NOTE: DISTRICT COURT ORDER IN [2023] NZDC 23347 PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE VICTIMS REMAINS IN FORCE.

NOTE: DISTRICT COURT ORDER IN [2023] NZDC 23347 PROHIBITING PUBLICATION OF CERTAIN DETAILS OF THE APPELLANTS BACKGROUND REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA685/2023
[2024] NZCA 268

BETWEEN	QUINTON WAIATI OHLSON Appellant
AND	THE KING Respondent

Hearing: 15 May 2024

Court: French, Muir and Campbell JJ

Counsel: J M Grainger for Appellant
J A A Mara for Respondent

Judgment: 25 June 2024 at 11.30 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Muir J)

Introduction

[1] Mr Quinton Ohlson appeals his sentence in respect of multiple charges including burglary,[1] various offences of violence,[2] and driving, drug and firearms related offending.[3] The sole ground of appeal relates to the Judge's imposition of a minimum period of imprisonment (MPI) of 50 per cent,[4] this being three years and four and a half months on a sentence of six years and nine months' imprisonment. He says that no MPI should have been imposed or, if unsuccessful in that argument, that it should have been set at 40 per cent.

[2] The Crown says there was no error in the approach adopted. It notes that as a result of a methodological error in setting the sentence, the sentence should in fact have been seven years and two and a half months' imprisonment. Although it does not bring an appeal from that error, it says the resulting benefit should be taken into account in any overall assessment of whether the MPI of 50 per cent was manifestly excessive .

Background

[3] At around 2.30 am on 13 June 2021 Mr Ohlson gained entry to a home in South East Christchurch by breaking a window. The owners were absent at the time. He stole a number of items.

[4] Thirty minutes later he entered the neighbour's residence through a back door. The owners of the property were asleep, and their daughter (victim one) was out with friends. Having entered the house, he turned off the power and began to take various

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1 Two charges, Crimes Act 1961, s 231(1)(a)—maximum penalty 10 years' imprisonment.

2 Injuring with intent to cause grievous bodily harm, s 189(1)—maximum penalty 10 years' imprisonment; impedes breathing, s 189A—maximum penalty seven years' imprisonment; and injuring with reckless disregard, s 189(2)—maximum penalty five years' imprisonment.

3 Driving whilst disqualified, Land Transport Act 1998, s 32(1)(a) and (3)—maximum penalty three months' imprisonment; obstructs police, Summary Offences Act 1981, s 23(a)—maximum penalty three months' imprisonment; unlawful possession of ammunition, Arms Act 1983, s 45—maximum penalty four years' imprisonment; possession of a Class A controlled drug (methamphetamine), Misuse of Drugs Act 1975, s 7(1) and (2)—maximum penalty six months' imprisonment; possession of a Class C controlled drug (cannabis), s 7(1) and (2)—maximum penalty three months' imprisonment; and possession of utensils, s 13(1)(a) and (3)—maximum penalty one year imprisonment.

4 *R v Ohlson* [2023] NZDC 23347 [judgment under appeal] at [81].

items. He took a knife from the kitchen and placed it on a beanbag in a bedroom, next to a pile of electronic items he had collected.

[5] Victim one arrived home at approximately 3.45 am. As she walked up the side path towards the rear door of the property, Mr Ohlson came towards her, pushed her and directed her to be quiet. In response she bit his finger. He then punched her in the face causing her to fall to the ground where he inflicted multiple further punches to her face, possibly as many as 15. When she screamed, Mr Ohlson throttled her neck, impeding her breathing and causing her to become dizzy and lose consciousness.

[6] The commotion caused victim one's mother to wake and she in turn woke her husband (victim two). He went downstairs to investigate and saw his daughter on her hands and knees pointing down the path saying "man". Victim two then ran after Mr Ohlson but was punched in the face and knocked unconscious. Mr Ohlson fled on foot after a failed attempt to steal the family's vehicle.

[7] Three days later, and while still subject to a prior disqualification, Mr Ohlson was observed driving in Somerfield. When he stopped to enter a dairy, the police waited for him to exit and when he attempted to flee, tasered and searched him. The police identified on his person three rounds of shotgun ammunition, cannabis plant material, 0.15 grams of methamphetamine and two used methamphetamine pipes.

The sentencing decision

[8] Judge Crosbie initially imposed a sentence of seven years' imprisonment but subsequently corrected this on his own volition under s 180 of the Criminal Procedure Act 2011 by imposing the sentence indicated above.[5]

[9] As noted, both the original and corrected sentences contained an error in methodology, in that Mr Ohlson's previous convictions were identified as an

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5 Judgment under appeal, above n 4, at [76]; and *R v Ohlson* DC Christchurch CRI-2021-009-00458, 29 November 2023 (Minute of Judge Crosbie).

aggravating feature of the offending rather than an aggravating factor personal to the offender.[6] The result was to understate the sentence by five and a half months.

[10] In respect of all offending on 13 June 2021, the Judge identified a combined starting point of eight years and six months' imprisonment. For the offending on 16 June 2021, he identified a combined starting point of nine months' imprisonment.[7] He then uplifted the global starting point by 15 per cent on account of Mr Ohlson's previous offending.[8]

[11] In terms of personal factors, the Judge applied discounts of 12.5 per cent on account of Mr Ohlson's background and 10 per cent for rehabilitative efforts and remorse.[9] He then applied a discount of 10 per cent for Mr Ohlson's various guilty pleas, noting the different times they were entered in respect of each set of offending.[10] He allowed a further discount of five months for time spent on EM bail at the Grace Foundation.[11] He was satisfied that an MPI of 50 per cent should be imposed.[12]

Jurisdiction

[12] The appeal falls to be decided under ss 244 and 250 of the Criminal Procedure Act. This Court must be satisfied that there was an error in the District Court's decision to impose an MPI, such that the end result is a manifestly excessive sentence.

Minimum periods of imprisonment

[13] Section 86(2) of the Sentencing Act 2002 (the Act) provides that:

> (2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:
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> (a) holding the offender accountable for the harm done to the victim and the community by the offending:

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6 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [46]; *Gray v R* [2020] NZCA 548 at [31]; and *Mo'unga v R* [2023] NZHC 1967 at [28]–[36].
7 Judgment under appeal, above n 4, at [48].
8 At [55].
9 At [63] and [70].
10 At [72].
11 At [75].
12 At [81].

(b) denouncing the conduct in which the offender was involved:

(c) deterring the offender or other persons from committing the same or a similar offence:

(d) protecting the community from the offender.

[14] Where a minimum non-parole period is contemplated as potentially necessary, the sentencing Judge must carry out a two-stage process. First, they must fix the maximum length of sentence by reference to all of the relevant sentencing considerations. Secondly, as a separate exercise, they must consider whether the normal parole eligibility of one-third of the length of the sentence is insufficient to meet one or more of the four specified purposes in s 86(2), and if so how long the minimum non-parole period should be.[13] This requires a reconsideration of the relevant sentencing principles found in ss 7, 8 and 9 of the Act and should not be done in a routine or mechanistic way without regard to the circumstances of the individual case.[14]

[15] In what is necessarily a holistic inquiry, the ultimate objective is to establish—by reference to any one or more of the factors identified in s 86(2)—whether release after one third of the sentence would constitute an insufficient response in the eyes of the community, so that an MPI is required to confer a degree of reality on the sentence and the overall outcome.[15]

The appellant's case

[16] Mr Grainger, for the appellant, argues that the Judge, although otherwise sentencing on a very comprehensive basis, applied the MPI in a mechanistic way and without reasoned analysis, contrary to this Court's guidance in *Zhang v R*.[16] He says that as a result, we should assess whether an MPI should be imposed in light of the views expressed by the Judge about the offending and the offender and in light of the submissions received on appeal.[17]

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13 *R v Taueki* [2005] 3 NZLR 372 (CA) at [51]–[56].

