IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CRI-2019-419-000086
[2020] NZHC 94

BETWEEN	THE QUEEN Appellant
AND	LB Respondent

Hearing: 3 February 2020

Counsel: JN Hamilton for Appellant
RP Boot for Respondent

Judgment: 7 February 2020

JUDGMENT OF DOWNS J

This judgment was delivered by me on Friday, 7 February 2020 at 4 pm.

Registrar/Deputy Registrar

Solicitors:
Crown Law, Wellington.
Crown Solicitor, Hamilton.
Gavin Boot Law, Hamilton.

A Crown appeal

[1] Between 1994 and 1998, Mr LB repeatedly raped his younger cousin.[1] Mr LB also repeatedly violated her with his fingers. On one occasion, Mr LB forced the victim to suck his penis until he ejaculated. Mr LB was aged between 14 and 18 years; the victim 12–16. She later attempted suicide, more than once. In 2018, the offending came to light. Mr LB pleaded guilty. He has not committed any further offences.

[2] Judge D C Clark adopted a starting point of 11 years' imprisonment. The Judge mitigated this by 76 percent for personal factors; then a further 25 percent for Mr LB's guilty pleas. This left a notional sentence of two years' imprisonment. The Judge commuted this to 12-months' home detention. So, an 11-year starting point for serious sexual offending became a sentence other than imprisonment.

[3] The Crown appeals. The Solicitor-General contends the Judge erred and the sentence is manifestly inadequate. Mr LB resists this analysis. He contends his sentence should stand.

The facts

[4] Mr LB first sexually violated the victim when he was 10 and she eight. He did so at a family function. Mr LB pulled aside the victim's underwear and inserted a finger to her vagina. Mr LB then tried unsuccessfully to penetrate her with his penis. This incident did not form part of the sentencing mix as Mr LB was too young to be criminally responsible.

[5] In late 1994, cousins were playing hide and seek at an uncle's home. Mr LB told the victim he wanted to "do it to her again". Mr LB pulled the victim to the floor, kissed her, pulled her underwear down and then inserted his fingers to her vagina. Mr LB then forced his penis into her vagina. He later ejaculated inside her. The same day, Mr LB again inserted his fingers to the victim's vagina. Mr LB also forced the victim to suck his penis until he ejaculated in her mouth. Mr LB was 14; the victim 12.

---

[1] Mr LB does not have name suppression, but the victim expressed a concern she may be identified if his name were not anonymised in this judgment.

[6] A few months later, Mr LB and the victim were on holiday with their families. Mr LB repeatedly followed the victim to remote locations. There, he inserted his fingers and then penis to her vagina.

[7] This became a pattern. It happened regularly for four years. The victim told the defendant many times she did not want him to do this, as it hurt and she may become pregnant.

[8] Mr LB's final act of rape occurred in the victim's bedroom in October 1998. Mr LB was 18; the victim 16.

[9] In November 2018, members of the victim's family confronted Mr LB. He acknowledged the offending. Police became involved months later. On 18 June 2019, Mr LB admitted almost all the offending. Charges were laid 11 July 2019. Mr LB pleaded guilty 30 August 2019. He was then 39.

[10] The agreed summary of facts says Mr LB "expressed extreme remorse for his actions".

Victim impact

[11] Victim impact is significant. The victim describes fear and intimidation over "many years", hypervigilance, loneliness, isolation, anxiety, depression and repeated suicide attempts—one after seeing Mr LB in a shop. In 2019, the victim was diagnosed with post-traumatic stress disorder. She experiences flashbacks and anxiety. She requires medication to sleep. Unsurprisingly, the victim considers Mr LB stole her childhood.

Pre-sentence report and other matters

[12] Mr LB is married with three children.

[13] His pre-sentence report describes "a good and pro-social upbringing [by] his parents and family" and says Mr LB has not been the victim of any sexual violence.

However, the report says Mr LB suffered "violent and abusive" experiences at school. He has sought counselling for these.

[14] Mr LB told the pre-sentence report writer the offending gave him "a sense of belonging". He also said he then believed the victim "was wanting to participate too".

[15] The report recommended imprisonment given the "severity of Mr LB's historical offending" or, failing that, home detention.

