IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-404-211
[2018] NZHC 2453

	BETWEEN	SOLICITOR-GENERAL Appellant
	AND	RACHAEL HETA Respondent

Hearing: 21 August 2018

Counsel: M J Lillico for Appellant
L Hughes and N Murden for Respondent

Judgment: 18 September 2018

[REDACTED] JUDGMENT OF WHATA J

This judgment was delivered by me on 18 September 2018 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors: Crown Law, Wellington
Public Defence Service, Manukau

[1] Rachael Heta pleaded guilty on two charges, one of causing grievous bodily harm with intent to cause grievous bodily harm and one of common assault. Judge Moala sentenced Ms Heta on those charges to three years, two months imprisonment. This comprised a start point of six years eight months, a 30 per cent discount for personal circumstances described in a report pursuant to s 27 of the Sentencing Act 2002, a 10 per cent discount for participation in a restorative justice process and a 25 per cent discount for guilty plea.[1]

Issues

[2] The Solicitor-General acknowledges that "an argument might made that 30% was warranted as a discount for hardship in Ms Heta's case because of the need to recognise Maori post-colonial experience and to meet the Parliamentary intention underlying s 27." It is submitted however that *Keil v R* precludes a discount of 30 per cent. *Keil* says:[2]

> Our sentencing regime cannot be seen to condone a particular group's use of violent force to exact physical retribution. Similarly, cultural norms cannot excuse that conduct for some groups but not for others. While those norms may help to explain, they can never justify offending of such severity as occurred here.

[3] As a result, the Solicitor-General submits that the usual discounts for hardship apply and thus a 30 per cent discount for Ms Heta's personal circumstances was too high.

[4] Two central questions are therefore addressed in this judgment:

(a) Does the Court of Appeal's decision in *Keil v R* preclude a discount of 30 per cent for matters raised in a s 27 report? And/or

(b) Is the end sentence manifestly inadequate?

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1 *R v Heta* [2018] NZDC 11085.
2 *Keil v R* [2017] NZCA 563 at [58].

Background

[5] Ms Heta became angry at her partner, the victim, believing that he was having an affair. She took a steak knife from the next door neighbours (where she had been drinking) and went to confront the victim at her house. Her friend tried to calm her down but Ms Heta punched her two times and told her to "fuck off". She said she was going to stab the victim.

[6] Ms Heta then confronted the victim, who had been sleeping, about the suspected affair and stabbed him multiple times to the chest and under arm area. The victim received four stab wounds under his arm pit and chest area because of the attack. One of the stab wounds punctured his lung and resulted in him being hospitalised for nearly two weeks.

District Court sentence

[7] Judge Moala sentenced Ms Heta following her acceptance of a sentencing indication. In that sentencing indication, the Judge identified extreme violence, use of a weapon, and the vulnerability of the victim (having been asleep) as aggravating features. Judge Moala indicated that an appropriate starting point would be seven years imprisonment. The Judge applied a six-month reduction for provocation, and a two-month uplift for Ms Heta's previous conviction for assault with intent to injure. This resulted in a sentence indication of six years eight months, to which a 25 per cent deduction for guilty plea would be applied.

[8] At sentencing the Judge identified the real issue as:

> [4] … what additional discounts I can give you, in addition to your discount of 25 percent for your guilty plea?

[9] In resolving this issue, the Judge placed considerable reliance on a restorative justice report and a s 27 report. The Judge noted that Ms Heta had met with the victim, apologised to him and he confirmed that he had forgiven her. Given the level of remorse and the positive report from restorative justice, the Judge gave Ms Heta 10 per cent discount from the starting point of six years and eight months.

[10] In addressing the s 27 report, the Judge observed that Ms Heta's life reflects the significant post-colonial trauma and disruption of the cultural identity experienced by Māori whānau, hapu and iwi, where alcohol and poverty has resulted in offending of this type.[3] The Judge noted that Ms Heta has lived a life that has involved drinking, physical and emotional violence that controlled her from childhood into her adulthood. The Judge also identified Ms Heta's linkages to her Māoritanga, the importance of her relationships with her whānau and the effect of her mental health and poor decision-making on her wairua. Ms Heta's disconnection from her community and from her family are also noted as are references in the cultural report about poor role models, Ms Heta's "fight for survival" during her childhood, and ongoing issues with alcohol and trust.

[11] The Judge concluded:

> [30] Having ready that report, I am persuaded that a significant discount be given, not just for the cultural aspect of it, but for the horrific background in that report. I am going to reduce your sentence by 30 percent to take into account the background and cultural information in that report. So that is a total discount of 21 months.

[12] In the result, Judge Moala handed down a sentence of three years and two months' imprisonment, comprising a start point of six years and eight months, a discount of 21 months for personal factors and a 25 per cent discount for guilty plea.

The s 27 report

[13] A report, pursuant to s 27 of the Sentencing Act, was produced by Khylee Quince of Ngāpuhi, Ngāti Porou and Ngāti Kahungungu, a barrister and solicitor of the High Court of New Zealand and a senior lecturer in law. The tabling of the report was not opposed and the probative value of the observations made in it were not challenged in the District Court or in this Court. The following is a summary of the contents of that report.

