ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF VICTIM PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY
I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CRI-2017-470-27
[2017] NZHC 2410

BETWEEN	TYLA BRITTIN Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	26 September 2017 (Heard at Rotorua)
Appearances:	C Tuck and B Hall for the Appellant A Shore for the Respondent
Judgment:	2 October 2017

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 2 October 2017 at 4:45 p.m. pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr C Tuck, Barrister, Tauranga
Ms A Shore, Hollister-Jones Lellman, Office of the Crown Solicitor, Tauranga

[1] Tyla Brittin appeals against a sentence of 12 months imprisonment for an offence of causing harm by posting a digital communication.[1] This is an offence against s 22 of the Harmful Digital Communications Act 2015 (the Act). The maximum penalty for an offence by a natural person is imprisonment for two years or a fine of $50,000.

[2] This appears to be the first appeal against sentence to come before this Court.[2]

The facts

[3] In November 2015 Mr Brittin and the victim made contact through a Facebook dating site. Mr Brittin was then 20 years old. The victim was a 30 year old single woman. They communicated for about two weeks by phone and text messages. Over this period the victim sent Mr Brittin several photographs of her naked breasts and of her sitting naked in a bath with her fingers by her genitals. It appears from the summary of facts, to which Mr Brittin pleaded guilty, that the victim and Mr Brittin met twice. The victim travelled from her home town to Mr Brittin's home in another town. On each occasion there was some intimacy, but the victim declined Mr Brittin's requests that she have sex with him. On the second occasion there was an argument before the victim left and returned to her home.

[4] The relationship soured. It ended in December 2015 when the victim made clear one day, by text message and phone calls, that the relationship was over. What then occurred is conveniently taken from the sentencing notes of Judge P G Mabey QC:

> [3] Later that night one of her friends alerted her that there were naked photographs of her on the Facebook website NZ Kinky Temptations R18+. These were the photographs that she had sent you via Facebook messenger previously. They were of her breasts and of her in the bath with her fingers in or about her genitals. You posted a comment to go with the photographs. "She's DTF boys, … [the victim's name and mobile phone number were then recorded]." … is her name, which will be suppressed, the phone number was hers and I am told that that DTF is an acronym for "down to

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1 *Police v Brittin* [2017] NZDC 16230.

2 There appears to be one appeal against sentence to the Court of Appeal: *Waine v R* [2017] NZCA 287. This was an appeal against dismissal of an application for discharge without conviction. The Court of Appeal's judgment is not relevant to the central matters in issue on this appeal.

> fuck". You made this digital communication from your account which had your name.
>
> [4] Shortly after 8.00 pm on 29 December the victim received the first of many text messages from various males who were unknown to her. They asked her if she [was] available for sex. She received many calls and text messages and they caused her to become mentally and emotionally stressed. She changed her number to stop the unsolicited text messages.
>
> [5] I have a victim impact statement which tells me that she is a single woman of 30. She said she has been humiliated. She walks with her head down to avoid being recognised. She has had random people come up to her saying such things as, "Aren't you that chick with the nude photographs on Facebook?" Her friends and family know what has happened. Some friends have deserted her. She says that her mind is affected to the point that she has lost her appetite through stress. She has lost her self-confidence. She says this:
>
> > He took a part of me and destroyed it with what he has put me through. I've lost all trust and faith in people. I wake up from nightmares about this, crying. When I get a message from a name or number that I don't recognise my heart starts pounding and I hold my breath till I open it. He has destroyed the person I have spent my entire life working towards being.

The sentencing

[5] The Judge assessed the starting point for the offence as 18 months imprisonment. He said that "deterrence, denunciation and accountability must be paramount" because that is consistent with the purposes of the Act.

[6] The Judge identified the following as aggravating features: the photographs had been sent to Mr Brittin in confidence and in posting them Mr Brittin "breached her trust in the most vile way"; he demeaned her character; and he caused significant victim harm with the publication of her name and phone number with the direct invitation to men to contact her for sex.

[7] The Judge referred to three other sentencing decisions of the District Court in respect of this new offence.

