IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA718/2017
[2019] NZCA 529

BETWEEN	PETER JOHN ORCHARD Appellant
AND	THE QUEEN Respondent

Hearing: 6 June 2019

Court: Kós P, Miller and Brown JJ

Counsel: A B Fairley for Appellant
B J Horsley and A J Ewing for Respondent

Judgment: 4 November 2019 at 11 am

JUDGMENT OF THE COURT

A The applications to adduce fresh evidence on appeal are declined.

B The appeal against sentence is allowed.

C The sentence of six years and nine months' imprisonment on the charge of causing grievous bodily harm is quashed and a sentence of four years and three months' imprisonment is substituted.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Orchard, an arborist, fell from a tree. He suffered significant physical injuries and a mild traumatic brain injury. He has since been diagnosed with

post-traumatic stress disorder.[1] This has the effect of causing severe anxiety, mood dysregulation, poor impulse control and maladaptive coping strategies, including chronic suicidal thinking.

[2] The accident occurred in 2013. Following the accident Mr Orchard became estranged from his wife. In 2015 she obtained a protection order against him. But she continued to maintain contact with him, in part because of their children. In January 2016 Mrs Orchard and three of their young children went with him in the family car to the beach. On the way there she received a text message from a friend making certain allegations about Mr Orchard. She told him about the message and its contents. He became angry and upset.

[3] That angry, agitated state continued as he drove home. He said things like, "I don't have anything to lose". Then he drove the car deliberately at some lamp posts. As he did so he unclipped his wife's seatbelt. Two lamp posts were knocked over before the third brought the car to a halt. In a continued state of agitation Mr Orchard climbed a tree with a length of rope and attempted to hang himself. Two members of the public rescued him from that fate, together with some police officers who had been called to the scene.

[4] Mrs Orchard was knocked unconscious by the accident, badly bruised and spent three days in hospital. Fortuitously the children were not injured physically at all.

[5] Mr Orchard pleaded guilty to one count of wounding with intent to cause grievous bodily harm to his wife,[2] one count of breaching a protection order, two counts of assaulting the two men who rescued him and one count of driving dangerously. Downs J sentenced Mr Orchard to an effective sentence of six years and nine months' imprisonment on these charges.[3]

[6] Mr Orchard appeals that sentence. He says the starting point of nine years for the lead GBH offence is too high, that uplifts given for the protection order breach and

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1 Hereafter, "PTSD".
2 Hereafter, "GBH".
3 *R v Orchard* [2017] NZHC 3015 [Sentencing notes].

prior offending were too high, and that the discount of 15 per cent given for his mental health issues was too low.

Mr Orchard's health

[7] At sentencing, the Judge considered reports from two psychiatrists, Dr Ian Goodwin and Dr Kyros Karayiannis. Both reports were prepared to assist the Court determine whether Mr Orchard was unfit to stand trial, or, in the alternative, whether a defence of insanity might be available.

[8] These reports discussed Mr Orchard's fall, relationship difficulties and mental and physical health. The fall resulted in multiple injuries, including significant spinal injuries as well as secondary complications and chronic pain. Both reports noted that Mr Orchard was diagnosed with PTSD and had experienced some symptoms of depression and anxiety following the fall. He had not been diagnosed as suffering from a primary psychotic disorder, or serious mood disorder. He had no documented history of any severe traumatic brain injury; though it is highly likely he did suffer from a mild traumatic brain injury at the time of his fall from the tree. He had previously been reviewed by Mental Health Services in a number of crisis situations, where he felt suicidal or threatened suicide. These situations occurred primarily in the context of relationship difficulties with his wife.

