

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR  
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203  
AND 204 OF THE CRIMINAL PROCEDURE ACT 2011**

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

**I TE KŌTI PĪRA O AOTEAROA**

**CA399/2022  
[2023] NZCA 3**

BETWEEN	JAMIE ROBERT THOMPSON Appellant
AND	THE KING Respondent

Hearing:	23 November 2022
Court:	Goddard, Woolford, Fitzgerald JJ
Counsel:	A M Dooney for Appellant G A Kelly for Respondent
Judgment:	2 February 2023 at 11.00 am

---

**JUDGMENT OF THE COURT**

---

- A The appeal against sentence is allowed.**
- B The sentence of three years and seven months' imprisonment is quashed and substituted with a sentence of two years and 11 months' imprisonment.**
- 

**REASONS OF THE COURT**

(Given by Fitzgerald J)

## Introduction

[1] Following a trial before Judge D J Orchard and a jury, Mr Thompson was found guilty of one charge of sexual violation by unlawful sexual connection.<sup>1</sup> He was sentenced to three years and seven months' imprisonment.<sup>2</sup>

[2] Mr Thompson now appeals against his sentence on the basis that:

- (a) the starting point adopted by the Judge was too high; and
- (b) the discount given by the Judge for Mr Thompson's background should have been greater, and the Judge should also have allowed discounts for Mr Thompson's prior good character and time spent on remand on bail.

[3] An appeal against sentence may only be allowed by this Court if it is satisfied that there has been an error in the imposition of the sentence and that a different sentence should be imposed.<sup>3</sup> The focus is not on the process by which the sentence was reached, but on the correctness of the end result.<sup>4</sup>

## The offending

[4] On 11 July 2020, Mr Thompson was at a friend's home in Whangārei. The evidence at trial was that Mr Thompson and his wife regularly went to the friend's home to socialise at weekends and that on such occasions, significant quantities of alcohol would be consumed. The Judge observed in her sentencing notes that this particular night was no different.

[5] Mr Thompson was 32 years old at the time of the offending. The complainant, a 17-year-old young man, had travelled with his family to Whangārei to attend a tangi. The deceased had been a close friend of the friend of Mr Thompson and his wife, at whose house they were staying that weekend. A wake was held at the friend's home

---

<sup>1</sup> Crimes Act 1961, s 128(1)(b).

<sup>2</sup> *R v Thompson* [2022] NZDC 14213.

<sup>3</sup> Criminal Procedure Act 2011, ss 250(2) and 250(3).

<sup>4</sup> *Ripia v R* [2011] NZCA 101 at [15].

after the tangi, which evolved into a birthday celebration for the friend's teenage daughter. The complainant and his family were present. Later in the evening, the complainant's family left to return to the hotel at which they were staying, though the complainant stayed on for the birthday celebration. The evidence at trial was that during the course of the evening, all those present, including the complainant, had a lot to drink and were playing drinking games.

[6] Mr Thompson, his wife and her son decided to stay overnight, as did the complainant. They all "bunked down" in the lounge. Mr Thompson, his wife and her son slept on a mattress on the floor and the complainant slept on a nearby couch.

[7] The complainant woke in the early hours of the morning to the realisation that Mr Thompson had partially lowered the complainant's trousers and underpants, and had put the complainant's penis into his mouth. Mr Thompson had also put the complainant's hand onto his (Mr Thompson's) penis. The complainant was shocked and exclaimed words to the effect of, "who are you, what are you doing?", to which Mr Thompson's response was a suggestion to the complainant that he was enjoying what Mr Thompson was doing.

[8] The complainant immediately got up and left the room and as he did so, looked back and saw Mr Thompson continue to masturbate. The complainant went and spoke to the homeowner's daughter and told her what had happened. He was very distressed. She awoke her mother and initially the complainant was given a bed to sleep in, but he left shortly thereafter and returned to the hotel where his family was staying.

[9] Mr Thompson pleaded not guilty to the charge, his position at trial being that the offending had not happened. Mr Thompson gave evidence at the trial, though given the verdict the jury obviously did not accept his version of events.

### **Materials before the Judge at sentencing**

[10] At sentencing, the Judge had before her Mr Thompson's criminal and bail history, a Provision of Advice to Courts (PAC) report and a cultural report for the purposes of s 27 of the Sentencing Act 2002. She also had 14 character references in

relation to Mr Thompson, as well as two victim impact statements (from the complainant and his mother).

