NOTE: ORDER MADE IN THE HIGH COURT PROHIBITING PUBLICATION OF CERTAIN EVIDENCE AND DETAILS RELATING TO THE APPELLANT'S RELATIONSHIP WITH HER SON REMAINS IN FORCE. SEE [2023] NZHC 234 AT [183].

NOTE: HIGH COURT ORDER MADE IN [2022] NZHC 2800 AT [61(B)] REMAINS IN FORCE.

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF CONNECTED PERSON PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE [2022] NZDC 8105 AT [55].

ORDER PROHIBITING PUBLICATION OF CERTAIN EVIDENCE CONTAINED IN THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011. SEE [2022] NZDC 8105 AT [56].

INTERIM ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF APPELLANT UNTIL THE MATTER IS REVISITED BY THE HIGH COURT.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA153/2023
[2024] NZCA 136

BETWEEN	C (CA153/2023) Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	4 March 2024
Court:	Thomas, Whata and Palmer JJ
Counsel:	K J Beaton KC and A L Hollingworth for Appellant Z R Johnston for Respondent
Judgment:	29 April 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of 28 months' imprisonment is quashed. In substitution, the appellant is sentenced to 22 months' imprisonment with the standard and special conditions as set out at [62] to expire six months after the sentence expiry date.

C We make an order for interim name suppression until the High Court reconsiders the matter.

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] The appellant was found guilty and sentenced to two years and seven months' imprisonment following a judge-alone trial on two charges of neglect of a vulnerable adult.[1] Her sentence was reduced to two years and four months' imprisonment on

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[1] *Police v Lee* [2022] NZDC 11997 [verdict decision] at [729] and [731]; *Police v Lee* [2022] NZDC 20000 [sentencing decision] at [87]; and Crimes Act 1961, s 195(1) and (2)(a): maximum penalty of 10 years' imprisonment.

appeal to the High Court.[2] This Court granted leave for a second appeal, on the basis that it was seriously arguable the High Court did not give adequate consideration to the interests of the appellant's son when sentencing her.[3]

The offending

[2] The appellant and her eight-year-old son were living with her then-partner, Mr Lee (who was jointly charged), and Mr Lee's 90-year-old father (the victim) who has advanced dementia. The appellant and Mr Lee were the victim's carers.

[3] The first charge of neglect arose out of their failure to ensure the victim received his prescribed antibiotics in a timely manner following his discharge from hospital in June 2020. They waited five days to collect the antibiotics and the victim appears to have taken only seven of the fifteen tablets prescribed to him.

[4] The second charge of neglect arose following the execution of a police search warrant on 23 June 2020. The victim was found locked inside his bedroom and it was evident that he had soiled himself without being able to clean up. The bedroom was in darkness with the light switch taped over so it could not be turned on, the bedroom window secured shut with duct-tape, and a dark sheet covered the window so no light could enter. There was a heater in the room but the controls were also taped over. The victim was wearing a wetsuit over the top of a used adult nappy. He had no drinking water available to him.

[5] Subsequent enquiries established that the victim was regularly locked in his bedroom for up to 16 hours a time in those conditions. His calls for help from the appellant and Mr Lee would go unanswered. At times when he was found in an unsanitary condition, he would be berated and verbally abused.

Evidence at sentencing

[6] Evidence filed on the appellant's behalf at sentencing included a report from a psychologist. When discussing the index offending, the psychologist's report noted

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2 *C v Police* [2023] NZHC 234 [sentence appeal] at [179].
3 *C v Police* [2023] NZCA 622 [leave decision] at [26].

the appellant had no prior convictions, no anti-social attitudes or past delinquency and appeared as someone with pro-social values and behaviours, with great empathy for others. The psychologist described her part in the offending as appearing to be "very out of character for her, if not completely unfathomable". The psychologist said:

> … in my clinical experience and the many family harm cases I have [been] involved in over the years, the severity of the psychological control, manipulation, and coercion that Mr Lee appears to have exerted on [the appellant] is frankly amongst the very worst I have come across.

