

Adams on Criminal Law — Sentencing

2/10/20 Update Summary

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LEGISLATION

PAROLE ACT 2002

Section 107G, was amended, as from 26 August 2020, by the Contempt of Court Act 2019.

Section 121 was amended, as from 7 August 2020, by the Public Service Act 2020.

CRIMINAL PROCEEDS (RECOVERY) ACT 2009

Sections 5 and 88 were amended, as from 7 August 2020, by the Public Service Act 2020.

SIGNIFICANT CASES

Commentary has been included on the following cases:

SENTENCING ACT

Arps v Department of Corrections [2020] NZHC 706 — Parole — Special release conditions — All conditions appealed on basis they did not rehabilitate offender — Appeal dismissed: [SA86D.08]

Asiata v R [2020] NZCA 53 — Sexual offences — Historic — Intellectual impairment and mental health issues not taken into account — Appeal: [SA9.21]



Baillie v Police [2020] NZHC 155 – Imprisonment substituted for home detention – Home detention appealed because time spent in custody not taken into account – Manifestly excessive – Appeal – 6 months' home detention quashed in place of lesser home detention sentence and special condition to attend Odyssey House programme: [SA80K.02]

Closey v Police [2020] NZHC 990 – Domestic violence – Home detention – Manifestly excessive – Appeal – Reduction: [SA82.03A]

Curzey v Police [2020] NZCA 145 – Injuring with intent to injure – Protection order – Leave to appeal – Question of law: [SA4.01], [SA25.02A], [SA123B.05]

De Macedo v R [2020] NZCA 132 – Misuse of drugs – Importation – Class A – Minimum period of imprisonment – Appeal – Mitigating factors – Sentence of imprisonment reduced and MPI imposed was quashed: [SA86.02(1)]

Duff v R [2020] NZCA 116 – Murder of daughter – Minimum period of imprisonment – Appeal against conviction on basis of insufficient evidence and non-disclosure – Appeal dismissed: [SA104.03]

Dunn v Police [2020] NZHC 316 – Drug offences and breach of community work – 22 months' imprisonment – Discounts not fully taken into account – Imprisonment reduced to 18 months: [SA9.24]

Fowlds-Kotuhi v Police [2019] NZHC 985 – Driving while disqualified – Appeal – No further disqualification – Community work: [SA124.05(1)]

Gebbie v Police [2019] NZCA 540 – Criminal harassment – Community detention and supervision – Appeal against conviction and sentence: [SA123B.03A]

Gebbie v R [2020] NZSC 9 – Harassment – Appeal – Leave to appeal: [SA123B.03A]

Govender v R [2019] NZHC 3212 – Misuse of drugs – Possession – Class A – Manifestly excessive: [SA9.24]

Irwin v R [2020] NZCA 181 – Misuse of drugs – Possession – For supply – Class A – 2 years and 2 months' imprisonment – Appeal – Discounts for mitigating factors too low and end-sentence should have been home detention – Reduction to 1 year and 10 months' imprisonment with post-release condition: [SA9.15(2)]

Jenner v Police [2020] NZHC 62 – Strangulation – Imprisonment – Appeal – Manifestly excessive – Discount should have been given for time spent on electronically monitored bail: [SA84.02(3)]

K v R [2020] NZCA 95 – Sexual offences – Minimum period of imprisonment – Appeal – Discount should have been given for lack of previous convictions: [SA86.02(1)], [SA86.03A]

Lowenstein v Police [2020] NZHC 786 – Arson – Appeal – Manifestly excessive – Discount should have been given for dysfunctional upbringing – mitigating factors: [SA8.12]

Luxton v Police [2020] NZHC 1355 – Release on conditions – Variation of conditions – Electronic monitoring conditions quashed: [SA93.05]

Marong v R [2020] NZCA 179 – Murder – Minimum period of imprisonment – Appeal – Out of time: [SA104.01]

Masters v Police [2020] NZHC 33 – Driving while disqualified – Community service – Appeal dismissed – Public interest: [SA124.05(1)]

Mathieson v Police [2019] NZCA 406 – Males assaults female – Threats to kill – Appeal – Low level of culpability – Both conviction and sentence quashed: [SA107.05]

Moeller v R [2020] NZHC 1290 – Imprisonment cancelled in place of home detention – Appeal – Length of home detention sentence halved: [SA80K.03]

Moore v R [2019] NZCA 205 – Unsuccessful appeal to reduce sentence of imprisonment – Had knowledge gun loaded and would be used to “deal with” gang members: [SA24A.01]

Moses v R [2020] NZCA 296 – Misuse of drugs – Possession – For supply – Class A – Aggravating and mitigating factors – Guilty plea: [SA9.18], [SA9.18(3)], [SA9.18(6)], [SA9.22]

