IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA469/2019
[2019] NZCA 592

BETWEEN	PHILIP NEVILLE ARPS Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	18 November 2019
Court:	Collins, Brewer and Gendall JJ
Counsel:	A M S Williams and J D Lucas for Appellant F R J Sinclair and V McCall for Respondent
Judgment:	28 November 2019 at 3.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal against sentence is granted.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] On 16 March 2019, Mr Arps distributed to approximately 30 of his associates video footage which showed Mr Tarrant shooting a large number of people in two Christchurch mosques on 15 March. The actions of Mr Tarrant have led to him facing 51 charges of murder, 40 charges of attempted murder and one charge under the Terrorism Suppression Act 2002. On 16 March, Mr Arps also sent the video

footage to another person and arranged for them to modify the video to include an image of rifle "crosshairs" and a "kill-count". Later, on 16 March, the Prime Minister made a statement to the effect that it was likely an offence for anyone to distribute the video footage. Thereafter, Mr Arps deleted the modified video footage and refrained from any further distribution of the unmodified video footage.

[2] Mr Arps was charged with two offences alleging that he had supplied or distributed objectionable material contrary to s 124(1) of the Films, Videos, and Publications Classification Act 1993. The maximum penalty for breaching that section is 14 years' imprisonment.

[3] Mr Arps sought a sentence indication, which was given by Judge O'Driscoll in the District Court at Christchurch on 17 April 2019. The indication was that if Mr Arps pleaded guilty the Judge would adopt a starting point of 2½ years' imprisonment. The Judge said he would make deductions totalling 9 months from the starting point to reflect, amongst other matters, a 25 per cent discount for an early guilty plea. The Judge told Mr Arps that he would not convert the sentence to one of home detention. Mr Arps accepted the sentence indication and pleaded guilty. He was sentenced by Judge O'Driscoll on 18 June 2019 to 21 months' imprisonment.[1]

[4] Mr Arps appealed his sentence to the High Court. His appeal was dismissed by Dunningham J on 27 August 2019.[2]

[5] Mr Arps now seeks leave to pursue a second appeal against his sentence.

Criteria for granting leave to appeal

[6] Before this Court can grant leave for Mr Arps to pursue a second appeal against sentence, we need to be satisfied that:[3]

(a) the appeal involves a matter of general or public importance; or

(b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

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1 *R v Arps* [2019] NZDC 11547 [Sentencing Notes].
2 *Arps v Police* [2019] NZHC 2113 [High Court judgment].
3 Criminal Procedure Act 2011, s 253(3).

The criteria for granting leave for a second appeal against sentence are disjunctive. Mr Arps' application can therefore be granted if he satisfies just one of the leave criteria.

[7] If leave is granted we must allow the appeal if satisfied that:[4]

> (a) for any reason, there is an error in the sentence imposed on conviction; and
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> (b) a different sentence should be imposed.

[8] If an appeal is allowed, our powers include the ability to vary the sentence imposed upon Mr Arps.[5]

Grounds of application

[9] The grounds of the application for leave to appeal can be distilled to four points.

[10] First, it is argued the Courts below erred when they held that s 9(1)(h) of the Sentencing Act 2002 was engaged in this case. Section 9(1) of the Sentencing Act says that when sentencing a defendant, the Court must take into account the aggravating factors listed in that subsection to the extent they are applicable. Section 9(1)(h) identifies offending motivated by hate as being an aggravating factor when sentencing a defendant. It applies where:

> (h) the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
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> (i) the hostility is because of the common characteristic; and
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> (ii) the offender believed that the victim has that characteristic.

[11] Second, it is said the Courts below erred by failing to take into account s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA), which affirms the right of

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4 Section 256(2).
5 Section 257(2).

everyone in New Zealand "to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".

[12] Third, it is contended on behalf of Mr Arps that it is of general or public importance that leave be granted to Mr Arps to pursue a second appeal because other cases of a similar nature are coming before the Courts and sentencing Judges will benefit from knowing how we assess the sentence imposed on Mr Arps.

[13] Fourth, it is submitted that the sentence imposed was manifestly excessive and ought to be replaced with either a sentence of home detention or a lesser period of imprisonment.

Summary of lower Court decisions

[14] Before examining the basis upon which it is contended leave to pursue a second appeal should be granted, we will briefly explain the reasons for Mr Arps' sentence and why his appeal to the High Court was dismissed.