[7] There was also a report in the form of a letter from a psychologist who had assessed the appellant's son for the purpose of a Family Court Report. The psychologist described the appellant's son's primary and most significant attachment relationship as being with the appellant, saying:

> [The appellant] appears to understand and accept his differences and is accommodating of them. She helps him to regulate his emotions and contributes to his sense of safety and security. It is likely that the absence of his mother will be destabilizing for [the child] as his mother has been helping him to navigate relationships with others and helping him to co-regulate his emotions.
>
> [Redacted]

[8] The pre-sentence report addressed the impact of a sentence of imprisonment on the appellant's son. He was by this time 11 years old and has a suspected neurodiversity. He had lived with the appellant and Mr Lee for five years. The report writer described the picture that had emerged from talking with professionals and friends of the couple as being one of manipulation, with power and control exerted on all members of the household by Mr Lee. Oranga Tamariki reported that, since he had been removed from Mr Lee's home and the child returned to the care of his mother, the child had "blossomed". Oranga Tamariki considered that a custodial sentence for the appellant would have "a very severe impact on the child who has been through a great deal in the past few years".

District Court sentencing

[9] The District Court Judge rejected the claim that the appellant was less culpable than Mr Lee.[4] Although the appellant had been diagnosed with a personality disorder and her relationship with Mr Lee was coercive, the Judge considered some of that "sting" was mitigated because of the appellant's behaviour towards the victim even when Mr Lee was not around.[5] The submission that the appellant continued to defend the charges until the second to last day of the trial because of Mr Lee's influence was also rejected.[6]

[10] The aggravating features of the offending were assessed as: the vulnerability of the victim, who was entirely dependent on Mr Lee and the appellant; the serious breach of trust because the appellant lived at the address to ensure the victim had around the clock care; and the inhumane conditions in which the victim was left, including minimal access to food and water, verbal and physical abuse, neglect, being ignored when seeking help, and the wearing of the wetsuit which was a "form of torture" in those circumstances.[7] The Judge also considered that the offending caused significant physical and mental harm to the victim and cruelty was involved because the victim's basic human dignity was ignored.[8] Additionally, the failure to provide the victim his prescribed medication was an aggravating feature.[9] The Judge said there was nothing to suggest the appellant (or Mr Lee) was incapable of looking after the victim, she was not otherwise employed, and had support from outside agencies.[10]

[11] The Judge noted that in 2012, the maximum penalty for this offending was increased from five to ten years' imprisonment.[11] After considering the cases referred to by counsel,[12] and taking into account that the behaviour was well below the standard required and even amounted to "torture",[13] the Judge adopted a starting point of four

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4 Sentencing decision, above n 1, at [29].
5 At [30]–[31].
6 At [32].
7 At [38]–[39].
8 At [42].
9 At [43].
10 At [44]–[45].
11 At [46].
12 At [48]–[59], citing *Heppell v R* [2017] NZHC 64; *R v Hegh* [2019] NZDC 11210; *R v Karauria* [2017] NZHC 2759; and *Adams v Police* [2014] NZHC 42.
13 Sentencing decision, above n 1, at [62].

years' imprisonment.[14] From there, the Judge gave a total discount of 33 per cent, noting that the appellant had no prior convictions and deserved credit for her previous good character.[15] The Judge also took account of the appellant's major depressive disorder and that she was not likely to reoffend, but said that the evidence in the reports about her unusual relationship dynamic with Mr Lee had to be balanced against the evidence of her offending and the finding of equal culpability.[16]

[12] Lastly, the Judge acknowledged the case of *Zhang v R*, and the need to consider the effect of a prison sentence separating mother and child, particularly where the case stands on the cusp of custody.[17] However, the Judge was not of the view that the appellant's case was on the cusp.[18] An end sentence of two years and seven months' imprisonment was imposed.[19]

Appeal to the High Court

[13] The appellant appealed her sentence on the grounds the starting point was too high, her culpability was not equal to that of Mr Lee and insufficient credit was given for mitigating factors. Fresh evidence in the form of a second report from the appellant's psychologist provided further information about coercive control and its potential relationship to the offending.[20]

[14] On appeal, Nation J considered the District Court Judge erred in assessing the appellant's culpability as equal to that of Mr Lee.[21] He distinguished the finding of criminal liability required for the verdicts from culpability, the latter being a principle to be considered on sentence as required by s 8(a) of the Sentencing Act 2002.[22] He considered that, while the District Court was right to find the defendants as equally criminally liable, an assessment of culpability for sentencing includes a consideration of "moral blameworthiness".[23] This necessarily requires the Court to consider

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14 At [65].
15 At [84] and [86].
16 At [84]–[85].
17 At [85], citing *Zhang v R* [2022] NZCA 267.
18 Sentencing decision, above n 1, at [85].
19 At [87].
20 Sentence appeal, above n 2, at [38]–[42].
21 At [100].
22 At [101].
23 At [102]–[103].

