IN THE SUPREME COURT OF NEW ZEALAND

SC 29/2014
[2014] NZSC 83

BETWEEN		IORITANA TUAU Applicant
AND		THE QUEEN Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: E A Hall for Applicant
M H Cooke for Respondent

Judgment: 2 July 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant pleaded guilty to wounding with intent to cause grievous bodily harm and was sentenced by Miller J to nine years imprisonment with a non-parole term of four years six months.[1] The victim suffered catastrophic injuries and is "unable to move purposefully and cannot speak".[2] The applicant was one of three men involved in the assault. The sentence was arrived at on the basis of a starting point of 12 years (reduced from 14 years to allow for provocation) and reduced by a further 25% for good character (10%) and the guilty plea (15%).

[2] The assault occurred in the early hours of 15 September 2011. The applicant was arrested on 20 September 2011, as a result of him having voluntarily gone to the police. On 23 April 2012, the applicant received an end sentence indication of five years three months (which was apparently on the basis that he had stomped on the

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1 *R v Tuau* [2013] NZHC 681.
2 *Tuau v R* [2013] NZCA 623 [*Tuau* (CA)] at [7].

victim's head). The applicant was given until 10 May 2012 to consider his position. Whether the applicant had kicked and stomped on the victim's head, however, remained in contention. When the case was called on 10 May 2012 the Judge proceeded with the committal process (over the opposition of the applicant's counsel) but she recorded in a notation that the Crown accepted that if "matters" were "resolved" (meaning by a plea of guilty) "after scientific analysis" (a reference to further testing which was to be undertaken) the applicant would be entitled to a "pre-committal credit" (by which was meant a discount of 25%).[3] The results of this further analysis were not provided until 14 January 2013 and on 7 or 8 February 2013, the applicant indicated that he would be pleading guilty. He finally pleaded guilty on 26 February 2013, two weeks before his scheduled trial. The case had been retained in the High Court.

[3] The applicant contends that the sentence imposed was manifestly excessive. The submissions in support of the leave application put everything in issue but primarily rely on the fact that Miller J did not allow a 25% discount for the plea of guilty and thus did not honour the indication given on 10 May 2012. From what was said in the Court of Appeal it would appear that Miller J did not have the opportunity to consider the notation made on 10 May 2012.[4]

[4] The Court of Appeal accepted that a more generous discount could have been justified but thought that any increase from 15% was unlikely to affect the end sentence as the discount given for provocation was generous.[5] The Court also noted that there had never been any indication that the applicant wished to change his plea.[6]

[5] It is elementary that the Court of Appeal was required to address the appropriateness of the overall sentence rather than the way in which the Judge arrived at it. The 10 May 2012 indication was not binding on Miller J and there is no suggestion that the applicant wishes to change his plea on the basis that the sentence

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3 The notation does not expressly refer to a 25% discount albeit that, as explained by counsel, this is what was meant.
4 *Tuau* (CA), above n 2, at [45].
5 At [46].
6 At [45].

imposed was not in accordance with that indication. Nor could it fairly be suggested that the sentence was outside the range which was available to Miller J. There is thus no question of public or general importance in the proposed appeal and we see no appearance of a miscarriage of justice.

Solicitors:
Crown Law Office, Wellington for Respondent