NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE NAMES CONTAINED IN THE VICTIM IMPACT STATEMENTS REMAINS IN FORCE. SEE [2020] NZDC 8014.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA2/2021
[2021] NZCA 201

BETWEEN	CATHRYN KINITA Applicant
AND	THE QUEEN Respondent

Court: Gilbert, Simon France and Edwards JJ

Counsel: E A Hall for Applicant
M R L Davie for Respondent

Judgment: 20 May 2021 at 9.30 am
(On the papers)

JUDGMENT OF THE COURT

The application for leave to bring a second appeal against sentence is declined.

REASONS OF THE COURT

(Given by Edwards J)

[1] On 3 November 2019 Ms Kinita was driving her car while under the influence of cannabis and methamphetamine. She collided with a cyclist who died at the scene.

[2] Ms Kinita pleaded guilty to being in charge of a motor vehicle causing death while under the influence of drugs to such an extent as to be incapable of having proper

control of the vehicle,[1] possession of cannabis,[2] possession of methamphetamine,[3] and possession of a pipe.[4] On 8 May 2020, Ms Kinita was sentenced in the District Court at Palmerston North to 22 months and two weeks' imprisonment and was disqualified from holding or obtaining a drivers' license for two years.[5]

[3] Ms Kinita's appeal to the High Court was successful with a further four-month discount applied for personal circumstances.[6] The sentence of imprisonment was replaced with an end sentence of 10 months' home detention.[7] In fixing that sentence, Grice J declined to apply the two-step methodology endorsed in this Court's recent decision in *Moses v R* on the basis that the substituted sentence was within the appropriate range.[8]

[4] Ms Kinita seeks leave to bring a second appeal to this Court on the grounds that the failure to apply the *Moses* two-step methodology was in error; the proposed appeal involves a matter of general or public importance; and a miscarriage of justice may occur if the appeal is not heard.

Sentencing decisions

[5] The District Court sentencing took place on 8 May 2020. This was prior to this Court's decision in *Moses v R*, which was delivered on 15 July 2020. Accordingly, Judge Krebs adopted the three-step approach to sentencing.[9]

[6] The Judge took a starting point of three years and six months' imprisonment (42 months).[10] He applied a six month discount for remorse and a six month discount for previous good character. He then applied a further 25 per cent discount for guilty

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1 Land Transport Act 1998, ss 61(2)(a) and 61(3AA) (maximum penalty: 10 years' imprisonment or a fine not exceeding $20,000).
2 Misuse of Drugs Act 1975, ss 7(1)(a) and (2)(b) (maximum penalty: three months' imprisonment or a fine not exceeding $500).
3 Section 7(1)(a) and (2)(a) (maximum penalty six months' imprisonment and/or a fine not exceeding $1,000).
4 Sections 13(1)(a) and (3) (maximum penalty: one year's imprisonment or a fine not exceeding $500).
5 *R v Kinita* [2020] NZDC 8014 [District Court judgment].
6 *Kinita v R* [2020] NZHC 1008 [High Court judgment] at [49].
7 At [74].
8 At [54]; referring to *Moses v R* [2020] NZCA 296, (2020) 29 CRNZ 381.
9 District Court judgment, above n 5, at [28].
10 At [24].

pleas (totalling seven months and two weeks). The final sentence was 22 months and two weeks' imprisonment.[11] The Judge declined to impose home detention, finding it would be insufficient to meet the gravity of the offending.[12]

[7] An appeal to the High Court was filed on 19 May 2020. That was prior to the delivery of *Moses*. However, the judgment had issued by the time of the appeal hearing on 10 November 2020 and so the appeal grounds included the fact that the *Moses* methodology should be applied retrospectively with the consequence of a lower end-sentence.

