left hand turn at which Mr Robinson lost control of the Nissan Skyline and crashed into the van. The sisters were used to cars speeding past. But on that evening, they got up from the couch to look out the windows of their house when they heard vehicles approaching and, as they described it, racing. As the cars went past their

house one was overtaking the other, driving in a way which they had never seen before, and sounding a lot faster than what they normally heard.

[24] As they watched the tail lights of the cars speeding away, one passing the other, they had seen the headlights of what they later knew to be a van coming towards the two vehicles. They then heard the collision, got into their car and drove to the scene where they called 111.

[25] The driver of the van, Matthew Scheepers, also gave evidence. Immediately prior to the accident he saw two cars coming towards him around a corner relatively fast. One car was passing the other on the corner. The car seemed to be moving back into the oncoming right-hand lane. But then Mr Scheepers saw the headlights start to turn. He realised the car was "fishtailing". His recollection was it fishtailed three times until it crossed into his lane at right angles to the direction he was travelling in. At that point he hit that car.

[26] In the days following the accident Mr Cossey participated in a videotaped evidential interview and Mr Jones made a formal statement. The DVD was played, and Mr Jones' statement was read at trial. Mr Jones also gave evidence at trial. Mr Cossey did not.

[27] In his evidential interview Mr Cossey explained that before they had reached Ohaupo he had come up behind the Skyline and then followed it as, using a passing lane, it passed a ute. The Skyline almost collided with the ute and was spitting stones at Mr Cossey's vehicle. To avoid the stones chipping his windscreen Mr Cossey, still in the passing lane, overtook the Skyline. After that "just cruising", "driving normally", he had driven on through Ohaupo —without stopping — with the Skyline behind him. Just through the roundabout near Hamilton airport Mr Cossey was travelling at 100 kph. The Skyline was "right up my arse", so close that Mr Cossey could not see the Skyline's lights. Mr Cossey said he had put his foot down a little bit, accelerating his car to 120 kph to put some distance between it and the Skyline. But the Skyline had kept up with him and, when he took his acceleration off, the Skyline had overtaken him, one of its passengers "pointing the fingers". At that point Mr Jones had started videoing "because he thought he [the driver] was an idiot".

The Skyline had pulled back over but, going way too fast, had lost control and crashed into the oncoming vehicle.

[28] Mr Cossey said he was in shock. They could see the Nissan in half and "just knew". He didn't know what to do. Mr Jones told him to "gap it" which he did — slowing down to pass the scene of the accident and driving on to Hamilton without stopping.

[29] In his formal statement, Mr Jones provided a similar narrative of the events leading up to the accident. Travelling to Ohaupo, they had followed a Skyline that was using a passing lane to overtake a line of cars and trucks. The Skyline, deliberately Mr Jones suggested, had been flicking stones at their vehicle with its tyres. They had passed the Skyline and driven on as normal. The Skyline had made no effort to pass them after leaving Ohaupo. Then, as they exited the roundabout by the Hamilton airport, the Skyline pulled right up behind them, pulsing: that is, it would get right up behind them then drop back a bit and repeat that action. Mr Cossey sped up a bit, and at that point the Skyline had overtaken them, gone too fast into the corner, braked and fishtailed into the oncoming lane. They had been driving normally. He had stopped recording after the crash.

[30] The Crown case was that the vehicles driven by Mr Cossey and Mr Robinson had been racing each other. They had been observed driving dangerously, at high speed, overtaking other vehicles and each other, along Ohaupo Road. The race had only come to an end when, after overtaking Mr Cossey for the last time, Mr Robinson had lost control, crashed, killing himself and the three other occupants of the Nissan Skyline. Based on the edited version of the recording, which Mr Jones subsequently made available to the police, the Skyline was calculated as travelling at or just less than 150 kph as it passed Mr Cossey's Honda and lost control.

[31] By the time sentencing occurred, it was accepted that the jury's verdict as regards Mr Cossey established that the jury had found the facts to be very much as the Crown contended.