[16] Mr LB offered to attend a restorative justice meeting. The facilitator considered this could be detrimental to the victim's position, so no meeting took place.

Sentencing

[17] The Crown sought a starting point of 15 years' imprisonment. Mr LB advocated the much lesser starting point of 10 years' imprisonment. The Crown acknowledged Mr LB's then youth, subsequent good character, and guilty pleas constituted mitigating factors. Mr LB sought discounts for those and for:

(a) Remorse.

(b) Mr LB's preparedness to attend a restorative justice meeting.

(c) His offer of $10,000 for emotional harm.

Each was advanced as warranting discrete discount.

[18] Mr LB did not enjoin home detention, at least in his (lawyer's) written submissions. These presupposed a sentence of imprisonment, albeit one mitigated by the factors above.

[19] Judge Clark adopted a starting point of 11 years' imprisonment. The Judge treated the offending as within band two of *R v AM*.[2] *AM* is the Court of Appeal's guideline sentencing judgment in this area. It articulates four sentencing bands for

---

2 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

rape. Band one is the least serious; band four the most serious. The Judge was influenced by two decisions in which a 10-year starting point was adopted for historical sexual offending by a teenager,[3] and Mr LB's age throughout the offending.

[20] The Judge mitigated the starting point by 76 percent for personal factors, including 40 percent for youth. These discounts reduced the starting point to 31.7 months, which the Judge rounded down to 31 months.

[21] Many discounts overlapped. Sixteen percent was allowed for remorse, Mr LB's willingness to attend a restorative justice meeting, and "personal circumstances". An additional 10 percent was deducted for Mr LB's willingness to pay $10,000 reparation.

[22] The Judge discounted the 31-month figure by 25 percent because Mr LB pleaded guilty promptly. This resulted in a notional sentence of two years' imprisonment. The Judge commuted it to home detention. The Judge did not address s 128B(2) of the Crimes Act 1961, which creates a presumption of imprisonment for the offence of sexual violation.

A precis of the competing cases

[23] The Solicitor-General contends the Judge made several errors. She argues the offending was governed by band three of *AM*, not band two; and a starting point of not less than 13 years' imprisonment was required. The Solicitor-General submits the Judge double-counted Mr LB's youth by modifying the starting point for this feature and then deducting a further 40 percent. Relatedly, the Solicitor-General contends the Judge erred in her approach to mitigating features:

> The unmodified aggregation of mitigating factors, many of which were overlapping, led to a home detention sentence for rape that was manifestly inadequate. The learned District Court Judge's approach of simply adding together credit for mitigating features resulted in a grossly excessive reduction from an already inadequate starting point. While there were several mitigating features that warranted credit in Mr LB's case, the Crown submits that the repeated rape of a vulnerable family member over an extended period of time called for a sentence closer to four years' imprisonment.

---

3 *B v R* [2016] NZHC 1511 and *R v Bradnock* [2014] NZHC 2575.

[24] Finally, the Solicitor-General contends the Judge wrongly imposed home detention notwithstanding the presumption of imprisonment.

[25] Mr LB contends the Judge did not err. He emphasises the discretionary nature of the sentencing jurisdiction and the Court of Appeal's recent reiteration of this feature in *Zhang v R*[4] and *Orchard v R*.[5] Mr LB argues his case warrants home detention.

Principle

[26] A sentence appeal must be allowed if the Court is satisfied there is an error in the sentence and a different one should be imposed.[6] Crown appeals in this context are not for borderline cases: "Their legitimate scope is confined to cases where there is a solid ground for treating a sentence as manifestly inadequate or inappropriate".[7] So, considerations justifying an increase in sentencing must be more compelling than those justifying a reduction. Care must be taken not to countermand the legitimate exercise of a Judge's sentencing discretion, especially when the Judge has been (properly) merciful.[8] All this is well-known.

Analysis

Did the Judge err when fixing the starting point?

