**IN THE HIGH COURT OF NEW ZEALAND**
**WHANGAREI REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**WHANGĀREI-TERENGA-PARĀOA ROHE**

**CRI-2018-088-3647**
**[2019] NZHC 1932**

**THE QUEEN**

v

**MICHAEL DAVID NEPIA**

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| Hearing: | 9 August 2019 |
| Appearances: | M B Smith for the Crown<br>A B Fairley and A M Harvey for the Defendant |
| Judgment: | 9 August 2019 |

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**SENTENCE OF GAULT J**

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Solicitors:
Mr M B Smith, Marsden Woods Inskip Smith, Office of the Crown Solicitor, Whangarei
Mr A B Fairley and Mr A M Harvey, Thomson Wilson, Whangarei

[1] Mr Nepia has pleaded guilty to one charge of manslaughter following a sentence indication I gave on 13 June 2019.[1]

[2] As I said at the indication, this offending is an example of tragically common "one punch" manslaughter.

[3] The victim, Mr Townsend, was sitting outside Savoeun's Café at 119 Maunu Road. He was homeless and was known to frequent the block of shops there. He had two dogs that were off leash. Mr Nepia was out walking his own two dogs, on leads, and his route took him past Mr Townsend. As he walked towards where Mr Townsend was sitting, their respective dogs began to growl at each other, and began to fight.

[4] Mr Townsend kicked Mr Nepia's dogs in an effort to get them away from his own dogs, telling Mr Nepia to "get your dogs". Mr Nepia became furious with the victim and punched him in the face with significant force, causing Mr Townsend to fall straight back, hitting his head on the pavement. He had no chance to brace himself.

[5] Mr Nepia collected his dogs and walked away. A nearby person called an ambulance, and the victim was taken to hospital, where he later tragically died.

[6] I indicated a sentence with a starting point of three years and six months' imprisonment, one month's discount for time spent on EM bail, and a 25 per cent discount for a guilty plea, bringing the indicated sentence to two years and seven months' imprisonment.

[7] I do not propose to re-state how I came to that indication. I will annex the indication to my sentencing notes and it will form part of this sentencing.

[8] At the indication, as is customary, I did not conclude whether any mitigating factors personal to Mr Nepia justify a further discount to the sentence. I will do so now.

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1 *R v Nepia* [2019] NZHC 1332.

[9] Mr Fairley's submission, both at the indication and now, is that home detention is the appropriate end sentence. I was unable to indicate a sentence of home detention, because I came to a custodial sentence above the two-year level where home detention may be substituted. But Mr Fairley submits there are several mitigating features that warrant further discount to Mr Nepia's sentence:

(a) The cultural report by Ms Turner, Mr Fairley submits, makes a very strong link between those factors outlined in s 27 and the offending and the type of sentence.[2] He submits a significant discount can be given for this.

(b) The victim's family are supportive of Mr Nepia, whom they know outside of these tragic events, and do not wish him to be imprisoned.

(c) Mr Nepia is deeply remorseful. Mr Nepia and two members of the victim's extended family participated in an extremely positive restorative justice conference.

(d) Mr Nepia is committed to doing further work on himself in the form of a 20-week Man Alive (living without violence) course.

(e) Mr Nepia is relatively young.

[10] In support of these factors, Mr Nepia has several positive reports in his favour. These are the s 27 cultural report, a pre-sentence report, and a restorative justice report. In addition, several members of his extended family and friends have provided letters of support, and the victim's cousin, Ms Horton, has provided a victim impact statement. I will address each of these in turn, and then consider what discount may be appropriate to reflect Mr Nepia's circumstances.

[11] But first, Mr Fairley has brought to my attention an error in the sentence indication. In the indication, based on the earlier submissions, I noted that Mr Nepia had been on EM bail for two months, and so I indicated a discount of approximately

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2 Sentencing Act 2002, s 27.

one month to his sentence to reflect the restrictiveness of EM bail. Mr Fairley informs me that, in fact, Mr Nepia had been on EM bail for four months by the date of the indication, and now has been on EM bail for six months. I will account for this when I come to consider the final sentence.