District Court decision

[15] When sentencing Mr Arps, Judge O'Driscoll referred to his comprehensive sentence indication, which formed part of his sentencing notes. The Judge observed that the relevant sentencing purposes were the need to hold Mr Arps accountable for his offending, to denounce his conduct, to deter him and others from further or similar offending, to protect the community and to provide for the interests of the victims. The Judge noted the Crown had argued for a starting point of 3 years' imprisonment while Mr Williams, counsel for Mr Arps, had urged a starting point of 18 months' imprisonment.

[16] The key factors that influenced the sentence imposed by Judge O'Driscoll were:

(a) Mr Arps' motive for distributing the video, which the Judge said "was to endorse and support attacks on Muslims and to encourage others to endorse [Mr Arps' views about Muslim people]".[6]

(b) Mr Arps' previous conviction was relevant to his motivation and culpability. In 2016, Mr Arps was convicted of offensive behaviour for having placed a severed pig's head at the door of a mosque. He was fined by Justices of the Peace. His appeal was dismissed by Judge Gilbert, who described Mr Arps' offending as a deliberate hate crime against Muslims.[7] Thereafter, Mr Arps made a video blog in which he said:

> Obviously [Judge Gilbert] knows me well. White Power, my friends, my family, my people get those fuckers out.
>
> Bring on the cull. Get the fuckers out. The rules are changing White Power.

(c) Comparisons drawn between Mr Arps' offending and that considered by this Court in *Patel v R*.[8] In that case the appellant distributed to 52 people material which portrayed gross gratuitous violence, including beheadings, torture, limb amputation, mutilation, immolation, and victims being run over by tanks. Mr Patel had received a warning from his telecommunications provider after he first distributed this material. He nevertheless did so on a second occasion, days after having been warned not to do so. This Court agreed with the starting point of 5 years' imprisonment in that case. In doing so, it was noted Mr Patel's purpose in distributing the material was to endorse terrorist activities and to encourage others to do the same. Judge O'Driscoll was persuaded that Mr Patel's offending was more serious than that of Mr Arps' and that a lower starting point than that adopted in Mr Patel's case was justified in Mr Arps' circumstances.

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6 *Police v Arps* DC Christchurch CRI-2019-009-2562, 17 April 2019 at [102].
7 *Police v Arps* [2016] NZDC 12341.
8 *Patel v R* [2017] NZCA 234.

(d) The harm caused by Mr Arps' offending. Judge O'Driscoll rejected an argument advanced by Mr Arps' counsel that no harm was caused by his offending. The Judge explained that the distribution of images of extreme violence caused immense distress to all who were associated with Mr Tarrant's actions, particularly as the video was distributed very soon after the shootings.

(e) Mr Arps' lack of remorse. When interviewed by the police and asked about the video Mr Arps said it was "awesome". When asked about the victims of the shooting he said, "I could not give a fuck mate". In his pre-sentence interview with a probation officer Mr Arps said that he requested the addition of the "crosshairs" and "kill-count" to the video to "lighten it up a bit, make it a bit funny because it was so heavy". He maintained his position with the pre-sentence report writer that his crimes were "victimless".

(f) Mr Arps' lack of rehabilitative prospects. It was noted by Judge O'Driscoll that Mr Arps was 44 years old with deeply entrenched ideological views that diminished his prospects of rehabilitation.

(g) Mr Arps ceased distributing the offending video on 16 March after the Prime Minister indicated it was likely to be classified as objectionable and he did not distribute the modified video.[9]

(h) Mr Arps' personal circumstances. He is married with a family and has a small business. His employees and family were dependent on Mr Arps being able to continue his business.

(i) Judge O'Driscoll said there were four reasons why he would decline to convert the prison sentence to one of home detention:[10]

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9 It transpired that on 18 March 2019 the Chief Censor classified the video as objectionable material.

10 Sentencing Notes, above n 1, at [25].

(i) "an electronically monitored sentence would [not] achieve the purposes and principles of sentencing".

(ii) Mr Arps' lack of remorse.

(iii) Mr Arps' "prospects of rehabilitation or … changing [his] views on religion or race are virtually non-existent".

(iv) It was important that he not serve his sentence in his home where his offending occurred.

[17] In addition to sentencing Mr Arps to 21 months' imprisonment, Judge O'Driscoll imposed the standard conditions of release and four special conditions of release. Those special conditions covered a psychological assessment of Mr Arps, a prohibition on Mr Arps using electronic devices capable of accessing the internet, Mr Arps making available for inspection any electronic devices in his possession capable of accessing the internet and him completing any recommended intervention for alcohol or drug use. The special conditions were imposed for a period of six months from Mr Arps' release from prison.