[27] The Judge was influenced by two decisions: *B v R*[9] and *R v Bradnock.*[10] In *Bradnock*, Keane J adopted a 10-year starting point for similar, but less serious, sexual offending. The Judge treated Mr Bradnock's age at the time of the offending—14–18 years—as affecting the starting point. There was no appeal. In *B*, Judge Ingram adopted a 10-year starting point for historical sexual offending against four young victims. The defendant was then 13–17. The starting point was not disturbed on appeal.

---

4 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
5 *Orchard v R* [2019] NZCA 529.
6 Criminal Procedure Act 2011, s 250.
7 *R v Cargill* [1990] 2 NZLR 138 (CA) at 140.
8 *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 550.
9 *B v R* [2016] NZHC 1511.
10 *R v Bradnock* [2014] NZHC 2575.

[28] Both cases involved less serious offending than Mr LB's, and *B* is distinguishable. *B* did not involve rape; the case fell under *AM's* lesser unlawful sexual connection bands. The final sentence in *Bradnock* was six years' imprisonment; like Mr LB, he pleaded guilty. But, as observed, Keane J did consider the defendant's age relevant to starting point. Judge Clark did likewise.

[29] Orthodox sentencing methodology treats youth as a mitigating factor, hence a deduction from the starting point *after* it is settled. The Court of Appeal has consistently exhorted this approach, and for good reason. It promotes structure and consistency. It also promotes transparent reasoning; the offender, victim and public readily know what discounts have been applied to a sentence, and why. This is no little thing. In *B*, the High Court was invited to revisit this approach. It was argued historical sexual offending by a teenager was not amenable to *AM's* bands, and it was wrong to imprison a defendant who had since led an entirely blameless life. Cases of this type, it was contended, should be treated differently, and perhaps as a special category of their own. Katz J held *AM* governed the offending and was binding.

[30] Mr B sought leave to appeal to the Court of Appeal.[11] He argued the orthodox approach should be revisited, and youth directly relevant to the selection of a starting point for historical sexual offending:[12]

> Mr Tuck argues the existing authorities on sentencing for sexual offending are not sufficiently flexible to accommodate a case such as this one, where the offending occurred at a very young age and the offender—now in his late twenties—has not offended since. In Mr Tuck's submission, the adult starting point mandated by *R v AM(CA27/2009)* is so high it prevents a sentencing judge from imposing what would be the appropriate sentence, namely a community-based sanction. Mr Tuck contends the lengthy period of imprisonment imposed on B is unfair.

[31] The (Permanent) Court of Appeal disagreed:[13]

> Contrary to Mr Tuck's submissions, we do not consider the test is met in this case. In our view, the existing authorities already accommodate the general concerns he raises. The impact the youth of an offender may have on sentencing has already been comprehensively reviewed by this Court in the decision of *Churchward v R*. That decision applies to all types of offending,

---

11 *B (CA343/2016) v R* [2016] NZCA 483.
12 At [7].
13 At [10]–[12] (footnotes omitted).

> including serious sexual offending. Further, there is no upper limit on the discount that may be given at sentencing on account of youth.
>
> We note too that it is open to a sentencing judge to give a discount for good character in recognition of an offender's clean record after the offending. The decision of this Court in *Lennon v R*, which involved similar facts to the current case, is a case in point. In *Lennon* the Court allowed a discount of one-third for youth and a further discount of one year for good character. Another case similar to B's case is the decision of *Overton v R*, where a two-year discount was allowed on account of youth.
>
> We also agree with the Crown submission that orthodox sentencing methodology provides sufficient flexibility to allow youth to be taken into account, but ensures this is done in a structured, principled and hence transparent way. Transparency in sentencing is important. Mr Tuck's submissions also ignore the comments made by the Court in *R v AM(CA27/2009)* that sentences should reflect personal factors, expressly including youth, and that the point of guidelines is not to impose a straitjacket on sentencing judges.

