IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE PAPAIOEA ROHE

CRI-2019-454-006
[2019] NZHC 312

BETWEEN	JAMIE ROBERT ACKLAND Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 1 May 2019

Counsel: J A Younger for appellant
D R Davies and E R Pairman for respondent

Judgment: 10 May 2019

JUDGMENT OF COOKE J

Table of Contents

[1] On 8 March 2019 Mr Ackland was sentenced by Judge Edwards in the District Court at Palmerston North to two years nine months' imprisonment on the following charges:[1]

[1] *Police v Ackland* [2019] NZDC 4208.

(a) one charge of strangulation;[2]

(b) one charge of assault on a person in a family relationship,[3] and

(c) one charge of assault with a weapon.[4]

[2] Mr Ackland appeals his sentence on three main grounds. First, he says the District Court Judge erroneously took into account three culpability factors in assessing the starting point of the lead charge of strangulation. Second, he says that the starting point for each term of imprisonment was too high and resulted in a sentence of imprisonment that was manifestly excessive. Third, he says the Judge gave insufficient credit for remorse, mental health, and steps taken towards rehabilitation.

[3] The Police oppose the appeal on the grounds that the starting points for all three charges were within the available range; the Judge took into account totality; and the discounts for personal mitigating factors were appropriate.

[4] The lead charge for the imposition of this sentence was the charge of strangulation under s 189A of the Crimes Act 1961, with the sentences imposed on the other charges served concurrently. The offence of strangulation came into force on 3 December 2018. It is expressed in the following terms:

> **189A Strangulation or suffocation**
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> Everyone is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly impedes another person's normal breathing, blood circulation, or both, by doing (manually, or using any aid) all or any of the following:
>
> (a) blocking that other person's nose, mouth, or both:
>
> (b) applying pressure on, or to, that other person's throat, neck, or both.

[5] I am advised by counsel that this is the first High Court appeal from a decision of the District Court imposing a sentence for strangulation as the lead charge. For that reason, and as I explain in greater detail below, I will address the overall approach to

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2 Crimes Act 1961, s 189A, maximum penalty seven years' imprisonment.
3 Section 194A, maximum penalty seven years' imprisonment.
4 Section 202C, maximum penalty five years' imprisonment.

sentencing for the new offence in order to assess whether the present sentence is consistent within that approach. Doing so may also be of general assistance to the District Court pending a decision of the Court of Appeal or further decisions of this Court.

Factual background

[6] Mr Ackland and the victim had been in a relationship for eighteen years and married for seven. They have five children together.

[7] On the evening of 3 January 2019, Mr Ackland was at his home address with the victim and their children. An argument started between Mr Ackland and the victim, and she stood up to leave. Mr Ackland then slapped her across the face four or five times with an open hand, causing her to sit down to steady herself. This brought the first charge of assault on a person in a family relationship.

[8] Mr Ackland then forcibly put his hands around the victim's neck. His grip was so forceful that she began gagging. He yelled at her saying "If you want I can end it for you all now". The victim's body began tingling and she lost consciousness. This resulted in the second charge of strangulation. The victim suffered bruises to her face and a sore neck and chest as a result of the assault and the strangulation.

[9] When the victim regained consciousness, she left the address. Mr Ackland followed her outside and they continued arguing on the road. A neighbour saw the arguing and went to intervene. Mr Ackland grabbed the neighbour by the throat and held a knife to his neck, causing a minor laceration. Mr Ackland released his grip on the neighbour upon seeing the blood on his neck and went back inside his house. This resulted in the final charge of assault with a weapon.

[10] Mr Ackland was located inside the house a short time later after a serious suicide attempt. Mr Ackland had attempted to hang himself and had stabbed himself in the thigh. He subsequently spent four days in hospital, two of those in the intensive care unit.

District Court decision

[11] After outlining the facts and victim impact statements, the Judge turned to a consideration of the relevant purposes and principles of sentencing.

[12] The Judge noted that the lead offence of strangulation was a new offence, and she cited several passages from the Law Commission Report *Strangulation: The Case for a New Offence*.[5] In doing so she observed the purpose of introducing the new offence was to recognise that strangulation is a serious offence of violence, even where there is no visible injury.