High Court judgment

[18] Dunningham J reviewed the reasons for the sentence imposed by Judge O'Driscoll and concluded the sentence of 21 months' imprisonment was within the range that was reasonably available and therefore not manifestly excessive.

[19] The High Court Judge:

(a) Compared Mr Arps' offending with that of Mr Patel and concluded that the latter's offending was more serious than Mr Arps'. Nevertheless, Mr Arps' offending was considered by the Judge to be serious because it occurred the day after the attack on the mosques when families of the victims were waiting to hear if loved ones had been killed. The Judge described Mr Arps' offending as displaying a "particular callousness"

and that he arranged for the video to be modified "to both glorify [Mr Tarrant] and trivialise the death of innocent people".[11]

(b) Rejected the argument advanced by Mr Arps' counsel that the video distributed by Mr Arps was in the "low range" of offensiveness.[12]

(c) Dismissed the claim Mr Arps' offending caused no harm to others.

(d) Explained why Mr Arps' offending engaged s 9(1)(h) of the Sentencing Act.

(e) Concluded Mr Arps' lack of remorse and his limited potential for rehabilitation were matters of concern.

[20] After assessing these factors, Dunningham J explained that she was satisfied with the starting point adopted by Judge O'Driscoll and the discounts he applied when reaching the end sentence of 21 months' imprisonment. The High Court Judge also reviewed and endorsed the reasons given by Judge O'Driscoll for not converting Mr Arps' sentence to one of home detention.

Analysis

Section 9(1)(h) Sentencing Act

Legislative history

[21] Section 9(1)(h) of the Sentencing Act was added to the Sentencing Bill during the Select Committee's deliberations. Because s 9(1)(h) was inserted at the Select Committee stage, there was no Attorney-General's report on whether or not the section breached the NZBORA.[13] The Select Committee had, however, the benefit of advice from the Law Commission that explained there was precedent for s 9(1)(h) in Canada, the United States and the United Kingdom where legislation has been passed that identifies hate motivation as an aggravating factor that should be taken into account

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11 High Court judgment, above n 2, at [47].
12 At [48].
13 New Zealand Bill of Rights Act 1990, s 7.

when sentencing an offender. In its report back to Parliament, the Select Committee explained the rationale for s 9(1)(h) in the following way:[14]

> Offenders who commit hate crimes need to be punished/dissuaded further, as prejudice presents a long-term threat. A focus on hate crimes has the effect of both denouncing them and encouraging awareness of their existence …
>
> Most of us agree that hate crimes represent the point at which we want the law to say 'we simply will not tolerate this kind of behaviour'. At this point, it is important for the court to send a real message on fundamental values.

[22] In Canada, s 718.2(a)(i) of the Criminal Code 1985 provides that a sentence should be increased to account for any relevant aggravating circumstances, which are defined to include:

> evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor …

[23] The British Columbia Court of Appeal has stated that s 718.2(a)(i) of the Criminal Code reflects Canadian's pride in "being members of a pluralistic, multicultural society" and that violence against a person by virtue of their personal characteristics is abhorred and "antithetical to our collective beliefs".[15] The Supreme Court of Canada considered hate speech more generally in *Saskatchewan (Human Rights Commission) v Whatcott* and found that the prohibition on publications that expose persons to hatred on the basis of a protected characteristic was a justified limit on freedom of expression.[16]

[24] In the United States, almost all states have passed legislation that provides for a separate hate crime offence or that permits courts to treat hate crime characteristics as being an aggravating factor for invoking greater penalties when sentencing an offender.[17] In *Wisconsin v Mitchell*, the Supreme Court of the United States examined the constitutionality of state legislation that permits sentences to be increased where offending occurs against victims chosen because of a victim's race,

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14 Sentencing and Parole Reform Bill 2001 (148-2) (select committee report) at 12.

15 *R v Woodward* 2011 BCCA 251, [2011] BCJ 964 at [27].

16 *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11, [2013] 1 SCR 467.