[8] The first is *R v Waine*.[3] I agree with Judge Mabey's conclusion that the offence in that case was far less serious than the offence in this case and that it does not otherwise assist.

[9] A decision of Judge Ruth in *Police v Tamihana* is more relevant.[4] Judge Mabey summarised the *Tamihana* case as follows:

> [16] … There was a breakdown in a relationship and as a result Mr Tamihana went on Facebook and revealed intimate photographs of his former partner to her mother with the comment "what your daughter's really up to". The Judge sentenced Mr Tamihana to nine months' imprisonment commenting that to do otherwise would send the totally wrong message to the defendant and others who might embark upon that sort of behaviour.

[10] The Judge concluded that Mr Brittin's offending was considerably more serious. This was because it was not posting of photographs to a member of the victim's family, but posting of photographs to a public website coupled with the other information already noted.

[11] The third case is a decision of Judge Cook in *Police v Kelly*.[5] Judge Mabey's summary of that case was as follows:

> [18] ... Mr Kelly took photographs of his ex-partner in the shower and posted them on Facebook. They showed her fully naked and showering at her home address. The Judge considered that case less serious than the matter of Mr Tamihana that I have referred to. She adopted a start point of nine months' imprisonment, made a reduction for remorse, an offer for reparation and guilty plea. Home detention was the ultimate outcome.

[12] Judge Mabey assessed Mr Brittin's offending as also being considerably more serious than that of Mr Kelly.

[13] The Judge concluded his assessment of the starting point as follows:

> [20] The maximum penalty is reserved for the most serious cases of a particular kind. I do not know of a more serious case than this but I am prepared to accept that there probably will be or could be.

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3 *R v Waine* [2016] NZDC 4615. The defendant in that case appealed to the Court of Appeal: *Waine v R*, above n 2.

4 *Police v Tamihana* [2016] NZDC 6749; [2016] DCR 240.

5 *Police v Kelly* [2016] NZDC 12912.

> [21] I consider that when measured against the maximum penalty of two years a start point of 18 months' imprisonment is appropriate and that will be the start point that I adopt today.

[14] From the starting point of 18 months imprisonment, the Judge deducted three months for previous good character and expressions of remorse, and a further three months (20 per cent) for Mr Brittin's guilty plea. This took the starting point down to 12 months imprisonment.

[15] There was an application for home detention. The Judge's assessment of this was as follows:

> [27] Given [the calculation of 12 months imprisonment] home detention is something that is potentially available to you. But as I said to you right at the outset, Mr Brittin, you are not going to have the benefit of an electronically monitored sentence. For me to impose home detention for this level of offending would, as His Honour Judge Ruth said in Nelson, send the entirely wrong message not only to you but to other people who might want to offend in this way. One of the purposes of the Act is to deter and that applies not only to you personally but to others. Your offending is grave. The effect of your offending has been severe. The least restrictive outcome is imprisonment and you will be sentenced to 12 months' imprisonment on this charge.

Grounds of appeal

[16] Mr Tuck, for Mr Brittin, advanced two main grounds of appeal:

(a) He argued that the sentence was manifestly excessive. This was directed to the starting point of 18 months imprisonment. Mr Tuck submitted that the starting point should have been no more than nine to 12 months imprisonment.

(b) The Judge erred in his assessment of home detention and a sentence of home detention should have been imposed.

[17] No issue was taken with the Judge's assessment of the three months credit for personal factors and the further 20 per cent reduction for the guilty plea.

[18] Ms Shore, for the respondent, supported the Judge's reasons for fixing a starting point of 18 months imprisonment. On the question of home detention, Ms

Shore acknowledged, in effect, that this ground of appeal was reasonably arguable for Mr Brittin and advised that she did not seek to advance any oral submissions in response to those of Mr Tuck. For reasons I will come to, I consider that that was a responsible approach.

