IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 104/2021
[2021] NZSC 155

BETWEEN	SURENDER SINGH MEHROK Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Williams JJ

Counsel: R J Stevens for Applicant
E J Hoskin for Respondent

Judgment: 11 November 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] Mr Mehrok was convicted of manslaughter for killing a 14-week-old baby on 7 June 2016. He was 19 at the time. The baby belonged to his then-partner who had gone out at the time of the offence. Mr Mehrok attempted to soothe the baby when he began to cry, but was unsuccessful. Mr Mehrok eventually went into one of the bedrooms and threw the baby, causing massive head trauma.

[2] Mr Mehrok was initially charged with and convicted of murder in 2017. He was retried following a successful appeal against conviction,[1] and found guilty of manslaughter in 2020.

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1 *Mehrok v R* [2019] NZCA 663.

[3] In addition to the murder charge, Mr Mehrok was also charged in relation to multiple assaults on other children living in the same household. All of these occurred before the death of the baby. Mr Mehrok admitted responsibility for the baby's death, and his assault charges were severed from the murder charge as a result.

[4] Mr Mehrok was sentenced to seven years and nine months' imprisonment for the manslaughter.[2] His appeal against sentence was dismissed by the Court of Appeal.[3] He seeks leave to appeal against that decision.

The application

[5] Mr Mehrok submits that his case raises three issues of general or public importance:

(a) whether a guilty plea discount precludes any further discount for steps taken to shorten proceedings;

(b) whether an uplift for the convictions in relation to the other children is appropriate where those convictions were entered after the date of the index offending; and

(c) whether it is appropriate to reduce a youth discount for lack of remorse and poor prospects of rehabilitation.

[6] Mr Mehrok also submits that the reduction in youth discount in his case resulted in a miscarriage of justice.

Steps taken to shorten proceedings

Lower Court decisions

[7] At sentencing, the High Court Judge declined to give Mr Mehrok a discount for taking steps to shorten his trial, as provided by s 9(2)(fa) of the Sentencing Act 2002.[4] The Court of Appeal upheld the decision, noting that admitting evidence

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2 *R v Mehrok* [2020] NZHC 2722 (Gordon J) [HC judgment].
3 *Mehrok v R* [2021] NZCA 370 (Brown, Brewer and Davison JJ) [CA judgment].
4 HC judgment, above n 2, at [46].

that is plainly not in dispute will not usually attract a discrete discount.[5] Nor will there be more than one discount if a single concession also has the incidental effect of shortening the proceeding.[6] The Court agreed that Mr Mehrok's admission of responsibility for the baby's death should not result in a further discount for shortening the trial, as that was incidental.[7] And the severance of the assault charges was to Mr Mehrok's advantage; the resulting shortening of the trial was also incidental.[8]

Submissions

[8] Mr Mehrok submits that guidance is required from this Court on the appropriate use of s 9(2)(fa), as no cases have properly considered the principles behind its application, including whether a guilty plea would generally preclude it from having any effect. He would argue that the Court of Appeal was incorrect in finding that no discount should be given for admissions in relation to evidence plainly not in dispute; on the contrary, he says that this is the very type of evidence that s 9(2)(fa) is aimed at.

[9] The Crown submits that the admission of responsibility for the baby's death overlapped with Mr Mehrok's offer to plead guilty to manslaughter, so allowing for a discount for shortening proceedings on that basis would risk double counting what was, in effect, the same concession. Further, the Court of Appeal was right to say that Mr Mehrok's separate admissions in relation to undisputed evidence should not warrant a discount, as those matters were largely peripheral. Finally, the Crown says that the Court of Appeal did not find that a guilty plea precludes a discount for shortening proceedings, and that there is no need for appellate guidance on s 9(2)(fa) because the statutory wording is clear and what discounts apply in each case will turn on the facts.

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5 CA judgment, above n 3, at [51].
6 At [52].
7 At [53].
8 At [54].

Discussion

[10] The relevant part of s 9(2) says that the sentencing court:

> … must take into account the following mitigating factors to the extent that they are applicable in the case:
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> …
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> (fa) that the offender has taken steps during the proceedings (other than steps to comply with procedural requirements) to shorten the proceedings or reduce their cost…

[11] Whether discounts should be given for concessions in relation to undisputed evidence raises a potential question of principle, but the provision is cast in factual terms. The ultimate question is whether, in all the circumstances, the concession did in fact shorten the proceedings, or if an offer is made but rejected by the prosecution, whether such offer would have shortened proceedings. In this case, all relevant circumstances were carefully considered by the Courts below, leaving no room for the question posed to have any material effect on the outcome. Further, the argument with respect to the relevance of guilty pleas under s 9(2)(fa) has insufficient prospects of success to warrant the grant of leave. It follows that no question of principle ultimately arises; nor is there any prospect of miscarriage on this ground.[9]

Uplift for previous convictions

Lower Court decisions

[12] The High Court Judge imposed an uplift of three months for Mr Mehrok's previous convictions for violence against children.[10] This related to Mr Mehrok's assault convictions for the charges that were severed from the murder charge. The Court of Appeal upheld this decision, finding that the offending against other children in the household bore directly on Mr Mehrok's culpability for later causing the death of the baby.[11]

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9 Senior Courts Act 2016, s 74(2)(a) and (b).
10 HC judgment, above n 2, at [39].
11 CA judgment, above n 3, at [28].

Submissions

[13] Mr Mehrok wishes to argue that a sentencing court cannot take into account previous convictions that had not been entered at the time the offence was committed. This is because previous convictions are taken into account in three ways: 1) they are an indicator of character and culpability, 2) they show the need for a greater deterrent response, and 3) they show a greater risk of reoffending. Mr Mehrok submits that where the convictions had not been entered at the time of the offending for which an offender is to be sentenced, considerations of deterrence and the risk of reoffending do not apply. As for culpability, Mr Mehrok says that his assault convictions were taken into account in setting the starting point, so a discrete uplift would be double counting.

[14] The Crown submits that s 9(1)(j) plainly contemplates consideration of other offending as aggravating, as long as the offending predated the present offending. That section says that the court must consider:

> the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time…

[15] The Crown accepts that the need for additional deterrence is not relevant where the previous convictions were not entered at the time of the later offending, but the other factors of culpability and risk of reoffending remain relevant. It says that the starting point was not influenced by the assault convictions so there is no double counting.

Discussion

[16] The point of principle advanced by the applicant in relation to this ground has insufficient prospects of success to justify the grant of leave. Further, it is not at all clear that the trial judge did in fact double count the separate convictions.

Youth discount

Lower Court decisions

[17] The High Court Judge granted Mr Mehrok a youth discount of five per cent to recognise his impulsiveness, but no more, on the ground that the other main consideration for youth—the prospect of rehabilitation—was not applicable here because the pre-sentence report emphasised limited progress in this regard.[12]

[18] The Court of Appeal upheld this ruling, noting that:[13]

> Discounts for youth often go hand in hand with discounts for remorse because remorse goes hand in hand with rehabilitation. It was accepted by Ms Hadaway at sentencing that Mr Mehrok was not entitled to a discount for remorse.

Submissions

[19] Mr Mehrok submits that the Court of Appeal wrongly conflated the youth discount with that for remorse or efforts towards rehabilitation, and that remorse should be addressed separately. The principle in relation to the youth discount is that young people have a greater capacity for rehabilitation regardless of the level of remorse.[14] There was nothing to indicate that Mr Mehrok does not have the capacity for rehabilitation. Mr Mehrok also submits that the five per cent discount is so low as to amount to a miscarriage of justice, and that 15 per cent was warranted instead.

[20] The Crown submits that the lower Courts assessed the specific facts of the case, and the youth discount was appropriately reduced as a result of a lack of capacity for rehabilitation, which is in turn demonstrated by a lack of remorse. Youth discounts vary significantly, and 5 per cent was available to the Judge here.

Discussion

[21] While this issue may need to be considered by the Court at some point in the future, the present case is not an appropriate one for doing so. Although the youth

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12 HC judgment, above n 2, at [41]–[42].
13 CA judgment, above n 3, at [43].
14 Citing as an example *Rolleston v R* [2018] NZCA 611, [2019] NZAR 79.

discount was modest, the circumstances of the case, including the seriousness of the index offending, the fact that it was preceded by earlier assaults on children and that Mr Mehrok was 24 at the time of conviction and when his prospects for rehabilitation were addressed, are such that there are insufficient prospects of success on the facts.

Result

[22] The application for leave to appeal is dismissed.

Solicitors:
Public Defence Service, Auckland for Applicant
Crown Law Office, Wellington for Respondent