

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 57/2023
[2023] NZSC 103

BETWEEN DANIEL GARY FRENCH
Applicant

AND THE KING
Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: A J Bailey for Applicant
Z A Fuhr for Respondent

Judgment: 10 August 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr French pleaded guilty to a charge of manslaughter and was sentenced to a term of imprisonment of three years, cumulative on a sentence of seven years and two months imposed in relation to earlier drug and firearms-related charges.¹ The earlier sentence was imposed by Gendall J along with a sentence of life imprisonment for murder.² Mr French successfully appealed against the murder conviction (the 2021 Court of Appeal judgment).³ He subsequently pleaded guilty to manslaughter. He also appealed against the sentence for the drug and firearms offending. That appeal

¹ *R v French* [2022] NZHC 2470 (Osborne J) [HC judgment].

² *R v Cochrane* [2020] NZHC 1485.

³ *Sullivan v R* [2021] NZCA 702 (Brown, Mallon and Moore JJ).

was allowed on technical grounds, and the sentence was recalibrated without altering the overall outcome of an effective sentence of seven years and two months.⁴

[2] A point raised on Mr French's behalf at the time of the manslaughter sentencing was that Mr French faced a threat to his life from the members of a gang while in prison, arising from the fact that the victim of the manslaughter had been a member of that gang. This led to special measures being taken to keep Mr French separate from members of that gang in the prison. It was argued these measures reduced the availability to Mr French of rehabilitative programmes, which could impact on his chances of being granted parole.

[3] In sentencing Mr French, Osborne J allowed a 10 per cent discount to recognise this factor.⁵

[4] The sentencing approach adopted by Osborne J was to commence with a starting point of six years and nine months for the manslaughter charge. He then allowed a 25 per cent discount for Mr French's guilty plea, a five per cent discount to recognise that Mr French had agreed to participate in a restorative justice process and a further 10 per cent for the problems Mr French would face in prison. This amounted to a 40 per cent discount, reducing the starting point to four years. He then made a further adjustment based on totality, given that Mr French was already serving a sentence of seven years and two months for the earlier offending. Applying the totality principle, he made a further reduction and reached a final sentence of three years' imprisonment.⁶

[5] If Osborne J had allowed a 15 per cent discount for Mr French's problems in prison, that would have increased the overall discount from 40 per cent to 45 per cent, reducing the starting point of six years and nine months to three years and eight months. It is far from clear that this would have made any difference to the overall outcome, given the totality adjustment. If it had, it could have been expected that the

⁴ At [93].

⁵ HC judgment, above n 1, at [52].

⁶ At [57].

end sentence may have been in the vicinity of two years and nine months' imprisonment, assuming the adjustment for totality remained at 25 per cent.

[6] Mr French appealed to the Court of Appeal against the three-year sentence. The Court allowed the appeal and reduced the sentence to two years and six months.⁷ Despite this, Mr French seeks leave for a further appeal to this Court. He wishes to argue, if leave to appeal is granted, that the reduction in his sentence by the Court of Appeal was insufficient. The focus of his proposed appeal to this Court is the discount for the problems Mr French faces in prison.

[7] Mr French argued in the Court of Appeal that the discount for his problems in prison should be increased from 10 per cent to 15 per cent. In addition, he argued that the 15 per cent discount should be applied not only to the manslaughter sentence, but also to the seven-year-two-month sentence for his earlier offending. He had not sought this discount for his drug and firearms offending in the High Court, nor at the earlier sentencing. The Court of Appeal described this submission as being made “[s]omewhat optimistically”.⁸ Earlier in the judgment, the Court had refused to recall the 2021 Court of Appeal judgment so that the sentencing outcome for the drug and firearms offending could be reopened.⁹

[8] Mr French highlights a comment in the Court of Appeal’s judgment about discounts for those who face problems in prison of the kind he is experiencing. The Court said:¹⁰

[67] We are not comfortable with the idea that a sentence that is otherwise appropriate should be reduced to take account of possible difficulties that might be encountered by prisoners at the hands of rival gang members in the prison. ...

[9] It seems to us that this was referring to the argument that the discount should be applied to a sentence that was not under appeal; indeed a sentence that had already been the subject of an appeal. The Court did not express any conclusion on the point;

⁷ *French v R* [2023] NZCA 176 (Cooper P, Lang and Downs JJ) [CA judgment].

⁸ At [66].

⁹ At [37].

¹⁰ Mr French says the reference to a “rival” gang is inapposite as he is not a gang member.

it said it was not necessary to do so because there were other factors justifying a six-month reduction in the manslaughter sentence imposed by Osborne J.¹¹

[10] Mr French says the Court's expression of discomfort amounted to a decision that sentencing courts should not take into account custodial issues similar to those faced by Mr French. He says the Court therefore overruled the approach taken by Osborne J and that taken in other cases, for example, *R v RHB*.¹²

[11] Mr French acknowledges the Court of Appeal said Osborne J was justified in taking into account his custodial issues when sentencing him on the manslaughter charge.¹³ He said the Court's later expression of "discomfort" could not be reconciled with its "justified" comment. It seems to us to be rather a confirmation that the Court's discomfort was confined to the notion that it should reopen a sentence that was not under appeal, rather than being a general comment about sentence discounts for custodial issues.

[12] We do not see the Court of Appeal as having overruled earlier decisions. So Mr French's submission that the overruling gives rise to a matter of public importance is not accepted.¹⁴

[13] Nor do we see any appearance of a miscarriage of justice in the way in which the Court of Appeal addressed the appeal to that Court against the manslaughter sentence.¹⁵ It did after all allow the appeal.

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

Solicitors:
Crown Law Office, Wellington for Respondent

¹¹ At [67].

¹² *R v RHB* [2012] NZHC 2879 at [54].

¹³ CA judgment, above n 7, at [65].

¹⁴ Senior Courts Act 2016, s 74(2)(a).

¹⁵ Section 74(2)(b).