[9] Both reports concluded that Mr Orchard had a number of mild depressive symptoms and some significant ongoing problems with emotional dysregulation, as well as a history of PTSD dating back to 2013 for which he was receiving appropriate treatment. One expert described the condition as moderately severe. In 2017 a third psychiatrist (whose report was referred to by Dr Karayiannis) recorded him as having long-standing problems with depression, anxiety and difficulty managing his emotions since his fall. He was prescribed antidepressants. He also used alcohol and cannabis to control his emotions or for pain relief. He suffered from alcohol abuse and/or dependence at times, but this did not appear to have been a prominent feature at the time of the alleged offending. He was unlikely to be mentally impaired, and he did not satisfy the statutory criteria for a "mental disorder".[4] Mr Orchard was fit to stand

[4] Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2.

trial. He was not suffering a disease of the mind that would enable a defence of insanity.

[10] It may also be observed that Mr Orchard had had no contact with the criminal justice system until January 2015, some 16 months after his fall, when he was 35 years of age. His first contact with psychiatric services was a year after his fall. It resulted from reported depression and suicidal ideation.

Sentence imposed

[11] Applying the sentencing methodology in *R v Taueki*, the Judge first set the starting point, having regard to factors related to the culpability of the offending, then considered what allowance might be given for aggravating and mitigating circumstances personal to the offender.[5]

[12] In determining the appropriate starting point, the Judge identified five aggravating features of Mr Orchard's offending. First, the use of Mr Orchard's car and the lamp posts as weapons (by driving at and through them at speed). Secondly, the vulnerability of the complainant as a passenger whose seatbelt had been unbuckled. Thirdly, the offending involved extreme violence, by using the car as a weapon and unbuckling the complainant's seatbelt. Fourthly, the unbuckling of the seatbelt meant it was likely the complainant's head would sustain much of the impact, which Mr Orchard must have appreciated. Fifthly, the complainant suffered physical harm. It was remarkable that she did not sustain more serious injury, and that the children were not harmed physically. Although there was no victim impact statement, the Judge considered it "inherently unlikely" that the complainant and children suffered no psychological harm.[6]

[13] Given the nature and number of these aggravating factors, the Judge considered Mr Orchard's offending to sit at the top end of band two, shading into band three, of the guidelines identified in *Taueki*:[7]

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5 *R v Taueki* [2005] 3 NZLR 372 (CA) at [8] and [44].
6 Sentencing notes, above n 3, at [11]–[16].
7 See below at [28].

> [18] … To state the obvious, you intended to cause your partner really serious bodily harm by maximising the impact between the car and the lamp posts, all after you had unrestrained her, and while she was helpless. Her head was likely to sustain the worst of the impact. She and your children must have believed they were about to die. It is fortunate no one did.
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> [19] Bad as all this was, however, I do not regard your offending as warranting a starting point near to the maximum penalty. Sadly, worse cases can be imagined— and readily found. I adopt a starting point of nine years' imprisonment, which is at the top of band two and the bottom of band three of the judgment I have explained to you.

[14] From this nine year starting point, the Judge applied a six month uplift to reflect the fact the offending breached the 2015 protection order, another serious offence.[8] The Judge applied a further uplift of six months as Mr Orchard had repeatedly breached protection orders in relation to the complainant.[9] The Judge also noted that each of the earlier breaches of protection order offences had associated convictions for violence, although in the absence of evidence it had to be assumed that the complainant in the index offending was not also the complainant in these offences.[10]

[15] The Judge turned to the mitigating factors relevant to Mr Orchard. The Judge considered that the reports of Drs Goodwin and Karayiannis established that Mr Orchard suffered from PTSD after his fall in 2013, along with likely alcohol abuse, as well as symptoms of depression and anxiety, but did not suffer from a mental illness or disorder.[11]

[16] The circumstances indicated that Mr Orchard's fall had contributed to his offending, underscored by his attempt to take his own life, thereby reducing culpability for the offending, but any discount had to be tempered by the fact that Mr Orchard posed a danger to his family. The Judge considered Mr Orchard's mental health issues to be "something of a dual-edged sword".[12] The Judge reduced the starting point by 15 per cent to account for this, noting Mr Orchard had expressed a desire to change,

