NOTE: PERMANENT HIGH COURT ORDER SUPPRESSING PARTICULAR DETAILS REMAINS IN FORCE: [2024] NZHC 3079 AT [66].

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA704/2024
[2024] NZCA 590

BETWEEN	JAYDEN RAY KAHI Appellant
AND	THE KING Respondent

Hearing: 7 November 2024

Court: Cooke, Fitzgerald and Jagose JJ

Counsel: A M S Williams and K N Stitely for Appellant
K A White and C M Hallaway for Respondent

Judgment: 13 November 2024 at 12.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of two years' imprisonment is set aside, and a sentence of 11 months' home detention at the proposed address on standard conditions is substituted.

REASONS OF THE COURT

(Given by Cooke J)

[1] Jayden Kahi appeals from a sentence of two years imprisonment imposed by the High Court following his guilty plea to one charge of manslaughter.[1] He contends

[1] *R v Kahi* [2024] NZHC 3079 [Judgment under appeal].

that the Court erred by adopting a starting point which was too high, and that a sentence of home detention rather than imprisonment should have been imposed.

The offending[2]

[2] Mr Kahi has a son who was seven years of age at the date of the offending. Mr Kahi and his son spent time at Linwood Park in Christchurch at around 6.30 pm on 7 April 2023. Mr Kahi tried to leave with his son but his son refused to do so. Mr Kahi then went to his car and drove away without his son to "teach [him] a lesson".

[3] A short time later Mr Kahi drove his car back to the park. As he did so he saw an unknown male holding his son's hand. Mr Kahi noted that the male was wearing a turban and a scarf. Mr Kahi tried to get to his son but he was held up in traffic. He became enraged. Eventually when he was able to find a place to park he got out, and yelled "that's my fucking son", told the male to get his hands off his son, and then shoved him.

[4] Mr Kahi and his son drove back to his ex-partner's address. Mr Kahi told his ex-partner what had happened. His son then said that the man in the park was trying to walk him to "daddy's car". Mr Kahi then said "fuck this, I'm going back there to find him". His ex-partner advised him not to do so but he left the address anyway.

[5] Mr Kahi drove back to Linwood Park. He located the victim on Linwood Avenue outside Linwood Park. Mr Kahi noted that the victim was no longer wearing a turban or scarf but believed he had identified the same man who was with his son earlier. He got out of his car and confronted him. He grabbed the victim by the collar of his shirt and accused him of trying to abduct his son. He shoved the victim and then let him go. He then punched the victim once in the jaw with a closed fist in a haymaker-style punch. The victim immediately fell backwards and struck his head on the pavement with considerable force.

[6] Believing that he had killed the victim, Mr Kahi left the scene and returned to his house and told his ex-partner he had hit the male and thought he had killed him.

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[2] This summary is based substantially on the summary given in the High Court, see Judgment under appeal, above n 1, at [5]–[17].

He then left the address and drove to his own address where he told his flatmate he thought he had killed someone. Mr Kahi's ex-partner phoned emergency services.

[7] The victim did not regain consciousness after being punched and hitting the pavement. He was treated in intensive care at Christchurch Hospital with a skull fracture and internal bleeding. He also had a single bruise to the left side of his jawline indicative of a forceful punch to that area. The pattern of injuries was consistent with a single punch to the face, then a backwards fall, resulting in the victim hitting the back of his head on the asphalt footpath. The victim's injuries were inoperable, and he subsequently died after being taken off life support on 9 April 2023.

[8] The police attended Mr Kahi's address after the incident had been reported. Mr Kahi told police he did not know whether the victim was dead or not. He said that he had lost control, hit him, and was worried that he was dead. When he was asked what had happened, Mr Kahi advised that he had been at the park with his son and that an Indian male had tried to take his son. He had returned to the park to look for the Indian male and found him. Mr Kahi advised he punched the male in the face and that he felt that he had killed the male.

