

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR  
IDENTIFYING PARTICULARS OF COMPLAINANT 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**

**CA722/2021  
[2022] NZCA 442**

BETWEEN                      W (CA722/2021)  
   Appellant

AND                              THE KING  
   Respondent

Hearing:                      15 June 2022

Court:                          Courtney, Mander and Fitzgerald JJ

Counsel:                      S Brickell for Appellant  
   E J Hoskin for Respondent

Judgment:                    19 September 2022 at 11.30 am

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**JUDGMENT OF THE COURT**

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- A      The appeal against conviction is dismissed.**
- B      The appeal against sentence is allowed.**
- C      The sentence of five years and six months' imprisonment is set aside and  
         substituted with a sentence of four years and eight months' imprisonment.**
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**REASONS OF THE COURT**

(Given by Courtney J)

## Introduction

[1] In 2015 X, then aged seven, was placed in foster care with Ms W. The appellant, who is Ms W's son and was then aged 14, was also living in the house.<sup>1</sup> Sometime later, after X had been moved from Ms W's care, she alleged that the appellant had raped her while she was living with him and his mother.

[2] In 2021, the appellant stood trial before a jury and Judge Harvey in the District Court at Whangarei on the following charges:

- (a) charge 1 – sexual violation by rape between 14 September 2015 and 19 May 2016, described as the “[f]irst occasion”;
- (b) charge 2 – sexual violation by rape between 14 September 2015 and 19 May 2016, described as the “[l]ast occasion”; and
- (c) charge 3 – sexual violation by rape between 14 September 2015 and 19 May 2016, a representative charge described as “[o]ccasion(s) other than in [c]harges 1 and 2”.

[3] The appellant was convicted on charges 1 and 3. He was acquitted on charge 2, which related to a party at Ms W's house at Easter 2016 (referred to during the trial as “the party rape”).

[4] The appellant appeals his convictions on the grounds that a miscarriage of justice occurred because:

- (a) Although the representative charge was correctly framed based on the complainant's evidential video interview (EVI), at the conclusion of the Crown case the evidence required it be split into two distinct charges. The failure to do so tainted both convictions.

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<sup>1</sup> The appellant's name has not been used, despite it not being suppressed, because identifying him by name would risk breaching the complainant's statutory protections under ss 203 and 204 of the Criminal Procedure Act 2011 due to the nature of the offending and his relationship to the complainant. See *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [54]–[58].

- (b) The Judge failed to direct the jury specifically in relation to the need for unanimity on charge 3.

[5] The appellant was sentenced to five and a half years' imprisonment.<sup>2</sup> He appeals his sentence on the ground that it is manifestly excessive as a result of the Judge taking too high a starting point and allowing too low a discount for youth.<sup>3</sup>

### **Circumstances of the offending**

[6] The following was not in dispute. X came into Ms W's care in September 2015. At that time, the household comprised Ms W, the appellant and Ms W's then partner, Ms D.

[7] X had been in foster care with another family and was known to have behavioural issues, including sexualised behaviour. House rules were put in place to manage this issue. Initially, the sleeping arrangements were that Ms W and Ms D shared a bedroom and X and the appellant each had their own bedrooms.

[8] On 27 November 2015 Ms W began working night shifts. X alleged that the offending began the night of Ms W's first night shift.

[9] In January or February 2016 the relationship between Ms W and Ms D ended. As a result, there were changes in the sleeping arrangements. The appellant moved to sleep in a sleepout on the property. Ms W continued to sleep in her bedroom with her new partner, Ms H. Ms D moved into the room previously occupied by the appellant with her new partner.

[10] Ms W's last night shift was on 21 February 2016.

[11] In May 2016 Oranga Tamariki moved X into foster care with another family. The reason was that Ms W's new partner was not approved as a foster carer.

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<sup>2</sup> *R v [W]* [2021] NZDC 23402 [Sentencing notes].

<sup>3</sup> A further ground, that an inadequate discount was given for cultural factors, was not pursued.