#### *Mr Thompson's criminal history*

[11] Mr Thompson has 10 prior convictions, many of which relate to excessive use of alcohol, including four convictions for driving with excess breath alcohol. He also has one conviction for burglary. That offending occurred in November 2009 and Mr Thompson was sentenced to nine months' imprisonment. Community-based sentences, fines and/or driving disqualifications were imposed for his other offending. Putting aside the present offending, Mr Thompson's last offending was in December 2012 (driving with excess blood alcohol (third or subsequent)).

#### *The PAC report*

[12] The PAC report canvasses Mr Thompson's background and upbringing, recording that his parents had separated when he was very young and that his father went on to have a number of subsequent partners. Mr Thompson spent his childhood and early teenage years moving between his parents' homes. He reported having a good relationship with his mother and his stepfather, but that he did not get along with his father's partners.

[13] Mr Thompson said that he did not suffer any physical abuse as a child, but suffered extensive sexual abuse from the age of 13 onward. The Crown does not dispute that this occurred.<sup>5</sup> The offender was an older man who had evidently sexually abused other young men like Mr Thompson.<sup>6</sup> The offending started after the man gave Mr Thompson a job working at a local café. He initially pressured Mr Thompson to perform sexual acts on him, and Mr Thompson said this escalated to three instances of rape.<sup>7</sup> Mr Thompson left school at 15 and through the offender, got a job at a local supermarket where the offender worked. During this period, the sexual abuse continued, which led to Mr Thompson drinking and experimenting with a range of

---

<sup>5</sup> The PAC report confirms that the man who sexually offended against Mr Thompson was ultimately convicted and sentenced to nine years' imprisonment.

<sup>6</sup> The report records Mr Thompson saying there were at least seven complainants but only two came forward to police.

<sup>7</sup> There is nothing in the materials before us to verify the precise nature of the offending for which the offender was convicted.

drugs. This resulted in him being thrown out of home by his father and quitting his job at the supermarket. He went to live with another male who was a member of the Mongrel Mob gang (though Mr Thompson said he was never a member of the gang). He and the gang member were co-offenders to Mr Thompson's burglary offending in 2009.

[14] After being released from prison in 2010, Mr Thompson realised that his life in Rotorua had spiralled out of control with drink-driving offending and methamphetamine use, and decided that he needed to move away. He moved to Whangārei where he met his now wife and gained an apprenticeship in aluminium joinery, a trade in which he worked for approximately eight years until being arrested for the present offending.

[15] Relevant to remarks made by the Judge in her sentencing notes,<sup>8</sup> the PAC report records that Mr Thompson said that he "all but gave up alcohol" upon moving to Whangārei, using it about twice a month and cannabis the same amount.

[16] The report also records that Mr Thompson "respects the jury's decision", only adding that alcohol was present in the offending. The report writer states that Mr Thompson exhibited no remorse for his actions and minimised them by arguing that he should not be sent to prison "as it would ruin his future and what was the point of it".

[17] The PAC report writer assessed Mr Thompson's risk of reoffending as low. Given the nature of the offending, however, a sentence of imprisonment was recommended.

#### *The s 27 cultural report*

[18] The s 27 cultural report reflects interviews with Mr Thompson, his wife, his mother and his sister.

---

<sup>8</sup> See [32] below.

[19] The report traverses and is confirmatory of those matters addressed in the PAC report about Mr Thompson's upbringing. In particular, Mr Thompson's sister endorses his experiences of moving frequently between their parents' homes during their childhood and having to adjust to different family groups, step-parents and half siblings, particularly on their father's side. She also corroborates Mr Thompson's account of being groomed and sexually abused as a teenager.

[20] The information provided by Mr Thompson and his wife highlights a very good relationship with his mother and his stepfather, and a more "on and off" relationship with his father, though confirms that the relationship has improved in more recent years (and prior to Mr Thompson's offending). As in the PAC report, Mr Thompson reported no particular physical abuse during his childhood — other than the sexual abuse already described — but described feeling neglected by his father who he perceived to be more focused on his relationships.

