

**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

**CA191/2023
[2023] NZCA 384**

BETWEEN **RIKIHANA WIWARENA**
Appellant

AND **THE KING**
Respondent

Court: Collins, Lang and Woolford JJ

Counsel: W T Nabney for Appellant
H G Clark for Respondent

Judgment: 23 August 2023 at 9.00 am
(On the papers)

JUDGMENT OF THE COURT

- A** **The application for leave to bring a second appeal is granted for the limited purpose of error correction.**
- B** **The appeal is allowed to the extent that the sentences of imprisonment imposed on Charges 1, 4 and 11 are quashed and replaced by convictions and discharges.**
- C** **The application for leave to bring a second appeal is otherwise declined.**
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REASONS OF THE COURT

(Given by Woolford J)

[1] Following a Judge-alone trial in the Tauranga District Court, Judge Connell found Rikihana Wiwarena guilty of seven charges of sexual offending against three of his female cousins, all of whom were children.¹ The offending commenced when he too was a child aged 13. It continued until he was 17.

[2] On 21 September 2021, Judge Connell sentenced Mr Wiwarena to 12 months' home detention.² The Solicitor-General appealed to the High Court at Tauranga against the sentence on the basis that it was manifestly inadequate and wrong in principle.

[3] On 16 December 2021, Moore J allowed the appeal.³ He quashed the sentence of 12 months' home detention and substituted a sentence of five years and four months' imprisonment as the minimum necessary in the interests of justice to remove the element of manifest inadequacy. Moore J directed that Mr Wiwarena surrender himself to the Tauranga Central Police Station no later than 10:00 am on 29 December 2021 to commence his sentence of imprisonment. Mr Wiwarena did not surrender himself and it was some time before he was located and arrested.

[4] Mr Wiwarena now applies to the Court of Appeal for leave to bring a second appeal.

Offences

[5] Mr Wiwarena was initially charged with 11 offences. He was found guilty of seven charges and discharged or acquitted of four charges. We gratefully adopt the summary of the facts leading to each charge as set out by Moore J:⁴

¹ *R v Wiwarena* [2021] NZDC 18790 [District Court judgment] at [1].

² At [39].

³ *Solicitor-General v Wiwarena* [2021] NZHC 844 [High Court judgment].

⁴ High Court judgment, above n 3 (footnotes added, emphasis in original).

Offending against A

Mr Wiwarena is four years older than A. At the time of the offending, A was aged between nine and 13 years old.

[Charge 1:] Indecent assault on a young person⁵

This was the last incident in the series which [made] up the offending and led to the Police investigating Mr Wiwarena more closely. Between 1 January 2018 and 31 March 2018, A's grandmother was receiving medical treatment at Tauranga Hospital. A was staying with her grandmother at accommodation provided by the hospital. Other family members, including Mr Wiwarena, also spent time there. [Mr Wiwarena was 17 years old at the time.]

On one occasion, Mr Wiwarena was alone with A in the kitchen. Her grandmother and brother were asleep elsewhere in the house. After closing the doors, Mr Wiwarena kissed A on the lips and hugged her. He touched her body and tried to put his hands down her pants. A told Mr Wiwarena that what he was doing was wrong and to stop.

Family members present at the time became aware of the incident and contacted Police. A was interviewed by Police and disclosed several other incidents involving Mr Wiwarena.

[Charges 2 and 3:] Sexual connection with a child under 12 years of age⁶ and sexual violation by unlawful sexual connection⁷

On one occasion between 5 November 2013 and 31 December 2015, [when he was between 13 and 15 years old,] Mr Wiwarena was visiting A's family home. A number of other family members were also present.

At some stage during the evening A went to her bedroom to sleep. Mr Wiwarena entered the room and lay down on the bed next to her. He attempted to put his hand down her pants. A repeatedly pulled his hand out. Mr Wiwarena then removed A's pants and placed his penis into her vagina. At some point during the incident he put his penis in A's mouth and forced her to give him oral sex.

[Charges 4 and 5:] Sexual connection with a young person⁸ and sexual violation by unlawful sexual connection

On approximately four occasions between 5 November 2013 and 4 November 2016, [when he was between 13 and 16 years old,] Mr Wiwarena engineered situations so that he was alone with A when she was living at her family home. He would again exploit these opportunities to put his penis in A's vagina and force her to give him oral sex.