The Judge's sentencing decision

[32] Considering the starting point sentence for Mr Cossey's offending the Judge said she took the manslaughter charges as "the lead offence".[3] The Crown had, the Judge summarised, submitted a starting point in the range of eight to nine years' imprisonment was appropriate, identifying a number of aggravating factors, in particular greatly excessive speed in racing against another vehicle; a prolonged, persistent and deliberate course of various bad driving; and aggressive driving in that both vehicles were travelling too close together.[4] For Mr Cossey, Mr Morgan QC acknowledged that the starting point suggested by the Crown might be appropriate for the driver of the other vehicle. But, placing particular emphasis on the fact that Mr Cossey was not the driver directly responsible for the collision and had been on the correct side of the road immediately prior to the accident and had decelerated, submitted the starting point should be three years imprisonment.[5]

[33] Central to the Judge's conclusion that three years' imprisonment was the appropriate starting point were the following factors:[6]

(a) Mr Cossey had been racing and travelling at high speed, and those factors had been a material cause of the crash. But there was no additional action by him which caused the driver of the other car to lose control, such as aggressive driving, a dangerous passing movement or erratic driving.

(b) It was Mr Robinson's driving which was the direct and primary cause of the loss of control which resulted in death. Mr Robinson was the one who had made the decision to move into the oncoming lane in order to overtake Mr Cossey. Mr Robinson's blood alcohol level was almost three times the legal limit, and his blood samples were positive for the presence of methamphetamine and cannabis.

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3 *R v Cossey*, above n 1, at [17].
4 At [17].
5 At [18].
6 At [22]–[28].

(c) Mr Cossey's culpability was, therefore, less than that of Mr Robinson.

(d) In terms of aggravating features for this type of offending, as outlined in *Gacitua v R*, the key aggravating feature here was that of greatly excessive speed.[7] By the Judge's assessment, whilst the way Mr Cossey drove was dangerous, it was not a prolonged, persistent or deliberate course of very bad driving, nor was there, in the sense used in *Gacitua*, aggressive driving. The period of racing was relatively confined.

[34] On that basis and noting that sentencing in cases such as this was highly fact-specific, the Judge concluded that Mr Cossey's culpability could be distinguished from that of offenders where starting point sentences of five years or higher had been adopted. Such cases "involved offenders of greater culpability, whose actions were the only or clearly a primary cause of the loss of control resulting in death".[8]

[35] The Judge noted the very tragic outcome, and the fact that Mr Cossey was driving unsupervised.[9] Mr Cossey did not, however, have any previous convictions and the other common aggravating factor, the consumption of alcohol by the offender, was not present.

[36] Having regard to all those factors, she considered the starting point of three years was appropriate.[10]

[37] The Judge then turned to Mr Cossey's personal circumstances. Whilst the pre-sentence report writer had stated that Mr Cossey had demonstrated little in the way of remorse, the Judge accepted that Mr Cossey was indeed remorseful, although he had a strange manner of showing it. She based that conclusion on Mr Morgan's submissions as to the significance of the mental illness Mr Cossey had suffered after the accident; Mr Cossey's employer's advice Mr Cossey had been greatly changed since, and was sorry for, the accident and its impact on the families of the deceased;

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7 *Gacitua v R* [2013] NZCA 234 at [25].
8 At [21].
9 At [24]–[25].
10 At [29].

Mr Cossey's obvious distress (he was crying) during his evidential interviews; and that, as his report writer had recorded, Mr Cossey had acknowledged he had partially caused the accident — a significant step forward in the Judge's assessment.[11]

[38] Together with that recognition of remorse the Judge noted:[12]

(a) Mr Cossey was involved in a programme, Right Track, designed to re-educate young people involved in destructive behaviour involving motor cars;

(b) had a supportive family and good employment prospects;

(c) was a first-time offender, not one at a high risk of re-offending; and

(d) was, by the Judge's assessment, an immature and naïve 18-year-old.