numerous other matters which were not relevant to the assessment of criminal liability.[24] The Judge was of the view that the District Court should have found the appellant less culpable than Mr Lee because Mr Lee was the primary caregiver, largely responsible for the care at night, more seriously verbally abused the victim and was probably responsible for setting up the physical restraints.[25]

[15] After considering relevant cases and the appellant's lower level of culpability, the High Court Judge concluded that the appropriate starting point was three years and six months' imprisonment.[26]

[16] The District Court had given a global discount for personal factors. The High Court Judge did not regard that as a material error.[27] He also considered there would have been no error had the Judge given only 10 per cent for the appellant's expressed shame, previous good character, and engagement in counselling to address relationship issues.[28]

[17] The significant issue in the appeal was whether the District Court Judge erred in not recognising, or inadequately recognising, the extent to which the appellant's offending resulted from her psychological vulnerability and Mr Lee's alleged manipulative and coercive conduct.[29] The Judge considered the District Court had taken this into account, referring to the pre-sentence report and the appellant's psychologist's first report.[30] The High Court Judge concluded that the District Court had weighed the mitigating aspects of the appellant's relationship, her psychological difficulties and her vulnerabilities against what he made of all that he heard and observed during the trial.[31] It was appropriate for the District Court Judge to do so.[32]

[18] With appropriate deference to the advantage of the trial Judge, the High Court saw no error in the 23 per cent discount given for the above factors.[33] On the adjusted

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24 At [104].
25 At [106]–[107].
26 At [133].
27 At [141].
28 At [142].
29 At [143].
30 At [144].
31 At [150].
32 At [165].
33 At [169].

starting point of 42 months, a 33 per cent discount resulted in an end sentence of 28 months' imprisonment (rounded down).[34] In arriving at that sentence, the High Court Judge accepted the Crown's submission that the impact of the sentence on the appellant and her son was not a factor that could require a material shortening of the prison sentence. The offending was serious and it was not a case which, appropriately considered, stood on the cusp of custody.[35] Given the advantages of the trial Judge and the seriousness of the offending, the High Court did not see a discount beyond 33 per cent necessary.[36] He added that, even if the end sentence had come within range of a non-custodial sentence, he would have refused to substitute a sentence of home detention due to the particularly serious offending.[37]

[19] The appeal was allowed and a sentence of two years and four months' imprisonment was substituted.[38]

Leave decision

[20] The appellant sought leave from this Court to bring a second appeal against her sentence pursuant to s 253 of the Criminal Procedure Act 2011.

[21] This Court considered it is seriously arguable that the High Court did not give adequate consideration to the interests of the appellant's son in sentencing the appellant. In particular, the Court said it was seriously arguable that:[39]

> (a) This was a case that stood on the cusp of custody, contrary to the view expressed by the Judge, because a sentence of two years and four months' imprisonment is sufficiently close to the two-year threshold for home detention to require particular attention to the impact of a custodial sentence on the family life of an innocent child.
>
> (b) The Judge erred by treating the interests of the child as relevant only where a case is on the cusp of custody.
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> (c) The Judge erred by proceeding on the basis that this was such serious offending on the part of [the appellant] that there was little if any scope to consider the interests of her son.

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34 At [170].
35 At [171].
36 At [173] and [176].
37 At [177].
38 At [179].
39 Leave decision, above n 3, at [26] (footnote omitted).

[22] This Court did not consider that the proposed appeal raised a question of general or public importance in relation to the relevance of coercive control to the assessment of culpability at the first stage of sentencing, rather than the second stage.[40]

[23] Leave was therefore granted to the appellant to pursue the arguments set out in [21] above.[41]

Did the High Court Judge err by treating the interests of the child as relevant only where a case is on the cusp of custody?

[24] We begin with the second issue as that involves a discussion of the general principles to be applied when sentencing a primary caregiver of a dependent child.

[25] Ms Beaton KC, for the appellant, referred us to numerous non-binding international sources to demonstrate the research and evidence supporting the approach of treating the interests of a dependent child as a primary consideration when sentencing their parent or caregiver. This included academic articles with research across the United Kingdom and Europe; the United Nations Convention on the Rights of the Child;[42] other resolutions of United Nations bodies; the England and Wales Court of Appeal decision of *R v Petherick;*[43] federal and state level legislative recognitions of hardship caused to an offender's dependent children by imprisonment in Australia; and South Africa's constitution and the decision of its Constitutional Court in *M v State.*[44] Ms Beaton submitted New Zealand ought to adopt a similar approach to protecting children as much as reasonably possible from the adverse effects of parental imprisonment as seen in these international materials. Further, Ms Beaton relies on the Supreme Court's decision in *Philip v R,* and this Court's decision in *Sweeney v R,* where the Supreme Court and this Court

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40 At [25].

