ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CRI-2019-441-000040
[2019] NZHC 3375

BETWEEN	T Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 17 December 2019

Appearances: W R Hawkins for the Appellant
L M Marshall for the Respondent

Judgment: 18 December 2019

JUDGMENT OF DOOGUE J

Introduction

[1] On 20 September 2019, the appellant, Mr T, appeared for sentence before Judge Sygrove in the District Court at Hastings, having pleaded guilty to one charge of strangulation,[1] one charge of assault with intent to injure,[2] two charges of breaching release conditions[3] and one charge of intimidation.[4] Mr T was sentenced to three years' imprisonment.[5]

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1 Crimes Act 1961, s 189A(b); maximum penalty seven years' imprisonment.
2 Section 193; maximum penalty three years' imprisonment.
3 Sentencing Act 2002, s 96(1); maximum penalty one year's imprisonment or a fine not exceeding $2,000.
4 Summary Offences Act 1981, s 21(1)(a); maximum penalty three months' imprisonment or a fine not exceeding $2,000.
5 *Police v T* [2019] NZDC 18953.

[2] Mr T appeals his sentence on the basis it was manifestly excessive, a contention opposed by the Crown.

Background

[3] The charges to which Mr T pleaded guilty occurred at two separate points in time: on 6 November 2018 and 3 January 2019.

Breach of release conditions

[4] On 22 August 2018, Mr T was released from Hawke's Bay Regional Prison after having been sentenced to six months' imprisonment on 18 July 2018 for a number of property-related offences. He was subject to special release conditions for nine months and three days, one of which was to not move to a new residential address without the prior approval of a probation officer. Mr T signed a document acknowledging he understood these conditions.

[5] On 6 November 2018, Mr T's probation officer unsuccessfully attempted to contact him several times. A home visit was conducted. The unit where Mr T was supposed to be residing was empty. This gave rise to the charges of breaching release conditions.

The other charges

[6] At around 5:30 a.m. on 3 January 2019, Mr T and the victim were at an address in Camberley, Hastings. At that stage, the pair had been in a nine-year relationship. They have two children together.

[7] The victim got up to take her dogs for a walk. The victim returned an hour later and found that Mr T had been using drugs, namely synthetic cannabis. The victim had recently decided to stop using synthetic cannabis.

[8] Upon finding Mr T in this situation, the victim became upset and asked him to leave. The victim's flatmate told the victim to leave the address in order to calm down. She did so, going to a nearby address. Mr T then began "smashing up the house". This gave rise to the intimidation charge.

[9] The victim returned to the house at around 8 a.m. While she was tending to one of her dogs in the back yard, she heard someone approaching. It was Mr T. He ran at the victim shouting, "if I'm going to jail, I'm going for a good reason". As he shouted this, he did a running kick to the victim, connecting with her forehead. The victim fell to the ground and lost consciousness. The victim awoke with a pain in her right arm as Mr T was dragging her along the ground towards the house. She told Mr T that she thought she had broken her arm to which he replied, "I don't give a fuck". This gave rise to the assault with intent to injure charge.

[10] Mr T then forced the victim into her flatmate's bedroom, shutting and blocking the door with his body. It is at this stage the victim noticed blood on her chest. In an attempt to escape via the window, the victim tried to persuade Mr T that she was not upset and wanted a cigarette by the window so that she could blow smoke outside. Realising this was a ruse, Mr T went over to the victim, grabbed her around the neck in a headlock and hauled her onto the bed. The victim tried to fight him off, but she could not. She eventually felt her lips tingle and lost consciousness. This gave rise to the strangulation charge.

[11] When the victim awoke, she realised that she had lost bladder control and had wet herself. Mr T then attempted to apologise. Upon hearing the sound of sirens approaching however, he fled the property. He was apprehended a short time later.

[12] As a result of the offending, the victim suffered a concussion, a sprain to her jaw, a cut to the tissue connecting her ear to her scalp, bruising to the shell of her ear as well as to her ribs, hip and arm.

District Court decision

[13] Judge Sygrove began by outlining the facts concerning the offending on 3 January 2019 as above. In setting the starting point, he took the strangulation charge as the lead offence and referred to the decision of this Court in *Ackland v Police*.[6] In particular, the Judge considered the aggravating factors outlined in that case and the

6 *Ackland v Police* [2019] NZHC 312, [2019] NZAR 1112.

guidance provided by Cooke J by way of sentencing bands.[7] The Judge considered Mr T's offending to be a "serious case".[8] It involved an assault to the face in the context of a domestic relationship, loss of consciousness and injuries to the victim. The Judge therefore adopted a starting point of three years' imprisonment.

