

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR
IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY
S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA26/2021
[2024] NZCA 354**

BETWEEN	OHN NYUNT KHON Appellant
AND	THE KING Respondent

Hearing:	19 June 2024
Court:	Cooke, Venning and van Bohemen JJ
Counsel:	A M S Williams and K N Stitely for Appellant A J Ewing for Respondent
Judgment:	31 July 2024 at 10.30 am

JUDGMENT OF THE COURT

- A The appeal against sentence is allowed in part.**
- B The minimum period of imprisonment of 50 per cent of the term of imprisonment is quashed.**
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REASONS OF THE COURT

(Given by van Bohemen J)

[1] Ohn Nyunt Khon appeals the sentence of 13 years and six months' imprisonment imposed by Judge A A Zohrab in the District Court at Nelson on 7 August 2020 having been found guilty of 18 charges of serious sexual offending

against three children.¹ Mr Khon also appeals the minimum period of imprisonment (MPI) of 50 per cent of the sentence imposed by the Judge.²

[2] Mr Khon was convicted by a jury on seven counts of sexual violation by rape (three being representative charges), three counts of sexual violation by unlawful sexual connection (one being a representative charge), and eight counts of indecently assaulting a girl under 12 years old (two being representative charges).

[3] Mr Khon contends his sentence is manifestly excessive because the Judge erred in failing to adequately recognise the disproportionately severe impact that imprisonment would have on him given his health, age, and inability to speak or understand the English language.

Relevant background

[4] Mr Khon is a refugee from Myanmar/Burma. Following the 1988 Uprising in Myanmar/Burma, Mr Khon was displaced to a refugee camp in Thailand, where he met the victims' parents, also refugees from Myanmar/Burma, and became an "uncle" to their children. They all came to New Zealand in 2001. The victims and their family moved to the South Island in 2001. When Mr Khon moved to the South Island in May 2002, the family invited him to live with them.

[5] Over the four years that followed, Mr Khon sexually offended against three of the family's daughters. For the purposes of this appeal, it is sufficient to recall that, as recorded in the Judge's sentencing notes:³

- (a) The offending against the first complainant involved Mr Khon rubbing her genital area while she was sitting on his knee when they were alone in his room. Mr Khon was found guilty of indecent assault on a girl under 12 years old for this offending, which took place between 31 May 2002 and 24 December 2003.

¹ *R v Khon* [2020] NZDC 15797 [Sentencing notes] at [28]. Mr Khon's appeal against sentence was initially filed out of time, however the requisite extension of time was granted by Cooke J on 18 April 2024.

² At [27]–[28].

³ At [2]–[6].

- (b) The offending against the second complainant involved Mr Khon touching the complainant's genital area, including under her clothing, and penetrating her with his fingers, while sitting on the couch and watching TV or a movie. The offending escalated to include a rape in an upstairs room used by Mr Khon and other indecent touching. It escalated further to include sexual violation in the bushes in a park, where Mr Khon would lie the complainant on the ground, remove her lower clothing, and perform oral sex on her before raping her. In relation to this offending, which took place between 31 May 2002 and 12 October 2006, Mr Khon was found guilty of indecent assault on a girl under 12 years old, sexual violation by unlawful sexual connection (including a representative charge), and sexual violation by rape (including a representative charge).
- (c) The offending against the third complainant involved Mr Khon calling or taking the complainant into a room at two separate addresses, removing her lower clothing, feeling around her genital area with his hand, and then raping her. In relation to this offending, which took place between 28 June 2004 and 12 October 2006, Mr Khon was found guilty of indecent assault on a girl under 12 years old (including two representative charges), and sexual violation by rape (including two representative charges).

Sentence imposed in the District Court

[6] In considering an appropriate starting point, the Judge had regard to the rape bands set out in *R v AM (CA27/2009)*.⁴ The Judge accepted the submission of both counsel that the offending fell within band four — multiple instances of offending over a considerable period of time. The Judge then outlined the extensive impact of the offending on the victims.⁵ The two victims who were raped described “ongoing severe depression, anxiety, post traumatic stress disorder, social difficulties, inhibited schoolwork and tertiary study, and suicidal thoughts”.⁶ The Judge accepted the

⁴ At [16], citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

⁵ Sentencing notes, above n 1, at [9]–[13].