## **First and second grounds of appeal: failure to divide charge 3 and to direct on unanimity**

### *Relevant principles*

[12] Generally, a charge must relate to a single offence and contain sufficient particulars to fully and fairly inform the defendant of the substance of the offence alleged.<sup>4</sup> As was noted in *Gamble v R*, separate counts facilitate fairness in the conduct of the trial by focusing attention on matters of fact and law which can and need to be distinguished for the purposes of the different counts and enable each specific allegation to be tested separately.<sup>5</sup>

[13] However, s 20 of the Criminal Procedure Act 2011 (CPA) permits representative charges in specified circumstances. Relevantly, s 20(1) provides that:

- (1) A charge may be representative if—
  - (a) multiple offences of the same type are alleged; and
  - (b) the offences are alleged to have been committed in similar circumstances over a period of time; and
  - (c) the nature and circumstances of the offences are such that the complainant cannot reasonably be expected to particularise dates or other details of the offences.

[14] A “representative charge should not be filed under s 20(1) if the evidence supporting that charge discloses identifiable, discrete instances of offending”.<sup>6</sup> Where evidence that distinguishes instances of alleged offending arises for the first time at trial, the charge may be divided under s 21(1)(a) of the CPA:

- (1) The court may on the application of any party or on its own motion, in the interests of justice,—
  - (a) order that any charge worded in the alternative, or that is representative, be amended, or divided into 2 or more charges ...

[15] There will be no unfairness, however, if the charge is not divided and the jury is instead instructed to distinguish between the relevant acts alleged and reminded of

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<sup>4</sup> Criminal Procedure Act 2011, s 17.

<sup>5</sup> *Gamble v R* [2012] NZCA 91 at [33].

<sup>6</sup> *Renes v R* [2021] NZCA 188 at [53]. See also *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [8].

the need to be sure that each particular incident has occurred.<sup>7</sup> This course requires careful attention to the requirement of unanimity. Where discrete instances of offending can be identified there is a risk that the jury may be satisfied that some offending has occurred but is not sure which instance has been proven. Alternatively, jurors may all be satisfied that an instance of offending has occurred but not be agreed as to which one. In *Gamble v R* this Court expressly referred to the statement in *R v P* that:<sup>8</sup>

The result is that the verdict may not reflect a unanimous view that any one particular rape had occurred. In the circumstances of this case it is quite possible that there were differing views as to the proof of each incident, but a common view that one unspecified incident, not necessarily the same in the eyes of all jurors, had been established. ...

It also referred to the statement by Elias CJ in *R v Mead*:<sup>9</sup>

[14] A jury must be unanimous as to the essential ingredients of the offence. ...

[15] It is not necessary that jurors be in agreement about the evidence. They can arrive at the same point by different reasoning. But the essential points upon which they must agree are not simply a conclusion based upon the statutory criteria for the offence. The statutory elements will need to be anchored to the facts relied upon by the prosecution as the basis of liability and put in contention by the defence. The jury must be agreed upon the factual basis on which they find the accused guilty ... Without such agreement there is no common foundation for the verdict.

...

[20] Where a number of specific incidents or transactions or courses of conduct are included in the same count, there is a risk that all jurors will be satisfied of the proof of one, but not necessarily the same one. ...

(citation omitted)

### *The appellant's argument*

[16] The appellant says that by the end of the Crown case, charge 3 no longer met the statutory criteria in s 20(1) for a representative charge. He says that charge 3 should have been divided into two discrete charges and/or that the Judge should have

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<sup>7</sup> *Walker v R* [2012] NZCA 520 at [52]; *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 at [12]; and *Gamble v R*, above n 5, at [51].

<sup>8</sup> At [49], citing *R v P* [1998] 3 NZLR 587 (CA) at 591.

<sup>9</sup> At [50], citing *R v Mead* [2002] 1 NZLR 594 (CA).

directed the jury on the evidence that distinguished the rapes that were the subject of charge 3.

[17] The appellant's defence was that the offending never happened and there was no opportunity for it to have happened. As the charge stood, the jury was required to consider the very wide date range of September 2015 to April 2016. However, Mr Brickell, for the appellant, submitted that under cross-examination, X was able to identify the rapes (other than the party rape) as occurring only on the first three nights of Ms W's night shift. Since the first date was known (27 November 2015) the subsequent dates were able to be ascertained by the jury.

[18] Mr Brickell argued that the appropriate course was for the Judge to have directed that the representative charge 3 be divided into two single charges which would have covered the alleged rapes on 28 and 29 November 2015. That would have allowed the jury to focus on the very limited period during which the offending was alleged. The appellant's defence was much stronger if the jury was confined to the narrow window of two consecutive nights in November 2015. This was, in part, because at that stage Ms D was still Ms W's partner and was more likely to be attentive to the house rules put in place at the outset.

