

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT AND PERSON UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA493/2019
[2020] NZCA 599**

BETWEEN DOUGLAS ROY ANDREWS
Appellant

AND THE QUEEN
Respondent

CA518/2019

BETWEEN THE QUEEN
Appellant

AND DOUGLAS ROY ANDREWS
Respondent

Hearing: 20 July 2020

Court: Cooper, Peters and Whata JJ

Counsel: L L Heah for Mr Andrews
F R J Sinclair and H V Bennett for the Crown

Judgment: 27 November 2020 at 3 pm

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B The appeal against sentence is allowed. The sentence imposed in the District Court of nine years and six months' imprisonment on charge 6 is set aside.**
- C A sentence of 11 years and six months' imprisonment on charge 6 is substituted. It is to be served concurrently with the other sentences imposed in the District Court.**
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REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] At his trial before Judge Maze and a jury Mr Andrews was convicted of four representative charges of doing an indecent act on a child under 12,¹ one representative charge of sexual violation by unlawful sexual connection by digital penetration,² one representative charge of sexual violation by rape and one specific charge of sexual violation by rape.³

[2] Mr Andrews appeals against his conviction on the sexual violation charges.

[3] The Crown appeals against the sentence imposed,⁴ which was an effective term of nine years and six months' imprisonment.⁵ It is submitted that the Judge should have taken a starting point significantly higher than the 10 years she adopted.

Factual overview

[4] The alleged offending took place between 1 April 2015 and 9 August 2016. There was one complainant, C, who was aged between four and six years over that

¹ Crimes Act 1961, s 132(3).

² Sections 128(1)(b) and 128B.

³ Sections 128(1)(a) and 128B.

⁴ Criminal Procedure Act 2011, s 246.

⁵ *R v Andrews* [2019] NZDC 17825 [Sentencing notes].

period. She was the youngest of six children who lived with their mother, a dairy farm worker. At the relevant times, the family lived in two different locations in South Canterbury.

[5] Mr Andrews, some 23 years older than C, befriended the family, having initially formed a friendship with C's oldest brother. He would visit the family regularly, approximately every second weekend. Because C's mother worked long hours at a dairy farm, Mr Andrews was often left alone with the children. The Crown case was that much of the offending occurred on these occasions.

[6] It was said that when Mr Andrews was alone with C he made her touch his penis and masturbate him, as well as touching her vagina or the area surrounding it. This conduct was the subject of the four charges of doing an indecent act on a child aged under 12. It was also alleged that Mr Andrews inserted his finger into C's vagina (charge 5), and that he inserted his penis into her vagina on a number of occasions (charges 6 and 7).

[7] Charge 6 was a representative charge of rape. The evidence on which the Crown relied for that charge included an incident referred to in C's evidential video interview in which she described being driven by Mr Andrews to a location for the purpose of collecting wood (the wood gathering incident). She described a paddock, "almost by our house" where there was "wood". She said that Mr Andrews had stopped the vehicle and "just did it on the ground". The Crown also relied on an incident occurring in August 2016, when one of C's brothers, B, walked into his bedroom and found Mr Andrews and C lying on his bed. It was his evidence that he saw Mr Andrews pulling up C's pants, and that he could see her vagina. The Crown claimed that Mr Andrews raped C on this occasion too. B reported what he had seen to their mother.

[8] Charge 7 related to a specific incident at Easter in 2016, when Mr Andrews was alleged to have raped C at his home where she stayed overnight with her older brother on their way to see Warbirds over Wanaka.

[9] Both C and B gave evidential video interviews on 10 August 2016. Mr Andrews was interviewed on 11 August 2016, essentially denying all of C's allegations. Charges were subsequently laid.

Conviction appeal

[10] The conviction appeal proceeded on two grounds. The first was that there was no reliable evidence on which the jury could reasonably conclude that digital or penile penetration had occurred. Ms Heah, counsel for Mr Andrews, submitted that the verdicts on charges 5 to 7 were unreasonable on this basis.

[11] The second ground of appeal related to the representative charge of rape (charge 6). Ms Heah contended that C relevantly described two separate incidents of rape, the wood gathering incident and the incident in B's bedroom. She submitted that the evidence on which Crown relied related to events allegedly occurring in two different locations and carried with it the risk that all the jurors might have been satisfied a rape had occurred without being unanimous as to the particular incident. Ms Heah also argued that the Judge's direction to the jury failed to make it clear that all the jurors had to agree about at least one occasion on which there had been a rape. This was said to give rise to a miscarriage of justice.

Unreasonable verdicts

[12] Ms Heah submitted that the jury could not reasonably have been satisfied to the requisite standard that there was penetration of C's genitalia as required by charges 5 to 7. She addressed different submissions in relation to charge 5 on the one hand, and charges 6 and 7 on the other. In relation to all three charges, however, she focused on criticisms of the manner in which C's evidential video interview had been conducted, which she said resulted in C's responses to the questions asked being unclear and unreliable.

[13] As we will explain, the criticisms of the interviewer were substantially a repetition of similar criticisms made prior to the trial which were relied on to support a successful application to adduce expert opinion evidence about interviewing

techniques and children's memory, and to oppose a pre-trial appeal by the Crown which resulted in this Court ruling that the expert opinion evidence was inadmissible.⁶

Charge 5 — unlawful sexual connection by digital penetration

[14] Ms Heah raised two broad complaints about C's evidential video interview as it related to charge 5. First, she contended that repetitive questioning by the interviewer created a risk that C's answers were unreliable. Secondly, she argued that the interviewer's use of an analogy between the ear and the vagina was inappropriate.

[15] Ms Heah noted that C, six years old at the time of the interview, had been interviewed over one and a half hours, the transcript running to some 50 pages. When asked why her mother brought her to the police station, C said Mr Andrews had done "gross things" to her and disclosed being made to touch the "wrong spot" on him. In response to the interviewer's question of whether anything different also happened with Mr Andrews, C said "one time he like, my pants were up and he was tickling it right there, but my pants weren't down they were up". Ms Heah accepted that when using the words "tickling it right there" C indicated the area of her vagina. While that was said of an occasion when C's "pants were up", Ms Heah also accepted that later C said that sometimes her pants were "down and up".

[16] Later, after exchanges in which C clearly said that Mr Andrews had got her to touch his penis, C responded to a further question about the other things Mr Andrews did to her by saying "well he does lots of other things but I can't remember what other things he does".