[39] Those mitigating factors told strongly in Mr Cossey favour. His offending, whilst serious, was not so serious as to make it inappropriate to have regard to his youth.

[40] The Judge found that a global discount of 12 months was called for.[13] Home detention, thus available, was itself a serious punishment with a significant element of deterrence. Imprisonment would be in neither Mr Cossey's nor the community's interest.

[41] On that basis the Judge sentenced Mr Cossey to 12 months' home detention, 400 hours community work (the maximum available) and a very lengthy period — seven years — of disqualification.[14]

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11 At [33]–[34].
12 At [35]–[39].
13 At [40].
14 At [48].

The appeal

The Crown

[42] For the Solicitor-General, Ms Brook made the general submission that, by focussing on what she acknowledged was Mr Cossey's lesser culpability compared with that of Mr Robinson, the Judge had failed to confront the seriousness of Mr Cossey's offending. More specifically, Ms Brook based the Crown's appeal on three propositions:

(a) the starting point for Mr Cossey's sentence of imprisonment should have been at least six years;

(b) the discount received for mitigating factors was excessive; and

(c) home detention was not available as the sentence.

[43] To establish those propositions, Ms Brook first addressed sentencing for comparable offending. She noted this Court's recognition in *Gacitua* of the relevance of the aggravating and mitigating features set out in United Kingdom guideline judgment of *R v Cooksley*.[15] Those factors are, in our view in terms of the Sentencing Act 2002, best understood as assisting a court to apply the principles of sentencing found in s 8(a), (c) and (d). That is, they go to the court's assessment of the gravity of the offending, the culpability of the offender and, within offending of the relevant type, the relative seriousness of the particular offending.

[44] Ms Brook then identified the following aggravating factors:

(a) excessive speed and the additional danger inherent in racing — where two vehicles travel at speed overtaking each other from time to time;

(b) the fact Mr Cossey and Mr Robinson were racing;

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[15] *Gacitua v R*, above n 7, at [25]–[26]; and *R v Cooksley* [2003] EWCA Crim 996, [2003] 3 All ER 40.

(c) that Mr Cossey was driving in breach of his restricted licence; and, most significantly of all,

(d) the unprecedented scale of death caused by this incident of racing and the severe injuries to the fifth victim, the driver of the van.

[45] Having regard to all those factors, she submitted a starting point of six years was called for.

[46] Ms Brook then argued the Judge's recognition of mitigation had been excessive. She submitted it pointed to the sentence being tailored to allow for home detention. Ms Brook submitted there was little objective evidence of remorse. Mr Cossey's pre-sentence report did not find particular remorse. The victim impact statements recorded no remorse had ever been expressed to the families of those who were killed. Mr Cossey's mental health issue had arisen after the offending, appeared to have been resolved by the time of sentencing (being connected with the stress of the trial) and was not causative of the offending. The Judge had misunderstood Mr Cossey's involvement with the Right Track programme. All that had happened was that Mr Cossey had expressed a willingness to participate in that programme as a commentator on the tragic consequences of driving in the way he did. After consideration, the organisers of the programme had not considered that appropriate.

[47] Previous good character and youth were acknowledged, but they could not — Ms Brook submitted — support the extent of the discount granted by the Judge.

[48] Finally, home detention was simply not available as a sentence. Even if it had been an option, as a matter of principle, it would not have been appropriate.

[49] In terms of disposition, Ms Brook recognised the principle that it may on occasion be unjust to sentence a person to imprisonment who has been sentenced to, and served a substantial part of, a non-custodial sentence. Nevertheless, here that outcome was not unjust. The facts called for Mr Cossey to be sentenced to imprisonment. A term of three and a half years was, in the circumstances, appropriate.