**Cultural report**

[12] The cultural report prepared by Ms Turner was both helpful and thorough. The early part of Mr Nepia's life was not easy. He has faced significant challenges.

[13] Mr Nepia's father died in a car accident when he was six, and Ms Turner writes that this became the impetus for significant disadvantages that Mr Nepia experienced. He was in and out of various schools, often expelled for fighting. He left school with no formal qualifications. Since his schooling he has worked on and off in forestry, as well as for a time in Australia. He is up-front about his convictions, and says he was often not a whanāu person.

[14] But it seems in the last few years he has turned something of a corner, after having children, and he wants to be a good father and partner. This is supported by the many letters from his friends and family attesting to his being a good father and partner.

[15] Mr Nepia identifies as Māori, but he says his cultural connectedness is not strong. Ms Turner writes that it is well known that Māori have experienced inter-generational trauma from displacement brought about by the effects of colonisation. Social, economic and cultural disadvantage ensued and Māori continue to be over-represented in the worst statistics in New Zealand. Ms Turner writes that Mr Nepia and his whānau are no exception, and his cultural disconnectedness is just one indicator of the systematic disadvantage experienced by Māori.

[16] Ms Turner posits that there is a plausible connection between Mr Nepia's background and cultural disconnectedness and his offending, which, while of course not in any way justifying his offending, does go some way to explaining his impulsive and excessively violent response.

[17] Ms Turner also writes that Mr Nepia is extremely remorseful and committed to moving forward with his life in a positive and constructive manner.

[18] I thank Ms Turner for her efforts in preparing the report.

**Pre-sentence report**

[19] Turning to the pre-sentence report. The report writer begins by noting that this is Mr Nepia's sixth violent offence, but that he has not been imprisoned before.

[20] The writer met with Mr Nepia's partner, who spoke highly of Mr Nepia as a partner and father.

[21] As to Mr Nepia himself, the writer considered Mr Nepia had positive goals for the future, as he had plans to work for his brother's business and eventually work his way into management. The writer says Mr Nepia presented as owning responsibility for the offending, and as remorseful. Importantly, the writer concluded by recommending home detention as he considered Mr Nepia capable of being compliant, as evidenced by his abiding by the conditions of EM bail.

**Victim impact statement**

[22] Ms Horton has provided a victim impact statement.

[23] She and the victim knew each other when they were young, as she would often care for him when he was a child. Although they lost contact, they reunited some eight years ago, and have had intermittent, but very positive, contact since then.

[24] She writes that although the victim lived on the streets, he enjoyed his life and loved the people he met. She writes that there has been an outpouring of grief from the community following his death, and that his death has left a gap in many people's lives.

[25] Ms Horton says that Mr Nepia has shown true remorse and should not go to prison. She believes that the victim would also have compassion for Mr Nepia, and that the victim's death was the result of a stupid split-second decision.

[26] I thank Ms Horton for her presence today, and for her very compassionate statement.

**Restorative justice**

[27] Mr Nepia participated in a restorative justice conference with the victim's cousin, Ms Horton. The two of them knew each other prior to the offending.

[28] The restorative justice conference, I am told, was extremely positive. Mr Nepia profusely apologised for his offending. Ms Horton accepted that Mr Nepia did not intend to hurt the victim, and that her heart went out to Mr Nepia and his family because of what they were going through. Echoing her sentiments in her victim impact statement, she said that she did not feel he needed to be punished.

[29] Mr Nepia expressed that he is committed to participating in the Man Alive programme to address the reasons behind his offending, which Ms Horton thought was a positive thing. The conference concluded with Mr Nepia offering to help Ms Horton by providing firewood and helping with physical tasks around her home. Ms Horton provides alternative healing services and offered to help Mr Nepia to move on and heal from this tragedy, which Mr Nepia eagerly accepted.

[30] The conference seems to have been a very positive process, and I commend Mr Nepia and Ms Horton for participating in it. It demonstrates true remorse and acceptance of his offending.

[31] As Mr Smith said, the wishes of the victim's family are not, of course, binding on the Court but, in this case, they are meaningful and influence me.