[19] In addition, Mr Brickell argued that the particulars of the other two charges should have been amended to conform with the evidence at trial in relation to the date of the offences.<sup>10</sup> That would have seen charge 1 amended to specify the date of the offence as on or about 27 November 2015. That would have ensured that the jury considering charges 1 and 3 would be considering three consecutive nights in accordance with the evidence. Likewise, he submitted that the date of the alleged offending in charge 2 should have been amended to specify on or about Easter 2016 because it was clear that the complaint related to the alleged offending at the Easter party.

[20] Mr Brickell also argued that the failure to divide and amend the charges meant that some jurors may have considered whether the appellant was guilty of the offending on the specific dates in November, but others would have been considering

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<sup>10</sup> Criminal Procedure Act, ss 16, 17 and 133.

rapes on other occasions in the very broad range particularised in the charges. This meant a risk of the verdict not being unanimous. This risk was exacerbated by the prosecutor's focus on the evidential interview and his invitation to the jury to make allowances for X's inability to recall dates because dates were not important.

*Should charge 3 have been divided?*

[21] Mr Brickell's argument was based on the evidence that X gave under cross-examination. However, that assumed that X's evidence under cross-examination reflected her evidence generally. We do not accept that it did.

[22] The Crown opened on the basis that:

The charges cover a time period between September 2015 through to about May 2016 when [X] is between seven to eight/nine years of age. It is a broad time period but the focus is on a period of time when the defendant's mother had a night shift type job and would be absent from the house in the evening.

[23] It is common ground that this position fairly reflected the statement that X had made in her 2018 EVI, which was played to the jury. In her EVI, X gave a general description of the offending:

[X] ... [O]ne night his mum ...

...

[X] ... got a new job.

...

[X] ... [I]t was a night shift job, and he would have to stay home and, you know, take care of me ...

...

[X] ... while she was ... at work.

...

[X] And he ... would come into my room ...

...

[X] ... he would rip my pyjamas off me and ...

...

[X] ... force me to have sex ...

...

[X] ... [H]e did that to me every night ...

...

[X] ... that she had left. He would give it a couple of seconds until she had left ... out of the driveway and gone.

...

[X] ... [H]e would always come into my room every night and do that to me.

[24] X then gave more detail about the first occasion:

[X] ... he just told me to wake up, ... shaking me up. 'Cos I'm a deep sleeper so, you know, it took him a while to wake me up, but I eventually woke up. And as soon as I woke up, that's when he had taken off my clo-, my pyjamas, my cute unicorn pyjamas.

...

[X] ... I think the first time he had just straightaway put his penis inside my vagina ...

...

[X] ... the first night wasn't so tough on me, so, you know, if I told him to stop he would stop the first night. But as ... he kept on coming in, he wouldn't listen. So I think it was because he was, you know, ... trying to make me think that this is going to happen every night. And I didn't really know what was going on, so — until I realised all the other nights that he had kept on doing it to me.

[25] X said that the offending happened “quite a few times”.

[26] X described when the offending finished:

[X] [I]t had stopped when ... his mum got a new partner. Because she got a new job that was working daily, not nightly, so he had stopped. And, yeah, so it stopped when his mum got a new partner.

[27] X described the “worst time” as being at the Easter party in 2016. This was also described by X as the last time, being the alleged offending covered by charge 2.

[28] In evidence-in-chief X confirmed that the statements in her EVI were true.



[29] In cross-examination, X was challenged about her statement that the appellant had raped her every night. She made statements that were inconsistent with her EVI:

Q. ... you see there on page 12 [of the EVI transcript]: “he would always come in every night and do that to me”, are you saying there that every night he would come in and rape you, is that what you are getting at?

A. Not every night, but it was three nights.

Q. Pardon?

A. It was the first three nights of [Ms W’s] new job.

...

Q. So did you mean that he was raping you every night that [Ms W] was working at night ... ?

A. For the first three nights.

Q. For the first three nights and then are you saying that’s it, it stopped?

A. Yeah.

Q. Apart from the party of course. Is that what you’re saying?

A. Yes.

[30] The notes of evidence show that during this interaction the Judge asked X if she wanted to have a break. Ms Hoskin, for the Crown, advised (without objection from Mr Brickell) that the jury then asked whether X had any learning difficulties that affected how she processed information and events. The officer-in-charge was interposed and the question was put to her. She confirmed that this was the position. Cross-examination of X resumed.

