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**NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF  
DETAILS OF RENTED ACCOMMODATION REMAINS IN FORCE.**

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

**I TE KŌTI PĪRA O AOTEAROA**

**CA719/2022  
[2023] NZCA 395**

BETWEEN	SCOTT WAYNE LUKE MCCULLOUGH (AKA LUKE MCCALLISTER) Appellant
AND	THE KING Respondent

Hearing:	19 July 2023
Court:	French, Thomas and Moore JJ
Counsel:	S A McKenna for Appellant S C Baker for Respondent
Judgment:	25 August 2023 at 12.30 pm

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### **JUDGMENT OF THE COURT**

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**The appeal against sentence is dismissed.**

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### **REASONS OF THE COURT**

(Given by Thomas J)

## Introduction

[1] Scott McCullough, also known as Luke McCallister, was convicted after a jury trial in the District Court at Hamilton on two charges of sexual violation by rape,<sup>1</sup> two charges of sexual violation by unlawful sexual connection,<sup>2</sup> and one charge of unlawfully being in a building.<sup>3</sup> The jury acquitted him on one charge of rape. He had pleaded guilty at the start of the trial to two charges of blackmail<sup>4</sup> and pleaded guilty during the trial to one charge of accessing a computer system for a dishonest purpose.<sup>5</sup> Mr McCullough was sentenced to 13 years' imprisonment.<sup>6</sup>

[2] Mr McCullough appeals his sentence on the ground that the starting point adopted by the Judge was out of all proportion to the offending and, as a result, the sentence was manifestly excessive.

## Background

[3] Mr McCullough and the victim met on Tinder in December 2019 and commenced a relationship in January 2020. The relationship progressed quickly and soon became a sexual one. The relationship was tumultuous, characterised by frequent arguments followed by protestations of love and affection. The main reason for the arguments was Mr McCullough's jealousy about the victim's former partner, his feelings of rejection by her family and his suspicion about the victim's infidelity. Those suspicions manifested themselves in his excessive use of Facebook Messenger, text, email and phone calls to the victim throughout the relationship.

### *Accessing a computer system for a dishonest purpose and unlawfully being in a building*

[4] In August 2020, Mr McCullough used the victim's phone to order pizza. When searching on Google "how to catch your partner cheating", Mr McCullough located a website called FlexiSPY which he downloaded onto her phone. This gave

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<sup>1</sup> Crimes Act 1961, ss 128(1)(a) and 128B. Maximum penalty of 20 years' imprisonment.

<sup>2</sup> Sections 128(1)(b) and 128B. Maximum penalty 20 years' imprisonment.

<sup>3</sup> Summary Offences Act 1981, s 29(1)(a). Maximum penalty three months' imprisonment.

<sup>4</sup> Crimes Act, ss 237(1) and 238. Maximum penalty 14 years' imprisonment.

<sup>5</sup> Section 249(1)(a). Maximum penalty seven years' imprisonment.

<sup>6</sup> *R v McCullough aka McAllister* [2022] NZDC 24400.

him access, via a portal on his own phone, to the victim's call history, text messages, Facebook Messenger, sound recordings and video recordings. He was trying to catch the victim being unfaithful.

[5] The relationship ended around 3 October 2020. On the night of 5 October 2020, Mr McCullough went to the victim's address. She told him not to return. He returned to the address the following night in an attempt to catch the victim with another man because of something he thought he heard on FlexiSPY. He entered the house via an unlocked door and went to her bedroom. There were several other people home at the time, including the victim's parents and two young children.

*Blackmail, sexual violation by unlawful sexual connection and rape*

[6] In the following week, Mr McCullough sent the victim text messages, saying he wanted to talk to her.

[7] On 17 October (the first incident), Mr McCullough arranged for the victim to meet him in his car. Mr McCullough told her about the spyware on her phone and accessing her text messages. He showed her a photograph of her naked which also showed her name and where she worked. Mr McCullough threatened to publish it around the local area if she did not tell him what he wanted to hear. Mr McCullough asked the victim if she had slept with anyone else. He locked the doors to the car, removed her underwear and, despite her resistance, digitally penetrated her vagina.

[8] Mr McCullough told the victim she would have to do what she was told. Despite her resistance, he raped her.

