

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR  
IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY  
SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA39/2018  
[2019] NZCA 253**

BETWEEN	JASON MARK O'REILLY Appellant
AND	THE QUEEN Respondent

Hearing:	11 April 2019
Court:	Clifford, Katz and Thomas JJ
Counsel:	L O Smith for Appellant M H Cooke for Respondent
Judgment:	25 June 2019 at 4 pm

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**JUDGMENT OF THE COURT**

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**A The application for leave to adduce fresh evidence is declined.**

**B The appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Katz J)

[1] Following a jury trial, Jason O'Reilly was found guilty of 18 charges of sexual offending (sexual violation and indecent assault) against two sisters. Seventeen charges related to the older sister (A) whom Mr O'Reilly offended against from the

time she was aged eight until she was 12. The remaining charge relates to the younger sister (B).

[2] Judge R G Marshall sentenced Mr O'Reilly to 12 years' imprisonment, with a minimum period of imprisonment ("MPI") of six years.<sup>1</sup> Mr O'Reilly does not challenge the length of his sentence, but appeals the imposition of an MPI. He seeks to introduce fresh evidence from a psychologist, Mr van Rensburg, in support of his appeal. We deal with both the application to adduce fresh evidence, and the substantive appeal, in this judgment.

[3] Shortly before the hearing the Crown filed a memorandum raising an issue regarding name suppression. That issue was not able to be dealt with at the appeal hearing. Rather, it has been determined on the papers subsequently, by way of a separate judgment that is being released contemporaneously with this one.

### **Factual Background**

[4] Mr O'Reilly's offending took place between 2012 and 2016. It started with Mr O'Reilly rubbing A's vagina. He told her not to tell anyone and threatened to hurt her family members if she did. From that time onwards, Mr O'Reilly would regularly remove A's pants and rub and place his fingers inside her vagina.

[5] Over time the offending increased in severity. A's evidence was that Mr O'Reilly would sexually violate her two or three times a week. He forced A to masturbate him, touched her breasts, and digitally penetrated her. Mr O'Reilly also performed oral sex on her and forced her to perform oral sex on him.

[6] In June 2016 A disclosed to her school guidance counsellor that she had been sexually abused by Mr O'Reilly for the past four years. This prompted charges being laid against him.

[7] Mr O'Reilly also exposed his penis to B and her friend on one occasion. On another occasion he exposed his penis to A and her friends.

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<sup>1</sup> *R v O'Reilly* [2017] NZDC 28508.

## District Court sentencing

[8] The Judge held that the offending fell within band three of the tariff case of *R v AM*.<sup>2</sup> He determined that 13 years' imprisonment was the appropriate starting point. He reduced this by one year to take account of Mr O'Reilly's previous good character. The deliberateness, degree and nature of the offending were aggravating factors, alongside the vulnerability of A, the breach of trust that the offending entailed, and the impact on A and her family. Also significant was the fact Mr O'Reilly was unwilling to accept responsibility for his offending. Mr O'Reilly was assessed as being at high risk of re-offending and causing harm to others, especially vulnerable children.

[9] Section 86 of the Sentencing Act 2002 provides that the Court may impose an MPI of no more than two-thirds of the sentence if it is satisfied that the normal one-third non-parole period, under the Parole Act 2002, is insufficient for any or all of the following purposes:

- (a) holding the offender accountable for the harm done to the victim and the community by the offending;
- (b) denouncing the conduct of the offender;
- (c) deterring the offender or others from committing the same or a similar offence;
- (d) protecting the community from the offender.

[10] When considering whether an MPI should be imposed, the Judge was particularly concerned by Mr O'Reilly's lack of acceptance of responsibility. The Judge considered that this meant he fell within a higher risk category as an untreated sex offender. Given the seriousness, scale and length of the offending against a vulnerable child, the Judge was not satisfied that a one-third non-parole

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<sup>2</sup> At [18], citing *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

period would be sufficient to meet the purposes set out in s 86. He therefore imposed a 50 per cent MPI of six years' imprisonment.<sup>3</sup>

### **Did the Judge err in imposing an MPI?**

[11] Mrs Smith submitted that the imposition of an MPI was inconsistent with recent case law and was not necessary in all the circumstances.