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8 Sentencing notes, above n 3, at [20].
9 At [20]–[21].
10 At [22]–[23].
11 At [29].
12 At [31].

but indicating the figure would have been higher but for the danger posed by Mr Orchard.[13]

[17] The Judge then applied a 20 per cent discount for Mr Orchard's guilty plea.[14]

[18] This resulted in an end sentence of six years and nine months' imprisonment on the GBH charge, to be served concurrently on sentences of 18 months' imprisonment for the breach of protection order charge; three months' imprisonment on the dangerous driving charge; and three months' imprisonment on the two assault charges.[15]

Appeal

[19] Mr Orchard appeals his sentence on the basis that it was manifestly excessive, because:

(a) The starting point was too high given the disconnect between the injuries suffered by the complainant and the mechanism of injury.

(b) The uplifts for Mr Orchard's other offending and previous convictions were too high.

(c) The 15 per cent discount for mental health issues was insufficient as the Judge erred in considering this factor to be a "dual-edged sword".[16]

[20] Before addressing these grounds, we consider applications made by both parties to adduce further evidence on appeal.

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13 At [32].
14 At [34].
15 At [35]–[36].
16 Mr Orchard also raised a mathematical error by the Judge in calculating the end sentence, but it is unnecessary for us to address this given the conclusions we have reached on the other issues.

Further evidence on appeal?

[21] Mr Fairley sought to tender a further report from Dr Goodwin. It postdates sentencing. It repeats or enlarges on some of the matters in Dr Goodwin's first report and establishes that Mr Orchard is responding well to medicinal and counselling interventions.

[22] Mr Horsley sought to tender a victim impact statement from the complainant. As noted above, no victim impact statement had been put before the Judge.

[23] We decline to receive either document. The question before this Court is whether the sentence imposed was erroneous and a different sentence should be imposed.[17] Appellate process does not permit new evidence on a sentence appeal unless the evidence is credible, fresh and cogent:[18]

> [16] The principles for assessing the admissibility of fresh evidence for appeals against conviction are now well established. There is no reason why different principles should be engaged where an appellant wishes to adduce fresh evidence for an appeal against sentence. Thus, if the fresh evidence is not credible it should not be admitted. If it is credible, an assessment needs to be made as to whether it could not have been presented to the sentencing Court with reasonable diligence. If the evidence is both credible and fresh it should be admitted unless the appellate court is satisfied it would have had no effect on the sentence. If the evidence is credible but not fresh, the appellate court should assess its strength and its potential impact on the sentence. If the appellate court considers that the sentence could be manifestly excessive if the evidence is excluded, then it should be admitted not withstanding that it is not fresh.

[24] The second report from Dr Goodwin, to the extent it repeats and reinforces assessments made in his first report, is not fresh. Nor does it add anything to the material that was before the Judge. To the extent it goes on to advise Mr Orchard's health status since sentencing, we do not consider it to be sufficiently exceptional or relevant to warrant admissibility given the general principle that events postdating sentence should be disregarded on appeal.[19]

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17 Criminal Procedure Act 2011, s 250(2); and *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30]–[31].

18 *Mark v R* [2019] NZCA 121, citing *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120]. See also *Campbell v R* [2017] NZCA 623 at [15]; and *Antonievic v R* [2017] NZCA 87 at [39].

19 *Poi v R* [2015] NZCA 300 at [11]; and *Monk v R* [2013] NZCA 564 at [33].

[25] Mr Fairley had not received Mrs Orchard's statement prior to the hearing of the appeal. In any event, we do not think it is a matter we should take cognisance of in deciding this appeal. If material, it should have been before the sentencing Judge, responded to at that time by defence counsel, and considered in setting the original sentence.

Starting point

[26] Mr Fairley submitted that the Judge erred in failing to give adequate consideration to the nature of the injuries suffered by the complainant. These were limited, and not enduring. The Judge was unduly focused on the mechanism of injury, and did not have sufficient regard to the fact that other sentencing decisions adopting a similar starting point of nine years involved premeditated serious violence resulting in serious, enduring injury. The disconnect between the mechanism of injury and the injuries actually suffered by the complainant meant the offending warranted a lower starting point.

[27] In response, Mr Horsley submitted Mr Orchard's offending warranted the nine year starting point, despite the fact his partner and children were not severely injured. What brought it into that territory was not only the potential for greater harm, but the unique combination of other aggravating features: the sheer degree of force involved, the presence of three children in the car, and Mr Orchard's callous removal of the complainant's seatbelt, which (Mr Horsley submitted) suggested he had done everything he could to maximise her injuries.

Discussion

[28] In this Court's recent judgment in *Zhang v R* we emphasised that sentencing must achieve justice in individual cases.[20] That requires flexibility and discretion in setting a sentence notwithstanding the existence of general guidelines stated in a judgment such as *Taueki*.[21] Consistency is not an absolute end; sentencing remains

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20 *Zhang v R* [2019] NZCA 507 at [10(a)].
21 At [120].

an evaluative exercise and guideline judgments must not be applied in a mechanistic way. Sentencing outside bands is not forbidden, but must be justified.[22]

[29] This Court recently also reviewed sentencing for GBH offending in a domestic context in *Solicitor-General v Hutchison.*[23] That case also concerned a lead charge of wounding with intent to cause GBH. The violence there involved a prolonged beating using a weapon, causing lasting injury. This Court applied a nine year starting point to that charge.[24] It will be at once apparent that a sentencing disparity should exist between that decision and this appeal, yet identical starting points were adopted.

[30] In *Hutchison* we considered a number of other GBH cases in a domestic context. Two are worth recounting here. *Griffiths v R* concerned six serious violent domestic assaults.[25] The worst involved the offender forcing the complainant to put a sponge in her mouth to keep her quiet, then deliberately splashing boiling water over her abdomen and legs. This Court dismissed an appeal against sentence and upheld the sentencing Judge's starting point of eight years.[26] *Kauwhata v R* concerned an attack in which an estranged partner hit the complainant's face, causing her to fall to the floor.[27] He then took a knife, stabbing her in the chest and attempting to stab her throat. By good luck the latter blows were ineffective. This Court identified the appropriate starting point as seven years' imprisonment, within band two in terms of *Taueki*. The offending was premeditated and involved the use of a weapon, but no serious or lasting injury resulted.[28] By contrast this case is, we consider, less serious than those two cases. It is true that the potential for great harm was considerable, but such harm did not eventuate.

[31] In *Taueki* this Court observed:[29]

> A domestic assault by an offender on his or her spouse or partner (or former spouse or partner) which is impulsive, does not involve the use of a weapon and does not cause lasting injuries, but where the victim is properly classified

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22 At [48].
23 *Solicitor-General v Hutchison* [2018] NZCA 162, [2018] 3 NZLR 420.
24 At [29].
25 *Griffiths v R* [2011] NZCA 102.
26 At [18] and [24].
27 *Kauwhata v R* [2010] NZCA 451.
28 At [22]–[23].
29 *R v Taueki*, above n 5, at [37(b)].

> as vulnerable, may require a starting point in the region of four years. Where there is a degree of premeditation or there is the use of a weapon (but, again, no lasting injuries), a higher starting point could be expected, perhaps five years or more.

That guidance, too, suggests the present sentencing starting point of nine years is somewhat out of line.

[32] The Court in *Taueki* was sensitive to the risk that its guidelines, involving a number of aggravating factors, a certain number of which in combination might move the offender from one band to another, would result in over-sentencing. The Court emphasised that a sentencing judge needed not only to identify aggravating (and mitigating) factors, but also to evaluate the seriousness of each factor. The Court went on:[30]

> The evaluative task is an important aspect of sentencing: without it, there would be a danger of a formulaic or mathematical approach to the assessment of sentencing starting points.

The Court also observed that the features of the offending in each case must be carefully assessed in order to establish a starting point which properly reflects the culpability inherent in the offending.[31]

[33] Flexibility in applying a guideline judgment is essential to achieving justice in an individual case. Aggravating factors, duly evaluated for seriousness, may be used to establish location within a sentencing band. But the judge must then step back and consider the justice of the indicative guideline outcome in that case, compared to other cases.

[34] Taking that approach here we accept that the Judge was right to identify the use of the car as a weapon, although the impulsiveness of the action taken diminishes the extent to which that fact is aggravating. The Judge was certainly right to focus on the vulnerability of the complainant as a passenger. The unbuckling of her seatbelt was serious, increasing both her vulnerability and the likelihood of her being injured — including injury to her head. We do not however think that it is right to describe

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30 At [30].
31 At [42].

this as the use of "extreme violence", in the sense intended in *Taueki*, which focuses on the extent and duration of the GBH offending. In this case the impulsive and singularly self-destructive nature of the offending weighs against adding "extreme violence" to the sentencing scales. It is behaviour at a significant remove from most other serious domestic violence involving the meting out of a beating, with weapons and/or boots, by way of some sort of punishment. And it must be considered that although physical injury resulted, it was not enduring in nature.

[35] At a pinch one might find five aggravating factors here, although we think it is more accurate to say there were two: use of a weapon and vulnerability. The presence of any of these factors aggravates offending that might otherwise be said to be routine. It compels a sterner than normal response. But little good is achieved by searching for aggravating features and thereby boosting band standing. The offending is the offending. The better approach, in the context of domestic violence, is to look at the specific examples given in *Taueki* for band one and band two offending, and to ask to which the new offending is more proximate. The band one example is set out above, at [31]. The band two example given in *Taueki* is:[32]

> A domestic attack on the partner or former partner of the attacker which is premeditated and involves the inflicting of serious and lasting injury would require a starting point in band two. The appropriate point in that band would require evaluation of the seriousness of those factors. Where the attack involves the use of a weapon, particularly where it is brought to the scene, the starting point could be expected to be at the higher end of band two.

[36] Approached in that way, it is clear the offending here is closer in kind and outcome to the band one, than the band two, example. It was not premeditated, and it did not cause serious and lasting injury. As *Taueki* also makes clear, the presence of more than one aggravating factor does not necessarily take the offending out of band one.[33] The offending here lies on the borderline of bands one and two, in the starting point range of five to six years.

[37] The offending here is objectively more serious than the conduct this Court thought in *Taueki* might call for a starting point of five years.[34] But it is less serious

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32 At [39(c)].
33 At [36].
34 See above at [31].

than that in *Kauwhata* that resulted in a starting point of seven years. In our view the proper starting point here is six years and six months' imprisonment.

Uplifts

[38] Mr Fairley submitted that the uplift for the breach of protection order in the index offending amounted to double counting because it involved the same actus reus as the GBH offending, and the uplift for previous offending was too high. Mr Horsley, on the other hand, submitted that the uplifts were warranted because of repeated breach of the protection order.

Discussion

[39] Section 9(1)(j) of the Sentencing Act 2002 requires a court to take into account the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time. Both elements of the provision are engaged in this appeal. In addition, any uplift for *prior* offending must take into account s 26(2) of the New Zealand Bill of Rights Act 1990, which provides that no one who has been finally convicted of an offence shall be punished for it again.[35] Previous convictions are relevant as an indicator of character and culpability, or because they show the need for a greater deterrent response, or as an indicator of risk of reoffending.[36] The second and third considerations may call for an uplift at the second stage of the *Taueki* methodology.[37]

[40] We accept Mr Fairley's submission that the discrete six month uplift for the breach of protection order charge was wrong in principle. That charge was based on the offering of violence to the complainant, which was the same act already punished by the index GBH offence. It did not involve a sufficiently distinct actus reus, or physical act, to justify further uplift.

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35 Geoff Hall *Hall's Sentencing* (online ed, LexisNexis) at [I.6.12].

36 Simon France (ed) *Adams on Criminal Law — Sentencing* (online ed, Thomson Reuters) at [SA9.15]. See also *Te Hau v R* [2013] NZCA 431 at [18].

37 At [SA9.15].

[41] Secondly, we accept that some uplift for Mr Orchard's previous breach of protection order offending was needed to reflect both deterrence and risk. But any such uplift must be proportionate to the sentence imposed for the original offence. An uplift is unlikely to be proportionate if it exceeds the prior sentence.[38] Here, the original sentence for the first protection order breach in February 2015 was five months' home detention and for the second, in August 2015, one month's imprisonment. A discrete uplift of six months to reflect that prior offending constitutes a "considerable degree of further punishment", warranting reduction.[39]

[42] We consider an uplift of no more than two months' imprisonment to be appropriate.[40]

Mental health discounts

[43] Mr Fairley submitted that the Judge erred in determining that Mr Orchard's PTSD meant he posed an increased future risk to the complainant and to his children. The risk of Mr Orchard re-offending was assessed as low, diminishing the requirement for the end sentence to place emphasis on specific deterrence and denunciation. As such, Mr Orchard ought to have received a greater discount to his end sentence.

[44] Mr Horsley submitted that Mr Orchard's PTSD could not warrant more than a 15 per cent discount, given its limited causal contribution to his offending and the public safety concerns engaged by his history. Even if motivated to continue treatment, neither medication nor counselling had previously been able to prevent Mr Orchard's violence. Nor had he proved able to manage the more central precipitants of his offending, notably alcohol abuse and his difficult relationship with the complainant.

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38 *Patel v R* [2017] NZCA 234 at [61]. See, for example, *Julian v R* [2012] NZCA 453 at [17], where an uplift that was 150 per cent of the original sentence was held to be unsupportable; and *Taylor v R* [2014] NZCA 561 at [13], where a six month uplift in respect of four relatively minor previous charges, receiving sentences of community detention and a fine, was reduced to two months.

39 *Taylor v R,* above n 38, at [13].

40 Compare *Heke v R* [2016] NZCA 38 at [12], where an eight month uplift was upheld to reflect Mr Heke's repeat offending against the same complainant involving convictions for two breaches of a protection order, six of male assaults female, and one of threatening to kill.

Approach to mental health issues in sentencing

[45] Theoretically, mental health issues may be engaged at two stages of the sentencing process. First, they may affect the starting point at stage one.[41] That will be relatively rare, however, as the first stage is concerned with the intrinsic seriousness of the offending conduct, viewed objectively.[42] This enables sentencing comparisons to be made from case to case.[43] To be a proper stage one consideration, mental disability must have altered the character and gravity of the offending itself.

[46] Secondly, and more typically, mental health issues may operate as a mitigating factor relevant to the offender's personal circumstances at stage two.[44] Other, comparable personal considerations such as youth or systemic deprivation are usually considered at this stage also.[45] Mental health issues may mitigate the offending, diminishing moral culpability for the offending, and thereby also diminishing deterrence, accountability and denunciation as sentencing concerns.[46] The weight given to the consideration, for those purposes, will however depend on evidence supporting the view that the condition contributed causally to the offending.[47] Alternatively, it may be the condition means that a sentence will weigh more heavily on the offender than it would on a person in normal health, or that there is a serious risk of imprisonment having a significant adverse impact on the offender's mental health.[48] There may of course be a combination of these considerations.