⁶ At [9].

aggravating factors included the scale of the offending, the age and vulnerability of the victims, the gross breach of trust, and the range and extent of offending.⁷ Accordingly, the Judge adopted a starting point of 16 years' imprisonment.⁸

[7] When considering mitigating features personal to Mr Khon, the Judge declined to apply a discount for previous good character because he considered that Mr Khon's persistent offending over a span of four or five years extinguished any credit that may have been available for good character.⁹

[8] With regard to Mr Khon's age and health, the Judge considered that a 15 per cent discount was appropriate because there was no suggestion of any limited lifespan or overwhelming health difficulties. The Judge held that this discount should also incorporate the social difficulties that Mr Khon would encounter in prison because of his poor English skills.¹⁰

[9] This resulted in an end sentence of 13 years and six months' imprisonment.¹¹

[10] With regard to the question of whether an MPI was required to meet the aims and objectives of sentencing, the Judge referred to submissions of counsel for the Crown to the effect that MPIs of 50 per cent of the nominal sentence are routine in cases involving multiple counts of sexual offending against children.¹² The Judge acknowledged Mr Khon's age and health issues but noted that he had to consider the aims and objectives of sentencing in a case like this and also consistency. He held that an MPI of 50 per cent was appropriate given the facts of the case, the aggravating features identified by the Crown, the need to deter Mr Khon and others from this sort of offending, and to give effect to the purposes of denunciation and accountability.¹³

[11] Mr Khon was sentenced to 13 years and six months' imprisonment with an MPI of 50 per cent for the rape charges. The Judge also imposed concurrent sentences

⁷ At [7]–[9].

⁸ At [17].

⁹ At [18].

¹⁰ At [19]–[22].

¹¹ At [26].

¹² At [24], citing *R v AM (CA27/2009)*, above n 4, at [156]–[157].

¹³ At [27].

of five years' imprisonment for the sexual violation charges, and three years' imprisonment for the indecent assault of a girl under 12 charges.¹⁴

Approach on appeal

[12] Under s 250(2) of the Criminal Procedure Act 2011, the Court must allow an appeal against sentence if it is satisfied that, for any reason, there was an error in the sentence and that a different sentence should be imposed. In any other case, it must dismiss the appeal.¹⁵

[13] It is well-established that an appeal against sentence will be successful only if the appellant can point to an error, either intrinsic to the Judge's reasoning, or as a result of materials submitted on the appeal, that is material to the exercise of the lower court's sentencing discretion.¹⁶ Unless there is a material error in the end sentence, the Court will not intervene.¹⁷ The focus is on whether the end sentence is within the available range, rather than the process by which the sentence was reached.¹⁸ Mere tinkering is not permitted.¹⁹

Submissions for Mr Khon

[14] Mr Williams, counsel for Mr Khon, submits the sentence is manifestly excessive. He says the Judge should have applied one discount of 15 per cent for Mr Khon's age and health and a separate discount of 10 per cent for the disproportionately severe effect of imprisonment on Mr Khon because of Mr Khon's language barrier. He notes that a discount of 15 per cent for Mr Khon's health and age alone would be consistent with similar cases, including the decisions of this Court in *R v KJB (CA41/07)* and *Hastie v R*.²⁰ He accepts there is no indication that Mr Khon's health issues will impact his lifespan but says that was also the case in these decisions.

¹⁴ At [28].

¹⁵ Criminal Procedure Act 2011, s 250(3).

¹⁶ *R v Shipton* [2007] 2 NZLR 218 (CA) at [138]–[140]; *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30]; and *Tamihana v R* [2015] NZCA 169 at [14].

¹⁷ *Tamihana v R*, above n 16, at [14], citing *Te Aho v R* [2013] NZCA 47 at [30].

¹⁸ *Tamihana v R*, above n 16, at [14], citing *Tutakangahau v R*, above n 16, at [36]; and *Ripia v R* [2011] NZCA 101 at [15].