14 *R v Gordon* [2009] NZCA 145 at [48]; and *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [169].

15 *R v Gordon*, above n 14, at [15]–[16].

16 *Zhang v R*, above n 14, at [307]; *Blackler v R* [2019] NZCA 232 at [38]; and *Tang v R* [2021] NZCA 266 at [35].

17 As was done in *K (CA479/2019) v R* [2020] NZCA 95 at [15].

[17] He says that given Mr Ohlson's overall culpability, an MPI was not warranted or, at the very least, should have been set at a lower level. While acknowledging that the offending was serious, that Mr Ohlson has an entrenched history of previous offending,[18] and that the criteria for imposition of an MPI in s 86(2)(a) and (b) of the Act were thus engaged, Mr Grainger contends that these factors are not determinative and an MPI was not warranted.

[18] He further submits that Mr Ohlson received a stern but within range uplift for previous convictions, and that this should count against the imposition of an MPI. He acknowledges however the calculation error in Mr Ohlson's favour.

[19] Significant emphasis is placed on Mr Ohlson's guilty pleas; his remorse; the genuine apologies expressed at the restorative justice conference he attended; his sustained rehabilitative efforts (involving participation in a one-year residential programme); and the personal background factors outlined in a psychological report.

[20] Counsel submits that in combination, these elements bring the appeal within the categories of cases recognised by this Court in *Tran v R* for reconsideration of minimum non-parole periods.[19]

Discussion

[21] We are not persuaded that the Judge undertook his MPI analysis in a mechanistic or inadequately reasoned way. We accept that of the five paragraphs in his sentencing notes which address the issue, four discuss the parties' submissions or the relevant principles.[20] But it is, in our view, clear from the fifth that it was the "many aggravating features of the offending" which ultimately underpinned his conclusion and that the victim impact statements, in turn, featured in his assessment.[21] The discussion of the "aggravating features" of the offending in earlier parts of the sentencing notes is fulsome.

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18 Comprising, inter alia, 16 burglary offences, multiple other dishonesty offences, breath alcohol offending, male assaults female and wounding with intent to cause grievous bodily harm.

19 *Tran v R* [2021] NZCA 464 at [54].

20 Judgment under appeal, above n 4, at [77]–[81].

21 At [81].

[22] We consider that, in context, the relatively brief reasoning was adequate. It is clear that the Judge regarded the factors in s 86(2) of the Act as sufficiently engaged and considered that a non-parole period was required to confer a degree of reality on the sentence and the overall outcome.

[23] Mr Grainger submits that the principles of deterrence and protection (as identified in s 86(2)(c) and (d) of the Act) were not significantly engaged on the facts. He says that there are essentially two reasons for that:

(a) The offending was born of a serious drug habit reflected in a long and recidivist history. He submits that the majority of residential burglars fall into this category; that drug fuelled crime carries little "consequential thinking"; that personal deterrence has little impact in that context; and that accordingly an MPI is not justified on that basis.[22]

(b) He emphasises what he described as Mr Ohlson's "commendable and sustained" rehabilitative efforts "whereby he has taken the time to begin to address his personal circumstances that facilitated the need to offend". He describes Mr Ohlson's rehabilitative prospects as high based on his participation in a one-year residential programme, the report from which indicates that he has transitioned from being a person with poor self-esteem and addiction issues to a person capable of leading a work team and acknowledging his previous shortcomings. Mr Grainger also relies on Mr Ohlson's guilty pleas, and the genuine and serious remorse expressed at the restorative justice conference.

[24] We respond as follows:

(a) Section 86(2) specifies four purposes, all *or any* of which may justify the imposition of an MPI. As indicated, the appellant acknowledges

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[22] Relying on comments in *Zhang v R*, above n 14, at [85]–[93].

that his offending was of a character which could potentially engage s 86(2)(a) and (b).

(b) We accept that the principles in s 8 of the Act and the aggravating and mitigating factors identified in s 9 are applicable in determining whether or not an MPI should be imposed to the extent that they are relevant to the s 86(2) purposes. This approach is longstanding.[23] As such we accept Mr Ohlson's rehabilitative prospects weigh in the calculus.

(c) Although we commend Mr Ohlson's efforts, the reality is that the success of them is yet to be tested outside the essentially institutionalised environments of his residential rehabilitation facility and, subsequently, prison. The pre-sentence report identified him as being at moderate risk of reoffending given his age and recidivist history. Mr Grainger acknowledges that assessment as "fair" albeit one which must be considered "in tandem with what appears to be genuine commitment to rehabilitation".

(d) Section 86(2)(c) of the Act refers not only to personal but to general deterrence. Unlike the position in *Zhang*, there is no evidence before us that residential burglars generally suffer from addiction or offend without reference to consequences.[24] Moreover, although there may not have been a high degree of premeditation in relation to the violent aspects of Mr Ohlson's offending, it is in that respect that general deterrence has potentially the greatest impact. Adult male burglars confronted by adolescent girls have many alternatives available to them, apart from punching them multiple times in the face and strangling them to the point of unconsciousness.

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23 *R v Nguyen* [2009] NZCA 239 at [33], citing *R v Walsh* (2005) 21 CNRZ 946 (CA) at 951.

24 Compare the position discussed in *Zhang v R*, above n 14, at [92] in relation to the generality of those charged with methamphetamine offending.

(e) Expressions of remorse carry significantly less weight in the context of recidivist offenders.[25] We accept, however, that in combination with committed efforts towards rehabilitation, that position may require reassessment in specific cases.

[25] Mr Grainger submits that Mr Ohlson's rehabilitative efforts could well be undermined by the 50 per cent MPI imposed because, with a current parole eligibility date of, we are told, 18 November 2025, it may be some time before he can realistically expect to participate in custodial rehabilitative programmes. He relies on observations of this Court in *Moore v R* indicating that "[p]riority for courses is given to those approaching parole eligibility".[26] We infer from his submission the prospect of 'backsliding' pending admission to such programmes.

[26] *Moore* related to a sentence of preventive detention where this Court was concerned the offender would be of "low priority" until parole eligibility was established. There is no evidence before us as to when Mr Ohlson, who already has a fixed eligibility date, could be expected to gain entry to courses that may assist him. The corollary is also true. If we cancelled the MPI he would be eligible for parole on or about 4 October 2024. There is no evidence whether, in the time available between now and then, Mr Ohlson could be inducted into and complete the courses which may be useful to him. We therefore place little weight on this point.

[27] Standing back, we are unpersuaded that—given Mr Ohlson's long history of offending, the seriously aggravating factors of the index offending and the context in which it occurred (two sequential burglaries and further offending three days later)—the imposition of an MPI resulted in a manifestly excessive sentence. We come to that conclusion even allowing for the extent to which personal mitigating factors are necessarily taken into account.

[28] Nor are we persuaded that we should intervene in respect of the MPI percentage imposed. This Court has recognised that MPIs that are at or near the

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25 *R v Ngamo* [2009] NZCA 512 at [9].
26 *Moore v R* [2023] NZCA 286 at [92].

statutory maximum of 66 per cent are unexceptional in the case of recidivist burglars.[27] In this case that was appropriately tempered by the aspects of personal mitigation identified. A 50 per cent MPI was within the available range taking a holistic analysis of both offender and offending.

[29] We also consider it relevant in that context that the MPI of three years and four months' imprisonment was only 47 per cent of the sentence which should have been imposed, but for the Judge's error in methodology.

Result

[30] The appeal against sentence is dismissed.

Solicitors:
Public Defence Service | Ratonga Wawao ā-Ture Tūmatanui, Christchurch for Appellant
Crown Law | Te Tari Ture o te Karauna, Wellington for Respondent

[27] *R v Clayton* [2008] NZCA 348 at [32].