[13] The Judge considered the guideline judgments for violent offending of *Nuku v R* and *R v Taueki* to be relevant.[6] She adopted a starting point of three years and three months' imprisonment. This was based on the following aggravating factors: the offending took place in the home and in the presence of Mr Ackland's young children; the victim lost consciousness for an unknown period of time; the strangulation was accompanied by a verbal threat of death; and the violence was prolonged as it was the second stage of an earlier incident.[7] In reaching this point the Judge noted that past cases involving strangulation as part of a family violence charge were of limited use, and the approach in setting the starting point "must be more nuanced than that".[8]

[14] The Judge then uplifted the starting point by three months for the assault on a person in a family relationship, and six months for the assault with a weapon. This brought the sentence up to four years imprisonment.[9]

[15] Finally, the Judge discounted four months for Mr Ackland's circumstances, including his history of depression and anxiety,[10] and gave a full 25 per cent discount for entry of early guilty plea.[11] This resulted in an end sentence of two years, nine months' imprisonment.

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5 Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016).
6 *New Zealand Police v Ackland*, above n 1, at [11]; *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39; and *R v Taueki* [2005] 3 NZLR 372 (CA).
7 *New Zealand Police v Ackland*, above n 1, at [13].
8 At [14].
9 At [15].
10 At [27]–[28].
11 At [29].

Approach to appeal

[16] This appeal is governed by subpart 4 of Part 6 of the Criminal Procedure Act 2011. A first appeal under subpart 4 must be determined in accordance with s 250. The focus will be on the final sentence and whether that was in the available range, rather than the exact process by which it was reached.[12]

New offence of strangulation

[17] The offence of strangulation was introduced under the Family Violence (Amendments) Act 2018 and came into force on 3 December 2018. The broader context of the new offence of strangulation is comprehensively examined in the Law Commission's 2016 report, *Strangulation: The Case for a New Offence*.[13]

[18] The key concern leading to the new offence was that the current legal framework of offending did not always appropriately reflect the seriousness of that offending. The Commission said:

> 1.3 Two key factors distinguish strangulation from most other forms of family violence. First, it is an important risk factor for a future fatal attack by the perpetrator.[14] Victims of family violence who have been strangled have seven times the risk of going on to be killed than those who have suffered other forms of violence but not strangulation. People who make decisions about the victim or the perpetrator (particularly judges) need to understand that risk so that they make decisions that will help to keep the victim safe. Second, it characteristically leaves few marks or signs, sometimes even when it has been life threatening. That presents unique challenges for prosecution and contributes to the dangerousness of strangulation being underestimated and the perpetrators not being held appropriately accountable.

[19] In proposing a new offence, the Commission also said:

> 4.56 The main problem is that the current framework of serious violent offences is not well suited to those instances of strangulation that do not result in visible injuries. This means that type of strangulation tends to be charged as "male assaults female". The maximum penalty of two years' imprisonment for that offence does not adequately reflect the seriousness of strangulation. There is, therefore, a gap in the current framework of offences. We consider that this gap justifies

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12 *Ripia v R* [2011] NZCA 101 at [15].

13 Law Commission *Strangulation: The Case for a New Offence*, above n 5.

14 Nancy Glass and others "Non-fatal strangulation is an important risk factor for homicide of women" (2008) 35 J Emerg Med 329.

> an amendment to the law to create an offence more suited to prosecuting strangulation. There should also be other, non-legislative action taken to ensure that strangulation is better understood so that perpetrators are held accountable and victims are kept safe.

[20] In essence, therefore, what is involved is a recalibration of sentencing for conduct previously treated leniently, particularly where strangulation occurred without other offending with higher maximum sentences. That recalibration is accordingly relevant when the more serious offending has not been triggered, and strangulation is the principal act of violence. When that is so, the lead offence has sometimes required to be of a less serious kind.[15] When strangulation has been part of other, more serious, violent offending such as injuring with intent to injure under s 189(2) of the Crimes Act 1961 (five years maximum),[16] or injuring with intent to cause grievous bodily harm under s 189(1) (10 years maximum),[17] higher sentences have been imposed.