¹⁹ See for example, *Cao v Police* [2022] NZHC 2034 at [19]; and *Maihi v R* [2013] NZCA 69 at [21].

²⁰ *R v KJB (CA41/07)* [2007] NZCA 292; and *Hastie v R* [2011] NZCA 498.

[15] Mr Williams says Mr Khon does not have a conversational level of English and can only engage with others in the Burmese language. Mr Williams says prison will be very isolating for Mr Khon and he will also be unable to participate in his Buddhist religion in the way he would outside of prison. He submits a 10 per cent discount would be appropriate in this case.

[16] Mr Williams submits the Judge erred in imposing a 50 per cent MPI. He says the Judge only engaged in a perfunctory analysis without assessing whether the standard parole period in s 84(1) of the Parole Act 2002 was sufficient to meet the factors in s 86(2) of the Sentencing Act 2002. Mr Williams submits the purposes of accountability, denunciation, deterrence, and protection of the community are appropriately served by the determinative and significant period of imprisonment.

Submissions for the Crown

[17] Ms Ewing, Crown counsel, submits the sentence is not manifestly excessive. She says a 15 per cent discount adequately recognised both Mr Khon's limited proficiency in English, and his health issues. Assuming each factor attracted a 7.5 per cent discount, Ms Ewing submits the discounts were well within the available range.

[18] Ms Ewing says there is no evidence Mr Khon's health issues will make his prison sentence more severe. Ms Ewing notes that a letter from Mr Khon's doctor outlining his various conditions does not suggest these cannot be managed in prison.

[19] Ms Ewing says Mr Khon's circumstances are not comparable to other situations where discounts have been given because of an inability to speak English; for example, drug mules,²¹ or a young mother separated from her young child.²² Ms Ewing notes Mr Khon has lived in New Zealand for over 20 years and has a wife and friends. She submits that foreign nationals imprisoned in New Zealand do not get a discount as of right; they must illustrate that their circumstances make a prison sentence disproportionately severe.

²¹ *Keino v R* [2019] NZCA 457 at [59]–[60].

²² *Sami v R* [2019] NZCA 340 at [67].

[20] Ms Ewing says the MPI was warranted because Mr Khon's offending involved several young family members. She says that, if Mr Khon were to serve just four years and four months in prison, that would be inadequate to denounce his repetitive rapes of two young girls over several years. Ms Ewing also submits that, because Mr Khon has continued to deny the offending, he has no rehabilitative prospects weighing against imposing an MPI.

Analysis

[21] Mr Khon takes no issue with the starting point adopted by the Judge. He challenges only the adequacy of the discount and the imposition of an MPI.

[22] Section 8(h) of the Sentencing Act provides that, in sentencing, the Court:

- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; ...

Health and age / inability to speak English

[23] It is well established that age and ill health may be taken into account when considering whether imprisonment will have a disproportionately severe effect on an individual. As this Court said in *Hastie v R*:²³

[40] ... Discounts given for ill health have ranged from approximately 14–33%, depending on the severity of the health conditions. This Court, in *R v P* and *R v B*, upheld discounts given for ill health where the appellants had numerous cardiac impairments, which represented approximately 14 and 17% (respectively) of the sentence which would otherwise have been appropriate. In *R v Luce*, a discount of approximately 30% was given to take account of the appellant's recurrent renal failure, requiring regular dialysis and the fact that he had two or three years left to live. In *R v Verschaffelt*, a discount of approximately 33% was given to take account of the appellant's "extremely" unusual medical condition, brought on by exposure to the cold.

[24] There can be little doubt that the discount of 15 per cent given for Mr Khon's health and age is within the range discussed in *Hastie*. As Mr Williams accepts, there is nothing to suggest that Mr Khon's health conditions are life threatening. Accordingly, we consider that a discount toward the bottom end of the range discussed

²³ *Hastie v R*, above n 20 (footnotes omitted).

in *Hastie* was appropriate. The only real issue is whether a separate discount should have been given because of Mr Khon's lack of facility in English.

