ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF VICTIMS PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA847/2013
[2014] NZCA 272

BETWEEN	DAVID ROBERT GILMOUR ROSS Appellant
AND	THE QUEEN Respondent

Hearing:	11 June 2014
Court:	French, Venning and Mallon JJ
Counsel:	G L Turkington for Appellant M D Downs for Respondent
Judgment:	25 June 2014 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal against sentence is dismissed.

B Order prohibiting publication of names, addresses, occupations or identifying particulars of victims pursuant to s 202 Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Venning J)

[1] David Ross was responsible for loss in excess of $115 million of investor funds. He was charged with, and pleaded guilty to, four representative charges of false accounting and a further representative charge of theft by a person in a special

relationship.[1] He also pleaded to charges of supplying false information, dishonestly obtaining authorisation to act as an authorised financial adviser and acting as a broker without registration.[2]

[2] On 15 November 2013 Judge Denys Barry sentenced Mr Ross to eight years' imprisonment on the charges of false accounting under s 260 of the Crimes Act 1961 and two years, 10 months on the other Crimes Act charges.[3] The sentence of two years, 10 months was cumulative, leading to an overall sentence of 10 years, 10 months' imprisonment. The Judge also imposed a minimum period of imprisonment (MPI) of five years, five months. The MPI was structured in accordance with this Court's decision of *Van Wakeren v R* by four years being imposed on one charge under s 260 and a cumulative one year, five months being imposed on the theft charge.[4]

Background

[3] Mr Ross was a financial adviser for approximately 23 years. He offered investment and fund management services through Ross Asset Management Ltd (RAM). He was the sole director of RAM and solely responsible for decision-making in respect of its operations. He instructed administrative staff employed by the company to enter false security transactions into its computer systems. The false security transactions were recorded as being conducted through a fictitious broker named Bevis Marks.

[4] Between approximately 30 June 2000 and 30 September 2012 Mr Ross caused fictitious transactions for securities held by Bevis Marks to be entered into RAM's computer system. The transactions purported to show profits of some $351 million. Between the same dates he caused fictitious transactions accounting for the closing position in relation to securities held by Bevis Marks totalling some $385 million to be entered into the system.

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1 Crimes Act 1961, ss 252 (prior to 1 October 2003), 260 and 220.
2 Financial Markets Authority Act 2011, s 61(1); Financial Advisers Act 2008, s 136; and Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 11.
3 *Serious Fraud Office v Ross* DC Wellington CRI-2013-085-7462, 15 November 2013.
4 *Van Wakeren v R* [2011] NZCA 503 at [72]–[87].

[5] RAM provided quarterly investment reports to its investors generated from its computer system. The false accounting hid losses from investors and/or overstated the performance of some investors' portfolios. Information contained in the quarterly investment reports was instrumental in attracting new investors and/or causing existing investors to either maintain their existing investments or invest further funds with the company. RAM's management fees and commissions were also calculated based on the fictitious amounts. Between 1 October 2003 and 31 October 2012 Mr Ross had control of over $200 million of investor funds through RAM. Mr Ross used the funds primarily to repay investments of other investors in the mode of a classic Ponzi scheme. Some funds were also used for business expenditure. Investors in RAM from both New Zealand and overseas lost over $115 million as a result of Mr Ross's actions.

[6] The less serious offending prosecuted by the Financial Markets Authority (FMA) related to Mr Ross's failure to apply to be registered to provide broking services, making a false declaration when applying for authorisation as an accredited financial adviser and, on a later occasion, providing false investment reports in response to a notice from the FMA.

[7] Mr Ross's offending was discovered in November 2012 when the FMA obtained asset preservation orders and receivers and managers were appointed for Mr Ross, RAM and other associated entities following complaints from a number of investors about Mr Ross's handling of their funds. RAM and the associated entities were subsequently placed in liquidation.

[8] In November 2013 Mr Ross and his wife settled claims against Mrs Ross by the liquidators and receivers. Mr Ross assigned all assets over which he held an interest, save for his wife's claim for a half share to the matrimonial home held by family trusts. Mr Ross remains personally liable for the investor losses but there is no prospect of any further recovery of significance from him.

[9] Mr Ross accepted his offending and pleaded guilty at an early stage. He read a letter to the Court at sentencing expressing his profound sorrow at what he had done.

The Judge's sentencing

[10] Mr Ross pleaded guilty after Judge Hobbs had given him a sentencing indication of an end sentence of in excess of 10 years with a minimum period of imprisonment of six years.[5]

[11] Judge Barry considered that the particularly aggravating feature of Mr Ross's offending was its scale. With overall losses at around $115 million, at least 700 victims and a sustained period of offending of over 12 years, it was at the most serious level of commercial fraud in New Zealand. The Judge took a starting point of 16 years. He then applied a 10 per cent or 19 month reduction to take account of Mr Ross's remorse, which he accepted was genuine (albeit manifest only after the involvement of the FMA), cooperation with authorities, the nominal reparation and Mr Ross's fragile health. He accepted Mr Ross was suffering from depression triggered by the reality of his position. The Judge also took into account that a long prison sentence was more difficult for an elderly person. Mr Ross was 63 at the time of sentence.

[12] The Judge then gave a full discount of 25 per cent for the early guilty plea, leading to an end sentence of 10 years, 10 months' imprisonment. As the lead offending under s 260 of the Crimes Act carried a maximum of 10 years' imprisonment, he imposed a sentence of eight years on the lead offences and imposed sentences of two years, 10 months, concurrent with each other but cumulative on the eight year sentence, on the other Crimes Act charges.

[13] On the Financial Markets Authority Act 2011 and Financial Advisers Act 2008 charges, which carried fines only, Mr Ross was convicted and discharged as a fine was untenable. On the charge under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 Mr Ross was sentenced to eight months' imprisonment, also concurrent.

[14] The Judge then considered whether to impose a minimum period of imprisonment. He considered that Mr Ross's offending was sufficiently serious that

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5 *Serious Fraud Office v Ross* DC Wellington CRI-2013-085-6852, 22 August 2013.

the ordinary minimum length of imprisonment would not be enough to denounce, deter or effectively punish the offending. He accepted there was no issue about community safety or protection but still fixed the MPI at 50 per cent of the end sentence, which led to the MPI of five years and five months.

[15] The Judge also ordered reparation in terms of the deed agreed by the parties providing for whatever assets Mr Ross had to go to the receivers.

The appeal

[16] Mr Turkington accepted it was open to Judge Barry to impose an MPI but submitted the Judge erred in imposing an MPI of five years, five months' imprisonment, which was 50 per cent of the overall term of imprisonment.

[17] Mr Turkington submitted that in arriving at the MPI the Judge failed to consider all relevant factors, particularly Mr Ross's personal circumstances. He argued that having regard to Mr Ross's cooperation with authorities, remorse, efforts at reparation, early guilty plea, age and health the MPI should have been no more than four years. He emphasised the need for the Court to consider Mr Ross's rehabilitation in his twilight years.

[18] In his written submissions Mr Turkington noted that the closest comparable sentence for fraud was that imposed in *R v Swann*, where the fraud allegations had been contested.[6] Stevens J imposed an MPI of four years and six months, just under 50 per cent of Mr Swann's total sentence of nine years, six months' imprisonment. But Mr Swann was only 47 years old. Mr Turkington submitted that considerations of accountability, deterrence and denunciation fell away in the present case and the minimum period of five years, five months dashed all hope. It was a crushing sentence for Mr Ross at the age of 63.

Decision

[19] Although Mr Turkington accepted the imposition of an MPI was open to the Judge we note that the wording of the Sentencing Act changed over the period of

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6 *R v Swann* HC Dunedin CRI-2007-012-4181, 11 March 2009.

Mr Ross's offending. From the commencement of the Sentencing Act 2002 until 6 July 2004, in order to impose an MPI the court had to be:[7]

> satisfied that the circumstances of the offence are sufficiently serious to justify a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002.

[20] From 7 July 2004 the test was altered to the following:[8]

> (2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:—
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> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
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> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.