[8] Additional information had been prepared for the High Court appeal. This included an alcohol and drug report prepared by Te Hauora Runanga O Wairarapa Inc and a psychological report dated 3 September 2020. In light of those reports, Grice J applied an additional four-month discount for personal circumstances.[13]

[9] As to the challenge regarding the sentencing methodology, the Judge noted that application of *Moses* would result in a lower end-sentence.[14] She recorded the Crown's acknowledgement that, in the event the appeal was allowed and the sentence set aside, the Court would be entitled to consider whether to apply the *Moses* methodology in calculating the new sentence.[15] The Crown's further submission, that *Moses* should not be routinely applied retrospectively, the focus must remain on the end sentence and the Court should not intervene if the sentence was within range, was also recorded by the Judge.[16] The Judge declined to apply the two-step methodology finding that the reduced sentence incorporating the additional discount for personal circumstances was within the appropriate range, and it was not appropriate to apply *Moses* to reduce it further.[17]

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11 At [28].
12 At [33].
13 High Court judgment, above n 7, at [49].
14 At [51].
15 At [52].
16 At [53].
17 At [54].

Should leave to bring a second appeal be granted?

[10] Leave to bring a second appeal must not be granted unless we are satisfied that the appeal involves a matter of general or public importance, or a miscarriage of justice may have occurred or may occur unless the appeal is heard.[18] The threshold for leave is a high one.

[11] This Court has recently clarified the retrospective application of the *Moses* methodology on appeal.[19] In deciding whether the application of *Moses* should be any different to the retrospective application of other guideline judgments (such as *Zhang v R*), the Court said:[20]

> [48] Should *Moses* be treated differently? Generally, the answer is no. It will be apparent from what we have said that an offender is entitled to have *Moses* applied to past conduct that resulted in a sentence delivered at first instance after its date of issue, 15 July 2020. The Court applies *Moses* where an appeal was pending at that date. The Court does not ordinarily apply *Moses* where an offender had been sentenced before 15 July 2020 and an appeal was not pending at that date. When the Court finds the sentence in such a case manifestly excessive for other reasons, however, it may use the two-step methodology when substituting another sentence.
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> (Footnotes omitted.)

[12] As the appeal in this case was filed prior to the delivery of *Moses*, and the Judge had found the District Court sentence to be manifestly excessive for other reasons, namely the additional discount required for personal circumstances, it was open to the Judge to apply the two-step methodology in calculating the substituted sentence.

[13] However, as this Court in *Cheung v R* made clear, the endorsement of the two-step methodology in *Moses* does not mean that sentences fixed by reference to the prior three-step methodology are wrong. The Court said:

> [20] It did not follow that sentences using the three-step methodology were wrong. The sentencing judge fixes the starting point and any uplifts and discounts in an evaluative way by reference to sentencing purposes, principles and factors found in the Sentencing Act. The sentence is imposed after standing back and asking whether it is just. The three-step methodology, like the two-step one that replaced it, structured the sentencing analysis in pursuit of consistency and transparency. The only concrete limit imposed was the 25

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18 Criminal Procedure Act 2011, s 253(3).
19 *Cheung v R* [2021] NZCA 175.
20 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

> per cent cap on a guilty plea discount. The change of methodology was limited to calculation of the guilty pleas discount, albeit the most common and usually the largest. It is only when a guilty plea discount is combined with other substantial discounts that the methodology is liable to produce a materially different outcome, as the facts of *Moses* itself demonstrate. And on appeal, the question is not whether a given methodology was followed but whether the end sentence was manifestly excessive.
>
> (Footnote omitted.)

[14] This means that the failure to follow the *Moses* methodology is not, in and of itself, an error by the Judge.

[15] There is also nothing to suggest that the sentence substituted on appeal was manifestly excessive. In fact, the Crown suggests that the sentence is quite generous when compared to other analogous cases such as *Bowlin v R*.[21] Methodology does not exist in a vacuum and, in the absence of any comparable authority suggesting the end-sentence was too high, we do not accept that there is a real risk of a miscarriage of justice if leave is not granted.

[16] Further, we do not accept that the proposed appeal raises issues of general or public importance. The retrospective application of the *Moses* methodology on appeal is expressly addressed by this Court in *Cheung v R*. Accordingly, the threshold for leave to bring a second appeal is not met.

Result

[17] The application for leave to bring a second appeal against sentence is declined.

Solicitors:
Crown Law Office, Wellington for Respondent

Solicitors:

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[21] *Bowlin v R* [2015] NZCA 137.