17 Alison M Smith and Cassandra L Foley *State Statutes Governing Hate Crimes* (Congressional Research Service, RL33099, 28 September 2010).

religion, colour, disability, sexual orientation, national origin or ancestry. The Supreme Court held that these types of provisions do not violate the free speech provisions of the First Amendment of the United States Constitution.[18]

[25] In the United Kingdom, s 28 of the Crime and Disorder Act 1998 made hateful conduct towards a victim based on the victim's race or religion an aggravating factor in sentencing for certain crimes. Sections 145 and 146 of the Criminal Justice Act 2003 expanded the circumstances under which a Court could assess whether an offender's conduct was motivated by hostility thereby constituting an aggravating feature when sentencing the offender. Other offences have an aggravated penalty where they involve racial or religious hostility.[19]

[26] In addition to the jurisdictions we have referred to at [22]–[25], our research indicates that at least 13 European countries have legislative provisions similar to s 9(1)(h) of the Sentencing Act.

[27] Section 9(1)(h) is not the only legislation in this country that endeavours to mark society's condemnation of offending motivated by hate of other persons in society. Religion is a prohibited ground of discrimination in the Human Rights Act 1993.[20] In addition, s 61 of the Human Rights Act makes it unlawful to publish or distribute "threatening, abusive, or insulting … matter or words likely to excite hostility against or bring into contempt any group of persons … on the ground of the colour, race, or ethnic or national origins of that group of persons". Religion is, however, not a factor specifically referred to in s 61 of the Human Rights Act.

Application of s 9(1)(h) of the Sentencing Act to Mr Arps' case

[28] Mr Williams submitted that Mr Arps' opinions should not be conflated with the argument that his offending was motivated by hostility towards Muslim people or any other group in society and, that the evidence in this case did not truly engage s 9(1)(h) of the Sentencing Act.

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18 *Wisconsin v Mitchell* 508 US 476 (1993).
19 Crime and Disorder Act 1998 (UK), ss 29–32.
20 Human Rights Act 1993, s 21(c).

[29] There are, however, two impediments to that submission. First, the evidence relied upon by the Crown, much of which is in the summary of facts Mr Arps accepted when he entered his pleas of guilty. The second problem with this aspect of Mr Arps' case is that, although he carries no onus of proof, he has not provided any evidence to rebut that relied upon by the Crown.

[30] In order to explain why the lower Courts were correct when they concluded s 9(1)(h) of the Sentencing Act applied to Mr Arps' offending, we need only recite the following aspects of the Crown's evidence.

[31] First, Mr Arps' offending was in response to attacks on people worshipping in the Christchurch mosques. Those who were shot in the mosques became victims because of their religion.

[32] Second, Mr Arps' offending was motivated, at least in part, because of his hostility towards Muslim people and in the context of him knowing the victims of his offending would be predominantly Muslim people. The evidence that supports this conclusion is:

(a) when asked about the contents of the video when he was interviewed by the police, Mr Arps demonstrated profound hostility towards Muslim people;

(b) when questioned by the writer of the pre-sentence report, Mr Arps strongly justified his offending on political grounds and endeavoured to justify his conduct in a way which demonstrated hostility towards Muslim people; and

(c) Mr Arps' previous hate motivated offending and his comments about Judge Gilbert's decision demonstrated deep-seated hostility towards Muslim people.

[33] We note Mr Arps did say to the writer of the pre-sentence report that he was disturbed by a part of the video footage that showed a female victim being harmed. That by itself does not, however, negate the factors we have summarised at [32].

[34] We are therefore satisfied that Judge O'Driscoll correctly applied s 9(1)(h) of the Sentencing Act in this case and that Dunningham J reached the right conclusion when she endorsed the sentencing Judge's approach.

Section 14 of the NZBORA

[35] The right to freedom of expression is one of the most cherished in a free and democratic society. It is justified on the basis that a free exchange of ideas is integral to democratic government.[21] Closely linked to this rationale is the idea that the 'marketplace of ideas' will produce a better society if that marketplace is able to function without restraint.[22] It has also been said that freedom of expression is linked to "individual self-fulfillment"[23] and human development and provides an important social "safety valve".[24]

[36] Article 19 of the International Covenant on Civil and Political Rights, which came into force in New Zealand on 23 March 1979, also affirms the right of everyone to freedom of expression.[25] Article 19 recognises that the right to freedom of expression may be restricted by laws that are necessary to respect the rights or reputations of other people, or to protect, amongst other interests, national security and public order. Similar provisions may be found in a number of cognate jurisdictions.

[37] Mr Williams submitted that Mr Arps' right to freedom of expression has been infringed, or at least not properly recognised by the Courts below. This submission raises two propositions:

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21 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [13.6.1]–[13.6.16]; and *New York Times Co v Sullivan* 376 US 254 (1964) at 269 per Brennan J.

