

**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

**CA709/2018
[2019] NZCA 581**

BETWEEN	ROBERT ALLAN JESEN Appellant
AND	THE QUEEN Respondent

Hearing: 5 August 2019

Court: Courtney, Mallon and Moore JJ

Counsel: C S Cull for Appellant
E J Hoskin for Respondent

Judgment: 11 December 2019 at 12 pm

**JUDGMENT OF THE COURT
[redacted]**

- A The appeal is allowed.**
- B The sentence of preventive detention is quashed and a sentence of 17 years' imprisonment with a minimum period of eight and a half years is substituted as set out at [74]–[76].**
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REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] Mr Jesen pleaded guilty to 15 charges of a sexual nature spanning a 17 year period from 1999 to 2016. The five complainants were members of his extended family. Their ages, at the time of the offending, ranged between six and 27.

[2] On 23 October 2018 Toogood J sentenced the appellant to preventive detention with a minimum period of imprisonment (MPI) of seven and a half years.¹ He appeals that sentence, arguing that a finite term, rather than preventive detention, should have been imposed.²

The offending

[3] The appellant pleaded guilty to the following charges:

- (a) sexual violation by rape (x5);³
- (b) sexual violation by unlawful sexual connection (x6);⁴
- (c) indecent act on a young person under 16 (x3);⁵ and
- (d) assault with intent to commit sexual violation.⁶

[4] The five complainants were [identifying particulars redacted].⁷ Until his arrest it appears none of the complainants knew of the offending against the others.

[5] Set out below, in approximate chronological order, are the details of the offending.

¹ *R v Jesen* [2018] NZHC 2740 [Sentencing notes] at [41].

² No issue was taken with the provisional setting of a 17-year end sentence.

³ Crimes Act 1961, s 128(1)(a) and 128B; the maximum penalty is 20 years' imprisonment.

⁴ Section 128(1)(b) and 128B; the maximum penalty is 20 years' imprisonment.

⁵ Section 134(3); the maximum penalty is seven years' imprisonment.

⁶ Section 129(2); the maximum penalty is 10 years' imprisonment.

⁷ Identifying particulars of the complainants have been redacted to ensure compliance with ss 203 and 204 of the Criminal Procedure Act 2011.

V (12 June 1999 — 19 November 2005)

[6] V was the appellant's [younger female relative]. The appellant pleaded guilty to one representative charge of rape in respect of V.

[7] [Detail redacted]. From 1999 to 2002, approximately four or five times a year, he raped V. At the time the appellant was aged between 14 and 17.⁸ V was aged between 10 and 13. She used to try and hide from the appellant in the barn. But he would seek her out. On one occasion, the appellant entered V's room, pushed her onto the bed and raped her roughly. V resisted by kicking out. She then heard the sound of a tractor and realised her mother was nearby. She called out for help. To prevent this, the appellant smothered her face using a pillow.

W (24 January 2002 — 23 January 2004)

[8] The offending against W, who was [another younger female relative of the appellant], was reflected in one charge of sexual violation by unlawful sexual connection and one charge of assault with intent to commit sexual violation.

[9] The appellant was babysitting W and her siblings. The appellant was aged 16 to 18. W was six or seven. The appellant told W that her mother had left her a surprise in her bedroom. W went in. The appellant followed her. There he forced her to perform oral sex. W was unable to breathe and vomited afterwards. The appellant told her she would get in trouble if she told anyone. For W, whose mother used to regularly beat her, this threat was real.

[10] On another occasion, when the appellant was babysitting, he dragged W down the hallway and covered her mouth. He then began to unzip his trousers. W screamed. Her sister entered the room and the appellant left.

⁸ The summary of facts to which the appellant pleaded guilty records that the appellant began raping V when he was nine and she was six. However, the charges are confined to the period when the appellant was 14 years or older.

X (1 December 2003 — 31 May 2016)

[11] The appellant and X began their relationship at the end of 2002. The appellant was 17 and X was 15. X became pregnant within a few months. She and the appellant later married. Over the course of their relationship, the appellant committed various offences against X. Those reflected in the Crown's Charge List included:

- (a) four charges of rape (one representative); and
- (b) four charges of sexual violation by unlawful sexual connection (two representative).

[12] On numerous occasions the appellant had sex with X without her consent. He digitally penetrated her and forced her to perform oral sex on him. This offending founded the three representative charges.

