IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 54/2022
[2022] NZSC 97

BETWEEN	MOHAMMED OMAR NASSERY Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: N T C Batts for Applicant
T R Simpson for Respondent

Judgment: 12 August 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mohammed Nassery seeks leave to appeal against the dismissal in the Court of Appeal of his sentence appeal.[1]

[2] Mr Nassery was convicted by a jury following trial in the Auckland District Court on the following charges: two charges of knife-based aggravated robbery (in each case, a few hundred dollars cash and cigarettes from different dairies); one charge of stealing $50 worth of diesel from a service station; and one charge of receiving stolen registration plates valued at between $20 and $30.

[3] He is a former refugee from the Soviet invasion of Afghanistan, and was 42 years old at the time of sentencing. He arrived in New Zealand as an 11-year-old.

---

1 *Nassery v R* [2022] NZCA 213 (Clifford, Venning and Moore JJ) [CA judgment].

He is a methamphetamine addict who relapsed following early exit from a drug rehabilitation programme. He has prior convictions, but none are relevant.

Lower Court judgments

[4] In the District Court, Judge Ryan took a starting point of five years for all offending,[2] then deducted 50 per cent for background factors (addiction 20 per cent, refugee and family background 20 per cent, separate mental health issues five per cent and other general factors such as EM bail five per cent). This left a final sentence of two years and six months.[3]

[5] While these are significant discounts, the essential argument for the applicant was articulated in the Court of Appeal as a matter of evaluative process. It was argued that the guideline judgment (*R v Mako*)[4] and the necessity of reaching the two-year limit to qualify for home detention, were applied too rigidly. A prior and broader assessment should have been made. That is, the sentencing Judge failed first to satisfy herself, as required by s 16 of the Sentencing Act 2002, that relevant purposes and principles of sentencing could only be met by a sentence of imprisonment.

[6] The Court of Appeal described the applicant's argument as "misguided".[5] The Court said s 16 is not a free-standing first principle or a dominant purpose section. It referred to s 15A(1)(b) directing that a sentence of home detention is only available if the applicable sentence would otherwise have been "a short-term sentence of imprisonment" — that is, a term of 24 months or less as defined in s 4(1) of the Parole Act 2002.

[7] The Court referred to the consistency-based justifications for guideline judgments repeatedly referred to in the authorities and endorsed by this Court in *Hessell v R*.[6] It also emphasised that guideline judgments assist but do not displace the essentially evaluative task allocated to the sentencing judge. But, in general terms,

---

2 Four years and six months for the first robbery, a four-month uplift for the second robbery and two months for the other two charges.
3 *R v Nassery* [2022] NZDC 868.
4 *R v Mako* [2000] 2 NZLR 170 (CA).
5 CA judgment, above n 1, at [21].
6 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

guideline judgments provide the reasoning methodology by which judges can decide in terms of s 16, whether the purposes and principles of sentencing really do require a sentence of imprisonment. Following references to *Zhang v R* and *Moses v R*,[7] the Court summarised the required approach:[8]

> … if, at the conclusion of what we have described as the orthodox sentencing exercise, the court has arrived at an end sentence of more than a short term sentence of imprisonment a non-custodial sentence is unlikely to be consistent with the application of the remaining purposes and principles of the Act.

The Court then concluded:

> [37] The short answer to the present appeal is that, given the sentence under consideration was of two years, six months' imprisonment, home detention was not an available sentence. Section 15A(1)(b) of the Act applies. Mr Nassery was not eligible for a short term sentence of imprisonment.

[8] It was, the Court noted, unnecessary for the sentencing Judge to refer to s 16.

Relevant provision

[9] Section 16 of the Sentencing Act provides:

> **16 Sentence of imprisonment**
>
> (1) When considering the imposition of a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.
>
> (2) The court must not impose a sentence of imprisonment unless it is satisfied that,—
>
> (a) a sentence is being imposed for all or any of the purposes in section 7(1)(a) to (c), (e), (f), or (g); and
>
> (b) those purposes cannot be achieved by a sentence other than imprisonment; and
>
> (c) no other sentence would be consistent with the application of the principles in section 8 to the particular case.
>
> (3) This section is subject to any provision in this or any other enactment that—

---

7 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648; *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.

8 CA judgment, above n 1, at [34].

(a) provides a presumption in favour of or against imposing a sentence of imprisonment in relation to a particular offence; or

(b) requires a court to impose a sentence of imprisonment in relation to a particular offence.

Submissions

[10] For the applicant, Mr Batts reprises the arguments advanced in the Court of Appeal. Guideline judgments are focused on the consistency principle in s 8(e), so cannot override other relevant purposes and principles. Home detention sentences ought not to involve a struggle to get to a short-term sentence of imprisonment in accordance with the relevant consistency driven guideline judgment. Rather, if the sentencing judge's own evaluation is that the purposes and principles of sentencing can be met by a sentence short of imprisonment, then s 16 directs that a non-custodial sentence is required. Mr Batts argues that the purpose of s 15A(1) was to address the issue of over punishing through home detention (as opposed to imposing less restrictive non-custodial options). It was not, he argued, designed to create the ceiling currently attributed to it.

[11] In its submissions, the respondent generally adopts the reasoning of the Court of Appeal.

Analysis

[12] We accept that a question of principle may well arise in cases such as this one about the relationship between ss 15A and 16 and the purposes and principles of sentencing set out in the Sentencing Act, but we are not satisfied that this is an appropriate case to address it.

[13] The difficulty for the applicant here is that the discounts given were already generous, but the sentencing Judge explicitly concluded that a two-year sentence was a bridge too far. The applicant had argued in the District Court for a 70 per cent discount from the five-year starting point. The sentencing Judge then put to counsel the counterfactual of a guilty plea on top of the background-based discounts. *Hessell* would dictate that, if he pleaded guilty, Mr Nassery should receive a further 25 per cent

deduction or a total discount of 95 per cent. That would have left a 3-month sentence of imprisonment, convertible to 6 weeks home detention — for two armed robberies, theft and receiving. This counterfactual explains why the Judge's own overall evaluation did involve an assessment of the necessity for a sentence of imprisonment in the circumstances of the case. Also implicit in the Judge's reasoning was that, had Mr Nassery entered an early guilty plea, he probably would have qualified for a sentence of home detention based on the acceptance of responsibility such plea would have represented.

[14] We conclude therefore that the proposed appeal lacks sufficient prospects of success to justify the grant of leave.[9] The application for leave to appeal is dismissed.

Solicitors:
Haigh Lyon, Auckland for Applicant
Crown Law Office, Wellington for Respondent

---

9 *Prime Commercial Ltd v Wool Board Disestablishment Company Ltd* [2007] NZSC 9, (2007) 18 PRNZ 424 at [2].