IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA610/2019
[2020] NZCA 218

BETWEEN	STEVEN ROBERTSON Appellant
AND	THE QUEEN Respondent

Hearing:	30 April 2020
Court:	Gilbert, Wylie and Muir JJ
Counsel:	T A Simmonds for Appellant B M Finn for Respondent
Judgment:	5 June 2020 at 2 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Following a six week judge-alone trial before Katz J, Mr Robertson was convicted of 23 charges of theft by a person in a special relationship, 11 charges of obtaining by deception and four charges of dishonest use of a document.[1] He was sentenced to six years and eight months' imprisonment and ordered to serve a minimum period of three years and four months' imprisonment.[2] The sentence was constructed by adopting an overall starting point of seven years' imprisonment and

1 *R v Robertson* [2019] NZHC 2032 [Verdicts judgment].
2 *R v Robertson* [2019] NZHC 2773 [Sentencing judgment].

allowing a discount of four months (approximately five per cent) for providing legally binding undertakings that would assist recoveries for the victims of his offending.

[2] Mr Robertson appeals against his sentence. He argues the sentence was manifestly excessive and no minimum period of imprisonment (MPI) was justified. In particular, he says:

(a) The starting point adopted of seven years' imprisonment was excessive and should have been of the order of six years.

(b) A discount of approximately 10 per cent should have been allowed to reflect personal mitigating factors — previous good character, personal/family circumstances and remorse.

(c) No MPI should have been imposed.

The facts

[3] The Verdicts judgment is comprehensive and runs to 191 pages. Helpfully, the Judge gave a succinct summary of the key facts in her Sentencing judgment:

> *The "trading on behalf" charges*
>
> [3] In summary, during the period 2009 to 2015 you operated various companies that sold software packages to people to assist them to trade on share, foreign exchange and commodities markets. The software programmes were not easy to use, and some investors did not have the skills or time to master them or were not computer literate. When confronted with disgruntled investors, you would sometimes offer them an alternative. You (or sometimes one of your staff members) told them that if they gave you their money, you, or one of your companies, would trade it on their behalf by investing it for them in the financial markets. You painted a glowing albeit false picture of your prowess as a trader, for example telling one investor that you were "as good as John Key".
>
> [4] You obtained significant funds for trading on behalf of clients in this way. You did not, however, trade any of those funds as you had promised. Rather, you used the money for your own purposes, including funding a lavish lifestyle involving expensive cars, frequent travel by private helicopter, luxury weekend getaways, overseas holidays (including by private jet), and expensive jewellery.

The shareholding charges (obtaining by deception)

> [5] You subsequently offered some of these "trading on behalf" clients a further "opportunity". You invited them to become shareholders in one of your companies, or in a company you were planning to set up overseas. A number of people took up these offers. This group of victims paid tens of thousands of dollars (and in some cases more than that) for fictitious shareholdings. I found in my verdicts that you never actually intended to transfer shares in the relevant companies, or anything else of value, to this group of investors. Rather, you continued to treat the relevant companies as exclusively your own. Most of these victims lost all of the money that they gave you.

Credit card charges (dishonest use of a document)

> [6] Finally, on several occasions when you or one of your companies was low on funds you resorted to simply stealing money out of clients' credit card accounts.

[4] The net loss to victims from Mr Robertson's offending over the six-year period was assessed at the time of sentencing to be approximately $1.2 million and AUD 271,200.[3]

[5] The Judge observed that of the 22 victims, most were elderly and either retired or approaching retirement. The Judge described Mr Robertson as "an extremely skilled and persuasive salesman", who targeted people who were, on the whole, elderly, trusting, and unsophisticated. These victims all lost capital they had saved over a lifetime of hard work and cannot now replace. This will have significant ongoing consequences for them in their retirement. The Judge noted that because of Mr Robertson's offending, many were now facing financial difficulties, for example, having to continue working in their 70s to pay off a mortgage and being unable to assist family members, upgrade aging vehicles, or visit gravely ill relatives overseas. One victim was finding it difficult to pay rent. Another had to place his property on the market because he could not afford to pay the rates.[4] The Judge described the circumstances of one victim from whom Mr Robertson stole over $200,000. This victim is now aged 79. He and his wife were forced to sell their family home and move to an apartment in another town. They face an uncertain future as they will not

---

3 At [16].
4 At [8]–[11].

be able to afford to pay outgoings on this apartment after three years. The Judge stated:[5]

> As a result, in their early 80s, they will need to move again, to somewhere even cheaper. You have robbed them of the comfortable retirement they had worked hard for and left them stressed and anxious about their future. It was apparent from the evidence at trial that [Mr Robertson] recognised this victim as particularly vulnerable and exploited him shamelessly.