*Was the imposition of an MPI inconsistent with similar cases?*

[12] A sentencing Judge must have regard to s 8(e) of the Sentencing Act (the general desirability for consistency in sentencing) both in deciding whether or not to impose an MPI and assessing the appropriate length.<sup>4</sup>

[13] In *R v AM*, this Court noted that “the imposition of an MPI of at least half of the nominal sentence is very routine” in cases concerning multiple counts of sexual offending against children.<sup>5</sup> Mrs Smith placed reliance, however, on a recent High Court case, *R v Martin*, where an MPI was not imposed.<sup>6</sup>

[14] In *R v Martin*, Mr Martin pleaded guilty to sexual offending against three children who were aged between six and 15 at the time of the offending. Mr Martin was relatively young at the time of the offending (aged 17 to 25) and had himself been a victim of sexual offending as a child. Prior to sentencing, Mr Martin took part in a restorative justice process over two days. The sentencing Judge described that conference as being “by all accounts, a remarkable event” that was of immeasurable value to Mr Martin, his victims, and the wider whānau.<sup>7</sup> Mr Martin was deeply remorseful and took full responsibility for his actions.

[15] The Judge gave particular weight at sentencing to the restorative justice process he had engaged in, his remorse, and his guilty pleas. Those factors demonstrated that he had accepted responsibility for his offending and gained insight

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<sup>3</sup> At [20].

<sup>4</sup> *R v AM*, above n 2, at [155]. See also *R v Gordon* [2009] NZCA 145 at [17]; *R v Laungaue* CA32/06, 1 September 2006; and *R v Wellm* [2009] NZCA 175 at [23].

<sup>5</sup> *R v AM*, above n 2, at [156].

<sup>6</sup> *R v Martin* [2017] NZHC 1571.

<sup>7</sup> At [27].

into its seriousness.<sup>8</sup> Further, they would help protect the community from the risk of such offending in the future. Further community protection was provided by the length of the sentence and Mr Martin’s commitment to rehabilitation during his prison sentence. That the offending was relatively historical, and Mr Martin’s relative youth at the time of the offending was also relevant. Taking all of these factors into account, the Judge concluded that the purposes of accountability, deterrence, denunciation and community protection were adequately met without the imposition of an MPI.

[16] The facts of the present case, however, are far removed from those of *Martin*. Mr O’Reilly did not plead guilty but was found guilty following a jury trial. He has not demonstrated any remorse or insight into his offending, which he continues to deny. Lack of responsibility and insight has been recognised as a factor pointing towards a greater risk of reoffending, favouring the need for an MPI.<sup>9</sup> Nor can Mr O’Reilly rely on youth as a mitigating factor. He was in his forties when he offended.

[17] Further, *Martin* does not reflect a “move away” from the *R v AM* approach, as Mrs Smith submitted. Each case will turn on its own facts. *Martin* simply reflects a careful application of the s 86 criteria to the particular facts of that case (which were somewhat unusual). Due to the very significant differences between this case and *Martin*, reference to that case does not support the submission that the imposition of an MPI was inappropriate in this case.

*Should the Judge have declined to impose an MPI on the basis that it is not “necessary”?*

[18] Mrs Smith submitted that the imposition of an MPI on Mr O’Reilly was not necessary. The reason for this, she submitted, was that due to the operational practices and procedures of the Department of Corrections (relating to when offenders are eligible to attend rehabilitative programmes) it is highly unlikely that Mr O’Reilly will be released prior to serving 50 per cent of his sentence, even without the imposition of an MPI. The consequence of imposing a 50 per cent MPI, Mrs Smith submitted, is

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<sup>8</sup> At [47].

<sup>9</sup> *Pomare v R* [2015] NZCA 191 at [11].

that Mr O'Reilly is unlikely to be released (at the earliest) until he has served close to two-thirds of his sentence.

[19] In support of this argument, Mrs Smith sought leave to adduce an affidavit from an Auckland psychologist, Mr van Rensburg, as fresh evidence on appeal. Mr van Rensburg's affidavit covers the following matters:

- (a) the stage at which prisoners convicted of sexual offending are eligible to commence a programme to address their sexual offending;
- (b) how much of a backlog there is at present for sexual offenders seeking to do such a programme;
- (c) when a sentenced prisoner can get on the waiting list for a sex offender treatment programme;
- (d) whether the Parole Board and Corrections have a policy about sex offenders doing a programme before they have served their MPI; and
- (e) whether an MPI is "necessary" in sexual cases involving long sentences.