[32] The Court of Appeal's judgment in *B* was not cited to Judge Clark; only the High Court judgment. Nor was the Court of Appeal's decision in *Alletson v R*, in which the same argument was also rejected:[14]

> Mr Goodwin said that the starting point needed to reflect this. He referred to the decision of this Court in *R v Mako* [2000] 2 NZLR 170 at [34], where the Court described the starting point as "the sentence considered appropriate for the particular offending (the combination of features) for an adult offender after a defended trial". That was adopted in the later decision of this Court in *R v Taueki* [2005] 3 NZLR 372 at [8]. In *R v Takiari* [2007] NZCA 273 this Court adopted the starting point appropriate for an adult and then treated youth as a mitigating factor, which ensures that it is appropriately recognised in the final sentence. We consider this to be the correct sentencing methodology.
>
> That means that the approach adopted by the Judge in this case was correct, and the issue is therefore whether the discount which she gave was appropriate. As noted, she intended to give a discount of 30 per cent but in fact gave a discount of 43 per cent. This is clearly more than adequate recognition of the appellant's youth at the time of the offending.

[33] This is not to overlook possible counterpoint. In the 2012 case of *V v R*,[15] the Court of Appeal adopted a nine-year starting point for historical sexual offending by a teenager. However, there was expert evidence in that case the defendant was "hypersexual" at the time he committed the offences.[16]

---

14 *R v Alletson* [2009] NZCA 205 at [67]–[68].
15 *V (CA400/2012) v R* [2012] NZCA 465.
16 The victim in that case did not want her brother imprisoned either.

[34] Nor is this to treat Mr LB's age as irrelevant to the starting point. Band four of *AM* requires starting points of between 16 and 20 years' imprisonment.[17] The band has as its "paradigm" the "repeated rapes of one or more family members over a period of years".[18] This is what Mr LB did. However, other aggravating factors associated with the paradigm are not present. The paradigm presupposes an adult offender. Mr LB was not an adult for most of the offence period. The paradigm also presupposes the offender is the victim's parent or caregiver. Mr LB was neither. Consequently, there was no *gross* breach of the victim's trust, albeit a breach. The victim was entitled to look to an older cousin for protection, not trauma.

[35] Band three requires starting points between 12 and 18 years' imprisonment. It captures cases with aggravating features at a relatively serious level, including those in which two or more of these factors are present to a high degree. Band two has starting points between 7 and 13 years' imprisonment. It is reserved for cases of moderate seriousness only.

[36] Mr LB's offending had several aggravating factors, including some very bad ones. The victim was vulnerable because of her age. She was not appreciably less so because Mr LB was only two years older. The offending continued for four years. It involved three distinct species of violation, two repeated frequently. As observed, Mr LB breached the victim's trust as her older, male cousin. The offending had at least an element of planning or premeditation: Mr LB *followed* the victim to remote locations to commit almost all the offences. And the victim has suffered significant harm.

[37] At first instance, the Crown advanced a starting point of 15 years' imprisonment. This was too high for the reasons at [34]. On appeal, the Solicitor-General offers a recalibrated figure of 13 years' imprisonment. This level of sanction captures the aggravating factors described. It is also consistent with pre-*AM* decisions founded on an earlier, now spent, guideline judgment.[19] However, rarely is

---

17 In *R v Jeffries* [2012] NZCA 608, the (Permanent) Court of Appeal held *AM* applied to sexual violation offences governed by the 20-year maximum penalty, thus to offending from 1993. The prohibition on retrospective penalties was held not to be engaged because of the increase to the maximum penalty to 20 years' imprisonment from 1 September 1993.

18 *R v AM (CA27/2009)*, above n 2, at [109].

19 *R v H (CA789/2008)* [2009] NZCA 77 at [7].

one figure the only available starting point. Sentencing typically anticipates a range of available starting points, thus the expression used by criminal courts of a sentence or starting point being within or beyond "the available range". A starting point of 13 years' imprisonment was available. So too, contrary to the submission of the Solicitor-General, a 12-year starting point.

[38] The significance of these figures is that they represent the cusp between bands two and three, which is where this offending should have been placed. The offending could be treated as either a very bad band two case, or a band three case toward the bottom of that band. Mr LB's offending provides a good example of why the *AM* bands overlap. It follows an 11-year starting point was outside this range, and inadequate.

[39] The point can be explained this way. The maximum penalty of 20 years' imprisonment applies to a single act of sexual violation. Eleven years' imprisonment is only little more than half the statutory maximum despite Mr LB's commission of many rapes and other violations of a victim who has suffered greatly.

