NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA202/2021
[2022] NZCA 140

BETWEEN	SUKHWINDER SINGH Appellant
AND	THE QUEEN Respondent

Hearing:	21 March 2022
Court:	Goddard, Simon France and Hinton JJ
Counsel:	M J Taylor-Cyphers for Appellant C P Paterson for Respondent
Judgment:	26 April 2022 at 10.00 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal against sentence is allowed in part.

C The order that Mr Singh serve a minimum period of imprisonment of 50 per cent of the full term of the sentence of 12 years, eight months' imprisonment is quashed. There is substituted in lieu an order that he serve a minimum period of imprisonment of five years, six months, being 50 per cent of the sentence for the count of sexual violation by rape and two counts of sexual violation by unlawful sexual connection.

D The appeal is otherwise dismissed.

REASONS OF THE COURT

(Given by Hinton J)

[1] In July 2019, Mr Singh was convicted by jury of three charges of male assaults female,[1] assault with intent to injure,[2] sexual violation by rape,[3] two charges of sexual violation by unlawful sexual connection[4] and contravening a protection order.[5]

[2] He had pleaded guilty to and was convicted of being unlawfully in a building,[6] a further charge of male assaults female, and two further charges of breaching a protection order.

[3] On 20 August 2019, Judge Down sentenced Mr Singh to 12 years, eight months' imprisonment with a minimum period of imprisonment (MPI) of six years, four months.[7]

[4] Mr Singh now appeals against sentence. He accepts the starting point was in range but says that (a) the Judge failed to apply the totality principle following uplifts for the additional charges; (b) no discounts were given; and (c) the MPI was unjustified and wrongly imposed.

[5] Mr Singh's appeal was filed out of time on 12 April 2021. He seeks an extension of time to appeal. The Crown does not oppose and the application is granted.

Offending

[6] As of 17 November 2017, the complainant had been in a relationship with Mr Singh for three years. She was staying that night at a Women's Refuge in fear that he would go to her apartment.

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1 Crimes Act 1961, s 194(b); maximum penalty two years' imprisonment.
2 Section 193; maximum penalty three years' imprisonment.
3 Sections 128(1)(a) and 128B; maximum penalty 20 years' imprisonment.
4 Sections 128(1)(b) and 128B; maximum penalty 20 years' imprisonment.
5 Domestic Violence Act 1995, ss 19(1)(a) and 49(1)(b); maximum penalty three years' imprisonment.
6 Summary Offences Act 1981, s 29(1)(a): maximum penalty three months' imprisonment or a $2,000 fine.
7 *R v Singh* [2019] NZDC 26798 [Sentencing notes].

[7] At 3 am on 17 November 2017, Mr Singh entered the complainant's apartment and slept there the night. He wrote messages in lipstick on the walls and mirror.

[8] On 23 January 2018, Mr Singh pleaded guilty in the District Court to being unlawfully in a building. The District Court Judge made a protection order against Mr Singh with the complainant as the protected person. Mr Singh was not sentenced at this time.

[9] On 25 January 2018, Mr Singh and the complainant had been drinking together. They returned to the complainant's apartment. Mr Singh threw the complainant into the shower and said, "go have a shower you drunk bitch, you know no one is going to believe you". While she was in the shower, Mr Singh picked her up by her hair. He then threw her around the living room and punched and slapped her.

[10] Mr Singh then put the complainant on the bed and began choking her. He undressed himself and suffocated her with a pillow. He then vaginally and anally raped her, and forced his penis into her mouth. The complainant subsequently heard Mr Singh taking photographs of her.

[11] Later Mr Singh told the complainant variously that no one would believe her, she was so drunk she would not really recall it, or she had had an epileptic seizure and hurt herself. He told her to shut her mouth and not tell anyone.

[12] On 7 February 2018, Mr Singh was in the complainant's apartment. He became violent after drinking. He accused her of cheating on him and she attempted to leave. He physically assaulted her in a prolonged altercation in which he hit, pushed and kicked her, hit her with a lamp, whipped her with a lanyard attached to keys, and picked her up and dumped her on the ground.

[13] During the trial in July 2019, Mr Singh contacted the complainant. Judge Down remanded Mr Singh in custody. He was granted bail after the complainant had given evidence. He then breached bail to leave a gift at the complainant's address and attempted to contact her in other ways.

Sentencing

[14] The Judge adopted the guideline judgment of *R v AM (CA27/2009)* for the offending on 25 January 2018, sexual violation being the lead offence.[8] The Judge considered there were four aggravating features present to a moderate or high degree: the level of violence, the harm to the victim, the scale of the offending and the degree of violation. He also found that there was a small degree of vulnerability of the victim.[9]

[15] Counsel agreed that the offending fell within band 2. The Judge considered the offending could have easily put Mr Singh into band 3, but accepted counsel's submissions and adopted band 2, being a seven to 13 year starting point.[10] The Judge fixed a starting point of 11 years' imprisonment.[11]

[16] The Judge considered whether there were any aggravating factors relating to Mr Singh. He considered Mr Singh's previous convictions were unrelated to the present offending and did not justify an uplift. He noted that the breach of protection order occurred during the trial and was particularly egregious and blatant.[12]

[17] The Judge then addressed the additional offending. In relation to the offending of 7 February 2018, the starting point of one years' imprisonment was reduced by 15 per cent due to a guilty plea, albeit made on the morning of the trial.[13] For the offending that occurred during the trial, he adopted a starting point of one year and reduced it by 25 per cent due to an early guilty plea.[14] For the original offending of being unlawfully in a building in November 2017, a starting point of six weeks' imprisonment was reduced to one month for a guilty plea.[15] Imposed cumulatively, this resulted in a 20-month uplift for a final sentence of 12 years, eight months' imprisonment.[16]

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8 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
9 Sentencing notes, above n 7, at [17]–[24].
10 At [24].
11 At [29]–[30].
12 At [26].
13 At [31].
14 At [32].
15 At [33].
16 At [34].

[18] Finally the Judge considered whether he should impose an MPI. He concluded as follows:

> [35] The Crown urge me to impose a minimum period of imprisonment, pursuant to s 86 of the Sentencing Act 2002. Your counsel has submitted to me, on authority from a Court of Appeal decision, that because you are assessed in the pre-sentence report as being at low risk of further offending, the Court should not impose a minimum period of imprisonment. Although I accept that is an appropriate submission to make, I have come to the following conclusion. Section 86 requires the Court to consider whether the usual parole period, which is one-third in a long-term sentence, is insufficient for any or all of the following purposes:
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> (a) Firstly, holding the offender accountable for the harm done to the victim and the community.
>
> (b) Second, denouncing the conduct in which the offender was involved.
>
> (c) Third, deterring the offender or other persons from committing the same or similar offences.
>
> (d) Fourth, protecting the community from the offender.
>
> [36] Therefore the submission made by your counsel relating to the risk of you committing further offences, in other words the protection of the community, of other female partners in the future, is only one aspect to s 86 that the Court should take into account. I have come to the conclusion that one-third parole would be insufficient to fulfil the following purposes:
>
> (a) To hold you accountable for the harm that you did to the victim in the community.
>
> (b) And to denounce this dreadful conduct, in which you were involved.
>
> (c) Also, to deter you from further offending of this type.
>
> [37] I am satisfied that the appropriate level of minimum period that should be imposed under s 86 is one half of the period of imprisonment. In other words, six years and four months would be the minimum period of imprisonment that I impose.

The appeal

[19] Ms Taylor-Cyphers for Mr Singh first submits that the sentencing Judge failed to take into account an assessment of totality when applying the 20-month uplift for the additional offending for which Mr Singh entered guilty pleas.

[20] Ms Paterson for the Crown says that the failure of the Judge to mention the totality principle when considering the uplift is not an issue so long as the sentence imposed is proportionate to the offending.[17] The subsequent offending was clearly serious in the shadow of the lead offence and in the context of a domestic violence relationship. The overall sentence remained within band 2 of *R v AM*.

[21] Secondly, Ms Taylor-Cyphers submits the sentencing Judge did not consider discounts for having no previous relevant convictions, or having an alcohol problem (that is, addiction), nor did he consider credit for time spent on bail. She says that *Zhang v R* applies in relation to addiction as a mitigating factor.[18]

[22] Ms Paterson responds that lack of previous relevant convictions is not a recognised mitigating factor. *Zhang v R* does not apply because the appeal was filed after that judgment.[19] There is insufficient evidence and information before the Court by which to assess Mr Singh's fresh claim on appeal that he has an alcohol dependence to such a degree that it would entitle him to a discrete discount. Ms Paterson also submits that time spent on bail simpliciter is not a mandatory consideration, and the bail conditions to not visit the complainant's apartment and curfew from 9 pm to 7 am are not sufficiently restrictive to warrant credit. Also, Mr Singh had five bail breaches.

[23] Thirdly, Ms Taylor-Cyphers argues there was no reasoning specific to Mr Singh as to why the test for imposing an MPI was met, especially given the Judge accepted that he was at low risk of re-offending. Finally, she argues that an MPI ought to have only been imposed on the sentences for which an MPI is statutorily available, and thus only on the sentence for the sexual violation charges.

[24] Ms Paterson counters that the MPI was appropriate given the seriousness of the offending and that the Judge expressly turned his mind to the s 86 factors. Although the Judge erred in imposing the MPI on the cumulative sentence, the length of the term was nonetheless correct.

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[17] *Kite v R* [2018] NZCA 485 at [21].
[18] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
[19] *Zhang v R*, above n 18, at [188] and [191], and as an example of a rejection of an attempt to apply *Zhang* to a late-filed appeal see *Cheng v R* [2021] NZCA 68 at n 4.

Discussion

[25] We are satisfied that there was no error in the imposition of the sentence itself.

[26] The uplifts for additional offending were appropriate in relation to severity, and as the Crown identifies, the final sentence was still within band 2 for the lead offence.

[27] The Judge was not required to consider time on bail simpliciter or the lack of relevance of previous convictions to the offending as potential mitigating factors. Nor was there evidence before him (or indeed this Court) that Mr Singh had an alcohol addiction causative of the offending, merely that alcohol was involved in some of it.

[28] The imposition of an MPI was within the discretion of the sentencing Judge. He correctly identified the statutory factors and applied them, in particular noting the need to denounce Mr Singh for his "dreadful" conduct.[20] In fact, we would not accept, as the Judge seemed to, that Mr Singh was at low risk of offending based solely on the probation officer's report. As the report writer also noted, Mr Singh's current offending demonstrates a significant escalation of risk, particularly of harm to others in a relationship. There are a number of red flags attached to this offending.

[29] However, we accept Ms Taylor-Cyphers' submission that the Judge has inadvertently imposed the MPI on the cumulative sentence which includes sentences of two years' imprisonment or less. Section 86(1) of the Sentencing Act 2002 provides that if a Court sentences an offender to a determinate sentence of imprisonment of more than two years *for a particular offence* a minimum period can be imposed only in relation to *that particular sentence*. There are a number of instances where this Court has reduced an MPI because the sentence failed to comply with s 86(1).[21]

[30] Ms Paterson accepts that the Judge did not approach the exercise correctly but says he was not led into error. She submits that six years, four months' imprisonment (the equivalent of 60 per cent of the long-term sentence) is still an appropriate MPI. The court is able to impose an MPI of up to 66 per cent and is able to consider the full

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20 Sentencing notes, above n 7, at [36].

21 See for example, *R v Kite* [2007] NZCA 385; *R v Bell* [2007] NZCA 17; and *Van Wakeren v R* [2011] NZCA 503.

ambit of the offending including short-term sentences when considering whether an MPI is necessary.[22] It must also follow that the court can take account of the full ambit of the offending when fixing the percentage MPI to impose on the long-term sentence.

[31] We agree with Ms Paterson as to principle. Where the sentence does not comply with s 86(1), the appellate court should make its own assessment. In some of the cases cited above, the MPI had been fixed at sentencing, not only on the cumulative sentence but at the maximum rate of 66 per cent, such that the argument Ms Paterson advances here was not available.

[32] However, we consider that while an MPI is warranted in this case, a 60 per cent MPI would be at the top of the available range. An assessment of the length of the MPI to be imposed takes into account all the relevant circumstances of the offending and the offender.[23] This was serious offending but not the most severe of its kind. The sentencing Judge noted it appeared to be opportunistic rather than premeditated.[24] Mr Singh's previous offending is limited and minor. The Judge clearly thought the MPI should be set at 50 per cent rather than a higher percentage, and we agree the case falls into that category.[25] We do not consider the more minor offending materially impacts on the MPI in this case. Accordingly the MPI is to remain at 50 per cent but be fixed on the long-term sentence only.

Result

[33] The application for an extension of time to appeal is granted.

[34] The appeal against sentence is allowed in part.

[35] The order that Mr Singh serve a minimum period of imprisonment of 50 per cent of the full term of the sentence of 12 years, eight months' imprisonment is quashed. There is substituted in lieu an order that he serve a minimum period of

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22 See Sentencing Act 2002, s 86(2).
23 *R v Nguyen* [2009] NZCA 239 at [34]. See also *R v Taueki* [2005] 3 NZLR 372 (CA); and *R v Brown* [2002] 3 NZLR 670 (CA).
24 Sentencing notes, above n 7, at [16].
25 See the comprehensive review in this Court of sexual offending cases where an MPI of around 50 per cent was set: *R v Gordon* [2009] NZCA 145.

imprisonment of five years, six months, being 50 per cent of the sentence for the count of sexual violation by rape and two counts of sexual violation by unlawful sexual connection.

[36] The appeal is otherwise dismissed.

Solicitors:
Crown Solicitor, Auckland for Respondent