[9] When interviewed at Christchurch Central Police Station, he said that he had seen the victim holding his son's hand. He believed the victim was a paedophile trying to take his son. At one point he stated that when he punched the victim he wanted to kill him, but at other times in the interview he commented that he did not mean to.

The mental health evidence[3]

[10] After being remanded in custody, Mr Kahi was assessed as suffering either from a psychotic illness or significant anxiety disorder and he was transferred to Te Whare Maanaki and received treatment. He was initially charged with murder. A report was ordered under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003, directed to whether Mr Kahi had a defence of insanity, and a psychological report was subsequently provided from Ms Kate McKeogh. Further reports were then

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[3] We preface our discussion of this evidence by noting that there remains a permanent order suppressing publication of certain details. See Judgment under appeal, above n 1, at [66].

obtained from a psychiatrist and a further psychologist, Dr Erik Monasterio and Mr Ghazi Metoui. The conclusions reached in these reports are largely consistent.

[11] Ms McKeogh reported that Mr Kahi suffered from a mental illness characterised by psychotic symptoms including auditory hallucinations, paranoia, and persecutory beliefs. Mr Kahi's background included a traumatic and difficult early life which developed into a propensity to be paranoid. That background included drug use. In the period of time leading up to the offending, his mental health had deteriorated which was complicated by chronic methamphetamine use. Mr Kahi had stopped using methamphetamine and gone to his general practitioner in the weeks leading up to the offending and had been referred for a specialist mental health appointment at a date after the date of the offending. Ms McKeogh says that following admission after the offending, his psychotic symptoms presented with overwhelming distress and anxiety and that he had attempted self-strangulation. A consultant psychiatrist had made a provisional diagnosis, with which Ms McKeogh agreed, of a psychotic disorder not otherwise specified.

[12] Dr Monasterio reported that Mr Kahi had a longstanding history of anxiety, and mood and post-traumatic stress disorder (PTSD) symptoms which included a preoccupation with child sex offenders. Dr Monasterio confirmed the suicide attempt reported by Ms McKeogh and the significant deterioration in Mr Kahi's mental state and functioning for several months before the offending. Dr Monasterio considered that Mr Kahi's mental health state, and the belief that the victim was a paedophile, was most likely a manifestation of PTSD associated with pronounced anxiety and mood symptoms developed in association with his background.

[13] Mr Metoui also confirmed the decline in Mr Kahi's mental health before the offending, and the initial diagnosis of psychotic disorder not otherwise specified. Mr Metoui advised that Mr Kahi's statements at the time of the offending needed to be taken with a great deal of caution.

[14] In a further report for sentencing, Dr Monasterio advised that, following treatment, Mr Kahi had been discharged from forensic services as he had not experienced a relapse in his psychotic symptoms. He said that the undiagnosed and

unrecognised symptoms of PTSD arising from Mr Kahi's background had contributed to his heightened concern for his son's and other children's risk of sexual abuse. He also reported that, given Mr Kahi's response to treatment and the application of formal risk-assessment tools, his current future risk of violent reoffending was at the low end of the low to moderate spectrum. He considered that Mr Kahi was suffering from complex and severe PTSD associated with social anxiety symptoms, but without symptoms of psychosis.

[15] The report writers also described the steps actively taken by Mr Kahi to address the factors giving rise to the offending, not only by engaging with psychiatric services, but by attending drug, alcohol, and anger management programmes. Mr Kahi has significant family and community support evidenced by a number of letters provided at sentencing. He also swore an affidavit describing his background in which he expressed profound remorse for the offending.

[16] In the pre-sentence advice to the Court, the report writer indicated that there was a low risk of reoffending, and that given this low risk, the time successfully spent on electronically monitored (EM) bail, and his efforts to address his substance misuse home detention was recommended.

