IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA51/2024
CA142/2024
[2024] NZCA 334

BETWEEN	KAIYA FRANCES SHUTE Appellant
AND	THE KING Respondent

Hearing:	15 April 2024
Court:	Cooke, Collins and Moore JJ
Counsel:	E P Priest and M C Jaquiery for Appellant H G Clark for Respondent
Judgment:	23 July 2024 at 10.30 am

JUDGMENT OF THE COURT

A The application for bail pending appeal is declined.

B The application for leave to adduce further evidence on appeal is granted.

C The appeal against sentence is dismissed.

D The appeal against refusal to grant name suppression is dismissed.

REASONS

Collins and Moore JJ [1]
Cooke J (dissenting) [122]

COLLINS AND MOORE JJ

(Given by Moore J)

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Introduction

[1] Following a trial by jury, Kaiya Shute and her co-defendant, William Grace, were found guilty of the manslaughter of Connor Boyd. Ms Shute was found guilty of manslaughter by assault. Mr Grace was found guilty of manslaughter by dangerous driving.

[2] Shortly before her trial, Ms Shute pleaded guilty to a charge of assault with intent to injure. Then, at the commencement of the trial, she pleaded guilty to two further charges of assault with intent to injure and three charges of common assault.

[3] Two months ahead of sentencing, Ms Shute sought to have the interim name suppression granted by this Court[1] (and continued throughout the trial) extended pending the Supreme Court's determination of the appeals in *E (SC 13/2023)*[2] or, alternatively, made permanent. The trial Judge, Gault J, declined the application.[3]

[4] On 16 February 2024, Mr Grace and Ms Shute were sentenced. Ms Shute was sentenced to two years and two months' imprisonment on the charge of manslaughter. In respect of the three charges of assault with intent to injure and the three charges of common assault she was sentenced to nine months' imprisonment and three months' imprisonment respectively, with all sentences ordered to be served concurrently.[4]

[5] Ms Shute now appeals her sentence and the decision declining name suppression. She also applies for bail pending appeal. For the reasons given we dismiss both appeals and accordingly decline to grant bail pending appeal.

The offending

[6] We gratefully adopt the Judge's summary of the facts as set out in his sentencing notes:

> [5] Ms Shute, on Thursday 21 April 2022 at approximately 2:00 am, inside Saturdays bar in Britomart, you saw Ms Olson, called her names, poured your drink over her head, grabbed her drink and poured that over her head and then threw multiple punches at her body and kicked her leg before security intervened. This was the first assault with intent to injure.
>
> [6] The following Saturday evening, you, Mr Grace and some friends spent time at your flat in Ponsonby before Mr Grace drove you and three friends into town in his Hilux Surf at about 12:30 am on Sunday 24 April 2022. You again went to Saturdays bar. Ms Olson was there again too. At around 2:00 am, you approached her from behind, grabbed her hair and dragged her

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1 *S (CA284/2022) v R* [2022] NZCA 383 [Interim suppression appeal judgment].

2 *E (SC 13/2023 v R* [2023] NZSC 61. The Supreme Court granted leave to appeal the judgment of *LF (CA596/2022) v R* [2022] NZCA 656. The Supreme Court's substantive decision was released after the hearing of these appeals: *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83.

3 *R v Shute* [2023] NZHC 3835 [Suppression judgment].

4 *R v Shute* [2024] NZHC 197 [Sentencing judgment] at [79]–[82].

to the ground. You then ran away. This was the second assault with intent to injure.

[7] Mr Grace, at around 2:15 am, Mr Boyd and a friend were having a conversation outside Saturdays near Takutai Square. You approached them and joined the conversation, which began to get heated. You then punched Mr Boyd once in the face, which caused him to stumble backwards. This was common assault.

[8] Ms Shute, at that time you and two friends were sitting in Mr Grace's vehicle. Someone saw the altercation between Mr Grace and Mr Boyd, and you got out of the vehicle and walked towards them. The four of you were then standing on Roukai Lane talking. You became visibly aggressive towards Mr Boyd. You pushed him with two hands forcefully in the chest and neck area, causing him to fall backwards into a planter box. This was common assault. As Mr Boyd was sitting in the planter box, you lifted your right leg and front kicked him in the chest. This was another assault with intent to injure. As Mr Boyd attempted to get out of the planter box, you slapped him across the face with your right open palm. This was common assault. Mr Boyd got up from the planter box and attempted to walk backwards away from you. You followed him until security intervened.

[9] A few minutes later, after a conversation between Mr Grace and Mr Boyd on Takutai Square, Ms Shute and a friend returned to Mr Grace's vehicle, followed shortly afterwards by Mr Grace. Mr Grace, you were in the driver's seat and Ms Shute, you were sitting in the back right behind Mr Grace. Mr Grace drove down Galway Street and turned left onto Gore Street.

[10] At approximately 2:36 am, Mr Boyd was standing in the street talking to people in the car driven by Ms Olson's mother, who had arrived to take her and her friends home. Mr Grace, you stopped as you turned the corner and Mr Boyd walked over to your vehicle. You and Ms Shute both had the right-hand side windows down. Words were exchanged between you Mr Grace and Mr Boyd.

[11] Ms Shute, you then reached out of the right rear window and struck Mr Boyd in the head with your right hand. This was common assault.

[12] After he was hit, Mr Boyd said to Mr Grace "control your missus". Mr Grace, you then leaned out of the driver's window and grabbed Mr Boyd by the shirt, and drove off while holding onto Mr Boyd, causing him to stumble, turn and run alongside the vehicle. Ms Shute, you also reached out and grabbed onto Mr Boyd from behind. You both held onto Mr Boyd while Mr Grace proceeded to drive along Gore Street. Mr Grace turned sharply right and undercut the corner turning into Customs Street. At some point during the turn, Mr Boyd managed to jump onto the running board of the vehicle, holding onto the exterior. Mr Grace, you continued to drive at speed along Customs Street heading towards Queen Street. As your vehicle approached the next intersection at Commerce Street, Mr Boyd lost his footing and fell off the running board. As he fell, the back right wheel of the vehicle ran over Mr Boyd's head and body. The fall and bump caused Mr Boyd to spin around and land close to the middle of the road.

[13] You both felt a bump. Mr Grace, you continued driving without stopping to check on Mr Boyd, who was lying in the road. You drove back to

> your flat. Ms Shute called 111 approximately seven minutes after Mr Boyd fell.[[5]]
>
> [14] Members of the public rushed to Mr Boyd and called an ambulance. Tragically, Mr Boyd died three days later as a result of his unsurvivable injuries.

Sentence appeal

Sentencing decision

[7] The Judge set his starting point by reference to Ms Shute's overall offending against Mr Boyd, taking the charge of manslaughter as the lead offence.[6] He identified two aggravating factors for this offending:[7]

(a) first, actual violence, given Ms Shute punched, kicked, and slapped Mr Boyd earlier in the evening before reaching out of the vehicle window, striking Mr Boyd, and then grabbing hold of his shirt as Mr Grace drove off; and

(b) secondly, victim vulnerability, given Mr Boyd was outnumbered by Ms Shute and her friends — who he had shown no physical aggression towards — and then later by Ms Shute and Mr Grace when they both grabbed him as Mr Grace drove off.

[8] While acknowledging that Ms Shute was not the one who had been driving, the Judge accepted that but for Ms Shute's animus towards Mr Boyd and her assistance to Mr Grace when he was driving, Mr Boyd would not have died.[8] As a consequence

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5 The only note we would add to the Judge's summary was that in her call to emergency services, Ms Shute told the emergency call operator that Mr Boyd was "holding onto the car" and that Mr Grace was "driving on because [Mr Boyd] was trying to punch [Mr Grace] in the face and [Mr Boyd] wouldn't let go". Ms Shute later said, in the same call, that "[Mr Grace] was driving but [Mr Boyd] was literally trying to punch [Mr Grace] in the face and wouldn't let go of the car". It is apparent from these remarks that Ms Shute attempted to blame Mr Boyd for what had happened in her call to emergency services.

6 Sentencing judgment, above n 4, at [55].

7 At [56].

8 At [57].

and considering the cases referred to by counsel,[9] the Judge adopted a starting point of three years' imprisonment.[10]

[9] The Judge then turned to Ms Shute's offending against Ms Olson. He considered this would have warranted a standalone starting point of one year's imprisonment.[11] However, allowing for modest credit for Ms Shute's late guilty pleas in relation to those charges and having regard to the totality of her offending, the Judge considered an uplift of nine months' imprisonment appropriate.[12]

[10] That accordingly brought the Judge to an overall starting point of three years and nine months' imprisonment.[13]

[11] The Judge then turned to Ms Shute's personal circumstances. Accepting that she had no personal aggravating factors, the Judge considered several mitigating factors to be relevant:

(a) First, the Judge noted Ms Shute's youth.[14] The Judge acknowledged that Ms Shute was 18 at the time of the offending and 20 at the time of sentencing. While Ms Shute's conduct was repeated, the Judge considered it was also impulsive and reflective of a lack of maturity.

(b) Secondly, the Judge noted Ms Shute's previous good character.[15] He acknowledged that Ms Shute had no previous convictions. He considered this fact, and her business and charity work, to be an indication of her potential for rehabilitation.

(c) Thirdly, the Judge noted Ms Shute's remorse and the contents of her psychological report prepared by Dr Brindley.[16] He acknowledged that

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9 *Mouat v R* [2017] NZCA 603; *R v King* HC Blenheim CRI-2009-009-17816, 9 February 2011; *R v Paku* HC Hamilton CRI-2005-019-6408, 7 September 2006; *R v Clarke* HC Rotorua CRI-2009-270-73, 29 May 2009; *R v Tawa* [2020] NZHC 95; and *R v Stevens* [2017] NZHC 727.
10 Sentencing judgment, above n 4, at [60].
11 At [64].
12 At [64].
13 At [65].
14 At [69]–[70].
15 At [71].
16 At [72]–[73].