[13] Additionally, X recalled specific instances of abuse. These included:

- (a) One night when their daughter was five weeks old: the appellant pressured X for sex. Fearful of becoming pregnant again she told him no. The appellant ignored her and raped her.
- (b) When their daughter was a toddler: the appellant and X were engaged in consensual intercourse. X noticed she had her period. She asked the appellant to stop. He refused and continued. Afterwards he threw a towel at her and told her to clean up the blood.
- (c) On two separate occasions, in the course of consensual sex: the appellant attempted to penetrate X's anus. X attempted to wriggle away and told the appellant no. He ignored her and proceeded to force his penis into X's anus. This caused extreme pain.

[14] The last time the appellant raped X was in early 2016. This was after the couple had separated. X was in bed. The appellant entered the bedroom. He began to masturbate in front of her. He told her that if she just lay there and let him ejaculate

on her, he would not touch her. X told him to leave. The appellant told her that if she let him do what he wanted, he would not do something they would both regret. He left but returned a short time later, demanding sex. X told him no. The appellant directed her to leave the house and not return. As X began to pack up her things, he pushed her onto the bed and raped her.

Y (25 December 2012 — 24 December 2013)

[15] Y is [a female relative]. On an occasion when Y was 15, X asked her to babysit. She was sitting on a couch. The appellant sat next to her. He ran his hands up her legs. Then he put his arm around her shoulders and forcefully interlaced their fingers.

[16] After about 20 minutes, Y summoned the courage to get up and go the kitchen. The appellant followed her and escorted her back to the lounge. He put her on the couch next to him and caressed her thighs, right up to the bottom end of her shorts.

[17] This conduct was reflected in the charge of indecent assault on a young person.

Z (12 February 2015 — 11 February 2016)

[18] Z is [a female relative]. She was 12 at the time of the offending.

[19] One evening [detail redacted], the appellant asked [Z and another girl] if they wanted him to spend the night in their bed. They said yes.

[20] As Z began to fall asleep, the appellant took her hand and placed it on his penis. He forced her to masturbate him, touching her breasts as he did so. He then inserted his fingers into her vagina. Eventually, Z told him to stop and leave the room. The appellant told her not to tell her mother.

[21] This conduct was reflected in two charges of indecent assault on a young person and a charge of rape.

Personal circumstances

[22] The appellant was 33 years old at the time he was sentenced. He had only a minor criminal history and no convictions for sexual offending of any kind.

[23] When spoken to by Police, he denied any sexual contact with the complainants. He admitted to the offending against Z, but said he was drunk and could not remember it. He also admitted to the offending against X but only in respect of two instances:

- (a) when their daughter was five weeks old; and
- (b) when X had her period.

[24] In respect of the latter, the appellant acknowledged that X had asked him to stop but claimed he did not believe she meant it. He said that X consented on all other occasions, although the summary of facts records that the appellant accepted that X “may have told him to stop” on one occasion when he penetrated her anus.

[25] Given his limited admissions, it is unsurprising the pre-sentence report recorded the appellant as demonstrating a lack of remorse, insight and any sense of responsibility for his offending. Instead, it noted he viewed himself as a victim. By way of example, the appellant apparently made the following comments to the report-writer:

- (a) the summary of facts had been changed to “make it look worse than it really was”;
- (b) he “didn’t realise [he] was hurting her” when he offended against X; and
- (c) his family was “banding together” against him because he had “touched [Z] one night when [he] was drunk”.

[26] The appellant’s sense of entitlement and offending-related arousal were identified as factors contributing to his offending. Given the duration of the offending

and his lack of remorse, the report assessed the appellant as representing a high risk of reoffending.

The health assessor reports

[27] Reports were prepared by Dr Rishi Duggal, a consultant clinical psychiatrist and Mr Jim van Rensburg, a registered psychologist. Both are attached to the Mason Clinic.⁹ We briefly summarise the findings of each.

Dr Duggal

[28] The appellant told Dr Duggal about his childhood and upbringing:

- (a) He was raised by his mother on a farm and he never knew his father.
- (b) He was physically, but never sexually, abused by his mother and grandfather until the age of 12.
- (c) He left high school with an unremarkable record; due to his weight he was bullied.
- (d) At 16 he commenced a relationship with a 15-year-old girl (who was not X); they waited four months before having sex because she had been previously raped and he “respected” her boundaries.