Starting point

[6] The Judge identified the following aggravating factors — the nature and extent of the offending, the level of sophistication involved, the motivation (greed), the vulnerability of the victims and the serious breaches of trust, and the impact on the victims.[6] Mr Simmonds, for Mr Robertson, does not dispute the existence of these aggravating features of the offending.

[7] However, Mr Simmonds submits the Judge simply chose the approximate mid-point of the various authorities that were referred to the Court by counsel where starting points ranging from five to eight and a half years' imprisonment were adopted. He says this approach was in error. Instead, the Judge should have been guided particularly by two cases, *Mount v R* and *R v Scott*[7], where respective starting points of six and seven years' imprisonment were adopted.

[8] We reject this submission. There is absolutely no basis for the contention that the careful and experienced Judge simply chose a mid-point without making any proper comparison between the cases cited to her and the circumstances of the present case.[8] In fairness to Mr Simmonds, he acknowledged that this was not the strongest feature of the appeal. Having considered the authorities referred to and the many aggravating factors involved in the index offending, we are quite satisfied the starting point adopted by the Judge cannot be impeached.

---

5 At [12].
6 At [16].
7 *Mount v R* [2015] NZCA 489 at [95], *R v Scott* [2017] NZHC 2510 at [32].
8 See Sentencing judgment, above n 2, at [17].

Discount for personal mitigating factors

Previous good character

[9] The Judge was not prepared to allow any discount for previous good character given the scale and prolonged nature of Mr Robertson's offending and the degree of sophistication and premeditation involved.[9] Mr Simmonds submits that up to 2009, when the index offending commenced, when Mr Roberson was aged 36, he had led a responsible and blameless life. Mr Simmonds argues that the Judge was wrong not to allow a modest discount for this. We disagree. The case for a discount for previous good character was weak at best given the scale of Mr Robertson's cynical offending against his elderly and vulnerable victims over a six-year period. This was hardly a one-off, out of character fall from grace by a person who had led an otherwise blameless life. We are unable to see any error in the Judge's exercise of her sentencing discretion in declining to allow any discount for previous good character in all the circumstances.

Personal/family circumstances

[10] Mr Simmonds urged the Judge to allow a "modest" discount to reflect Mr Robertson's personal circumstances, including the impact his imprisonment will have on his eight year old son. The Judge responded to this submission by saying that imprisonment was the inevitable consequence of the decisions Mr Robertson made to offend as he did.[10] No error in this analysis is evident.

Remorse

[11] The Judge was not prepared to allow any discrete discount for remorse. She considered any remorse Mr Robertson felt was primarily a response to the situation he now found himself in.[11] The Judge's assessment was consistent with an observation made by the probation officer who prepared the pre-sentence report:

> Mr Robertson expressed remorse for his actions and how they have affected the victims, however there was an element to this that suggested he is more sorry for how his conviction has had an effect on his own circumstances.

---

9 Sentencing judgment, above n 2, at [19].
10 At [20].
11 At [25].

[12] Last minute claims of remorse at sentencing are commonplace. Such claims are easily made and therefore require robust assessment to determine whether they are truly genuine and deserving of a sentencing discount. The Judge was well-placed to make this assessment. There was no tangible evidence of genuine remorse here, such as a prompt confession or efforts to make amends to the victims. On the contrary, despite the strength of the Crown's case, Mr Robertson denied his offending to the end. Although this was his right, his refusal to accept responsibility added to the stress already on his elderly victims because it meant they had to come to the High Court to give evidence. Mr Robertson's very late expression of remorse seems more consistent with his ongoing promotion of self-interest rather than being motivated by any genuine concern for the plight of his victims. Mr Robertson undoubtedly now regrets what he did, but this is not the same as genuine remorse.

[13] Despite Mr Simmonds' careful submissions on behalf of Mr Robertson, we are not persuaded the Judge was wrong to conclude that no discrete discount was warranted for Mr Robertson's claimed remorse. Indeed, we cannot see any basis on which we could properly interfere with her assessment.