Ms Shute's regret and remorse were evident from both her pre-sentence and psychological reports but agreed it was appropriate in the circumstances that a discrete discount for remorse was not sought. The Judge also acknowledged Ms Shute's diagnoses of acute stress disorder and of post-traumatic stress disorder (PTSD), although he expressed some misgivings over the nexus of these diagnoses to Ms Shute's offending.

(d) Fourthly, the Judge referred to Ms Shute's rehabilitative prospects.[17] He acknowledged she had attended programmes with Community Alcohol and Drug Services, and that she was looking to undertake further programmes at the time of sentencing. Given that engagement, combined with the assessment in her psychological report that risks of future violence were low, and the "good family support" Ms Shute had access to, the Judge considered Ms Shute to have good rehabilitative prospects.

[12] Taking those overlapping factors together and keeping in mind the seriousness of Ms Shute's offending, the Judge considered a 40 per cent discount on account of these personal mitigating factors to be warranted.[18]

[13] The Judge then turned to consider the time Ms Shute had spent on bail, which included a night-time curfew, but which he otherwise considered was not particularly restrictive. The Judge considered a credit of one month appropriate.[19]

[14] Accordingly, an end sentence of two years and two months' imprisonment was reached. The availability of home detention did not, therefore, arise.[20]

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17 At [74].
18 At [75].
19 At [76].
20 At [77].

Approach on appeal

[15] This Court must allow the appeal if satisfied that for any reason there was an error in the sentence imposed and a different sentence should be imposed.[21] The focus is on the end sentence rather than the process by which it is reached.[22] The Court will not interfere where the sentence is within the range that can properly be justified by accepted sentencing principles.[23] To this end, the concept of a "manifestly excessive" sentence is well-engrained and there is no reason not to use it.[24]

Analysis

[16] Ms Priest advanced Ms Shute's appeal on the grounds that the Judge's uplift for her offending against Ms Olson was excessive and that the Judge's discounts for Ms Shute's personal mitigating factors were insufficient. She took no issue with the Judge's starting point, which she accepted was within range. Had the Judge not erred in those ways, she submitted a sentence of home detention would have been available and that it should have been imposed as the least restrictive sentence appropriate in the circumstances.

[17] Ms Priest further submitted that, in any event, the appeal should be allowed because an end sentence of imprisonment was simply manifestly excessive. In that respect, she invited us to consider Ms Shute's sentence based on the approach set out in Goddard J's concurring judgment in *Diaz v R*.[25]

[18] We take each of these points in turn.

(a) Was the Judge's uplift for Ms Shute's offending against Ms Olson excessive?

[19] Ms Priest submitted that an uplift of no more than six months' imprisonment was warranted for Ms Shute's offending against Ms Olson. While it was appropriate for the Judge to have approached the uplift by evaluating what the appropriate starting point would have been for this offending as a term of imprisonment, she submitted

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21 Criminal Procedure Act 2011, s 250(2).
22 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
23 At [36].
24 At [35].
25 *Diaz v R* [2021] NZCA 426.

that had Ms Shute been sentenced for this offending alone her guilty pleas would have warranted a discount of around 20 per cent and, consequently, she would have received a non-custodial sentence. Furthermore, though accepting that an uplift was not precluded by s 18 of the Sentencing Act 2002, Ms Priest submitted that the uplift was also excessive because it was inconsistent with the policy unpinning s 18: that young people should be kept out of prison unless absolutely necessary.

[20] While we accept that Ms Shute would likely have received a non-custodial sentence had she been sentenced solely on this offending, we disagree that the Judge's uplift was excessive. Ms Shute's offending against Ms Olson took place on two separate occasions. On the first, she insulted Ms Olson by calling her names, poured two drinks over her head and threw multiple punches to her body and a kick to her leg. On the second occasion, Ms Shute approached Ms Olson from behind, grabbed her hair and dragged her to the ground.

[21] In reaching the conclusion that this offending would have justified a standalone starting point of one year's imprisonment, the Judge bore in mind:[26]

(a) the 12-month starting point this Court considered to be appropriate for the single kick to the head made by the appellant in *Tamihana v R*, after a co-defendant first punched and then kicked the victim on the ground;[27]

(b) the 18-month starting point imposed against the appellant in *Graham v Police* for punching the victim in the face with such force that he sustained a large laceration and lost a number of teeth;[28]

(c) the 12-month starting point imposed against the appellant in *Moore v Police* for grabbing the victim and punching her in the back of the head to the extent she fell to the ground;[29] and

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[26] Sentencing judgment, above n 4. The Judge referenced the decisions referred to by the Crown, and by defence counsel, in footnotes to his judgment: at [61]–[62], n 16 and n 17.
[27] *Tamihana v R* [2015] NZCA 169 at [33].
[28] *Graham v Police* [2014] NZHC 2112 at [37].
[29] *R v Moore* DC Dunedin CRI-2013-012-2986, 10 December 2014; aff'd *Moore v Police* [2015] NZHC 616.

(d) this Court's guidance in *Nuku v R* as to how the guideline judgment in *R v Taueki* should be applied to offending under ss 189(2), 188(2) and 191(2) of the Crimes Act 1961.[30]

[22] Given that the offending was not a single isolated event and involved a concerted effort to inflict violence, we cannot say the uplift was excessive having regard to the above authority. Notably, the first assault stopped only when nightclub security intervened. Ms Shute's offending against Ms Olson was at least comparable to that in *Tamihana* and *Moore*. The Judge's standalone starting point — and therefore his uplift — cannot be said to have been excessive by comparison.

[23] Furthermore, while we accept that Ms Shute's age was a highly relevant factor in setting an appropriate end sentence, we do not accept that the uplift was excessive because it was purportedly inconsistent with the policy underpinning s 18 of the Sentencing Act. Section 18 provides that no court may impose a sentence of imprisonment on an offender in respect of a particular offence other than a category four offence or a category three offence with a maximum penalty of at least 14 years' imprisonment if, at the time of their offending, the offender was under the age of 18 years. It follows that the policy underpinning s 18 is thus limited to ensuring young offenders under the age of 18 at the time of their offending do not go to prison unless they commit category four or certain category three offences.[31] As Ms Priest acknowledged, s 18 does not apply here because Ms Shute was 18 years old at the time of the offending.

[24] Even so, we disagree with the implication of Ms Priest's submission which is that the Judge's uplift was excessive in light of Ms Shute's age and the desirability of keeping young persons out of prison. The appropriate point in the sentencing methodology at which to consider such factors was the second stage after an overall starting point had been fixed.[32] That is what the Judge did.

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30 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39 at [37]–[38], referring to *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 (CA).

31 *Diaz v R*, above n 25, at [60] per Goddard J.

32 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [46].

(b) Were the discounts for Ms Shute's personal mitigating factors insufficient?

[25] Ms Priest next submitted the Judge's discounts for Ms Shute's personal circumstances were insufficient. She argued that Ms Shute should have received an aggregate discount of 55 per cent, as compared to the 40 per cent the Judge gave, made up of discounts of:

(a) up to 25 per cent for youth;

(b) 10 per cent for previous good character and lack of convictions;

(c) 10 per cent for rehabilitative efforts and prospects; and

(d) a further 10 per cent in recognition of mental health difficulties and the impact of imprisonment.

[26] Given the overlap in the personal mitigating factors for which discounts were sought, it is understandable that the Judge adopted the global approach he did. However, it is apparent that there were at least three personal mitigating factors which would have warranted discrete discounts had the Judge taken that approach. These were Ms Shute's youth (which necessarily included the impact imprisonment would have on her but which also intersected with her rehabilitative potential), her previous good character, and her rehabilitative efforts and prospects. We turn next to discuss each.

(i) Youth

[27] Ms Priest submitted that, as in *Diaz*, Ms Shute's offending was clearly driven by her "poor youthful judgement and impulsivity". In light of what Ms Shute was going through and what she had experienced in the days leading up to her offending, Ms Priest submitted she was particularly vulnerable to external pressures and impulsive decision-making, and that a discount of up to 25 per cent would have been appropriate to recognise this factor.

[28] In *Diaz*, the appellant was found guilty of causing grievous bodily harm with intent to do so for his part in a group assault against a victim who had refused to leave the appellant's family home. He had just turned 17 years old. The context to the offending was that Mr Diaz and his family considered their father to be vulnerable to manipulation and exploitation and for this reason did not welcome the victim's presence at their home. On arriving home and confronting the victim, Mr Diaz got into a fight after the victim punched him in the face. Despite an attempt to leave, the victim was then surrounded and beaten with tree branches before one of Mr Diaz's co-defendants drove directly into him sending him to the ground. Mr Diaz and his co-defendants then took turns punching and kicking him before neighbours and other members of the public intervened. As a result of the attack, the victim suffered broken ribs and a collapsed lung.

[29] Mr Diaz also pleaded guilty to a charge of injuring with intent to injure that arose out of an unrelated domestic incident with his then partner.