[47] The usual effect of mental health issues is to mitigate sentence, although it may also be a neutral consideration and it may even aggravate the level of sentence, where the offender's mental health issues affect the risk of reoffending and thereby public protection.[49]

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41 *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [44]–[45].
42 *R v Taueki*, above n 5, at [28]; *De Reeper v R* [2012] NZCA 617 at [55]; and *Pesefea v R* [2016] NZCA 35 at [8].
43 *R v Taueki*, above n 5, at [43].
44 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [84].
45 *Overton v R* [2011] NZCA 648 at [22]; *Fane v R* [2015] NZCA 561 at [46]; and *Arona v R* [2018] NZCA 427 at [59].
46 *Fairbrother v R* [2013] NZCA 340 at [34]–[35].
47 *E (CA689/2010) v R* [2011] NZCA 13, (2011) 24 CRNZ 411 at [68]; and *Gotz v R* [2019] NZCA 99 at [20].
48 *E (CA689/2010) v R,* above n 47, at [68]; and Sentencing Act 2002, s 8(h).
49 Sentencing Act, s 7(1)(g). See, for example, *Shailer v R,* above n 41, at [43]; and *R v Taueki*, above n 5, at [45].

[48] In *E (CA689/2010) v R*, the Court noted that stage two discounts for mental health issues ranging from 12 per cent to 30 per cent had been seen as appropriate.[50] This is not be taken to confine the upper range discount where diminished responsibility by reason of mental health deficits substantially diminishes moral culpability and the needs of deterrence, accountability and denunciation generally as sentencing concerns.

Application in this case

[49] There is adequate evidence in the psychiatric reports that Mr Orchard's PTSD, a product of his fall, contributed to his behaviour on the day in question. And, ultimately, to his actions in crashing his car, injuring his wife and seeking to take his own life. The Judge certainly thought that to be the case. He said:

> [30] Totality of circumstance implies your workplace accident has contributed causally to your criminal offending, both generally and in relation to these offences for sentence. Your attempt to take your own life underscores this conclusion. So, your culpability for this offending is diminished — meaning reduced.

[50] But the Judge felt he had to give Mr Orchard a lesser discount because his condition made him a danger to his family. As noted earlier, the Judge considered Mr Orchard's mental health issues to be "something of a dual-edged sword".

[51] We understand how the Judge might have reached that conclusion. We however reach a different one. We do so for four reasons. First, the sentence imposed incorporates by its nature and extent the provision for community protection required by s 7(1)(g) of the Sentencing Act. Secondly, no additional provision was considered necessary for community protection in the form of a minimum period of imprisonment. Thirdly, where (as here) a mental health condition has contributed causally to the offending, and thereby mitigated that offending, we think the full measure of that mitigation ought to be allowed unless it can be said that the reduced discount is likely to make a real difference in terms of safety. In this case, we are talking about a difference of around five months to the end sentence and perhaps as little as six weeks to time served. Little purpose in that modest retreat from full

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50 *E (CA689/2010) v R,* above n 47, at [71].

mitigation is apparent to us. Fourthly, what matters more here is Mr Orchard's insight into his condition, and willingness to undertake treatment. Both are evident in the psychiatrists' reports.

[52] We would have allowed a discount here of 20, rather than 15, per cent. We think that properly reflects the causative effect of Mr Orchard's mental health disability on the offending perpetrated by him.

Conclusion

[53] The net result is an end sentence of four years and three months' imprisonment, calculated thus: a starting point of six years and six months' imprisonment; uplifted by two months for previous convictions (six years and eight months); reduced by 20 per cent to reflect diminished culpability (and diminished need for deterrence, accountability and denunciation) given the appellant's mental health disability (five years and four months); then reduced by a further 20 per cent for the guilty plea (four years and three months).

Result

[54] The applications to adduce fresh evidence on appeal are declined.

[55] The appeal against sentence is allowed.

[56] The sentence of six years and nine months' imprisonment on the charge of causing grievous bodily harm is quashed and a sentence of four years and three months' imprisonment is substituted.

Solicitors:
Thomson Wilson, Whangārei for Appellant
Crown Law Office, Wellington for Respondent