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3 *R v Heta*, above n 1, at [9]-[10]

Whānau background

[14] Ms Heta's whānau background is characterised by alcohol abuse by her parents, parental absenteeism, violence and **[suppressed]**. Ms Heta's schooling was intermittent and she dropped out of high school after two weeks. Ms Heta is a sickness beneficiary with no formal qualifications and her work history is limited to an 18-month period as a cook at a day care centre. Ms Heta's personal relationships are marked by violence and she has several prominent scars to her upper body and is permanently disfigured because of various assaults.

[15] Ms Heta has four children and is proud of her whānau. At one stage, having discovered that her then long-term partner had been unfaithful, Ms Heta attempted to commit suicide. She remained on her own for several years until she met the current victim. The victim was a heavy drinker and her relationship with him was marked by "more bad than good days". Excessive and problematic alcohol consumption has been a dominant feature of Ms Heta's life since she was ten years old.

Linkages

[16] Ms Heta is proud of her Māori identity and recognises the need for balance "in the constituent elements of Te Taha Tinana (physical aspect), Te Taha Wairua (the spiritual aspect), Te Taha Whānau (the family aspect) and Te Taha Hinengaro (the psychological aspect)". The report observes that each of these aspects have been impaired through Ms Heta's upbringing. Impaired mental health and poor decision-making are described as a reflection of an affected wairua and hinengaro. Disconnection to her community and fractured family relationships are identified as an impaired taha whānau.

[17] The metaphor of the harakeke or flax bush was used to explain the impact of on Ms Heta of this disconnection, noting that a healthy harakeke is stabilised by a root system representing values and practises of aroha, manaakitanga, wairuatanga and whanaungatanga. The absence of these protective factors in what Ms Heta describes as "a fight for survival" underpinned her relationship choices, and her ongoing issues with alcohol and trust. The report notes:

> On the night Rachel assaulted Barry, she had discovered he had been unfaithful, with a friend of thirty years. This would have triggered memories of her previous relationship breakdown and subsequent suicide attempt.

Processes

[18] The report refers to the restorative justice process. The report notes that face-to-face (kanohi ki te kanohi) reconciliation between parties involved in conflict is the centrepiece of Māori dispute resolution practice. Ms Heta's sense of whakamā or shame was noted, as was the fact that whakamā is a relational concept, meaning that it is required to be acknowledged so that the individual can move forward. According to Ms Quince, the victim's attendance and participation in the process allowed this to occur.

Rehabilitation

[19] The report also explains the process of rehabilitation or "whakahoki mauri" undertaken by Ms Heta. She has stopped drinking and given up a 40-year addiction to tobacco. Ms Heta has renewed attention to her physical wellbeing and she is receiving treatment for a kidney condition, arthritis and scleroderma; she takes nine different pills a day. The rehabilitation has also manifested itself in Ms Heta being more positive and well organised in prison. The report notes that she has no citations for misconduct.

Possible sentences

[20] The report then addresses how Ms Heta's background may be relevant to possible sentences. The report notes that Ms Heta has supportive children and sisters, and a cousin has made her home available for home detention. The report also notes that Ms Heta has spent much of her adult life, including a 17-year stretch, totally offence-free.[4] The key to her rehabilitation, the report concludes, lies in removing alcohol from her life.

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[4] I note that this does not align with Ms Heta's criminal history which instead records a 15-year stretch without offending.

The restorative justice report

[21] A restorative justice report was prepared by Robyn Edmonds, the facilitator at the restorative justice conference. Relevant parts of the report, include the following:

> Barry said, "I have come here to let you know I have forgiven you. I never wanted it to get to this far. I'm sorry mate, I know it's not all your fault. I don't want you to be in here. My life has been shit. I had so much to put on paper but didn't know where to start. If my family knew I was here they would never speak to me again. I wanted to see you and I don't hold nothing against you.

[22] The report also records:

> Rachael told Barry she didn't know how bad he was until the summary of facts had been read. "I'm glad you came" she told Barry. He responded "time is a healer, it will heal the scars. If there is anything I can say or do for you, I will, but forgive yourself Rachael".

[23] The report concludes:

> Barry asked if he could have contact with Rachael and they both embraced. They both became very emotional, with Rachael telling him "I'm so sorry" and Barry responding "I forgive you Rachael".

Victim impact statement

[24] The victim provided a victim impact statement. It predates the restorative justice conference. He is a European male currently living in Manurewa. In that report, he says:

> She deserves to be where she is because she put herself there, not me. I've never done any violence against her and she needs help.

He also says:

> It really hurts, she really did change my life but I can't blame it all on her. It takes two to tango but I wasn't the violent one.
>
> I honestly hope Rachael seeks the appropriate help to make it a fairer society and so she can walk amongst us because at the moment she can't. Without that help she never will, she really needs help.

PAC report

[25] The PAC report for this offending assesses Ms Heta's risk of reoffending as low, but puts her risk to others as medium to high as a result of a 2016 assault with intent to injure conviction. It notes that Ms Heta was halfway through a violence prevention course with the Inner-City Women's Group (the PAVE programme) when she was held in custody for the current offending. The PAC report recommends a sentence of imprisonment.