[21] The primary focus is accordingly on arriving at an appropriate assessment of the seriousness of the offending in light of the recalibration contemplated by the new offence.

Relevant features/aggravating circumstances

[22] Here, the Judge referred to Court of Appeal decisions providing tariffs for violent offending, particularly *Nuku v R* and *R v Taueki*.[18] As the Judge recognised, however, the specific nature of the strangulation offence and its adverse impacts mean that the aggravating factors highlighted by those decisions do not necessarily apply to this new offence.

[23] The Court of Appeal may well be called upon to consider the factors relevant to sentencing, and provide a tariff decision for the strangulation offence. In the

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15 See, for example, *Waitai v Police* [2014] NZHC 2116, where the starting point was reduced on appeal to 12 months' imprisonment to reflect the lower charge of male assaults female. See also *Penrose v Police* [2013] NZHC 2757; *Pathiranage v Police* [2013] NZHC 738; and *O'Connor v Police*, HC Wellington, CRI-2008-485-13, 17 April 2008.

16 See, for example, *Waho v Police* [2018] NZHC 1767, starting point three years nine months' imprisonment; *Luff-Pycroft v R* [2012] NZCA 107, District Court had started with two years, although reduced to home detention on appeal.

17 *Lufe v R* [2018] NZCA 327, starting point of five years' imprisonment or longer was described as "readily … justified"; *R v Vitali* [2014] NZHC 49, starting point of six and a half years' imprisonment.

18 *Nuku v R* and *R v Taueki*, above n 6.

meantime, however, it seems to me to be appropriate to make some attempt at identifying those factors in order to understand where the current case sits in the general range of cases that may arise under this section. This is necessary in order to address the criticisms made of the starting point. This may also assist in providing guidance for the District Court prior to any decision of the Court of Appeal being available. What I say below may also be further refined by future decisions of this Court in the meantime.

[24] In assessing factors relevant to the seriousness of the offending, and suggesting the maximum penalty of seven years' imprisonment, the Commission said the following:

> 5.42 In setting the maximum penalty for this offence, we must consider the worst class of strangulation behaviour that should be captured, excluding behaviour that would be charged under another serious violent offence. Strangulation that results in injury or wounding, or for which there is evidence of an intention to commit another offence, is out of scope because such cases could be charged under existing serious violent offences.
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> 5.43 An example of the worst class of strangulation within scope would feature the hallmarks of coercive or controlling behaviour and the terror we have identified. For example, a perpetrator enters the victim's home in breach of a protection order. After an altercation, he strangles her with his hands on and off for several minutes, leaving her struggling for breath, incontinent and unconscious. The victim thinks she will die and knows that the perpetrator has the power to kill her. Because he invaded her home, after the strangulation, she lives in constant fear for her security and life. As a consequence, he has achieved coercion and control over her.
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> 5.44 It is the terror that results from strangulation that is at the heart of this kind of criminal conduct. That terror is likely to seriously affect all aspects of the victim's life. In our view, the terror that results from this "worst class of case" is greater than the harm of a minor injury and at least equivalent to a serious physical injury.

[25] Against that background, the Commission considered seven years' imprisonment, being similar to the maximum for to wounding with intent to injure under s 188(2) of the Crimes Act 1961 (seven year maximum) or injuring with intent under s 189 (five or 10 year maximum) to be appropriate. This assists in identifying the kind of offending that is to be regarded as equivalent with the new offence for sentencing purposes.

[26] The above passage suggests a number of factors that are relevant when assessing the seriousness of the offending. Having considered the Commission's report, as well as decisions in relation to sentencing for other offences which have involved strangulation, the following seem to me to be key factors:

(a) *Strangulation in the context of a domestic or intimate relationship/vulnerability of victim*: Whilst the concern voiced by the Commission is focused on domestic violence, it is recognised that strangulation can take place outside that context. The offence is prescribed in s 189A without any element relating to that kind of relationship. But the commission of the offence within that kind of relationship raises the fear associated with strangulation. Strangulation in the family violence context also has greater ongoing scope for, and likelihood of, coercion and control. The Commission also suggested that victims in this context are more likely to die from further violence.[19] Particular vulnerability of the victim might also be regarded as significant in assessing culpability.

(b) *Threats, particularly threats to kill*: The issuing of threats, particularly those including an element of coercion, is part of the adverse impact of the offence on the victim.[20] The Commission suggested that this element of coercion could be inferred from multiple events, although it is usually apparent from express words where the victim is instructed to do or not to do something, potentially accompanied by the threat to kill the victim if the victim does not comply.

(c) *Loss of consciousness*: Loss of consciousness is an indicator of a longer, purposeful period of strangulation warranting higher culpability. The Law Commission stated that applying pressure to the neck for 10 seconds can cause unconsciousness.[21] The application of pressure for such a period indicates a more culpable intention.

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19 Law Commission *Strangulation: The Case for a New Offence*, above n 5, at [2.31].
20 At [6.7].
21 At [2.2].

(d) *Multiple events*: When the offending has formed part of a pattern of one or more events of strangulation, the intimidation and fear felt by the victim is accentuated and the adverse impacts are exacerbated.

(e) *Other violence/injury*: Although it is important to avoid double-counting when strangulation is accompanied by other acts of violence, additional violence is an aggravating factor in much the same way that strangulation has been for other offending such as injuring with intent to injure. The enactment of the new offence was intended to address the fact that strangulation often occurs without physical injury, or without attempt to cause such injury. But if injury does in fact occur, it is likely to be an aggravating circumstance.

(f) *Significant impact on others*: A significant impact on other persons, particularly children, may also be an aggravating factor. The commission of the offence in relation to someone who is known to be pregnant, with a consequential effect on the unborn child, is significant. This might also be thought of as involving particular vulnerability for the victim. As with other domestic violence, offending in the presence of children is aggravating, given the potential for physical or psychological harm to the children, and the potential longer term adverse effect of the normalisation of such violence.

(g) *Breach of protection order*: As with other domestic violence offending, strangulation in the face of a breach of a protection order should attract higher culpability.

[27] As indicated, I am conscious I have identified the above factors as a first attempt at identifying material factors or aggravating circumstances in considering the appropriate sentence. The list is clearly capable of amendment or refinement by further decisions and experience of the courts.

Appropriate bands

[28] In light of the above circumstances, a question arises whether tariff guidelines can be appropriate for this offending. In the family violence context the circumstances vary greatly. Here, Ms Davies for the Police similarly suggested that the use of bands as a means of assessing culpability was inappropriate as it did not take into account the complex environments in which this sort of offending occurred. She submitted that the starting points ought to be set by reference to the aggravating features in light of comparable cases, which would be more appropriate when a larger body of appellate authority on this charge was available.

[29] Whilst there is some force in that submission, it is nevertheless important to understand where this case fits in the overall range of cases involving this kind of offending. Addressing the overall range may also provide some assistance for future courts to provide a possible outline of an approach, recognising that there should be flexibility, particularly in this initial phase, for the District Court to make an assessment that it regards appropriate to the particular case.

[30] At the lower end would be offending involving strangulation as an intentional result of pressure being applied to the throat for a brief period, potentially without any of the above factors being present. Such offending might attract a starting point of six months to two years' imprisonment.

[31] Offending at the highest end of the range involving a starting point of five to seven years' imprisonment may correspond to the offending described in [5.43] of the Law Commission's report — being offending with a number of the factors.[22] I stress, however, it is not the number of the above factors that is important, but the overall nature and culpability of the offending. The above factors are intended simply to provide some guidance, or a framework for making that assessment.

[32] In between these two categories is the mid-range of cases where a starting point of two to five years may be appropriate. No doubt case law over time will build up to give greater clarity on appropriate starting points for cases within this middle range.

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22 At [26] above.

But it is important to take into account sentencing cases involving more serious offending that have included strangulation. The concern in relation to strangulation addressed by the new offence mainly arose from those cases where there was a lack of physical injury, or intent to cause that injury, have meant that charges needed to be laid for more minor offences, such as male assaults female. But where there have been strangulation cases involving more serious offending, such as offending under ss 188 or 189 of the Crimes Act 1961, these cases will continue to provide considerable assistance. For that reason the cases addressed at paragraphs [42] and [44] below will continue to provide guidance.