**Letters in support**

[32] Many of Mr Nepia's friends and family have provided letters of support: too many to address individually. The common themes throughout are that Mr Nepia is a good partner and father, is genuinely remorseful and committed to bettering his life, and is fundamentally a good person despite the offending.

[33] I thank all who wrote these letters for their time and support of Mr Nepia.

**Discussion**

[34] I consider it beyond doubt that Mr Nepia is genuinely remorseful for his actions and is committed to being a good partner and father and living a positive life. From all I have read and heard from Mr Nepia's family and friends, as well as the positive reports, I consider he has it in him to achieve this.

[35] I also consider Mr Nepia's background influenced his offending, and contributed to him behaving so impulsively, as described by Ms Turner.

[36] Then, of course, there is Mr Nepia's relative youth, for which Court's often allow a discount to reflect that people are more impulsive when they are younger, so often have a greater capacity for rehabilitation. While Mr Nepia is not overly young, I consider this is still a mitigating feature, especially when considered alongside the strong prospects for rehabilitation.

[37] I consider that, on their own, each of these mitigating features could well attract a discount in the region of 10-20 per cent, perhaps more.

[38] Taking them all together, I consider a discount of 35 per cent is appropriate. This is a significant discount. But I consider it appropriate in this case. In addition, I would allow a discount of four months to reflect the time Mr Nepia has spent on EM bail.[3] From a starting point of three years and six months' imprisonment, this brings me to one year and eleven months. With the full indicated discount for the early guilty plea of 25 per cent, this comes to one year and five months' imprisonment.

[39] I must now consider whether home detention is appropriate in this case.

[40] This was impulsive, stupid offending, with a tragic consequence. Manslaughter is one of the most serious crimes a person can be convicted of in

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[3] Courts will most often not award a discount on a one to one basis for time spent on EM bail: see the Court of Appeal's discussion in *Keown v R* [2010] NZCA 492. But, given the restrictiveness of EM bail vis-à-vis the sentence I will impose, I consider a discount for the majority of time spent on EM bail is appropriate.

New Zealand. But, as I have said, I consider Mr Nepia is genuinely remorseful, and has every prospect of living a positive life from now on.

[41] I do not consider imprisonment is in his interest, or in the interests of the community. In coming to this conclusion, I bear in mind the principles of sentencing include that I must impose the least restrictive outcome appropriate in the circumstances, that I must take into account the offender's personal, family, whānau, community and cultural background in imposing a sentence, and must take into account any outcomes of restorative justice processes that have occurred.[4] A non-custodial sentence will also meet the purpose of sentencing to assist in Mr Nepia's rehabilitation.[5]

[42] I consider a sentence of home detention is the most appropriate penalty. Home detention is a severe restriction on a person's liberty, and I consider this is the least restrictive sentence I can impose that would still meet the need to hold Mr Nepia accountable, denounce his conduct, and deter others from acting similarly violently.[6]

[43] Taking the usual approach and halving the final sentence of imprisonment, I would impose a sentence of eight months' home detention. In coming to this sentence, I have compared my sentence against other decisions involving similar offending. I regard this offending as similar to, but less serious than, that in *R v Tarawa*, another one-punch manslaughter case, where Toogood J imposed a sentence of 10 months' home detention.[7]

**Conclusion**

[44] Mr Nepia, please stand.

[45] On the charge of manslaughter, I sentence you to eight months' home detention on the normal conditions and those identified in the pre-sentence report.

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4 Sentencing Act 2002, ss 8(h)–(i).
5 Section 7(h).
6 Sections 7(e) and (f).
7 *R v Tarawa* [2018] NZHC 3205 at [43].

[46] Please stand down.