Jurisdiction

[26] An appeal will be successful only if the appellant can point to an error, either intrinsic to the Judge's reasoning, or because of additional material submitted on the appeal which vitiates the sentencing decision of the Court below.[5] Unless there is a material error in sentence, for example, that it is manifestly excessive, manifestly inadequate, or wrong in principle, an appellate court will not intervene.

Solicitor-General's submissions

[27] Mr Lillico, for the Solicitor-General, submits that a 30 per cent discount for personal circumstances based on the information provided by the s 27 report was too high. He accepts a sentencing court may mitigate sentence for hardship and may consider what part culture might play. He contends, however, the most valuable information in the s 27 report was the childhood hardship faced by Ms Heta. The historical or systemic dimension was not mentioned in Ms Heta's report, but he accepts Judge Moala was correct to consider it. Other factors identified in the report did not however justify a discount.

[28] The effects of systemic deprivation and incarceration asymmetry on the Māori community was acknowledged by Mr Lillico, as was the fact it has not improved since 1985 when the predecessor to s 27 was introduced. As foreshadowed in the introduction, the Solicitor-General also accepts an argument might be made that a 30 per cent was warranted as a discount for hardship in Ms Heta's case because of the need to recognise the Māori post-colonial experience and to meet the Parliamentary

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5 *Tutakangahau v R* [2014] NZCA 279 at [29]-[31].

intention underlying s 27. But an enhanced discount for hardship of Māori offenders cannot be contemplated on current authority, in particular *Keil v R.*[6]

[29] Overall, Mr Lillico submitted that while s 27 reports may help Judges by providing relevant information, any discount granted must, nevertheless, be in line with discounts given in other cases. An increased award to recognise the position of Māori is precluded by current Court of Appeal authority. Based on a survey of recent authorities, Mr Lillico submitted that a discount for social deprivation in the order of 10 per cent was, at most, available.[7]

Submissions for Ms Heta

[30] Ms Hughes submitted a cultural report can be considered in one of two ways – by mitigating culpability, and/or by impacting on the relevance of a rehabilitative sentence. While ethnicity or cultural background can never be the sole ground for a discount on sentence,[8] she says the factors identified in a s 27 report require careful weighing in each case.[9]

[31] Ms Hughes also refers to extra-judicial comments made by Judge O'Driscoll, who noted in a 2012 paper:[10]

> Section 27 does not seek to reduce sentences for Māori or for those from other cultures; the section attempts to provide a court with relevant and appropriate material. A court can then give appropriate weight to that material and take the material into account along with all the other material placed before it. In this way the court is likely to impose a more relevant, meaningful, and appropriate sentence than it would without the material … if the sentence more readily and appropriately addresses the causes of offending and reduces the likelihood of further offending, that must be in the interests of the community.

[32] Similar observations made by Judge Winter in *R v Evans*[11] were also cited:

> This section [s 27] has often been criticised as not providing for equal treatment of all citizens. That sort of argument collapses around the discussion

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6 *Keil v R*, above n 2, at [58]. *R v Mason* [2012] NZHC 1849 is also referred to.

7 In written submissions, the range was put at 0-6 per cent. In argument Mr Lillico softened his position, submitting that a 10 per cent discount might be available.

8 *Mika v R* [2013] NZCA 648.

9 Citing Nick Chisnall *"The Mitigatory Effect of Social Disadvantage"* (2016) Criminal Law Symposium 129 at 146.

10 Judge O'Driscoll "A powerful mitigating tool" (2012) NZLJ 358 at 360.

11 *R v Evans* [2017] NZDC 21170 at [23].

> of what equality means. Equality does not mean sameness. It does not mean treating like for like. Equality must always mean there is a respect across difference, and where there is difference, particularly when it comes to sentencing, then a purposive reading of s 8(i) and s 27 requires that there be an appropriate discount given for offenders who have provided the Court with a proper sense of mitigating matters that engage their personal, family, whānau, community and cultural background against the provisions of s 27 of the Act.

[33] Ms Hughes responds to the Crown's citation of cases dealing with social deprivation. She submits that they are not apposite and are not directed to s 27 matters. She submits that it is too simplistic to view any discount pursuant to s 27, and the discount in fact given by Judge Moala, as a "race-based" discount or a "social deprivation" discount. In relation to *Keil*, it was directed to a specific issue, namely, a discount that might be afforded for cultural provocation or "muru". The comments in *Keil* therefore do not seek to limit the scale of discount that might be given for other matters raised in a s 27 report. The High Court sentence in *R v Rakuraku,*[12] is cited, where the Judge gave a 12-month discount on a minimum period of 18 years to account for the factors raised in a s 27 report. Other District Court cases were also noted where substantial discounts have been given.

Section 27

[34] This appeal is centrally about the relevance of the information supplied pursuant to s 27 to sentencing. I will address the effect of *Keil* below at [51]. It is necessary first to explain the purpose and scope of s 27. It states:

> **27 Offender may request court to hear person on personal, family, whanau, community, and cultural background of offender**
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> (1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—
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> (a) the personal, family, whanau, community, and cultural background of the offender:
>
> (b) the way in which that background may have related to the commission of the offence:
>
> (c) any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving

[12] *R v Rakuraku* [2014] NZHC 3270.

the offender and his or her family, whanau, or community and the victim or victims of the offence:

(d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:

(e) how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.