[31] We were not invited to draw any particular inference from this aspect of the trial and do not do so. We merely observe the obvious fact that the assessment of a witness is very much a matter for the jury, which enjoys advantages not available to an appellate court.

[32] In closing the prosecutor did not expressly address the inconsistency in the evidence about how many times the offending occurred. The focus of the Crown’s closing was on the general issue of credibility and the only reference to dates was in that context:

Don't impose some sort of higher standard on a young person. In fact, if anything, it should be different because a young person doesn't have the markers that an adult has, jobs and houses and diaries and phones and things like that and life experience that help them mark things. She just has what she has as, first of all, an eight-year-old, then a 10-year-old, to try and mark timings and things of that sort. I am highlighting that because sometimes we can fall into a situation where: "Well, she's not right about the time something occurred or that doesn't make sense to us". Well, two things I would say about that. One, that the time something happened, remember, isn't one of the elements or questions you are asked, neither is the particular date or the day of the week or anything of that sort. The focus is on did it happen, and we understand people might get them mixed up, might have, you know, it does seem that — I used the phrase: "One person's party is another person's gathering", or something similar, that we are talking about two events ...

[33] In comparison, the defence closing focussed heavily on the change in X's account of the offending. Counsel emphasised, at length, the evidence X had given in her EVI and said:

... This is her first story. [Ms W] starts work. We know that's November. Every night [Ms W] finishes the nightshift in April. So what's that, you can work out how many nights that is. Every night he's coming in and raping her. As soon as [Ms W] goes off and then when he hears the car coming back, when he hears the car coming back and we'll see that, ... that's when he stops. ...

But under cross-examination ... we get to where it happens, *three nights only*, and of course the party night, the fourth night ...

This is a substantive shift. They talk about consistency. This is total inconsistency. You imagine just someone stood up here and said, "I was whacked for four months every night". And then when their story is tested and we look at the time of the testing when we get to the *three nights*, "Oh, no, well actually it was only three nights out of all those months." ...

[34] Counsel went on to emphasise the contextual factors — the fact that X was already sexualised, that it was inherently unlikely that the appellant would be left to look after her, and that on Ms D's evidence X often slept in her bed while Ms W was at work.

[35] In addition, counsel addressed the jury at length regarding charge 2 — the party rape — on which the jury ultimately acquitted the appellant.

[36] In relation to charge 3 the Judge directed the jury as follows:

[20] Now, charge 3 is what is called a representative charge. Charge 3 alleges that [the appellant] between the 14<sup>th</sup> day of September 2015 and the

19<sup>th</sup> day of May 2016, but at times different to those allegations contained in charges 1 and 2, raped [X]. You will recall the evidence is that it is alleged that [the appellant] raped [X] on three occasions. Now, I should say three occasions plus the party. Now, not surprisingly, she was not able to put a date or dates when she said that that occurred. Rather, she said it was ongoing. So, to find [the appellant] guilty on charge 3 you must be satisfied that he did rape [X] on at least one occasion during the alleged period, but that occasion being different to the occasions referred to in charges 1 and 2.

[37] Later, in summarising the respective cases, the Judge specifically referred to the cross-examination and the apparent difference between X's answers in cross-examination and her EVI:

[36] Mr Fairley says, really, what you have to do here is, first, look at the EVI and what [X] said in that EVI and then you have got to compare that with what she is saying now because, Mr Fairley says, contrary to what the Crown submit to you, she has not been consistent at all. Remember when she said that [Ms W] started to work ... [the appellant] was left to look after her. Well, said Mr Fairley, given that these people knew that this was a troubled young girl, do you think they really would have allowed that to have occurred? Then [X] says in her EVI that: "He did it to me every night. He would always come in and he would do it to me every night and it started when Mum started night shift". Well, that changed somewhat under cross-examination. We now know that she is saying it happened on three occasions plus the party and Mr Fairley says that is a quantum shift.

[38] Clearly, X's statements under cross-examination were inconsistent with her EVI but that inconsistency did not mean that her evidence in cross-examination was to be treated as determinative. In particular, it is significant that X was aged between seven and eight at the time of the offending in 2015–2016, 10 when she gave her EVI in 2018 and 13 when she gave evidence at trial in 2021, more than five years after the offending. Her age, the drawn-out process and the inconsistencies in her account, suggest that X either could not, or could not reasonably be expected to, particularise the exact dates of the offending.