[21] The offending in the present case extended from 30 June 2000 to 30 September 2012. The MPI was imposed on the offending that occurred after 1 October 2003, so most of the offending occurred in the period after the amendment to s 86(2) came into force on 7 July 2004. However, to the extent that an MPI could only have been imposed if the court was satisfied the circumstances of the offence were sufficiently serious to justify an MPI, the test is satisfied because the circumstances of the offending in this case, as noted above at [11], take the offending well beyond the ordinary range of offending for even serious or complex fraud.[9]

[22] Mr Turkington focussed his submissions on the wording of s 86(2) that applied after 7 July 2004. He submitted the Judge had failed to take into account the considerations referred to by this Court in *R v Gordon*:[10]

> [48] At the second stage of the sentencing inquiry, where a minimum period of imprisonment is being considered, it is necessary to reconsider all of the sentencing principles in ss 7, 8 and 9. Judge Taumaunu identified a

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7 Sentencing Act 2002, s 86(2) as it applied from 30 June 2002 to 6 July 2004.
8 Sentencing Act, s 86(2) as it applied from 7 July 2004.
9 See *R v Brown* [2002] 3 NZLR 670 (CA).
10 *R v Gordon* [2009] NZCA 145.

> number of mitigating features, which together justified a discount of 25% from his starting point. Those factors included the appellant's early guilty plea and genuine remorse, previous good character, a period of service in the army, and difficult personal circumstances which it is unnecessary to canvass here. Taken in combination, factors such as those would ordinarily suggest a minimum period of imprisonment falling short of the maximum two-thirds of the finite sentence, despite the undoubted gravity of the offending.

[23] However, while the Judge did not expressly refer again to Mr Ross's guilty plea, remorse and personal factors when considering the imposition of the MPI, he was clearly aware of those factors having taken them into account when fixing the lead sentence. We are satisfied the Judge would have taken them into account, to the extent he could, when imposing the MPI in this case.

[24] We say to the extent he could because we also accept the force of Mr Downs' submission that in this case Mr Ross's personal circumstances were outweighed by the gravity of his offending. As this Court went on to observe in *R v Gordon*:

> [49] … there may be cases in which the circumstances of the offending are of such gravity as to completely outweigh factors personal to the offender, … .

[25] We do not agree with Mr Turkington's submission that the Court's observation should be restricted to instances of serious sexual offending. The point is that if the offending is serious enough of its type (whether it be sexual, fraud or otherwise) the circumstances of it can outweigh considerations of the offender's personal circumstances.

[26] While accepting in this case that there was no need to deter Mr Ross from further offending or to protect the community any further, nevertheless an MPI of a sufficient length was required to hold Mr Ross accountable for the harm done to the numerous victims (some 772) and the community generally by the losses caused and also to denounce his dishonest conduct over such a lengthy period of time. The Judge could have imposed an MPI of up to two-thirds but instead chose a rather more merciful figure of 50 per cent.

[27] As noted, an MPI of just under 50 per cent was imposed in the case of Mr Swann's offending, and in *R v McKelvy* this Court upheld an MPI of 62.5 per

cent imposed for dishonesty offending.[11] In upholding the imposition of a minimum term of five years' imprisonment on a sentence of eight years for Mr McKelvy's fraud, the Court observed:

> [44] We disagree with Ms Baigent that Heath J failed to turn his mind to the sentencing principles set out in ss 7, 8 and 9 of the Sentencing Act 2002 when setting the length of the minimum non-parole period. He clearly did so, and did so fully, in the course of determining the appropriate sentence for the appellant. It is disingenuous to suggest that those principles were then overlooked when it came to determining the length of the non-parole period to be applied. Given that Heath J categorised this offending as among the most serious of this type, and found that community protection was required, a non-parole period four months shorter than the maximum two-thirds allowed under the Sentencing Act cannot be considered manifestly excessive. The appeal must also fail on this point.
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> [45] In summary, the end sentence of eight years imprisonment, with a minimum non-parole period of five years, cannot possibly be said to be manifestly excessive.

Conclusion

[28] We are satisfied that, in the context of this offending, even taking account of Mr Ross's personal circumstances (to the extent we can) and the considerations under ss 7, 8 and 9 of the Sentencing Act, it was well open to the Judge in this case to impose an MPI of 50 per cent. It cannot be said to be manifestly excessive.

Result

[29] The appeal against sentence is dismissed.

[30] We make an order prohibiting publication of the names, addresses, occupations or identifying particulars of the victims pursuant to s 202 of the Criminal Procedure Act 2011.

Solicitors:
Chapman Tripp, Wellington for Appellant
Crown Law Office, Wellington for Respondent

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11 *R v McKelvy* [2007] NZCA 340.