(2) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.

(3) If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.

(4) Without limiting any other powers of a court to adjourn, the court may adjourn the proceedings to enable arrangements to be made to hear a person or persons under this section.

(5) If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).

[35] Section 27 was preceded by s 16 of the Criminal Justice Act 1985. Section 16 was a conscious attempt to recognise the importance of trying to meet the needs of Māori offenders, and in particularly young Māori offenders, who formed such a disproportionately large element within the prison population.[13] That disproportionality, or asymmetry,[14] has persisted. The Waitangi Tribunal report, *Tū Mai te Rangi,* cited by the Solicitor-General, illustrates the breadth and depth of that asymmetry:[15]

(a) Māori make up 50.8 per cent of all sentenced prisoners in New Zealand's Corrections system, despite comprising 15.4 per cent of New Zealand's population.

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13 As Michael Cullen said at the second reading of the Criminal Justice Bill, "the Committee had made a conscious attempt to recognise in particular the importance of trying to meet the needs of Māori offenders, and more particularly young Māori" – (1985) 463 NZPD 4795.

14 A description borrowed by Mr Lillico from Justice Joe Williams "Harkness Henry Lecture – Lex Aotearoa: A heroic attempt to map the Māori dimension in modern New Zealand law" (2013) 21 Wai L Rev 1 at 29.

15 Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending* (Wai 2540, 2017) at 8.

(b) Of all sentenced male prisoners, Māori men make up 50.4 per cent and of all sentenced female prisoners, Māori women make up 56.9 per cent. Young Māori figure prominently.

(c) 65 per cent of youth, that is under 20 years of age in prison, are Māori, up from 56 per cent a decade ago.

(d) Re-imprisonment rates are similarly skewed. After two years, 41.3 per cent of released Māori prisoners are re-imprisoned, while by comparison, only 30.5 per cent of non-Māori released from prison are re-imprisoned after two years.

[36] The Tribunal noted that "whatever measures were presented, the rates for Māori were invariably worse".[16]

[37] Section 27 however does not enunciate a "Māori" specific response to this asymmetry. Rather, s 27 enables background information about offenders, including Māori, to be presented to a sentencing Judge. The matters listed at subs (1) incorporate into the sentencing exercise the full background of the offender, the relationship of that background to the commission of the offence, the processes used to resolve the offense, and the role of whānau and community to prevent further offending and in respect of possible sentences.

[38] The extent to which this s 27 information engages the purposes and principles of the Act is then an evaluative matter and applied, where relevant, in accordance with the sentencing framework. While there is no statutory direction as to the weight to be afforded to the information, the requirement at s 27(2) to hear from a person called by the offender under s 27(1) unless unnecessary or inappropriate, emphasises the importance of each of the matters specified at subs (1) to the sentencing exercise.

[39] In this regard, s 27 information has been applied in respect of the following sentencing criteria:

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16 At 8.

(a) Section 8(a) – the degree of the offender's culpability;[17]

(b) Section 8(g) – the least restrictive sentence possible;[18]

(c) Section 8(h) – the circumstances of the offender that would mean a sentence is disproportionately severe;[19]

(d) Section 8(i) – the offenders personal, family, whānau, community and cultural background with a partly or wholly rehabilitative purpose;[20]

(e) Section 9(2)(f) – remorse /offers to make amends by the offender / whānau.[21]

Systemic Māori deprivation

[40] The effects of colonisation on Māori communities are well documented. Loss of land and other tribal resources[22] together with the destruction of traditional social structures, tikanga, culture and language[23] preceded widescale migration from tribal rohe to urban areas.[24] For every generation since, Māori have been disproportionately represented among the poorest, most illiterate and most criminalised in New Zealand.[25] The entrenched asymmetry of Māori in prisons is only one of many

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17 See *R v Watson* CA360/90, 19 April 1991; *Keil v R*, above n 2.

18 *R v Rakuraku,* above n 12; *R v Jolley* [2018] NZHC 93.

19 *R v Eruera* [2016] NZHC 532

20 *Solicitor-General v SC* [2017] NZHC 2252.

21 *Oneroa-Hill v District Court at Tauranga* [2017] NZHC 2471.

22 Claudia Orange *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004) at 318-319; Mason Durie *Te Mana Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 119.

23 Waitangi Tribunal *Report of the Waitangi Tribunal on Te Reo Māori* (Wai 11, 1986) at [3.2]-[3.4]; *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 at 306.

24 At 300 - 307. Mason Durie *Te Mana Te Kāwanatanga: The Politics of Māori Self-Determination*, above n 21, at 86.

25 Mason Durie *Ngā Kāhui Pou: Launching Māori Futures* (Huia Publishers, Wellington, 2003) at 62-66; Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending*, above n 15, at 8; Statistics New Zealand "Wealth patterns across ethnic groups in New Zealand" (4 November 2016) <https://www.stats.govt.nz/reports/wealth-patterns-across-ethnic-groups-in-new-zealand>; See also Lisa Marriott and Dalice Sim *Indicators of Inequality for Maori and Pacific People* (Victoria University, Working Paper 09/2014, August 2014) This report showed that on all major indicators of inequality (health, knowledge and skills, paid work, economic standard of living, cultural identity and social connectedness) Maori (and Pacifica people) performed considerably worse than European/Pakeha people and that in relation to a majority of those indicators the disparity was increasing. The report also observes the poverty

indicators of the systemic nature of this social disadvantage. For ease of reference I will refer to this pervasive and persistent social disadvantage affecting Māori as systemic Māori deprivation.