[20] Rule 12B of the Court of Appeal (Criminal) Rules 2001 governs the admissibility of fresh evidence:

**12B Fresh evidence**

- (1) If a ground of appeal is that there was a miscarriage of justice because further evidence has become available since the trial, particulars of the further evidence must be set out in—
  - (a) the notice of appeal; or
  - (b) a memorandum to be filed and served by the appellant within 30 working days of filing the notice of appeal.
- (2) The appellant must, within 30 working days of filing the notice of appeal, file and serve on the prosecutor any affidavits that relate to the ground of appeal.
- (3) The affidavits must—
  - (a) set out the further evidence; and
  - (b) explain why the further evidence was not available at the trial and why it could not, with reasonable diligence, have been called.

- (4) The prosecutor must file and serve any affidavit in reply within 15 working days after service of the appellant's affidavit.

[21] Mr van Rensburg's evidence is clearly credible. It is not, however, fresh as it could have been obtained with reasonable diligence prior to sentencing.<sup>10</sup> Overall, we have not been persuaded that failure to admit this evidence would be contrary to the interests of justice, for the reasons outlined below.

[22] In essence, the argument Mrs Smith seeks to advance, based on Mr van Rensburg's evidence, is that the community will be protected from Mr O'Reilly for at least half the term of his sentence, even if an MPI is not imposed. This is because, it is claimed, Corrections do not refer high risk sex offenders to treatment programmes until relatively close to their parole eligibility date. It takes some time, however, to complete an intensive rehabilitation programme. As a result, Mrs Smith submitted, there is currently no realistic prospect of high risk sex offenders being released on or close to their parole eligibility date and the imposition of an MPI of 50 per cent on Mr O'Reilly is therefore not "necessary". Even without an MPI, she argued, he will almost certainly serve 50 per cent or more of his sentence before he is paroled. (The same argument would presumably apply equally to all or most sexual offenders sentenced to long terms of imprisonment.)

[23] A sentencing Judge is required to have regard to all four of the criteria in s 86, namely the need to hold the offender accountable for the harm done, denouncing the offender's conduct, deterrence, and community protection. The argument advanced by Mrs Smith (and Mr van Rensburg's evidence) is primarily directed to the fourth factor. While community protection is an important factor, MPIs are also imposed to hold offenders publicly accountable for the harm they have done, to denounce their conduct and to deter them and others from offending in a similar way. Those purposes are also important and must be carefully considered by a sentencing Judge. In *R v Gordon*, this Court described the overall purpose of s 86 as conferring a degree of reality on the sentence and outcome where the offending is so serious that release after one-third of the sentence would be insufficient in the eyes of the community.<sup>11</sup>

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<sup>10</sup> *Lundy v R* [2013] NZPC 28, [2014] 2 NZLR 273 at [120].

<sup>11</sup> *R v Gordon*, above n 4, at [15].

[24] Mrs Smith did not suggest that it would be unjust or manifestly excessive for Mr O'Reilly to be required to serve 50 per cent of his sentence before being eligible for parole. It follows that the sentence, as imposed by the Court, is not manifestly excessive. In reality, Mr O'Reilly's complaint is that due to the (current) manner in which Corrections is said to manage the treatment of sex offenders, he may well have to serve more than 50 per cent of his sentence before the Parole Board will consider him to be suitable for parole.

[25] Concerns or complaints as to the manner in which Corrections manages high risk sex offenders, and the impact this may have on their ability to obtain parole in a timely fashion, may (or may not) give rise to grounds for a claim against Corrections. Such matters cannot, however, justify a sentencing Judge declining to impose an MPI in circumstances where the normal one-third non-parole period would be inadequate to meet the purposes set out in s 86.

[26] In this case we are satisfied that the Judge was correct to conclude that the s 86 factors, considered as a whole, warranted the imposition of an MPI.

## **Result**

[27] The application for leave to adduce fresh evidence is declined.

[28] The appeal is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent