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IN THE SUPREME COURT OF NEW ZEALAND

SC 149/2013
[2014] NZSC 48

BETWEEN	KERRYN MITCHELL Applicant
AND	THE QUEEN Respondent

Court: McGrath, William Young and Arnold JJ

Counsel: C J Tennet for Applicant
J M O'Sullivan for Respondent

Judgment: 2 May 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against a sentence of 25 months imprisonment imposed for breach of a protection order and intentional damage.

[2] The protection order was made in 2008 and has been extended to the victim's current partner. The applicant has nine previous convictions for breaching the order. On the night of the offending, the applicant left abusive voice messages on the victim's cell phone (at around 10.30pm). She visited his house (at around 11.30pm) equipped with a tyre iron. She broke most of the accessible windows of the house and two outside lights. She then broke a large glass panel beside the front door and entered the house. The occupants of the house (other than the victim) appear to have confronted her in the hallway. She verbally abused them but walked out of the house when they told her that the victim was not present, hitting the letterbox with the tyre iron on her way out.

[3] The facts of the case were reviewed carefully by the Court of Appeal.[1] The Court broadly agreed with the approach taken to sentencing by Judge Becroft,[2] the sentencing Judge,

[4] The proposed grounds of appeal and our responses are as follows:

(a) The applicant argues that the maximum sentence available was only two years. This is not right. The maximum sentence theoretically available to the sentencing Judge was nine years (two years for breach of the protection order and seven years for intentional damage). The applicant's argument seems to be that because the intentional damage allegation was originally reflected in a charge under the Summary Offences Act 1981, it should be treated as if it were subject to a maximum penalty of three months. If this argument were correct, it would mean that the maximum sentence available to the Judge would have been 27 months imprisonment and not two years. In any event, however, the premise underlying the argument is unsound. The intentional damage charge was eventually proceeded with under the Crimes Act 1961 – properly so, as the Court of Appeal held – and the Judge was entitled to sentence on that basis.

(b) In the alternative, the applicant argues that the sentence should have been rounded down to two years (resulting in the applicant's entitlement to release after 12 months). Because the sentence imposed was greater than 24 months, the applicant is eligible for release on parole after eight months but has no entitlement to release before the expiry of her sentence. Given her antecedents and the nature of the offending, she is not a good candidate for parole and may have to serve the entire sentence. We accept that in some circumstances – likely to be rare – a sentencing judge might be influenced by parole considerations in deciding the length or structure

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1 *R v Mitchell* [2013] NZCA 583 (Wild, Asher and Dobson JJ).
2 *R v Mitchell* DC Wellington CRI-2012-032-3561, 10 September 2013.

of a sentence of imprisonment.[3] But there is plainly no principle by which sentences just over 24 months must be rounded down in the manner proposed by counsel for the applicant.[4] In the present case, it is far from obvious that the sentence imposed should have been artificially reduced so as to confer a right to early release for someone to whom the Parole Board would be unlikely to grant parole, particularly as this would remove any incentive for the applicant to address, while in prison, the causes of her offending.

(c) The third ground advanced by the applicant is that the sentence was manifestly excessive. This argument does not raise any question of principle and is of a kind which would not usually be seen as warranting leave to appeal.

[5] The case does not raise a question of public or general importance and there is no appearance of a miscarriage of justice. The application for leave to appeal must accordingly be dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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3 See, for instance, *R v Mwai* [1995] 3 NZLR 149 (CA) at 157.

4 Such rounding down would be to the prejudice of offenders who are good candidates for parole and thus likely to be released after serving one third of the sentence.