[14] To this the Judge imposed an uplift of one year to account for Mr T's other offending.[9] He then applied a 25 per cent discount to account for Mr T's time spent on electronically-monitored (EM) bail and for his "limited remorse" as expressed in the pre-sentence report.[10] This resulted in an overall sentence of three years' imprisonment.

Approach on appeal

[15] This is an appeal under s 244 of the Criminal Procedure Act 2011. This Court must allow the appeal if satisfied that, for any reason, there is an error in the sentence imposed on conviction and that a different sentence should be imposed.[11]

[16] A sentence appeal is an appeal against a discretion and only if the sentence is manifestly excessive or contains an error in principle should the appellate court re-exercise the discretion. An error of principle includes an error of fact or law, failing to take into account a relevant consideration, or if the decision was plainly wrong.[12] The focus is on the final sentence and whether that was in the available range, rather than the exact process by which it was reached.[13]

Submissions

Mr T's submissions

[17] Mr T's appeal is predicated on the ground his sentence is manifestly excessive because the Judge adopted a starting point that was too high and gave an insufficient discount for his guilty plea.

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7 At [26] and [30]-[32].
8 *Police v T*, above n 5, at [6].
9 At [6].
10 At [6].
11 Criminal Procedure Act 2011, s 250(2).
12 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 481 at [30]-[35].
13 *Ripia v R* [2011] NZCA 101 at [15].

[18] As to the first ground, Mr Hawkins for Mr T submits that while *Ackland* provides helpful guidance for strangulation cases, the Judge placed too much emphasis on the sentencing bands in that case. Relying on *Houkamau v Police*,[14] the facts of which Mr Hawkins says are broadly similar to the present circumstances, he submits that an appropriate starting point would have been around two years' imprisonment.

[19] Mr Hawkins also submits that the Judge erred in two further respects in setting the starting point. First, the Judge did not take into account the principle of totality which, he says, should have resulted in a discount of some 10 per cent. Second, the Judge was prejudiced by both an earlier summary of facts which erroneously described the victim's injuries as being more serious than they were, and by the fact the summary of facts noted that Mr T and the victim had been the subject of "16 reported family harm episodes".

[20] As to the second ground, Mr Hawkins submits that Mr T ought to have received a full 25 per cent discount for his guilty plea, rather than a global discount of 25 per cent for all mitigating factors as was applied by the Judge. While Mr T pleaded guilty on the day of his Judge-alone trial, he did so only because several charges had been withdrawn, namely burglary, injuring with intent to injure and assault on a person in a family relationship. Mr Hawkins submits that Mr T should not be denied a full discount for pleading guilty as soon as he knew the true nature of the case against him.

Crown's submissions

[21] Ms Marshall, for the Crown, submits that the starting point adopted by the Judge was within range when considering the aggravating factors identified in *Ackland*. She submits that four of those factors featured in Mr T's offending: strangulation in the context of a domestic relationship, threats, loss of consciousness and additional violence or injury.

[22] In respect of the adjustments made to the starting point, Ms Marshall submits that while it is not clear what methodology the Judge used in coming to a total discount of 25 per cent, that figure is nonetheless defensible. She submits that credit for time

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[14] *Houkamau v Police* [2019] NZHC 2743.

spent on EM bail could cancel out any uplift for relevant previous convictions (Mr T has 46 previous convictions, including two for common assault against the same victim and five for breaching release conditions). While the Crown concedes that, depending on the Court's view of the reality of resolutions adopted which resulted in Mr T's guilty plea, a full 25 per cent discount for that plea may have been available, the end sentence was not manifestly excessive.

Relevant authorities on strangulation

[23] In light of the disagreement between counsel as to the appropriate starting point and given the limited appellate case law on strangulation, it is necessary for me to address *Ackland* and *Houkamau* in some detail.

Ackland

[24] *Ackland* was the first appeal to this Court from a sentence for strangulation following s 189A of the Crimes Act 1961 coming into force on 3 December 2018. That provision made strangulation a stand-alone offence.

