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203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF
APPELLANT'S NAME REMAINS IN FORCE**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA131/2018
[2018] NZCA 481**

BETWEEN	T (CA131/2018) Appellant
AND	THE QUEEN Respondent

Hearing:	1 October 2018
Court:	Miller, Woolford and Collins JJ
Counsel:	M R Walker for Appellant C E Martyn for Respondent
Judgment:	7 November 2018 at 11.00 am

JUDGMENT OF THE COURT

- A The appeal is allowed. The sentences imposed on the unlawful sexual connection charges are quashed.**
- B A sentence of six years' imprisonment is substituted on the lead charge of unlawful sexual connection, concurrent on the sentences for the other unlawful sexual connection charges and the indecent act charge.**
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REASONS OF THE COURT

(Given by Woolford J)

[1] Following a jury trial, T was found guilty of three charges of sexual violation by unlawful sexual connection (digital penetration) and one charge of committing an indecent act on a young person. The victim in each case was his stepdaughter. She was around 10 to 14 years old at the time of the offending.

[2] Judge Phillips sentenced T to seven years' imprisonment on the lead unlawful sexual connection charge, and four years' imprisonment concurrently on the remaining charges.¹ The Judge adopted a starting point of seven years' imprisonment.² There were no personal aggravating or mitigating factors and so the end sentence was also seven years' imprisonment.³ The Judge also granted T permanent name suppression on the basis that publication of his name would cause extreme hardship to his own children.⁴

[3] T now appeals against sentence on the ground that it is manifestly excessive.

Facts

[4] T married the victim's mother in 2005. They lived together with the victim and T's children from then on.

[5] The first unlawful sexual connection charge was a specific offence. At some stage between 1 January 2013 and 31 August 2014, T was looking after the victim at their home. He told her she had to wear a nightie with nothing underneath, so as to have "fresh air" on her genitalia. She was around 10 to 11 years old at the time. The offending involved T touching the victim's legs and thighs, spitting on his fingers, touching the victim's vagina and inserting his fingers into her vagina.

[6] The second and third unlawful sexual connection charges were representative. In total, they covered approximately five separate incidents of digital penetration.

¹ *R v [T]* [2018] NZDC 4205.

² At [24].

³ At [24].

⁴ At [25].

[7] As to the second charge, between 18 April 2014 and 20 April 2014, T and the victim were staying at a camping ground. They were there to hunt possums. Again, she was in a nightie. T required her to lie down and spread her legs. He knelt in front of her, put his fingers on her legs and thighs, spat on his fingers and inserted his fingers into her vagina. That occurred each night they were away. She was 11 years old at the time.

[8] The offending which gave rise to the third charge also occurred on a trip away. Between 1 May 2016 and 1 July 2016, T and the victim spent some time at a different camping ground, again to hunt possums. T inserted his fingers into the victim's vagina. He asked her whether it was nice. She said no. He inserted his fingers into her vagina on each of the nights they were away. On one occasion, he exposed himself to her. She was 13 years old at the time.

[9] The fourth charge was a specific offence. The offending occurred at some point in 2016 at their home. T required the victim to lie on a couch with her legs open. He then touched the outside of her vagina. She was 13 or 14 years old at the time.

District Court

[10] The Judge identified the aggravating factors as:

- (a) Moderate planning and premeditation: T made requests of the victim and imposed requirements on her.⁵
- (b) The victim's vulnerability: the Judge said the victim was vulnerable because of her age, T's age, the relationship between them and the fact they were alone when the offending occurred. Overall, he assessed her vulnerability as moderate.⁶

⁵ At [20].

⁶ At [20].

(c) Moderate psychological harm: the victim said the offending had substantially impacted her ability to trust anyone. She had flashbacks and required counselling.⁷

(d) Breach of trust to a high degree: T was the victim's stepfather.⁸

[11] Considering these factors, the Judge determined that the case fell within the middle of band two (four to 10 years) of the guideline decision,⁹ *R v AM (CA27/2009)*.¹⁰ He fixed the starting point at seven years' imprisonment. As mentioned, there were no personal aggravating or mitigating factors. The end sentence was therefore also one of seven years' imprisonment.

Appeal

[12] T appeals on the ground the starting point was manifestly excessive. He accepts the offending fell within band two. Rather, the issue on appeal concerns the appropriate starting point within that band.

[13] Counsel for T made extensive reference to comparable cases to support the submission that the starting point was manifestly excessive. He referred to cases where higher starting points were adopted and submitted that these involved significantly more serious offending than the present case, primarily because the cases tended to feature more incidents of abuse and some involved prolonged violence or multiple victims.¹¹ Counsel also referred to cases where lower starting points were adopted than in the present case and submitted that those aligned more closely with T's offending.¹²

⁷ At [21].

⁸ At [22].

⁹ At [24].

¹⁰ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [113].

¹¹ *MS v R* [2012] NZCA 86; *Ali v R* [2012] NZCA 241; *Aleki v R* [2014] NZCA 473; and *Botha v R* [2015] NZCA 196.

¹² *R v BSW* HC Auckland CRI-2009-044-7874, 9 March 2011; *Bond v R* [2010] NZCA 381; and *Rua v R* [2014] NZCA 599.

[14] The Crown submits the starting point was within the available range. As with the appellant, comparable cases are relied on to support this submission.¹³

Analysis

Features of the offending

[15] When determining where a case falls within a certain *AM* band, a mechanistic approach is not appropriate.¹⁴ Rather, an evaluative judgment is required which takes into account all the circumstances. Comparable cases will assist but it must be kept in mind that facts are rarely identical. The analysis will ultimately turn on the features of the present offending.

[16] We start by analysing the features of the offending. The aggravating features are as follows. First, the victim was vulnerable due to her age. She was 10 to 14 years old at the time of the offending. Second, T breached the victim's, and others', trust. He was her stepfather. She was entitled to be safe with him. And others should have been able to rely on that. Third, T offended against the victim on a number of occasions over some years. Fourth, there was some planning and premeditation. This is evident in the requests made by T of the victim and the fact he repeatedly offended. But we are not prepared to conclude the trips away were organised for the purpose of sexually assaulting the victim. There were other trips where no assaults occurred. There is also a two-year gap between the second and third charges.

[17] We hesitate to characterise harm to the victim as a predominant aggravating feature. While the victim has undoubtedly suffered significant psychological harm, such is inherent in sexual offending.¹⁵ This is not to downplay psychological harm. As the Judge noted, it can often be more serious and lasting than physical harm, especially when dealing with young victims.¹⁶ In the present case, however, there is no evidence to show the effect on the victim makes this case more serious than others involving sexual offending.

¹³ *R v K (CA588/2008)* [2009] NZCA 107; *Pavlovich v R* [2014] NZCA 88; *Aleki v R*, above n 11; and *Botha v R*, above n 11.

¹⁴ *R v AM (CA27/2009)*, above n 10, at [36].

¹⁵ At [44].

¹⁶ *R v [T]*, above n 1, at [21].

[18] The offending also lacks certain aggravating factors. The degree of violation was largely limited to digital penetration. Further, while there is violence inherent in any act of sexual violation, there was no additional violence. To be clear, these matters are not mitigating factors. The point is had these matters been present, the offending would have been more serious.

[19] We consider these features put the offending around the middle of band two, so as to call for a starting point of six to six and a half years' imprisonment.

Comparable cases

[20] We have also considered all the cases cited to us. And more. Sadly, there are many cases of sexual offending against children. Those cited to us are just a sample. It is unnecessary to traverse each in detail — some are clearly distinguishable.¹⁷ We make four observations as to how the relevant cases inform the appropriate starting point in the present case.

[21] First, common features of the relevant cases include that the victim was vulnerable due to age and there was a breach of trust because of the relationship between the defendant and victim. Premeditation varies, but tends to be present at a moderate level. Therefore, the focus is primarily on the number of incidents and the extent of violation and associated violence.

[22] Second, the cases with starting points around the seven to eight year mark generally concerned significantly more incidents than the present case:

- (a) In *R v K (CA558/2008)*, the defendant pleaded guilty to two charges of sexual violation by unlawful sexual connection and two of indecent assault on a child under the age of 12 years.¹⁸ The charges were representative over a two-year period. The defendant admitted to assaulting the victim, his stepdaughter, on approximately 50 occasions.

¹⁷ *MS v R*, above n 11; and *Aleki v R*, above n 11, concerned significantly more serious offending. *Pavlovich v R*, above n 13, concerned a violent and isolated assault in public against a child the defendant had encountered by chance. *Rua v R*, above n 12, concerned offending in the school context.

¹⁸ *R v K (CA/558/2008)*, above n 13.