Offending against B

Mr Wiwarena is seven years older than B. At the time of the offending, B was aged between seven and nine years old.

⁵ Crimes Act 1961, s 134(3). Maximum penalty of seven years' imprisonment.

⁶ Section 132(1). Maximum penalty of 14 years' imprisonment.

⁷ Sections 128(1)(b) and 128B. Maximum penalty of 20 years' imprisonment.

⁸ Section 134(1). Maximum penalty of 10 years' imprisonment.

[Charge 9:] Sexual violation by rape⁹

On numerous occasions between March 2015 and July 2017, [when he was between 14 and 16 years old,] Mr Wiwarena raped B. Her evidence was that these occurred in four different locations. On one occasion Mr Wiwarena raped B at what she called the “Green Shed”, a shed on a [Mōtītī] Island property. B said that Mr Wiwarena raped her when she was living at both of her nan’s houses. Her evidence was that there were “a few” incidents at one house, and fewer at the other. She said that the offending occurred “sort of everywhere” at the house, but specifically mentioned incidents outside and inside the shed. B’s evidence was that there were also “quite a few” incidents of rape at Mr Wiwarena’s house – not quite every month but seemingly close to that frequency.

Offending against C

Mr Wiwarena is three years older than C. At the time of the offending, C was 14 years old.

[Charge 11:] Sexual connection with a young person

On one occasion between October and December 2017, [when he was about 17 years old,] Mr Wiwarena was drinking at an address occupied by family, including C and another younger female relative, D. Late that night, Mr Wiwarena went into D’s bedroom, placed her on top of him, and put his arms around her. C interrupted Mr Wiwarena. Once he realised he had been seen, he moved D off his body. The Crown alleged that Mr Wiwarena had indecently assaulted D before being interrupted by C. However, the Judge found that there was insufficient evidence to infer that an indecent assault had occurred at that point and Mr Wiwarena was acquitted on that charge.

C invited Mr Wiwarena to come with her and continue drinking. This was a device. She was concerned for D and wanted to keep him away from her. Mr Wiwarena placed his hand on C’s leg. The pair then had sexual intercourse.

District Court sentencing

[6] At the outset of his sentencing notes, Judge Connell commented that it was unfortunate that there had been no restorative justice process undertaken and noted that Mr Wiwarena’s offending had split his whānau into two – those who believed he had committed the offences and those who did not.¹⁰ The Judge saw no evidence of any remorse nor acknowledgement of the emotional harm done to the victims, because Mr Wiwarena continued to deny the offending.¹¹

⁹ Sections 128(1)(a) and 128B. Maximum penalty of 20 years’ imprisonment.

¹⁰ District Court judgment, above n 1, at [4].

¹¹ At [6].

[7] The Judge noted that if those mitigating factors had been present, especially remorse, they:¹²

...would have made it easier for the Court to come to a conclusion – especially if [he] had been remorseful – that a non-custodial sentence might be given to [Mr Wiwarena] because there would be hope for [his] rehabilitation.

The Judge nevertheless considered that Mr Wiwarena’s absence of a criminal record evidenced his good rehabilitative prospects.¹³

[8] The Judge then referred to the victim impact reports and noted the profoundly negative effect of the offending on the victims.¹⁴

[9] The Judge noted that the Crown relied on *R v LB*,¹⁵ a successful Solicitor-General’s appeal against a sentence of home detention for sexual offending that was “not dissimilar” to Mr Wiwarena’s offending.¹⁶ The Judge commented that:¹⁷

[16] ... I recognise in cases such as this it would be indeed very rare for such an outcome as home detention rather than a term of imprisonment. It makes your sentencing for me today very difficult. Because of your young age at the time of your offending, I was hopeful of trying to impose a non-custodial sentence for you and in some ways I find it difficult to get around the decision of *LB* and the other cases and authorities that have been mentioned by the Crown in the course of this sentencing.

[10] The Judge referred to *R v AM*,¹⁸ the guideline judgment on sexual violation sentencing. He acknowledged that the starting point, taking into account Mr Wiwarena’s youth, was a sentence of nine years’ imprisonment.¹⁹ From that starting point, the Judge granted discounts of 50 per cent for youth,²⁰ one year (11.1 per cent) for Mr Wiwarena’s lack of previous convictions and previous good character,²¹ and 18 months (16.6 per cent) for personal and cultural factors, including the need for rehabilitation described in a psychologist’s report and a cultural report

¹² At [8].