Statutory provisions

[19] Section 22 of the Act, defining the offence and prescribing the penalties, is as follows:

> **22 Causing harm by posting digital communication**
>
> (1) A person commits an offence if—
>
> (a) the person posts a digital communication with the intention that it cause harm to a victim; and
>
> (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
>
> (c) posting the communication causes harm to the victim.
>
> (2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including—
>
> (a) the extremity of the language used:
>
> (b) the age and characteristics of the victim:
>
> (c) whether the digital communication was anonymous:
>
> (d) whether the digital communication was repeated:
>
> (e) the extent of circulation of the digital communication:
>
> (f) whether the digital communication is true or false:
>
> (g) the context in which the digital communication appeared.
>
> (3) A person who commits an offence against this section is liable on conviction to,—
>
> (a) in the case of a natural person, imprisonment for a term not exceeding 2 years or a fine not exceeding $50,000:
>
> (b) in the case of a body corporate, a fine not exceeding $200,000.
>
> (4) In this section, victim means the individual who is the target of a posted digital communication.

[20] As will be noted from subsection (1), there are three essential elements to the offence and harm is part of each element. "Harm" is defined in s 4 as "serious emotional distress".

[21] The purpose of the Act is defined in s 3 as follows:

> The purpose of this Act is to—
>
> (a) deter, prevent, and mitigate harm caused to individuals by digital communications; and
>
> (b) provide victims of harmful digital communications with a quick and efficient means of redress.

[22] The definition of purpose reflects the fact that the Act established a civil regime as well as creating two criminal offences.[6]

Evaluation: the starting point

[23] The Judge's assessment of a starting point is conveniently considered under four subheadings:

(a) The starting point assessed against the maximum penalty of two years imprisonment.

(b) Should deterrence, denunciation and accountability be paramount?

(c) Aggravating and mitigating factors of the offending.

(d) Other cases.

The starting point assessed against the maximum penalty of two years imprisonment

[24] The Judge's assessment of the gravity of the offending puts it in s 8(d) of the Sentencing Act 2002: "near to the most serious of cases for which the penalty is

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[6] The Act established an "Approved Agency" to deal with complaints about harm caused by digital communications, to undertake other functions to seek to prevent or mitigate harm and, as indicated by s 3(b), to provide victims with a "quick and efficient means of redress". The other criminal offence is in s 21 – non-compliance with an order made under the civil regime.

prescribed". This is apparent from his references to the maximum penalty and to the probability that there will be or could be more serious offences than Mr Brittin's offence, as well as the starting point.

[25] In deciding whether offending is within the most serious of cases for a particular offence, the authorities make clear that there "is no rule that the maximum penalty is to be reserved for the most devilish instance of crime that judicial imagination can conceive".[7]

[26] In this case the Judge did make an allowance for the probability of more serious cases. But a difficulty in assessing a starting point for offences under this new enactment is that there have been very few cases to enable a reasonably reliable assessment of relative gravity. Because this is a new offence, in my judgment a cautious approach in setting starting points is required.

[27] There is some relevant commentary in the report of the Justice and Electoral Committee on its referral of the Harmful Digital Communications Bill back to Parliament.[8]

[28] The introduction to the commentary records that the Bill would, amongst other things, create "new criminal offences to deal with the most seriously harmful digital communications …".[9]

[29] Penalty levels were discussed as follows:[10]

> **Penalty levels**
>
> We recommend adjusting the maximum penalties for the new offences of non-compliance with a court order (clause 18), and causing harm by posting a digital communication (clause 19) to make them consistent with the penalties for similar offences in the Harassment Act 1997. We consider it important that harassment in the physical world and online be dealt with consistently. Therefore, we recommend amending subclause 18(2) to provide for a maximum penalty for an individual of six months' imprisonment or a $5,000 fine, and $20,000 for a body corporate; and

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7 *R v Lawrence* (1980) 32 ALR 72 at 78, cited in *R v Beri* [1987] 1 NZLR 46 (CA) at 48. And see *R v Xie* [2007] 2 NZLR 240 (CA) at [26].