Mundy v Police [2020] NZHC 240 – Dangerous driving causing death – Manifestly excessive sentence – Appeal – Mitigating factors: [SA9.19]

Northover v Police [2020] NZHC 167 – Assault on child – Assault with weapon – 4 months’ community detention – Appeal – Cultural background and effect on employment taken into account – Convictions and sentences quashed: [SA107.02], [SA107.05]

Orchard v R [2019] NZCA 529 – Wounding with intent to cause GBH – Imprisonment – Appeal – Manifestly excessive – Mental disorder: [SA9.15(6)]

Pahulu v Police [2020] NZHC 153 – Compliance convictions – Imprisonment – Appeal – Manifestly excessive – Discount given for guilty pleas – Term reduced by 5 months: [SA9.15(6)], [SA15A.01], [SA80I.01]

Papa v Police [2019] NZHC 1309 – Driving while disqualified – 3rd or subsequent – 12 months’ imprisonment – Appeal – Leave granted to apply for home detention: [SA80I.01]

Papa v R [2020] NZHC 80 – Assault on a prisoner – Sentenced with co-offenders – Imprisonment – Appeal – Judge correctly exercised discretion balancing all factors – Appeal dismissed: [SA80A.05]

Parkinson v Police [2019] NZHC 1710 – Burglary and cannabis convictions – Home detention – Appeal – Manifestly excessive – Further discounts given – Home detention reduced by 1 and 1/2 months: [SA82.03A]

R v Davies [2020] NZHC 903 – Manslaughter – Discounts given for ill-health and severe impacts of imprisonment, and early guilty plea but none for remorse – 4 years’ imprisonment: [SA9.18(5)]

R v De Lautour [2020] NZDC 7119 – Misuse of drugs – Possession – For supply – Class A – Home detention – Discount given for early guilty plea – Previous compliance on EM bail and medical condition taken into account: [SA8.04]

R v Kokiri [2019] NZHC 501 – Manslaughter – Personal factors, mitigating and aggravating factors, s 27 report and early guilty plea taken into account – 2 years' imprisonment with leave granted to substitute for home detention: [SA9.18(3)]

R v Larson [2020] NZHC 237 – Manslaughter – Discounts given for youth, previous good character, remorse and restorative justice, s 27 report, early guilty plea and compliance while on bail – 2 years' home detention with special conditions: [SA8.15], [SA10.02]

R v LB [2020] NZHC 94 – Sexual offences – Historical – Home detention – Discounts given for youth, good character, remorse, willingness to attend restorative justice meeting, willingness to pay \$10,000 in reparation – Appeal by Crown – Type of sexual offending considered – Presumption of imprisonment for sexual offending – HD quashed and 4 years' and 3 months' imprisonment substituted: [SA9.17(2)]

R v Mitai-Ngatai [2020] NZHC 410 – Indecent assault – 3rd strike offence – Maximum term of imprisonment – 7 years' imprisonment: [SA86D.05]

R v Muraahi [2020] NZHC 346 – Aggravated robbery and unlawful use of vehicle – 3rd strike offence but no evidence oral warning given after committing 1st strike offence and no evidence written warning given after committing 2nd strike offence – Maximum term of imprisonment therefore cannot be given – Sentenced as 1st strike offender with serious criminal history – 13 years' imprisonment: [SA86C.05], [SA86D.08]

R v Nuku [2020] NZHC 506 – Wounding with intent to cause GBH – Second 3rd strike offence (ie 4th strike offence) but already serving sentence of preventive detention – Aggravating features of offending – Further preventive detention – Minimum sentence of 14 years' imprisonment: [SA86D.04]

R v Orchiston [2020] NZHC 224 – Sexual offending – Victims under 12 years – Discount given for early guilty plea but previous convictions and age were aggravating factors – Preventive detention with minimum sentence of 5 years' imprisonment: [SA87.07B(3)]

R v Scott [2020] NZHC 68 – Misuse of drugs – Importation – Class A – Sentenced with co-offenders – Personal circumstances and roles each played in offending taken into account – Varying sentences of imprisonment given: [SA8.04]

Te Aotonga v Police [2019] NZHC 1274 – Refusing blood specimen to be taken – Fined \$400 plus costs, declined s 94 application and awarded 6 months' disqualification – Appeal – Matter remitted back to court for re-sentencing: [SA124.05(1)]

Thompson v Police [2020] NZHC 20 – Breach of protection order – 10 months' imprisonment – Appeal – Discounts given for insight and remorse, guilty plea but adding for family violence history – Original sentence quashed and 7 months' imprisonment substituted: [SA9.08A], [SA86D.08]

Vea v R [2020] NZCA 68 – Breach of protection order – Domestic violence – 10 months' imprisonment with standards and special conditions on release – Appeal – Sentence quashed and 7 months' imprisonment substituted with standard and special release conditions to remain: [SA104.03]

Whiteford v R [2020] NZCA 130 – Misuse of drugs – Dealing Class A and B, possession for supply Class C – 5 years and 2 months’ imprisonment – Appeal – Not enough discount given for ill health and ability to cope with condition in prison environment, remorse and detrimental effect of imprisonment on family – 4 years and 5 months’ imprisonment: [SA8.13A]

Whiu v Police [2020] NZHC 298 – Breach of protection order, breach of release conditions, wilful damage – 2 years and 3 months’ imprisonment with serving partly cumulative and partly concurrent – Appeal – Aggravating and mitigating factors – 25 per cent discount should have been given – 6 months’ imprisonment served partly cumulative and partly concurrent: [SA9.08A]

Winterburn v R [2019] NZHC 104 – Presenting firearm – Community work – Appeal against conviction and sentence – Appeal dismissed: [SA106.10]

Woods v Police [2020] NZSC 3 – Criminal procedure – Appeal – Leave to appeal given: [SA93.04]

SENTENCE APPEALS

J v R [2019] NZCA 429 – Misuse of drugs – Possession – For supply – Class A – Appeal – Whether Judge should have admitted evidence as propensity evidence – Prejudicial to fair trial rights – Appeal dismissed as evidence was correctly assessed – It demonstrated state of knowledge and intention to supply: [SAB5.07(1)]

SENTENCING LEVELS AND GUIDELINES

Crump v R [2020] NZCA 287 – Rape, physical assault and threatening behaviour – 2 years and 9 months’ imprisonment – Appeal against sentence and conviction – Initial consent changed to withdrawal of consent – Appeal against sentence dismissed – Original sentence quashed and 18 months’ imprisonment substituted: [SAC7], [SAC9.01]

De Macedo v R [2020] NZCA 132 – Misuse of drugs – Importation – Class A – Minimum period of imprisonment – Appeal – Mitigating factors – Sentence of imprisonment reduced and MPI imposed was quashed: [SAC9.02(a)]

Joyce v R [2020] NZCA 124 – Misuse of drugs – Possession – For supply – Class A – Aggravating and mitigating factors – Appeal against sentence allowed – Application for fresh evidence granted: [SAC9.02(a)]

Lowenstein v Police [2020] NZHC 786 – Arson – Appeal – Manifestly excessive – Discount should have been given for dysfunctional upbringing – Mitigating factors: [SAC3]

Moses v R [2020] NZCA 296 – Misuse of drugs – Possession – For supply – Class A – Aggravating and mitigating factors – Guilty plea: [SAC3]

R v Larson [2020] NZHC 237 – Manslaughter – Discounts given for youth, previous good character, remorse and restorative justice, s 27 report, early guilty plea and compliance while on bail – 2 years’ home detention with special conditions: [SAC9.01(e)]

R v Scott [2020] NZHC 68 – Misuse of drugs – Importation – Class A – Sentenced with co-offenders – Discounts given for each offender according to their individual circumstances and the differing roles they played in committing the crime: [SAC9.02]

Su v R [2020] NZCA 128 – Misuse of drugs – Possession – For supply – Class A – 5 years and 10 months' imprisonment – Appeal – Discount should have been given for addiction – Appeal allowed – 5 years' imprisonment substituted: [SAC9.02]

PAROLE

Butcher v New Zealand Parole Board [2020] NZHC 960 – Judicial review sought on NZ Parole Board decision declining release on parole – Application for review dismissed due to denial of offending, his presentation as an aggrieved party, mental health issues, unwillingness to undertake rehabilitative programmes – Still considered a risk to community: [PA67.06]

C v R [2020] NZHC 225 – Sexual offences – Mentally impaired offender – 2 years and 9 months' imprisonment – Appeal against conviction dismissed – Appeal against sentence allowed: [PA91.01]

Chord v Chief Executive of the Department of Corrections [2020] NZCA 4 – Sexual offences – Application to cancel Extended Supervision Order – Application refused – Appeal – Appeal allowed – Referred back to District Court for reconsideration: [PA107H.01], [PA107R.01]

Department of Corrections v M [2020] NZHC 220 – Sexual offences – Victims were under 12 – Department of Corrections applied for Extended Supervision Order – No intense drive to commit sexual offence – Application not granted: [PA107IAA.01]

Rutherford v Chief Executive of the Department of Corrections [2020] NZCA 126 – Second Extended Supervision Order granted – Appeal – None of the arguments successful – Appeal dismissed: [PA107I.05], [PA107I.10], [PA107I.12]

COSTS IN CRIMINAL CASES

S v R [2020] NZHC 1375 – Charged with manslaughter of son – Jury unable to determine charge – No retrial sought by Crown – S sought to recover costs against Crown – Crown failed its disclosure obligations – \$30,000 awarded under CPA and \$145,000 awarded under CCCA: [CC5.03]

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SUGGESTIONS WELCOME

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