[40] A 12-month error in the context of Crown appeal against sentence would not necessarily be significant for the reasons at [26]. But, as will be apparent, the Solicitor-General contends the Judge made other errors too, which, taken together, have produced a manifestly inadequate sentence.

Did the Judge err in relation to mitigating features?

[41] The Judge mitigated the starting point by 50 percent for Mr LB's youth and subsequent good character.

[42] Contrary to popular misconception, a discount for youth is not automatic. It requires the presence of a feature or features referable to the defendant's age at the time of the offence. For example, the offending may constitute a youthful indiscretion or impulsive act.[20] Or, a young person may be influenced by older offenders to have

[20] *Arahanga v R* [2014] NZCA 379.

committed the offence.[21] Sometimes the discount reflects greater rehabilitative prospects,[22] or the potentially harsher effect of prison on an adolescent.[23]

[43] None of these applies to Mr LB's offending. The one feature that may is this: sometimes a young person does not fully appreciate the gravity of what they are doing, thereby diminishing his or her culpability.[24] The summary of facts says, "the offending eventually stopped when the defendant left for school … and realised what he had been doing was wrong".

[44] There is no fixed amount for a youth discount. Sometimes, youth has a radical effect on sentence. On other occasions, it may have little, if any, effect.[25] Offence seriousness is a highly relevant consideration. So too deterrence and denunciation. Decisions of the Court of Appeal in this context are instructive. Those briefly discussed all involve young people who committed serious, sexual offences, but later led offence-free lives or largely offence-free lives.

[45] In *Alletson*, the defendant committed sexual offences between the ages of 15 and 17. The District Court Judge intended to afford 30 percent for youth and later good character, but mistakenly gave 43 percent. The Court of Appeal said this level of discount was "more than adequate".[26]

[46] In *V v R*,[27] the defendant was between 14 and 17 at the time of the offending. He was described as having shown "real remorse" in the intervening 12 years and taken significant, rehabilitative steps. The Court of Appeal approved a discount of 30 percent for these features.

[47] The defendant in *BB v R* was 14 to 17 years of age when he committed sexual offences. A 40 percent deduction was given for youth and later good character, despite

---

21 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.
22 *Churchward v R*, above n 21.
23 *R v Chankau* [2007] NZCA 587.
24 *Overton v R* [2011] NZCA 648.
25 *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868.
26 *R v Alletson*, above n 14, at [68].
27 *V (CA400/2012) v R* [2012] NZCA 465.

a lack of remorse. The Court of Appeal said this figure was "towards the upper reaches of the available range".[28]

[48] Thirty-five percent was upheld in *Clarke v R*.[29] Mr Clarke had not committed an offence for 25 years and was now "a happily married 43 year old father of three children who had been based in Australia for some 15 years".[30]

[49] In *M v R*, the defendant was between 14 and 17.[31] He had since become a much-trusted member of the community. A 40 percent discount was treated as "a sufficient reflection of M's personal circumstances overall, including youth ... his personal development and positive contribution to society since the offending".[32]

[50] All this reveals the 50 percent discount as excessive. Mr LB was young when he committed these offences, but the only rationale likely engaged was Mr LB's apparent misapprehension what he was doing was not wrong. Forty percent was the maximum available in these circumstances.

[51] A similar error arises in relation to the Judge's discounts for remorse and associated matters. The Judge afforded 16 percent for remorse, Mr LB's preparedness to attend a restorative justice meeting, personal circumstances, and his attendance at counselling. The Judge added a further 10 percent for Mr LB's offer to pay $10,000 reparation. The combined discount was 26 percent. This level of discount is contrary to authority:[33]

> As the Supreme Court has emphasised, discounts for remorse in addition to those for guilty pleas are to be given in exceptional circumstances only. Similarly, while the Court must take into account offers of reparation under s 10 of the Sentencing Act 2002, this Court has confirmed that these sorts of discounts "will generally be limited".