[25] The appellant in *Ackland* had been in a relationship with the victim for 18 years and the pair had five children together. Following an argument one evening, the appellant became violent, striking the victim across the face several times. He then forcibly put his hands around the victim's neck, causing her to gag. He yelled at her saying "If you want I can end it for you all now". The victim's body began tingling and she lost consciousness. In the District Court, the Judge adopted a starting point of three years and three months' imprisonment given the offending took place in the presence of the pair's children, the victim lost consciousness, the strangulation was accompanied by a verbal threat of death, and the violence was prolonged as it was the second stage of an earlier incident.

[26] On appeal, Cooke J agreed with the culpability factors highlighted by the District Court Judge as well as the starting point.[15] In dismissing the appeal, Cooke J attempted to provide some guidance on sentencing for this new offence. He noted the

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15 *Ackland v Police*, above n 6, at [40] and [46].

Law Commission had recommended the enactment of a stand-alone offence because strangulation was an important risk factor for a future fatal attack by a perpetrator, and it characteristically leaves few marks or signs, sometimes even when it has been life threatening.[16] This latter point persuaded the Law Commission that the framework for serious violent offences at the time was not well suited to instances of strangulation where no injury was visible. Cooke J noted (footnotes omitted):

> [20] In essence, therefore, what is involved is a recalibration of sentencing for conduct previously treated leniently, particularly where strangulation occurred without other offending with higher maximum sentences. That recalibration is accordingly relevant when the more serious offending has not been triggered, and strangulation is the principal act of violence. When that is so, the lead offence has sometimes required to be of a less serious kind. When strangulation has been part of other, more serious, violent offending such as injuring with intent to injure under s 189(2) of the Crimes Act 1961 (five years maximum), or injuring with intent to cause grievous bodily harm under s 189(1) (10 years maximum), higher sentences have been imposed.
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> [21] The primary focus is accordingly on arriving at an appropriate assessment of the seriousness of the offending in light of the recalibration contemplated by the new offence.

[27] Pending guidance from the Court of Appeal, Cooke J sought to identify culpability factors for the purpose of assessing the seriousness of the offending. He identified the following factors: strangulation in the context of a domestic or intimate relationship/vulnerability of victim; threats, particularly threats to kill; loss of consciousness; the offending being one of multiple instances of strangulation; other violence or injury caused to the victim; significant impact on others; and the offending occurring in breach of a protection order.[17]

[28] Cooke J then went on to propose the following sentencing bands for strangulation (footnotes omitted):

> [30] At the lower end would be offending involving strangulation as an intentional result of pressure being applied to the throat for a brief period, potentially without any of the above factors being present. Such offending might attract a starting point of six months to two years' imprisonment.
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> [31] Offending at the highest end of the range involving a starting point of five to seven years' imprisonment may correspond to the offending described in [5.43] of the Law Commission's report — being offending with a number of

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16 At [18]-[19], citing Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [1.3].

17 At [26].

> the factors. I stress, however, it is not the number of the above factors that is important, but the overall nature and culpability of the offending. The above factors are intended simply to provide some guidance, or a framework for making that assessment.
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> [32] In between these two categories is the mid-range of cases where a starting point of two to five years may be appropriate. No doubt case law over time will build up to give greater clarity on appropriate starting points for cases within this middle range. But it is important to take into account sentencing cases involving more serious offending that have included strangulation. The concern in relation to strangulation addressed by the new offence mainly arose from those cases where there was a lack of physical injury, or intent to cause that injury, have meant that charges needed to be laid for more minor offences, such as male assaults female. But where there have been strangulation cases involving more serious offending, such as offending under ss 188 or 189 of the Crimes Act 1961, these cases will continue to provide considerable assistance. For that reason the cases addressed at paragraphs [42] and [44] below will continue to provide guidance.

[29] Despite proposing the above bands, Cooke J suggested that cases involving charges with similar maximum penalties such as wounding with intent to injure under s 188(2) of the Crimes Act 1961 and injuring with intent to cause grievous bodily harm or injury under s 189(1) or (2), would continue to be informative.[18] Further, where strangulation was part of offending which formerly attracted a higher maximum penalty, Cooke J noted the following:[19]

> There may also be some recalibration involved for strangulation cases even when they have involved offending with the higher penalties. It might be said that the adverse effects of strangulation have now been more fully recognised by Parliament. I do not want to overemphasise that last point, but it is a factor to be considered when considering earlier cases.

Houkamau

[30] The appellant in *Houkamau* had been in a relationship with the victim for around three years. In the early hours of New Year's Day, an argument ensued between the appellant and the victim. The appellant approached the victim, grabbed her by her clothing and shoved her out the front door of the house. He then punched her in the forehead and began choking her by putting both his hands around her neck and squeezing. The victim tried unsuccessfully to pull his hands off her throat. Despite asking him to let go of her throat, the appellant continued to choke the victim for a

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18 At [45].
19 At [47].

short period before shoving her back into the ground, causing her neck to hit the wooden edging around the garden.

[31] At sentencing, the District Court Judge adopted a starting point of two years' imprisonment, noting that while the offending was less serious than that in *Ackland*, it took place within the home and occurred following an earlier assault. On appeal, Thomas J upheld the starting point though noted that it could considered stern.[20]

[32] Thomas J acknowledged that *Ackland* was the first attempt at identifying material considerations in respect of strangulation offending and was clearly capable of amendment or refinement.[21] Referring to *Ackland*, Thomas J stated:[22]

> I do not disagree with the factors identified by Cooke J. I would, however, emphasise that, in respect of the first factor, strangulation in the context of a domestic or intimate relationship, the focus of the Commission's report was on strangulation being used as a means of achieving coercion and control over the victim. That, it seems to me, is at the heart of the Commission's report and the principal rationale for the new offence.

[33] Of particular significance were Thomas J's comments in respect of assessments of the seriousness of any strangulation offending:

> [33] The purpose of my discussing *Ackland v Police* is to emphasise the importance of judges (and counsel) carefully considering the facts and context of the offending. Family violence is an extremely complex area and care is needed not to focus unduly, or only, on what might be described as key factors, falling into the trap of a somewhat mathematical approach to the exercise rather than a proper consideration of the subtleties of the offending. Indeed, the Commission's report and rationale for the new offence highlights the subtleties that are often involved in coercive and controlling behaviour, of which strangulation often forms part.

[34] Expanding on the above, Thomas J emphasised the care with which sentencing bands ought to be applied given they can be subject to manipulation:

> [35] The Judge then described the offending as falling within the lower end of the second band in *Ackland v Police*. Equally, it could have been described as the upper end of the lowest band. This, to my mind, demonstrates the way in which banding can be subject to manipulation. By characterising the offending as in the middle of three bands, the assessment of the seriousness of the offending is inevitably perceived as higher. This, then, contributes to the

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20 *Houkamau v Police*, above n 14, at [36].
21 At [31].
22 At [31].

> way in which arguments are presented on appeal, the case is used as a precedent and matters such as the commutation of a nominal starting point into the end sentence are influenced. All of these observations are intended to emphasise the care with which these types of analyses should be undertaken.

Starting point

General observations

[35] Like Thomas J in *Houkamau*, I do not disagree with the culpability factors identified by Cooke J in *Ackland*. However, I agree with Thomas J that *Ackland* ought not to be used to approach sentencing for strangulation in an overly mechanistic fashion. As the Supreme Court said in *Hessell v R*, sentencing must involve "a full evaluation of the circumstances to achieve justice in the individual case".[23] The Court of Appeal recently added in *Zhang v R* that this "calls for flexibility and discretion in setting sentences. A guideline judgment is not supposed to alter that fundamental requirement."[24]

[36] It is only relatively recently that strangulation within the context of domestic relationships has attracted the attention of policy makers and scientific research.[25] The consequence is that past cases in which strangulation formed part of the offending may be of limited use both because the offending would have fallen under a different offence with potentially a different maximum penalty as Cooke J appreciated in *Ackland*, but also because our understanding of the complexities and consequences for the victims of this sort of offending would have been more limited.

[37] In my view, the courts must be cautious of applying a rigid banding approach to sentencing for strangulation as it has the potential to restrict an examination of the complexities of this form of offending, particularly in the domestic violence context. Accordingly, while *Ackland* is informative, sentencing for strangulation must start with an appreciation of the specific circumstances of each case and not by reference to bands.

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23 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38].

24 *Zhang v R* [2019] NZCA 507 at [120].

25 Adam Pritchard, Amy Reckdenwald and Chelsea Nordham *Nonfatal Strangulation as Part of Domestic Violence: A Review of Research* (2017) 18(4) Trauma, Violence & Abuse 407 at 407 [*Research Review*].

[38] It may be that with an increased body of case law and authority from the higher courts bands are ultimately accepted. But at this stage, I consider a particularised focus on all the complexities in the singular case (armed with our increased scientific and psychological knowledge) is a more appropriate initial point of reference for sentencing.

[39] In suggesting a maximum penalty of seven years' imprisonment for strangulation, the Law Commission made reference to and gave an example of the "worst class of strangulation". This is the example to which Cooke J referred in *Ackland*. The Law Commission said:

> 5.43 An example of the worst class of strangulation within scope would feature the hallmarks of coercive or controlling behaviour and the terror we have identified. For example, a perpetrator enters the victim's home in breach of a protection order. After an altercation, he strangles her with his hands on and off for several minutes, leaving her struggling for breath, incontinent and unconscious. The victim thinks she will die and knows that the perpetrator has the power to kill her. Because he invaded her home, after the strangulation, she lives in constant fear for her security and life. As a consequence, he has achieved coercion and control over her.
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> 5.44 It is the terror that results from strangulation that is at the heart of this kind of criminal conduct. That terror is likely to seriously affect all aspects of the victim's life. In our view, the terror that results from this "worst class of case" is greater than the harm of a minor injury and at least equivalent to a serious physical injury.

[40] There is sound reason behind the Law Commission's classification of this combination of features as forming the worst type of strangulation offending. First is the act of strangulation itself. Strangulation can lead to unconsciousness in one of two ways: where breathing is impeded or where vascular occlusion occurs. In the latter case, unconsciousness may be brought about within 10 to 15 seconds.[26] If the pressure applied to a person's neck or throat is maintained, death may ensue within three to five minutes.[27] However, even where the pressure is released well before this critical point, the sustained lack of oxygen supply to a person's brain can result in irreversible brain

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[26] Martyna Bendlin and Lorraine Sheridan *Nonfatal Strangulation in a Sample of Domestically Violent Stalkers: The Importance of Recognising Coercively Controlling Behaviours* (2019) 46 Crim Just & Behavior 1528 at 1529. See also Law Commission, above n 16, at [2.2]; Gael Strack and others *Why Didn't Someone Tell Me? Health Consequences of Strangulation Assaults for Survivors* (2014) 19(6) Domestic Violence Report 87 at 88 [*Health Consequences*].

[27] At 1528.

injury.[28] Further, studies have shown that delayed death can eventuate in cases of strangulation.[29] It is for these reasons that unconsciousness, as with urinary or faecal incontinence, are strong indicators of near-fatal strangulation.[30]

[41] Second is the coercive nature of strangulation. As the Law Commission noted, strangulation can be distinguished from situational violence which is intermittent in nature, is not rooted in a desire to control and does not necessarily escalate over time.[31] In a 2001 study of 300 strangulation cases in San Diego, California — specifically discussed by the Law Commission — one of the key findings was that most offenders do not strangle to kill, but rather strangle to show they *can* kill.[32] Strangulation is in many instances a means by which an abuser can instill and perpetuate fear in the victim for the purpose of controlling her. This fear can persist well after the physical act of strangulation ceases.

[42] Third is the increased risk of a future fatal attack.[33] This, the Law Commission suggested, elevates the importance of such behaviour being understood and taken into account by the person or body charged with making decisions in respect of both the victim and perpetrator of strangulation.[34] It is also relevant that in a 2010 paper commissioned by the Ministry of Social Development entitled *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006*, the authors found that a woman is at higher risk of being killed by her male partner if, amongst other factors, he has been violent in the past and exhibits extreme jealousy or control.[35] Strangulation falls under both of these indicators.

Starting points for strangulation in a domestic violence context

[43] In recommending the enactment of a new offence for strangulation, the Law Commission acknowledged that it had "described an offence in which liability flows

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28 Law Commission, above n 16, at [2.9].
29 *Research Review*, above n 25, at 416; *Health Consequences*, above n 26, at 89.
30 *Health Consequences*, above n 26, at 87.
31 Law Commission, above n 16, at [2.24].
32 At [2.19]. See also Gael Strack and Casey Gwinn *Strangulation and Domestic Violence: The Edge of Homicide* (2014) 19(6) Domestic Violence Report 81 at 90.
33 At [2.26]-[2.30].
34 At [2.31].
35 Jennifer Martin and Rhonda Pritchard "Learning from Tragedy: Homicide within Families in New Zealand 2002-2006" (Ministry of Justice, 2010) at 41.

merely from intentionally applying force to the neck (or otherwise impeding normal breathing or blood circulation). The resulting harm or motivating intention could vary widely." In other words, the Law Commission reiterated that as with any other offence, the seriousness of the offending will depend on the facts of the individual case. For example, strangulation may encompass intentionally applying force to a person's neck which impedes their breathing in the spur of the moment in the context of a street fight. While the charge is the same as in the present appeal, the contexts are extremely different.

[44] It is not surprising then that much of the Law Commission's discussion revolved around family violence. Strangulation in this context presents particular challenges for the courts and for agencies and bodies who deal with both victims and perpetrators of family violence. These challenges are absent from other instances in which strangulation occurs.

[45] Section 8 of the Sentencing Act 2002 requires the courts to consider various factors when sentencing offenders. While framed as considerations, these are essentially restrictions which prevent the courts from sentencing on an arbitrary basis. Relevant for the purposes of setting starting points are the requirements to: take into account the gravity of the offending in the particular case, including the degree of culpability of the offender (s 8(a)); impose the maximum penalty if the offending is within the most serious of cases, unless circumstances relating to the offender make that inappropriate (s 8(c)); impose a penalty near to the maximum if the offending is near to the most serious of cases, unless circumstances relating to the offender make that inappropriate (s 8(d)); and take into account the general desirability of consistency with appropriate sentencing levels in respect of similar offenders committing similar offences in similar circumstances (s 8(e)).

[46] In *Hessell*, the Supreme Court noted that the enactment of the Sentencing Act 2002, and in particular the principles in s 8, did not alter the requirement for sentencing Judges to undertake a full evaluative exercise in each individual case.[36] Rather, it

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[36] *Hessell v R*, above n 23, at [44].

simply sought to clarify what Judges had to take into account under the Act to assist public understanding of the sentencing process.

[47] The principles in s 8 of the Sentencing Act 2002 remain paramount. Nevertheless, I wish to make a few observations in respect of setting starting points for strangulation in a domestic context.

[48] In my view, it would be unlikely that strangulation in a domestic context would attract a lower-end starting point. This is because strangulation in a domestic context very frequently encompasses certain aggravating factors. In many instances, there is an element of vulnerability, whether that is because of physical isolation (if the strangulation occurs in a private setting as it so often does) or differences in physical strength between the perpetrator and the victim. For example, overseas research suggests that, over the course of a lifetime, women are between four and 11 times more likely than men to report strangulation by an intimate partner.[37] Strangulation in a domestic context is also strongly linked to long-term emotional and physical effects.[38] The result is that the impact on many victims is greater than the physical effect of the act of strangulation itself.

[49] There will of course be instances of strangulation in a domestic context where some or all of these factors are not present. It will be for the sentencing Judge to determine the serious of the offending and the appropriate starting point in each case. However, research suggests that these factors are common in domestic contexts. If so, the starting point ought to adequately reflect their presence. The courts must be aware of and responsive to the impact of this type of offending on both victims and those who indirectly suffer such as dependent children or children present when the offending occurs.

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37 Susan Sorenson, Manisha Joshi and Elizabeth Sivitz "A Systematic Review of the Epidemiology of Nonfatal Strangulation, a Human Rights and Health Concern" (2014) 104(11) Am J Public Health 54 at 57; Gael Strack and Casey Gwinn "On the Edge of Homicide: Strangulation as a Prelude" (2011) 26(3) Criminal Justice 32. See also Kristie Thomas, Manisha Joshi and Susan Sorenson "'Do You Know What It Feels Like to Drown?': Strangulation as Coercive Control in Intimate Relationships" (2014) 38 PWQ 124 at 133.

38 Strack and Gwinn, above n 37.

Starting point for Mr T's offending

[50] I do not agree with Mr Hawkins' submission that Mr T's offending more closely resembles that in *Houkamau* than that in *Ackland*. This is for a number of reasons. First, a significant aggravating factor in the present case is the fact that Mr T's actions rendered the victim unconscious and incontinent. Such an outcome — indicative of both the length of time and the force with which the strangulation is likely to have occurred — did not eventuate in *Houkamau*. Second, Mr T's offending occurred in the context of a home invasion in that he entered the victim's home without permission after he had been asked to leave, and essentially detained the victim there. The fear she must have felt is evidenced by her contemplation of escaping via the window; escape by any means possible. Third, Mr T's offending included verbal threats implying serious physical harm which are likely to have increased the terror experienced by the victim over and above the physical act of being strangled.

[51] Certain features of Mr T's offending are telling of the seriousness of his actions. Most obvious is the victim's unconsciousness and incontinence. It is fortunate that the victim's injuries were reversible and did not result in permanent brain injury or death. Strangulation which leads to unconsciousness or urinary or faecal incontinence, given they are indicators of near-fatal strangulation, must be seen as increasing the seriousness of the offending.

[52] The element of home invasion in Mr T's offending is a further aggravating factor. In *Solicitor-General v Hutchinson*, the Court of Appeal commented on the incidence of offending within the home, stating:[39]

> Family violence has become one of the scourges on New Zealand society. The family home is a place where an occupant is entitled to feel, and be, safe. The courts have repeatedly emphasised the importance of respect for the sanctity of the home.

[53] Mr T's behaviour emphasises the controlling nature of his actions, asserting his dominance over the victim in the one space she ought to have felt safe. The acts of dragging the victim into her house, blocking the doorway preventing her from

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[39] *Solicitor-General v Hutchinson* [2018] NZCA 162, [2018] 3 NZLR 420 at [27].

leaving and continuing the physical assault once inside all served to isolate the victim and would likely have resulted in a heightened sense of helplessness.

[54] Further, Mr T's offending was prolonged and escalated in nature from simple physical assault to more violent physical assault combined with psychological control. The strangulation offending was only one part of this sequence of events however throughout, Mr T showed a complete disregard for the victim's wellbeing.

[55] The impact of the offending on the victim is also significant. The injuries sustained reiterate the seriousness of the overall series of assaults. However, there is an added factor of humiliation resulting from the victim's incontinence brought on by her loss of consciousness. In her victim impact statement, the victim acknowledged that what "[Mr T] did to [her] was worse than anything he's ever done before".

[56] Having taken these factors into account, there is little that distinguishes Mr T's offending from the "worst class of strangulation" as proposed by the Law Commission. While his offending did not occur in breach of a protection order, it nonetheless had the hallmarks of psychological coercion and control, and physical domination. Certain factors I have discussed such as the victim's incontinence, the home invasion element and the degree of coercion and control evidenced by his behaviour, elevate the seriousness of Mr T offending beyond that in *Ackland*, warranting a higher starting point.

[57] In my view, the starting point adopted by Judge Sygrove was lenient in light of the circumstances, particularly the domestic violence context and the overall severity of the offending. However, the Judge is not necessarily to be criticised for this given both prosecution and defence counsel submitted that a starting point of three years' imprisonment was appropriate based on a rigid interpretation of *Ackland*. It does, however, show the dangers of applying culpability factors and sentencing bands in an overly mechanistic manner. This is something to which the courts should be alert given the potentially fatal consequences of intimate partner violence, particularly where strangulation is concerned.

[58] For completeness, I briefly address Mr Hawkins' submission that the Judge was prejudiced by both an earlier summary of facts which erroneously recorded that the victim had also suffered a broken jaw, dislodged fillings and an infection, and by the fact the summary of facts noted that Mr T and the victim had been the subject of "16 reported family harm episodes". Mr Hawkins also submitted that an adjustment of 10 per cent to the end starting point of four years' imprisonment was warranted for totality.

[59] I disagree with both submissions. As professional decision-makers, Judges frequently must disregard irrelevant, inadmissible or prejudicial information which they have already seen or been given for the purposes of making a decision. This is exactly what has happened in the present case. The Police failed to omit from the summary of facts erroneous information, something which was raised at sentencing and clarified by the Judge. No error has occurred.

[60] As to totality, Mr Hawkins has provided no authority for his submission that the Judge should have adjusted the end starting point by 10 per cent. In *R v Xie*, the Court of Appeal noted that the "fundamental tenet of the totality principle is that the final sentence must reflect 'the totality of the offending'. How the total sentence is made up has never been important."[40] The Court went on to confirm one of the key principles of sentencing for multiple offences is that the "final sentence must represent the overall criminality of the offending and the offender."[41]

[61] In light of these authorities and given my view on the starting point adopted by Judge Sygrove, I do not consider that the Judge erred in respect of adjusting the end starting point for totality. On the contrary, because I consider the starting point of three years' imprisonment to be lenient, the end starting point after the Judge took into account uplifts was well within range.

[62] For these reasons, this ground of appeal is dismissed.

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40 *R v Xie* [2007] 2 NZLR 240 (CA) at [16]. See also *Haywood v R* [2015] NZCA 551 at [11] for comments on the principle of totality in respect of cumulative sentences.

41 At [17(c)].

Guilty plea

[63] From an end starting point of four years' imprisonment, Judge Sygrove gave Mr T a 25 per cent discount which "[took] into account time spent on EM bail and...limited remorse." Mr Hawkins submits that Mr T ought to have received the full 25 per cent discount for his guilty plea in accordance with *Hessell*[42] — although he pleaded guilty on the day of his Judge-alone trial, he did so after a more serious burglary charge as well as a charge of assaulting a person in a family relationship were withdrawn.

[64] In *Hessell*, the Supreme Court said the following in respect of discounts for guilty pleas:

> [74] But, as we have emphasised, the credit that is given must reflect all the circumstances in which the plea is entered, including whether it is truly to be regarded as an early or late plea and the strength of the prosecution case. Consideration of all the relevant circumstances will identify the extent of the true mitigatory effect of the plea.
>
> [75] The reduction for a guilty plea component should not exceed 25 per cent. That upper limit reflects the fact that remorse is dealt with separately. Whether the accused pleads guilty at the first reasonable opportunity is always relevant. But when that opportunity arose is a matter for particular inquiry rather than formalistic quantification. A plea can reasonably be seen as early when an accused pleads as soon as he or she has had the opportunity to be informed of all implications of the plea.

[65] Mr Hawkins' submission is essentially that Mr T's guilty plea was entered as soon as he had an opportunity to be informed of all implications of that plea.

[66] There is force in that submission. In *Heta v R*, the appellant had pleaded guilty to an amended set of charges part-way through her trial.[43] This set of charges represented a lesser level of offending. The trial Judge declined to apply any credit for this ostensibly belated guilty plea. On appeal, the Court of Appeal held that she ought to have received a full 25 per cent discount for her plea as the significant downgrade in the charges meant that she could be said to have pleaded at the first reasonable opportunity.[44] However, it also became evident on appeal that the trial

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42 *Hessell v R*, above n 23.
43 *Heta v R* [2012] NZCA 267.
44 At [31].

Judge was not aware the appellant had already made an admission to the less serious charges and had only sought to defend them when coupled with the more serious ones.[45] She had not, therefore, set out "to defend the indefensible" as the trial Judge had incorrectly assumed.[46] Accordingly, *Heta* turns on its facts.

[67] *Heta* can also be contrasted to *Aupouri v R* where the Court of Appeal held that a full discount for guilty plea was not warranted despite the appellant having promptly pleaded guilty to lesser charges (sexual exploitation of a person with a significant impairment) during the course of his trial for rape.[47] This was because the appellant had taken "no earlier step to express a willingness to plead to a lesser offence on the basis of lesser offending."[48] Had the appellant shown that willingness, the Court commented that he might have been entitled to the full discount.[49]

[68] I acknowledge that Mr T's guilty plea was entered only after the critical burglary charge, for which the maximum penalty is 10 years' imprisonment, was withdrawn. In this regard, it is not unreasonable to say that he pleaded guilty at the earliest possible opportunity. However, even if I accept this, that is likely to have led to a further discount of five per cent, or just over two months. This is because Mr T's counsel at sentencing (not Mr Hawkins) submitted that a discount of 20 per cent for guilty plea was appropriate. Given the relatively minor credit available for time spent on EM bail and remorse, it is likely the District Court Judge adopted this figure and increased the total discount by a further five per cent to account for the other mitigating factors. However, I do not consider that a failure to give Mr T a further two-month discount has resulted in an end sentence that is manifestly excessive.

[69] I come to this conclusion for a further reason. The Judge included in the 25 per cent discount Mr T's "limited remorse". With respect, I cannot see from the information before this Court any manifestation of that remorse. On the contrary, the Provision of Advice to the Court (PAC) Report indicated that Mr T showed a lack of remorse for his actions, instead blaming the victim and asserting she was a liar.

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45 At [27]-[29].
46 At [27].
47 *Aupouri v R* [2019] NZCA 216.
48 At [16].
49 At [16].

Therefore, Mr T is perhaps fortunate that the Judge gave him any recognition whatsoever for remorse. Even if a greater discount could have been given for guilty plea, it was considerably off-set by the discount given for remorse.

[70] Accordingly, this ground of appeal is also dismissed.

Result

[71] The appeal is dismissed.

Suppression

[72] In light of the physical and emotional harm experienced by the victim, I sought submissions from counsel as to the appropriateness of suppressing Mr T's name in order to avoid undue hardship for her. Having considered those submissions, I order that Mr T's name and identifying particulars be suppressed pursuant to s 200(2)(c) of the Criminal Procedure Act 2011.

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Doogue J

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