8 Harmful Digital Communications Bill 2013 (2014 No 168-2) (Select Committee report).

9 At 1.

10 At 4-5.

> amending subclause 19(3) to increase the maximum penalty for an individual to two years' imprisonment.
>
> In respect of the clause 19 penalty, we are aware that under section 39(1) of the Sentencing Act 2002, where an enactment only allows a sentence of imprisonment the court many [sic] sentence an offender to pay a fine instead. We would like to emphasise that the penalties we propose are maximum penalties; a Judge would impose a sentence proportionate to the nature of the offending in each case.

[30] The observation at the end of the second paragraph is relevant to the second ground of appeal, in respect of the refusal of the application of home detention, discussed later. Of present relevance is the fact that the maximum penalty was increased from three months, proposed in the Bill as introduced, to two years to make it "consistent with the penalties for similar offences" in the Harassment Act 1997.

[31] The offence of criminal harassment, for which the maximum penalty is two years imprisonment, is defined in s 8(1) of the Harassment Act as follows:

> (1) Every person commits an offence who harasses another person in any case where—
>
> (a) The first-mentioned person intends that harassment to cause that other person to fear for—
>
> (i) That other person's safety; or
>
> (ii) The safety of any person with whom that other person is in a family relationship; or
>
> (b) The first-mentioned person knows that the harassment is likely to cause the other person, given his or her particular circumstances, to reasonably fear for—
>
> (i) That other person's safety; or
>
> (ii) The safety of any person with whom that other person is in a family relationship.

[32] Comparing the facts of serious offences of criminal harassment with the facts of Mr Brittin's case, and the small number of other cases under the Act, is likely to be of limited assistance. But a general observation can be made. Even the least serious of offences against the Act involve conduct by the defendant intended to cause, and consequences for the victim which do cause, more serious harm than the

act and intention (or knowledge) that would be sufficient to constitute the least serious offence of criminal harassment. This follows from the definitions in the Act of the offence and of "harm". For an offence under s 22 to be committed there must be significant emotional harm, and this is required not only in relation to the effect on the victim, but also the intention of the defendant. This point about the inherent gravity of any offence is given some emphasis by the statement in the introduction to the Select Committee's commentary.

[33] This, in my judgment, is a distinction of importance when endeavouring to set an appropriate starting point for offences under s 22 of the Act. It is considered further in discussing the following topics.

Should deterrence, denunciation and accountability be paramount?

[34] The stated purpose of the Act does make clear, as the Judge said, that the offence and penalties under s 22 are intended to deter infliction of harm from posting digital communications. However, in my opinion the Judge has erred by giving paramountcy to deterrence, denunciation, and holding the offender to account, on the basis that deterrence is a stated purpose of the Act.

[35] The fact that the Act has deterrence as a purpose does not bear on the importance of the separate sentencing purposes of denunciation and accountability. Also, although the statement of purpose in the Act is relevant, the primary guide for sentencing must be the Sentencing Act and, in particular, the purposes and principles of sentencing. This is implicitly recognised in the commentary of the Select Committee in its report to Parliament, in the concluding sentence quoted above. There was need to weigh the different purposes, and the principles, of sentencing, rather than to start on the basis that deterrence, denunciation and accountability are paramount.

[36] In addition, the relative weight to be given to a purpose of sentencing, when directed to assessment of a starting point, should in my opinion also be assessed having regard to the fact already noted: any offence against s 22 will always involve both an intention to cause *serious* emotional harm and the causing of *serious* emotional harm.

[37] I also consider that deterrence needs to be assessed in a reasonably measured way, both in respect of general deterrence and individual deterrence of the offender being sentenced.

[38] It may be appropriate to give more weight to general deterrence when sentencing for this offence. This is because the effectiveness of general deterrence depends to a reasonable extent on the risk of being detected and then convicted. That risk for this offence may be higher than for many other types of offence because this offence requires a digital communication and in many cases tracing the origin of the communication will be possible. In addition, when the motivation of a posting, or the content of it, has features similar to what occurred in this case and in *Tamihana* and *Kelly*, the person responsible for the posting is likely to be readily detected.