The sentence

[17] Harland J reviewed the circumstances of the case, and previous decisions on single punch manslaughter. When referring to the circumstances set out in the summary of facts, she indicated that the key issue was whether Mr Kahi had intended to cause the victim serious injury.[4] Whilst this was not addressed in the summary of facts, she inferred "an intention [on Mr Kahi's part] to cause serious harm" and indicated she would sentence him accordingly.[5] She said that she would have adopted a starting point of six years' imprisonment, but reduced that starting point to five years' imprisonment given Mr Kahi's mental health at the time of the offending.[6] She then referred to what she described as Mr Kahi's tragic upbringing and the assessments made by the health professionals. She reduced the starting point by 25 per cent for

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4 At [31].
5 At [42].
6 At [45].

Mr Kahi's early guilty plea, and a further global discount of 20 per cent for his personal mitigating circumstances.[7] She also gave a nine-month discount for a significant period served on EM bail.[8] This led to a sentence of two years' imprisonment.[9]

[18] The Judge then considered whether a sentence of home detention should have been imposed. She concluded:

> [61] This has been a difficult decision for me because there are arguments that can be made in favour of home detention and arguments that can be made against it. Unfortunately, when I consider the purposes of the sentencing that I have referred to earlier however, I conclude that home detention would not be sufficient to meet them, particularly the necessity to denounce what happened here, and this means that I will be sentencing you to a term of two years' imprisonment.

[19] On appeal, Mr Williams for Mr Kahi argues that the sentence was manifestly excessive as a consequence of an excessive starting point, and that the circumstances of the case warrant a sentence of home detention.

Analysis

[20] An appeal against sentence pursuant to s 244 of the Criminal Procedure Act 2011 will almost always turn on whether the end sentence is manifestly excessive.[10]

[21] We do not accept Mr Williams' submission that the Judge imposed a sentence that was manifestly excessive because the starting point was too high. Mr Williams responded to the Judge's reference to the typical starting point of five to six years for one punch manslaughter, indicated by this Court in *Everett v R*,[11] by referring to *Murray v R,* where the range was said to be three to four years.[12] But each case turns on its circumstances, and whilst the Judge notionally started with six years' imprisonment, she reduced that to five years' imprisonment because of the mental health considerations, and she then gave significant discounts for personal mitigating

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7 At [46]–[57].
8 At [58].
9 At [59].
10 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36]; and *Ripia v R* [2011] NZCA 101 at [15].
11 *Everett v R* [2019] NZCA 68 at [21], citing *R v Pene* [2010] NZCA 387; and *Murray v R* [2013] NZCA 177.
12 *Murray v R*, above n 11, at [21], citing *Kepu v R* [2011] NZCA 104 at [9], n 3.

circumstances.[13] The ultimate question is whether the end sentence was manifestly excessive and we do not consider that an end sentence of two years' imprisonment was so, particularly given the impact of the offending on an innocent member of the community doing no more than seeking to assist an abandoned child.

[22] We do accept, however, that the Judge erred by sentencing Mr Kahi on the basis that when he returned to the park he had an intention to cause serious harm to the victim. As noted earlier, that was not stated in the summary of facts to which Mr Kahi entered his guilty plea. It is common and permissible for the Court to draw inferences from the agreed facts.[14] But that still involves sentencing on the basis the prosecution and defence have agreed under s 24 of the Sentencing Act 2002. If there is an aggravating feature that has not been expressly or implicitly agreed to by the defendant, the Court must indicate the weight that is likely to be given to it, and the defendant is then entitled to proceed to a disputed fact hearing where the Crown will have the obligation to prove the existence of the aggravating factor beyond reasonable doubt.[15] Significant aggravating factors that are not expressly or implicitly agreed to should not be relied upon by the sentencing Judge without following this process. If the Crown wished to contend that Mr Kahi had this particular intent when he returned to the park, this needed to be set out in the summary of facts.[16]