[17] Ms Heah complained that over the next nine pages of the transcript, the interviewer repeatedly asked for more details about the inappropriate touching (C being made to touch Mr Andrews' penis and being tickled in her vagina area) but also about the other "bad" things that Mr Andrews did to her. Ms Heah submitted that C's inability to provide details about the other things led to the following exchange:

⁶ *R v Andrews* [2019] NZCA 151 [Pre-trial appeal decision].

Interviewer: Remember, cos I wasn't there, so I don't really know. So I need your help for you to tell me what happens, otherwise I won't know.

C: Well tickling you mean?

Interviewer: Anything different to the tickling?

C: Well he sometimes he does like *poke me up there* and it hurt me, that's why I said ow and he said does it hurt and he said yes and he does the, does it lots of other times and it's like hurting and I just hold my breath so I don't say anything.

Interviewer: Mmm. When you say that he pokes you up there, where do you mean?

C: Like here.

Interviewer: Oh. Mmm hmm. Mmm hmm, so tell me some more about that?

C: Well he does, he just does tickling and yeah do that.

Interviewer: Just describe to me what you mean when you say he pokes you up there?

C: Well it does hurt me.

Interviewer: Mmm.

C: And I don't really wanna say ouch, cos he might say does it hurt and he might do it again.

Interviewer: What does he poke you with?

C: Um his finger.

Interviewer: Oh. Tell me some more about that?

C: Well finger, well he sometimes he, I think so he doesn't have a clip and he doesn't clip his nails and it really hurts cos it feels like it's sharp.

Interviewer: Mmm. Where does, where do you feel that?

C: Well it feels like over here and there.

Interviewer: Mmm.

C: And it really hurts.

Interviewer: Mmm hmm, mmm hmm, okay, mmm hmm. So is that different to the tickling thing that he does or is it the same?

C: It's like different and different.

Interviewer: Oh, mmm hmm. So was it just, is there just one place that he pokes you or a different place that he?

C: He just does it in one place.

Interviewer: Uh huh, okay. Mmm. And when um Doug tickles you, what does he tickle you with?

C: He just tickles me with his finger.

Interviewer: Oh, okay. So tell me everything that you can feel his finger doing when that happens?

C: Well it, I doesn't laugh cos it's not actually ticklish.

(Emphasis added).

[18] As to these aspects of the interview, Ms Heah first complained that the interviewer's repeated questioning was unsafe as it may have suggested that something more must have occurred, putting pressure on C to disclose events that did not happen. Ms Heah also submitted that aside from telling C not to guess or make anything up towards the start of the interview, the interviewer did not remind C to say so if she could not remember what happened. This was said to heighten the risk, resulting from the interviewer's repeated questioning, that C's answers were not reliable.

[19] Secondly, Ms Heah argued there was "serious doubt" as to whether C's recollection that Mr Andrews would "poke [her] up there" was a reference to the inside of her vagina, as C pointed to her buttocks and thigh area when referring to "there". Ms Heah further argued that C's reference to the fact it "really hurt" was not conclusive of penetration of the vagina and could also have referred to pain on her labia or other sensitive area on the outside of her vagina.

[20] Shortly after the passage quoted above, the interviewer introduced the analogy between an ear and C's vagina in the following exchange:

Interviewer: Oh okay, mmm. You know that if I show you on my ear.

C: Yeah.

Interviewer: There's an outside part of my ear.

C: (Nods head).

Interviewer: And there's an inside part of my ear and just like on your vagina there's an outside part and an inside part.

C: (Nods head).

Interviewer: So where do you feel that um Doug pokes you?

C: Um it feels *like over here* and it feels like sharp.

Interviewer: Mmm hmm, mmm hmm.

C: Like when I poke my eye it feels really sore.

Interviewer: Mmm hmm.

C: But my, all the time my fingers have to get um, um get um like not cut off, but they do need to get clipped.

Interviewer: Okay. *So do you feel um Doug's finger on the outside part or the inside part of your vagina?*

C: The inside part.

(Emphasis added).

[21] Ms Heah submitted that C's reference to "the inside part" was insufficiently reliable to constitute proof beyond reasonable doubt that Mr Andrews had introduced his finger into C's genitalia.

[22] Ms Heah contended this was because it was most unlikely that a child of C's age was capable of mentally visualising an object as both an object in its own right and as a symbol for another object. Further, Ms Heah argued that C's answer "the inside part" was tainted by prompts given by the interviewer. In her original answer "feels like over here", C indicated to her buttocks. Her recollection that she felt Mr Andrews' finger on "the inside" of her vagina was made only once the interviewer had asked whether C felt Mr Andrews' finger on the outside or the inside of her vagina. Ms Heah said that the interviewer prompted C by pointing to the outside of her own ear when referring to the "outside part" and pointing to the inside of her ear when referring to "the inside part of your vagina".

[23] Section 232(2)(a) of Criminal Procedure Act 2011 provides that the Court must allow an appeal if satisfied that, having regard to the evidence, the jury's verdict was unreasonable. In *R v Owen*, the Supreme Court confirmed that a verdict "will be unreasonable if, having regard to all of the evidence, the jury could not

reasonably have been satisfied to the required standard that the accused was guilty”.⁷ The Supreme Court endorsed aspects of this Court’s judgment in *R v Munro* which it summarised as follows:⁸

- (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
- (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
- (c) The weight to be given to individual pieces of evidence is essentially a jury function.
- (d) Reasonable minds may disagree on matters of fact.
- (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
- (f) An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.⁹

[24] The Supreme Court also endorsed the statement in *Munro* that the correct approach is “to assess, on the basis of all the evidence, whether a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant”.¹⁰ Further, a verdict will be deemed unreasonable if, having regard to all the evidence, it is one which “no jury could reasonably have reached to the standard of beyond reasonable doubt”.¹¹

[25] In the end, we have not been persuaded that the issues raised by Ms Heah on appeal about the repeated questioning rose above the level of issues for the jury to weigh in assessing the reliability of C’s evidence.

⁷ *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

⁸ At [13] citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

⁹ The reference to s 385(1)(a) was to that provision in Crimes Act, now replaced by s 232(2)(a) of Criminal Procedure Act which is to the same effect.

¹⁰ *R v Owen*, above n 7, at [14] quoting *R v Munro*, above n 8, at [86].

¹¹ At [14] quoting *R v Munro*, above n 8, at [87].

[26] In its pre-trial judgment, this Court observed that, having viewed the interview, the jury would be well placed to form their own assessment of what effect the repeated questioning had, in the light of counsel's submissions.¹² We agree. The complaints Ms Heah raises with the interviewer's questioning go to the reliability of C's answers. As the Supreme Court made clear in *R v Owen*, matters of honesty and reliability are ordinarily a matter for the jury.¹³ In this case, the jury had the advantage of seeing and hearing C's evidential video interview and forming a view on C's reliability.

[27] We are not satisfied that the interviewer's questioning was such that the jury could not have found C's answers to be reliable. C was young and there were signs in the transcript, as might be expected, that she found the interview process uncomfortable. There were instances where she appeared not to grasp what she was being asked. While there was some repetition of questions, that was done to elicit further information and we regard the interviewer as having made a genuine attempt to ascertain what C could recall about Mr Andrews' conduct. In this regard, we agree with this Court's conclusion on the pre-trial appeal that, while C was asked on a number of occasions whether anything further had happened, and said that she could not remember, further questioning did result in her revealing more information.¹⁴

[28] It is also relevant to note that Ms Heah cross-examined the interviewer at the trial, drawing from her propositions that were helpful to the defence. Ms Heah referred to these in her closing address, reminding the jury of the concessions made by the witness:

Now you will recall that when I cross-examined [the interviewer] ... she agreed, one, that an interviewer needed to be particularly careful not to provide any cues or hints that may contaminate or influence the answers of the child. She agreed that any question in the way it is worded and in the way it is asked that could steer the child in a particular direction, that that sort of question is unsafe. She agreed that the pressure that an interviewer can exert on a child can be non-verbal and subtle and dangerous in that it could elicit answers that may not be accurate. So she agreed with all of that.

[29] Ms Heah then told the jury that it was for them to determine whether the techniques used by the interviewer were safe, and appropriate. She said:

¹² Pre-trial appeal decision, above n 6, at [51].

¹³ *R v Owen*, above n 7 at [13]. See also *Patel v R* [2009] NZCA 102 at [27].

¹⁴ Pre-trial appeal decision, above n 6, at [50].

The two tools that the defence have the greatest concern with is, one, the repeated questioning. Now in my cross-examination of the specialist interviewer, and I'm not going to go through it, I highlight it, her repeated questioning of [C] even though she repeatedly said she could not remember more. Right, there was at least 10 times that I counted when [C] said she could not remember anything else. But the interviewer was undeterred. She went on and on and as the interviewer went on and on [C's] allegations became, or grew in seriousness from he made me touch the wrong spot, he tickled my vagina, it grew to digital penetration or what appears to be digital penetration and what appears to be rape.

[30] Ms Heah then went on to say that the repeated questioning would have put pressure on C to come up with more information, giving rise to the risk that the additional information might not be true, accurate or based on real experiences.

[31] We consider the points made by Ms Heah were adequately summarised by the Judge in her summing up:

Ms Heah reminded you of the concessions about what make good practice from [the interviewer] and the dangers of eliciting answers which might not be accurate. She says that there are clear signs the complainant was under pressure ... Ms Heah is critical of the dangers from simply repeating questions, critical of the dangers of not repeating the reassurance, "If you don't know, if you don't understand, if you can't remember, just say".

[32] The proposition that C's answers were not reliable as a result of the interviewer's questioning was squarely before the jury. Before finding Mr Andrews guilty on charge 5, the jury therefore must have confronted this issue and decided that, despite the points raised by Ms Heah, there was sufficient basis on which to find the elements of the charge satisfied beyond reasonable doubt.¹⁵

[33] We also consider that any lack of clarity about the part of C's body where she had been poked by Mr Andrews was a matter for the jury to assess, after seeing C's evidential video interview. The issue of where C pointed and what implications that had for her answers was also put before the jury by Mr Heah in her closing address:

When asked where Mr Andrews poke[d] her she indicated the side of her thigh, then she indicated her vagina area and then the indicated the thigh area. She was confused. It was not clear.

¹⁵

See for example *G (CA663/2012) v R* [2013] NZCA 222 at [38].

[34] We have reached the same conclusion in respect of Ms Heah's complaints about the ear/vagina analogy. Ms Heah addressed the jury about this issue in closing, raising all the points that she has addressed on appeal. We consider the issues raised were all matters for jury assessment.

[35] Nor do we consider that the ear/vagina analogy was inappropriate because of C's age, and the argument that she was not capable of understanding the analogy is unconvincing. That is especially so given the fact that the witness used her own analogy in describing how she felt when she was referring to a poke in her eye. We are of the same view expressed by this Court in its pre-trial decision that the evidence given following the questioning based on the ear/vagina analogy indicates that C understood the questioning.¹⁶

[36] Overall, we are satisfied that there was sufficient evidence in C's evidential video interview upon which the jury could conclude beyond reasonable doubt that Crown had discharged its burden of proof in respect of charge 5. The verdict was not unreasonable.

Charges 6 and 7 — rape

[37] In respect of both these charges Ms Heah submitted that the jury could not reasonably have been satisfied beyond reasonable doubt that there was penetration of C's genitalia by Mr Andrews' penis. Ms Heah's submissions in this part of the appeal repeated and amplified complaints about the interviewer's repetitive questioning, but we do need to address that issue separately again.

[38] In relation to charge 6, Ms Heah referred to various parts of the video interview, including the incident when C's brother, B, came into his bedroom in which C was present with Mr Andrews on a bed. Ms Heah pointed out that at one stage C had said that Mr Andrews' and her pants were up at the time, which Ms Heah contended meant that penile penetration would have been impossible. Ms Heah also submitted it was improbable that Mr Andrews would have raped C on this occasion with B and C's other siblings present in the house at the time.

¹⁶ Pre-trial appeal decision, above n 6, at [55]–[56].

[39] Ms Heah also noted that the interviewer's attempts to obtain more information about that incident were not successful. This was followed, however, by the following exchange, after the interviewer had mentioned C's earlier disclosure about Mr Andrews getting C to touch his penis:

Interviewer: Tell me you can, everything you can see about Doug's penis?

C: Well I could see he had hair, that's only what I could see but I could see he had little bits of hair.

Interviewer: Mmm hmm. Tell me some more.

C: I can't remember what he did, um I can't remember what um more things he had, but he only had um big hairs and little hairs.

Interviewer: Mmm hmm, mmm hmm. Okay. And you said sometimes that Doug's penis, ah Doug's pants were down?

C: Yeah.

Interviewer: Mmm hmm. So tell me all about that happening?

C: Well he did do some other things, ah when his pants were down he, you remember when I said he was like, he's like, he was like doing this weird thing to me, like going like that thing when he would go like, like you know.

Interviewer: Mmm, mmm.

C: Yeah he did that and he um, he didn't tickle me.

Interviewer: Mmm hmm.

C: But lots of time[s] he does make me do that um weird thing where he um like does make me touch his penis.

Interviewer: Mmm hmm.

C: Yeah he does that and some other things, but I can't remember what he does of the other things.