[39] On the other hand, the need for individual deterrence – deterrence of the person being sentenced – must be assessed case by case. The pre-sentence reports indicate that the likelihood of Mr Brittin's re-offending is minimal. The Judge appears to have given substantial weight to individual deterrence in fixing a starting point. In my opinion, this was an error.

Aggravating and mitigating factors of the offending

[40] The three factors expressly identified by the Judge as aggravating factors of the offending were noted above at [6]. The breach of trust is an aggravating factor. Posting the photographs to the particular website, with the victim's name, phone number and the additional comment were seriously aggravating factors. However, part of what the Judge has treated as aggravation is an essential ingredient of the offence, both in respect of Mr Brittin's intention and in respect of the harm caused to the victim. The remaining aggravating factor identified by the Judge was that Mr Brittin demeaned the victim's character, but that does not appear to add anything beyond what had to be proved – causing serious emotional harm.

[41] Mr Brittin's culpability for the offence, and for the extent of the harm caused, was undoubtedly aggravated in a substantial way by a number of features of his

offending, but the Judge has added more by way of aggravation than the offence itself permits.

[42] I also consider that the Judge erred in his assessment of two mitigating factors. One is the impulsiveness of Mr Brittin's act. The Judge said:

> [7] I have a pre-sentence report which tells me that you are 21 and that you acted in the heat of the moment. You may well have acted in the heat of the moment but in that moment you did an act which, by your plea, was intended to harm. The effect has been to humiliate, belittle, embarrass and undermine your victim.

[43] Nothing more was said about the impulsiveness of the act. And, as I will come to, no weight was attached to Mr Brittin's age at the time of the offence. What was set against the impulsiveness was the intention and effect of the act. But again, at least a substantial part of what the Judge referred to in that regard is inherent in the offence. The impulsiveness of Mr Brittin's act should have been given some weight. It does not require flights of fancy to anticipate that there will be offences against this Act where there are a number of carefully planned digital postings over an extended period of time and which are designed, with calculation, to seek to inflict emotional distress of the most severe type and which do so. Mr Brittin's culpability falls well short of those sorts of aggravating intentions, acts and consequences.

[44] Impulsiveness ties in with the other mitigating factor – Mr Brittin's age. He had his 20th birthday approximately three months before this offence occurred. The Sentencing Act requires the Court on sentencing to take into account the age of the offender to the extent that age is applicable in the case.[11] The relevance of youth in sentencing was discussed by the Court of Appeal in some detail in *Churchward v R.*[12]

[45] Mr Brittin's age has a material bearing on the circumstances leading to the offence and on Mr Brittin's culpability. The Judge, in his assessment of personal mitigating factors, said that he would not give any credit for Mr Brittin's age (which the Judge recorded as 21, being Mr Brittin's age at the date of sentencing). In my judgment Mr Brittin's age at the time of the offence, considered in the factual

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11 Sentencing Act 2002, s 9(2)(a).

12 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77]-[78].

context coupled with the impulsive nature of the offence, are factors which should have been put into the balance as factors mitigating the offending.

Other cases

[46] There appear to be three publically available District Court sentencings for offences against s 22 in addition to the three considered by the Judge.[13] The facts of those cases are too far removed from the facts of the present case to be of material assistance.

[47] Some observations are appropriate on two of the cases referred to by Judge Mabey, *Tamihana* and *Kelly*.

[48] The Judge said that Mr Tamihana had sent intimate photographs of his former partner to her mother, with the comment "what your daughter's really up to" and that the sentence was nine months imprisonment. What Mr Tamihana sent to his former partner's mother was a video recording of his former partner in sexual activity with a person who was not Mr Tamihana.[14] That was worse, assessed in relation to the elements of the offence, than sending "intimate photographs". In addition, the end sentence was not, as the Judge said, nine months imprisonment. That was the starting point for the offence.[15] Mr Tamihana was sentenced at the same time for three other offences, there was an uplift from the starting point of three months for the totality of the offending, a further three months were added for previous convictions, and 25 per cent deducted for guilty pleas. This resulted in an end sentence of 11 months imprisonment.