The present case

[33] In light of the above, I turn to the present case, and the arguments advanced for Mr Ackland on appeal.

Ground one: Culpability factors

[34] Ms Younger for Mr Ackland submits the District Court Judge erroneously took into account three culpability factors in assessing the starting point of the lead charge of strangulation. The Judge took into account the following factors in adopting a starting point of between three years and three years three months' imprisonment:[23]

(a) the offending took place in the home and in the presence of Mr Ackland's young children;

(b) the victim lost consciousness for an unknown period of time;

(c) the strangulation was accompanied by a verbal threat of death, and

(d) the violence was prolonged as it was the second stage of an earlier incident.

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23 *New Zealand Police v Ackland*, above n 1, at [13].

[35] First, Ms Younger submits the Judge was wrong to consider the fact that the offending took place in the family home as an aggravating factor. She says that family violence by its very nature is likely to occur in a joint home or shared residence.

[36] I do not accept this. As previously indicated, the Law Commission has recognised that the strangulation offence occurs in other contexts,[24] and the offence as enacted is not limited to situations of family violence but is of general application.[25] As such I consider there was no error on the part of the Judge in considering the fact the violence took place in the home and in front of the children was an aggravating factor.

[37] Second, Ms Younger argues the fact the period of unconsciousness was for an unknown period of time should not have had a part to play in assessing culpability. I do not accept that the Judge did so. The fact of unconsciousness itself was considered by the Judge to be an aggravating factor.[26] The period of strangulation involved, and whether it results in loss of consciousness, are likely to be relevant considerations. But the precise period of unconsciousness may not be so. But in any case, I do not read the Judge's observation that the period of unconsciousness was unknown as being an aggravating factor in itself.

[38] Third, Ms Younger submits the Judge erred in effectively double counting the strangulation as a second stage of an earlier incident, as well as separately uplifting for that earlier incident. But the Judge was cautious to take account of the principle of totality in awarding an uplift for the earlier assault. She said:[27]

> There must be some uplift for the earlier assault, which in itself carries that maximum penalty of two years' imprisonment. However, bearing in mind that the whole incident must be treated on a global basis and taking into account totality, I am going to limit that uplift to three months. This means for the overall assaults on your partner, I am adopting a starting point of three years and six months' imprisonment.

[39] Further, the violence was prolonged even without a consideration of the earlier assault. The strangulation was not "momentary and spontaneous" as argued by

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24 Law Commission *Strangulation: The Case for a New Offence*, above n 5, at [2.17].

25 See also the Government response paper to the Law Commission report, Cabinet Social Policy Committee "Reform of Family Violence Law Paper Three: Prosecuting family violence" at [17].

26 *New Zealand Police v Ackland*, above n 1, at [13].

27 At [15].

Ms Younger. Mr Ackland applied force to the victim's throat long enough for her to lose consciousness so it cannot realistically be regarded as momentary.

[40] For these reasons I see no error by the Judge in addressing the particular factors in assessing the seriousness of the offending.

Ground two: Starting point too high

[41] Ms Younger submitted that the starting point for this offending was too high, not only because of the Judge's treatment and the culpability factors, but more generally. She argues these circumstances of this case are at the minor end of the range of offending and should attract a starting point in these circumstances of two to two and a half years' imprisonment. This goes to the key issue relating to the starting points for offending for this new offence.

[42] In support of her submission Ms Younger compared the circumstances of the present case with others involving strangulation for contravention of other provisions. She said that the overall starting point in the present case was too high compared with these other cases:

(a) *R v Singh*:[28] Injuring with intent to cause grievous bodily harm under s 189(1). Starting point of four years and end sentence three years six months' imprisonment. The victim was knocked unconscious with a cricket bat, and was then strangled to the point where her tongue hung from her mouth and her eyes rolled back in her head. This was accompanied by the threat "I'm going to kill you tonight".

(b) *Latu v Police*:[29] Injuring with intent to injure under s 189(2) and male assaults female under s 194(b). Starting point four years' imprisonment, uplifted for 12 months to account for totality. End sentence three years five months' imprisonment. Offender showed up at partners house, punched her multiple times, strangled her to the point she lost consciousness, continued to punch her again when she regained

[28] *R v Singh* [2015] NZHC 1641.
[29] *Latu v Police* [2017] NZHC 363.

consciousness, and choked her again a second time until she lost consciousness.