[39] Apart from the dates, the alleged offending was of multiple offences of the same type — the appellant was said to have come into X's bedroom and raped her. There were no variations in the description of the instances of offending, nor any other distinguishing features that might have justified separate charges. We consider that the representative charge was still appropriate at the conclusion of the Crown case and there was no justification for it to be divided.

[40] We also note the point made by Ms Hoskin, that neither the very experienced trial counsel nor the very experienced trial Judge, considered dividing charge 3. Nor is there any assertion of trial counsel error in the failure to do so. This point is not determinative but, for the reasons just discussed, we do not consider that there was any basis on which the appellant could have sought to have the charges amended. We note, too, that dividing charge 3 would have carried the very real risk of the appellant being convicted on four discrete charges rather than three.

*The Judge's summing-up on unanimity*

[41] The Judge did not direct on unanimity specifically in relation to charge 3. In relation to charge 3 the Judge directed:

So, to find [the appellant] guilty on charge 3, you must be satisfied that he did rape [X] on at least one occasion during the alleged period, but that occasion being different to the occasions referred to in charges 1 and 2.

[42] At the conclusion of his summing-up, he said:

In a moment, I will be asking you to retire to consider your verdicts, and I ask you, please, to remember that your verdicts must be unanimous ...

[43] We do not consider that there was an error by the Judge in directing on charge 3. It was for the jury to consider the effect of the inconsistency in X's evidence when assessing her credibility and reliability. It was open to the jury to accept only some of her evidence. The jury may therefore have accepted that, notwithstanding the statements drawn from her in cross-examination, the offending was not limited to those three nights. It was therefore proper for the Judge to direct as he did, drawing attention to the various statements X had made and recognising that it was open to the jury to determine the charge on the basis of the evidence that it accepted.

## **Sentence appeal**

*Sentencing in the District Court*

[44] The Judge sentenced the appellant on the basis of four rapes, being the first occasion and "three further occasions".<sup>11</sup> The Judge viewed the first occasion as

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<sup>11</sup> Sentencing notes, above n 2, at [2].

“more opportunistic” but considered that the subsequent offending involved premeditation.<sup>12</sup> He identified X’s vulnerability as an aggravating factor but did not see any breach of trust in relation to X.

[45] The Judge treated the offending as falling within band two of *R v AM*.<sup>13</sup> He settled on a starting point of eight and a half years.<sup>14</sup>

[46] Responding to the arguments advanced by the appellant’s counsel for a discrete discount for youth, previous good character, time spent on restrictive bail and the matters raised in the s 27 report, the Judge said:

[16] ... Clearly, you are entitled to some credit for your youth although I am not going to double count and also give you credit for previous good character because of course, you were very young. I accept that there should be a further discount to recognise the factors set out in s 27.

[17] ... I intend to give you a 20 per cent discount to recognise your youth. I intend to give you a further 15 per cent discount for the factors set out in the s 27 report. Accordingly, on the representative charge of rape, you are convicted and you are sentenced to a term of five and a half years and on the charge of rape, the first charge, you are likewise convicted and sentenced to five and a half years.

[47] Mr Brickell submitted that the starting point of eight and a half years was too high and the discount for youth was too low. Neither he, nor Ms Hoskin, criticised the discount for s 27 factors, which they both regarded as appropriate.

### *The starting point*

[48] The first issue raised in relation to the starting point is the Judge’s decision to sentence on the basis of four rapes. Acknowledging the trial Judge’s right to form his own view of the facts on the basis of the evidence, Mr Brickell nevertheless submitted that the appropriate basis for sentencing was for two rapes. He pointed out that the appellant’s acquittal on charge 2 indicated some concern with X’s evidence and the significant inconsistency between her EVI and evidence under cross-examination meant that a more conservative view ought to be taken. Ms Hoskin did not entirely resist this submission; although she accepted that three offences was an appropriate

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<sup>12</sup> At [7].

<sup>13</sup> At [9], applying *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

<sup>14</sup> At [16].

basis for sentencing, she nevertheless submitted that the Judge's reference to four rapes would not materially have altered the starting point.

[49] We agree with Mr Brickell that sentencing on the basis of four rapes did not reflect the evidence. If the Judge had proceeded on the basis of X's statements in cross-examination, the evidence would only have allowed for three rapes. Otherwise, the evidence would not have justified finding a specific number of offences. However, on any view, the evidence indicated at least two rapes in addition to the first occasion. We consider that the appellant should therefore have been sentenced on the basis of three rapes in total.