Undertaking/recovery

[14] Following the intervention of the Financial Markets Authority (the FMA), all assets under Mr Robertson's control were placed under the control of receivers and liquidators by order of the Court. In response to a minute issued by Katz J on 23 October 2019, one week before sentencing, Mr Robertson provided a written undertaking to the effect that he would cooperate in allowing any funds recovered from these assets to be made available to meet the claims of victims. Mr Robertson also undertook not to oppose any application by the receivers, the liquidators or the FMA to release those funds. The Judge was satisfied Mr Robertson deserved credit for these undertakings which would streamline the legal process. She considered these undertakings were a tangible and important acknowledgement of wrongdoing and justified a discount of four months (approximately five per cent) on sentencing.[12]

---

[12] At [26]–[27].

[15] Mr Simmonds does not challenge this discount. Rather, he submits a further five per cent discount ought to have been allowed for the likely recoveries which he says can be characterised as reparation to the victims. Mr Simmonds provided a letter dated 5 March 2020 from counsel for the receivers and liquidators advising that total creditor claims against Mr Robertson and related parties are $2,786,802 and assets available to meet these claims have an assessed value of $1,943,673. Mr Simmonds says it is apparent from this updated information that there will be a significant recovery, and this should be recognised by an additional discount of five per cent. Mr Simmonds says this factor and the complaint about the MPI together form the real substance of the appeal.

[16] The extent of the losses suffered by the victims is relevant to the assessment of the appropriate starting point. The assessment must be made at the time of sentencing based on the information available. The Judge found the net loss was approximately $1.2 million plus AUD 271,200. She added that the quantum of any recoveries could not be accurately assessed.[13] There is no suggestion the Judge made any error in these respects.

[17] Nothing has changed. The victims have still not received any recovery, so their net loss remains the same. The quantum of future recoveries has still not been able to be accurately assessed. The question of whether the victims will receive any recovery, and if so at what level, remains unclear. The shortfall between assets and liabilities on the latest information is of the order of $840,000. If the assets had all been realised, no further costs needed to be incurred, and all creditors were entitled to share equally, they might expect to receive a dividend of nearly 70 cents in the dollar. However, that is plainly not the case. The assets have not yet been realised. Because of the way Mr Robertson conducted his financial affairs, including intermingling the assets of different entities, the position as between the various creditor classes is complicated. The receivers and liquidators have not yet been able to determine questions of priority, and therefore where the victims will sit relative to Mr Robertson's other creditors. In the result, there is still no indication of whether, and if so when, these elderly victims might recover any of their money.

---

13 At [16(a)].

[18] Mr Robertson cannot claim any credit for reparation. The only credit he can claim is for his undertaking not to oppose the receivers' and liquidators' efforts in endeavouring to untangle the financial mess he created and maximising recoveries in the best interests of the various classes of creditors. We consider the Judge was correct to provide a discount in recognition of the undertakings, but not otherwise for reparation.

Minimum period of imprisonment

[19] The Court may impose a MPI if it is satisfied that the normal parole period is insufficient for any or all of four stated purposes in the Sentencing Act 2002.[14] In general terms, these are: to hold the offender accountable for the harm done by the offending; to denounce the conduct; to deter the offender or other persons from committing the same or any similar offence; and to protect the community from the offender.

[20] The Judge considered the first three of these purposes were engaged and required a MPI to be imposed. The Judge repeated that Mr Robertson had targeted multiple elderly, unsophisticated and vulnerable victims and robbed them of the security and comfort they were entitled to expect in their retirement. The sentence imposed needed to be sufficient to hold Mr Robertson accountable for this harm. The Judge also considered that the normal parole period would not suffice to denounce Mr Robertson's conduct, given its nature and scale. The Judge identified specific and general deterrence as being key considerations in a case such as this where the motivation was pure greed and the offending involved persistent dishonesty over a lengthy period targeting multiple vulnerable victims. The Judge took all these factors into account in reaching her conclusion that the normal non-parole period (one-third of the sentence, calculated as two years and five months' imprisonment) would be insufficient and a MPI of three years and four months (50 per cent of the sentence) was required.[15]

---

14 Sentencing Act 2002, s 86(2).
15 Sentencing judgment, above n 2, at [28]–[36].

[21] Mr Simmonds refers to this Court's recent decision in *Zhang v R* where it was emphasised that MPIs must not be imposed as a matter of routine or in a mechanistic way.[16] A reasoned analysis is required as to whether an MPI should be imposed and, if so, for how long. This is, of course, correct. But there is no indication the Judge imposed the MPI mechanistically or as a matter of routine.