[21] Mr Thompson self-reported "a bit of anxiety and depression", though no expert health assessor report was before the Judge at sentencing. Mr Thompson also confirmed that he was now seeking assistance from his doctor, who had referred him to mental health services to "start sorting out my issues". Mr Thompson's mother confirmed this, describing the fact that Mr Thompson has sought counselling as a "giant step forward". His mother also reported that the move from Rotorua to Whangārei had been very good for Mr Thompson, that he got a settled job, made new good friends and met his now wife. The report confirms that Mr Thompson is in a settled and good relationship with his wife, that they have one young child together, and that his wife also has an older child from a former relationship with whom Mr Thompson has a good relationship.

[22] As well as addressing Mr Thompson's upbringing and background, the report is replete with references to academic reports and journal articles, including academic literature about Adverse Childhood Experiences (ACEs), said to be linked to many "criminogenic" risks (including substance and alcohol abuse, deprivation, poor educational attainment and mental health problems). The report writers carried out ACE testing of Mr Thompson (based on Mr Thompson's response to 10 questions), in which he scored eight out of 10 risk factors. The report records this as reflecting

“high exposure to abuse, neglect and household dysfunction”. The report writers go on to state:

The impact of [Mr Thompson’s] ACE score of 8 out of 10 is concerning. Prolonged activation of his toxic stress response systems and disruption of developing brain architecture is significantly associated with impaired control, executive function and emotion regulation, developmental delays, ADHD, PTSD, poor mental health and criminal behaviour.

[23] The report writers then give their opinion about the implications of Mr Thompson’s ACE score by reference to further academic articles and reports. The report states that the writers “perceive a linkage” between Mr Thompson’s offending and various risk exposures described as:

- (a) severe childhood adversities (disclosed by the eight out of 10 ACE score);
- (b) disordered parent/child relations, separation anxiety and fear of abandonment;
- (c) adolescent exposure to sexual grooming and homosexual abuse; and
- (d) poor mental health.

[24] The report concludes:

The writer emphasises theoretical linkages between first, [Mr Thompson’s] ACE score of 8/10, including insecure attachments and his exposure to [child sexual abuse] which as outlined prior, can result in the development of criminogenic needs that can contribute to sexually abusive behaviour, and second, grooming and sexual abuse after 12 years by a father figure in a relationship of dependence.

[25] We pause to observe that while the factual content of the s 27 report is helpful, we share the Judge’s concern in relation to it (the Judge stating in her sentencing notes that she did not find the report “a particularly impressive document”).<sup>9</sup> As noted earlier, the report is heavily footnoted to academic studies and literature, but there is no suggestion the report writers themselves have expertise in the underlying subject

---

<sup>9</sup> *R v Thompson*, above n 2, at [21].

matter, or in assessing the linkage between Mr Thompson's background and his offending. Further, it seems to us that, putting aside the sexual abuse against Mr Thompson, the report paints a more extreme picture of Mr Thompson's upbringing and family circumstances than is warranted by the information disclosed. Again putting aside the sexual offending, while there were clearly some challenges in Mr Thompson's upbringing, these seem to us to be fairly unremarkable. In particular, there is no evidence of the type of socio-economic deprivation and abuse which is all too frequently seen in the courts. Rather, common sense suggests that Mr Thompson's difficulties up until he was released from prison in 2010 are much more likely to have arisen from the sexual abuse of him as a teenager. It is unfortunate that no expert health assessor report was available at sentencing to address these matters.<sup>10</sup>

#### *Character references*

[26] As noted, the Judge was provided with a large number of character references about Mr Thompson, including from his wife, parents, mother-in-law, stepson, half-siblings, friends and past and present employers. All were aware of Mr Thompson's conviction for sexual offending. They paint a picture of Mr Thompson as having turned his life around after his release from prison in 2010, and having a stable and pro-social network around him.

#### *The victim impact statements*

[27] The victim impact statements highlight the psychological harm to the complainant from Mr Thompson's offending and in particular, the adverse effects it had on the complainant's mental health, schooling, social behaviour and relationship with his girlfriend. The complainant's mother says that the complainant went from the accelerated programme at school to failing his final exams, starting to drink excessively and getting into fights, and describes him as now having a "harder edge to him".

---

<sup>10</sup> We proceed on the basis that this may have been because of Mr Thompson's continued denial of his offending.