Interviewer: Mmm.

C: He does lots of other things too, but I can't remember what he does.

[40] When referring to the "weird thing", Ms Heah noted that C put her hands together, palms facing each other, in a "clap" position. Further questions were asked about what C meant when she put her hands together in this way:

Interviewer: Mmm. So what parts of Doug can you feel on you when that happens?

C: I can feel his um, um his boobs and I can feel his like penis and no, none other things.

Interviewer: Uh huh, okay, mmm hmm. Okay. Does Doug's penis stay the same the whole time when that's happening or?

C: He um it's um, it stays the same.

Interviewer: Mmm hmm, or is anything different to that happen to it?

C: Um it just stays the same when he does like different other things.

Interviewer: Mmm, mmm hmm. So what's all the things that Doug does with his penis?

C: Well he does do other things but he doesn't do other things but sometimes he like makes me do that thing.

Interviewer: Mmm.

C: And does that thing and makes me and he tickles me and he and yeah.

Interviewer: Okay.

C: Takes his t-shirt off sometimes too.

...

Interviewer: Yeap and you said you could feel his boobs and his penis. So where on you could you feel his penis?

C: I could feel it down there and I could feel a pointy bit too.

Interviewer: Uh huh. So tell me all about that part happening.

C: Well I can't remember what other things he does, but he does lots of other things too.

[41] Ms Heah complained that C never said Mr Andrews put his penis in her vagina, just that she could “feel it down there”, including the “pointy bit”. While Ms Heah argued that C pointed to her thigh area when referring to where she felt Mr Andrews’ penis, she conceded that C also pointed in the direction of her vagina. In our view C’s intended meaning seems plain from the questions and answers which immediately followed:

Interviewer: So what part of your body was that called again?

C: Um ah you mean the penis?

Interviewer: The part of your body?

C: Oh um, um the vagina.

Interviewer: Uh huh and you know how we talked about the outside of your vagina and the inside of your vagina?

C: Yeah.

Interviewer: Tell me all the places that you could feel Doug's penis that time?

C: I could feel it like lots of other places, but he does it lots of other places but I don't know why he does that.

[42] Ms Heah claimed this passage showed C was unable to say whether she felt his penis on the outside or inside of the vagina, despite being given a “specific hint”. The interview then continued:

Interviewer: Okay, mmm hmm, mmm hmm. So I just need to get this really clear in my mind, cos I'm not really sure at the moment. Where could you feel Doug's penis?

C: I could.

Interviewer: On the *outside or the inside of you?*

C: Um the inside.

Interviewer: Okay. Tell me all about the way that felt?

C: Well um he does do it some other times, but not with anybody else.

...

Interviewer: Thank you. *And when Doug puts his penis in your vagina.*

C: Yeah.

Interviewer: Tell me, how, how does that feel to your vagina?

C: It just, it just feels scared.

(Emphasis added).

[43] Ms Heah raised two complaints in relation to this part of the interview. First that C was unlikely to have understood the interviewer's question “on the outside

or inside of you” as referring to her vagina. Secondly, that when the interviewer said “when Doug puts his penis in your vagina” she was telling C, not asking her, what occurred.

[44] Ms Heah also canvassed the evidence about the wood gathering incident. In respect of that incident the evidence included an exchange in which the interviewer asked C what had happened when she was on the ground. C answered:

Um he was on top and I was on the bottom and he did, you remember when he like does that weird thing when people have sex.

[45] Ms Heah complained that C’s answer was simply a repetition of an earlier answer she had given when asked about what happened on B’s bed, “he does do um the weird thing like I’m on bottom and he’s on top and he just like does that weird thing when people have sex”. Ms Heah also contended that C did not necessarily mean sexual intercourse when she referred to the “weird thing when people have sex”.

[46] We do not accept that the jury’s conclusion that there had been penetration for the purposes of charge 6 can be characterised as unreasonable. In her closing address, Ms Heah made the points that she has repeated in this Court. The matters relating to C’s reliability and the proper meaning of the answers she gave were all matters which were appropriate for the jury to consider. The inference that penetration of C’s vagina cannot have occurred on B’s bed because C said her pants were up, and others were present in the house, was also put before the jury in Ms Heah’s closing address, and was for the jury to assess. In the end, there was sufficient evidence from C that Mr Andrews had put his penis inside C’s vagina, and on a number of occasions, for the jury to conclude that the representative charge of rape was established beyond reasonable doubt.

[47] Ms Heah made some further and particular points about charge 7, the rape which the Crown alleged had taken place at Mr Andrews’ home. She focussed on the following questions and answers in the interview:

Interviewer: Mmm hmm. Mmm hmm. Okay. So that time that you’re talking about when Doug, when you could feel his penis.

C: Yeah.

Interviewer: On your vagina, where were you when that happened?

C: I was with him.

Interviewer: Mmm hmm. So where were you?

C: Um when I went to his house he had two beds and I asked if I could sleep in this bed and he said yes cos he had his own bed on that side and then he hopped in with me and he said can I ah, what did he say, can I sleep with you and he said yes he, then he didn't go to sleep and he just did it the weird thing.

Interviewer: Mmm hmm.

C: That and that's not even sleeping.

Interviewer: Mmm. So what did he do that time?

C: Well he did lots of other things but I don't know why he did that.

Interviewer: Mmm. Tell me about the lots of other things.

C: Well he does do um, he does do the um, you remember when I said he does that weird thing when he does that thing?

Interviewer: Mmm hmm.

C: Yeah, it's just making my head feel weird in my body.

Interviewer: Mmm hmm.

C: All other things.

Interviewer: What can your body feel?

C: It could just feel weird.

Interviewer: Mmm and tell me some more about that?

C: It does um feel pretty um weird when he does that.

[48] Ms Heah maintained that this passage of the interview formed the only basis for charge 7. She submitted that it was insufficient to establish proof of penile penetration of C's genitalia at Mr Andrews' home. She bolstered this argument by referring to a passage in the interview in which C had apparently referred to Mr Andrews getting her to touch his penis as "the weird thing". Further, Ms Heah claimed that on the night when C stayed at Mr Andrews' home her older brother who was present had slept on the floor of the bedroom in which the incident had allegedly

occurred. Ms Heah argued it was improbable Mr Andrews could have raped C given the presence of her brother.

[49] The latter point was plainly a matter for the jury to weigh. The former point overlooks the context of the questioning in that part of the interview. It is clear from the beginning of the passage that the interviewer was asking C about the occasions when she could feel Mr Andrews' penis on her vagina. In the context of that part of the interview, it was reasonable for the jury to infer that when C referred to the "weird thing" she was referring to sexual intercourse.

[50] Once again, we think there was sufficient evidence for the jury to form the view that there had been penile penetration of C's vagina on this occasion. Overall, we are satisfied that the jury's verdict on charge 7 cannot properly be characterised as unreasonable.

[51] We therefore reject the first ground of appeal.

Charge 6 — miscarriage of justice

[52] As we have noted, the second ground of the conviction appeal involved an argument that, on the evidence, there was a risk that jurors might have agreed that a rape took place during the period between 1 April 2015 and 9 August 2016, without being unanimous as to the particular incident when that occurred.

[53] The argument was advanced on the basis the evidence established that C's family lived in two different locations during the period of the alleged offending. The first was in the period down to 19 December 2015 and the second, after that. Ms Heah claimed that the rapes alleged could have occurred in either location, or both, and the locations should have been specified in the charge list.

[54] She submitted further that the Crown case as to penile penetration relied on two aspects of C's evidential video interview. The first, in which she said she could feel Mr Andrews' penis on "the inside" of her vagina and secondly, her description of the activity between Mr Andrews and her as being like when people have sex, with her on the bottom and he on the top. In relation to the first answer, Ms Heah noted

that C had not been asked for or offered any information as to when or where that occurred. In relation to the statements referring to the top/bottom position described as akin to when people have sex, C described this as having occurred in the incident in B's bedroom, and also during the wood gathering incident. It was clear that the bedroom incident occurred when the family was living in the second location, but there was no evidence as to when the wood gathering incident occurred. It could have taken place at either location.

[55] In these circumstances, Ms Heah submitted there was a distinct risk that all the jurors were satisfied of the proof of one specific incident of rape but not necessarily the same one. Some jurors might have considered that a rape occurred in the bedroom incident, and others during the wood gathering incident. Ms Heah claimed there was also a risk that some but not all of the jurors had agreed that a rape occurred when C described Mr Andrews' penis as being on "the inside" (whenever that incident might have taken place).

[56] Ms Heah then submitted that the direction given by the trial judge had failed to give a sufficiently clear direction about unanimity. In the circumstances, there was a real risk that the conviction on charge 6 was unsafe and there had been a miscarriage of justice.

[57] In order to put these arguments in context it is necessary to say a little more about the course of the trial. At the outset of the trial the charge list contained 12 charges, all proffered as representative charges. They were:

- (a) Six charges (numbered 1 to 6 in the charge list) alleging Mr Andrews had committed indecent acts against C, a child aged under 12 years.¹⁷
- (b) Three charges (numbered 7 to 9) alleging sexual violation by unlawful sexual connection (digital penetration).¹⁸
- (c) Three charges (numbered 10 to 12) alleging rape.¹⁹

¹⁷ Crimes Act, s 132(3).

¹⁸ Sections 128(1)(b) and 128B.

¹⁹ Sections 128(1)(a) and 128B.

[58] The six charges of doing an indecent act comprised three charges where the indecent act was making C touch Mr Andrews' penis, and three where the indecent act was touching her vagina or the area surrounding her vagina. The three charges in the former category were alleged to have occurred respectively at the two locations where the family lived in the period of the offending and at Mr Andrews' address. The same applied with respect to the three charges in the latter category. The three charges of sexual violation by digital penetration were also advanced respectively in relation to the two places where the family resided and Mr Andrews' home. The same was true in respect of the three charges of rape.

[59] At the end of the Crown case there was agreement that the charge list should be amended. The Judge recorded the position reached in a minute she made on 26 June 2019. She explained at the outset of her minute what had transpired to that point:²⁰

[1] The Crown has closed its case. As a result of that and the somewhat rambling nature of the complainant's interview, which is unsurprising given her age at the time, we have now been obliged to review the position in relation to the charges as originally laid for the commencement of this trial. It now seems to be agreed between all counsel that certain changes will be required, and the jury will be presented with an amended charge list.

[60] She then referred to a concern expressed by the prosecutor, Mr McRae which, in context, apparently related to charge 1 alleging touching of Mr Andrews' penis at the second place where the family resided. The Judge said:

[3] Mr McRae has expressed a concern that as the evidence has developed through trial it is arguable that the incident said to have occurred in August 2016 in [B]'s bed is a separate and identifiable act, distinct from more general allegations that this has occurred elsewhere. He says it is then arguable there should be a new charge laid which specifically addresses the August 2016 assertion. I am not satisfied that would meet the interests of justice at this point in time. It would be unhelpful, to say the least, to have to run the trial again. The defendant has proceeded on the basis of charge 1 being as it is. Also, the evidence is somewhat vague in relation to anything over and above that one event and I therefore consider that it is not in the interests of justice to allow an amendment to charge 1 at this point in time. Therefore charges 1, 2 and 3 will remain as they are.

[61] She continued:

²⁰ *R v Andrews* DC Timaru CRI-2016-076-726, 26 June 2019 (Minute of Judge Maze).

[4] It is accepted by both counsel that charges 4, 5 and 6 are now unable on the evidence to be distinguished as to place, and that the proper course is for them all to be replaced by a single representative charge of alleged offending by way of touching the vagina, or area surrounding the vagina, of the complainant in South Canterbury within the same timeframes.

[62] The Judge then turned to the six charges alleging sexual violation. She said:

[5] Similarly, charges 7, 8 and 9, which are allegations of sexual violation by introducing the finger into the genitalia of the complainant, suffer from the same difficulty and they will be replaced by a single representative charge relating to the South Canterbury area but otherwise in the same terms. Charges 10 and 11 also have the same difficulty and will be replaced by a single representative charge alleging sexual violation by rape within the South Canterbury area. Finally, charge 12 will be amended to be a non-representative charge as it appears to stand alone on the evidence as it now stands.

[63] In context, the reference to the charges facing the “same difficulty” was in reference to the inability on the evidence to distinguish the allegations as to place.

[64] As a result of the directions in the Judge’s minute, the overall number of charges alleged was reduced to seven. Insofar as the allegations of sexual violation were concerned, the Crown proceeded on charges 5 to 7 as they have been discussed in this judgment. What had been charges 7, 8 and 9 became charge 5, a representative charge alleging unlawful sexual connection by digital penetration “between 1 April 2015 and 9 August 2016, in South Canterbury”. What were charges 10 and 11 became charge 6 alleging as a representative charge sexual violation by rape, again within the relevant period and in South Canterbury. Charge 7 replaced charge 12 with a specific charge relating to the alleged rape by Mr Andrews at his home. The Judge recorded in her minute that both counsel had agreed on the course to be followed.

[65] For the Crown, Mr Sinclair noted that at an early stage of her interview, C had described the wood gathering incident when sexual activity occurred on the ground. However, the evidence did not establish whether the incident had occurred near the first or second of the family homes. C’s mother was asked whether she could recall wood lying on the ground in the vicinity of either the first or the second house, but she was not able to say. Mr Sinclair said it therefore seemed likely that the uncertain state of the evidence led the parties to agree that charge 6 should simply refer broadly to “South Canterbury”. That would be in accordance with the Judge’s minute.

However, Mr Sinclair properly conceded that the issue of whether a representative charge was appropriate does not turn on whether a particular location can be identified, but whether the evidential narrative discloses a specific incident that can be distinguished from other acts of similar offending in a “sensible and meaningful way”.²¹

[66] Mr Sinclair accepted that in this case, a sensible distinction did exist. The wood gathering incident had stood out in C’s mind and involved specific detail about the location and circumstances (travel in a car, to a wooded area, where some of the offending took place on the ground). Even if the physical location of the area could not be established, it was distinguishable from a rape or rapes that occurred inside C’s home. In the circumstances, Mr Sinclair accepted that treating the wood gathering incident as offending for the purposes of charge 6 did not appear to comply with s 20 of the Criminal Procedure Act, providing for when charges may be representative, and there had been no curative direction requiring the jury to be unanimous in relation to at least the same incident covered by the representative charge.

[67] Having made those concessions however, Mr Sinclair submitted that the error had not caused a miscarriage of justice. In this regard, he submitted first that there was no prejudice to the defence from the failure to bring a separate charge for the wood gathering incident. Counsel for Mr Andrews had consented to that course, the incident had been identified in C’s evidential video interview and Ms Heah had cross-examined C and her mother about surrounding details concerning both that and the only other incident relied on for the purposes of charge 6, namely the bedroom incident observed by C’s brother, B. Mr Sinclair argued that since the defence proceeded on the basis that only those two incidents were relied on in respect of charge 6, and there could be no suggestion that the character of the defence would have changed in any material way if one of those incidents had been the subject of a separate charge.

[68] Mr Sinclair further submitted that there was no issue in respect of unanimity on the particular facts of this case. That was because it was clear the Crown relied on

²¹ *R v J (CA686/2017)* [2018] NZCA 343 at [26]. See too the discussion in *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 at [9]–[10].

C's evidence about feeling the defendant's penis on the inside of her vagina in respect of all three incidents. Mr Sinclair submitted that to convict on charge 7 the jury must have accepted that C's reference to the "weird thing" which occurred at Mr Andrews' home included penetration of her vagina. She had then described the two incidents involving the wood gathering incident and the incident in B's bedroom in very similar terms. In the circumstances, Mr Sinclair argued it was difficult to articulate a rational basis on which the jury could have distinguished between the two charge 6 incidents. He argued that any prospect that the jury were not unanimous on any single incident within charge 6 was remote. It was a theoretical rather than a realistic possibility.

Discussion

[69] In *Mason v R* the Supreme Court discussed s 329(6) of the Crimes Act 1961, the predecessor to s 17 of the Criminal Procedure Act, which required that every count should "in general" apply only to a single transaction. However, the Court identified a requirement emerging from case law that "if particular acts of alleged offending can sensibly be charged separately without undesirably lengthening the indictment (overcharging), then that should be done".²² The Court continued:²³

It is necessary that distinctly identifiable acts of alleged offending be the subject of separate charges where the accused may be prejudiced either at trial or on sentencing if they are combined in a single count. On the one hand, the use of a multiplicity of counts is to be avoided where fewer would suffice for the interests of justice. On the other, overly complex counts may prejudice the defence or make it difficult to frame fair and accurate directions to the jury. If necessary trial judges should intervene if either problem arises.

[70] In the present case, by the time the Crown case closed, it was clear that there were at least two particular incidents which were alleged under charge 6. They were the wood gathering incident and the incident in B's bedroom. We consider Mr Sinclair was right to concede that those incidents could have been charged separately. There was evidence in C's video interview that there had been other instances of rape. For example, in relation to feeling Mr Andrews' penis on "the inside" of her vagina C said Mr Andrews "does it some other times". It is fair to say that the evidence about other occasions on which there might have been penetration was unclear, but possibly

²² *Mason v R*, above n 21, at [9].

²³ At [9].

there could have been a further representative charge, as well as separate charges in relation to the wood gathering and bedroom incidents.

[71] However, we agree with Mr Sinclair's submission that this is a case where the failure to prosecute the particular incidents as separate charges cannot realistically have resulted in any prejudice to Mr Andrews. The facts that distinguished the two specific incidents were established. It is very difficult to see how Mr Andrews would have been in any better position if separate charges had been laid. The Crown case on each incident would still stand or fall on C's evidence. To the extent that the incident in B's bedroom was bolstered by the statement made by B, he was available for cross-examination at the trial and was indeed questioned by Ms Heah. But there could have been no suggestion that, if charged separately, different relevant evidence could have been called.

[72] Overall, we have concluded that no prejudice to Mr Andrews arose from the failure to bring separate charges in relation to the incidents which were the subject of charge 6.

[73] We mention here another issue that would not be decisive on its own, but which is consistent with the conclusion just expressed. As can be seen from [3] of the Judge's minute set out above,²⁴ at the conclusion of the Crown case the prosecutor raised an issue about whether one of the indecency charges relating to what had occurred in B's bedroom should be alleged as a specific charge. The Judge did not consider that appropriate and what she said in [3] suggests she did not consider that was necessary to protect Mr Andrews' interests. Ms Heah evidently agreed. A similar point might have been raised in relation to the charge of rape based on the bedroom incident, but it was not.

[74] The amendments to the charge list proceeded by consent. The fact no issue was taken by trial counsel at the time is inconsistent with any suggestion of prejudice arising from the course followed.

²⁴ Above at [60].

[75] That leaves for consideration the issue concerning the adequacy of the Judge's summing up. The critical passage was as follows:

[25] Charges 1 to 6 are representative charges. The Crown can bring a representative charge where the complainant says that acts of a similar kind were repeated but the witness or witnesses cannot say exactly how often or exactly when it happened. Before you may find the defendant guilty on a representative charge you must be satisfied beyond reasonable doubt that the offence was committed on at least one particular occasion in the period specified in the charge and I will add in the place specified in the charge, because of course were you to conclude that charge 7 is proven, you could not use that for charge 6, for example. I am not saying that is what you will do, I am simply saying in theory this is the way to approach it.

[76] Ms Heah submitted that the Judge did not say that the jurors must "all" be satisfied beyond reasonable doubt that the specified offence was committed on at least one occasion. She claimed that the wording the Judge actually used left open the possibility that some of the jurors might have thought Mr Andrews raped C in B's bedroom and others may have thought this occurred during the wood gathering incident.

[77] We do not consider that there is a realistic possibility that jurors would have approached the issue in that way. The suggestion that a direction could have been improved by the use of the word "all" is unpersuasive given the overall content of the summing up, including the fact the Judge gave a clear direction on the jury's obligation to reach unanimous verdicts on each count. With particular reference to the representative nature of the charges, the Judge specifically told the jury that they "must all be satisfied beyond reasonable doubt as to the incident concerned in a representative charge". Combined with the direction that the jury must be satisfied beyond reasonable doubt that the offence was committed "on at least one particular occasion" in the specified period, the directions were adequate. Given those directions, we are not satisfied a real risk that the jury were not unanimous on any single incident within charge 6 has been established.

[78] Ms Heah identified a further risk that not all of the jurors had agreed that a rape occurred when the complainant described the appellant's penis as being "on the inside". We are satisfied the Judge's directions were quite clear that the jury had to be satisfied beyond reasonable doubt about the issue of penetration.

[79] For these reasons, we reject the second ground of the conviction appeal.

Sentence appeal

[80] The Judge sentenced Mr Andrews to a concurrent term of three years' imprisonment in respect of each of the four charges of doing an indecent act on a child under 12.²⁵ On the three charges of sexual violation, she sentenced him to concurrent terms in each case of nine years and six months' imprisonment.²⁶

The starting point

[81] As noted earlier, the Judge took a starting point of 10 years' imprisonment.²⁷ In the course of her sentencing remarks, the Judge described C as having been an impressive witness, very articulate both at the time of interview and at trial, attempting to be accurate and not overstate.²⁸ However, the Judge was also conscious that in response to the factual challenges mounted by Ms Heah it was necessary for her to state with some clarity the factual basis upon which she would sentence Mr Andrews.²⁹ In respect of the sexual violation charges, the Judge noted in the case of charge 5 that the evidence obtained when C was interviewed was "a little confused" but she noted that C had referred to "poking up there and it hurt and he does it lots of other times".³⁰ The Judge recorded that the jury had clearly found it occurred more than once, and there was an evidential basis for that conclusion.

[82] As to charge 6, the Judge noted that C had said that she could feel Mr Andrews' penis touching her genital area, she could feel it on "the inside" and "he does do it some other times".³¹ The Judge said that she was satisfied, despite Ms Heah's submissions, that C was well able to distinguish the difference between one other and several other occasions. She had said "he does do it some other times". The Judge said:³²

²⁵ Sentencing notes, above n 5, at [29].

²⁶ At [30].

²⁷ At [27].

²⁸ At [24].

²⁹ At [12].

³⁰ At [15].

³¹ At [16].

³² At [17].

That means more than the [incident at Mr Andrews' home] and more than once. I cannot obviously say that I am satisfied the evidence shows it was more than twice. Therefore, while there is not full penetration or ejaculation, there is sufficient [evidence] for a conclusion that sentencing should proceed on the basis of introduction of the penis into the victim's genitalia to a limited extent and more than once for charge 6 and then the single event charge 7 ...

[83] In the case of charge 7, the Judge noted the evidence was of a single incident which the jury had accepted as rape. It appeared to have been on the basis of the same level of penetration as in the case of charge 6.³³

[84] The Judge considered that the "degree of violation" for the purposes of charges 6 and 7 was "at the lowest end".³⁴ There had been no additional violence, or demeaning or humiliating behaviour. The aggravating features above the elements of the offences themselves included C's vulnerability at the age of between four and six and the likely lifelong impact the offending would have on her.³⁵ The offending had occurred over a period of 15 to 16 months.³⁶ The Judge accepted a submission made by Ms Heah that the evidence did not disclose planning and manipulation. Rather, she thought Mr Andrews had simply taken advantage of opportunities when they presented themselves.³⁷ Nor did the Judge consider there any suggestion of grooming or the making of threats or the offer of rewards to C.³⁸ On the other hand, the Judge noted there had been a breach of trust in the sense that Mr Andrews had been alone with C and at times was the only present adult in the family's home, assuming the role of adult in the absence of the children's mother.³⁹ As a result, the Judge considered Mr Andrews had been in a position of trust and had breached it in a significant and serious way.

[85] In the end the Judge accepted Ms Heah's submission that the case fell within band 2 of the bands articulated in the guideline judgment of *R v AM*,⁴⁰ and attracted a starting point of 10 years' imprisonment on the basis that was sufficient to recognise

³³ At [17].

³⁴ At [19].

³⁵ At [20].

³⁶ At [21].

³⁷ At [22].

³⁸ At [23].

³⁹ At [25].

⁴⁰ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

the overall offending.⁴¹ Because of Mr Andrews' previous good character, she then allowed a discount of six months.⁴²

Submissions

[86] The main proposition advanced by Mr Sinclair was that the Judge was wrong to regard the case as falling within band 2. Rather, he submitted the Judge should have placed the offending in band 3. That band was "appropriate for offending which involved two or more of the factors increasing culpability to a high degree, such as a particularly vulnerable victim and serious additional violence, or more than three of those factors to a moderate degree".⁴³ In this case, the relevant factors were C's vulnerability, the scale of the offending, planning and premeditation, breach of trust and the harm inflicted on C.

[87] Obviously, there can be no issue that C was vulnerable, having regard to her age. Addressing the scale of the offending, Mr Sinclair submitted that the offending had spanned a period of 15 months, during which time C suffered repeated sexual violation. Addressing the question of planning and premeditation, Mr Sinclair submitted there had been premeditation to a high degree. He contended that Mr Andrews had won the family's trust to such an extent that he had effectively become another family member. His presence was such an ordinary feature of their daily lives that he could choose when he visited and stayed, and he should be regarded as having contrived the situation that gave him regular opportunities to molest C. Mr Sinclair was also critical of the Judge's treatment of the issue of grooming. He submitted that C's evidential video interview indicated she had been lured into situations where the offending could occur by the prospect that "fun things" of a non-sexual nature might occur.

[88] Mr Sinclair submitted there was clearly a significant breach of trust having regard to Mr Andrews' relationship with the family and the trust they had in him, and this should be recognised as an aggravating factor in its own right.⁴⁴

⁴¹ Sentencing notes, above n 5, at [27].

⁴² At [28].

⁴³ *R v AM (CA27/2009)*, above n 40, at [105].

⁴⁴ Citing *Donaldson v R* [2019] NZCA 338 at [18].

Further, Mr Sinclair argued the Judge had been wrong to describe the degree of violation as “at the lowest end” because the offending had not been accompanied by “additional violence or demeaning or humiliating behaviour”.⁴⁵ He said the Judge had been right in her assumption that the offending would cause long term effects for C.

[89] Another point made by Mr Sinclair was that it was not clear that the acts of digital penetration, which C had described as involving pain and happened “lots of other times”, had been adequately reflected in the starting point. The reasons for adopting the starting point had been articulated in a way that focussed on the appropriate starting point for charge 6.

[90] Overall, Mr Sinclair submitted that, properly analysed, the offending was far too serious to belong in band 2 and to put it in that category was an error of principle which had resulted in an inadequate sentence. Mr Sinclair therefore contended that a starting point of between 12 and 13 years’ imprisonment was the lowest available to correct the inadequacy of the sentence.

[91] Mr Sinclair further submitted that the six-month deduction for good character had compounded the inadequacy of the sentence, and in the context of sustained and serious sexual offending against a child, a discount was inappropriate.

[92] Ms Heah addressed various arguments in support of the approach taken by the Judge. In summary, she argued the Judge had properly assessed the scale of the offending, and the degree of violation. She maintained it was appropriate to assess the period over which a rape occurred, and the degree of penetration involved. C’s young age was already treated as an aggravating factor in terms of her vulnerability, and Mr Andrews’ breach of trust was not as serious as if he had been an actual family member or been specifically entrusted with the care of C. Ms Heah submitted the Judge’s reasoning in relation to planning and premeditation was correct and claimed that, although harm to C was inherent in the offending, it could not be properly assessed as an aggravating factor in its own right. Ms Heah also submitted that the Judge’s six-month credit for good character was not an error of principle.

⁴⁵ Sentencing notes, above n 5, at [19].

Discussion

[93] Notwithstanding Ms Heah’s detailed submissions, we have concluded that Mr Sinclair was right to say that the offending should have been placed in band 3 of *R v AM*. We accept that it was appropriate to take charge 6 as the lead offence for the purposes of sentencing. We also accept the Judge properly approached her assessment of that charge on the basis that the jury must have concluded it related to more than one rape. This meant that C had been raped at least three times over the period covered by the charges, once charge 7 was brought to account. Further, taking charge 6 as the lead offence also required the starting point to reflect the offending covered by charge 5. As to that, C described the digital penetration as painful, and that Mr Andrews had done it “lots of other times”. We agree with Mr Sinclair that the Judge’s sentencing notes do not articulate what role the charge 5 offending played in fixing the starting point.

[94] Both counsel have addressed the culpability assessment factors set out in *R v AM*. In that case this Court also made the “trite but important” point that what is required is an evaluation of all the circumstances, and that listing the relevant factors and setting out bands did not remove the need for judgment.⁴⁶ This Court observed that a “mechanistic approach” is inappropriate.⁴⁷

[95] For sentencing purposes, the important features of this case are the repeated sexual violations, and the fact that C was aged between four and six at the time of the offending. Mr Andrews was a trusted and close friend of the family. He was regularly in the presence of C and her siblings. Because of that trust, he was able to be regularly in C’s company, it would seem often alone with her. The maintenance of that relationship with the family of itself gave him opportunities for repeated offending so there were repeated breaches of trust. We do not consider that it makes his conduct less reprehensible that the evidence does not disclose particular acts which might fall under the descriptor of “grooming”, or planning or premeditation. The simple fact of the matter was that so long as he maintained his relationship with the family, opportunities for further offending would arise. He took advantage of that situation.

⁴⁶ *R v AM* (CA27/2009), above n 40, at [36].

⁴⁷ At [36].

[96] We add to this the significant point that there was a considerable age disparity. Mr Andrews was 28 to 29 years old, some 23 years older than C, during the period of the offending. Given that age disparity, and the repeated nature of the offending, we doubt that it was right to characterise the degree of violation as at the “lowest end” even though the evidence did not disclose violence (beyond that inherent in the offence itself) or demeaning or humiliating behaviour.

[97] We add that the starting point adopted for charge 6 had also to reflect the lesser offending represented by charges 1 to 4. While less serious, it is clear from the evidence that there were repeated acts throughout the period in which Mr Andrews made C touch his penis and touched her vagina and the area surrounding it. In *R v AM*, band 3 was described as encompassing offending which is accompanied by aggravating features which are at a relatively serious level. The Court said:⁴⁸

Rape band three is appropriate for offending which involves two or more of the factors increasing culpability to a high degree, such as a particularly vulnerable victim and serious additional violence, or more than three of those factors to a moderate degree.

[98] In our view, the offending in the present case involved the presence of three aggravating factors, namely vulnerability, scale and premeditation to a high degree. Those considerations were coupled with a breach of trust. The appropriate band was band 3.

[99] This is a Crown appeal. The Court should increase the sentence only to the extent necessary to remedy the error.⁴⁹ Here, that would mean taking a starting point of 12 years’ imprisonment, the lowest that could have been adopted in accordance with placing the offending in band 3.

[100] Given the period over which the offending took place, the Judge’s allowance of a period of six months for previous good character was generous. But we cannot say that it was an approach which she could not take in the exercise of her discretion. There was no error of principle.

⁴⁸ At [105].

⁴⁹ See *Solicitor-General v Hutchison* [2018] NZCA 162, [2018] 3 NZLR 420 at [11]; *R v Lata* [2018] NZCA 615 at [44]; and *Solicitor-General v Ahmed* [2009] NZCA 459 at [24].

[101] However, for the reasons we have given, the sentence appeal must be allowed. A starting point of 12 years' imprisonment less the six-month discount for previous good character results in an end sentence of 11 years and six months' imprisonment. That sentence will be substituted.

[102] Although the Judge did not specifically say so, we think it is clear that she took charge 6 as the lead sentence. However, rather than imposing a greater sentence on that charge to reflect the overall offending, she imposed the same sentence on all three charges of sexual violation. We think the appropriate course to follow in accordance s 85(4)(a) of the Sentencing Act 2002, is to impose a sentence on charge 6 which reflects the overall gravity of the offending, and that is the approach we will take.

Result

[103] Mr Andrews' appeal against conviction is dismissed.

[104] The Crown's appeal against sentence is allowed. The sentence imposed in the District Court of nine years and six months' imprisonment on charge 6 is set aside.

[105] A sentence of 11 years and six months' imprisonment on charge 6 is substituted. It is to be served concurrently with the other sentences imposed in the District Court.

Solicitors:
Crown Law Office, Wellington for Crown