41 At [27].

42 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

43 *R v Petherick* [2012] EWCA Crim 2214, [2013] 1 WLR 1102. The Court at [22] noted that, in a threshold case, the impact of a custodial sentence on dependent children may shift the balance to a non-custodial sentence or suspended sentence based on judicial assessment of the principle of proportionality.

44 *M v State* [2007] ZACC 18, [2008] 3 LRC 504. The Constitutional Court of South Africa at [35] observed that emphasising the duty of the court to acknowledge the interest of children is not to permit errant parents from avoiding appropriate punishment but rather to protect the innocent children from avoidable harm as much as reasonably possible in the circumstances.

respectively awarded discounts of 10 per cent in recognising the interests of dependent children.[45]

[26] Ms Johnston, for the Crown, acknowledged the Sentencing Act requires the Court to take into account personal factors that would include the interests of children, and to do so would be consistent with New Zealand's international obligations. However, Ms Johnston noted that the fact an offender has a dependent child does not, of itself, automatically require a reduction in the sentence.

[27] Whether, and the extent to which, the interests of a child of an offender can be taken into account on sentencing has undergone a marked change in recent times. The attitude expressed by judges not so long ago to the effect that an offender should have considered their child before offending is well and truly outdated.

[28] The need for a change in approach has been discussed for some time but has only recently been given effect in sentencing decisions.

[29] The United Nations Convention on the Rights of the Child (the Convention) was adopted in 1989 and ratified by New Zealand in April 1993. While the Convention does not specifically reference children affected by parental imprisonment, the rights of such children are generally encompassed by several articles, particularly: the principle of non-discrimination (art 2); the best interests of the child (art 3); the right of the child to life, survival and development (art 6); the right of the child to preserve his or her identity (art 8); the right not to be separated from parents (art 9); the right of the child to express their views (art 12); and the entitlement to special protection from the State for children who are temporarily or permanently deprived of their family environment (art 20).

[30] The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) were adopted by the UN General Assembly in 2010.[46] They are not a binding treaty; rather they outline

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45 *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [15] and [58] per Winkelmann CJ, Ellen France and Williams JJ; and *Sweeney v R* [2023] NZCA 417 at [27].

46 *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)* GA Res 65/229 (2011) [Bangkok Rules].

international norms and minimum standards.[47] The Bangkok Rules encourage member states such as New Zealand to adopt legislation and develop mechanisms needed for their implementation.[48] They can be regarded as a useful starting point in any sentencing decision involving a pregnant woman or one with dependent children.

[31] Rule 64 of the Bangkok Rules provides:

> Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

[32] The Bangkok Rules recognise that many women offenders are charged with relatively low-level offending and do not necessarily pose a risk to society.[49] Their imprisonment can result in disastrous consequences for families. Even a short period in prison may have damaging, long-term consequences for the children concerned and should be avoided, unless unavoidable for the purposes of justice.[50] English academic, Dr Shona Minson, has researched and written in this area extensively. She discusses the impact on dependent children of their caregivers' incarceration.[51]

[33] The interference imprisonment has on family life was discussed in *R v Petherick*, where the English Court of Appeal considered the case of a woman who had been sentenced to four years and nine months' imprisonment for driving offences which resulted in the death of a passenger.[52] She was the sole caregiver of her two-year-old son. The Court noted that "where the case stands on the cusp of custody … the interference with the family life of one or more entirely innocent

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47 Adrià Cots Fernandéz and Marie Nougier *Punitive drug laws: 10 years undermining the Bangkok Rules* (International Drug Policy Consortium, Briefing Paper, February 2021) at 1; and Piet Hein van Kempen and Maartje Krabbe (eds) *Women in Prison: The Bangkok Rules and Beyond* (Intersentia Ltd, Cambridge, 2017) at 12 and 28.

48 Bangkok Rules, above n 46, at 4.

49 See r 41(a).

50 United Nations Office on Drugs and Crime *The Bangkok Rules: United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary* (March 2011) at 43–44.

51 See for example Shona Minson *Maternal Sentencing and the Rights of the Child* (Palgrave Macmillan, Cham (Switzerland), 2020). Dr Minson's writing also discusses the need to recognise that the care of a (in many cases traumatised) child while their caregiver is in prison is a very heavy burden to place on a person: at 174–185.