22 *Abrams v United States* 250 US 616 (1919) at 630 per Holmes J dissenting.

23 *R v Sharpe* 2001 SCC 2, [2001] 1 SCR 45 at [141] per L'Heureux-Dubé, Gonthier and Bastarache JJ.

24 *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 (HL) at 126.

25 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

(a) Mr Arps was engaged in protected speech at the time he distributed the video footage; and

(b) s 9(1)(h) of the Sentencing Act should not have been invoked because it limits his rights under s 14 of the NZBORA.

[38] While Mr Arps' application for leave to appeal raised general concerns about the application of s 14 of the NZBORA to the circumstances of his case, the hearing before us evolved into an examination of the interface between s 14 of the NZBORA and s 9(1)(h) of the Sentencing Act. Mr Williams appeared to accept that as his client had pleaded guilty to having committed two offences under s 124(1) of the Films, Videos, and Publications Classification Act, this was not the case to argue that the offence provisions of that Act breach the rights affirmed by s 14 of the NZBORA. Instead, we understand Mr Williams to have submitted that s 14 of the NZBORA was a factor that should be taken into account when determining the appropriate penalty for breaching the offence provisions in the Films, Videos, and Publications Classification Act. We proceed on the basis that the key issue in the application for leave to appeal concerns the relationship between s 14 of the NZBORA and s 9(1)(h) of the Sentencing Act.

Was Mr Arps engaged in protected speech at the time he distributed the video footage?

[39] Integral to the right to freedom of expression is the imparting of "information and opinions of any kind". In the context of this case, there is a close link between the "information" and the "opinion" conveyed by the video footage distributed by Mr Arps. Parliament's use of the conjunctive "and" between the nouns "information" and "opinion" in s 14 of the NZBORA underscores the close connection between those two concepts.

[40] The information conveyed in the video distributed by Mr Arps was that a large number of Muslim people had been shot while attending the Christchurch mosques for religious purposes. The opinion that was being conveyed by Mr Arps when he distributed the video footage reflected his extreme ideological views namely, that there is no place for Muslim people in our society.

[41] The phrase "opinions *of any kind*" in s 14 of the NZBORA is a broad concept that was adopted by Parliament to capture a wide spectrum of beliefs and views. This Court has previously described the right as being as "wide as human thought and imagination".[26] This wide spectrum includes those opinions that most members of society vehemently reject. It does not matter, however, that an opinion is totally objectionable.[27] It is still an "opinion of any kind". While right thinking members of society regard Mr Arps' opinions as being utterly repugnant, they are nevertheless opinions that fall within the wide ambit of s 14 of the NZBORA precisely because they are "opinions of any kind". We are therefore satisfied Mr Arps was imparting information and his opinion when he distributed the video footage. His case therefore engages s 14 of the NZBORA.

Was Mr Arps' right to freedom of expression limited by the application of s 9(1)(h) of the Sentencing Act

[42] Section 9(1)(h) of the Sentencing Act imposes a punitive consequence for committing an offence that is motivated by hostility towards a section or sections of society. It applies in circumstances such as the present, when Mr Arps conveyed information and his opinion to others. His previously expressed opinions were also relevant to the application of s 9(1)(h).[28] In the present case, Mr Arps' sentence was calculated in the context of his offending having been motivated by his hostility towards Muslim people. Accordingly, s 9(1)(h) of the Sentencing Act infringed Mr Arps' right to freedom of expression.

Was Mr Arps' right to freedom of expression justifiably limited by s 9(1)(h) of the Sentencing Act?

[43] There are multiple limitations to a person's freedom of expression. Those limitations may be necessary to protect society's interests such as national

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[26] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15]; *Irwin Toy Ltd v Québec (Attorney-General)* [1989] 1 SCR 927 at 969; and compare *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 59.

[27] An exception for violent speech was raised before in the hearing. This Court had previously commented that even hateful or dangerous speech is expression regardless. The justification inquiry under s 5 is the appropriate stage to evaluate whether protection should continue: see *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [38]. We agree with this approach and will not carve out any internal limit to s 14 of the NZBORA.

[28] Sentencing Act 2002, s 24.

security, public order and public health and to protect individual interests, such as another's reputation or rights.[29]

[44] Having concluded Mr Arps' conduct engaged the aggravating factor in s 9(1)(h), we now explain why s 9(1)(h) justifiably limits Mr Arps' right to freedom of expression in the circumstances of this case.

[45] The Supreme Court in *R v Hansen* has provided a framework for analysing whether limiting a right protected under the NZBORA is justified.[30] The starting point of this part of our analysis is s 5 of the NZBORA which states that the rights and freedoms contained in the NZBORA may be subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". If the limit is found not to be justified, s 6 of the NZBORA must be considered, which provides that where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the NZBORA, "that meaning shall be preferred to any other meaning". If no rights-consistent meaning can be found, s 4 applies.[31] The relevant part of that section provides that no court shall decline to apply any provision of an enactment "by reason only that the provision is inconsistent with any provision of this Bill of Rights".

Section 5 of the NZBORA

[46] In order to constitute a reasonable limitation to the rights affirmed by s 14 of the NZBORA, s 9(1)(h) of the Sentencing Act must be capable of being "demonstrably justified in a free and democratic society".[32] This in turn requires us to be satisfied that:

(a) section 9(1)(h) serves a sufficiently important purpose to justify limiting s 14 of the NZBORA;

(b) there is a rational connection between s 9(1)(h) and its purpose;

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29 Butler and Butler, above n 21, at [13.8.1]–[13.8.9].
30 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].
31 At [92].
32 At [101] per Tipping J.

(c) section 9(1)(h) abridges the right in s 14 of the NZBORA no more than is reasonably necessary to achieve its purpose; and

(d) section 9(1)(h) is a proportionate response to the importance of its objective.

We address each of these considerations at [48]–[52].

[47] Although we have not had evidence produced to support the Crown's case that s 9(1)(h) of the Sentencing Act justifiably limits the rights in s 14 of the NZBORA, we do not think this is fatal to the Crown's case. This is because although many cases will require evidence to justify limiting a right or freedom in the NZBORA,[33] evidence will not always be required. Publicly available legislative materials, such as the Select Committee's Report, supplemented by "common sense" and "inferential reasoning" may suffice.[34]

(a) Does s 9(1)(h) of the Sentencing Act serve a sufficiently important purpose to justify limiting s 14 of the NZBORA?

[48] The purpose of s 9(1)(h) of the Sentencing Act is to require courts sentencing a defendant to treat as an aggravating factor of the offending that it was wholly or in part motivated by the defendant's hostility towards the victim because of, amongst other factors, the victim's religion. As we have noted from the Select Committee Report on s 9(1)(h), the purposes of the measure include marking society's condemnation of various types of hate motivated offending, holding those who commit such crimes accountable for their motives, deterring others from similarly motivated offending and protecting the interests of victims of such offending. These are very important objectives in a society that wishes to condemn and deter those who are motivated to undermine the wellbeing of society and the interests of individuals by engaging in hate motivated offending of the kind that is the focus of s 9(1)(h) of the Sentencing Act.[35] These very important purposes necessitate

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33 At [9], [50], and [132]–[133].

34 *R v Sharpe*, above n 23, at [78].

35 See also Rochelle Rolston "Addressing Hate Crime in New Zealand: A Separate Offence?" (LLB (Hons) Dissertation, Victoria University of Wellington, 2019).

the placing of limits on the right to freedom of expression in order to protect the wider interests of society and the rights of victims of crime that are motivated by hate.

(b) Is there a rational connection between s 9(1)(h) of the Sentencing Act and its purpose?

[49] Inherent in s 9(1)(h) of the Sentencing Act is the requirement that the Court sentencing a defendant must assess whether the defendant's offending was motivated by his or her hostility towards the victim or victims because of an enduring characteristic, such as their religion. Thus, s 9(1)(h) identifies victims of hate motivated offending by reference to their "enduring common characteristic" and requires a sentencing Judge to take into account the defendant's motivation for offending based upon hostility towards the victim or victims because of their common characteristic. Thus, s 9(1)(h) of the Sentencing Act is rationally connected to the purposes of that provision.

(c) Does s 9(1)(h) abridge the right in s 14 of the NZBORA no more than is reasonably necessary to sufficiently achieve its purpose?

[50] Parliament has entrusted the courts to decide to what degree, if any, a sentence should be increased where the offender was motivated by hate towards certain groups in society. That decision is to be exercised in conjunction with applying all other relevant principles and purposes of sentencing set out in the Sentencing Act. The sentencing process requires Judges to assess mitigating as well as aggravating factors. This requirement places a restraint on the application of s 9(1)(h) of the Sentencing Act that demonstrates why s 9(1)(h) abridges the rights in s 14 of the NZBORA no more than it is necessary to sufficiently achieve the purpose of s 9(1)(h).