[25] This Court considered cultural dislocation and the resulting severity of a prison sentence in *Cheng v R*:²⁴

[22] The effects of dislocation from family and culture can add to the significant challenges faced by a foreign national serving a long-term sentence of imprisonment in this country and justify an adjustment to the sentence which might otherwise be imposed. Such adjustment can be appropriate even in cases involving serious drug related offending. In *Zhang*, this Court accepted that the isolation from, and denial of, family support to foreign nationals can be treated as a mitigating factor where it makes a sentence harder than usual to bear. It did however record that any discount for such matters is in the discretion of the sentencing judge.

[23] Discounts for foreign nationals who are likely to find sentences imposed by the courts harder than usual to bear are not uncommon. Discounts of five to 10 per cent have been allowed.

[24] Whether a discount is appropriate depends upon an offender's personal circumstances and whether those circumstances render an otherwise appropriate sentence disproportionately severe.

[26] We do not consider that Mr Khon's circumstances equate to the situation described by the Court. Mr Khon has been in New Zealand for over 20 years. Given the small size of the Burmese community in New Zealand,²⁵ we consider it unlikely that Mr Khon would have interacted only with other Burmese people over that 20-year period. We consider it likely that he has developed a means of engaging with other New Zealanders and of making himself understood and understanding them. Mr Khon also has a wife and Burmese friends in New Zealand who can visit him in prison. He is not isolated in the way discussed in *Cheng*.

[27] Apart from the assertion that Mr Khon cannot speak English, we have not been provided with any evidence that establishes that he will suffer disproportionately severe consequences from his imprisonment because he has not learned to speak English since he came to New Zealand. Nor have we been provided with any evidence of disproportionately severe consequences that will stem from an inability to

²⁴ *Cheng v R* [2021] NZCA 68 (footnotes omitted).

²⁵ 2,475 adults reported as being of Burmese origin in the 2018 Census. See Statistics New Zealand "2018 census ethnic group summaries: Burmese ethnic group" <<https://www.stats.govt.nz/tools/2018-census-ethnic-group-summaries//burmese>>.

participate in his Buddhist religion in the way he would outside of prison. Accordingly, we are not persuaded that the Judge made any error when he included this consideration in the 15 per cent discount given for Mr Khon's age and health.

Minimum period of imprisonment

[28] Section 86(2) of the Sentencing Act provides:

- (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:
 - (a) holding the offender accountable for the harm done to the victim and the community by the offending;
 - (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.

[29] It is relevant to note that the above provision came into force on 7 July 2004 in accordance with s 7 of the Sentencing Amendment Act 2004. Prior to that date, s 86(2) and (3) of the Sentencing Act provided:

- (2) The court may impose a minimum period of imprisonment under this section if it is satisfied that the circumstances of the offence are sufficiently serious to justify a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002.
- (3) For the purposes of this section, the circumstances of an offence may be regarded as sufficiently serious if the court is satisfied that the circumstances take the offence out of the ordinary range of offending of the particular kind.

[30] The period in which Mr Khon's offending occurred began just before the Sentencing Act entered into force (on 30 June 2002), straddled the period the original version of s 86(2) and (3) was in force, and extended into the period when the current version of the section came into force.

[31] As this Court held in *R v Chadderton*, and confirmed in *Robinson v R*, consistently with s 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of

Rights Act 1990, which enshrine the retrospectivity rule, the earlier version of s 86 applies to offending that occurred when that version of s 86 was in force.²⁶ However, for reasons that are apparent below, we have considered the appropriateness of the imposition of the MPI solely by reference to the current version of s 86(2), because this does not operate to Mr Khon's disadvantage.

[32] In *Zhang v R*, this Court observed:²⁷

[169] As this Court has emphasised in other decisions, minimum periods of imprisonment must not be imposed as a matter of routine or in a mechanistic way. It is not sufficient for a judge simply to recite s 86 without more. A reasoned analysis is required, both as regards the imposition of a minimum period of imprisonment and its length. In a number of recent appeals, this Court having undertaken that analysis has concluded that either the sentencing judge was wrong to impose a minimum period of imprisonment or that its length was excessive and not justified.