[52] Another factor enters the mix. Mr LB wrote a letter of apology to the sentencing Judge. In this, he described the victim as "a willing participant". As

---

28 *BB (CA732/2012) v R* [2013] NZCA 139 at [13].
29 *Clarke v R* [2016] NZCA 91.
30 At [39].
31 *M (CA468/2018) v R* [2018] NZCA 630.
32 At [12].
33 *Pollard v R* [2018] NZCA 244 at [37].

observed, Mr LB also told the pre-sentence report writer he believed the victim wanted to participate in his acts (at that time). These observations contradict both an essential element of the offences and the summary of facts. The latter records the victim as having repeatedly asked Mr LB to stop, in part because she was in pain. Discount for these features should not have been more than five percent in total.

[53] This level recognises the best expression of remorse is a prompt guilty plea and the discrete, often substantial discount afforded that feature—a maximum of 25 percent. It also recognises the dangers of "discount creep", a phenomenon by which closely related or interrelated mitigating features are artificially disaggregated, then each awarded full and discrete discount to achieve a desired result.

The presumption in favour of imprisonment

[54] Section 128B of the Crimes Act creates a presumption of imprisonment in relation to the offence of sexual violation. The provision was framed this way when Mr LB committed the offences:

> Every one who is convicted of sexual violation shall be sentenced to imprisonment unless, having regard to the particular circumstances of the offence or of the offender, including the nature of the conduct constituting the offence, the Court is of the opinion that the offender should not be so sentenced.

[55] The Court of Appeal has held Courts must be careful not to "effectively negate Parliament's intention".[34] Mr LB did not cite any case in which like-offending had resulted in a sentence other than imprisonment, or articulate features of his case that would justify such a response. It follows even if Mr LB's sentence ought to have been two years or less, the Judge erred by imposing home detention.

What sentence should be imposed?

[56] As observed, the starting point should have been not less than 12 or 13 years' imprisonment. Because this is an appeal by the Crown, the lower figure prevails. Discounts for youth and subsequent good character should not have exceeded 40 percent; that for remorse and related matters, five percent. The Solicitor-General

---

34 *R v Donaldson*, above n 8, at 547.

did not contest the 25 percent discount for Mr LB's guilty pleas. She was right not to do so. They were promptly entered, spared the victim the ordeal of testifying and the taxpayer the cost of a trial. This would produce a sentence of just less than five years' imprisonment.

[57] Mr LB has already served three months' home detention. This must also be recognised. One month of home detention is often regarded as synonymous with two months' imprisonment. This would create a six-month deduction. I allow eight months for this factor. This higher level of discount recognises the stress on a defendant who, months after sentencing, must now go to prison. This produces a sentence of four years and three months' imprisonment.

Some final observations

[58] Mr LB argues his sentence can be justified because recent decisions of the Court of Appeal—*Zhang* and *Orchard*—recognise the importance of a Judge's sentencing discretion. I acknowledge as much. However, nothing in these decisions suggests a sentencing Court may decline to apply a guideline judgment. It is also important to record that guideline judgments were introduced because the previous sentencing model (called instinctive synthesis) was regarded as more likely to produce anomalous outcomes. If two unrelated offenders commit the same offence in similar circumstances, each is entitled to expect a similar sentence. So too their victims and public. Again, Mr LB was unable to cite any case in which the repeated rape and sexual violation of a relative had resulted in a sentence other than imprisonment. Mr LB was also unable to identify a case in which an 11-year starting point had resulted in a sentence of home detention.

[59] Mr LB's case ultimately reduces to the proposition historical sexual offending by a young person should be approached differently. I acknowledge this argument too. However, the Court of Appeal has expressly rejected this approach. To accept it would be to ignore binding authority. It would also be unfair to the many defendants who have been imprisoned for like offending. Conceptions of what constitute the Rule of Law differ, but everyone agrees consistency of decision-making is an essential aspect. Moreover, it is one thing to entertain the prospect of a non-custodial sentence

when a young person has committed a single, sexual offence that is not particularly serious. It is another to do so when a young person has committed a series of rapes and other violations over several years, thereby causing the victim great harm.

Result

[60] The appeal is allowed. Mr LB's sentence of home detention is quashed. A sentence of four years and three months' imprisonment is substituted.

[61] Mr LB must surrender to the Hamilton High Court by **10 am, Monday 10 February 2019**.

……..

Downs J