*Blackmail, sexual violation by unlawful sexual connection and rape*

[9] Just over a week later, Mr McCullough proposed a deal to the victim whereby he would send her loving messages and she would respond as if she loved him. This was to last for seven days. At the end of that seven-day period, Mr McCullough would give her all the hard copies of the photographs showing her naked and delete images of her from his phone.

[10] The victim agreed to go with Mr McCullough for three nights in a row to accommodation which Mr McCullough had rented. On all three nights they had sexual intercourse.

[11] On the last night, 1 November 2020 (the second incident), Mr McCullough told the victim to take off her clothes and threatened to send photographs to her friends if she did not do so. Mr McCullough showed the victim a video on his phone of her youngest daughter and accused the victim of having sex with someone else at the time the video was filmed. The victim became upset at seeing a video of her daughter on Mr McCullough's phone.

[12] Mr McCullough grabbed the victim's breast and kissed her neck. She resisted but Mr McCullough persisted in his behaviour. The victim believed she would be unable to stop the unwanted sexual activity. She struck a "new deal" whereby she agreed to let Mr McCullough do whatever he wanted if he would then leave her alone, delete all naked images of her that he had, destroy the physical copies of the photographs and take her home afterwards.

[13] Mr McCullough raped and anally violated the victim, putting his hand over her mouth to muffle her.

[14] When taking the victim home, Mr McCullough said he would not keep to the new deal. He said he wanted to see the victim again or he would distribute the photographs which showed her naked through a friend and that she would seriously regret it if she made a complaint to the police.

### **The District Court sentencing**

[15] Judge Stephen Clark described the relationship between Mr McCullough and the victim as tumultuous. The Judge had no doubt that, from the tone of the messages and language used, Mr McCullough attempted to control the relationship and was manipulative and obsessive throughout.<sup>7</sup>

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<sup>7</sup> *R v McCullough*, above n 6, at [5]–[6] and [26].

[16] Referring to the case of *R v AM*, the guideline judgment for sexual violation,<sup>8</sup> the Judge identified the aggravating factors of the offending as: planning and premeditation; victim vulnerability; impact on the victim; detention of the victim in the first incident; and the scale of offending.<sup>9</sup>

[17] The Judge assessed the offending as falling on the cusp of the highest end of band two or the lower part of band three of *R v AM*.<sup>10</sup>

[18] The Judge noted that the offending in *W (CA190/2012) v R*, discussed in more detail below, was similar, involving aggravating features similar to the present case.<sup>11</sup> In that case, this Court upheld a starting point of eight years' imprisonment for rape which was uplifted by 15 months on two charges of blackmail.<sup>12</sup>

[19] The Judge addressed the second incident, which involved charges of rape, sexual violation by unlawful sexual connection and blackmail. He said, if he were dealing with those charges on a stand-alone basis, an appropriate starting point would have been nine years' imprisonment.<sup>13</sup>

[20] The first incident, involving charges of rape, sexual violation by unlawful sexual connection and blackmail, was assessed by the Judge as only slightly less serious than the second incident because it did not involve anal penetration. If sentencing on those charges alone, the Judge said an appropriate starting point was in the region of eight years' imprisonment.<sup>14</sup>

[21] Assessing both incidents on a global basis, the Judge said the offending warranted a starting point of 12 years' imprisonment. He applied a one-year uplift for the charges of unlawfully being in a building and accessing a computer system for a dishonest purpose. The Judge did not uplift for prior convictions, considering them historic (we note a total sentence of four years, six months' imprisonment was imposed

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<sup>8</sup> At [44], citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

<sup>9</sup> At [45].

<sup>10</sup> At [46].

<sup>11</sup> *W (CA190/2012) v R* [2013] NZCA 316, (2013) 26 CRNZ 608.

<sup>12</sup> *R v McCullough*, above n 6, at [47]–[48].

<sup>13</sup> At [53].

<sup>14</sup> At [54].

in 2002 for indecent assault, aggravated wounding (stupefying) and “other disabling/stupefying”). The Judge reached an adjusted starting point of 13 years’ imprisonment.<sup>15</sup>

[22] The Judge declined to give any discount for guilty pleas as they did not result in any saving of trial time. The Judge was not satisfied Mr McCullough was remorseful so declined any credit for remorse.<sup>16</sup> He did not impose a minimum period of imprisonment but noted that there were aspects of Mr McCullough’s offending and personality which caused real concern about his attitude towards relationships and women.<sup>17</sup>

[23] Mr McCullough was sentenced to 13 years’ imprisonment on the two charges of rape; one year to be served concurrently on the two charges of sexual violation by unlawful sexual connection, two charges of blackmail and one charge of accessing a computer system; and two months to be served concurrently on the charge of unlawfully being in a building.

### **The appeal**

[24] Mr McKenna, for Mr McCullough, criticised the Judge’s approach. First, that the Judge had considered all of the sexual offending on a global basis but did not identify the separate culpability factors applicable to the two incidents. Secondly, that, despite this, the Judge then considered separate starting points for the two incidents and then adjusted the starting point based on the totality principle. This resulted, in Mr McKenna’s submission, in a hybrid approach which fell somewhere between dealing with the offending as an ongoing course of conduct on the one hand, and as two separate and distinct incidents on the other. Mr McKenna submitted this hybrid approach resulted in a starting point out of all proportion to the offending.

[25] We will address the issues as follows:

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<sup>15</sup> At [56]–[58].

<sup>16</sup> At [60]–[63].

<sup>17</sup> At [64].

- (a) Did the Judge err in his assessment of the culpability assessment factors?
- (b) Did the Judge err in his approach to sentencing the two incidents of sexual offending?
- (c) Was the starting point too high?

**Did the Judge err in his assessment of the culpability assessment factors?**

[26] We begin by briefly addressing *R v AM*, where this Court set out guidelines for sentencing in cases of rape and other forms of sexual violation.<sup>18</sup>

[27] This Court noted that the first point of reference for the sentencing judge is the Sentencing Act 2002. It also provided a list of culpability assessment factors with the observation that, given the wide variety of circumstances offending in this area can involve, it was not possible to provide an exhaustive list of all factors that may contribute to the culpability of an offender.<sup>19</sup> The Court outlined nine culpability assessment factors: planning and premeditation; violence, detention and home invasion; vulnerability of victim; harm to the victim; multiple offenders; scale of offending; breach of trust; hate crime; and degree of violation.

[28] It is helpful to refer in summary to what this Court in *R v AM* said about the factors identified by the Judge as being relevant to Mr McCullough's offending.

*Planning and premeditation*

[29] The degree of planning and premeditation reflects criminality (s 9(1)(i) of the Sentencing Act). Sexual violation of an impulsive nature, although still serious, will generally be less so than that involving predatory behaviour.<sup>20</sup>

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<sup>18</sup> *R v AM*, above n 8, at [2].

<sup>19</sup> At [35]–[36].

<sup>20</sup> At [37].

### *Violence, detention and home invasion*

[30] Alongside the violence inherent in any act of sexual violation, there will usually be some associated violence. Where the level of associated violence is more than mild, this is another factor which increases culpability. Violence encompasses threats of violence or other harm to the victim and to others, the presence and use of weapons, and other forms of intimidation designed to assert control or to prevent a victim from reporting the offending.<sup>21</sup>

[31] A level of detention is inherent in sexual offending because the victim is not free to leave. But, where the sexual violation involves detention or abduction beyond that, this too increases the seriousness of the offending.<sup>22</sup>

### *Vulnerability of the victim*

[32] Section 9(1)(g) of the Sentencing Act treats as an aggravating factor the vulnerability of the victim because of age or health, or any other factor known to the offender. The other situations in which a victim may be considered vulnerable are varied.<sup>23</sup>

### *Harm to the victim*

[33] Harm is inherent in the offending. The more harmful the offending, the more serious it is. Physical harm is an indication the offending is more serious. This is not to downplay psychological and other non-physical harm, for example escalation of psychological problems and other restrictions on the ability to go about the victim's daily life.<sup>24</sup>

### *Scale of offending*

[34] More than one incident or extended abuse over a prolonged period of time is more serious, as is repeated rape or sexual violation and associated degradation or indignities. Cruelty or callousness also make the offending more serious. A realistic

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<sup>21</sup> At [38]–[39]

<sup>22</sup> At [40].

<sup>23</sup> At [42]–[43].