[41] There is no express requirement to have regard to systemic Māori deprivation in sentencing. However, the Court when fixing sentence may consider "any aggravating or mitigating factor the court thinks fits."[26] Section 27 then mandates consideration of the full social and cultural matrix of the offender and the offending. There is no obvious reason why this should exclude evidence of systemic Māori deprivation and how (if at all) this may have contributed to the offending. On the contrary, inclusion of all material background factors in the assessment aligns with the underlying premise of s 27 just mentioned and it better serves the purposes and principles of sentencing to identify and respond to all potential causes of offending, including where relevant, systemic Māori deprivation. It may inform, among other things, the actual and relative moral culpability of the offender and the capacity for rehabilitation.

[42] In *Mika*, the Court of Appeal acknowledged that "the social, economic and cultural disadvantages suffered by many Māori … frequently contribute to offending."[27] But the Court added, unsurprisingly, "it does not logically follow that a person is more likely to be at a disadvantage and to simply offend by virtue of his or her Māori heritage." The Court also stated that Australian and Canadian authorities relied upon by Mr Mika were decided in different legislative contexts and were of "no assistance" on that appeal.[28] However, the Court in *Mika* was responding to a submission seeking a fixed 10 per cent discount based "on Māori heritage and thus social disadvantage". The Court was rejecting the idea that ethnicity *per se* triggered a discount. It was not saying that the presence of systemic deprivation was presumptively irrelevant to the sentencing exercise.

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rates of Maori and Pacific ethnic groups typically are around double those of European/Pakeha ethnic group regardless of the measure used. 23 per cent of Maori, 22 per cent of Pacifica people and 11 per cent of European/Pakeha people had household incomes of less than 60 per cent of the medium income.

26 Sentencing Act 2002, s 9(4).

27 *Mika v R*, above n 8, at [12].

28 At [13].

[43] Relevantly, the normative basis for recognition of systemic Māori deprivation as a mitigating sentencing factor is not dependent on racial or ethnic classification. Rather, it is the presence of systemic deprivation in the lives of Māori offenders and their whānau that may trigger the potential for a differential sentencing response. This idea has been common place in Australian for more than 30 years. As Brennan J stated in *Neal v R*:[29]

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.

[44] Wood J (as he then was) in *Fernando* identified the significance of systemic deprivation in this way:

> … While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

[45] Wood CJ (as he later became) put it this way in *R v Pitt*:[30]

> … disadvantages, which may arise out of membership of a particular group, which is economically, socially or otherwise deprived to a significant and systemic extent, may help to explain or throw light upon the particular offence and upon the individual circumstances of the offender.

[46] More recently, the Australian High Court in *Bugmy* stated:[31]

> … Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.

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29 *Neal v R* (1982) 149 CLR 305 at 326.
30 *R v Pitt* [2001] NSWCCA 156 at [21].
31 *Bugmy v R* [2013] HCA 37, (2013) 249 CLR 571 at 594.

[47] Similarly, the Supreme Court of Canada observed:[32]

> Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely – if ever – attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their culpability.

[48] The High Court in *Bugmy* however rejected the submission that the courts should take judicial notice of systemic deprivation. The Court stated "(w)ere this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice."[33] Rather the Court said:[34]

> Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about the particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation to mitigate sentence, it is necessary to point to material tending to establish that background.

[49] But unlike Australian sentencing norms, the evident legislative policy of s 27 is that background factors, such as the presence of systemic deprivation, may be relevant to individualised justice. I agree however that the presence of deprivation, systemic or otherwise, in the lives of all Māori offenders cannot be assumed. This brings back into focus the significance of s 27. It mandates and enables Māori (and other) offenders to bring to the Court's attention information about, among other things, the presence of systemic deprivation and how this may relate (if at all) to the offending, moral culpability and rehabilitation. Thus, the cogency of any s 27 information, and the likely presence of systemic deprivation and strength of the linkages between (among other things) that deprivation, the offender and the offending, together with the availability of rehabilitative measures to specifically address the effects of systemic deprivation, will be critical to the assessment.[35]

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32 *Ipeelee v R* [2012] 1 SCR 433 at [73].

33 *Bugmy v R*, above n 31, at 592. Note this observation was made by the majority comprising French CJ, Hayne, Crennan, Kiefel, Bell, and Keane JJ. Gageler J joined with the majority in the result without commenting on this aspect.

34 At 594.

35 The Court of Appeal in *Nelson v R* [2014] NZCA 121 at [28] emphasised the importance of a causal nexus between personal difficulties and the offending in order to attract a substantial discount.