52 *R v Petherick*, above n 43.

children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate".[53] The Court reduced her sentence to three years and 10 months' imprisonment to reflect the combined factors of personal mitigation, coupled with the effect upon the child.[54]

[34] The catalyst for change in New Zealand in respect of the treatment of children whose parents are incarcerated was the tragic case of five year-old Malachi Subecz, who was murdered in November 2021 after he was left in the care of his murderer following his mother being remanded in custody.[55] That brought into stark relief the impact of a child's caregiver's remand in custody and led to Dame Karen Poutasi undertaking an independent review into the children's sector response to abuse.[56] Dame Karen identified the lack of adequate safety nets in place to deal with the needs of a dependent child when his or her caregiver was subject to criminal prosecution.[57]

[35] New Zealand's domestic legislation supports the proposition that a defendant's circumstances, including dependent children, should be taken into consideration in bail and sentencing decisions. While there is no express incorporation of a wellbeing and best interests assessment of dependent children in New Zealand's sentencing framework, the court has a statutory obligation to consider the impact on a child when sentencing a parent. Under s 8(i) of the Sentencing Act, the offender's personal, whānau and family background must be taken into account in imposing any sentence with a partly or wholly rehabilitative purpose. Under s 8(h), the court must take into account any particular circumstances of the offender that would mean an otherwise appropriate sentence would be disproportionately severe — this could include the fact that a defendant is the primary caregiver of young children.[58] Section 8(g), which provides the court must impose the least restrictive outcome appropriate in the circumstances, may also be relevant.[59] When considering aggravating and mitigating

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53 At [22].
54 At [27].
55 Karen Poutasi *Ensuring strong and effective safety nets to prevent abuse of children — Joint Review into the Children's Sector: Identification and response to suspected abuse* (23 November 2022) at [1]–[2].
56 At [4]–[6].
57 At [28]–[30].
58 Francessca Maslin and Shona Minson"What about the children? Sentencing defendants who are parents of dependent children" [2022] NZLJ 367 at 369–370; and *Zhang v R*, above n 17, at [68].
59 In accordance with the hierarchy of sentences and orders set out in s 10A of the Sentencing Act 2002.

factors, s 9(4)(a) permits the court to take into consideration any other mitigating factor and that would allow consideration of the impact of imprisonment on both the parent and the child.[60]

[36] The Supreme Court, in the recent decision of *Philip v R*, said that the Sentencing Act provides sufficient support for discounts for dependent children and observed that the Convention affirms this approach.[61] Mr Philip, who had pleaded guilty to charges of possession of methamphetamine and cannabis, had a close relationship with his young child. The Supreme Court unanimously agreed with the High Court that a discrete discount was available, given that Mr Philip was an important presence in his young child's life.[62] The mother had received a 20 per cent discount for the impact on the child, resulting in a sentence of home detention. The Court rejected the Crown's submission that such discounts will be rare. Instead, what is required is a consideration of all the relevant circumstances which must include the child's interests.[63] In *Sweeney v R*, this Court, while discounting the sentence by 10 per cent to account for the impact on a dependent child, declined to convert the sentence to one of home detention due to the serious violent offending involved and the presence of grandparents to care for the children.[64]

[37] It will be plain from this discussion that the answer to the question, did the High Court Judge err by treating the interests of the child as relevant only where a case is on the cusp of custody, is yes.

[38] The Judge recorded Ms Beaton's submission, referring to *Zhang v R*, that the particular circumstances of the family and the way in which the sentence could impact on a child within the family should have been taken into account on sentencing.[65] Her submission was to the effect that this was a highly relevant consideration because, she contended, home detention was the appropriate outcome.

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60 See Maslin, above n 58, at 369.
61 *Philip v R*, above n 45, at [52] and n 61 per Winkelmann CJ, Ellen France and Williams JJ.
62 At [53] and [62] per Winkelmann CJ, Ellen France and Williams JJ.
63 At [56] per Winkelmann CJ, Ellen France and Williams JJ.
64 *Sweeney v R,* above n 45, at [40]–[41].
65 Sentence appeal, above n 2, at [60(e)], citing *Zhang v R*, above n 17, at [66].

[39] The Judge said he accepted the Crown's submission that the impact of the sentence on the appellant and her relationship with her son was not a factor that could require a material shortening of the prison sentence.[66] We consider this put the Judge somewhat awry. Although the impact of the sentence on the appellant, given her relationship with her son, was a factor that could be taken into account, for example that in those circumstances a sentence of imprisonment could be disproportionately severe,[67] it was the impact on the child which was the mandatory consideration, as discussed above.