It was a Solicitor-General's appeal. This Court allowed the appeal and substituted a starting point of seven and a half years' imprisonment.¹⁹

- (b) In *Botha v R*, the defendant pleaded guilty to one representative count of sexual violation by unlawful sexual connection (digital penetration) and a second representative count of doing an indecent act on a child under the age of 12.²⁰ This Court upheld a starting point of seven years and nine months' imprisonment.²¹ The offending occurred over a nine-month period against the seven-year-old daughter of a close family friend of the defendant. It happened "dozens" of times.²²
- (c) In *A (CA41/2017) v R*, the defendant was found guilty of one representative charge of unlawful sexual connection (digital penetration) with a female under 12.²³ The victim was the defendant's stepdaughter, and the offending happened when she was between four and 10 years old. In her evidence, the victim said the defendant had "most probably" offended against her more than 20 times.²⁴ This Court upheld a starting point of seven and a half years' imprisonment.²⁵

[23] Third, the extent of violation in the cases that adopted starting points around the seven to eight year mark tended to be more serious than in the present case too:

- (a) In *R v K (CA558/2008)*, discussed above, the offending included the defendant inserting a finger into the victim's vagina, licking the victim's vagina and rubbing his penis on and around the victim's anus.²⁶ The defendant would often masturbate afterwards too.

¹⁹ At [19].

²⁰ *Botha v R*, above n 11.

²¹ At [18].

²² At [4].

²³ *A (CA41/2017) v R* [2018] NZCA 136.

²⁴ At [6].

²⁵ At [46].

²⁶ *R v K (CA558/2008)*, above n 13.

- (b) In *Ali v R*, the defendant offended sexually against his stepchildren.²⁷ This included digitally penetrating his stepdaughter's vagina, licking her vagina and getting her to massage his penis. The defendant also sexually assaulted his stepson by applying cream to his penis. Non-sexual "hidings" were common too, in respect of both children.²⁸ This Court upheld an overall starting point of eight years' imprisonment.²⁹
- (c) In *A (CA41/2017) v R*, discussed above, in addition to digital penetration, the offending also involved the defendant touching the victim's breasts, trying to kiss her and trying to put his penis "inside [her] bottom".³⁰

[24] Fourth, in our view, the features of the present case more closely align to cases where a starting point around the six year mark has been adopted:

- (a) In *Hart v R*, the defendant was convicted of two representative charges, one of sexual violation by unlawful sexual connection (digital penetration) and one of indecently assaulting a girl under 12.³¹ The offending occurred over a three-year period. The defendant was in an "on again, off again" relationship with the victim's mother.³² The digital penetration probably occurred twice, when the victim was aged between eight and 11. But the indecent assaults occurred on five to 10 occasions. This Court upheld a starting point of six years' imprisonment.³³
- (b) In *R v BSW*, a starting point of six years' imprisonment was adopted in respect of the offending against the defendant's granddaughter.³⁴ The defendant digitally penetrated the victim's vagina several times.

²⁷ *Ali v R*, above n 11.

²⁸ At [7].

²⁹ At [14].

³⁰ *A (CA41/2017) v R*, above n 23, at [5].

³¹ *Hart v R* [2009] NZCA 276.

³² At [6].

³³ At [78].

³⁴ *R v BSW*, above n 12.

He also made her touch his penis. A cumulative sentence was imposed in respect of another victim.

- (c) In *Bond v R*, the defendant was found guilty of one charge of sexual violation by unlawful sexual connection (digital penetration) and one representative charge of sexual violation by unlawful sexual connection (digital penetration).³⁵ The victim, aged between five and eight years' old at the time of the offending, was a relative of the defendant's partner. She was in the defendant and his partner's care at the time of the offending, staying at their house. The defendant digitally penetrated the victim's vagina on several occasions, up to six times in total. This Court upheld a starting point of five and a half years' imprisonment.³⁶

Conclusion

[25] In light of the features of the offending and comparable cases discussed above, we consider a starting point of six years was appropriate for the present offending.

Result

[26] The appeal is allowed. The sentences imposed on the unlawful sexual connection charges are quashed.

[27] A sentence of six years' imprisonment is substituted on the lead charge of unlawful sexual connection, concurrent on the sentences for the other unlawful sexual connection charges and the indecent act charge.

Solicitors:
Todd Walker Law, Queenstown for Appellant
Crown Solicitor, Christchurch for Respondent

³⁵ *Bond v R*, above n 12.

³⁶ At [42].