[29] When X became pregnant, she and the appellant agreed to have an abortion. However, on the day scheduled for the procedure X “couldn’t go through with it.” After high school, the appellant began working on local farms. He, X and their two daughters led a somewhat itinerant life. The appellant said his marriage to X was “good” but at a certain point he suspected she was having an affair with his best friend.

⁹ Dr Duggal’s initial report was dated 20 July 2018. Mr van Rensburg’s was dated 30 July 2018. However, due to an administrative error, neither health assessor was aware of the offending against Z when compiling their initial reports. Dr Duggal provided an updated report on 30 August 2018. Mr van Rensburg did the same on 3 September 2018.

[30] In 2014, the appellant was diagnosed with multiple sclerosis and prescribed high-dose steroids. From that point his health began to deteriorate. It affected his ability to work. He turned to drink. Other than cannabis, he reported no drug use.

[31] After separating from X in 2015, the appellant began a nine-month relationship with a younger woman. He said it was stressful and ended after she was unfaithful to him. Following that, the appellant had casual sex with two other women.

[32] The appellant maintained his denial of offending against V and W. He admitted to offending against X “a couple of times” and accepted that “it coulda happened more”. In respect of Y he accepted the summary of facts but offered no explanation. In terms of the offending against M, the appellant said all he remembered was lying down in bed with her because she was upset but added, “... apparently I touched [Z].”

[33] The appellant said he was ashamed of this. Despite that he said he did not believe he needed treatment for sexual offending. Instead, he felt he needed “counselling for [his] own issues”.

[34] Dr Duggal’s opinion was that the appellant clearly met the criteria for paedophilic disorder and alcohol abuse disorder. He had no serious mental illness or personality disorder. Taking into account the various risk factors, the doctor assessed the appellant as having a high risk of sexual recidivism:

... there were a number of factors that indicated that Mr Jesen had a tendency to similarly offend in the future. Mr Jesen index offending spanned several decades and targeted females across the age range from childhood to adulthood. While he admitted his paedophilic offending to me in relation to [Z], he denied the offending against two of his other child victims and expressed no spontaneous remorse during the assessment interview for offending against his adolescent and adult victims.

[35] In terms of the likelihood of the appellant engaging in rehabilitative treatment, Dr Duggal stated:

Mr Jesen reported at the assessment interview that he had only pleaded guilty to the index offences against children because of a ‘plea deal’ in which other charges had been withdrawn. He denied having offended against most of his child victims, minimised his offending against [Z], and minimised his offending against his adolescent and adult victims. He did not believe that he

needed rehabilitation for his offending. Rather, he was interested in counselling for himself.

On the other hand, there were no clear barriers (such as personality pathology or cognitive impairment) that would render Mr Jesen unsuitable for further rehabilitation.

[36] However, the doctor also noted that the appellant had never had an opportunity to engage in rehabilitation. Although the most significant barrier to this was his denial of the paedophilic offending, Dr Duggal considered it “possible” the appellant might admit to all the index offending with “motivational sessions”. He thus considered a lengthy determinative sentence was to be preferred.

Mr van Rensburg

[37] On the appellant’s background, Mr van Rensburg’s report largely repeats Dr Duggal’s. However, one point of difference was the appellant’s revelation that his grandfather and uncle had both been imprisoned for sexual offending against younger female family members. Mr van Rensburg thus formed the impression that the appellant grew up in a family environment where “the sexual violation of younger females at the hands of adult males was not uncommon”. It seems that apart from the time he was in prison, the appellant’s grandfather lived at the farm with the appellant and his mother. He died when the appellant was eight or nine.

[38] The appellant recounted a particular experience when he was 13 years old. He, V, W and his nephew discovered a pornographic magazine. V was 10 years old, W was two and her brother three. The appellant said they played “doctors and nurses” and experimented on modelling some of the images in the magazine. W’s father discovered this. CYFS was called. W and her family moved away. The appellant said he was blamed, despite his claim the play never went beyond touching and kissing. The appellant said that after this experience he was careful not to be around children by himself.

[39] Unlike his interview with Dr Duggal, it appears the appellant denied offending against Y when speaking with Mr van Rensburg. He also minimised his offending against X:

He admitted to some “possible” offences against his wife, although he maintained that their sexual interaction was always consensual. He said he pleaded guilty upon advice and because he could not deal with the stress of a court case. He also considered that he would not be believed, being one male against all these females making complaints against him.

