

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA520/2021
[2022] NZCA 90**

BETWEEN	GLENN AMBAS PAGULAYAN Appellant
AND	THE QUEEN Respondent

Hearing: 22 February 2022

Court: Dobson, Brewer and Edwards JJ

Counsel: G A Walsh for Appellant
R L Mann for Respondent

Judgment: 25 March 2022 at 3.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Edwards J)

[1] Mr Pagulayan pleaded guilty to two charges of sexual conduct with a child under 12 years of age. He was convicted of a further 14 charges relating to sexual offending against two other child complainants following a jury trial in the District Court at Hamilton.

[2] Mr Pagulayan was sentenced to eight years and seven months' imprisonment. He appeals against that sentence on the basis that it is manifestly excessive. The sole ground of challenge is to the 20 per cent discount applied by Judge Mabey QC for previous good character and matters contained in a cultural report prepared pursuant to s 27 of the Sentencing Act 2002.¹

Offending

[3] The three child complainants (SP, NP and TP) were related to Mr Pagulayan and regarded him as an uncle. The offending against them spanned a two-year period between 2017 and 2019. It took place in the homes of the children in both Auckland and Huntly.

[4] SP was aged between 10 and 12 years old at the relevant times. The offending against him involved numerous incidents over a two-year period. It involved Mr Pagulayan touching SP's genitals, making SP touch his genitals, digitally penetrating SP and using moisturiser as a lubricant to do so. Mr Pagulayan also sucked SP's penis, and on one occasion attempted to anally penetrate SP. Mr Pagulayan used treats and let SP use his computer to manipulate SP into engaging in this sexual conduct.

[5] The offending against NP occurred on two separate occasions. He was aged between 10 and 11 years old at the time. Mr Pagulayan rubbed and massaged close to NP's genitals and touched his body underneath his underwear. He touched NP at the same time as he was indecently touching SP while they were playing computer games. Similar touching using a pillow as a cover on NP's lap formed the basis of other charges.

[6] The offending against TP took place when she was 10 years old. Mr Pagulayan rubbed TP's breasts before massaging and then digitally penetrating her vagina. Mr Pagulayan asked TP if she liked what he was doing. Mr Pagulayan followed her to the bathroom, made her remove her underwear, and indecently touched her genitals

¹ *R v Pagulayan* [2021] NZDC 16277 [Sentencing notes].

again. It was as a result of disclosures made by TP that the broader offending came to light.

[7] Mr Pagulayan faced 17 charges for this offending. On the first day of trial, he pleaded guilty to two charges of sexual conduct with a child under 12. Those two charges related to offending against TP. Mr Pagulayan was discharged on another charge of sexual conduct with a child under 12, and was found guilty by a jury of the following 14 charges:²

- (a) Sexual violation by unlawful sexual connection (x 4);
- (b) Sexual conduct with a child under 12 (x 7);
- (c) Sexual conduct with a young person under 16 (x 2); and
- (d) Attempted sexual violation.

District Court sentencing

[8] After summarising the offending, the victim impact statements and the relevant purposes and principles of sentencing, the Judge turned to consider the starting point for the offending. He considered there were multiple aggravating factors, including a breach of trust, the young ages of the children, and the premeditated and persistent nature of the offending.³ The fact that the offending continued over a period of about two years was also recorded by the Judge.⁴ A starting point of 10 years and nine months' imprisonment was set by reference to the guideline judgment in *R v AM*.⁵ That starting point is not challenged on appeal.

[9] The Judge turned next to personal aggravating and mitigating factors. Mr Pagulayan has no previous convictions, and the Judge considered he was entitled

² The District Court sentencing notes record that there were six additional charges of sexual conduct with a child under 12 and three additional charges of sexual conduct with a young person under 16. Our summary is based on the Amended Crown Charge List. We do not consider that the discrepancy alters the assessment of the starting point.

³ Sentencing notes, above n 1, at [33]–[35].

⁴ At [36].

⁵ At [42], referring to *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

to credit for prior good character.⁶ As to remorse, Mr Pagulayan had only expressed regret for the conduct underlying the two charges to which he had pleaded guilty. There was no remorse expressed for the balance of the convictions which were not acknowledged or accepted by Mr Pagulayan.⁷

[10] The Judge had before him a s 27 report. The Judge regarded the only relevant part of the report to relate to Mr Pagulayan's own experience of sexual abuse as a child.⁸ Although this was entirely self-reported, the Judge did not consider it unusual for Mr Pagulayan's own sexual abuse to have only recently come to light.⁹ After considering this Court's decision in *Carr v R*, the Judge accepted that Mr Pagulayan's own experiences of sexual abuse explained why he might offend against children who regarded him as an uncle.¹⁰

[11] A discount of 20 per cent was applied for this factor and Mr Pagulayan's prior good character.¹¹ That resulted in an end sentence of eight years and seven months' imprisonment.¹²

Was the sentence manifestly excessive?

[12] Mr Pagulayan says the end sentence was manifestly excessive because the 20 per cent discount applied for previous good character and the s 27 report was too low. Counsel submitted that a 30 per cent discount should have been applied, comprising a 10 per cent discount for previous good character and a 20 per cent discount for the factors raised in the s 27 report.

[13] We start with good character. Mr Pagulayan was between 27 and 29 years old at the time of the offending and was 31 years old at the time of sentencing. He did not have any previous convictions either in New Zealand, or his home country of the Philippines. We accept that his prior clean record was deserving of some recognition by way of discount from the starting point.

⁶ At [43].

⁷ At [44]–[45].

⁸ At [47] and [50].

⁹ At [53].

¹⁰ At [51]–[54], discussing *Carr v R* [2020] NZCA 357 at [65].

¹¹ At [55].

¹² At [57]–[58].

[14] However, this was not a case where Mr Pagulayan's prior good character included service to the community or positive contribution to society. The sole basis for claiming a good character discount was the absence of convictions. As against that, the offending was serious and took place against three separate child complainants over a two-year period. Some judges may have regarded the duration and nature of the offending as negating Mr Pagulayan's prior good character altogether and afforded no discount at all. At the very least, we consider these factors tempered the quantum of any discount to be applied.

[15] We turn next to the factors raised in the s 27 report. We agree with the District Court Judge that the only matter of any moment raised in that report was Mr Pagulayan's experience of sexual abuse as a child. The District Court Judge accepted the credibility of that self-report. He also accepted that there was a causal nexus between Mr Pagulayan's experiences and the offending in this case.

[16] We accept the Judge's findings for the purposes of this appeal. However, we do not consider the matters raised in the report diminish Mr Pagulayan's culpability or moral responsibility for very serious sexual offending in any substantial way. We therefore cannot accept counsel's submission that Mr Pagulayan's prior experiences of sexual abuse warranted a standalone discount of 20 per cent.

[17] Furthermore, both mitigating factors needed to be considered in light of Mr Pagulayan's lack of remorse. Although Mr Pagulayan pleaded guilty to two of the 17 charges, these were amongst the least serious charges he faced. Both charges related to TP, and there was no acknowledgement of his offending against the two boys. We consider that lack of accountability and remorse for his actions moderates the discount otherwise available for personal mitigating factors.

[18] Taking all these factors into account we do not consider the discount applied by the Judge was too low or otherwise in error. Indeed, we consider the end sentence to be well within the range that could have been imposed. It did not result in a manifestly excessive sentence. It follows that the appeal must be dismissed.

Result

[19] The appeal is dismissed.

Solicitors:
Hamilton Legal, Hamilton for Respondent