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Gault J

**NOTE: PUBLICATION OF THE JUDGMENT AND OF THE REQUEST FOR A SENTENCING INDICATION IN ANY NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE IS PROHIBITED BY SECTION 63 OF THE CRIMINAL PROCEDURE ACT 2011 UNTIL THE DEFENDANT HAS BEEN SENTENCED OR THE CHARGE DISMISSED. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3865734.html**

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**CRI-2018-088-3647**
**[2019] NZHC 1332**

**THE QUEEN**

v

**MICHAEL DAVID NEPIA**

Hearing: 13 June 2019

Appearances: R B Annandale for the Crown
A B Fairley for the Defendant

Judgment: 13 June 2019

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**SENTENCE INDICATION OF GAULT J**

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Solicitors:
Mr R B Annandale, Marsden Woods Inskip Smith, Office of the Crown Solicitor, Whangarei
Mr A B Fairley, Thomson Wilson, Whangarei

## Introduction

[1] Mr Nepia is charged with manslaughter. He seeks a sentence indication.

[2] On the facts agreed for the purpose of this indication, this is a case of "one punch manslaughter" – tragically, all too common. The Crown submits a starting point of three to four years' imprisonment is appropriate. The defence seek a starting point of between two to two and a half years, although Mr Fairley, this morning, acknowledged that should be a little higher. The defence submit a discount in the realm of 35 per cent to reflect a guilty plea and other personal mitigating features is appropriate, which would allow me to consider whether home detention is appropriate, the end result for which the defence contend.

[3] Mr Nepia's trial is set down to commence on 4 May 2020.

## Facts

[4] At about 6:00 pm on 17 December 2018, Mr Nepia was walking along Maunu Road, Woodhill in Whangarei with his two dogs on leads.

[5] The victim, Mr Townsend, was sitting outside Savoeuns Café at 119 Maunu Road. He was homeless and was known to frequent the block of shops there. He had two dogs, which were not on leads.

[6] As Mr Nepia walked towards where Mr Townsend was sitting, their respective dogs began to growl at each other. They began to fight. Mr Townsend kicked Mr Nepia's dogs in an effort to get them away from his own dogs, telling Mr Nepia to "get your dogs". Mr Nepia became furious with the victim for kicking his dogs, turned his body to the right, dropping his weight behind his right shoulder, and punched the victim in the face. The significant force of the punch caused the victim to fall straight back, hitting his head on the pavement. He had no chance to brace himself.

[7] Mr Nepia collected his dogs and walked away. A nearby person called an ambulance, and the victim was taken to hospital, where he later died.

[8] Medical staff established the victim died as a result of the injuries sustained in the confrontation with the defendant. The injuries included a bruise to his face, a fractured skull and a severe brain bleed.

[9] The defence say the defendant went home and called the Police, although this was not in the summary of facts. Later the defendant told the Police that he admitted the facts outlined and that he had "lost it" when his dogs were kicked.

**Victim impact statement**

[10] I have seen a victim impact statement this morning from Ms Horton, Mr Townsend's cousin. I thank her for that compassionate account.

**Defendant's personal circumstances**

[11] Mr Nepia is 25 years old, and of Māori descent. He is father to four young children. He has a relatively short criminal history, but it includes violence-related offending. He has three convictions for male assaults female, and one for common assault. He has not been sentenced to more than community work with supervision.

[12] I do not have a pre-sentence report, which will become available if Mr Nepia pleads or is found guilty. I do, however, have a cultural report, prepared by Ms Turner. I thank Ms Turner for her thoughtful and detailed account of Mr Nepia's upbringing and life thus far. Mr Nepia's father died in a car accident when he was six, and Ms Turner writes that this became the impetus for significant disadvantages that Mr Nepia experienced. He was in and out of various schools, often expelled for fighting. He left school with no formal qualifications. Since his schooling he has worked on and off in forestry, as well as for a time in Australia. He is up-front about his convictions, and says he was often not a whanāu person. But, it seems in the last few years he has turned something of a corner, after having children, and wants to be a good father and partner. He also apparently has an offer of employment from his brother. His family are fully supportive of him. Ms Turner reports that Mr Nepia is quite disconnected from his culture, but says he wants to strengthen his cultural identity.

[13] Ms Turner also writes that Mr Nepia is extremely remorseful and wants to undertake restorative justice with members of the victim's family, some of whom he knows.

[14] It is somewhat unusual to have a cultural report at this stage. It is often most useful when read alongside a pre-sentence report, which also provides context and comments on matters such as the defendant's remorse. In these circumstances, I will leave full consideration of personal mitigating features for sentencing, if Mr Nepia pleads guilty.