[28] The complainant describes feeling disgusted and embarrassed by the offending, given another man had touched him intimately. He says that these feelings would often turn into anger which he then took out on those around him. He also describes the effect of the offending on his relationship with his girlfriend, and in the context of his peers, feeling like he has to “prove” to them how tough he is, despite them not knowing of the offending. He says that following Mr Thompson’s conviction, he finally felt some justice and started to accept that he cannot change the past and that he now needs to move on with life.

### **The District Court sentencing**

[29] Having recited the facts as she found them at trial, the Judge identified three aggravating factors of Mr Thompson’s offending:

- (a) First, the effect of Mr Thompson’s offending on the complainant, which the Judge described as “profound”.<sup>11</sup> The Judge observed that “[a]t the root of all of this is that your offending against him was in the form of an act which ran counter to his own sexuality, because it was homosexual.”<sup>12</sup>
- (b) Second, what the Judge described as the complainant’s “high degree of vulnerability”,<sup>13</sup> on the basis that he was in a place where he should have expected to be safe, that he was asleep at the time and because of the age difference between him and Mr Thompson.
- (c) Third, that Mr Thompson’s offending was predatory “to an extent at least”.<sup>14</sup>

[30] The Judge also addressed two decisions referred to her by Mr Thompson’s then counsel, *R v McNicholl* and *R v Fisher*.<sup>15</sup> She viewed Mr Thompson’s offending as more serious than that in both cases, noting that in both, the complainant and offender

---

<sup>11</sup> *R v Thompson*, above n 2, at [9].

<sup>12</sup> At [11].

<sup>13</sup> At [16].

<sup>14</sup> At [13].

<sup>15</sup> *R v McNicholl* CA176/02, 29 October 2002; and *R v Fisher* CA305/91, 18 November 1991.

had been friends, the complainants had reported that the offending had not had a great effect on them, and they had in fact expressed some sympathy for the offender.

[31] In terms of a starting point, the Judge stated, “[o]bviously, you fit into the lower bands for this sort of offending”<sup>16</sup> and adopted a starting point of four years’ imprisonment.<sup>17</sup> This places Mr Thompson’s offending near the top of band one or at the bottom of band two of the unlawful sexual connection bands in the guideline judgment of *R v AM*.<sup>18</sup>

[32] Turning to mitigating personal factors, the Judge accepted that Mr Thompson had prospects of rehabilitation in terms of employment and integration back into the community, including because he had a good work record and his employers, both present and past, spoke highly of him. She did not, however, consider Mr Thompson had good prospects of addressing the underlying causes of his offending, given he did not acknowledge that the offending had occurred. The Judge also commented on Mr Thompson’s history of offending as a result of excessive alcohol consumption, stating that Mr Thompson had “not been honest with the pre-sentence writer in relation to that”.<sup>19</sup> This was a reference to Mr Thompson’s statement to the report writer that he had all but given up alcohol upon moving to Whangārei in around 2010, which the Judge said was untrue on the basis of his own evidence at trial and also given his last conviction for driving with excess breath alcohol was in 2013.

[33] The Judge said that there could be no discount for good character because of Mr Thompson’s criminal record.

[34] The Judge then referred to the s 27 cultural report, observing, as noted earlier, that she did not find it “a particularly impressive document”.<sup>20</sup> She said that from the information contained in the report, it appeared that Mr Thompson has always had two loving parents who have been supportive of him throughout. The Judge described Mr Thompson’s education as being uneventful and his work history as largely solid.

---

<sup>16</sup> *R v Thompson*, above n 2, at [14].

<sup>17</sup> At [20].

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

<sup>19</sup> *R v Thompson*, above n 2, at [19].

<sup>20</sup> At [21].

[35] The Judge accepted, however, that Mr Thompson had been the subject of sexual abuse when he was a teenager, observing, “[i]ronically of course you do not accept that has actually led you to become an abuser yourself.”<sup>21</sup> However, given the index offending, the Judge considered she was entitled to take into account that the sexual abuse of Mr Thompson may well have been a factor contributing to his offending.

[36] Despite what she perceived to be the deficiencies in the cultural report, the Judge said she was prepared to give Mr Thompson a discount for a certain instability in his upbringing and for the fact that he had been abused himself. She was also prepared to take into account that until his index offending, Mr Thompson had not committed any offences over the previous seven or so years and had maintained a steady employment record. To reflect all of these matters, the Judge adopted a discount of 10 per cent, equivalent to five months’ imprisonment. This brought the end sentence to one of three years and seven months’ imprisonment. The Judge did not impose a minimum period of imprisonment.

### **The appeal**

#### *Was the starting point adopted too high?*

[37] Counsel for Mr Thompson on the appeal, Mr Dooney, submits that the four-year starting point adopted by the Judge was too high.

[38] In terms of the aggravating factors identified by the Judge, Mr Dooney submits that to the extent Mr Thompson’s conduct was “predatory”, this could only have been at the very low end of that factor. Mr Dooney accepts that the complainant’s vulnerability was a relevant aggravating factor, but again says that it falls at the lower end of that factor in terms of seriousness. In this context, Mr Dooney acknowledges that there was an age disparity between the complainant and Mr Thompson, but notes that it was not as significant as in many cases of sexual offending of this kind, and in particular, the complainant was not a young child. Mr Dooney also submits the Judge appears to have taken the views of the complainant into account as a separate

---

<sup>21</sup> At [23].

aggravating factor, when those are already adequately reflected in the aggravating factor of harm to the complainant.

[39] Mr Dooney referred us to two further decisions which he says are comparable and which suggest a lower starting point than that adopted by the Judge, *Cavaney v R* (starting point of three years' imprisonment) and *Barber v R* (starting point of two years and six months' imprisonment).<sup>22</sup>

[40] Taking all these matters into account, Mr Dooney submits that Mr Thompson's offending falls within band one of *R v AM* and a starting point of between two and a half and three years' imprisonment would have been appropriate.

[41] We begin by identifying the aggravating factors of Mr Thompson's offending.

[42] We agree with the Judge that an aggravating factor was the harm caused to the complainant. While there is no suggestion of physical harm, we accept that the complainant suffered not insignificant psychological harm as a result of Mr Thompson's offending. This psychological harm had a clear and tangible effect on the complainant's schooling, social behaviour and relationship with his girlfriend. We consider this aggravating factor to be present to a moderate degree.

[43] We also agree with the Judge that complainant was vulnerable, on the basis that he was in a home in which he would have understood he was safe, he was asleep at the time Mr Thompson made his advances on him, and there was an age disparity between him and Mr Thompson. That said, however, the age disparity was not as great as that seen in many cases of sexual offending of this nature, and the fact the complainant was asleep at the time the offending commenced did not make him inherently more vulnerable than any other person in the same position. Accordingly, while we accept vulnerability as an aggravating factor, we consider it present to a mild degree only.

---

<sup>22</sup> *Cavaney v R* [2022] NZHC 1807; and *Barber v R* [2022] NZHC 1435.

[44] We do not agree with the Judge’s characterisation of the offending as predatory, even to a limited extent. Rather, the offending appears to have been opportunistic. We therefore do not consider it a separate aggravating factor in terms of *R v AM*.

[45] In *R v AM*, this Court said that where one or more aggravating factors are present to a low or moderate degree, the offending will fall within unlawful sexual connection band one (two to five years’ imprisonment) and a starting point closer to the top of the band would be required.<sup>23</sup> Given there are two aggravating factors to Mr Thompson’s offending, and while neither are at the serious end of the range, the guidance given in *R v AM* suggests a starting point closer to the top of band one.

[46] Turning to comparable cases, we have considered those referred to the Judge at sentencing, those to which Mr Dooney referred us on the appeal, as well as other cases we have identified as involving broadly similar offending:

- (a) *R v McNicholl* involved offending by the male appellant against a female friend at a social function.<sup>24</sup> The complainant was intoxicated and went to sleep. She awoke to find that the appellant had removed her trousers and her underpants, had his face near her pubic area and his finger in her vagina. She got up and left the room. The appellant was 25 years old at the time of his offending and the complainant was 22. The decision records that the victim impact statement was “in restrained terms”.<sup>25</sup> The sentencing Judge adopted a starting point of three and a half years’ imprisonment. The end sentence was upheld on appeal, though it was said to be stern and at the top of the acceptable range. There was no specific discussion of the starting point.
- (b) *R v Fisher* is now quite an old case (1991).<sup>26</sup> It involved a male offender and a male complainant. At a social function at which both the appellant and the complainant were present, all were intoxicated and the complainant retired to bed with his partner, leaving the

---

<sup>23</sup> *R v AM*, above n 18, at [114].

<sup>24</sup> *R v McNicholl*, above n 15.

<sup>25</sup> At [8].

<sup>26</sup> *R v Fisher*, above n 15.

appellant sleeping in the lounge. The complainant woke to find that the appellant had removed the complainant's shorts and underpants and was sucking the complainant's penis. The appellant left when the complainant woke. The sentencing Judge adopted an end sentence of 17 months' imprisonment. On appeal, this Court observed that the complainant and appellant were well known to each other and their comparative ages did not raise any question of exploitation of a younger person. It also appears that the complainant had viewed the effect of the assaults on him as minimal. In that context, this Court described the offending as "very much at the lower end of the scale".<sup>27</sup> There was no particular discussion of the starting point adopted, but having taken into account the personal factors of the appellant, the sentence was quashed and a sentence of six months' imprisonment imposed.

- (c) In *Cavaney v R*, the complainant was at the appellant's house for a birthday celebration, which involved alcohol as well as cannabis.<sup>28</sup> Later in the evening the complainant went to bed and was joined by her partner. The complainant awoke to find that the appellant had entered the bedroom, pulled the blanket off her, moved her underwear aside and was digitally penetrating her vagina. The appellant stopped touching the complainant and left the bedroom. In the District Court, the Judge adopted a starting point of three years' imprisonment. On appeal to the High Court, there was no real challenge to or discussion of the starting point adopted, the focus being on whether an additional discount for remorse should have been applied.
- (d) In *Barber v R*, the complainant, her family and others were at the appellant's home for a social occasion.<sup>29</sup> Alcohol was consumed and the complainant became intoxicated and was taken to a bed by her husband around midnight. She woke in the early hours of the morning to find the appellant sexually violating her with a finger or fingers.

---

<sup>27</sup> At 5.

<sup>28</sup> *Cavaney v R*, above n 21.

<sup>29</sup> *Barber v R*, above n 21.

The sentencing Judge adopted a starting point of two years and six months' imprisonment. Again, however, the focus of the appeal was not the starting point adopted but whether the Judge had erred in the discounts applied.

- (e) *Hawkins v R* involved charges of sexual violation by unlawful sexual connection and indecent assault.<sup>30</sup> The male appellant and the male complainant had been friends since childhood. They spent the evening socialising and then attended a party together. The complainant was too intoxicated to drive home and fell asleep in a bedroom. The appellant entered the bedroom, lowered the complainant's pants and underwear and started masturbating the complainant's penis. The complainant awoke and told him to stop, upon which the appellant kissed the complainant on the cheek and side of the mouth, and then began to suck on the complainant's penis and placed his fingers into the complainant's anus. The District Court Judge adopted a starting point of four years' imprisonment. This was upheld on appeal.
- (f) Finally, *R v Smith* involved charges of sexual offending on more than one occasion.<sup>31</sup> The male complainant was a young friend of the appellant's daughter, employed by him on a casual basis, through which the complainant saw the appellant as a "father figure".<sup>32</sup> The charges of sexual violation, indecent assault (x 1) and stupefying arose from an incident where the complainant came to the appellant's house to pick up some personal belongings. The appellant offered the complainant alcohol and two pills which he said were antidepressants. After consuming the second pill, the complainant felt dizzy and had difficulty focusing so settled down to sleep. The appellant asked the complainant to lift his shirt and began massaging him. He then undid the complainant's belt and removed the complainant's pants and boxers, licked the complainant's nipples, masturbated him and

---

<sup>30</sup> *Hawkins v R* [2022] NZHC 283.

<sup>31</sup> *R v Smith* HC Wellington CRI-2007-485-44, 22 June 2007.

<sup>32</sup> Above at [2].

performed oral sex on him. On appeal, the High Court considered that but for the stupefying, the offending would fall in the middle of band one from *R v AM*, giving rise to a three and a half year starting point.<sup>33</sup> In totality, and taking into account the stupefying and other charges, the starting point was increased to five and a half years.

[47] We put aside *Fisher*, which is now dated and somewhat of an outlier. We do not derive any particular assistance from *McNicholl*, *Cavaney* or *Barber*, as there was no appellate consideration of the starting point adopted in each of those cases. *Smith* is somewhat different, given the stupefying charge. *Hawkins* involved similar offending, though more serious than Mr Thompson's and so provides some support for a lower starting point. Standing back, and reflecting the guidance from *R v AM* and the limited assistance we have obtained from the authorities discussed above, we consider that a starting point of three years and six months' imprisonment would have been appropriate.

*Were the discounts inadequate?*

[48] The overall thrust of Mr Dooney's submissions on this ground of appeal is that a 10 per cent discount for the combined factors of Mr Thompson's background, his good character, prospects of rehabilitation and time spent on bail was inadequate. Mr Dooney submits that based on the personal trauma evidenced by the cultural report, a discount of 15 to 20 per cent for these matters alone would have been warranted. He further submits that a five per cent discount for good character is available, noting that Mr Thompson's last offending was in 2012, and that his good character since then is well demonstrated by the s 27 report and the character references put before the Judge. Mr Dooney also emphasises that Mr Thompson had been on bail prior to sentencing (with a "non-24 hour curfew"), and that the Judge's reference in her sentencing notes to Mr Thompson "not being honest" about his alcohol consumption was incorrect, given the PAC report expressly recorded that Mr Thompson did continue to drink alcohol after he had moved to Whangārei, though only around twice per month.

---

<sup>33</sup> We note that the decision in *R v Smith* predates the introduction of the unlawful sexual connection bands in *R v AM*.



[49] We have already addressed why we do not find aspects of the s 27 cultural report helpful, including that it overstates the childhood trauma said to have been suffered by Mr Thompson.

[50] As this Court observed in *Carr v R*, where there is “a credible account of matters which might be considered to have impaired choice and diminished moral culpability”, and which establishes a causative contribution to offending, “it must have an effect on the sentencing outcome”.<sup>34</sup> In this case, however, and putting aside the sexual abuse of Mr Thompson as a teenager, we do not discern any credible account of matters which might suggest linkage between Mr Thompson’s family background and upbringing and his later offending.

[51] It is not in dispute that Mr Thompson was sexually abused as a young teenager and that that abuse appears to have extended over a fairly lengthy period of time. It is unfortunate that more detailed information about the abuse, or appropriate expert advice on the potential linkage between it and Mr Thompson’s own sexual offending, was not before the District Court. Despite the absence of expert advice, however, we agree with the Judge that the sexual abuse of Mr Thompson is likely to have been a causative factor of his own offending. Sexual offending by an adult male against teenage boys is unusual, and it seems an unlikely coincidence that Mr Thompson was sexually offended against when he was a teenager and he has in turn sexually offended against a teenage male. In this context, we do not accept the Crown’s submission that this linkage cannot be inferred given Mr Thompson’s denial of his offending. The point is that the jury found that the offending *did* occur, despite Mr Thompson’s denial. For these reasons, we think the 10 per cent discount adopted by the Judge for all mitigating factors is appropriate to reflect the contributing effect the sexual abuse of Mr Thompson is likely to have had on his own offending.

[52] As to further discounts, we disagree with the Judge’s conclusion that Mr Thompson’s earlier offending precludes a discount for good character. Following his release from prison in 2010, Mr Thompson demonstrated insight into the fact that he needed to take steps to turn his life around, including removing himself from the

---

<sup>34</sup> *Carr v R* [2020] NZCA 357 at [65].

difficult environment in which he found himself in Rotorua. Mr Thompson did not offend again for nearly eight years and appears to have led a stable and pro-social life in the interim. It is also apparent from the materials before us that while Mr Thompson has not accepted his present offending, he has nevertheless opened up to his wife and family about the earlier sexual offending against him, and has taken some, albeit early, steps to seek help. We therefore do not rule out the prospect of rehabilitation of the underlying causes of his offending despite his present denial of it. We therefore adopt a further five per cent discount to reflect Mr Thompson's more recent good character and some prospect of rehabilitation.

[53] As to time spent on bail, no details have been put before us about Mr Thompson's remand, including his bail conditions. What is clear however, is that he was not on electronically monitored bail, nor was he subject to a 24-hour curfew. We therefore do not discern any error in the Judge not allowing any additional discount for these matters.

[54] Applying the discounts we consider appropriate, which total 15 per cent, to the starting point of three years and six months' imprisonment leads to an end sentence of two years and 11 months' imprisonment. This precludes consideration of a sentence of home detention.

## **Result**

[55] The appeal against sentence is allowed.

[56] The sentence of three years and seven months' imprisonment is quashed and substituted with a sentence of two years and 11 months' imprisonment.

Solicitors:  
Crown Solicitor, Whangārei for Respondent