[22] Mr Simmonds observes that in *Mount* and *Scott*, referred to at [7] above, no MPI was imposed. Mr Mount was a financial consultant and investment advisor. Over a period of about 10 years he stole approximately $510,000 from his clients by inflating the reported purchase price of their investments and deflating the reported sale price, a process described as "skimming".[17] Following trial in the District Court, Mr Mount was sentenced to six years and nine months' imprisonment and ordered to serve a MPI of 50 per cent.[18] On appeal to this Court, the sentence was reduced to six years' imprisonment and the MPI quashed. This was because the uplift of nine months on the six-year starting point adopted in the District Court reflected conduct for which Mr Mount was neither charged nor convicted. The MPI was quashed because the same flawed reasoning infected the justification for its imposition.[19] It will be observed that the scale of this offending was significantly lower than that of Mr Robertson.

[23] Mr Scott defrauded 13 victims over a lengthy period resulting in them suffering losses of approximately $2.165 million. A starting point of seven years' imprisonment was adopted, the same as for Mr Robertson.[20] However, unlike Mr Robertson, Mr Scott, worked "assiduously" towards resolving the matter with the Serious Fraud Office, pleaded guilty to all charges, acknowledged the consequences of his offending and was genuinely remorseful. He sold assets in an attempt to pay back his victims but was ultimately declared bankrupt. He was an older man and in very poor health. His doctor expressed concern about the potential effects a prison sentence would have on him. The Judge accepted that the range of medical conditions Mr Scott suffered from would make imprisonment particularly difficult for him.[21] No MPI was

---

16 *Zhang v R* [2019] NZCA 507 at [169].
17 *Mount v R*, above n 7, at [7].
18 *R v Mount* DC Nelson CRI-2011-042-968, 17 December 2014.
19 *Mount v R*, above n 7, at [98].
20 *R v Scott*, above n 7, at [32].
21 At [33]–[41].

even sought in his case. It will be obvious that the circumstances in Mr Scott's case are very different from the present.

[24] Mr Simmonds also refers to this Court's recent decision in *Chen v R* where MPIs imposed on two offenders involved in a scheme to deceive three major banks through fraudulent loan transactions over a two-year period were quashed.[22] These cases are also distinguishable from the present.

[25] Mr Chen was a conveyancing solicitor, described by this Court as "the middleman". He assisted the principal offender who was the primary beneficiary of the scheme.[23] Mr Chen did not obtain any monetary benefit for his role. In quashing the MPI imposed on Mr Chen, this Court considered the Judge had failed to acknowledge Mr Chen's previous good character and the fact that he did not obtain any monetary benefit from his offending.[24] We do not see how Mr Chen's position can usefully be compared to that of Mr Robertson.

[26] Mr Jiang was a co-offender of Mr Chen. He was a bank employee who assisted with the fraudulent loan applications and received $240,000 in secret commissions. Mr Jiang was involved in about a third of the overall transactions.[25] This Court did not consider an MPI was necessary in Mr Jiang's case because he was said to be an otherwise law-abiding citizen and had consented to a forfeiture order enabling $850,000 to be recouped. This was regarded as an important acknowledgement of wrongdoing. The forfeiture order was also seen as an additional form of denunciation and deterrence.[26]

[27] Mr Robertson's position is not comparable. He was not a "middleman" who received no reward like Mr Chen, nor was he merely a knowing assister performing a limited facilitation role, like Mr Jiang. Mr Robertson was the principal offender and he directly benefited by deceiving multiple vulnerable victims over a six-year period. The scale of his offending resulted in net losses to these victims of approximately

---

22 *Chen v R* [2019] NZCA 299, (2019) 29 CRNZ 113.
23 At [8].
24 At [52].
25 At [54].
26 At [55].

$1.5 million. Mr Robertson benefitted directly in the same amount, which is an order of magnitude greater than the sum Mr Jiang received. Further, Mr Jiang assisted in the recoupment of a very substantial sum, considerably more than he personally obtained.

[28] We do not see these cases as providing support for Mr Simmonds' contention that a MPI could not be justified in Mr Robertson's case. We are not persuaded the Judge was wrong that a 50 per cent MPI was warranted in all the circumstances she identified.

Result

[29] The appeal against sentence is dismissed.

Solicitors:
Kendall Sturm & Foote, Auckland for Appellant
Meredith Connell, Auckland for Respondent