[40] The appellant told Mr van Rensburg that he and X used to have a “reasonably wide social circle” but that in later years most of their social interaction was with family members. Mr van Rensburg also noted that the isolated nature of the appellant’s lifestyle allowed him to offend as he did:

... it would appear as if Mr Jesen was sexually active from a young age (around 13 years of age), developed a strong sexual drive, possibly stimulated by overt sexual activities occurring on the farm between adults as well as his access to pornographic material. He had access to vulnerable females younger than him, whom he could submit to his attentions by virtue of his size and age advantage. All his offending took place within intra-familial situations, involving an adult and children victims.

[41] Mr van Rensburg noted that the appellant exhibited the following risk factors:

- (a) high sex drive and sexual preoccupation;
- (b) using sex as a coping mechanism;
- (c) deviant sexual interests;
- (d) the lack of a stable relationship;
- (e) social support from those who might be inclined to collude with him;¹⁰
- (f) identifying emotionally with children;
- (g) a tendency to objectify women; and
- (h) poor problem-solving skills.

¹⁰ The Judge noted that the appellant continues to receive the support of his mother and at least one sister: Sentencing notes, above n 1, at [13].

[42] In the appellant’s favour, Mr van Rensburg noted that the offending was “exclusively intra-familial” and he had no previous convictions. Mr van Rensburg initially assessed the appellant’s risk of reoffending as “moderate-high”:

The fact that Mr Jesen has had a lifelong predilection for sexual contact with female children related to him and continued with the same behaviour against his wife, support the likelihood that he may resort to similar offending in future. His offending has now become public, which may make it less likely for him to have access to young female victims in future. However, there appears to be a level of tolerance in the wider family for sexual exploits of a diverse nature that could give him future access to females over whom he may have power and control.

[43] Upon learning of the offending against Z, Mr van Rensburg increased the risk of reoffending, noting that the offending against Z confirmed the versatility of the appellant’s victim-selection. He recommended an indeterminate sentence.

The sentence

[44] As is required, the Judge began by setting the appellant’s provisional finite sentence.¹¹ Taking the offending against X as the lead charge, he adopted an initial starting point of 16 years’ imprisonment, placing it within band 4 of the rape bands set out in *R v AM (CA27/2009)*.¹² The Judge indicated that an uplift of five years for the other offending would have been appropriate.¹³ But considering the appellant’s youth at the time of the offending against V and W, he reduced this to three-and-a-half years. The adjusted starting point thus came to 19 years and six months.¹⁴

[45] The Judge reduced this by one year on account of the appellant’s multiple sclerosis and a further 18 months (or just over eight per cent) for his guilty pleas.¹⁵ He therefore reached an end finite sentence of 17 years’ imprisonment.

[46] He then turned to consider whether preventive detention was appropriate:

[36] Both Dr Duggal and Mr van Rensburg agree, as I do, that it is essential that you should receive appropriate treatment. You need to learn about the significance of consent in adult sexual relationships and how to own up to

¹¹ At [17].

¹² At [22]; citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

¹³ At [23].

¹⁴ At [23].

¹⁵ At [24]–[25].

responsibility for your past behaviour. Most of all, you need to understand how precious and fragile young lives are. ... [Preventive detention] is appropriate, in my view, where real doubts exist about the prospects of rehabilitation. Whether you succeed in being rehabilitated; whether you take advantage of the opportunities that will be provided to you is entirely in your hands, Mr Jesen, and no one else's. I, for one, am not prepared to take the risk that you might be released at a time before your rehabilitation is complete. ...

[47] The Judge's reasoning was underpinned by the following factors:¹⁶

- (a) There was a clear pattern of serious offending; the appellant offended against his family members, four of whom were children, over 17 years.¹⁷
- (b) The harm to the community was high; the appellant's actions tore at the fabric of family life and destroyed many relationships.¹⁸
- (c) The appellant showed a "well-ingrained tendency" to reoffend and there was "no doubt" he would do so again if he was released immediately; his offending was stopped only by his apprehension.¹⁹
- (d) Despite pleading guilty, the appellant remained in denial about the seriousness of his offending and his responsibility for it; this suggested he would not respond to treatment.²⁰
- (e) One of the consequences of offending over such an extended period without apprehension was that the appellant had not received any rehabilitative treatment.²¹ Despite this, he was old enough and responsible enough to have understood the seriousness of what he was doing to people who should have been able to trust him. Instead of taking steps to address or reduce his offending, he turned his attentions to Z.