**Approach to sentencing**

[15] I must have regard to the purposes and principles of sentencing as set out in the Sentencing Act 2002.[1] In serious violent offending such as this, the relevant purposes of sentencing include: to hold the offender accountable for harm done to the victim; to promote a sense of responsibility for that harm; denounce the conduct in which the offender was involved; and deter other persons from committing the same or a similar offence. I must also take into account the need to assist in the offender's rehabilitation and reintegration, the need for consistency between sentences for similar offending, and the need to impose the least restrictive sentence that is appropriate in the circumstances.

[16] I adopt the normal sentencing process for this indication.[2] First, I set a starting point, based on the characteristics of the offending and informed by sentences in similar cases. Secondly, I consider whether any of Mr Nepia's personal circumstances justify an adjustment to that starting point, up or down. I will leave a full consideration of all personal mitigating features to the time of sentencing, in line with my earlier comment. Thirdly, I consider whether Mr Nepia should receive a discount if he were to plead guilty.

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1 Sentencing Act 2002, ss 7-8.
2 *R v Taueki* [2005] 3 NZLR 372 (CA); and *Hessel v R* [2010] NZSC 135, [2011] 1 NZLR 607.

**Starting point**

[17] Both the Crown and defence have referred me to a number of cases of one punch manslaughter.[3] The Court of Appeal in *Murray v R* noted that a common starting point in one punch manslaughter cases is between three and four years' imprisonment.[4] The defence points out, however, that starting points between two and three years are not unheard of.[5]

[18] The Court of Appeal also noted that comparison with a sentence reached applying the tariff case *R v Taueki* (for grievous bodily harm offending) can sometimes be helpful.[6] However, the Court also noted that *Taueki* will not always be relevant, and many of the cases do not consider it. As Mr Fairley submitted, I consider it is more helpful in this case to examine similar manslaughter cases than to apply *Taueki* on the agreed facts given the lack of clear intent to cause serious injury.

[19] The Crown submits there are three aggravating features of the offending: actual violence; extent of the harm to the victim; and vulnerability of the victim. The Crown say the victim was vulnerable because he was homeless and 53 years old vis-à-vis the defendant who is 25 years.

[20] I do not consider these to be real aggravating factors. I consider the first two are inherent in one punch manslaughter. That is not at all to diminish the seriousness of the offending, but these features will always be present in offending of this kind. I also doubt that, of themselves, the disparity in age and that the victim was homeless, trigger vulnerability as an aggravating feature. It is not really suggested in the agreed facts that the victim was vulnerable in the sense of the characteristics that will often trigger that aggravating factor, namely, being incapable of defending oneself or isolated from help. Again, that is not to diminish the seriousness of the offending.

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3 Including *R v Efeso* HC Auckland CRI-2008-92-7925, 24 October 2008; *R v Hetaraka* [2015] NZHC 2631; *R v Tawara* [2018] NZHC 3205; *R v Larson* HC Dunedin CRI-2011-012-1013, 6 July 2011; and *R v Ovaleni* [2018] NZHC 2034

4 *Murray v R* [2013] NZCA 177 at [21], citing *Kepu v R* [2011] NZCA 104 at [9] and the authorities referred to there.

5 For example, *R v Hetaraka* [2015] NZHC 2631.

6 *Murray v R* [2013] NZCA 177 at [21]; and *R v Taueki* [2005] 3 NZLR 372 (CA).

[21] The defence submit, and I accept, that courts in one punch manslaughter cases often assess the seriousness of the offending by reference to four considerations:

(a) conduct of the victim (i.e. was there provocation, and if so how serious was it);

(b) severity of the punch or blow (was it a weak, glancing blow, perhaps causing the victim to trip, or was it a forceful direct punch);

(c) distance in time from any provocation to the blow (i.e. was it a heat of the moment response, or a more calculated, pre-meditated strike); and

(d) the conduct of the defendant after the punch – most importantly, whether they stayed to offer assistance.

[22] In this case, applying these factors, I make the following observations:

(a) There was some element of provocation by the victim in this case, kicking Mr Nepia's dogs. However, assaulting the victim was an entirely disproportionate response.

(b) The blow was forceful. As described in the summary of facts, Mr Nepia put much of his weight behind the blow.

(c) There was little time between the provocation and the blow. This was a heat of the moment reaction.

(d) The defendant did not stay to try and assist the victim or check on his welfare.

[23] The defence submit the present offending is somewhat similar to that in *R v Hetaraka*, where the Court took a starting point of two years – although I note Mr Fairley's responsible acknowledgement this morning.[7] I do not agree that the case

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7 *R v Hetaraka* [2015] NZHC 2631.

is sufficiently similar to *Hetaraka*. The offending in that case had a significant mitigating feature in that the defendant thought he was protecting a third party female from the victim. Ellis J determined it was a case of self-defence of another, but with excessive force.[8]

[24] Considering the cases referred to me, and the features of the offending, I consider a starting point of three years and six months' imprisonment is appropriate. I consider this offending is at least at the mid point of the three to four year range referred to in the cases because the punch was forceful, and the defendant did not stay and tend to the victim afterwards.

**Features personal to the defendant**

[25] The Crown submit a small uplift for Mr Nepia's criminal history is warranted. I do not agree. Mr Nepia does not have a significant criminal history and has never before been sentenced to imprisonment. While his convictions for violent offending do indicate a lack of impulse control, given the sentences previously imposed I do not consider they warrant an uplift.

[26] The defence refer to Mr Nepia's personal mitigating features. Mr Fairley submits discounts are warranted for Mr Nepia's deep remorse (including an offer to attend restorative justice), his personal background, time spent on restrictive EM bail, and an early guilty plea. It is submitted the discount could total around 35 per cent.

[27] Mr Nepia has been on EM bail subject to restrictive conditions for two months. Time on EM bail often attracts some form of discount to recognise the severe restriction on a person's liberty before they are sentenced. The discount is usually something less than the full amount of time spent on bail. It may be that a discount of one month, or slightly more, is warranted. This could be considered in more detail at sentencing.

[28] The cultural report provides valuable information on Mr Nepia's background, and it is clear he has faced significant challenges in his life thus far. It also provides

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8 *R v Hetaraka* [2015] NZHC 2631 at [12].

positive indications that Mr Nepia is remorseful and is committed to living a pro-social life. I have also read the letters of support provided this morning. I do not consider it appropriate at this stage, however, to indicate a specific discrete discount. I would leave this until the time of sentencing, if Mr Nepia were to plead, taking into account more complete information then available.

[29] But I can say, at this stage, that if Mr Nepia is willing to engage fully in restorative justice and his remorse is corroborated by the pre-sentence report and other material, together with his relative youth – looking at that in a broad sense – and his disadvantaged background, a material discount may be available.

**Guilty plea**

[30] The defence submit that the full discount of 25 per cent should be available. Mr Fairley submits that the desire for a sentence indication was expressed in January this year and formally requested on 4 April. He submits he delay is not the defendant's fault. Counsel notes that effort early in the year was directed at getting Mr Nepia bail and the serious charge.

[31] The Crown initially submitted the plea was not at the first available opportunity, and so should attract a discount of less than the maximum 25 per cent – although Mr Annandale this morning responsibly indicated that he did not resist the full discount.[9]

[32] While the plea is not at the earliest opportunity, I accept the defence submissions from Mr Fairley, and given that there is still nearly 11 months until trial and the trial would not be particularly complex, I would still allow the full 25 per cent discount if Mr Nepia pleaded promptly.

**Conclusion**

[33] For these reasons, the indication is for a starting point of three years and six months, with a one month discount for EM bail and a 25 per cent discount for a guilty plea, bringing the sentence to two years and seven months' imprisonment.

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9 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

[34] The defence asks that I consider whether home detention would be appropriate. With the sentence I have indicated at this stage, that would not be a possibility. However, it may well be that, with further information available at sentencing warranting a discount for personal mitigating factors, a sentence of home detention could be considered.

[35] This indication will expire at 5:00 pm next Friday, 21 June 2019.

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Gault J