[50] We turn to consider whether the starting point was too high. Mr Brickell argued that it was excessive, having regard to comparable cases. However, a review of these cases does not suggest that. All the cases relied on by both Mr Brickell and Ms Hoskin concerned relatively youthful offenders and much younger complainants, often family members. This was an appropriate approach, though we note that while the age of the defendant is relevant in terms of age disparity, which may indicate greater culpability, youth itself is properly addressed in terms of mitigating factors rather than in setting the starting points.

[51] *Pere v R* concerned two charges of sexual violation by rape and five of sexual conduct with a young person under 16.<sup>15</sup> The defendant was aged 14 or 15 years at the time of the first rape and 17 years at the time of the second. The complainant was a young female relative, aged 11 or 12 at the time of the first rape and 13 or 14 at the time of the second. On appeal this Court regarded the starting point of nine years taken by the sentencing Judge as too high in the circumstances of the case and reduced it to eight years. However, the significant distinguishing factor was the complainant's request in her victim impact statement for leniency. We infer that, without that factor, a starting point above eight years would have been appropriate.

[52] *Solicitor-General v Rawat* concerned three instances of rape and associated indecencies by an 18-year-old against the 11-year-old complainant.<sup>16</sup> The aggravating

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<sup>15</sup> *Pere v R* [2021] NZCA 407.

<sup>16</sup> *Solicitor-General v Rawat* [2021] NZHC 2129.

features were the complainant's vulnerability (her age and recent arrival in the country), the repetitive nature of the offending and the harm to the complainant. These factors placed the offending between the bottom and middle of band two in *R v AM*, but closer to the middle than the bottom.<sup>17</sup> On appeal to the High Court (the defendant having pleaded guilty) Mallon J considered that a starting point of nine years would have been appropriate but that the sentencing Judge's starting point was "lenient ... on the cusp of being outside the available range but, ... supportable".<sup>18</sup> In the context of a Solicitor-General appeal, the Judge stated that she would not have disturbed the starting point if it were the only issue.

[53] In *M v Police* the defendant, aged between 14 and 15, raped a younger family member, aged between eight and 10, on two occasions.<sup>19</sup> On appeal to the High Court, the Judge held that the eight year starting point taken by the sentencing Judge was open to him, commenting that a seven year starting point might have been appropriate had there been only one incident of rape.<sup>20</sup> This case is comparable but slightly less serious than the present case because it involved two discrete instances of rape.

[54] In *R v MT* the defendant was sentenced on three charges of sexual violation of his younger sister, two of rape and one for sexual violation by unlawful sexual connection.<sup>21</sup> Two of the charges were representative. The defendant was aged between 18 and 21 years and the complainant aged between six and nine years. Woodhouse J took a starting point of eight years.<sup>22</sup> We accept that, because of the greater disparity in age, the facts of *R v MT* are slightly more serious than the present case.

[55] *Lennon v R* was an appeal in respect of offending by a 14 to 15-year-old against two children — a girl aged between seven and eight and a boy aged between 10 and 12.<sup>23</sup> Only the offending against the boy involved sexual violation. There were indecencies against the girl. The offending occurred over a period of some two years.

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<sup>17</sup> At [35].

<sup>18</sup> At [36].

<sup>19</sup> *M v New Zealand Police* HC Wellington CRI-2011-485-72, 21 September 2011 at [15].

<sup>20</sup> At [15].

<sup>21</sup> *R v MT* [2016] NZHC 2374.

<sup>22</sup> At [19].

<sup>23</sup> *Lennon v R* [2012] NZCA 551.

The sentencing Judge took a starting point of 10 years. This Court considered that a starting point of no more than nine years and six months would have been appropriate, noting particularly that the sexual violations occurred on only six discrete occasions.<sup>24</sup>

[56] Finally, *Overton v R* involved an eight year starting point taken for offences against a young relative on numerous occasions over a period of about two years when the complainant was aged between six and seven and the defendant between 15 and 16, and subsequent offending when the complainant was 14 and the defendant 23.<sup>25</sup> This Court commented that a nine year starting point, for an adult offender, for the totality of the offending would have been “stern, yet nonetheless available”.<sup>26</sup>

[57] The present case involved three instances of rape against a complainant who was vulnerable because of her age and because she was a recent addition to the household as a foster child. In addition, the age disparity was significant — the appellant was aged 14 or 15 and X aged seven or eight. It can be seen from the cases discussed above that a starting point above eight years was not excessive for the offending.

#### *Allowance for youth*

[58] As noted, the appellant was 14 or 15 years old at the time of the offending. He was 21 years old at the time of sentencing. Mr Brickell argued that the 20 per cent discount allowed was inadequate and out of step with discounts given in comparable cases. He submitted that a discount of 30 per cent was appropriate to recognise the appellant’s age at the time of the offending, his age at the time of sentencing, the impact of a long sentence on such a young man and his good prospects of rehabilitation.

[59] Ms Hoskin did not accept that the Judge had erred in his assessment of the appropriate youth discount, noting the wide variation in discounts that had been given and submitting that the appellant’s offending was not impacted by many of the youth related attributes often focused on, namely susceptibility to negative influences, peer

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<sup>24</sup> At [39].

<sup>25</sup> *Overton v R* [2011] NZCA 648.

<sup>26</sup> At [24].



pressure or impulsivity. As a result, the youth discount in this case was appropriate to reflect the impact of long sentences on young offenders and a young person's greater capacity for rehabilitation. However, she argued that the appellant's rehabilitation prospects were not as favourable as those in other cases, with the probation officer describing him as having "a nonchalant attitude toward[s] the offences ... and no remorse or concern for his victim".

[60] An allowance for youth recognises the age-related neurological differences between young people and adults which make young people more susceptible to negative influences and more impulsive; the fact that long sentences may be crushing on young people; and also that young people have greater capacity for rehabilitation.<sup>27</sup> However, this Court has also cautioned that youth, in itself, does not necessarily justify a significant reduction. In *Pouwhare v R* it observed:<sup>28</sup>

[83] In the end, a judge sentencing a young person under the Sentencing Act must always weigh the young person's age and the reasons why he or she offended, against the seriousness of his or her offending and prospects of rehabilitation. Sometimes the young person's age will be a mitigating factor of high, perhaps decisive, significance not to be circumscribed by any fixed outer percentage. Equally, there can be no warrant for saying that youth, of itself, must always prevail as the paramount value on sentence, or that youth alone can justify radically reducing the sentence which would otherwise be proper.

[61] Discounts for youth generally vary between 10 and 30 per cent. There are outliers; Mr Brickell relied, for example, on *Martin v R* in which the sentencing Judge had allowed 50 per cent in respect of a 14 to 15-year-old offender who had committed serious sexual offending against a six or seven-year-old.<sup>29</sup> On appeal that discount was described as one that "could be seen as generous".<sup>30</sup>

[62] In the end the appropriate discount reflects the particular circumstances of the offender. For the following reasons we accept that the appropriate discount in the present case was 30 per cent. First, we accept Mr Brickell's submission that the offending was properly viewed as opportunistic, rather than premeditated — an impulsive response to the opportunity that presented itself. Impulsivity is a

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<sup>27</sup> *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].

<sup>28</sup> *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868.

<sup>29</sup> *Martin v R* [2015] NZCA 533.

<sup>30</sup> At [41].

characteristic that can fairly be attributed to the appellant's age. Secondly, we also agree that a long sentence imposed on this 21-year-old for offending committed when he was 15 has the potential to be crushing. Thirdly, we consider that there ought to have been recognition of the prospects for rehabilitation.

[63] Mr Brickell accepted the provision of advice to court (PAC) report writer's view that the appellant poses a high risk of offending in the future but pointed out that the assessment of risk appears to have been determined solely by reference to the nature of the offending and by his ongoing denial of the offending. We see it as relevant that the appellant had no history of offending either prior to his offending against X, nor afterwards. At the time of sentencing, he had a reasonable educational basis on which to build a productive life, a supportive partner and supportive mother and step-mother. In these circumstances there must be a prospect of rehabilitation, notwithstanding the concerns raised in the PAC report about his risk of re-offending as a result of his continued denial of the offending. Denial of the offending does not necessarily preclude the possibility of rehabilitation.<sup>31</sup>

[64] Given the length of the term imposed, we consider that the youth discount given has resulted in a manifestly excessive sentence.

## **Result**

[65] The appeal against conviction is dismissed.

[66] The appeal against sentence is allowed. The sentence of five years and six months' imprisonment is set aside and substituted with a sentence of four years and eight months' imprisonment.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>31</sup> *Rolleston v R (No 2)* [2018] NZCA 611, [2019] NZAR 79 at [39].