[40] The Judge referred to the evidence before the District Court. The registered psychologist who had been assisting the child said that the child's primary and most significant attachment relationship was with the appellant. Oranga Tamariki spoke of the strength of the appellant's relationship with her son and said that it did not consider there would be any care or protection issues for the child if he were to remain in her care. The Judge said there was, however, no information before the Court at sentencing to suggest there would be care and protection issues for the child if he were in the care of his father due to the appellant having to serve a prison sentence.[68]

[41] While it was certainly commendable that the child's father would take care of his son while the appellant was in prison, and no care and protection issues arose, that does not take into account the impact on the son of separation from his mother. Both the psychologist and Oranga Tamariki spoke of the strength of that relationship. It was to the father's credit and to the son's considerable advantage that psychologist sessions took place. We accept the sessions would have helped to ameliorate the impact on the son of the appellant's imprisonment but, where his primary attachment was with his mother, the impact of her imprisonment on him would obviously have been considerable.

[42] As the case of *Philip* demonstrates, it was an error not to take the child's best interests into account, even if it were a case where the sentence could not be considered to be on the cusp of custody.[69]

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66 At [171].
67 Sentencing Act, s 8(h).
68 Sentence appeal, above n 2, at [174].
69 *Philip v R*, above n 45, at [50]–[52] per Winkelmann CJ, Ellen France and Williams JJ.

Was a sentence of two years and four months' imprisonment sufficiently close to the two-year threshold for home detention to require particular attention to the impact of a custodial sentence on the family life of an innocent child?

[43] In accepting the Crown's submission that the impact of the sentence on the appellant and her relationship with her son was not a factor that could require a material shortening of the prison sentence, the High Court Judge observed this was not a case which stood on the cusp of custody.[70]

[44] Ms Beaton submitted that the 28-month sentence, which requires only a four-month reduction to reach the jurisdictional threshold for a non-custodial sentence to be considered, should have been considered as being on the cusp of custody, therefore enabling the consideration of home detention in substitution.[71]

[45] In response, Ms Johnston submitted this was not a case on the "cusp of custody" which she suggested applies when the sentence is 24 months' imprisonment or less, allowing home detention to be considered. In her submission, while the impact of a sentence on a dependent child can operate to reduce a sentence, it will not always be so, given the myriad of other considerations at play.

[46] The reference to "cusp of custody" comes from the decision of the English and Welsh Court in *R v Petherick*, discussed above. When considering sentencing decisions from overseas courts, it is important to understand the sentencing environment in that jurisdiction. While the English and Welsh Court discussed cases on the cusp of custody, it resulted in a reduced sentence of three years and 10 months' imprisonment in that case.[72]

[47] We do not think it helpful to embark on a detailed analysis of the meaning of the word "cusp" other than to observe that the cusp is the dividing line between two different things.

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70 Sentence appeal, above n 2, at [171].

71 Referring to comments of the England and Wales Court of Appeal in *R v Petherick,* above n 43, at [20]–[23].

72 At [27].

[48] Ms Johnston was correct to observe that, in the context of the Sentencing Act, a sentence will not be on the cusp of custody unless it is at the point where a sentence of home detention is potentially available. Home detention can be imposed only if, amongst other matters, the court would otherwise sentence the offender to a short-term sentence of imprisonment.[73] A short-term sentence of imprisonment is a determinate sentence of 24 months or less.[74] This means that a sentencing judge is precluded from considering home detention if, at the conclusion of their sentencing analysis, he or she has reached a sentence of more than 24 months' imprisonment and is satisfied such a sentence properly reflects the purposes and principles of sentencing.

[49] This emphasises the need for sentencing judges to consider the interests of a dependent child during the evaluative exercise involved in all sentencing decisions, including addressing aggravating and mitigating factors, and weighing up the purposes and principles of sentencing in each individual case. Particular attention to the impact of a custodial sentence on the family life of an innocent child is required in all cases. The end sentence must reflect all relevant factors relating to the offending and the offender[75] and, at the conclusion of the process, the judge must stand back and ask whether the sentence is a just one.[76]

[50] In the case of the appellant's sentencing, we reject Ms Beaton's submission that, having arrived at a sentence of 28 months' imprisonment, home detention should have been considered in substitution. The Sentencing Act does not permit that approach. Rather, what should have occurred, as discussed above, was for the interests of the appellant's son to have been considered before the Judge reached his conclusion as to the length of sentence.