(d) Is s 9(1)(h) of the Sentencing Act a proportionate response to the importance of its purpose?

[51] When assessing the proportionality of s 9(1)(h) of the Sentencing Act, we have had regard to the fact that provisions similar to s 9(1)(h) can be found in most comparable jurisdictions. It is also significant that where those measures have been tested, the highest courts of the United States and Canada have been satisfied that

provisions similar to s 9(1)(h) are constitutional. We have not found a single incidence of a final court in any free and democratic country expressing reservations about the way in which provisions equivalent to s 9(1)(h) of the Sentencing Act impact upon a citizen's freedom of expression.

[52] Our analysis in [48]–[51] leads us to conclude that s 9(1) of the Sentencing Act is a justified limitation upon the right to freedom of expression in s 14 of the NZBORA in the circumstances of this case.

Section 6 of the NZBORA

[53] Mr Williams endeavoured to argue that s 9(1)(h) of the Sentencing Act should not be used to denounce opinions that are considered unacceptable by society at large and that s 9(1)(h) of the Sentencing Act and s 14 of the NZBORA can be read in harmony. We have found that the limit on the right is justified but we shall still address this argument. The fundamental flaw with Mr Williams' submission is that Mr Arps has not been punished for his opinion alone. He has been punished for having distributed objectionable material and for doing so when he was motivated by his hostility towards members of the Muslim community.

[54] While in some cases s 6 of the NZBORA will provide a solution where an enactment can be interpreted in a way that is consistent with the freedoms and rights in the NZBORA, that solution is not available in this case. We do not think that the circumstances of this case allow us to construe s 9(1)(h) of the Sentencing Act in a way that is consistent with s 14 of the NZBORA.

[55] The target of s 9(1)(h) of the Sentencing Act is that part of offending that demonstrates hostility towards a particular group or groups in society. That hostility is often communicated either by the conduct of the offending and or by accompanying statements of the offender that establish his or her offending was motivated by hostility towards certain segments of society. As illustrated by Mr Arps' case, comments made to the police relating to the offending or previous conduct are often taken into

account.[36] The offending would not attract the aggravating factor but for the expression of opinions that demonstrate the offender's hostile motivation. Thus, in most cases where an offender is motivated by hostility towards specific groups in society, it will not be possible to interpret s 9(1)(h) of the Sentencing Act in a way that is consistent with s 14 of the NZBORA.

[56] We have considered whether it is possible for us to adopt an approach akin to that taken in *Brooker v Police* or *Hopkinson v Police*.[37] In the latter case, the word "dishonour" in s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981 was able to be given a narrow construction in order to achieve a rights-consistent interpretation.[38] In *Brooker*, the word "disorderly" in s 4(1)(a) of the Summary Offences Act 1981 was given a narrow interpretation consistent with s 14 of the NZBORA.[39] We do not however, see a logical basis upon which we can read down the scope of s 9(1)(h) of the Sentencing Act in the circumstances of this case in order to achieve a similar outcome to *Brooker* or *Hopkinson*.

[57] This conclusion is based on our concern that reading down the operative term "hostility" would undermine the legislative purpose of s 9(1)(h) of the Sentencing Act. Furthermore, trying to construct abstract and artificial limits as to what constitutes hostile motivation is neither practical or desirable. Instead, s 9(1)(h) must be applied on a case by case basis in a way that reflects the facts in each individual case. We are therefore content to leave it to sentencing Judges to make their assessments of the evidence as to whether or not the threshold in s 9(1)(h) is met, rather than construct an artificially narrow interpretation of "hostility" in s 9(1)(h) in order to limit the infringement of the offender's right to freedom of expression.

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36 See for example *R v Johansen* HC Auckland CRI-2004-083-1849, 2 June 2005 at [6]; *R v Bowling* HC Wellington CRI-2007-032-3065, 30 May 2008 at [13]; *Bryan v Police* HC Auckland CRI-2009-404-45, 3 April 2009 at [50]; *Currie v Police* HC Auckland CRI-2008-404-307, 27 May 2009 at [34]; *Landon v R* [2018] NZCA 264 at [59]; and *Angelich v R* [2018] NZHC 2429 at [29(f)].

37 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; and *Hopkinson v Police* [2004] 3 NZLR 704 (HC).

38 *Hopkinson v Police*, above n 37, at [81].

39 *Brooker v Police*, above n 37. Each of the Supreme Court Judges offered an interpretation: see [24] and [42] per Elias CJ, [56] per Blanchard J, [90] per Tipping J, [130] per McGrath J, and [188] per Thomas J.

[58] For the reasons canvassed at [53]–[57] we are satisfied that s 6 of the NZBORA does not assist Mr Arps.

Section 4 of the NZBORA

[59] The effect of the relevant part of s 4 of the NZBORA that we have set out at [45] means that s 9(1)(h) of the Sentencing Act must apply in the circumstances of this case.

Similar cases

[60] Mr Williams submitted that Mr Arps meets the criteria for leave for a second appeal against his sentence because his is the first of a number of cases where defendants are facing charges of possession, disseminating or editing footage of Mr Tarrant's actions. In other words, his appeal raises a matter of general and public importance.

[61] There are two reasons why that submission does not gain traction:

(a) As noted by the District and High Courts in this case, this Court's judgment in *Patel v R* provides sentencing Courts with an analytical structure that can be used and adapted when sentencing other defendants for distributing objectionable material of the kind disseminated by Mr Arps.

(b) This judgment is likely to provide sentencing Courts with as much assistance as it can when sentencing other defendants for offending similar to that engaged in by Mr Arps.

The sentence imposed

[62] Mr Williams also submitted a miscarriage of justice occurred because the sentence imposed upon Mr Arps was manifestly excessive.

[63] Although Mr Arps pleaded guilty after being fully informed that he would be sentenced to 21 months' imprisonment, he was nevertheless entitled to pursue an appeal against sentence to the High Court.[40]

[64] Mr Williams now submits the lower Courts should have adopted a starting point of 12 months' imprisonment in this case. We disagree. When we assess Mr Arps' offending against that of Mr Patel, we see considerable merit in the Crown's position in the District Court that a starting point of 3 years' imprisonment was justified in this case, particularly in light of the fact the maximum penalty for this type of offending is 14 years' imprisonment. In reaching this conclusion, we are mindful of the fact Mr Arps did not distribute the objectionable material after the Prime Minister suggested that those who sent the video to others may commit an offence. Mr Arps' response to the Prime Minister's warning means his offending was less serious than that of Mr Patel. Nevertheless, Mr Arps' offending was serious and more than justified the starting point adopted by the Courts below.

[65] The factors that influence us in reaching this conclusion are:

(a) The video footage distributed by Mr Arps was very disturbing. Judge O'Driscoll characterised it as being at the "high end of the scale of extreme violence or cruelty" of objectionable material.[41] We agree with that assessment.

(b) Mr Arps' offending was particularly insensitive as he distributed the video within about 24 hours of the attack on the mosques, at a time when many members of the victims' families were waiting to learn the fate of their loved ones.

(c) Mr Arps was motivated by his hostility towards members of the Muslim faith.

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40 Criminal Procedure Act, s 245.

41 *Police v Arps*, above n 6, at [63].

[66] We also think the District Court could not have been criticised if it had imposed a modest uplift in Mr Arps' sentence to reflect his previous hate crime offence even though that earlier offence only resulted in the imposition of a fine.

[67] The discounts provided when sentencing Mr Arps were appropriate and could not have been increased to reflect his personal circumstances. In particular, Mr Arps' lack of remorse and his lack of rehabilitative prospects is a troubling feature of his case.

[68] We also fully endorse the decisions of the Courts below not to convert Mr Arps' sentence to one of home detention for the reasons we have summarised at [16(i)].

[69] We therefore conclude the sentence was not manifestly excessive.

Disposition

[70] The only issue that remains to be determined is whether we should decline Mr Arps' application for leave to appeal or grant his application for leave to appeal and dismiss his appeal because of its lack of merit. The distinction is important as the former course of action deprives Mr Arps of any possibility of a further appeal.

[71] There would be no risk of a miscarriage of justice if we were to decline Mr Arps' application for leave to appeal. The Crown accepted at the hearing before us, however, that a matter of general or public importance is engaged by this appeal. We have therefore concluded, albeit by a fine margin, that Mr Arps' case concerning the interface between s 14 of the NZBORA and s 9(1)(h) of the Sentencing Act, as we have presented it in this judgment, does involve a matter of general or public importance. Accordingly, we grant Mr Arps' application for leave to appeal his sentence but dismiss his appeal against sentence.

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