[33] In the context of serious sexual offending, in the earlier case of *R v AM (CA27/2009)*, this Court held:²⁸

[156] A comparison with the appellate decisions from 2003 onwards of cases involving multiple counts of sexual offending against children reviewed in *Gordon* supports the Crown submission that an MPI ought to have been imposed in this case. This and the other authorities to which we were taken by the Crown suggest that the imposition of an MPI of at least half of the nominal sentence is very routine in cases of this type. Further, the totality considerations which justify capping a nominal sentence are not necessarily so cogent in terms of the proportion of the sentence which must be served. So, on a consistency basis, there is every reason why an MPI ought to have been imposed.

[157] On balance, we have concluded the s 86(2)(a) and (b) factors and the need for a consistent approach are such that an MPI should have been imposed.

[34] This Court in *Nicolson v R* remarked on the observation in *R v AM (CA27/2009)* that MPIs of at least half the determinate sentence were "very routine".²⁹ The Court went on to comment:³⁰

²⁶ *R v Chadderton* (2004) 21 CRNZ 566 (CA) at [14]; aff'd *Robinson v R* [2016] NZCA 188 at [16]-[18].

²⁷ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

²⁸ *R v AM (CA27/2009)*, above n 4.

²⁹ *Nicolson v R* [2018] NZCA 352 at [18], referring to *R v AM (CA27/2009)*, above n 4, at [156].

³⁰ Footnotes omitted.

[19] This is not the occasion to review sentencing practice with respect to MPIs. That would require that we review a range of considerations that may bear on the question whether the standard period of one-third of the determinate sentence sufficiently meets the purposes stated in s 86. However, two points must be made for purposes of this case. First, as the Court has often said, each case must be considered on its own facts and by reference to the specified purposes. To recognise a class of case in which MPIs commonly result is not to say that they may be imposed routinely at sentencing. In a number of decisions an MPI has been found inappropriate (or too long) although the case involved sexual offending against children, and this may be so particularly where the offender has had good rehabilitative prospects. Second, the sentencing purposes in s 86(2) also appear in s 7. The court must consider them when setting the determinate sentence. Put another way, the court ordinarily assumes that the offender may serve the entire sentence, as the Parole Act 2002 allows, and if paroled will be subject to supervision and at risk of recall until the sentence expiry date.

...

[22] We prefer the view that an MPI was not required here. We accept that the offending is of a kind that demands denunciation and calls for general deterrence, but those purposes are built into the *AM* bands and in this case they are sufficiently met by the determinate sentence. There is no additional need for specific deterrence. Nor, given the appellant's history and rehabilitative prospects, is there a need for additional community protection.

[35] We are satisfied that this case is also not the occasion to review sentencing practice with respect to MPIs, for the same reasons as given in *Nicolson*. We are also satisfied that an MPI was not warranted on the facts of this case.

[36] We acknowledge that the Judge referred to the matters identified in the current version of s 86(2). However, he did so by somewhat limited reference to the facts of the case and aggravating features identified by the Crown. He also did so in the context of a Crown submission that MPIs of 50 per cent were routine in such cases and by reference to the principle of consistency.

[37] We accept that consistency in sentencing is important, as reflected in s 8(e) of the Sentencing Act. However, as stated in *Nicolson*, each case must be considered on its own facts and by reference to the specified purposes of s 86. We recognise that District Court judges have heavy workloads and necessarily must deal with sentences as efficiently as possible. However, in the current case, we are not satisfied that the Judge gave sufficient regard to Mr Khon's individual circumstances when deciding to impose an MPI.

[38] Mr Khon's offending is historic offending — spanning a period from 31 May 2002 to 12 October 2006. There is no evidence to suggest that Mr Khon has offended since that period. Accordingly, considerations of deterrence, at least as regards Mr Khon himself, and protection of the community do not arise. The imposition of a term of imprisonment of 13 years and six months is itself a significant manifestation of the need to hold Mr Khon accountable for his actions, of denunciation, and of deterrence with regard to others. In the context of this case, with a man who is relatively advanced in years, has health issues, and who, for reasons of culture and language, is likely to find the prison environment a considerable challenge, we do not consider that an MPI was warranted.

Result

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

[40] The minimum period of imprisonment of 50 per cent of the term of imprisonment is quashed.

Solicitors:

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