Mr Cossey

[50] In supporting the Judge's sentencing decision Mr Morgan emphasised her advantages as trial Judge. She had — he said — carefully considered all relevant aspects of the offending, including the tragic outcome of the deaths of the four victims in Mr Robinson's car, the dangerousness of the racing that Mr Robinson and Mr Cossey had engaged in and — importantly here — Mr Cossey's lesser culpability.

[51] Similarly, the Judge had been uniquely placed to herself assess Mr Cossey's remorse and the significance for sentencing purposes of the various mitigating factors she had identified. Her assessment should be respected on appeal by this Court. Mr Cossey was a young man. He had and has good prospects of rehabilitation. He was and is supported by his family and his employer. He was, in effect, a first offender. The sentence of home detention was appropriate. As matters have transpired, Mr Cossey has served almost all of that sentence and at the same time undertaken more than half of the 400 hours of community work imposed upon him. He is subject to an extended period of disqualification.

[52] Even if the Court were to conclude that the sentence imposed on him was manifestly inadequate, it would in those circumstances be fundamentally unjust to now sentence him to a custodial sentence.

Analysis

Was the sentence the Judge imposed on Mr Cossey manifestly inadequate or otherwise wrong in principle?

[53] Whatever may have been the relative culpability of Mr Cossey and Mr Robinson, the consequences of this incident of racing — four victims dead and one critically injured — would appear to be by quite some margin the worst the courts have ever confronted. Counsel did not identify like offending which had caused more than two deaths. In two of those cases, starting point sentences of seven to eight and six years and six months respectively were considered appropriate in the case of the driver of the vehicle which, as a result of the racing, crashed.[16]

[16] *R v Smith* HC Auckland CRI-2005-057-675, 4 November 2005 at [25] (7–8 year starting point identified); and *R v Millar* [2018] NZHC 625 at [26] (6.5 year starting point identified).

[54] In the first of those cases, a starting point sentence of six years was considered appropriate for the driver of the vehicle which did not crash.[17]

[55] In *R v Elliot*, where a three-year starting point was identified, the offenders were racing on a rural road in the absence of other traffic.[18] The victim, a vulnerable person, had agreed to stand at the finish line to declare the winner and warn of oncoming traffic. For some reason the victim had crossed the road just as the cars approached the "finish line". He was struck and killed by a vehicle being driven at approximately 100 kph.[19]

[56] Whilst, as Ms Brook accepted, Mr Cossey may have been somewhat less culpable than Mr Robinson, that difference did not in our view justify the starting point sentence of three years identified by the Judge. We also agree with Ms Brook that the Judge's assessment that the way Mr Cossey drove was dangerous but did not involve any prolonged, persistent or deliberate course of very bad driving is one which is, to put it at its lowest, very favourable to Mr Cossey. In saying that, we note that sentencing proceeded on the basis that both Mr Cossey and Mr Robinson had passed each other when racing and that on one occasion they had passed another vehicle driving on the median strip. By his own admission, Mr Cossey had accelerated to, in his estimate, approximately 120 kph immediately before Mr Robinson overtook him. We do not think inferring that to be a conservative estimate would be unreasonable.

[57] In our view, the starting point in Mr Cossey's case should have been at least five years' imprisonment: a higher starting point could not have been criticised.

[58] On that basis, and whatever recognition might have been appropriate for mitigating circumstances, a sentence of home detention would not have been available.

[59] As to mitigation the Judge recognised a 33 per cent, or one year, overall reduction. We acknowledge that was a merciful response by the Judge, and indeed perhaps a very generous one. We acknowledge the Crown's submission that it was

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17 *R v Morgan* HC Auckland CRI-2005-057-675, 2 June 2006 at [19].
18 *R v Elliot* [2014] NZHC 214.
19 At [5]–[8].

too generous. On the other hand, we also acknowledge Mr Morgan's submission that the Judge carefully explained the reasons for the discount she identified. She was the trial Judge and was well placed to make the personal and very fact-specific assessment that is called for in this area. We are, therefore, reluctant to overturn that assessment and have concluded that in this case it is not appropriate that we do so.