[30] On appeal, this Court considered that a discount of 30 per cent was required for the appellant's "various youth-related matters",[33] in addition to discrete discounts of 20 per cent for the appellant's "extensive rehabilitative endeavours",[34] 10 per cent for his previous good character,[35] and 7.5 per cent for his remorse.[36] On the appropriate youth discount, this Court said:

> [40] … Having read [Mr Diaz's psychological report], we are persuaded that Mr Diaz lacked maturity, impulse control and foresight. He was caught in a volatile situation, surrounded by family members and others. He was trying to protect his impaired father from a person he perceived to be a threat. He was susceptible to the outside pressures created by the situation in which he found himself. He was known as "a fighter" by his family. It is likely that he was spurred on by those around him, perhaps subconsciously. …

[31] In making any comparison with the youth discount given in *Diaz*, it is necessary to understand what elements such a discount should recognise. This is because youth discounts are frequently given not only to recognise the age-related neurological differences which make young offenders more vulnerable and susceptible

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33 *Diaz v R*, above n 25, at [40] per Thomas and Wylie JJ.
34 At [43]–[44] per Thomas and Wylie JJ.
35 At [35] per Thomas and Wylie JJ.
36 At [42] per Thomas and Wylie JJ.

to negative influences and outside pressures, but (among other factors) as an acknowledgement that imprisonment is likely to be disproportionately severe for young people and that they have a greater capacity for rehabilitation.[37]

[32] Given Ms Shute's rehabilitative efforts to date, we consider that a discrete discount is warranted for those efforts and her rehabilitative prospects generally. As such, we consider that any discount for Ms Shute's youth should properly have reflected the former two considerations referred to, given the need to recognise rehabilitation separately. Indeed, we note that this is consistent with the approach that was taken by the majority in *Diaz*.[38]

[33] As with *Diaz*, we accept that Ms Shute's offending reflected a lack of maturity, impulse control, and foresight. However, we consider it significant that the size of the youth discount given to Mr Diaz was clearly explicable in light of the particular circumstances of his offending: that he was caught in a volatile situation, surrounded by family members, trying to protect his impaired father from a person he perceived to be a threat and that he was likely spurred on by those around him.[39]

[34] The discount that should be given for an offender's youth is that which recognises the causal relationship between an offender's age and their offending.[40]

[35] None of the protective dynamics involved in *Diaz* were engaged in Ms Shute's case. Rather, on the facts as the Judge found them, Ms Shute was the aggressor towards Mr Boyd. We thus agree with Ms Clark for the Crown that it is significant that Ms Shute was in no sense "caught" in a volatile situation nor subconsciously spurred on as Mr Diaz was. It follows we do not accept that a discount of or close to the magnitude given in *Diaz* was available on account of Ms Shute's youth here.

[36] Ms Priest also submitted (albeit under the separate heading of Ms Shute's psychological report) that the Judge should have afforded a discrete discount of

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37 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77]; and *Diaz v R*, above n 25, at [37] per Thomas and Wylie JJ.

38 *Diaz v R*, above n 25, at [40] and [43]–[44] per Thomas and Wylie JJ.

39 At [40] per Thomas and Wylie JJ.

40 Kelci Alderton-Armstrong "The Judicial Approach to the Youth Discount in Aotearoa New Zealand" [2024] NZ L Rev 1 at 3 and 39.

10 per cent to reflect Ms Shute's mental health difficulties, and the impact imprisonment would have on her. This included Ms Shute's attempt to take her own life before sentencing. In making that submission, Ms Priest emphasised Dr Brindley's conclusions that:

(a) at the time of her offending, Ms Shute was likely experiencing mental health difficulties (namely, "an acute stress response to threat");

(b) there was a nexus between Ms Shute's mental health difficulties and her offending; and

(c) since the offending, Ms Shute had experienced intrusive thoughts and symptoms supporting a diagnosis of PTSD.

[37] Although, as previously noted, Ms Priest made these submissions under a different heading, we consider the issue of Ms Shute's psychological presentation fits more comfortably as part of the present discussion given the influence these factors naturally have on the appropriate discount for Ms Shute's youth.

[38] Dr Brindley's psychological report is instructive in that it relays Ms Shute's account of what she had experienced in the lead up to her offending. This included that:

(a) her relationship with Mr Grace was strained because they had just moved in together;

(b) four days before Mr Boyd's death, her car had been "smashed up";

(c) three days before Mr Boyd's death, she had learned one of her friend's boyfriends had "cheated on" her friend with Ms Olson, and she was concerned about "moves" Ms Olson was making towards Mr Grace;

(d) two days before his death, Mr Boyd had allegedly threatened her housemate that he would "shoot up the house"; and

(e) later that same day, she and her housemates returned home to discover that someone had lit a fire in their backyard.

[39] Against that background, Dr Brindley said:[41]

> 53. At the start of April 2023 Ms Shute was exposed to threats of harm, property damage and threat to life. Ms Shute [experienced] a stress and trauma response and likely fulfilled criteria for the diagnosis of **Acute Stress Disorder** during that time.

[40] While we accept that these events would have causatively contributed to Ms Shute's offending, we do not consider that the strength of the nexus to her offending here warranted a greater discount than would otherwise have been given simply to recognise that as a young person, Ms Shute was vulnerable and susceptible to negative influences and outside pressures. Simply put, these background events were of a kind which Ms Shute was vulnerable to due to her age and relative immaturity. As such, they are appropriately taken into account in assessing what discount should be given for Ms Shute's youth.

[41] The fact that Ms Shute attempted to take her life is, of course, relevant to assessing the impact imprisonment will have on her. However, we consider that the deterioration in Ms Shute's mental health properly goes to the size of the youth discount rather than as the basis for a discrete discount on its own. We also observe that there is little evidence from Ms Shute about the impact that imprisonment has had on her mental wellbeing. Her affidavit only speaks to how she has been able to style the hair of her fellow inmates on a daily basis. Given her passion for hairdressing, it would not be unreasonable to infer that she is at least coping with her incarceration. Certainly, it is difficult to see why the opposite conclusion should be inferred.

[42] Thus, in summary, we do not consider the Judge was wrong to treat the relevance of Dr Brindley's psychological report as going towards the appropriate level of discount for Ms Shute's youth rather than to a discrete discount, as Ms Priest's submissions seemed to imply.

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41 Footnote omitted, emphasis in original.

[43] Stepping back as we must, Ms Shute's offending is perhaps best characterised as thoughtless stupidity spurred on by teenage drama, conduct which led to tragic consequences for all involved. Ms Shute's age at the time is plainly relevant to both causation and to her overall culpability. Any youth discount must necessarily account for Ms Shute's mental health and recognise that, as a young person, serving a sentence of imprisonment will likely be harder for her. In the circumstances, and while accepting that there was a more compelling basis for a greater youth discount in *Diaz* for the reasons discussed, we consider that a 20 per cent discount would have been appropriate to recognise Ms Shute's youth.

(ii) Previous good character

[44] Ms Priest next submitted that a discount of at least 10 per cent should have been given for Ms Shute's lack of prior convictions and in recognition of her charity work.

[45] We agree. Credit for previous good character typically turns on the length of time a defendant has exhibited good character, whether the evidence of good character consists of the absence of convictions or also includes positive contributions to society, and the need for any discount to be proportionate to the overall sentence.[42] The combination of Ms Shute's lack of previous convictions and charity work (which included the creation of a programme for young girls going through hardship to get their hair, nails, and makeup done) easily warranted a discount of 10 per cent.

(iii) Rehabilitative efforts and potential

[46] Finally, Ms Priest submitted Ms Shute should have received a discount of around 10 per cent to reflect her efforts at rehabilitation to date, and her positive rehabilitative prospects generally. She emphasised that prior to being sentenced to imprisonment, Ms Shute completed a four-week programme under the Community Alcohol and Drugs Service and had commenced treatment with Shine for support on living without violence.

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42 *Parkin v R* [2018] NZCA 404 at [16], citing *Manawaiti v R* [2013] NZCA 88 at [19].

[47] We similarly agree that a discount of 10 per cent would have been warranted here. Although Ms Shute was recorded not to have appreciated the role alcohol necessarily played in her offending, it is apparent that she is regretful and capable of successful rehabilitation.

(iv) Conclusion

[48] Our analysis on what the appropriate discrete discounts would have been for Ms Shute's youth, previous good character, and rehabilitative efforts and potential, leads to a combined discount of 40 per cent, the same figure the Judge arrived at adopting his global approach. It follows that we cannot agree that the Judge gave insufficient credit for Ms Shute's personal mitigating factors.

[49] For the reasons he gives, Cooke J considers Ms Shute's overall personal circumstances to be very similar to those in *Diaz* and that any differences do not justify Ms Shute receiving total discounts of only 40 per cent as compared to the total 67.5 per cent discounts that Mr Diaz received for his personal mitigating factors.

[50] We consider it significant however that the total discounts Mr Diaz received included discounts of 7.5 per cent for remorse and 20 per cent for his "significant rehabilitative efforts".[43] We consider neither of those factors to be present, or as strongly engaged, as in Mr Diaz's case.

[51] First, Ms Shute did not seek a discrete discount for remorse at sentencing. She does not pursue her sentence appeal on this basis either. Indeed, unlike Mr Grace, she did not write a letter to Mr Boyd's family expressing any remorse. As the sentencing Judge noted, aspects of Ms Shute's accounts to her probation officer and to Dr Brindley also differed from the evidence at trial and focused on the impacts to her personally, although we acknowledge that the Judge did consider some remorse was evident from the pre-sentence and psychological reports. That stands in contrast to Mr Diaz who expressed remorse for his principal offending to the writers of his pre-sentence and psychological reports, and who attended a successful restorative justice

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[43] *Diaz v R*, above n 25, at [42] and [44] per Thomas and Wylie JJ.

conference in relation to the offending for which he pleaded guilty.[44] In these circumstances, a discrete discount for remorse would not have been appropriate.

[52] Secondly, while Ms Shute's efforts at rehabilitation are laudable, we do not consider those efforts to warrant the kind of discount given to Mr Diaz. Mr Diaz attended five rehabilitative programmes, three of which were aimed at anger management, family violence and parenting.[45] As the majority in *Diaz* noted, the number of courses that Mr Diaz attended (and the fact that he had attended over 17 sessions with the Friendship House Living Without Violence programme) was unusual.[46] That unusualness no doubt factored into the sizeable discount that the majority considered appropriate for his rehabilitative efforts and prospects.

[53] In our view, the fact that those mitigating factors were either not applicable or not as strongly engaged here justifies the difference in the total discounts given for personal mitigating factors in these two cases.

[54] Even so, we do not consider our approach to the discrete youth discount that Ms Shute is entitled to receive to be inconsistent with *Diaz* or the approach required. As we have explained, the size of the discount given in *Diaz* was explicable on account of the facts of that case, which clearly demonstrated a strong causal link between Mr Diaz's age and his offending. We also note, again in contrast to Mr Diaz,[47] that Dr Brindley said Ms Shute "presented as mature for her age".