¹⁶ At [30]–[35], taking into account the considerations in s 87(4) of the Sentencing Act 2002.

¹⁷ At [30].

¹⁸ At [31].

¹⁹ At [32].

²⁰ At [33].

²¹ At [34].

- (f) Finally, if the appellant was to serve a finite sentence, he would be released from prison in his late 40s.²² Despite not posing a risk to society generally or “women or children in the street”, the appellant would then be likely to form close relationships and target further victims that way.²³

[48] Finally, the Judge imposed a minimum period of imprisonment of seven and a half years to ensure that the appellant “received treatment as soon as is reasonably possible”.²⁴

The appeal

[49] Ms Cull, for the appellant, submitted that the appellant has no previous convictions and thus did not disclose a pattern of serious offending. Further, the harm caused by his offending, while serious, was limited to family members rather than the community as a whole.

[50] However, the focus of Ms Cull’s submission was on the fact that the appellant has not had the opportunity to engage in rehabilitation. In these circumstances, it could not be said that his risk of future reoffending was high. The incremental admissions made to Dr Duggal suggested that the appellant is gradually accepting his offending. Thus his prospects for rehabilitation are more positive than the Judge gave him credit for. She submitted a finite sentence, coupled with an extended supervision order (ESO) and the appellant’s registration upon his release as a child sex offender would provide a sufficient safeguard.

Discussion

[51] An offender may be sentenced to preventive detention if the court is satisfied they are likely to commit a qualifying offence if they are released at the sentence expiry date.²⁵ The purpose of preventive detention is to protect the community from

²² At [35].

²³ At [35].

²⁴ At [38].

²⁵ Sentencing Act 2002, s 87(2)(c).

those who pose a significant and ongoing risk to the safety of its members.²⁶ But it is important to recognise that preventive detention is not a sentence of last resort or a punishment in itself.²⁷

[52] We begin with a jurisdictional issue which was not brought to the Judge's attention. In order to qualify for a sentence of preventive detention, an offender must be 18 years of age at the time of committing the qualifying offence.²⁸ The appellant did not turn 18 until 12 June 2003. The dates of the offending particularised in Charges 1, 3 and 6 (the offending against V and W) span periods both before and after the appellant's 18th birthday.²⁹ The Crown acknowledged it was impossible to tell from the summary of facts whether the offending in respect of each charge took place before or after 12 June 2003. Given this uncertainty Ms Hoskin, for the Crown, responsibly accepted the appellant should not be eligible for preventive detention on those charges.

[53] It thus follows it was an error to sentence the appellant to preventive detention for the offending against V and W. While the charges attract finite sentences only, the relevant offending may obviously be taken into account when considering whether to impose preventive detention in respect of the charges for which he is eligible for that sentence.³⁰ It is particularly relevant when assessing whether there is a pattern of serious offending.³¹

[54] Bearing that in mind, we now turn to consider whether the Judge was correct to consider the appellant was likely to offend sexually at the sentence expiry date.³² When examining a sentence of preventive detention the appeal court must make its own evaluation.³³

²⁶ Section 87(1).

²⁷ *R v C* [2003] 1 NZLR 30 (CA) at [6]; and *R v Evans* [2018] NZHC 69 at [27].

²⁸ Sentencing Act, s 87(2)(b).

²⁹ See above at [6]–[10].

³⁰ *R v Kurei* [2015] NZHC 2385 at [33]. See also *R v C*, above n 27, at [5].

³¹ *R v Taimo* [2019] NZHC 234 at [100].

³² Sentencing Act, s 87(2)(c).

³³ *Franklin v R* [2018] NZCA 495 at [26]; citing *Kumar v R* [2015] NZCA 460 at [83].

[55] We agree that the appellant has demonstrated a sustained pattern of serious sexual offending against his family. It is uncontentious that a pattern of serious offending may exist despite an offender having no previous convictions.³⁴

[56] As for the harm to the community, we agree with the Crown that Ms Cull's submission on this point is misconceived. The harm to the community caused by intra-familial sexual offending against children (as well sexual offending in the course of an intimate relationship) is manifest.

[57] There is also a related factor which in our view operates against the submission the appellant's offending should be seen as limited to the abuse of family members and not the wider community. Context is important. Throughout his offending the appellant lived in an isolated rural setting. His opportunities to sexually offend beyond the family setting were necessarily limited. That he offended against a range of differently-aged victims over such an extended period adds to the concern that his risk profile is not as limited as Ms Cull submitted.

[58] To a large degree, whether preventive detention should have been imposed hinges on an assessment of the likelihood of the appellant offending in the future. That is unsurprising. Preventive detention is all about the assessment and evaluation of risk.³⁵ In the appellant's case, that assessment comes down to two enquiries:

- (a) What is the risk of reoffending?
- (b) Could treatment reduce that risk to an acceptable level?

[59] In respect of the first question, we agree with the Judge that the specific risk in the appellant's case is that he will form new relationships upon his release and offend against those who are close to him. His history discloses an indiscriminate approach to those whom he chooses to offend against, provided they are female. However, that statement requires qualification insofar as the appellant's paedophilic tendencies are concerned.

³⁴ *R v Parker* [2013] NZHC 2075 at [57].

³⁵ Sentencing Act, s 87(2)(c); and *R v Taimo*, above n 31, at [75].

[60] The offending against V and W was significantly more serious than the recent offending against Y and Z. The offending against V was sustained over a number of years. And in relation to both V and W, the appellant took deliberate steps to isolate the girls so he could continue to offend against them. Along with the repetitive nature of the offending against L, this reveals significant premeditation.

[61] As did the Judge, we consider that the offending against V and W needs to be viewed in the context of the appellant's age at the time. He was a child and, later, a teenager. As an adult, he has not offended against children in the same way. Without minimising the seriousness of the appellant's conduct in relation to Y and Z, the later offending was more opportunistic and, it seems, spontaneous. Furthermore, both Y and Z were offended against only once.

[62] Clearly the appellant has an ongoing sexual interest in young, prepubescent girls. But his offending pattern suggests that this interest, or the extent to which the appellant allows it to control his decision-making, has waned. Z was vulnerable to his approaches and the appellant had the opportunity to offend against Z in a sustained and serious way. But there is nothing to suggest that the appellant offended against Z at any other time. Nor is there anything to suggest that he ever offended against any other family members at that time.

[63] Balanced against that is the fact that the appellant continued to offend against X throughout their relationship. This is of particular concern given he admitted to having sexual encounters with three women in the wake of his separation with X. One of those was in the course of a year-long relationship with a much younger woman. It is clear from the appellant's minimisation of his offending against X that he has no real understanding or insight into the importance of consent in sexual relationships.

[64] We therefore consider that the risk of the appellant reoffending is twofold:

- (a) first, a risk of offending sexually against young girls in a spontaneous and opportunistic way regardless of his relationship with them; and

- (b) secondly, a more significant risk of him sexually offending against adult women with whom he is in a relationship.

[65] That brings us to the second aspect of the enquiry: could rehabilitation reduce that risk to an acceptable level?

[66] The obvious concern is that to date the appellant has failed to accept the bulk of his offending despite entering guilty pleas. Of relevance is that the appellant has never been given the opportunity to engage in treatment because he was never apprehended before his arrest. That factor usually weighs in favour of a finite sentence, particularly if the offender has not served sentence of imprisonment before.³⁶ However, of equal relevance, is the likelihood of the offender engaging in treatment. The possibility of therapeutic success may be limited by, amongst other things, an offender's low prospects of developing sufficient insight so as to even permit the initiation of treatment. In such cases, the need to protect the community must prevail.³⁷ And, as Ms Hoskin pointed out, denial or minimisation of offending may warrant scepticism as to the prospects of rehabilitation and in turn affect the assessment of future risk.³⁸

[67] We consider that the appellant has accepted sufficient elements of his offending to support the conclusion that there is a reasonable possibility he will engage in therapeutic treatment. An offender's acceptance of their offending is often an ongoing process. As Ms Cull pointed out, the appellant has already made some progress towards this. He disclosed more to the health assessors, particularly Dr Duggal, than he initially did to police. There is the prospect for this trend to continue, particularly with professional psychiatric support and instruction. Although the appellant said he did not need treatment, he accepted the need for "counselling" for his own issues. We do not consider the difference to be material, particularly for one with limited experience in therapeutic rehabilitation. What is important is that the appellant accepts he should receive professional help in some form. And as Dr Duggal noted, there are no clear barriers that would prevent the appellant from engaging in rehabilitation.

³⁶ *Jenkins v R* [2015] NZCA 131 at [43].

³⁷ At [45].

³⁸ *R v Scobie* CA186/01, 2 August 2001 at [19].

[68] It is also important that the appellant has accepted his offending against X in two specific instances. Additionally, he has signalled, albeit in a non-specific way, that he accepts responsibility for more instances of abuse. Dr Duggal opined that it was “possible” that the appellant admit to all the index offending in due course. Further, the risk of the appellant reoffending against another adult woman with whom he shares a relationship and/or her children is our primary concern. It is thus comforting that he appears to have shown the greatest insight in respect of his offending against X. With regards to his risk of offending against children, registration under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 may also be seen as a protective factor.³⁹ Further, as Mr van Rensburg pointed out, the appellant’s family unit is now aware of his offending; this will naturally limit the opportunity he has to offend against children who are close to him.

[69] There is also the possible imposition of an ESO. An ESO is not an agreeable alternative to preventive detention, but it is a “potential safety valve” which shores up the principle that a lengthy finite sentence is preferable to preventive detention.⁴⁰ In *R v Parahi* this Court said that in finely balanced cases, the possibility of an ESO being imposed may tip the balance in favour of a finite sentence.⁴¹

[70] Ms Hoskin submitted that those comments need to be revisited. Since 12 December 2014, it has become more difficult to obtain an ESO due to the mandatory criteria in s 107IAA of the Parole Act 2002. However, we note that the comments in *Parahi* have been echoed by this Court more recently.⁴² That is because, notwithstanding the change in criteria, the same principle applies. ESOs will be granted where an offender exhibits a pervasive pattern of sexual offending (which is readily apparent in the appellant’s case) and there is a high risk they will commit a sexual offence in the future.⁴³ Self-evidently, an ESO will be unavailable if the appellant poses no such risk.

³⁹ *Bell v R* [2017] NZCA 90 at [26]; *Taitapanui v R* [2018] NZCA 300 at [33]; and *R v Pateman* [2017] NZHC 2401 at [42].

⁴⁰ *R v Mist* [2005] 2 NZLR 791 (CA) at [101].

⁴¹ *R v Parahi* [2005] 3 NZLR 356 (CA) at [87].

⁴² See, for example, *de Kwant v R* [2018] NZCA 600 at [32]; and *Grant v R* [2017] NZCA 614 at [50]–[52].

⁴³ Parole Act 2002, s 107I(2).

[71] It follows we consider that the Judge should not have imposed a sentence of preventive detention. No issue has been taken with the provisional finite sentence and we see no reason to disturb it.

[72] However, given the appellant will be serving a finite sentence, we consider the protection of the community requires the imposition of a sterner MPI.⁴⁴ We consider an MPI of 50 per cent, or eight and a half years, is appropriate. For clarity, we note this MPI does not apply to the charge of assault with intent to commit sexual violation pursuant to s 152 of the Sentencing Act 2002.⁴⁵

Result

[73] The appeal is allowed.

[74] We quash the appellant's sentence of preventive detention and substitute an effective sentence of 17 years' imprisonment. That sentence is to be made up in the following way:

- (a) for the offending against X, 17 years' imprisonment for each of the four charges of rape and four charges of sexual violation by unlawful sexual connection;⁴⁶
- (b) for the offending against V, eight years' imprisonment for the one representative charge of rape;⁴⁷
- (c) for the offending against W, four years' imprisonment for the charge of sexual violation by unlawful sexual connection and one years' imprisonment for the charge of assault with intent to commit sexual violation;⁴⁸

⁴⁴ Sentencing Act, s 86(2)(d).

⁴⁵ *Penwarden v R* [2013] NZCA 352 at [57].

⁴⁶ Charges 7, 8, 9, 11, 16, 17, 18 and 19 in the Crown Charge List.

⁴⁷ Charge 1.

⁴⁸ Charges 3 and 6.

- (d) for the offending against Y, one year's imprisonment for the charge of indecent assault on a person under 16;⁴⁹ and
- (e) for the offending against Z, three years' imprisonment for the charge of sexual violation by unlawful sexual connection and one year's imprisonment for the two charges of indecent assault on a person under 16.⁵⁰

[75] All sentences are to be served concurrently.

[76] We also impose an MPI of eight and a half years in respect of the offending against X.

Solicitors:
Crown Law Office, Wellington for Respondent

⁴⁹ Charge 20.

⁵⁰ Charges 22, 23 and 24.