¹³ At [32].

¹⁴ At [9]–[12].

¹⁵ *R v LB* [2020] NZHC 94.

¹⁶ District Court judgment, above n 1, at [15].

¹⁷ Footnote omitted.

¹⁸ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

¹⁹ District Court judgment, above n 1, at [34].

²⁰ At [35].

²¹ At [36].

under s 27 of the Sentencing Act 2002.²² The total discounts therefore applied were 77.8 per cent. These discounts brought the end sentence down to two years' imprisonment. The Judge then commuted Mr Wiwarena's sentence from two years' imprisonment to 12 months' home detention.²³

High Court appeal

[11] After summarising the offending and the District Court sentence, Moore J noted the issues on appeal as:²⁴

- (a) whether the Judge erred by adopting a starting point which was too low;
- (b) whether the Judge erred by applying discounts which were excessive; and
- (c) whether the Judge erred by commuting Mr Wiwarena's sentence of imprisonment to a sentence of home detention.

[12] As to the starting point, the Judge also referred to the guideline case of *R v AM*.²⁵

[26] ... There, the Court of Appeal set four bands of starting points for cases where the lead offence involves sexual violation. Of particular relevance to the present case are band 2 and band 3. Band 2 is appropriate for offending which involves two or three of the listed factors increasing culpability to a moderate degree. Such cases involve a scale of offending and premeditation which is, in relative terms, moderate. In particular it covers offending against a vulnerable victim. The range of starting points for offending in band 2 is seven to 13 years' imprisonment.

[27] Band 3 is appropriate for offending which involves two or more of the factors increasing culpability to a high degree, or more than three of those factors to a moderate degree. Such cases include offending accompanied by aggravating factors at a serious level. This may involve a particularly vulnerable victim, such as a child. The range of starting points for offending in band 3 is 12 to 18 years' imprisonment.

[13] The Judge considered the aggravating factors of the offending to be:²⁶

- (a) *The scale of the offending:* There were three separate victims. In particular there were possibly in excess of 10 instances of rape against

²² At [37]–[38].

²³ At [39].

²⁴ High Court judgment, above n 3, at [23].

²⁵ Footnotes omitted.

²⁶ At [28] (footnotes omitted).

B over a two year period when she was aged between seven and nine years.

- (b) *The vulnerability of those victims* – all were children: A was between nine and 13 years old. C was 14 years old. Seriously aggravating is the fact that B was between seven and nine years old during the period when she was raped by Mr Wiwarena (on numerous occasions).
- (c) *The degree of violation*: The offending involved penile penetration of the vagina and forced oral sex. The Judge considered this factor moderately, rather than seriously, aggravating because the charges relating to A and C were [of unlawful sexual connection and indecent assault, as opposed to] rape.
- (d) *The breaches of trust*: The offending was against family members. Further, some of the offending against B occurred within the family home, a place where the occupants were “entitled to feel, and be, safe”. [The Judge again considered] this factor moderately (rather than seriously) aggravating as the victims were not in Mr Wiwarena’s care, as would be typical of a case involving a most serious breach of trust.
- (e) *The harm to the victims*: In particular to B, who now has issues with self-harm and depression. B notes in her victim impact statement that these issues have been exacerbated by Mr Wiwarena’s lack of remorse and refusal to accept responsibility for his offending.

[14] Moore J noted that the “sentencing Judge considered that a starting point of nine years’ imprisonment was appropriate, placing the offending slightly below the middle of band 2” in *R v AM*.²⁷ Moore J found that if the sentencing Judge did take Mr Wiwarena’s youth into account when setting the starting point, as he appears to have done, that would be an error of principle. The Court of Appeal noted in *Overton v R* that “[y]outh is not a relevant factor when fixing the starting point.”²⁸

[15] Moore J considered that, in those circumstances, the sentencing Judge adopted a starting point which was too low.²⁹ Mr Wiwarena’s offending involved more than three of the *R v AM* factors, increasing culpability to that of moderate seriousness. That necessarily placed his offending in band 3. Moore J considered Mr Wiwarena’s offending to be of comparable seriousness to *R v LB*,³⁰ and thought that the appropriate starting point was 12 years’ imprisonment (the bottom of band 3).³¹

²⁷ At [29].

²⁸ *Overton v R* [2011] NZCA 648 at [22].

²⁹ High Court judgment, above n 3, at [33].

³⁰ At [35] citing *R v LB*, above n 15.

³¹ At [36].

[16] Moore J then considered whether the discounts applied by the sentencing Judge were excessive. He looked first at what discounts were properly available for youth, previous good character and rehabilitative prospects taken together. The Judge considered Mr Wiwarena's case to be "on all fours" with *BB v R*,³² where a 40 per cent discount had been applied. The Judge therefore considered a discount of 40 per cent for youth and previous good character (rather than 50 per cent), was also appropriate for Mr Wiwarena.³³

[17] As to the 15 per cent discount applied for personal circumstances disclosed in the psychologist's report and the s 27 cultural report, the Judge considered that Mr Wiwarena's circumstances were inconsistent with those cases in which a 15 per cent discount had been applied. It was difficult to make clear links between Mr Wiwarena's background and his offending. The Judge therefore considered that a 10 per cent discount was appropriate for Mr Wiwarena.³⁴

[18] Finally, the Judge noted that Mr Wiwarena had spent three months on home detention. He therefore allowed a discount of eight months in part to recognise the stress on a defendant who, months after sentencing, must now go to prison.³⁵

[19] The end sentence on appeal was therefore one of five years and four months' imprisonment.³⁶

Application for leave to appeal

[20] This application for leave to appeal is brought pursuant to s 253 of the Criminal Procedure Act 2011. Section 253 provides:

253 Right of appeal against determination of first appeal court

- (1) A convicted person may, with the leave of the second appeal court, appeal to that court against the determination of a first appeal by that person or the prosecutor under this subpart in respect of the person's sentence.

³² At [44] citing *BB (CA732/2012) v R* [2013] NZCA 139.

³³ At [44].

³⁴ At [49]–[50].

³⁵ At [52].

³⁶ At [53].

- (2) A prosecutor may, with the leave of the second appeal court, appeal to that court against the determination of the prosecutor’s first appeal under this subpart.
- (3) The High Court or the Court of Appeal must not give leave for a second appeal under this subpart unless satisfied that—
 - (a) the appeal involves a matter of general or public importance; or
 - (b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[21] Mr Wiwarena relies on the second limb, namely that a miscarriage of justice occurred, or may occur unless the appeal is heard. In *McAllister v R*, this Court declined to take a prescriptive approach to the application of “miscarriage of justice” test.³⁷ Rather, this Court noted that the test may be satisfied by an argument, where reasonably available, that the Court below is in error (although not every error will give rise to a miscarriage).³⁸

Mr Wiwarena’s submissions

[22] Counsel for Mr Wiwarena refers to *Dickey v R*,³⁹ which was delivered after the first appeal was heard, in support of his submission that a significantly higher discount should have been given by Moore J for Mr Wiwarena’s youth and other factors identified in the psychologist’s report and s 27 cultural report.

[23] Furthermore, counsel submits that in the first appeal no consideration was given to the fact that a custodial sentence was being substituted for a non-custodial sentence and the effect that would have on Mr Wiwarena. Counsel refers to *R v Donaldson*, in which this Court stated that on a Solicitor-General’s appeal, the appellate court will generally be reluctant to substitute a non-custodial sentence with a custodial sentence.⁴⁰ Counsel submit that a custodial sentence should not have been imposed. Alternatively, a lesser sentence should have been imposed to reflect Mr Wiwarena’s youth and the effect on him of substituting a custodial sentence for a non-custodial sentence.

³⁷ *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764.

³⁸ At [37]–[38].

³⁹ *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405.

⁴⁰ *R v Donaldson* (1997) 1 NZCrimC 640, (1997) 14 CRNZ 537 (CA) at 653.

Crown submissions

[24] At the outset, the Crown acknowledges an error on the part of both the District Court and the High Court in respect of the sentence imposed on three charges. Given his age at the time of the offending (under 18), Mr Wiwarena was not in law able to be sentenced to imprisonment for three of the seven sexual offences of which he was convicted.

[25] Section 18(1) of the Sentencing Act provides:

18 Limitation on imprisonment of person under 18 years

- (1) No court may impose a sentence of imprisonment on an offender in respect of a particular offence, other than a category 4 offence, or a category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years, if, at the time of the commission of the offence, the offender was under the age of 18 years.

[26] The same applies to sentences of home detention.⁴¹

[27] Accordingly, Mr Wiwarena was not able to be sentenced to imprisonment on the following charges:

- (a) Charge 1: Indecent assault on a young person, contrary to s 134 of the Crimes Act 1961, maximum penalty of seven years' imprisonment (relating to complainant A);
- (b) Charge 4: Sexual connection with a young person (representative), contrary to s 134(1) of the Crimes Act 1961, maximum penalty 10 years' imprisonment (also relating to complainant A); and
- (c) Charge 11: Sexual connection with a young person, contrary to s 134(1) of the Crimes Act 1961, maximum penalty 10 years' imprisonment (relating to complainant C – this charge was the only incident of offending against her).

⁴¹ Sentencing Act 2002, s 15B.

[28] In *Diaz v R*, this Court considered the effect of s 18 of the Sentencing Act. It stated:⁴²

...It would be inconsistent with the policy underpinning s 18 for the Court to uplift a sentence of imprisonment by reference to a charge which, pursuant to s 18, could not itself result in a sentence of imprisonment. Such an uplift would result in the young person spending (additional) time in prison as a result of the less serious charge: the very thing that s 18 is intended to preclude.

[29] In light of the effect of s 18 of the Sentencing Act on three of Mr Wiwarena's convictions, the Crown position is that the final term of imprisonment is ultimately unaffected. On appeal, and in light of that appeal being brought by the Solicitor-General and therefore requiring a conservative approach, Moore J adopted a starting point of 12 years' imprisonment. Twelve years' imprisonment is at the bottom of band 3 in *R v AM*.⁴³ Even without accounting for the three offences for which Mr Wiwarena cannot be sentenced to imprisonment, the offending falls squarely within band 3, thus the 12-year starting point is not affected. The extent of the discounts appropriate for Mr Wiwarena's mitigating factors are then clearly not affected. However, given the concurrent terms of imprisonment imposed on all charges, that error must be corrected.

[30] Accordingly, the Crown is not opposed to the application for leave to bring a second appeal for the purpose of error correction, but maintains that the sentence of five years and four months' imprisonment was available and appropriate.

Decision

[31] We grant leave to bring a second appeal, but only for the limited purpose of error correction. We quash the sentences of imprisonment imposed on the charges of indecent assault on a young person (complainant A), sexual connection with a young person (complainant A), and sexual connection with a young person (complainant C). Enhanced standard or standard community options such as intensive supervision or community work are not available because of the undisturbed sentences of imprisonment imposed on the other charges. Accordingly, Mr Wiwarena is

⁴² *Diaz v R* [2021] NZCA 426 at [32].

⁴³ *R v AM*, above n 18, at [105].

convicted and discharged on the above three charges for which he was unable to be sentenced to imprisonment because of his youth at the time of the offending.

[32] No other error has been identified in the judgment of Moore J. He carefully considered the circumstances of the offending and of the offender and the applicable law.

[33] Counsel for Mr Wiwarena does not specifically take issue with the starting point of 12 years' imprisonment adopted by Moore J. Judge Connell had adopted a starting point of nine years' imprisonment but appeared to take into account Mr Wiwarena's youth in doing so. He stated:⁴⁴

[34] I have come to this conclusion. I do agree that in my assessment of the starting point and taking account of *R v AM*, I must take account of the youth of yourself, Mr Wiwarena, in these offences. I would impose a sentence of imprisonment of nine years as a starting point.

[34] We agree with Moore J that if Judge Connell did take Mr Wiwarena's youth into account in setting the starting point then he made an error of principle.

[35] The thrust of counsel's submissions is that a significantly higher discount should have been granted for Mr Wiwarena's youth coupled with factors in the psychologist's report and the s 27 cultural report.

[36] As to the discount for youth, counsel for Mr Wiwarena refers to this Court's decision in *Dickey v R*,⁴⁵ which was delivered after Moore J's judgment. Although the issue in *Dickey* was whether it was manifestly unjust to impose a sentence of life imprisonment on three teenagers who had been convicted of murder, counsel points to comments about further research on adolescent brain development as confirming:⁴⁶

- (a) Adolescent behaviour reflects the slow pace of the development of those parts of the brain that control higher-order executive functioning, such as impulse control, risk assessment and planning ability. Young people behave and react differently from adults due to biological rather than behavioural or personality factors. As Ms Brook for the Crown said, "[a]ll young people suffer from these

⁴⁴ District Court judgment, above n 1.

⁴⁵ *Dickey v R*, above n 39.

⁴⁶ At [86].

cognitive deficits; and all will eventually develop fully to overcome them (assuming no cognitive impairment exists)”.

- (b) Neurological development may not be complete until the age of 25.
- (c) Young persons who commit serious offences frequently exhibit other characteristics which also tend to mitigate culpability, notably intellectual deficits, mental illness and experiences of abuse or other childhood trauma.
- (d) Young people are more receptive to treatment and therefore have better prospects of rehabilitation than adult offenders, who find it more difficult to alter entrenched behaviours.

[37] In *Dickey*, this Court commented that there was no outer limit to the discount for youth in current sentencing practice, but discounts of between 10 and 30 per cent were common.⁴⁷ Moore J stated that discounts for youth offenders in circumstances similar to those for Mr Wiwarena have been in the order of 30 to 40 per cent.⁴⁸ In saying so, Moore J considered four comparable cases.⁴⁹ He thought *BB v R*,⁵⁰ was most similar:⁵¹

In *BB v R*, the defendant was found guilty of five representative counts of sexual violation by unlawful sexual connection and one representative count of sexual conduct with a person under the age of 16 years.⁵² He offended against his two stepsisters over a three-year period when he was aged between 14 and 17 years old.⁵³ While he had limited rehabilitative prospects and was unremorseful,⁵⁴ the Court of Appeal held that a 40 per cent youth discount was available, albeit that it was “towards the upper reaches of the available range”.⁵⁵

[38] In the circumstances, we cannot say Moore J erred in granting a 40 per cent discount for Mr Wiwarena’s youth.

[39] Nor do we see any error in the discount of 10 per cent (rather than 15 per cent) granted by Moore J for the factors identified in the psychologist’s report and s 27 cultural report. The psychologist stated in the s 38 report:

⁴⁷ At [175].

⁴⁸ High Court judgment, above n 3, at [41].

⁴⁹ At [41] citing *BB v R*, above n 32; *V (CA400/12) v R* [2012] NZCA 465; *M v R* [2018] NZCA 630; and *Clarke v R* [2016] NZCA 91.

⁵⁰ *BB v R*, above n 32.

⁵¹ High Court judgment, above n 3, at [41(a)] (footnotes in original).

⁵² *BB v R*, above n 32, at [1].

⁵³ At [5].

⁵⁴ At [12].

⁵⁵ At [13].

[Mr Wiwarena] has a childhood history of multiple moves within both New Zealand and Australia and he attended a number of schools as a result. He denies any childhood physical, sexual or emotional abuse, but his mother was a heavy drinker and his father often lived away from the family.

It appears that observing and later participating in heavy drinking has been a regular feature of his life with his family. It seems possible that inadequate supervision of children occurred at these events and some of the offending reportedly occurred at these times.

[40] The s 27 cultural report writer concluded:

There is obvious social and economic depravity that exists in this whanau, but it is difficult to make clear links between [Mr Wiwarena's] background and his offending, due to his age and lack of immaturity [sic], as well as his limited ability to share relevant details with respect to his cultural and family background.

[41] In the present circumstances, where the offending cannot be definitively linked to factors in Mr Wiwarena's background, a more substantial discount is not warranted.⁵⁶

[42] Finally, we acknowledge that the substitution of a sentence of imprisonment for a sentence of home detention can be seen as unfair, especially by a young offender, but this was recognised by Moore J. He agreed with the approach taken by Downs J in *R v LB*, where Downs J had discounted the otherwise appropriate sentence of imprisonment by eight months for an offender who had served three months of home detention to recognise "the stress on a defendant who, months after sentencing, must now go to prison."⁵⁷

[43] We agree with Moore J that Mr Wiwarena's repeated offending against multiple complainants, of a serious nature and over such an extended period, means that home detention is simply not an available sentencing option. A non-custodial sentence cannot be artificially reached by setting a low starting point and applying overly generous discounts.

⁵⁶ See *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [107]–[111].

⁵⁷ High Court judgment, above n 3, at [51]–[52] citing *R v LB*, above n 15 at [57].

Result

[44] The application for leave to bring a second appeal is granted for the limited purpose of error correction.

[45] The appeal is allowed to the extent that the sentences of imprisonment imposed on Charges 1, 4 and 11 are quashed and replaced by convictions and discharges.

[46] The application for leave to bring a second appeal is otherwise declined.

Solicitors:

Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent