IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA568/2021
[2022] NZCA 299

	BETWEEN	DANIEL WAYNE SHRAMKA Appellant
	AND	THE QUEEN Respondent

Hearing: 2 December 2021 (further submissions 11 January 2022)

Court: Kós P, Miller and Clifford JJ

Counsel: J F Mather for Appellant
M L Wong for Respondent

Judgment: 7 July 2022 at 10 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Kós P)

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[1] The appellant, Mr Shramka, and the complainant, C, were partners. In October 2015, the two were at their residence arguing in the lounge. The argument became heated, and Mr Shramka punched C in the face, hard. The resulting laceration required three stitches to close. This incident resulted in a charge of male assaults female.

[2] The two then separated and C obtained a protection order against Mr Shramka. The protection order was made final in May 2017.

[3] In June 2019, Mr Shramka visited C at her home, with her permission. An argument ensued and C told Mr Shramka to leave. He refused. C wanted to call 111 but Mr Shramka had hidden her phone in his pocket. When C tried to get her phone back, Mr Shramka grabbed her by the neck with one hand, squeezing tightly. He maintained his hold as he pushed C onto a bed, obstructing her breathing. This continued for about half a minute. C almost passed out. She struggled against Mr Shramka, kicked out and managed to get him off her and push him backwards. She rolled onto her stomach, at which point Mr Shramka punched her hard to the back of the head. As C reached for her phone, which had fallen onto the ground, he punched her in the face.

[4] The incident left C with scratches and red marks on her neck, swelling and bruising to her left eye, a laceration on her left cheek, a large welt on the left side of her head above her eye, and bruising to the back of the head. C continues to be scared,

struggles to sleep, needs to have a light on during the night, and remains in a state of constant nervous anxiety.

[5] Following a trial by jury, Mr Shramka was convicted of five offences: strangulation,[1] injuring with intent to injure,[2] male assaults female (the 2015 incident),[3] and breaching a protection order (x 2).[4] The maximum penalty for strangulation is seven years' imprisonment. Mr Shramka received two years and three months' (27 months') imprisonment on the strangulation charge, with lesser concurrent sentences on the other charges.[5]

[6] Mr Shramka appeals his sentence, contending that it is manifestly excessive.

Sentence appealed

[7] Judge Glubb adopted strangulation as the lead charge.[6] He was satisfied Mr Shramka "intended to impede [C's] breathing" and was not merely reckless as to whether that occurred when he "firmly gripped her by the neck and for that length of time".[7]

[8] The Judge considered the following to be aggravating factors: the extent of the violence, the punches delivered to C's face and head, the domestic setting in which the incident took place, C's vulnerability (recognised by the existence of the protection order), the breach of trust, and the lasting harm done to C.[8] Mr Shramka's previous conviction history, including past breaches of a protection order in respect of C and another former partner (regarding whom Mr Shramka had also been convicted of a male assaults female charge), was a personal aggravating factor.[9]

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1 Crimes Act 1961, s 189A(b).
2 Section 189(2).
3 Section 194(b).
4 Domestic Violence Act 1995, ss 19(1)(a), 19(2)(c), 49(1)(b) and 49(3).
5 *R v Shramka* [2021] NZDC 16828 [Sentencing notes]. Mr Shramka received 15 months' imprisonment for the two breaches of a protection order, 10 months' imprisonment for the injuring charge, and three months' imprisonment for the assault charge: at [26].
6 See at [24] and [26].
7 At [5].
8 At [6]–[7].
9 At [8]–[9].

[9] After considering analogous authorities, the Judge held the repeated breaches of the protection order set Mr Shramka's offending apart and warranted an increase in the starting point.[10] The Judge adopted a starting point of three years and four months' (or 40 months') imprisonment, based on an initial starting point of 28 months for the strangulation and associated violence (excluding the punch to the back of the head) uplifted by 12 months for the two breaches of the protection order (including the punch just referred to). The Judge then further uplifted the starting point by four months for Mr Shramka's previous male assaults female conviction, and another two months for his other relevant previous convictions. This resulted in an adjusted starting point of 46 months.[11]

[10] The Judge then gave Mr Shramka a 20 per cent discount for information contained in a cultural report tendered under s 27 of the Sentencing Act 2002.[12] The report demonstrated Mr Shramka experienced significant dysfunction during childhood, characterised by physical and emotional abuse, resulting in him leaving school without formal qualifications at age 14. He began using cannabis at 9, alcohol at 11 and methamphetamine at 17. He told the probation officer he had ceased use of illicit drugs by 28, in 2013, although also told the s 27 report writer his methamphetamine habit "has been unproblematic for approximately two years now", that is, since 2019. The Judge gave Mr Shramka a further 10 per cent discount for the rehabilitative efforts he made while in custody, and a five-month discount for the 20 months Mr Shramka had spent on and off on electronically-monitored bail (EM bail).[13] This resulted in a sentence of 27 months' imprisonment on the strangulation charge, rounded down.[14]

[11] The Judge imposed concurrent sentences in respect of the other charges, resulting in a final sentence of 27 months' imprisonment.[15]

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10 At [23], citing *Ackland v New Zealand Police* [2019] NZHC 312, (2019) 29 CRNZ 179; *Mokaraka v Police* [2020] NZHC 718; *Houkamau v Police* [2019] NZHC 2743; *T v New Zealand Police* [2019] NZHC 3375, [2020] 2 NZLR 270; and *Parker v Police* [2020] NZHC 479.

11 At [24].

12 At [25].

13 At [25].

14 At [25].

15 At [26].

Appeal

[12] Mr Mather, for Mr Shramka, submits the end sentence was manifestly excessive. First, he submits the 40-month starting point adopted for the strangulation charge was "excessively high" having regard to the authorities. Both *T v New Zealand Police* and *Ackland v New Zealand Police* had involved assaults that caused the victim to lose consciousness and were accompanied by verbal threats of further violence or death. These aggravating features were not present in the current offending. Also, unlike *Ackland*, the present offending did not take place in the presence of children or as part of an ongoing series of attacks. Here the unique feature of the offending was the existence of the protection order, which was (appropriately) recognised in an uplift to the starting point. Being careful not to double-count for the breaches of the protection order, a more appropriate starting point would have been two years' imprisonment.

[13] Secondly, Mr Mather submits the five-month discount the Judge afforded to take account of Mr Shramka's time spent on EM bail was inadequate. No reasons were given for why only five months was allowed. A proper discount should have been 10 months, or half the time Mr Shramka spent on EM bail awaiting trial. Applying this discount would have produced an end sentence of less than two years.

Legislative framework

[14] In 2018 Parliament created the stand-alone offence of strangulation found in s 189A of the Crimes Act 1961:

> **189A Strangulation or suffocation**
>
> Everyone is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly impedes another person's normal breathing, blood circulation, or both, by doing (manually, or using any aid) all or any of the following:
>
> (a) blocking that other person's nose, mouth, or both:
>
> (b) applying pressure on, or to, that other person's throat, neck, or both.

[15] Section 189A was inserted by s 24 of the Family Violence (Amendments) Act 2018. Along with the Family Violence Act 2018, enacted at the same time, the new

legislation aimed to reduce rates of family violence in New Zealand by using a comprehensive approach that prioritised early intervention and prevention, and by, among other things:[16]

> Improving the criminal justice response by creating three new criminal offences and providing for more accurate recording of family violence offending in the criminal justice system.

[16] Strangulation was one of the three new criminal offences introduced by the Family and Whānau Violence Legislation Bill.[17] When the Bill was introduced, the then Minister of Justice, the Hon Amy Adams, stated:[18]

> Three new offences will be introduced. Significantly, this includes a new offence of strangulation and suffocation. International evidence tells us that the likelihood of a person being killed by their partner is significantly increased when they have been strangled by that partner previously. We want to send a clear message that this type of behaviour should not and will not be tolerated.

[17] The legislation had cross-party support. Its enactment was driven by an evident shared understanding among Members of Parliament that strangulation is a "common mark of abusive, coercive behaviour".[19] One MP observed:[20]

> I have spoken in this House previously about my work in both the Family Court but also as a manager in a refuge. Strangulation is defined as "blocking that other person's nose, mouth, or both:". It's extremely important that this aspect is put in, because people do not understand that they have been strangled, often. We would ask the question quite a lot, "Have you ever been strangled or choked?", and they'd say to us, "No. No I haven't." "Did he hold his hand over your mouth?" "Yes." "Did he hold you down and prevent you from breathing?" "Yes." That is the highest and most risky indicator of death and it is extremely serious. So I wholeheartedly support strangulation going into the Crimes Act through this bill.

[18] MPs frequently observed that strangulation is a precursor of more serious criminal offending, particularly homicide.[21] As one MP noted:[22]

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16 Family and Whānau Violence Legislation Bill 2017 (247–2) (commentary) at 2.

17 The others were assault on a person in a family relationship and coercing a marriage or civil union: Family Violence (Amendments) Act 2018, ss 25 and 28.

18 (11 April 2017) 721 NZPD 17279.

19 (11 September 2018) 732 NZPD 6448 (Virginia Andersen).

20 (11 September 2018) 732 NZPD 6450 (Angie Warren-Clarke).

21 See, for example, (11 September 2018) 732 NZPD 6453 (Priyanca Radhakrishnan) and (31 October 2018) 734 NZPD 7928 (Hon Andrew Little).

22 (11 September 2018) 732 NZPD 6434 (Mark Mitchell).

> One of the indicators that we know can clearly tell us whether a woman is in serious danger of maybe ending up as a homicide statistic is the fact the offender will often start to grab them around the throat and hold them around the neck. If you go back and if you have a look at the history in [a central North Island incident], you would have seen that, actually, he had started grabbing her around the neck and holding her around the throat.
>
> So under this bill, that information has to be captured and has to be shared with the relevant agencies so that it's a red flag and it becomes something that we can act on much quicker in terms of getting measures in place to provide the protection that she would have needed. Then, perhaps, we could have prevented a terrible and a tragic outcome for the family — and for her, obviously.

[19] The catalyst for the enactment of strangulation as a stand-alone offence in the Crimes Act was a 2016 report by the Law Commission: *Strangulation: The Case for a New Offence*.[23] The impetus for that report, in turn, was a recommendation in the Fourth Annual Report of the Family Violence Death Review Committee (FVDRC).[24] The FVDRC had intensively reviewed family violence homicides in New Zealand over the period 2009–2012 and conducted 17 in-depth regional reviews of selected death events. The Law Commission summarised the FVDRC's findings that:[25]

> - strangulation was commonly reported in the abuse histories of the homicide victims examined;
> - many of the victims had been subjected to multiple previous instances of strangulation;
> - just over half of the instances of strangulation were reported to Police;
> - just over one third resulted in charges with most of those charges being "male assaults female"; and
> - only six out of the 29 cases of strangulation reviewed resulted in convictions with the most serious conviction being for "male assaults female".

In the Law Commission's words, the FVDRC considered that "a specific strangulation offence would highlight the risk of fatality that accompanies strangulation, facilitate a more effective criminal justice response and highlight incidents of strangulation on the offender's criminal record".[26]

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23 Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016).

24 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, 2014).

25 Law Commission, above n 23, at [1.5]–[1.6].

26 At [1.7]. See also Family Violence Death Review Committee, above n 24, at 101.

[20] In its report, the Law Commission emphasised the unique nature of strangulation, saying:[27]

> Two key factors distinguish strangulation from most other forms of family violence. First, it is an important risk factor for a future fatal attack by the perpetrator. Victims of family violence who have been strangled have seven times the risk of going on to be killed than those who have suffered other forms of violence but not strangulation. People who make decisions about the victim or the perpetrator (particularly judges) need to understand that risk so that they make decisions that will help to keep the victim safe. Secondly, it characteristically leaves few marks or signs, sometimes even when it has been life threatening. That presents unique challenges for prosecution and contributes to the dangerousness of strangulation being underestimated and the perpetrators not being held appropriately accountable.

[21] As regards the first of those factors, the Law Commission recorded the FVDRC had found strangulation histories in 71 per cent of the family violence homicide cases it reviewed, with half of them involving multiple strangulations.[28] The Law Commission also cited numerous international studies that had found strangulation to be a risk factor for a future fatal attack.[29]

[22] In terms of the second factor, the Law Commission noted that strangulation can leave a devastating psychological impact on victims, notwithstanding the act itself characteristically leaves few marks or signs.[30] This psychological impact is what makes strangulation a "uniquely effective form of intimidation, coercion and control".[31]

[23] A third factor is also very important in this analysis. As the Law Commission noted, an abuser who strangles a victim may not be intending to kill, but is

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27 At [1.3] (footnote omitted). The sevenfold risk increase was drawn from a 2008 United States study: Nancy Glass and others "Non-fatal Strangulation is an Important Risk Factor for Homicide of Women" (2008) 35(3) J Emerg Med 329, discussed in more detail at [2.29]–[2.30].

28 At [2.22]. See also Family Violence Death Review Committee, above n 24, at 100.

29 At [2.26]–[2.28], citing Carolyn Rebecca Block *Risk Factors for Death or Life-Threatening Injury for Abused Women in Chicago* (2004); Jacquelyn C Campbell and others "Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study" (2003) 93(7) Am J Public Health 1089; and Jacquelyn C Campbell and others *Research Results From a National Study of Intimate Partner Homicide: The Danger Assessment Instrument* (2004).

30 At [1.2] and [2.11], citing Gael B Strack and Casey Gwinn "On the Edge of Homicide: Strangulation as a Prelude" (2011) 26(3) Criminal Justice 32.

31 At [1.2].

demonstrating that he *can* kill.[32] As the victim fears for her life and is unable to effectively resist, strangulation "induces behavioural and emotional reactions that facilitate coercive control".[33]

[24] The Law Commission was concerned that the contemporaneous legal framework did not capture the seriousness of strangulation offending. It noted that:[34]

> The cases in Appendix C demonstrate that strangulation in family violence circumstances is often charged at a low level as "male assaults female". More serious charges are the exception and are laid only when there is other violence or evidence of injury.

As most strangulations did not carry evidence of injury, a real part of the harm suffered by victims was the terror accompanying the belief they would die.[35] So, when incidences of strangulation were met merely with charges of assault, it resulted in sentences that seemed "out of step" with the offender's culpability.[36]

[25] The Law Commission then went on to consider what a new strangulation offence would look like. It proposed the offence be "kept as straightforward as possible".[37] The Law Commission recommended proof of harm, such as a loss of consciousness or enduring psychological effect on the victim, not be required to prove the offence, given the above difficulties and the associated risk of inhibiting effective prosecution.[38] Instead, liability for strangulation should "[arise] from intentionally strangling the victim" — that is, intentionally applying force to the victim's neck.[39] However, the resulting harm "will be relevant to the level of culpability and therefore the actual sentence imposed".[40]

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32 At [1.2], [2.16] and [2.25], citing Strack and Gwinn, above n 30; and Kristie A Thomas, Manisha Joshi and Susan B Sorenson "'Do You Know What It Feels Like to Drown?': Strangulation as Coercive Control in Intimate Relationships" (2014) 38(1) PWQ 124 at 125.

33 At [2.25], quoting Thomas, Joshi and Sorenson at 125–126, above n 32.

34 At [3.17].

35 At [3.19].

36 At [3.20] and [3.33]–[3.34], citing *Luff-Pycroft v R* [2012] NZCA 107; *Paikea v Police* HC Whangārei CRI-2010-488-53, 29 October 2010; and *Rikihana v Police* [2013] NZHC 711.

37 At [5.15].

38 At [5.18]–[5.19].

39 At [5.18]–[5.20].

40 At [5.41].

[26] Turning to proposed penalties, the Law Commission considered the maximum penalty should reflect the culpability of the worst class of strangulation offending that does not fall within another, more serious offence:[41]

> In setting the maximum penalty for this offence, we must consider the worst class of strangulation behaviour that should be captured, excluding behaviour that would be charged under another serious violent offence. Strangulation that results in injury or wounding, or for which there is evidence of an intention to commit another offence, is out of scope because such cases could be charged under existing serious violent offences.
>
> An example of the worst class of strangulation within scope would feature the hallmarks of coercive or controlling behaviour and the terror we have identified. For example, a perpetrator enters the victim's home in breach of a protection order. After an altercation, he strangles her with his hands on and off for several minutes, leaving her struggling for breath, incontinent and unconscious. The victim thinks she will die and knows that the perpetrator has the power to kill her. Because he invaded her home, after the strangulation, she lives in constant fear for her security and life. As a consequence, he has achieved coercion and control over her.
>
> It is the terror that results from strangulation that is at the heart of this kind of criminal conduct. That terror is likely to seriously affect all aspects of the victim's life. In our view, the terror that results from this "worst class of case" is greater than the harm of a minor injury and at least equivalent to a serious physical injury.

[27] The Law Commission thus recommended a maximum penalty of seven years' imprisonment.[42] That would equivalise strangulation with wounding with intent to injure, which carries that maximum sentence.[43] (It may be interpolated that aggravated injury carries the same maximum sentence also.[44]) It would also make strangulation "slightly more serious" than disabling, an offence that also affects a victim's consciousness, and carries a five-year maximum sentence.[45] The Law Commission considered "the terror resulting from strangulation or suffocation marks that offence out as more serious than 'disabling'".[46]

[28] It will be seen, then, that the Law Commission's recommendations were largely carried through into the 2018 amending legislation, with two material

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41 At [5.42]–[5.44].
42 At [5.45].
43 See Crimes Act, ss 188(2).
44 Section 191(2).
45 Law Commission, above n 23, at [5.46]. See also at [4.41]–[4.43]; and Crimes Act, s 197.
46 At [5.46].

variations. First, s 189A extends to reckless as well as intentional strangulation. Secondly, the actus reus also includes blocking the victim's nose and/or mouth.

[29] The legislative history just reviewed demonstrates Parliament's intent to signal to the public, police and others working in the criminal justice system the distinct significance of strangulation offending. As strangulation is a significant risk indicator of later homicide, its enactment as a new offence was designed to serve multiple policy objectives beyond those generally provided for in the Sentencing Act 2002: to encourage early and effective intervention in incidences of family violence, to educate those working in the criminal justice sector of the distinctive risks associated with this offending, and to leave a warning marker on the offender's criminal history.

High Court authority

[30] In *Ackland*, Cooke J set out, after careful consideration, what he considered were the aggravating factors of strangulation offending. These were: (1) strangulation in the context of a domestic or intimate relationship/vulnerability of the victim; (2) threats, particularly threats to kill; (3) loss of consciousness; (4) multiple events;

(5) other violence/injury — without double-counting, where injury occurs "it is likely to be an aggravating circumstance"; (6) significant impact on others (including children); and (7) breach of a protection order — which "should attract higher culpability".[47]

[31] The Judge went on to suggest some potential sentencing bands.[48] He suggested that:[49]

> At the lower end would be offending involving strangulation as an intentional result of pressure being applied to the throat for a brief period, potentially without any of the above factors being present. Such offending might attract a starting point of six months to two years' imprisonment."

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47 *Ackland v New Zealand Police*, above n 10, at [26].
48 At [30]–[32].
49 At [30].

In contrast, at the opposite, highest, end would be offending exemplified in the Law Commission's report set out at [26] above.[50] Cooke J suggested that particular offending would attract a starting point of five to seven years' imprisonment.[51]

[32] The offending in *Ackland* took place in the context of a domestic relationship with children present. The act of strangulation was accompanied by a threat to kill and caused the victim to lose consciousness and suffer ongoing psychological effects. A starting point of three years and three months' imprisonment was upheld on appeal in the High Court.[52]

[33] The next, similar case is *Houkamau v Police*.[53] The appellant and the victim were in a relationship when they got into an argument. The appellant grabbed the victim by her clothing and shoved her out the front door. He then punched her forehead and put his hands around her neck, eventually shoving her to the ground. On appeal, a starting point of two years was upheld.[54]

[34] *Parker v Police* involved an act of strangulation after several weeks in which three incidents of increasing seriousness occurred involving the appellant assaulting the victim and damaging the house.[55] After one argument, the appellant screamed at the victim and punched a hole in the door before grabbing the victim around the throat and squeezing. A starting point of two years was upheld on appeal.[56]

[35] In *T*, the appellant and the victim were in a relationship.[57] After an argument the victim left the house. On her return, the appellant ran at her and kicked her forehead, causing her to fall to the ground and lose consciousness. When the victim came to, the appellant was dragging her across the ground. He forced her into a bedroom. When the victim tried to escape through a window, the appellant grabbed her around the neck and hauled her onto the bed. The victim lost consciousness and

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50 At [31], citing Law Commission, above n 23, at [5.43].
51 At [31].
52 At [46].
53 *Houkamau v Police*, above n 10.
54 At [36].
55 *Parker v Police*, above n 10.
56 At [29].
57 *T v New Zealand Police*, above n 10.

control of her bladder. On appeal, the three-year starting point was upheld but considered "lenient".[58]

[36] Finally, in *Mokaraka v Police* the appellant strangled his partner while arguing with her.[59] He also grabbed the victim by her hair and dragged her down the hallway, bit her finger and threatened to kill her. A starting point of two years was considered appropriate on appeal.[60]

Sentencing strangulation — this Court's approach

[37] This is a conventional sentence appeal under ss 244 and 250 of the Criminal Procedure Act 2011. As it is, however, the first occasion this Court has dealt with s 189A sentencing, we provide a broader measure of guidance than usual on starting points for this offending. Accordingly, we will begin by considering the appropriate starting point for strangulation offending generally, before turning to the starting point for Mr Shramka's offending and then to his personal mitigating or aggravating factors.

Starting point for strangulation offending

[38] The analogy drawn by the Law Commission with wounding with intent suggests sentencing judges may be expected to sentence strangulation with an eye also on that offence, and the sentencing of other offences with similar maximum penalties. In *R v Tai*, and again more recently in *Everett v R*, this Court noted the need to bear in mind sentencing of related offences to avoid irrational divergence.[61] Those cases addressed divergences that had developed between manslaughter and grievous bodily harm sentencing. In a domestic context in *Everett*, we observed:[62]

> As we noted earlier, death following the deliberate infliction of [grievous bodily harm] must be a seriously aggravating factor in sentencing. However, if common fact patterns produce similar sentencing starting points whether or not death ensues, something is likely to be wrong. Either some manslaughter sentencing is too low, or some [grievous bodily harm] sentencing is too high.

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58 At [57].
59 *Mokaraka v Police*, above n 10.
60 At [17].
61 *R v Tai* [2010] NZCA 598 at [11]–[12]; and *Everett v R* [2019] NZCA 68 at [20]–[27].
62 *Everett v R,* above n 61, at [23].

[39] It follows that sentencing for strangulation will need to be undertaken in the light of sentencing approved by this Court in analogous offending, in particular wounding with intent to injure and aggravated injuring. It follows, too, that some of the methodology for grievous bodily harm offending prescribed in the guideline judgment in *R v Taueki* may assume relevance,[63] provided, as this Court has said, there is a "recalibration" to reflect lower maximum penalties.[64] Such recalibration is not simply a mathematical exercise. As this Court said in *Harris v R* some aggravating features identified in *Taueki* are likely to be relevant only to grievous bodily harm offending, and the wide range of moderate-violence offences offers scope for prosecutorial discretion and potential overcharging.[65]

[40] *Nuku v R* is a guideline decision of this Court for sentencing under ss 188(2), 189(2) and 191(2) where the offending involves intent to injure.[66] Section 188(2) — wounding with intent to injure — is what the Law Commission drew upon in recommending a seven-year maximum sentence for strangulation as a stand-alone offence.[67] Section 191(2), aggravated injuring with intent to injure, shares the same maximum sentence; s 189(2), injuring with intent, has a five-year maximum sentence. In *Nuku* this Court set out the bands applicable to these three offences:[68]

> (a) Band one: where there are few aggravating features, the level of violence is relatively low and the sentencing judge considers the offender's culpability to be at a level that might have been better reflected in a less serious charge, a sentence of less than imprisonment can be appropriate.
>
> (b) Band two: a starting point of up to three years' imprisonment will be appropriate where three or fewer of the aggravating factors listed at [31] of *Taueki* are present.
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> (c) Band three: a starting point of two years up to the statutory maximum (either five or seven years, depending on the offence) will apply where three or more of the aggravating features set out in *Taueki* are present and the combination of those features is particularly serious. The presence of a high level of or prolonged violence is an aggravating factor of such gravity that it will generally require a starting point within band three, even if there are few other aggravating features.

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63 *R v Taueki* [2005] 3 NZLR 372 (CA).
64 *Solicitor-General v Milne* [2020] NZCA 134 at [34].
65 *Harris v R* [2008] NZCA 528 at [8].
66 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39.
67 Law Commission, above n 23, at [5.45].
68 *Nuku v R*, above n 66, at [38].

[41] The offences to which *Nuku* applies are ones where injuring or wounding has occurred. By contrast, strangulation may not leave visible physical injury at all (and injury is not an element of the offending). As with much domestic violence offending, the enduring injury is more likely to be psychological, which will often be exactly the intended effect. Strangulation generally is potentially lethal; undertaking it typically involves both coercive control and the knowing assumption of risk of really serious harm. Any comparison with sentencing principles established for injuring or wounding needs to bear those considerations in mind.

[42] Drawing on *Taueki*, *Nuku, Ackland* and the legislative history reviewed earlier, we consider the relevant aggravating factors (relating to the offence) for strangulation to be these eight (which we list in logical chronological order):

(a) *Premeditation:* as noted in *Taueki*, the degree of premeditation and planning directly affects culpability.[69]

(b) *History of strangulation or prior very serious domestic violence:* this factor is required to recognise the particular risk of strangulation as a precursor to a future fatal attack, and to recognise that there is a pronounced risk of fatality where strangulation is repeated. This factor is not meant to re-punish the defendant, but to recognise the increased risk of fatality for the victim.

(c) *Vulnerability of the victim:* as also noted in *Taueki,* this factor concerns the physical or psychological disparity between the offender and victim, enlarging the risk of injury and extending the psychological consequences for the victim.[70]

(d) *Home invasion/breach of protection order:* we consider these two factors should be taken together, although the presence of both requires a more condign response. They recognise the right of the victim not to be harmed in her own dwelling place, whether or not

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69 *R v Taueki*, above n 63, at [31(b)].
70 At [31(i)].

reinforced by formal court protection order. Invasion of the sanctity of the home is an aggravating factor in all violent offending.[71]

(e) *Aggravated violence:* repeated or extended strangulation, in particular where loss of consciousness arises, indicates, as Cooke J noted in *Ackland*, "a longer, purposeful period of strangulation warranting higher culpability".[72] To that we would add loss of control of bodily functions.

(f) *Threats to kill:* use of associated threats to kill is aggravating, given the coercive nature of the offending and the particular and enduring psychological consequences of strangulation, in which such threats have continued resonance.

(g) *Enduring harm to the victim:* enduring consequences (psychological or physical) are an aggravating factor, recognising the terror strangulation causes its victims.

(h) *Harm to associated persons:* as Cooke J noted in *Ackland*, "offending in the presence of children is aggravating, given the potential for physical or psychological harm to the children, and the potential longer-term adverse effect of the normalisation of such violence".[73]

[43] Later authority may identify other aggravating factors, but this list covers the primary ones. We do not think it useful, however, to suggest bands based on the number of factors present. Some factors overlap to a degree; much strangulation offending will involve all or most of them — but that does not necessitate a rush to the top of the scale. This Court has noted the risks of an over-mathematical approach, over-counting factors. As we observed in *Taueki*:[74]

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71 *Solicitor-General v Hutchison* [2018] NZCA 162, [2018] 3 NZLR 420 at [27].
72 *Ackland v New Zealand Police*, above n 10, at [26(c)].
73 At [26(f)].
74 *R v Taueki* above n 63, at [42]. See also *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [35].

> … sentencing Judges will also need to exercise judgment in assessing the gravity of each aggravating feature. The features of the offending in each case must be carefully assessed in order to establish a starting point which properly reflects the culpability inherent in the offending.

[44] Sentencing is an evaluative exercise and guideline judgments must not be applied in a mechanistic way. It is important to judge relativity by reference to *examples* given in guideline judgments, whether they be theoretical or actual (as in *Zhang v R*).[75] The *absence* of an aggravating factor may also be more significant than its presence. When present, it is the *intensity* of the factor, in particular of the nature of the violence deployed and the harm caused to the victim, that requires careful assessment.[76]

[45] We propose to take that approach here, rather than, as in *Taueki* and *Nuku*, setting bands by reference to the number of aggravating factors engaged. Instead we provide two examples as reference points for comparison in future sentencing. Subsequent decisions, at all levels, will add to them. Our analysis should not be taken to endorse other, prior sentencing authority.

(1) Highest level s 189A offending

[46] We start with the example given by the Law Commission as exemplary of the "worst class" or band of offending under s 189A.[77] We set it out again:

> An example of the worst class of strangulation within scope would feature the hallmarks of coercive or controlling behaviour and the terror we have identified. For example, a perpetrator enters the victim's home in breach of a protection order. After an altercation, he strangles her with his hands on and off for several minutes, leaving her struggling for breath, incontinent and unconscious. The victim thinks she will die and knows that the perpetrator has the power to kill her. Because he invaded her home, after the strangulation, she lives in constant fear for her security and life. As a consequence, he has achieved coercion and control over her.

[47] The example involves six of the eight aggravating factors identified at [42]: (a) — premeditation (probably), (c) — vulnerability, (d) — home invasion and breach of protection order, (e) — aggravated violence to an intense degree (involving

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75 *Orchard v R*, above n 74, at [35]; *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
76 *R v Taueki*, above n 63, at [30].
77 See [26] above, citing Law Commission, above n 23, at [5.43].

repetition, duration and effect, resulting in unconsciousness), (f) — threats to kill (probably), and (g) enduring psychological harm to the victim, also to an intense degree. Assuming all these factors apply, we consider it would compel a starting point of five and a half years' imprisonment.

[48] We note that if factor (b) — history of strangulation or very serious domestic violence — had been engaged as well, the appropriate starting point would be six years' imprisonment.

[49] We emphasise the need for qualitative assessment, rather than simple factor-counting. A very bad case, albeit with a more limited number of individual aggravating factors, might still command a more condign sentence than that suggested at [47].

(2) Moderate s 189A offending

[50] We take the present case as an example of moderate level s 189A offending. Without diminishing the violence in the present case, it is somewhat removed from the extremity of the Law Commission's example. We note that it engages four aggravating factors: (c) — vulnerability (the parties' physical disparity demonstrated by the fact the victim almost passed out before managing to break free), (d) — breach of protection order (but not at the point of entry; it arose from Mr Shramka refusing to leave after visiting by invitation), (e) — aggravated violence (being in the order of 30 seconds, nearly resulting in unconsciousness), and (g) — enduring psychological harm to the victim.

[51] We would not however engage factor (b) — history of strangulation or very serious domestic violence — here. Although Mr Shramka has other convictions for domestic violence, they do not reach the level of aggravating the starting point of this offence. Rather, they are matters requiring some uplift to the starting point and are to be taken into account at the second stage of sentencing, as personal to him (his previous conviction history). Factors (a) — premeditation, (f) — threats to kill, and (h) — harm to associated persons — are not engaged in this case.

[52] In our view, therefore, in contrast to the Law Commission's example, the present case would compel a starting point of three years (36 months). We note that is some eight months longer than the figure the Judge adopted.[78]

[53] Had home invasion been involved, and the attack had resulted in unconsciousness, a starting point of four years or more would have been justified.

(3) Lower level s 189A offending

[54] We will not offer a worked example of this category, which will need to be developed on a case-by-case basis in future decisions, and by reference to the higher levels analysed above. We are satisfied the present offending does not fall within this category. However, had the strangulation been more transitory, and the harm less enduring, a lesser sentence would have applied — perhaps as low as two years. Such offending might be regarded as "lower level" offending, for which an eventual sentence of home detention may be available (assuming a suitable address was available, which often is not the case where domestic violence is in issue).

Sentencing — this case

[55] It follows we consider the starting point adopted in the present case was lenient. In our view, 36, rather than 28, months was appropriate, for the reasons given at [50]–[52] above. We turn now to adjustments needing to be made to that figure.

Uplifts

[56] As noted, the Judge uplifted the starting point by 12 months for the two breaches of the protection order, a further four months for Mr Shramka's male assaults female conviction, and a further two months for his other relevant previous convictions.[79]

[57] These were not challenged by Mr Mather. However, as noted at [51] above, we exclude Mr Shramka's past domestic violence as an aggravating factor in setting

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78 Sentencing notes, above n 5, at [24].
79 At [24].

the starting point, to avoid double-counting given the aggravating factors we have set out at [42]. Bearing in mind the points made by this Court in *Orchard* about uplifts, we would make another two adjustments.[80] First, the two breaches of the protection order for which Mr Shramka was being sentenced were taken into account as an aggravating factor in setting the starting point. To avoid further double-counting, we would reduce the relevant uplift from 12 to nine months.[81] Secondly, we consider a three-month uplift for prior offending is as much as is appropriate in this case.

[58] That would take the appropriate uplifted starting point to four years' (48 months') imprisonment.

Personal factors

[59] No challenge has been mounted against the 30 per cent discount the Judge afforded for Mr Shramka's dysfunctional upbringing and rehabilitative efforts. It may be noted that no allowance was made for remorse, Mr Shramka continuing to deny his offending in his probation interview (although expressing some remorse during his interview with the writer of the s 27 report).

[60] That would reduce the sentence to a little over 33 months, or two years and nine months' imprisonment. That is against the Judge's assessment of 32 months. Subject to the remaining issue, we agree with Ms Wong, for the Crown, that the Judge's sentence was available and should not be altered.

Allowance for time spent on EM bail

[61] As for the time Mr Shramka spent on EM bail, the extent to which the sentence is discounted taking account of this factor requires an evaluative assessment of all the circumstances in s 9(3A) of the Sentencing Act, namely: (1) the period of time spent on EM bail; (2) the restrictiveness of the EM-bail conditions; (3) the extent to which the EM-bail conditions were complied with; and (4) any other relevant matter.[82]

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80 *Orchard v R*, above n 74, at [39]–[42].

81 Because breach of the protection order is a factor in setting the strangulation sentence starting point. The reduction might have been more, but we take into account also the injuring with intent charge and the 2015 incident leading to the male assaults female charge.

82 Sentencing Act 2002, s 9(2)(h); *Tamou v R* [2008] NZCA 88 at [19]; *Keown v R* [2010] NZCA 492 at [12]; and *Rangi v R* [2014] NZCA 524 at [10].

[62] Unlike the Parole Act 2002, which provides a 100 per cent credit for time spent on custodial remand, time spent on EM bail is not "custodial".[83] Discounts allowed for time spent on EM bail commonly range between 30 and 50 per cent, and discounts of up to 50 per cent are not uncommon.[84] In *Paora v R* particularly restrictive, supervised EM bail attracted a 70 per cent discount.[85]

[63] Mr Shramka was admitted to EM bail on 3 October 2019 until his trial in April 2021. The trial was originally meant to take place in June 2020 but was rescheduled twice due to difficulties associated with COVID-19. This resulted in Mr Shramka spending 19 months on EM bail. He was subject to standard EM-bail conditions. These included to reside at his bail address for 24 hours, seven days a week, and not to leave that address without the prior approval of the Department of Corrections' EM-bail team. He was not to consume, possess or use any alcohol or drugs, nor was he to associate or have any contact with the victim. On 19 December 2019, the conditions were varied slightly to allow Mr Shramka to travel to a supermarket and gym once a week, and to attend employment-related appointments. On 20 November 2020, the conditions were further varied to allow Mr Shramka to be absent from the bail address between 7 am and 7 pm two days a week, under the condition that he not travel further than a two-kilometre radius from the address. In December 2020, the conditions were again varied to enable Mr Shramka to work.

[64] During this period, Mr Shramka breached the conditions once, for consuming alcohol. He has otherwise been fully compliant.

[65] In these circumstances, we agree that a discount of 30 per cent would be appropriate, given the progressive relaxation of Mr Shramka's confinement. That would be six months, rather than the five-month discount allowed by the Judge.

Conclusion

[66] It follows that, by a slightly different route, we reach the same end sentence as the Judge. It was not manifestly excessive.

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83 Compare Parole Act 2002, s 90; and Bail Act 2000, s 30Q.
84 *Paora v R* [2021] NZCA 559 at [53].
85 At [62].

Result

[67] The appeal is dismissed.

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