[23] We nevertheless agree with Ms Hallaway's submission that, given Mr Kahi returned to the park to confront the victim, it can reasonably be inferred that the intended confrontation could have included an assault. The summary of facts recorded that he had already pushed the victim when he had first retrieved his son, and an assault must fairly be said to have been a possibility when he returned to confront the victim in those circumstances. But the finding that he returned with an intention to cause serious harm to the victim involves a finding in relation to a specific intent which cannot fairly be inferred. It is a significant aggravating fact as defined in s 24(3) of the Sentencing Act. There was no reference to such an intention in the summary of facts, the Court was advised by defence counsel at sentencing that the defendant did not accept that he had that intent, and there was evidence from the three health

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13 Judgment under appeal, above n 1, at [45]–[57].
14 *Zagros v R* [2023] NZCA 334 at [28].
15 Sentencing Act 2002, s 24(2).
16 See *Gebhardt v R* [2024] NZCA 332 at [46]–[51].

professionals that Mr Kahi was engaged in delusional thinking at the time because of his mental health disorder.

[24] We also accept that this finding was of some significance given the Judge observed that this was a difficult sentencing exercise, that she had earlier referred to the intention to cause serious harm as being the key issue, and her ultimate conclusion was that imprisonment was required to meet the sentencing principle of denunciation.[17] It would appear that it was this factor that led the Judge to conclude that this case was "more culpable or blameworthy than a run of the mill one punch manslaughter".[18] If Mr Kahi had returned to the park to confront the victim, but then lost his temper when forming the view that the victim was a paedophile who had attempted to abduct his son, in part because of the delusional thinking arising from his mental health disorder, then this case has greater similarities to other one punch manslaughter cases, and the principles of denunciation, accountability, and deterrence would have less significance.

[25] When the Court is considering an appeal from a decision not to impose home detention the ultimate question for the Court is whether a sentence of home detention should have been imposed.[19] Home detention is a different kind of sentence, and the Court must impose the least restrictive outcome appropriate to the circumstances under s 8(g) of the Sentencing Act. If the Court concludes that home detention should have been imposed, an appeal should be allowed and a sentence of home detention substituted for that of imprisonment.[20]

[26] The ultimate question, therefore, is whether imprisonment or home detention is the least restrictive outcome available given the circumstances, and whether it is the sentence that best meets the other principles of the Sentencing Act. For the following interrelated reasons we consider a sentence of home detention is so:

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17 Judgment under appeal, above n 1, at [25] and [61].
18 At [35].
19 *Champion v R* [2024] NZCA 65 at [10]; *Palmer v R* [2016] NZCA 541 at [16]–[18]; and *R v Gledhill* [2009] NZCA 415 at [32].
20 *R v Gledhill*, above n 19, at [32].

(a) We consider that the principles of holding the offender to account and denouncing his conduct need to reflect the evidence of the mental health professionals that Mr Kahi was suffering from a significant mental health disorder, most likely acute PTSD, which had been in decline in the period leading up to the offending. This was to the point that Mr Kahi was engaged in delusional thinking and was suffering from hallucinations which led him to believe that the victim was a paedophile who had attempted to abduct his child. Whilst the conduct must still be denounced, and Mr Kahi must still be held accountable, these circumstances reduce his individual culpability. Further, home detention is not an easy sentence, and involves significant elements of denunciation.[21]

(b) For similar reasons individual deterrence is not a significant factor. Mr Kahi has no prior convictions involving violence, and only one prior traffic conviction (for speeding) in 2009. This highlights the causative contribution of his mental health to the offending. Given his response to treatment, he has been assessed as low risk in both the pre-sentence report, and by Dr Monasterio in applying formal risk assessment tools. In terms of general deterrence, given that Mr Kahi's mental disorder played a significant part in the offending, we also see less significance in this factor.

(c) It is clear that Mr Kahi is remorseful, and significantly regrets his conduct. His suicide attempt is evidence of this. The report writers all refer to his remorse, as does his affidavit.

(d) Mr Kahi has actively undertaken significant attempts to engage in rehabilitation, not only in terms of his mental health but also engaging in programmes directed to anger, violence, and substance abuse. Prior to the offending he had sought help from his general practitioner in

[21] *Fairbrother v R* [2013] NZCA 340 at [28].

relation to his mental health. We consider that he has significant rehabilitative potential.

(e) We were advised at the hearing that, given the time Mr Kahi has already spent in prison, and given he would be automatically released after serving half of his two year sentence, he would be due for release after serving approximately seven more months' imprisonment. It is unlikely that meaningful rehabilitation can continue within prison in this period, and his continued imprisonment may undermine the significant rehabilitative steps that he has already engaged in. Dr Monasterio reports that a custodial sentence is likely to exacerbate Mr Kahi's PTSD and diminish progress towards rehabilitation and community reintegration. We accept it is important that his rehabilitation continue in circumstances where he can engage with his significant family support. We also consider it important that Mr Kahi continue to have a role in his son's life which is a further factor to be taken into account,[22] and which is recommended by Dr Monasterio.

[27] We agree with the High Court Judge that this was a difficult case. It must be remembered that the victim was an entirely innocent member of the community who was doing no more than assisting a young child who had been abandoned by his father. That the consequence of his community-spirited actions was the loss of his life is a tragedy.

[28] But the need to denounce Mr Kahi's conduct and hold him accountable for what he has done needs to be balanced by the other principles of the Sentencing Act, including those relating to the circumstances of the offender. Given Mr Kahi's mental state at the time of the offending, his culpability is reduced. Requiring him to continue to serve a prison sentence may be more punitive than home detention, but it serves no real purpose, and it is not more effective in meeting the relevant Sentencing Act principles. We have concluded that the needs of rehabilitation and reintegration outweigh the need for individual denunciation in this case.

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22 *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [50]–[52].

[29] We emphasise that home detention is only the appropriate sentence in this case because of the particular circumstances. Whether home detention is an appropriate sentence for a one punch manslaughter will depend on the circumstances of the case, and the circumstances of the offender as previous decisions in the High Court show.[23]

[30] This is further illustrated by this Court's decision in *Palmer v R*, which involved a young person with Attention Deficit Hyperactivity Disorder (ADHD) who committed a one punch manslaughter. The Court declined to reduce the sentence to home detention given that the innocent victim was pursued by a group before the punch, and in light of the proposed home environment which may have involved a continued connection with undesirable associates as well as other related factors.[24]

[31] Home detention should not be regarded as a tariff for this category of case. Each case will need to be carefully assessed on its facts and circumstances against Sentencing Act principles.

[32] For the above reasons, the appeal is allowed. The sentence of two years' imprisonment is set aside, and a sentence of home detention is substituted. Given the period that Mr Kahi has already served in prison, the sentence of home detention will be for 11 months at the proposed address on the standard conditions.

[33] The parties also agreed to special conditions recommended in the pre-sentence report through their joint memorandum dated 7 November 2024. We do not consider that we have jurisdiction to impose those special conditions,[25] but we proceed on the basis that the rehabilitation programmes that they contemplate will be implemented by the probation officer in the administration of the home detention sentence.[26]

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23 See *R v Nagel* [2023] NZHC 2908; *R v Nagel* [2023] NZHC 3677; *R v Uhatafe* [2023] NZHC 248; *R v Unasa* [2020] NZHC 3139; *R v Hakopa* [2020] NZHC 2763; *R v Larson* [2020] NZHC 237; *R v Ropitini* [2019] NZHC 2836; *R v Nepia* [2019] NZHC 1932; *R v Kokiri* [2019] NZHC 501; *R v Feleti* [2019] NZHC 94; *R v Tarawa* [2018] NZHC 3205; and *R v Hetaraka* [2015] NZHC 2631.

24 *Palmer v R*, above n 19, at [25]–[28].

25 Sentencing Act, s 80D(2).

26 Section 80C(3)(c)(iii).

Result

[34] The appeal is allowed.

[35] The sentence of two years' imprisonment is set aside, and a sentence of 11 months' home detention at the proposed address on standard conditions is substituted.

Solicitors:
Crown Solicitor, Christchurch for Respondent