[50] The evidence of the presence of systemic deprivation (or social disadvantage more generally) on an offender need not be elaborate. The symptoms of systemic Māori deprivation are reasonably self-evident, including (among other things) intergenerational social and cultural dislocation of the whānau, poverty, alcohol and or drug abuse by whānau members and by the offender from an early age, whānau unemployment and educational underachievement, and violence in the home. Evidence from whānau about the offender's life is enough. But there must be some evidence identifying the presence of systemic deprivation in the offender's background and linkage to the offending. The facts in *Rakuraku* are illustrative of the requisite linkage. As Williams J, with respect, eloquently put it:[36]

> [56] But there are also mitigating factors. Your difficult upbringing is attested to eloquently by your sister. A childhood of poverty, violence and racism. There is, I think, a real chance that you do suffer from post-traumatic stress disorder, and that perhaps you suffer from brain injury as well. Indeed given your background, a genuine likelihood of that.
>
> [57] Your sister's success in her chosen career no doubt brought about by her time away from home at boarding school on a scholarship – attests to the causative impact of your past on your current criminality. There is also the story of trauma and loss in the history of Tuhoe. The impact of that on succeeding generations who, marginalised and impoverished, sought solace first in millennial religions such as Te Kooti's Ringatū and then in widespread self medication. Departure to the cities in search of work after the Second World War probably tore what was left of remaining social fabric for so many of those whanau.
>
> [58] This is cumulative and relevant in my view. Your anger and aggression is partly a factor of your personality and you made free choices in that regard. But it is also partly a response to the drivers I've discussed that aren't of your making at all; to the way the world responds generally to Māori boys and men from poor backgrounds. We must be honest with ourselves about that. So it comes as no surprise to me that you sought security in the brutalised and traumatised company of those who share your experience and history – the Mongrel Mob. That shared experience has a terrible magnifying effect when it gathers in one place. To deny that as a contributing factor would be to deny that race and history have any part to play in Māori criminality generally today, and therefore in your own criminality. The sentence I impose must take proper account of this factor if it is to be a punishment that fits both the offences and the offender.

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[36] *R v Rakuraku*, above n 12, at [56]-[58]. See also *R v Eruera*, above n 18, at [21]-[23] where Mr Eruera's history of dislocation from tikanga Tuhoe and exposure to gang culture is detailed, as well as the impact of "the mass Maori urbanisation in the 1960s, the emergence of the urban Maori gang, systemic unconscious bias, structural reform in the 1980s and high unemployment" which s 27 report writers considered contributed to Mr Eruera's offending.

Does the Court of Appeal's decision in *Keil v R* preclude a discount of 30 per cent for s 27 matters?

[51] Turning then to *Keil*. The Court of Appeal in *Keil* examined (among other things) whether the offender, Mr Paul, should have received a larger discount for his good character and the information contained in the cultural reports. The salient background facts may be stated briefly. Mr Paul, together with several others, responded to an attack on whānau members. They travelled to a property and attacked the first victim with weapons and fists. Later, the first victim and a second victim took up arms and confronted their attackers. They were disarmed and beaten with the weapons. The injuries to one of the victims was life threatening, while the injuries to the other victim were serious.

[52] Mr Paul was charged and found guilty of wounding with intent to cause grievous bodily harm. He was sentenced to four years and three months' imprisonment, comprising a start point of six years and a 20 per cent discount for mitigating factors.

[53] Several s 27 reports were filed. They detailed among other things, a cultural driver of the offending, namely "Mr Paul's sense of moral obligation to support and participate in an expedition which the authors described as an act of muru – that is an effective form of social control, restorative justice and redistribution of wealth among relatives, which seeks to reduce the transgression with the end goal of returning the affected party back to his or her original position in society."[37]

[54] The Court acknowledged:

> [56] We recognise the force of Mr Chisnall's submission. Judges in all courts of this country are acutely conscious of the overrepresentation of young Māori in our prisons. Moreover, before this event Mr Paul had led a blameless life. We accept that he presents a low risk of reoffending. Imprisonment will only serve the requirement of accountability, denunciation and deterrence of others from committing the same offending. It is unlikely to provide personal deterrence. It will not serve to protect the community from Mr Paul, from whom it does not need protection. And it will not assist in Mr Paul's rehabilitation and reintegration, who acted out of character in exceptional circumstances mitigated by a degree of cultural provocation.

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37 *Keil v R*, above n 2, at [51].

[55] And further:

> [57] In short, we agree this is a case which underscores the importance of accounting for a particular offender's personal, family, whānau, community, and cultural background during sentencing. That is why s 27 reports were prepared and considered.

[56] The Court however rejected a more substantial discount for these background factors noting:

> [58] However, the seriousness of Mr Paul's offending necessarily subordinated the purposes of personal rehabilitation and reintegration to the wider societal purposes set out under s 7. The requirements of accountability, denunciation and deterrence had to predominate in an end sentence which struck a balance between these competing goals. Our sentencing regime cannot be seen to condone a particular group's use of violent force to exact physical retribution. Similarly, cultural norms cannot excuse that conduct for some groups but not for others. While those norms may help to explain, they can never justify offending of such severity as occurred here.

[57] This statement reiterates an important sentencing policy. The seriousness of the offending may necessarily reduce the scale of any discount for personal mitigating factors.[38] It also makes clear that the sentencing regime does not condone violent retribution and cultural norms cannot excuse or justify that type of violence. But any binding direction to be found in *Keil* must consider the facts treated by the Court as material and the Court's decision as based on them.[39] It is expressly directed to Mr Paul's offending and the cultural explanation for it. Furthermore, *Keil* contains no detailed survey of sentencing authorities that might indicate that the Court was laying down a general rule about discounts for personal background factors.