[49] The starting point in *Kelly* was also nine months imprisonment.[16] In the present case Judge Mabey said that Judge Cook, in *Kelly*, had considered that Mr Kelly's offence was less serious than that of Mr Tamihana. Judge Cook had

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13 *R v Faulkner* [2017] NZDC 10417; *Police v Hopkins* [2016] NZDC 15579; and *Police v Bust* [2016] NZDC 4391. There is a decision of this Court, on appeal, in *Police v B* [2017] NZHC 526, [2017] 3 NZLR 203. It was not concerned with sentencing, but with what is sufficient evidence to prove that harm has been caused. There is a helpful discussion of the law reform background to the introduction of the Bill, with the focus being on the Law Commission's discussion of "harm" and the definition of harm in the Act.

14 *Police v Tamihana*, above n 4, at [9].

15 *Police v Tamihana*, above n 4, at [20].

16 *Police v Kelly*, above n 5, at [9].

considered that the information posted by Mr Kelly – the photographs of the victim naked in the shower – was less harmful than the video sent by Mr Tamihana, but that the nature of the posting was more harmful because it was a posting to Facebook, rather than to a single person as in Mr Tamihana's case.[17]

[50] I agree with Judge Mabey that Mr Brittin's actions were worse than those of Mr Tamihana and Mr Kelly. But I do not consider that Mr Brittin's culpability, including the harm inflicted, justified a starting point double that assessed in the other cases.

Conclusion on the starting point

[51] Taking account of the various matters discussed to this point, I consider that the gravity of Mr Brittin's offence, as best as that can be assessed in relative terms against the worst type of offending that is likely to occur, is at about the midpoint; that is, around 12 months imprisonment. In making that assessment I have also had regard to the fact that 12 months imprisonment is a lengthy term of imprisonment when assessed against the maximum of 24 months.

[52] The difference between a starting point of 12 months and one of 18 months is a disparity that indicates that the starting point of 18 months imprisonment was manifestly excessive. As a result, in terms of s 250(2) of the Criminal Procedure Act 2011, a different sentence should be imposed.

[53] A sentence of imprisonment assessed from a starting point of 12 months would be seven months imprisonment. This results from a credit of three months for personal factors and 20 per cent for the guilty plea. The Judge's credit of three months for personal factors was calculated by reference to a starting point of 18 months. In the circumstances of this case, including appropriate weight to all personal mitigating factors outlined in the pre-sentence reports (there were two of relevance), I do not consider it necessary to reduce that credit, notwithstanding the fact that it is assessed against a starting point of 12 months imprisonment rather than 18.

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17 *Police v Kelly*, above n 5, at [7] and [9].

Home detention

[54] The Judge's reasons for declining home detention are recorded above at [15]. In my opinion the Judge's approach was wrong in principle.

[55] The following principles, contained in the Sentencing Act and leading cases, are relevant:[18]

(a) Imprisonment is a measure of last resort.[19]

(b) A sentence of home detention is a severe sentence, second only to a sentence of imprisonment in the hierarchy of offences in s 10A of the Sentencing Act.

(c) When considering the imposition of a sentence of imprisonment, the Court *must* have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.[20]

(d) When a Court is considering sentencing for the purposes of deterrence, accountability and denunciation, amongst other purposes, it must not impose a sentence of imprisonment unless it is satisfied that those purposes cannot be achieved by a sentence other than imprisonment and no other sentence would be consistent with the application of the principles in s 8 of the Act.[21]

(e) A sentence of home detention carries with it in considerable measure the principles of deterrence and denunciation.[22]

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18 This summary is taken in large measure from *Fairbrother v R* [2013] NZCA 340 at [23]-[29].
19 *R v Rawiri* [2011] NZCA 244, (2011) 25 CRNZ 254 at [18].
20 Sentencing Act 2002, s 16(1).
21 Sentencing Act 2002, s 16(2).
22 *R v Iosefa* [2008] NZCA 453 at [41].

(f) It is an error of law if the purpose of deterrence has been given complete priority without regard to any of the countervailing purposes of sentencing.[23]

(g) One of the purposes of sentencing is to assist in the offender's rehabilitation.[24]

(h) The judge must make a considered and principled choice between the two forms of sentence, recognising that both serve the principles of denunciation and deterrence, and identifying which of them better qualifies as the least restrictive sentence to impose taking into account all the purposes of sentencing.[25]

[56] The reasons for my conclusion that the Judge's approach was wrong are that he did not give adequate weight to the principles recorded in the preceding paragraph. At a broad level, the Judge did not make a considered and principled choice between the two forms of sentence in the manner recorded in the citation from *Fairbrother*.

[57] It seems apparent that the Judge has not had regard to s 16(2) of the Sentencing Act, summarised above at [55](d). The Judge's entire focus, in the assessment of home detention, was deterrence. There was a failure to weigh other purposes and principles of sentencing.

[58] In addition, in my opinion the Judge was wrong to give weight only to deterrence when considering the alternative of home detention, and in giving weight both to individual as well as general deterrence. As already noted, in discussing the starting point, there was no information before the Court warranting imposition of a severe sentence for the purpose of individual deterrence. As also discussed, weight was required to be given to general deterrence for the purpose of fixing a starting point. As a matter of law, general deterrence is something that might also be weighed at the second stage, when assessing home detention, but to bring it in again

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23 *Manikpersadh v R* [2011] NZCA 452 at [17]-[19].
24 Sentencing Act 2002, s 7(1)(h)
25 *Fairbrother v R*, above n 18, at [30].

as the essential reason for declining home detention was a material error. It meant in this case that a person not in need of individual deterrence did not receive the sentence of home detention which would otherwise have been justified, in order to send a message to other people. In my judgment that is wrong.

[59] Given these conclusions, the sentence that I consider should have been imposed in the District Court would have been one of home detention assessed against the alternative short-term sentence of imprisonment of seven months. The length of a sentence of home detention is generally around half the length of the prison sentence that would otherwise have been imposed. This is because the release date of a short-term prison sentence is the date on which half the sentence has been served.[26] But more than half the length of the prison sentence for the home detention sentence may be warranted for punitive purposes of sentencing. More than half would have been warranted for denunciation, given what Mr Brittin did, and the severe harm undoubtedly caused to the victim in consequence, with this harm likely to be long lasting. I would have imposed a sentence of six months home detention.

[60] It is not possible, at this time, to quash the sentence of imprisonment and impose an appropriate sentence of home detention because there is no current home detention report. Had it been possible to impose the home detention sentence at this date, the appropriate sentence now would have been a sentence of home detention of one month. It could not have been six months because Mr Brittin has already served more than ten weeks of the prison sentence, having been committed on sentencing on 24 July 2017. The adjusted period of one month takes account not only of the fact that Mr Brittin has already served approximately two-and-a-half months of a prison sentence, but also the fact that his release date will be in approximately one month from the date of this judgment.

[61] As there is no present home detention report, the appropriate course is to grant leave to Mr Brittin to apply to the District Court under s 80I of the Sentencing Act for cancellation of the sentence of imprisonment that I will impose and substitution of a sentence of home detention if Mr Brittin finds a suitable residence at a later date. This course is the one sought by Mr Tuck on Mr Brittin's behalf.

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[26] Parole Act 2002, s 86(1).

Result

[62] The sentence of 12 months imprisonment is quashed.

[63] A sentence of seven months imprisonment is imposed.

[64] Pursuant to s 80I of the Sentencing Act 2002, Mr Brittin is granted leave to apply to the District Court for cancellation of the sentence of imprisonment of seven months and substitution of a sentence of home detention if Mr Brittin finds a suitable residence for home detention. If such an application is made and granted, the length of the sentence of home detention shall be calculated by deducting from 30 days the number of days between the date of this judgment and the date on which the sentence of home detention commences provided that the sentence of home detention, in accordance with s 80A(3) of the Sentencing Act, shall not be less than 14 days.

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Woodhouse J