[55] The true question here is whether Ms Shute's circumstances are such that the 20 per cent discount we consider she should receive is justified as compared to the 30 per cent discount given in *Diaz*. Whilst there is no outer limit to what discounts may be made for youth, discounts of 10–30 per cent are common.[48] Within that range, it stands to reason that a 20 per cent discount is sizeable. The question on appeal is whether the discount granted for this factor is within range. We are satisfied that it is.

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44 At [41] per Thomas and Wylie JJ.
45 At [43] per Thomas and Wylie JJ.
46 At [44] per Thomas and Wylie JJ.
47 At [36] per Thomas and Wylie JJ.
48 *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [175], citing *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [98].

For the reasons we have already given, as compared to *Diaz*, the causal relationship between Ms Shute's age and offending is not as cogent.

(c) Was a sentence of imprisonment manifestly excessive in any event?

[56] Finally, Ms Priest submitted that the appeal should be allowed, and a sentence of home detention substituted in any event on the basis that a sentence of imprisonment was simply manifestly excessive in these circumstances. In that regard, she invited us to adopt the approach set out in Goddard J's separate reasons in *Diaz*. Goddard J suggested that in cases involving an offender under the age of 18 who had committed a category three offence carrying a maximum penalty of 14 years' imprisonment or more, but whose offending was not at the upper end of the range of cases encompassed by that offence, and where s 18 of the Sentencing Act was engaged:[49]

> [61] … the court should begin by asking whether a sentence of home detention or imprisonment is the least restrictive outcome that is appropriate in the circumstances, or whether some less restrictive option is appropriate. If no less restrictive option is appropriate, so the choice is between home detention and imprisonment, the court would then ask whether a compelling justification has been made out for imposing a sentence of imprisonment rather than a sentence of home detention. That would require identification of relevant sentencing objectives, and some rational basis (such as empirical studies or expert evidence) for concluding that those objectives would be better advanced by imprisonment than home detention.

[57] Goddard J explained that if this approach were adopted:

> [62] … the guideline tariff for terms of imprisonment would become relevant only if the court concluded that imprisonment had been shown to be the least restrictive available outcome. Conversely, if one takes the guideline tariff as a starting point for the sentencing analysis, it is possible to arrive at a sentence of imprisonment … without ever directly confronting the question of whether imprisonment can be justified. It is at least arguable that there is a conceptual difficulty in taking as one's starting point the "last resort" of imprisonment, then assessing discounts to determine whether departure from that last resort can be justified. And a rigid application of that approach could lead to an unsatisfactory result. In a borderline case, a sentencing judge applying the usual methodology who considers that home detention is appropriate may of course be tempted to reverse engineer the available discounts to arrive at their preferred result: that is understandable, but seems less direct and less transparent than engaging directly with the question of whether the last resort of imprisonment can be justified.

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[49] *Diaz v R*, above n 25.

[58] As Ms Clark emphasised, Goddard J's alternative sentencing methodology was predicated on a different approach being warranted for young people to whom s 18 of the Sentencing Act applied. As Ms Shute was aged 18 years at the time of her offending, s 18 did not apply. As such, we do not consider this case to be an appropriate occasion to consider a departure from the orthodox and well-settled sentencing methodology this Court has previously discussed.[50]

[59] This brings us to an important point. The inquiry on an appeal against sentence is whether a sentence is manifestly excessive. That necessarily requires evaluating the entirety of the sentence Ms Shute received, including the starting point adopted. In *R v Paku*, one of the cases the Judge considered in setting his starting point, a three-year starting point was adopted for what in the circumstances was a single aggressive push that caused the victim's death.[51] As Ms Clark submitted, the offending against Mr Boyd was more serious. Mr Boyd was alone and outnumbered by the time he was grabbed, the offending involved a car, and Ms Shute had earlier pushed, kicked and slapped him that morning. We also note that the offending which culminated in Mr Boyd's death took place over some distance and for some time. It could not be described as brief or fleeting in the sense a punch or a push might. We thus agree with Ms Clark that the Judge's starting point was at the lower end of the range available. It follows that even if we had considered the Judge's uplift to have been excessive or his discounts to have been insufficient, it would still have been unlikely that we would have found the sentence to be manifestly excessive.

[60] Cooke J says it is difficult to see why a sentence of two years and two months' imprisonment should not ultimately be reduced to a sentence of home detention, given the potentially damaging implications of imprisonment for young people, the public interest in Ms Shute's rehabilitation, and the need to impose the least restrictive sentence in the circumstances. In that regard, he also emphasises that it is only the uplift for Ms Shute's offending against Ms Olson that leads to a sentence of more than two years' imprisonment.

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50 *Moses v R*, above n 32; and *A (CA104/2022) v R* [2022] NZCA 651 at [93]–[97].
51 *R v Paku*, above n 9.

[61] Respectfully, we do not consider that a sentence of home detention could, or necessarily should, have been reached so automatically. While we agree that the Judge needed to ultimately stand back and consider what sentence was just in all the circumstances,[52] the Judge followed the required approach unimpeachably. Sentencing judges must not artificially tailor their sentencing calculations to bring their end sentence to within the threshold at which home detention may be considered.[53] For that reason, we do not agree with Cooke J that even if a higher starting point were adopted, Ms Shute's personal mitigating factors should still have led to an overall discount where a short-term sentence of imprisonment was available.

[62] Having arrived at a sentence of two years and two months' imprisonment, we do not consider it was available to the Judge to simply commute Ms Shute's sentence to home detention accordingly. The Court may only impose a sentence of home detention it if would otherwise sentence an offender to a sentence of or less than two years' imprisonment.[54] That is the line Parliament has chosen to draw.

[63] Furthermore, once a short-term sentence is reached, the decision to commute to home detention is a discretionary decision that must be made in a way that gives effect to the purposes and principles set out in the Sentencing Act.[55] We agree with Cooke J that the Judge was required to impose the least restrictive sentence appropriate in the circumstances.[56] However, while those circumstances include Ms Shute's youth and prospects of rehabilitation, they also include the fact that Mr Boyd paid the ultimate price for her offending.

[64] We acknowledge that Ms Shute's end sentence is only beyond the two-year threshold because of the uplift for her offending against Ms Olson. However, as we have already explained, a higher starting point was open to the Judge for Ms Shute's

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52 *Moses v R*, above n 32, at [49]; *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [22] per Winkelmann CJ, William Young, Glazebrook and Williams JJ; and *McCaslin-Whitehead v R* [2023] NZCA 259 at [61].

53 See *R v Honan* [2015] NZCA 94 at [34], citing *R v Edwards* [2006] 3 NZLR 180 (CA) at [24] and [46] as an example of this Court's repeated reminders of this point.

54 Sentencing Act 2002, s 15A(1)(b); and see s 4(1) definition of "short-term sentence". See also Parole Act 2002, s 4(1) definition of "short-term sentence".

55 *Osman v R* [2010] NZCA 199 at [20], agreeing with William Young P's dissenting judgment in *R v Vhavha* [2009] NZCA 588 at [29].

56 Sentencing Act, s 8(g).

offending against Mr Boyd. Were it necessary to do so, we would have put such a starting point at three and a half years' imprisonment, having regard to the seriousness of the offending. Even so, the Court must look at the totality of a defendant's offending. In doing so, it must bear in mind that where concurrent sentences are imposed, the most serious must receive the penalty appropriate to the totality of the offending, while ensuring that each lesser offence receives the penalty appropriate to that offence.[57] That is what the Judge did. In that regard, we note that Cooke J discerns no error in the Judge's uplift for Ms Shute's offending against Ms Olson.

[65] Ultimately, an appeal against sentence must focus on whether a sentence is manifestly excessive. An appellate court should not intervene where the sentence is within range and can be properly justified by orthodox sentencing principles.[58] The Court should only intervene where a sentence is outside the permissible range. In this case, we consider the Judge's sentence to have been within the range reasonably available. For these reasons, we consider the appeal against sentence should be dismissed.

Suppression appeal

[66] Ms Shute was initially granted interim name suppression in the High Court, but was declined a continuation of that name suppression by Jagose J on 9 June 2022.[59] As indicated, this Court then overturned the High Court decision and granted suppression until the commencement of Ms Shute's trial to preserve her fair trial rights.[60] In making that decision, this Court did not directly address whether Ms Shute met the extreme hardship threshold.[61]

Suppression decision

[67] After her trial, Ms Shute sought permanent name suppression before Gault J on two grounds: first, extreme hardship to herself and secondly, to her parents.

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57 Sentencing Act, s 85(4).
58 *Tutakangahau v R*, above n 22, at [36].
59 *R v AB* [2022] NZHC 1339.
60 Interim suppression appeal judgment, above n 1, at [22].
61 At [14].

[68] As for the first, the Judge acknowledged that Ms Shute was still young and accepted, as general propositions, that young offenders were likely to suffer a greater degree of hardship from publication than adult offenders and that the potential hardship caused by publication on social media was of a "quite different magnitude" compared to that arising from publication in mainstream media.[62] However, the Judge disagreed with the submission that this Court's decisions on the name suppression of young persons meant every 18- to 20-year-old charged with and found guilty of serious offending reached the threshold of extreme hardship and were therefore entitled to name suppression.[63] In contrast to those cases, the Judge said no factors such as an acquittal or any particular vulnerabilities had been suggested for Ms Shute here.[64]

[69] The Judge noted that Ms Shute's affidavit evidence had not been updated since May 2022, although he acknowledged some further publications had been provided in submissions.[65] He determined that at least one of these contained inaccuracies but considered that this was "an example of sensationalist writing from afar rather than of toxic social media attacks".[66] The Judge also observed that the "inappropriate social media posts" about Ms Shute were from those who already knew her or her identity and that most of these were posted at the time of Ms Shute's offending.[67] While their source and timing were relevant to the assessment of what publicity Ms Shute might face, the Judge considered there was a "degree of speculation" that Ms Shute's likely publicity would be akin to the "toxic and potentially lifelong shaming referred to in *X v R*".[68]

[70] The Judge further considered that while Ms Shute had strong rehabilitative prospects due to her age and accepted that publication of her name would affect this, it did not follow that publication would necessarily give rise to extreme hardship.[69]

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62 Suppression judgment, above n 3, at [41].
63 At [41], referring to *X (CA226/2020) v R* [2020] NZCA 387, (2020) 30 CRNZ 296 and *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306.
64 Suppression judgment, above n 3, at [41].
65 At [43].
66 At [43].
67 At [44].
68 At [44].
69 At [45].

[71] As for the loss of Ms Shute's job soon after the offending occurred, the Judge noted that this was "a common consequence of the criminal justice process".[70] The Judge noted that even if Ms Shute lost her job in part because of social media activity, this had occurred when her name was suppressed. He said it did not follow, however, that after the conclusion of the criminal justice process, Ms Shute would be unable to gain employment. In that respect, he noted that there was no up-to-date evidence addressing the specific impact publication would have on her job prospects or her hair and makeup business.[71]

[72] Furthermore, while acknowledging the "understandable tension" between supporters of the deceased and Ms Shute and her co-defendant, Mr Grace, the Judge said there was no evidence to suggest any present or ongoing threats to Ms Shute's safety or to the safety of her family whether by way of vigilante behaviour or otherwise.[72] The Judge considered that in any event, those who might pose such a risk or who might otherwise harass Ms Shute already knew her name, and who she was.[73]

[73] In light of that assessment, the Judge concluded:

> [48] Thus, what can be said is that Ms Shute is young (now 20), a first-time offender and has strong rehabilitative prospects and that publication of her name will affect her rehabilitation. Her rehabilitative prospects, risk of reoffending and other personal circumstances will be relevant at sentencing. However, the statutory scheme for name suppression does not permit satisfying the high threshold to be deferred. On the limited evidence available on this application, I am not satisfied that publication would be likely to cause Ms Shute extreme hardship.
>
> [49] If the extreme hardship threshold had been met based on more specific evidence of the impact of publication on Ms Shute's strong rehabilitative prospects given her youth and other personal circumstances, I may well have concluded in the exercise of the discretion that the balance clearly favoured interim suppression for Ms Shute until sentencing on 16 February 2024. Given the short time period now until sentencing, the principle of open justice – even following conviction for manslaughter – may need to yield to such countervailing factors pending sentencing.

[74] The Judge then turned to consider whether Ms Shute's mother, Ms Grant, was likely to face extreme hardship from the publication of Ms Shute's name. He noted

[70] At [46].
[71] At [46].
[72] At [47].
[73] At [47].

that Ms Grant was a high profile and highly successful member of the stunt profession, and that she was concerned publication of her daughter's name would cause extreme hardship to her business and reputation. He also acknowledged that Ms Grant had received abusive messages through her social media pages, that she feared for her safety, and that she had recently undergone significant brain surgery from which she was trying to recover.[74]

[75] However, while the Judge accepted that abusive messages had been sent to Ms Grant on her social media pages, no updating evidence about any ongoing abusive messages had been put before him, which in any event must have been from those who already knew of the connection. He also noted that Ms Shute and Ms Grant did not share the same last name.[75] Given this, and the fact that embarrassment and financial consequences were otherwise ordinary consequences for a family member's offending, the Judge considered the threshold of extreme hardship was not met.[76]

[76] Finally, the Judge turned to consider whether Ms Shute's father, Mr Shute, was likely to face extreme hardship from the publication of Ms Shute's name. The Judge referred to an affidavit from Mr Shute given in May 2022. There Mr Shute explained that he had been in the hospitality industry for 30 years, that it was well known that Ms Shute was his daughter and that he was concerned that if the abuse directed at her or her mother was directed at him and his businesses it would have a significant impact on him.[77] However, the Judge concluded these factors did not reach the extreme hardship threshold. He noted that financial loss was commonly a direct consequence of the public knowledge of offending. Furthermore, Mr Shute's concern was that any abuse would be directed towards his businesses as well as to him.[78]

Further evidence on appeal

[77] Ms Shute seeks leave to adduce an updating affidavit in support of her appeal and various screenshots of social media commentary about her offending and sentencing.

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74 At [51].
75 At [52].
76 At [52]–[53].
77 At [54].
78 At [55].

(a) Ms Shute's affidavit

[78] Ms Shute speaks of her educational background, her training as a professional hair and makeup artist, and the concerns she holds for what may follow in the event her name is published. She explains that after losing her job, she set up her own hair stylist business which grew to service some 420 clients by the time she was sentenced. She claims that if her name is published, threats against her will escalate and those who know about her offending will start publicly naming her while exaggerating the facts of her case. She also fears that her clients will leave her once they learn of her convictions, and that people will engage with her social media accounts in order to deter possible future clients. As she left school at the age of 15, and given her convictions, she also worries that it would be difficult to find alternative employment.

[79] Ms Shute further says that she has a unique name, and that even if she were to change it, she fears that photographs of her would be used to identify and target her on social media. She explains that contemplating these issues has been very depressing for her, and that prior to her sentencing she attempted suicide. If her name is published, she says her mental health will deteriorate even more than it already has.

(b) Social media screenshots

[80] The various screenshots Ms Shute seeks leave to adduce are of the content and comments on:

(a) two Reddit posts sharing links to news articles about the sentences Ms Shute and Mr Grace received;

(b) two TikTok videos with a thumbnail of a New Zealand Herald article about the jury's guilty verdicts with text added over the video that reads "YOUNG COUPLE GUILTY OF MANSLAUGHTER"; and

(c) two Facebook posts by the New Zealand Herald sharing its articles about the jury's guilty verdict, and the sentencing that followed.

[81] Save for one of the Reddit posts titled "Two years sentence for murder of auckland teen", with the subtitle "Wake the fuck up new zealand, TWO FUCKING YEARS", the relevant social media commentary consists entirely of the comments made on these posts. While there are comments aimed at Ms Shute directly (for example, one comment on a Reddit post says "hope we can [name] and shame these shit people", and two comments on a TikTok video name her explicitly) the vast majority of the comments consist of criticism and disbelief that Ms Shute and Mr Grace were charged with manslaughter rather than murder, and with the sentences that they subsequently received. Furthermore, much of the commentary consists of criticisms of Gault J, and of the judiciary generally, for giving "lenient" and "soft" sentences. Some comments also make references to "vigilante justice", but do so in the context of saying that, in the commentators' views, victims may need to "take justice into their own hands" if the courts continue to give what, in the commentators' view, are unsatisfactory sentences.

[82] The social media commentary also comprises a number of comments (particularly on the two Reddit posts) from commentators clarifying to others that Ms Shute and Mr Grace were charged with manslaughter over murder, and which express agreement with that prosecutorial decision and the sentences that they subsequently received. There are also a number of comments that challenge the idea that Ms Shute and Mr Grace's offending could have founded charges of murder, or that the sentences imposed were inappropriate.

(c) Assessment

[83] Some of the screenshots Ms Shute seeks leave to adduce pre-date Ms Shute's application for name suppression before Gault J (for example, posts following the delivery of the jury's guilty verdicts) and therefore could have been placed before the Judge. However, the balance are clearly fresh evidence in that they relate to news coverage of the sentences received by Mr Grace and Ms Shute.

[84] Furthermore, while we acknowledge, as Ms Clark submitted, that some of the content Ms Shute refers to in her affidavit is not fresh evidence, we consider the balance to be updating evidence and nevertheless relevant to this appeal given

Ms Shute speaks to the state of her mental health prior to sentencing. As such, we accept that this evidence meets the usual criteria for leave.[79] Accordingly it may be adduced on appeal.

Applicable principles

[85] The Court's ability to permanently suppress the name of any person convicted of an offence is governed by s 200 of the Criminal Procedure Act 2011. That provision relevantly provides:

> **200 Court may suppress identity of defendant**
>
> (1) A court may make an order forbidding publication of the name, address, or occupation of a person who is charged with, or convicted or acquitted of, an offence.
>
> (2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—
>
> (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
>
> …
>
> (3) The fact that a defendant is well known does not, of itself, mean that publication of his or her name will result in extreme hardship for the purposes of subsection (2)(a).
>
> ...
>
> (6) When determining whether to make an order or further order under subsection (1) that is to have effect permanently, a court must take into account any views of a victim of the offence conveyed in accordance with section 16B of the Victims' Rights Act 2002.

[86] While consideration of name suppression always engages the principles of freedom of speech and of open justice,[80] determining whether the identity of an

[79] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].
[80] *R v Liddell* [1995] 1 NZLR 538 (CA) at 546.

offender should be suppressed involves the now well-known and understood two-stage approach:[81]

> [40] At the first stage, the judge must consider whether he or she is satisfied that any of the threshold grounds listed in [s] 200(2) [of the Criminal Procedure Act 2011] has been established. That is to say, whether publication would be likely to lead to one of the outcomes listed in subs (2). The listed outcomes are prerequisites to a court having jurisdiction to suppress the name of a defendant. It is "only if" one of the threshold grounds has been established that the judge is able to go on to the second stage.
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> [41] At the second stage, the judge weighs the competing interests of the applicant and the public, taking into account such matters as whether the applicant has been convicted, the seriousness of the offending, the views of the victims and the public interest in knowing the character of the offender.

[87] After the hearing of this appeal, the Supreme Court released its decision in *M (SC 13/2013) v R.*[82] In that case, the Supreme Court considered how youth justice principles interacted with the principle of open justice in decisions about name suppression for young people under ss 200 and 202 of the Criminal Procedure Act. In doing so, the Supreme Court surveyed New Zealand's obligations under the United Nations Convention on the Rights of the Child, s 25(i) of the New Zealand Bill of Rights Act 1990 and the courts' recognition of the relevance of an offender's youth in sentencing young people for their offending.[83] In light of that survey, the Supreme Court said:

> [64] Drawing these threads together, the various obligations to which New Zealand is committed recognise the desirability of rehabilitation and reintegration of young offenders. Those obligations, and what we know from the expert evidence relating to youth offending, support a requirement to treat the interests of youth as a primary consideration in name suppression decisions. There is nothing in the wording of the Criminal Procedure Act precluding recognition of the particular interests of youth in either the threshold inquiry or at the second stage of the s 200 analysis, and giving these interests what will, necessarily, be powerful weight. There is also nothing new in recognising that the child's best interests should weigh powerfully in the

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[81] *Robertson v Police* [2015] NZCA 7 (footnote omitted). See also *D (CA443/2015) v Police* [2015] NZCA 541, (2015) 27 CRNZ 614 at [10]; and *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9].

[82] *M (SC 13/2023) v R*, above n 2.

[83] At [54]–[65], referring to the Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990); *H v R* [2019] NZSC 69, [2019] 1 NZLR 675, citing *Churchward v R* , above n 37, at [77]–[78]; and, among others, *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [210], n 150 per Glazebrook J.

context of s 200. The special importance of those interests has been recognised at least since the Court of Appeal judgment in *DP* in 2015.[84]

> [65] That said, we agree with the respondent and NZME that to treat youth interests as comprising the governing presumption in favour of name suppression for young offenders outside of the Youth Court would not fit with the statutory scheme for name suppression in the Criminal Procedure Act and the importance it places on open justice. It is a part of the context in which that scheme is to be construed that, if the child or young person was appearing in the Youth Court, they would have automatic name suppression. But to establish youth principles as a governing presumption for name suppression decisions under the Act would require specific statutory provision.

[88] The Supreme Court's decision makes clear that while youth interests do not amount to a presumption in favour of name suppression for young offenders, these interests should necessarily be given powerful weight. The decision is thus of obvious importance to Ms Shute's appeal given her age.

[89] It is apparent however that in rejecting the proposition that there should be a presumption in favour of suppression for young offenders, the Supreme Court has reinforced and further clarified the approach to the suppression of young offenders as first outlined by this Court in *DP v R*, where we said:[85]

> [10] … When dealing with a child charged with a criminal offence, a Court must recognise the United Nations Convention on the Rights of the Child (UNCROC) and s 25(i) of the New Zealand Bill of Rights Act 1990 (NZBORA). UNCROC reinforces the desirability of promoting a child's reformation and reintegration into society, based on the assumption that he or she is capable of fulfilling a constructive role as an adult. The guarantee in [s] 25(i) of the NZBORA, that a child charged with an offence be dealt with in a manner that takes account of his or her age, is similarly justified by the desirability of promoting the child's rehabilitation. Thus, in all respects concerning children, including publication of name, the child's best interests shall be a primary consideration. As Ms Markham acknowledged, both UNCROC and NZBORA place children in a different category from adults by recognising that they require special protection when appearing before criminal courts.
>
> [11] While s 200 of the CPA must be given full effect, nothing within its terms precludes a Court from recognising the special importance of youth at either the jurisdictional or discretionary stages of the name suppression inquiry. When interpreting the s 25(i) NZBORA right, UNCROC's articles should be adopted in a way which advances Parliament's purpose. As noted, that purpose is shared by both instruments. Courts can be expected to interpret

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[84] *DP v R*, above n 63, at [10]. See also *NZME Publishing Ltd v R* [2018] NZCA 363 at [22] and [29]; *H (CA651/2021) v R* [2022] NZCA 132 at [23]–[26]; and *Harris v R* [2023] NZCA 462 at [30]–[34].

[85] Footnotes omitted.

> legislation consistently with international treaties ratified by New Zealand. Moreover, Parliament is not to be assumed to have intentionally legislated contrary to New Zealand's international obligations. In our judgment s 200 of the CPA must thus be interpreted in a way consistent with discharging those obligations.

[90] The approach as outlined in *DP*, which has been further refined by the Supreme Court, was the approach adopted by counsel at the hearing of this appeal. For that reason, we did not consider it necessary to call for further submissions following the release of the Supreme Court's judgment in *M (SC 13/2013) v R*.

[91] Finally, it is necessary to mention that in the appellate context, a challenge to the threshold assessment proceeds by way of rehearing in accordance with *Austin, Nichols & Co Inc v Stichting Lodestar*.[86] A challenge to the assessment of whether to grant name suppression then proceeds as an appeal against the exercise of a discretion.[87] However, as the Judge concluded that neither Ms Shute nor her parents could establish any likelihood of extreme hardship if Ms Shute's name were to be published and so did not come to whether he should then act to suppress Ms Shute's name, we shall approach that question afresh if we come to it.

Analysis

[92] The two questions on this appeal are whether Ms Shute would be likely to face extreme hardship if her name were published and, if so, whether this Court should grant name suppression accordingly.

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86 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

87 *Parker v R* [2020] NZCA 502, (2020) 29 CRNZ 536 at [29]–[30]; and *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] per Blanchard, Tipping and McGrath JJ. We acknowledge that the Supreme Court queried in *M (SC 13/2023) v R*, above n 2, at [45]–[47], whether the second stage of the name suppression inquiry was discretionary or rather evaluative, in which case the basis for appellate intervention would be in accordance with *Austin Nichols & Co Inc v Stichting Lodestar*, above n 86. However, the Supreme Court also said that the question was better addressed in a case in which it truly arose, and that whether the second stage of the name suppression inquiry was treated as discretionary was accordingly immaterial in that case. The question does not arise here given Gault J considered Ms Shute's application for name suppression failed at the first stage of the name suppression inquiry, and so did not turn to the second stage of the test.

(a) Is Ms Shute likely to face extreme hardship?

[93] The thrust of Ms Priest's submissions was that Ms Shute was likely to face extreme hardship because of the social media activity that would inevitably follow the publication of her name and the resultant impact that hardship would have on:

(a) her ability to earn a livelihood;

(b) her physical and psychological safety; and

(c) her prospects of rehabilitation.

[94] Considering what social media commentary there had been to date, Ms Priest submitted that any social media activity following publication would be vicious and intentionally targeted against Ms Shute. In light of her youth and mental health, she submitted that this hardship and the flow on effects that it would have on her life (as described) cumulatively met the test of being extreme.

[95] As Ms Priest did, we start first with the likelihood and nature of any social media activity likely to follow if Ms Shute's name were published, before turning to consider the resultant impacts such activity would be likely to have.

(i) Hardship from social media

[96] We accept that if Ms Shute's name is published, there is likely to be extensive but otherwise short-lived mainstream media publicity about her and Mr Grace's identities. We also accept that this will inevitably excite discussion on social media.

[97] The issue is whether the social media commentary that will follow is likely to be of a kind and degree which will result in extreme hardship for Ms Shute (whether individually or in combination with other factors), bearing in mind her particular circumstances. As this Court did in *X (CA226/2020) v R* and in *DV (CA451/2022) v R,* that assessment must necessarily be informed by what social media commentary there

has been to date.[88] In doing so, we bear in mind what a majority of this Court said in *DV (CA451/2022) v R*:[89]

> [39] Social media may increase, perhaps substantially, the risk that publication of an offender's name will cause that person extreme hardship, for two reasons. First, social media commentary may follow mainstream media reporting, but it relies on user-generated content to which no obligation of balance or fairness attaches. In the absence of such obligations, a court cannot assume that social media reporting will be fair or accurate. Nor can it assume that readers are likely to verify what they have been told before posting their responses. The nature of such reporting and the audience response are questions of fact.
>
> [40] Second, social media may facilitate harmful behaviours such as defamation, abuse, trolling, doxing and vigilantism. This tendency is in part a function of users' anonymity. In *X (CA226/2020) v R* the Court referred to "cancel culture", referring to a form of mob justice in which those deemed to have transgressed some norm are subjected to intense public shaming. Young people are vulnerable to this, partly for psychological reasons and partly because they may be forced offline to experience isolation in which they are excluded from innumerable economic and social opportunities, with long-term consequences. It may well not be reasonable to expect a person who has been unfairly vilified to respond by defending themselves in the same forums.

[98] Undertaking that assessment, we are not satisfied that the social media commentary likely to follow publication in this case is similar to that in *X (CA226/2020) v R* and *DV (CA451/2021) v R*, or that it reaches the standard of extreme hardship. Our reasons follow.

[99] In *X (CA226/2020) v R*, X was discharged without conviction after pleading guilty to common assault charges that related to inappropriate sexual behaviour at a Labour Party youth camp. X was 20 at the time of the offending. The political context meant that the public interest in X's identity was disproportionately and illegitimately high. Because of this, a significant body of social media commentary surrounded X's offending and his subsequent discharge without conviction. The commentary included what this Court described as "a considerable amount of harmful misinformation" such as claims that X was a "predator" and "paedophile" (unsupported by the facts and expert evidence), that his victims were "underage children" (when X's victims were all over the age of consent and only slightly younger than he was), and that he was

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[88] *X (CA226/2020) v R*, above n 63, at [59]; and *DV (CA451/2021) v R* [2021] NZCA 700 at [64] per Miller and Gilbert JJ.

[89] Per Miller and Gilbert JJ (footnotes omitted).

granted a discharge without conviction as a result of political connections (which was untrue).[90] While the comments did not target X by name, he was labelled a "pig", "rat", "young labour camp animal", "commie snowflake", and "Pervy McPerv".[91] This Court concluded X would suffer extreme hardship if his name was published given the uniqueness of his name, his culture, and the perception that he had avoided being brought to account. Unless suppression orders were made, the Court considered there was every reason to believe that such comments would grow in number and venom.[92]

[100] Compared to *X (CA226/2020) v R*, the present case is quite different. The commentary here is not of the same degree, kind, or magnitude. It reveals a degree of bafflement and disagreement over the fact that Ms Shute and Mr Grace's offending did not constitute murder and criticises the sentences that were imposed. However, in contrast to the other cases discussed, the discussion on some of the posts (such as the Reddit posts) is surprisingly balanced. Indeed, several commentators not only took it upon themselves to clarify to others that Ms Shute and Mr Grace were charged with manslaughter and not murder but challenged those who claimed a more serious charge should have been laid. To the extent that the negative commentary is targeted at anyone, it seems to us that it is the High Court Judge and the judiciary more generally who are the primary targets of negativity.

[101] The present case is also distinguishable from *DV (CA451/2022) v R*. There the appellants were granted discharges without conviction on charges of indecent assault and inciting indecent assault. The charges arose out of an ill-considered "prank" against a friend who had passed out after drinking. One of the appellants filmed the other pulling down the complainant's underwear and trousers before pretending to insert a plastic spoon into his anus. In the High Court, the appellants unsuccessfully appealed the District Court's refusal to grant them name suppression (although the appeal against that Court's refusal to discharge without conviction was allowed).[93] On appeal to this Court, the majority noted that the social media commentary was likely to take the form of what followed from mainstream news publications about the

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90 *X (CA226/2020) v R*, above n 63, at [55(c)].
91 At [55(d)].
92 At [56]–[59].
93 *DV v R* [2021] NZHC 1818; and *DV v R* [2021] NZHC 1077.

appellants' identities, but also publications instigated or encouraged by the complainant who felt strongly about being a male victim of sexual abuse and who considered the appellants had gotten away with their offending.[94] Because the appellants' names had not been suppressed at sentencing, there was evidence of what had been reported on social media following the sentencing and the appellants' discharge without conviction. The complainant's social media commentary included false statements and exaggerations of what happened to him. As a result of the abuse and ridicule the appellants had received on social media, they experienced severe and ongoing isolation, depression and anxiety.[95] Against this background, the majority concluded that further publication was likely to be "unbalanced and reasonably extensive", resulting in the appellants' "direct abuse and their continued isolation".[96] The Court thus concluded that the appellants were likely to experience hardship which, in all the circumstances, was extreme.[97]

[102] Although we accept that the unusualness of Ms Shute's name may make it easier for her to be targeted, we consider the social media commentary evidenced in this case to be of quite a different nature from that in *DV (CA451/2022) v R* too. It is apparent that the majority considered the resultant social media discussion in that case likely to be "unbalanced and reasonably extensive" precisely because of the concerted efforts of the complainant.

[103] While we accept that there are a small number of comments which specifically referred to Ms Shute by name or by the fact she is a hair stylist, we are unable to discern the same kind of risk that someone connected to this case is likely to act as the complainant in *DV (CA451/2022) v R* did. We acknowledge that there was an effort to have the charges of manslaughter against Mr Grace and Ms Shute increased to murder via a petition at the beginning of this saga. We also acknowledge, as the Judge said, that there was "understandable tension" between Ms Shute and Mr Boyd's family and friends.[98] However, we consider the prospect that someone is likely to engage in the kind of social media campaign that occurred against the appellants in

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94 *DV (CA451/2022) v R*, above n 63, at [49] per Miller and Gilbert JJ.
95 At [44] per Miller and Gilbert JJ.
96 At [57] per Miller and Gilbert JJ.
97 At [57] per Miller and Gilbert JJ.
98 Suppression judgment, above n 3, at [47].

DV (CA451/2022) v R to be speculative and unlikely. The trial has ended and sentencing has now passed. Significantly, all of the social media commentary to which we were referred has arisen out of news articles. Contrary to what the majority in *DV (CA451/2022) v R* said in that case, we see no basis to believe that any social media commentary that will follow publication of Ms Shute's name will come from a source other than news articles that may follow. Furthermore, it stands to reason that if there was a person or persons likely to embark on the same kind of concerted campaign as in *DV (CA451/2022) v R* that they would have already done so. There is no indication that anything of this extreme nature is likely to take place here.

[104] Ms Priest likened the media interest Ms Shute would experience if her name was revealed as comparable to that suffered by Bailey Kurariki, who at the age of 12 was convicted of manslaughter but was not given permanent name suppression.[99] She submitted that as with Bailey Kurariki, Ms Shute would be unable to move on from her offending if her name were published. She contended it would compromise her rehabilitation and reintegration. With respect, we do not consider this case to be comparable. As Ms Clark submitted, it is a tragic reality that it is not uncommon for 18-year-olds to be convicted of manslaughter. While the facts of Ms Shute's offending are unusual, we agree with Ms Clark that this case is unlikely to attract comparable levels of publicity when Mr Kurariki's case was of manslaughter involving a 12-year-old.

[105] This brings us to a final but important point under this heading. Ms Priest submitted it was unreasonable to expect Ms Shute to go "offline" as a result of the expected social media commentary, and that this too would be a form of hardship. As this Court recognised in *X (CA226/2020) v R*, being forced to go offline can amount to a form of hardship where it denies the right to participate in online life as equals.[100] However, for that hardship to warrant name suppression it must be, either on its own or in combination with other hardships, extreme.

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[99] *R v Rawiri* HC Auckland T014047, 16 September 2002; aff'd *Rawiri v R* CA358/02, 5 September 2003.

[100] *X (CA226/2020) v R*, above n 63, at [53]–[54].

[106] While the evidence suggests that in the event Ms Shute's name is published, it is probable there will be further critical social media commentary, we consider that it is most unlikely any such commentary will be enduring. Nor do we consider that this kind of commentary is anything other than an ordinary consequence of offending in an age where social media use is ubiquitous. Against that background, any hardship, such as it may be, is likely to be temporary. To that extent, we do not accept that if Ms Shute were to go offline, that it would have to be for such a duration or because of such ridicule that it could qualify as the kind of hardship that is necessary to be shown.

[107] For these reasons, we do not accept that the social media commentary that would follow if publication occurs is likely to be of a kind which would cause Ms Shute extreme hardship.

(ii) Resultant hardships

[108] It will be apparent from the forgoing analysis that we also reject the submission that any social media commentary will so impact on Ms Shute's ability to make a livelihood, compromise her physical and psychological safety, or so adversely affect her prospects of rehabilitation as to amount to extreme hardship.

[109] As Ms Priest properly accepted, the fact that Ms Shute may face difficulty making a livelihood, whether self-employed or not, is an ordinary consequence of her offending. If prospective employers or clients were to read the social media commentary of the sort discussed above rather than mainstream media reporting, they would see some strongly expressed views about the offending and subsequent sentencing. Some of it is incorrect. However, for the reasons we have discussed, we consider that to be an ordinary consequence of Ms Shute's offending. As the commentary here is not as unduly unfair or misinformed as in *X (CA226/2020) v R*, we do not consider that the difficulty Ms Shute might consequently face in making a livelihood to rise to the threshold required.

[110] As for Ms Shute's personal and psychological safety concerns, we consider these to be speculative and unlikely. The calls for "vigilante justice" which Ms Priest submitted were referable to Ms Shute personally, have to be viewed in context. As already explained, these comments were not directed at Ms Shute in a retributive

fashion. They were comments about the criminal justice system more generally. What the commentators were saying was that victims may need to "take justice into their own hands" if the courts continue to give what, in the commentators' views, were unsatisfactory sentences. These comments are readily distinguishable from those in *X (CA226/2020) v R* which were ad hominem in nature, such as "name suppression will NOT help you".[101] In this context we also note in passing that Ms Shute's application for name suppression was advanced on the basis of extreme hardship rather than endangerment to safety.

[111] Finally, on the question of Ms Shute's rehabilitative prospects, we accept that the resultant social media commentary may be difficult for Ms Shute given her age and mental health. However, we agree with Ms Clark that Ms Shute's mental health presentation has to be considered in context. Significantly, Dr Brindley's psychological report makes no mention of the impact publication might have on Ms Shute's mental health. We do not overlook Ms Shute's attempt to take her life. However, we understand that these events arose out of concerns ahead of sentencing rather than issues connected to the publication of her name. Ms Shute was sentenced on 16 February this year. She has been in prison since that time. There is no evidence of any recurrent self-harm ideation or any particular issues around Ms Shute's mental health. To her considerable credit, the rehabilitative efforts Ms Shute has already engaged in are reflected in the positive comments made by the author of the pre-sentence report who noted Ms Shute's engagement with a councillor, her self-referral to Community Alcohol and Drug Services and her expressed commitment "to learn from what happened, and to develop strategies to bring about positive change in her life and those she engages with". Furthermore, as the sentencing Judge observed, she has the support of a loving family dedicated to her rehabilitation and reintegration.[102] For these reasons we do not consider any likely social media commentary to be of such a level that it will compromise Ms Shute's clear potential for rehabilitation.

[112] It follows that for all these reasons we do not accept that Ms Shute is likely to face extreme hardship (whether from any of the factors individually or in combination) if her name is published.

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101 At [55(e)].
102 Sentencing judgment, above n 4, at [74].

(b) Should this Court grant name suppression?

[113] Having found that Ms Shute has not satisfied us that she would be likely to suffer extreme hardship if her name were published, it is not necessary to embark on the second stage of the name suppression inquiry. However, we briefly record that even if the claimed hardship was capable of meeting the threshold required, we do not consider it would have weighed against allowing open justice to prevail in this case.

[114] As this Court said in *DP v R*:[103]

> … Public identification takes account of an offender's culpability, and is an important component of the sentencing requirement of holding an offender accountable for the harm done to society for his or her crime. …

[115] That is true even for young offenders, notwithstanding that their best interests are also a primary consideration that must be given powerful weight. Here, we agree with Ms Clark that, ordinarily, people should have the right to know who they are engaging with for the purposes of employment or engaging someone's services generally. While Ms Priest is correct to highlight Ms Shute's lesser role in the index offending because she was not the driver, we do not agree that her culpability is low. As the Judge observed, but for Ms Shute's animus towards Mr Boyd and her own actions, Mr Boyd would not have been killed.[104]

[116] Furthermore, there are other relevant factors which further weigh in favour of open justice. These include the strong opposition to Ms Shute's name suppression conveyed by Mr Boyd's family and the fact that if Ms Shute's name were suppressed, it is difficult to see how Mr Grace's name would also avoid suppression.[105] For all these reasons, we would have declined to grant Ms Shute name suppression in any event.

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[103] *DP v R*, above n 63, at [9(b)] (footnote omitted).
[104] Sentencing judgment, above n 4, at [57].
[105] At [50], Gault J noted that if he had granted Ms Shute name suppression he would have also made an order suppressing Mr Grace's name until sentencing under s 200(2)(f) to avoid identifying Ms Shute.

Conclusion

[117] Ms Shute's appeal against the refusal to grant her name suppression is dismissed.

Application for bail pending appeal

[118] On 11 April 2024, Ms Shute applied for bail pending determination of her appeals.[106] We heard this application alongside her two appeals and reserved our decision on Ms Shute's bail application.

[119] We reserved our decision because in determining whether Ms Shute had satisfied us on the balance of probabilities that it would be in the interests of justice for bail to be granted,[107] it was necessary to engage with the apparent strength of her grounds of appeal.[108] In doing so, we have come to the conclusions that we have and thus have necessarily concluded that the interests of justice do not favour granting bail pending appeal. In the circumstances and given the importance of delivering a decision for Ms Shute as expeditiously as practicable, we considered it appropriate to release our decision on bail pending appeal with our decision on Ms Shute's substantive appeals.

[120] Accordingly, Ms Shute's application for bail pending appeal is declined.

Result

[121] The application for bail pending appeal is declined.

[122] The application for leave to adduce further evidence on appeal is granted.

[123] The appeal against sentence is dismissed.

[124] The appeal against refusal to grant name suppression is dismissed.

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[106] Bail Act 2000, s 54(2)(c).
[107] Section 14(1A).
[108] Section 14(3)(a).

COOKE J

[125] I would allow the appeal against sentence and substitute a sentence of two years' imprisonment, commuted to 12 months' home detention and 12 months' post-detention conditions as recommended in the pre-sentence report. I otherwise agree with the orders set out in the judgment of Moore J for the reasons given.

[126] The relevant facts and background circumstances are set out in the judgment of Moore J.

[127] Ms Shute was 18 years old at the time of the offending. In a series of recent decisions, both the Supreme Court and this Court have emphasised the impact that youth can have when determining an appropriate sentence applying the principles set out in the Sentencing Act.[109] Three factors can be emphasised. First, due to compromised neurological development young persons can engage in very poor decision-making. Secondly, young persons can have much greater prospects of effective rehabilitation. Thirdly, a sentence of imprisonment can have a crushing effect and interfere with effective rehabilitation. A court must be mindful of these considerations when sentencing a young person, and must carefully consider both the circumstances of the offending and the circumstances of the offender when doing so.

[128] The established methodology requires the sentencing judge to ultimately stand back and consider the appropriate sentence given the circumstances of the offence and the offender.[110] When assessing the appropriate discount for youth there is no upper limit to the percentage discount.[111] A realistic assessment balancing all factors is appropriate. The sentence to be imposed must be the least restrictive outcome appropriate given factors associated with the offender's youth per s 8(g) of the Sentencing Act. It is immaterial when that question is addressed in the sentencing

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[109] *Churchward v R*, above n 37, at [76]–[92] and [98], cited with approval in *H v R,* above n 83, at [33]; *Diaz v R,* above n 25, at [37] per Thomas and Wylie JJ; and *Millar v R* [2019] NZCA 570 at [25]–[31]. See more recently *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412 at n 114 per Glazebrook, O'Regan, Ellen France and Kós JJ, citing *Dickey v R,* above n 48, at [76]–[86], [169], [177] and [195].

[110] *Moses v R*, above n 32, at [49]; *Berkland v R,* above n 52, at [22] per Winkelmann CJ, William Young, Glazebrook and Williams JJ; and *McCaslin-Whitehead v R,* above n 52, at [61].

[111] *Pouwhare v R*, above n 48, at [98]. See also *Diaz v R*, above n 25, at [39] per Thomas and Wylie JJ.

methodology.[112] But it should be asked and answered. This approach is also consistent with the need to demonstrably justify the restriction of rights implicit in the sentence.[113] Here I agree that detention is required given the seriousness of the offending. But I consider home detention to be an available sentencing option, and that it is the least restrictive sentence that is appropriate in this case given the factors associated with Ms Shute's youth. I do not accept that this involves artificially tailoring the sentencing calculations, or imposing home detention automatically as the majority suggest.

[129] There is also a need to treat comparable cases in a similar way.[114] *Diaz* is the most comparable case because the Court was addressing a young person with no previous convictions, who exhibited remorse, who had strong rehabilitation potential, and who had taken significant rehabilitative steps. The circumstances are very similar to those of Ms Shute. In *Diaz*, this Court allowed a 30 per cent discount for youth, 10 per cent for good character, a 7.5 per cent for remorse and a 20 per cent for significant rehabilitative efforts leading to a total discount of 67.5 per cent. Whilst Mr Diaz was 17 and Ms Shute was 18, I do not agree with the majority's view that the circumstances here are so different that there should only be a total discount of 40 per cent in Ms Shute's case.

[130] Whilst there might be some mitigating factors that were present in *Diaz* that were not so present here (such as Mr Diaz acting in a protective way) there are others that are more apparent given Ms Shute's circumstances (such as the mental health issues that she likely faced at the time and continues to face). No two cases are ever identical. But it seems to me that the personal mitigating circumstances in each case are comparable. Yet one case involves discounts totalling 67.5 per cent and the other discounts totalling 40 per cent. I do not consider that difference can be justified. I consider that a total discount for personal mitigating circumstances of 45 per cent is plainly open in Ms Shute's case. This would give rise to a nominal end sentence of two years' imprisonment.

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112 See *Diaz v R*, above n 25, at [62]–[63] per Goddard J.

113 See for example *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [117]–[118] per Winkelmann CJ; and *Diaz v R*, above n 25, at [63] per Goddard J.

114 Sentencing Act, s 8(e).

[131] In terms of the circumstances of the offence, the offending is perhaps a classic example of poor decision-making associated with youth. Following an escalating period of fraught personal relationships involving both abuse and assaults, Ms Shute and her boyfriend engaged in an act of gross stupidity with fatal consequences. Mr Boyd's death was not intended, and the risk to his life does not appear to have been properly appreciated. Compromised decision-making by youth offenders can be reflected in a series of poor decisions and is not limited to one-off actions such as the punch or push referred to by the majority.[115] Ms Shute's involvement was also secondary, as she joined in on what Mr Grace was doing as the driver of the vehicle and she was not in charge of the vehicle. But she remains jointly responsible for Mr Boyd's death given her actions.

[132] In terms of the circumstances of the offender, Ms Shute was of good character with no previous convictions and evidence of previous community-based activities. At the time of the offending, Dr Brindley reports she was likely experiencing mental health difficulties, and likely fulfilled the criteria for acute stress disorder. She is genuinely remorseful, has engaged in significant rehabilitative efforts, and has strong rehabilitation potential and family support. I also consider that it is significant that Dr Brindley advised that she has psychological vulnerabilities which imprisonment was likely to exacerbate. She has since struggled with the implications of her offending to the point of making an attempt to take her own life. This is consistent with the evidence that imprisonment can have significant adverse effects on young persons.[116] I consider these to be compelling personal circumstances closely associated with her youth. They are at least as strong, if not stronger, than those relating to Mr Diaz.

[133] More importantly, once it is accepted that a sentence of two years and two months' imprisonment is available, and given the potentially damaging implications of imprisonment for such a young person (as reflected in Ms Shute's suicide attempt) it is difficult to see why a sentence of two years' imprisonment commuted to home detention is not also available, and more appropriate in terms of

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115 See above at [59].

116 I Lambie and I Randell "The Impact of Incarceration on Juvenile Offenders" (2013) 33 Clinical Psychology Review 448.

Sentencing Act principles. Moreover, it is only the uplift for the other offending apart from the manslaughter that ultimately leads to the sentence arrived at by the majority being more than two years. So, on the methodology applied by the majority, the manslaughter alone did not require a sentence of imprisonment. When assessing what the least restrictive sentence available is, the principles of denunciation, deterrence, and holding the offender to account must be applied. But the other sentencing principles, including rehabilitation, must be as well.

[134] A sentence of imprisonment rather than home detention does have a greater punitive element. But the associated adverse effects in terms of the other Sentencing Act principles, particularly assisting the offender's rehabilitation and reintegration, and the public interest in minimising the prospects of re-offending point strongly against imposing this additional level of punishment. In my view, the Sentencing Act principles are not advanced by imposing imprisonment rather than home detention in this case. It is true that sentencing calculations should not be approached artificially to tailor a result, but it is equally true that they should not be applied mechanically without regard to their significance in terms of Sentencing Act principles and the ultimate end sentence.[117] Adjusting a notional sentence arrived at in the application of a methodology so that it is appropriate in terms of the principles of the Sentencing Act is not only appropriate, but it is required.

[135] The offending here was more serious than in *Diaz*. But that goes to the starting point, not the subsequent discounts for personal mitigating circumstances.[118] The majority suggest that the starting point here could have been higher. But the starting point applied cannot be said to have been out of range. In any event, even with a higher starting point the personal mitigating circumstances should have led to an overall discount to the point where a short-term sentence of imprisonment was available. And once the appeal court considers home detention should have been imposed, appellate intervention is warranted.[119]

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117 *Berkland v R*, above n 52, at [24] per Winkelmann CJ, William Young, Glazebrook and Williams JJ; *Moses v R*, above n 32, at [4] and [49]; and *Dickey v R*, above n 48, at [175].

118 *Millar v R*, above n 109, at [30].

119 *R v Gledhill* [2009] NZCA 415 at [36].

[136] For these reasons I would have allowed the appeal and substituted a sentence of two years' imprisonment commuted to 12 months' home detention, with 12 months' post-detention conditions as recommended in the pre-sentence report. Given the amount of time that Ms Shute has already now served this would have involved her release from prison followed by a short period of home detention, and then 12 months post-detention conditions.

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