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[38] See also *R v Buttar* [2008] NZCA 28 at [27]. In the context of serious sexual offending, the Court of Appeal held in *R v Misitea* [1987] 2 NZLR 257 that "personal circumstances can carry little weight against the gravity of crimes of this kind". Similarly, in sentencing for drug offending the Supreme Court in *Jarden v R* [2008] NZSC 69, [2008] 3 NZLR 612 at [14] has held "the crucial importance of deterrence" means only modest discounts are available for personal circumstances – although modest in this case was a 17 per cent discount. See also *Chan v R* [2018] NZCA 148 where no MPI was imposed to reflect the offender's youth.

[39] *Fang v Ministry of Business Innovation and Employment* [2017] NZCA 190, [2017] 3 NZLR 316 at [35].

[58] More broadly, as the Supreme Court noted in *Hessell*, citing longstanding Court of Appeal authority:[40]

> In the end, almost everything turns of the facts of the particular case. It is part of the judicial responsibility to weigh these.

[59] Therefore, I do not accept that *Keil* directs that all discounts for personal background matters contained in a s 27 report are to be capped at 20 per cent. Rather, it is an important reminder that in sentencing violent offenders, countervailing aggravating factors may constrain the scope of any discount for personal mitigating factors. But, it remains incumbent on a sentencing judge to weigh the facts of the particular case.

Is the end sentence manifestly inadequate?

[60] It remains necessary to examine whether the end sentence was manifestly inadequate. This brings more squarely into focus the broader principle of consistency in sentencing legislatively affirmed by s 8(e), which states that the Court:

> … must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances.

[61] The present appeal is not framed on the basis that the end sentence is *per se* out of range. Rather the focal point of the appeal is the scale of the discount for deprivation (including childhood trauma). I will focus my analysis on this aspect.

[62] I have reviewed the cases referred to by both the Solicitor-General and the respondent. I am unable to discern a discount "range" for deprivation *per se*. There are, as the Solicitor-General submits, instances where relatively modest discounts, in the range of 0-6 per cent, were applied for this factor.[41] There are circumstances,

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40 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [26], citing *R v A* [1994] 2 NZLR 129 (CA) at 132.

41 In *Nelson v R*, above n 35, the Court of Appeal upheld a 6 per cent discount for the appellant's personal circumstances which included physical, sexual, and psychological abuse by a step-father where a causal relationship to the offending was not identified in background reports. In *R v Jolley*, above n 18, Katz J observed that *Mika* precluded a discount for to reflect Mr Jolley's Māori heritage "and associated economic and social disadvantages he had suffered" at [79]. For the reasons noted at [40]-[50], I respectfully disagree. In *Habib v Police* [2017] NZHC 1750 Dobson J identified a 5 -10 per cent discount for mental health conditions induced by a traumatic

however, where larger discounts for deprivation and trauma have been made, including for example, *Paul* where a 20 per cent discount "for the factors with which Ms Paul has had to contend through her life and her remorse" was affirmed by Brewer J.[42]

[63] Nor is there a clear unifying principle for applying discounts for deprivation. Rather, personal circumstances discounts tend to be informed by a multiplicity of overlapping factors, including deprivation, trauma, youth, drug and alcohol abuse, and mental health issues.[43] "Deprivation" is in many cases difficult to separate from these other factors because it is associated with and explanatory of them. What is tolerably clear, is that larger discounts tend to rely on identifying linkages between personal circumstances and the offending and thus the moral culpability of the offender.[44] Mercy is another apparent reason.[45] The countervailing sentencing factors, where applicable, then curb the extent of any discount.

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upbringing, but reduced the available discount to no more than 3 months (from a sentence of three years 9 months' imprisonment) to account for the seriousness of the offending (he also considered Mr Habib's mental health conditions by reducing the MPI). See also *Rowles v R* [2016] NZCA 208 at [21] where on appeal only 2 per cent was considered warranted for "very adverse personal circumstances".

42 *Paul v New Zealand Police* [2015] NZHC 2583 at [38]; see also *Te Whata v Police* [2016] NZHC 1293, where Mander J allowed an appeal against sentence for failing to account for youth and traumatic upbringing. From a start point of four years and five months, Mander J allowed a discount of 6 months (or 11 per cent) for personal mitigating factors. As noted in *Jarden v R*, above n 38, at [14], a "modest discount" for (albeit "extreme") personal circumstances which were not causative of the offending amounted to a 17 per cent reduction.

43 See for example *Waipouri v R* [2015] NZHC 2029 where a combined discount of 12 per cent was given to account for childhood trauma and related post-traumatic stress disorder; *R v Jenkins* [2013] NZHC 95, where a 17 per cent discount was given to recognise Ms Jenkin's troubled background, psychiatric issues (even though they were not causative of the offending), and remorse.