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73 Sentencing Act, s 15A(1).
74 Section 4(1) definition of "short-term sentence".
75 *R v Whiu* [2007] NZCA 591 at [34].
76 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [37] and [49] and *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [77].

Did the High Court err by proceeding on the basis that this was such serious offending on the part of the appellant that there was little, if any, scope to consider the interests of her son?

[51] Ms Beaton submitted that the appellant's incarceration represented a major change to her child's living situation and, while her offending was serious, it was not serious violence or in the category of the most serious cases of neglect. It was clear at sentencing that the appellant posed no ongoing risk of reoffending, was deeply remorseful, and her rehabilitative prospects were high.

[52] In Ms Johnston's submission, the seriousness of the offending was relevant but not determinative. She referred to the Supreme Court in *Berkland v R* for the proposition that causative contribution of a background may be displaced, in whole or in part, where the offending is particularly serious.[77] Applying that guidance to the appellant's appeal, Ms Johnston submitted that the seriousness of the offending was properly taken into account in the decision not to reduce the sentence in respect of the interests of the child.

[53] The High Court Judge noted that the appellant was being sentenced for "serious offending".[78] Having reached a sentence of 28 months' imprisonment, he was precluded from considering home detention but noted, even if that were not so, the seriousness of the appellant's offending and the need for denunciation meant he would have refused the substitution of a sentence of home detention.[79] He relied on *Berkland v R* and the Supreme Court's comment that sentencing purposes and principles such as deterrence, denunciation and community protection will usually be more powerfully engaged where offending is particularly serious.[80] He regarded the appellant's offending as of that sort.

[54] As already discussed, the impact of an offender's custodial sentence on a dependent child should be considered in all cases. The seriousness of the offending may tell against a discount or its level but it does not preclude consideration of the

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77 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [111] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

78 Sentence appeal, above n 2, at [171].

79 At [177].

80 At [178], citing *Berkland v R*, above n 77, at [94] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

child's interests. We agree with Ms Beaton's submission that the appellant's offending, while serious, was not serious violence or in the category of the most serious cases of its type. The pre-sentence report noted the evident shame and embarrassment the appellant felt in relation to the offending. She was clearly remorseful but caught up in a highly abusive relationship, the domestic situation described as being one of power and control exerted on the appellant by Mr Lee. Mr Lee's daughter spoke to the pre-sentence report writer about seeing the appellant psychologically abused on a daily basis and undermined with respect to her parenting. The counsellor with whom the appellant was meeting on a weekly basis at the time of the report described the relationship as featuring all the elements of the power and control wheel of family harm. The appellant has a history of poor mental health, with anxiety and depression. The pre-sentence report writer considered the appellant's expression of remorse, shame and guilt to be genuine and consistent with her presentation during the counselling sessions.

[55] The High Court Judge accepted the evidence of the appellant's psychological difficulties, vulnerability and being in a coercive and manipulative relationship.[81] That context should then have been taken into account when assessing the seriousness of the offending. The appellant's offending remains serious but there was still scope, indeed an obligation, to consider the interests of her child in the sentencing process.

What should the sentence have been?

[56] In her application for leave to bring a second appeal to this Court, the appellant sought to argue not only the question of how the interests of her child should have been addressed but also whether, in assessing culpability, coercive control should have been taken into account at the first stage of sentencing rather than the second. This Court noted that the cases took different approaches but that the important point was that the sentencing process should take account of these issues when they are relevant rather than the particular stage at which that is done.[82]

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81 Sentence appeal, above n 2, at [166].

82 Leave decision, above n 3, at [25], citing *R v Whiu*, above n 75, at [34].

[57] We simply observe that the purpose of the starting point to be determined at the first stage of sentencing is to reflect the culpability inherent in the offending.[83] Depending on the evidence in any particular case, coercive control might be relevant to an assessment of culpability or might better be considered in mitigation.[84] We can say that, in the appellant's case, the evidence of the psychologist was such that coercive control could well have been factored into the culpability assessment. However, as this issue was not the subject of full argument before us, we take it no further.

[58] Having regard to the appellant's situation, that is she has served 11 months of her sentence and is now on parole, we find ourselves somewhat constrained in the sentencing process. Ms Beaton suggests that, if the appeal is allowed and the term of imprisonment is reduced to two years or less, home detention is no longer appropriate given the appellant has likely served or nearly served the same period in prison. She suggests either imposing a short term sentence of imprisonment such that time is served and the appellant is immediately released, or imposing a community-based sentence such as supervision for six months, to enable the appellant to continue to receive support from her probation officer for a further finite period.

[59] There is no doubt that there should have been a discount to recognise the impact of the appellant's imprisonment on her son. The evidence was that the child's relationship with the appellant was his primary and most significant attachment. The psychologist's opinion was that the absence of the appellant would be destabilising for him, Oranga Tamariki saying it would have a very severe impact on him. He was 11 years old at the time, with developmental difficulties, high anxiety and a lack of resilience. In the circumstances, we set that discount at 15 per cent. Applying that and the other discounts to the High Court adjusted starting point of three years and six months' imprisonment results in an end sentence of 22 months' imprisonment, which

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83 *R v Taueki* [2005] 3 NZLR 372 at [42].

84 See for example *Edwards v R* [2019] NZHC 2755; and *Campbell v R* [2020] NZCA 356 in particular at [30] and [47], where the Courts took into account control exercised by a partner and co-offender at different stages of the sentencing process. See also *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 where this Court accepted that in sentencing one of the appellants, Ms Phillips, the High Court was correct to adopt a starting point much lower than the range indicated in the guideline case given her culpability was significantly less than that of her co-offender, her partner who she had accompanied out of a "sense of loyalty": at [214]–[218].

would have allowed home detention to have been considered. In our view, home detention would have been the appropriate sentence commensurate with the purposes and principles of sentencing. But, rather neatly, 22 months equates to the time the appellant has already served. The appellant is subject to parole conditions which we consider should be attached as special release conditions to her short sentence.

Outcome

[60] In respect of the questions posed, we answer as follows:

(a) Did the Judge err by treating the interests of the child as relevant only where a case is on the cusp of custody? Yes.

(b) Was a sentence of two years and four months' imprisonment sufficiently close to the two year threshold for home detention to require particular attention to the impact of a custodial sentence on the family life of an innocent child? Attention to the impact of a custodial sentence on the family life of an innocent child is required in all cases.

(c) Did the High Court err by proceeding on the basis that this was such serious offending on the part of the appellant that there was little scope, if any, to consider the interests of her son? Yes.

[61] The appeal is allowed.

[62] The sentence of 28 months' imprisonment is quashed. In substitution, the appellant is sentenced to 22 months' imprisonment with the following standard and special conditions to expire six months after the sentence expiry date:[85]

> (1) To reside at the address previously approved by the New Zealand Parole Board on 12 December 2023, or any other address approved in writing by a Probation Officer, and not move from that address without the prior written approval of a Probation Officer.

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[85] Sentencing Act, s 93.

(2) To attend an assessment for a Short Rehabilitation programme/maintenance group, and attend, participate in and adhere to the rules of the programme/maintenance group as directed by a Probation Officer.

(3) To attend, participate in and complete any programme/treatment/counselling as directed by a Probation Officer including discussion and the preparation of a safety plan.

(4) To disclose to a Probation Officer, at the earliest opportunity, details of any intimate relationship which commences, resumes, or terminates.

(5) Not to communicate or associate with your co-offender David Lee directly or indirectly, without the prior written approval of a Probation Officer.

(6) To obtain the written approval of a Probation Officer before starting or changing your position and/or place of employment (including voluntary and unpaid work). To notify a Probation Officer if leaving your position of employment.

(7) Not to have contact or otherwise associate with any victim of your offending, (including previous offending) directly or indirectly, without the prior written approval of a Probation Officer.

Suppression

[63] The appellant's application for final name suppression was declined and an appeal against that decision dismissed.[86] Interim suppression was ordered by the High Court pending the outcome of the sentence appeal, to be reviewed by the High Court following receipt of this Court's decision. We order interim suppression of the appellant's name to continue until the High Court considers the matter.

[64] Further suppression orders are in place as to the name of the appellant's son, the location of the residence of the appellant and her son, and statements about the appellant's relationship with her child (other than statements relating to the appeal).[87]

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[86] *Police v Lee* [2022] NZDC 8105 [suppression decision]; and *C v Police* [2022] NZHC 2800 [suppression appeal].

[87] Suppression appeal, above n 86, at [58]; suppression decision, above n 86; and sentence appeal, above n 2, at [183].

Result

[65] The appeal is allowed.

[66] The sentence of 28 months' imprisonment is quashed. In substitution, the appellant is sentenced to 22 months' imprisonment with the standard and special conditions as set out at [62] to expire six months after the sentence expiry date.

[67] We make an order for interim name suppression until the High Court reconsiders the matter.

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