

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 85/2020
[2020] NZSC 156**

BETWEEN XIANG SU
 Applicant

AND THE QUEEN
 Respondent

Court: Glazebrook, Ellen France and Williams JJ

Counsel: R J Hooker for Applicant
 C Ure for Respondent

Judgment: 22 December 2020

JUDGMENT OF THE COURT

**The application for an extension of time to apply for leave to
appeal is dismissed.**

REASONS

Background

[1] Mr Su was convicted after a jury trial of one charge of possessing methamphetamine for supply. He was sentenced to five years and 10 months' imprisonment. On appeal his sentence was reduced to one of five years' imprisonment.¹

[2] Mr Su then applied for recall of the appeal decision. He asserted that a mathematical error had occurred in calculating the final sentence meaning that the sentence should have been rounded down in the applicant's favour, resulting in

¹ *Su v R* [2020] NZCA 128 (Miller, Dobson and Moore JJ).

four years and 11 months' imprisonment instead of five years' imprisonment. He also sought further credit for personal mitigating features.

[3] The Court of Appeal refused his application for recall, saying that a challenge to the merits should have been pursued on appeal and not by way of recall.² As to the calculation error, it said:

[3] The short answer to the application is that there is no calculation error. The Court rounded up the sentence calculation to achieve what it considered the appropriate sentence in the circumstances. That is the objective of sentencing.

Application for leave

Applicant's submissions

[4] Mr Su seeks leave to appeal on the basis that his sentence should have been "rounded down" to four years and 11 months rather than "rounded up" to five years. He says this is a matter of general importance because there is inconsistency in the approach to this issue by sentencing judges.

[5] He points out that some sentencing judges have rounded the end sentence down, for example:

- (a) In *Gathergood v R*, the end sentence was rounded down to two years and five months' imprisonment.³
- (b) In *Blissett v Police*, the High Court (on appeal) applied a discount of 30 per cent and then rounded the result down.⁴
- (c) In *R v Tatana*, the High Court, having applied the relevant discounts, rounded the sentence down.⁵

² *Su v R* [2020] NZCA 408 (Miller, Dobson and Moore JJ) at [4].

³ *Gathergood v R* [2010] NZCA 350 at [28].

⁴ *Blissett v Police* [2013] NZHC 156 at [53].

⁵ *R v Tatana* [2014] NZHC 1614 at [40].

[6] He submits that, on other occasions, the Court has rounded the result up:

- (a) In *Waho v R*, the Court of Appeal rounded the sentence up.⁶
- (b) In *R v Smith*, the sentence had been rounded up by the District Court.⁷
- (c) In *Hansen v New Zealand Police*, the High Court allowed an appeal from a District Court sentence and, in substituting its own sentence, rounded the sentence up after allowing discounts for personal factors and a guilty plea.⁸

Crown's submissions

[7] The Crown notes that a sentence must ultimately be expressed as a term of years, months or weeks. Sentence credits may be expressed either temporally (months) or both mathematically (as a percentage) and then temporally (reducing the percentage to a period of months).⁹ It points to the comments of the Court of Appeal in *Moses v R*:¹⁰

[10] To say that uplifts or discounts at the second step must bear an appropriate proportion to the adjusted starting point is not to insist that they be calculated as a percentage. Judges commonly fix some discounts as a number of months or years. But it is usual to fix larger discounts, including those for youth, mental illness and guilty pleas, as a percentage, which aids calculation and facilitates comparison among cases.

[8] The Crown points out that the Court of Appeal has considered the approach to rounding previously and stated that “in progressing from percentage to sentence, the Judge’s rounding of the mathematical product up to the nearest month, rather than down, is normally unobjectionable and not an error calling for correction”.¹¹

⁶ *Waho v R* [2020] NZCA 526 at [33].

⁷ We note that the District Court rounded up the sentence after granting a 10 per cent discount for a guilty plea: *R v Smith* [2020] NZDC 3140 at [26]. An appeal against sentence was dismissed and the High Court judgment cited to us: *Ross v R* [2020] NZHC 1322.

⁸ *Hansen v New Zealand Police* [2018] NZHC 361 at [26]. The submission does not correctly summarise *Hansen*: the Judge in fact rounded up the discount, not the sentence (and so in effect the sentence was rounded down).

⁹ *Ferris-Bromley v R* [2017] NZCA 115 at [16].

¹⁰ *Moses v R* [2020] NZCA 296, (2020) 29 CRNZ 381 (footnotes omitted).

¹¹ *Ferris-Bromley*, above n 9, at [17], citing *Ludlow v R* [2013] NZCA 196 at [19].

[9] The Crown submits the proposed appeal does not meet any of the qualifying criteria for the granting of leave, there being no identifiable error in the Court of Appeal's decision and no important question of general principle arising. What the applicant is seeking, in the Crown's submission, is an unwarranted fettering of sentencing judges' discretion. It submits that this is not one of the rare cases in which it is appropriate for this Court to grant leave on a sentencing matter.

Application for an extension of time

[10] Mr Su's application for leave is out of time. He explains his delay by referring to the recall application in the Court of Appeal. The Crown opposes an extension of time, noting Mr Su's recall application was dated 17 August 2020, some three and a half months after the delivery of the appeal decision.

Our analysis

[11] There has been an inadequate explanation for the delay in submitting the leave application. We therefore dismiss the application for an extension of time to apply for leave to appeal.

[12] But, in any event, the leave criteria are not met.¹² Whether adjustments to sentences expressed as percentages are rounded up or down when translated into actual weeks, months or years will depend on the particular circumstances of each case. There is thus no matter of general or public importance. In this case, the Court of Appeal considered the appropriate sentence to be five years, based on its analysis of all the relevant circumstances. Nothing raised by the applicant suggests a risk of a substantial miscarriage of justice.

Result

[13] The application for an extension of time to apply for leave to appeal is dismissed.

Solicitors:
Vallant Hooker & Partners, Auckland for Applicant
Crown Law Office, Wellington for Respondent

¹² Senior Courts Act 2016, s 74(2).