44 *E(CA689/10) v R* [2011] NZCA 13 surveyed previous cases and noted discounts in the range of 12 to 30 per cent were warranted where an offender had a mental illness which contributed to the offending; *Churchward v R* [2011] NZCA 531 at [77] similarly found neurological differences between young people and adults could warrant a discount because they can lead to a reduction in culpability of young people as compared to adults; in *R v Whiu* [2007] NZCA 591 at [32], the Court of Appeal considered "is not necessary for there to be a formal diagnosis of battered women's syndrome before prolonged abuse suffered by a woman at the hands of a partner or family member can be taken into account on sentencing. The critical point is that, whatever label is used, there must be evidence which supports the view that prolonged abuse suffered by an offender *materially contributed to her offending*." (emphasis added)

45 Simon France (ed) *Adams on Criminal Law – Sentencing* (online looseleaf ed, Thomson Reuters) at [SA8.10]. *Jarden v R*, above n 38, at [14].

Application to present case

[64] I agree with the Solicitor General that Ms Heta's "difficult upbringing" could not by itself attract a discount of 30 per cent in addition to a discount of 10 per cent for participation in the restorative justice process. That is outside the range normally afforded for these factors where no linkages are drawn to moral culpability. However, I do not accept the personal mitigating factors identified in the s 27 report are isolated to these two matters. The report identifies several key facts that directly bear on *both* culpability and rehabilitation including (in addition to personal childhood trauma):

(a) Alcohol abuse is a key contributor to the offending;[46]

(b) Alcohol abuse is a learned behaviour from her parents;

(c) Ms Heta was isolated from positive whānau and other pro-social influences early in life;

(d) The alcohol abuse and whānau disconnection has significantly impaired Ms Heta's wellbeing and her life choices;

(e) Ms Heta is however proud of her Māori heritage;

(f) Ms Heta now has strong whānau support; and

(g) Ms Heta has made significant strides already toward rehabilitation.

[65] While generous, the combined discount of 40 per cent for personal mitigating factors does not require correction given these facts. First, a discount for personal trauma of 5-10 per cent was available on existing authority.[47] Second, a combined

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[46] Section 9(3) precludes alcohol consumption as a mitigating factor. I refer however to alcohol abuse an environmental factor that has impaired Ms Heta's life choices generally and thus indirectly bears on her moral culpability.

[47] *Paul,* above n 42. See also *R v Tiatoa* HC Auckland CRI-2009-055-1007, 11 October 2010. In this case Venning J adopted a start point of 3 years on a charge of failing to provide the necessities of life and applied a 6-month discount (17 per cent) for one of the defendants, Ms Leathers, for age (21) and her very unfortunate background. *R v Knoll* HC Hamilton CRI-2008-019-3966, 26 February 2009. In *Knoll* Andrews J adopted a starting point of 5 years on a charge of attempted

discount for the positive engagement in a restorative justice process, and for her remorse, of up to 20 per cent would not have been out of range.[48] Third, a discount to acknowledge Ms Heta's capacity to rehabilitate of 5-10 per cent would not have been inappropriate.[49] Fourth, while the s 27 report does not overtly draw linkages between *systemic* Māori deprivation, the offender and the offending, its presence in Ms Heta's life can be reasonably inferred. In any event, Judge Moala was aware of other reports produced by Ms Quince which refer to the effects of colonisation on Māori communities, and the Solicitor-General accepts that it was appropriate for the Judge to take this factor into account. It provides further justification for a cumulative discount at the higher end of the available range to better reflect Ms Heta's diminished relative culpability.[50]

[66] I accept that the scale of the discount in case involving very serious violent offending of the present kind would usually be reduced by the countervailing factors mentioned in *Keil.* But critically in this case recognition of deprivation and personal trauma does not involve condoning the offending. Rather it helps to explain it. Further, the positive outcome of restorative justice process, the views of the victim and the now low-risk of reoffending presented by Ms Heta, address remaining concerns about accountability, deterrence, denunciation and protection of the public.

[67] In the result, I do not consider the Judge erred in principle or that the sentence was manifestly inadequate. The 30 per cent discount for the matters detailed in the s 27 report together with a 10 per cent for participation in the restorative justice process, was not sufficiently excessive to require adjustment.

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murder and applied a discount of 24 months to account for age (19), parental role and traumatic background.

48 *R v A* [2018] NZHC 2024 at [46]; *R v Martin* [2017] NZHC 1517. See also *R v Maposua* CA 131/04, 3 September 2004 at [11]-[12] where the Court of Appeal upheld a 50 per cent discount for restorative justice in the form of the traditional Samoan practice of ifoga.

49 *Solicitor-General v SC*, above n 20 at [53]; *Mallett v R* [2014] NZCA 39 at [6], [11]. *Hansch v Police* [2014] NZHC 2438, where Mr Hansch's willingness to engage in rehabilitation favoured a community based sentence over imprisonment.

50 Robust evidence of intergenerational systemic deprivation that is causally connected to the offending might provide a basis for a distinct discount or differential sentencing response. As the s 27 report did not explicitly identify this factor I say no more about this. Moreover, the scale of discount this factor might attract is properly a matter for Senior Appellate Court assessment.

Outcome

[68] In answer to the central questions I find:

(a) *Keil* does not preclude discounts of 30 per cent for s 27 factors.

(b) The sentence was not so inadequate as to require adjustment.

[69] The appeal is dismissed.