[60] The issue for us now is whether we should therefore allow the appeal and impose a sentence of imprisonment on Mr Cossey or, principally on the basis that Mr Cossey has all but completed his sentence of home detention (which expires on 20 April 2019), we should decline to do so and dismiss the appeal.

[61] The starting point is the Court's general reluctance to increase sentences on Solicitor-General appeals.[20] This Court has said that it will only increase sentences in "clear cut" cases.[21] The Court is more disinclined to interfere where a community-based sentence has been imposed, and conditions which were ordered have been complied with when the appeal is heard, than where an inadequate custodial sentence is in issue. That increased reluctance reflects the Court's appreciation of the harsh effect of substituting a non-custodial sentence with a prison sentence. In *R v Donaldson*, this Court recognised that those considerations would not always result in a non-custodial sentence being left in place.[22] However, where the custodial sentence which the Court considered proper to be substituted would be in the vicinity of two years or less, the approach of acknowledging the appropriate sentence and dismissing the appeal was definitely available.[23]

[62] Were we to now sentence Mr Cossey to a term of imprisonment, we would need to take account of the period of almost one year Mr Cossey has spent on home detention, together with the other aspects of his existing sentence. Doing so, in our assessment, would result in Mr Cossey being sentenced to a term of imprisonment in the range of two years to two years and three months. That suggests to us it would not now be appropriate to sentence Mr Cossey to imprisonment.

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20 *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 549–550.
21 *R v Beaman* CA177/82, 16 December 1982 at 7.
22 *R v Donaldson*, above n 20, at 550.
23 At 550.

[63] Moreover, as the Court put it in *Donaldson*, there can be an especial element of inhumanity in sentencing where good progress has been made towards rehabilitation.[24]

[64] We therefore sought a report from the Department of Corrections as to Mr Cossey's compliance with the terms of his sentence, the progress he had made to recognising and addressing the causes of his offending and towards his rehabilitation more generally. Mr Cossey's supervising probation officer provided a written report. That report advised that Mr Cossey had complied substantially with the standard conditions of his sentence: there had been one minor discrepancy in the form of a deviation from an approved route on an approved absence, but that had been dealt with by way of sanction. Mr Cossey had attended assessments for alcohol and drug counselling but was not assessed as needing further intervention. He did not meet the criteria for psychological assessment as his level of risk was too low. Mr Cossey had been referred to rehabilitation and motivational programmes. He had been unwilling to speak about his offending. Accordingly, he did not complete those programmes. The probation officer noted, however, that unwillingness would appear to have been caused by trauma and emotional distress caused by the accident. Mr Cossey was therefore referred to a programme for people with mild to moderate mental health needs. Mr Cossey had engaged with a mental health clinician for an extended period, based on fortnightly meetings. The probation officer advised that there has been a marked transition in Mr Cossey's presentation and engagement.

[65] The probation officer also advised that Mr Cossey had been reporting and performing well on community work, was on the way to being granted his full 10 per cent remission, had been allowed to return to work and had been allowed recreational and social absences involving positive family engagement and participation in pro-social activities.

[66] Mr Cossey had — the officer concluded — stability in accommodation, a supportive family and meaningful work which would position him well to transition to post detention conditions. He would, however, need continued encouragement to

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[24] At 550.

remain on track with his sentence and be mindful of risk factors specifically that of negative peer association.

[67] That is, in our assessment, a relatively positive and favourable report.

[68] We are also mindful, in this context, of the time that has now passed since Mr Cossey's offending — some two and three-quarter years. That factor also, in our view, counts against now sentencing Mr Cossey to imprisonment.

[69] Accordingly, although we agree with the Solicitor-General that the sentence imposed by the Judge was manifestly inadequate, we do not consider it appropriate to now sentence Mr Cossey to a term of imprisonment.

Result

[70] The Solicitor-General's appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Appellant