(c) *Smith v R*:[30] Injuring with intent to injure under s 189(2). Starting point three years six months, end sentence two years nine months' imprisonment. Strangulation almost to the point of unconsciousness. Victim escaped, but defendant strangled her again causing her to lose consciousness. Significant injuries caused.

(d) *Hunia v Police*:[31] Injuring with intent to injure under s 189(2). Starting point two years' imprisonment, end sentence 19 months' imprisonment. Victim was grabbed by her bag straps, causing her to hit her head on a nearby kitchen table. When she sought to leave defendant grabbed her and choked her causing her to lose her breath and faint. There was a protection order in place. The victim was 16 weeks pregnant at the time and the victim's child was present during the incident.

(e) *Nahi v Police*:[32] Injuring with intent to injure under s 189(2). Starting point 16 months' imprisonment, end sentence 16.5 months' imprisonment. Defendant pushed victim onto the bed using both hands to choke her restricting her breathing causing loss of consciousness for a short period.

(f) *EWB v Police*:[33] Injuring with intent to injury under s 189(2). Starting point 20 months' imprisonment, end sentence 16 months' imprisonment. Defendant threw victim to the floor, threatened to punch her and strangled her to the point her body turned limp. There was a protection order in place.

[43] Ms Younger submitted that given the above cases, the ultimate starting point for all offending of four years adopted in the present case was disproportionately high.

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30 *Smith v R* [2014] NZHC 3033.
31 *Hunia v Police* [2013] NZHC 333.
32 *Nahi v Police* [2012] NZHC 2025.
33 *EWB v Police* [2012] NZHC 225.

[44] In her submissions Ms Davies identified other cases where more serious offending was involved including the following further cases:

(a) *Lufe v R*:[34] Injuring with intent to cause grievous bodily harm against s 189(1). Starting point of five years or longer was regarded as justified and end sentence of six years regarded as at lower end. Defendant strangled the victim who was six months pregnant to the point of losing consciousness. She received severely disfiguring short-term injuries. Defendant on release conditions following sentence of imprisonment for previous violence against her. Additional charge of attempting to pervert to cause of justice.

(b) *R v Vitali*:[35] Injuring with intent to cause grievous bodily harm under s 189(1). Starting point of six and a half years. Strangulation with a belt in the course of severe and gratuitous incidents of violence involving punching and kicking, dragging by the belt and causing the jaw to break. Victim then held under water.

(c) *Waho v Police*:[36] Injuring with intent to injure under s 189(2). Starting point of three years three months uplifted by six months for other offending. Defendant punched two victims and grabbed two victims by the throat. A further attack on one victim that night and again the following day where he pinned his victim and choked her to the point she could barely breathe.

(d) *Teka v Police*:[37] Assault with intent to injure under s 193 (maximum three years). Starting point of 15 months. Defendant threw the victim to the floor and strangled her after a domestic fight involving damage to property.

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34 *Lufe v R*, above n 17.
35 *R v Vitali*, above n 17.
36 *Waho v Police*, above n 16.
37 *Teka v Police*, HC Auckland, CRI-2009-404-253, 7 September 2009.

(e) *Sharma v R*:[38] Assault with intent to injure under s 193. Starting point of 19 months' imprisonment. Defendant went to victim's house and tried to get in, forced her to the floor and put her in a choke hold, with additional damage to property. There was a breach of protection order.

[45] It seems to me when responding to these submissions that the cases are of particular assistance when they involve charges with similar maximum penalties, including wounding with intent to injure under s 188(2) and injuring with intent to cause grievous bodily harm or injury under s 189(1) or (2).

[46] In the present case I broadly accept Ms Davies submissions and conclude that the District Court Judge's approach was within range. Based on the factors addressed above, I consider this offending is broadly in the middle of the available range: it was in a context of family violence; the strangulation was accompanied by a verbal death threat; the children witnessed the offending; and the victim lost consciousness. The victim reports she is scared for herself and her family and is terrified at the prospect of further violence. I consider the appropriate general band of offending in those circumstances was two to five years' imprisonment and that the nature of the offending here justified it being at a slightly higher level of that band. The starting point of three years, three months' imprisonment adopted by the Judge for the strangulation offence was not inappropriate.

[47] I accept Ms Younger's point that the present case can be seen as not fully consistent with some of the decisions addressed above. The present sentence is similar to that imposed in *Singh*, *Latu* and *Smith*, and materially higher than *Nahi*.[39] But given all of the cases addressed above the present decision is not outside of the general range. There may also be some recalibration involved for strangulation cases even when they have involved offending with the higher penalties. It might be said that the adverse effects of strangulation have now been more fully recognised by Parliament. I do not want to overemphasise that last point, but it is a factor to be considered when considering earlier cases.

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38 *Sharma v R* [2015] NZCA 468.

39 *R v Singh*, above n 28; *Latu v Police*, above n 29; *Smith v R*, above n 30 and *Nahi v Police*, above n 32.

[48] In relation to the other offending, Ms Younger also argues the charge of assault on a person in a family relationship properly attracts an uplift of only one month, and the charge of assault with a weapon should attract an uplift of only five months. The Judge uplifted three months for the assault on the victim and six months for the assault with a weapon.

[49] Again I accept Ms Davies submission. I consider the uplift of one month for the other offending was appropriate. As I have already held, the Judge was careful to consider the overall sentence. And in awarding an uplift of six months for the assault with a weapon, the Judge observed "the potential was there for the incident to be fatal". I see no error in this approach. An overall starting point of four years for all the offending was within range. Neither was the end sentence manifestly excessive.

[50] Accordingly, this ground of appeal fails.

Ground three: insufficient credit for mitigating factors

[51] Ms Younger finally submits the Judge failed to account for the appellant's remorse. She argued that Mr Ackland's addiction issues and subsequent efforts at rehabilitation justify a further discount. She says he has been clean from drugs and alcohol since the day of the offending and plans to attend rehabilitative programmes. The pre-sentence report indicates Mr Ackland has been suffering from substance addiction since he was 13. Following the offending, Mr Ackland made a serious attempt at suicide involving hanging himself and stabbing himself in the leg. This required admission to hospital, including in the intensive care unit. Ms Younger submits that it was clear that he suffered from a range of serious background problems. There was no report under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003, given there simply were not the resources to have the report commissioned. She argued that despite the lack of report, it was apparent from a number of sources, including the hospital discharge report, that Mr Ackland suffered from significant problems and the discount given by the District Court Judge of four months was inadequate in the circumstances. She argues on the basis of *E v R* that a discount of 12–13 per cent was appropriate.[40] The District Court Judge rejected the submission

[40] *E v R* [2011] NZCA 13, (2011) 25 CRNZ 411.

that Mr Ackland's suicide attempt had demonstrated remorse, but had not appropriately dealt with this issue in a broader sense.

[52] In response, Ms Davies submitted that in the absence of a report under s 38, the approach the District Court Judge had adopted was appropriate. As indicated in s 9(3) of the Sentencing Act 2002, the fact that Mr Ackland was in a significantly drug-affected state at the time of the offending was not to be taken into account. But there is no clear evidence of a mental disorder of the kind discussed in *E v R*. The reports available in that case involve an assessment of mental illness well beyond anything available here. It cannot be assumed from the significant suicide attempt alone that mental health issues of this kind arise, particularly given that this offending appears to have involved something in the nature of a drug-affected frenzy.

[53] In my view, whilst these factors are significant, the Judge has taken them into account in a way that she was permitted to by giving the four month discount. That included recognition of depression and the preliminary steps taken towards rehabilitation. I do not consider there has been any error of principle in this approach, or that the sentence was manifestly excessive as a consequence.

Conclusion

[54] For all the above reasons I conclude that Judge Edwards has appropriately addressed the sentence arising for the new offence, including by identifying the relevant factors for the sentencing in the present case, and has arrived at a sentence that is within the appropriate range. It is not manifestly excessive. I also reject the other arguments advanced on appeal. For these reasons, the appeal is dismissed.

Cooke J

Solicitors:
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