<sup>24</sup> At [44].



view is to be taken where a number of offences are committed as part and parcel of what is, in substance, a single incident. What is required is a common sense approach to overall culpability.<sup>25</sup>

#### *Breach of trust*

[35] Breach of trust increases the culpability of the offender.<sup>26</sup>

#### *Degree of violation*

[36] Seriousness increases as the degree of violation increases.<sup>27</sup>

#### *Culpability assessment factors relevant in this case*

[37] The Judge discussed the culpability assessment factors he identified as follows:<sup>28</sup>

- (a) Planning and premeditation: Mr McCullough persistently messaged and approached the victim, and used the pretext of a deal to delete and destroy/return naked photographs if sexual activity occurred.
- (b) Victim vulnerability: While he may have received naked photographs voluntarily from the victim, the photographs were not Mr McCullough's to exploit or manipulate. The victim was vulnerable because Mr McCullough had naked images of her. Mr McCullough preyed on that to get what he wanted and in doing so breached the victim's trust.
- (c) Impact on the victim: It was clear from the victim impact statement that Mr McCullough had caused the victim a great deal of psychological distress and harm. The Judge described the victim as somewhat naïve and easily manipulated by Mr McCullough.

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<sup>25</sup> At [47] and [49].

<sup>26</sup> At [50].

<sup>27</sup> At [52].

<sup>28</sup> *R v McCullough*, above n 6, at [45].

- (d) Detention of victim: In relation to the first incident, there was an element of detention in that Mr McCullough locked the victim in the car.
- (e) Scale of offending: The offending took place over a two-week period and involved digital, vaginal and anal penetration.

[38] Mr McKenna submitted planning and premeditation were present to a moderate degree, noting that it was unclear whether the initial intention of the plan was sexual violation or leverage to provide the opportunity to rekindle the relationship. He conceded that the use of photographs provided willingly to Mr McCullough during the relationship involved a breach of trust but said the Judge incorrectly treated this as demonstrating the victim's vulnerability, and it was more appropriately classified as a breach of trust alone.

[39] Mr McKenna noted there was no physical violence used to facilitate the sexual violation. The violence was purely psychological and in the low to moderate range, he suggested, with the threats held over the victim's head lasting about three weeks only.

[40] Addressing the scale of offending, Mr McKenna acknowledged that the offending extended over more than one incident and the psychological control over the victim existed for a period of time outside the incidents of offending. However, he submitted that the period of time was far below other cases where sexual offending accompanied by psychological control and manipulation has extended over several years.

[41] As this Court observed in *R v AM*, the list of factors that may contribute to culpability is not exhaustive and what is required is an evaluation of all the circumstances. Listing the relevant factors does not remove the need for judgment and a mechanistic approach is not appropriate.<sup>29</sup> Judges have a reasonable degree of

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<sup>29</sup> *R v AM*, above n 8, at [36].

latitude when conducting an evaluative exercise of judgment in considering the culpability of offending in a particular case.<sup>30</sup>

[42] We agree with Mr Baker, for the respondent, that the persistent messaging, reference to “deals” and the threatened use of naked images of the victim was deliberate and calculated, increasing in degree as an aggravating factor as the behaviour continued, culminating in the second incident.

[43] It matters little whether Mr McCullough’s threats to misuse the photographs showing the victim naked are considered a breach of trust or considered as victim vulnerability, given that Mr McCullough’s possession of the photographs made her vulnerable. Indeed we consider the Judge described this aspect correctly. He did conclude that it was a breach of trust but noted that Mr McCullough’s possession of the naked images of the victim meant she was vulnerable to the prospect of their being misused.

[44] There was no physical violence over and above the violence inherent in any act of sexual violation. However, *R v AM* notes that the threat of violence also encompasses other forms of intimidation designed to assert control or to prevent a victim from reporting the offending.<sup>31</sup> The threats made by Mr McCullough to disclose the images of the victim in order to coerce her into sexual activity with him and assert control over her could have been separately assessed under the heading of violence. It is clear, however, that the Judge took this factor into account under a different heading and avoided any double counting.

[45] The Judge identified the impact on the victim as an aggravating feature, noting her victim impact statement which described her having suffered a great deal of psychological distress and harm. The Judge referred to having watched the victim’s evidential interview and her evidence (which took place over a period of three days).<sup>32</sup> As the trial Judge, he was well placed to assess the impact on the victim.

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<sup>30</sup> At [79].

<sup>31</sup> At [39].

<sup>32</sup> *R v McCullough*, above n 6, at [45(c)].

[46] As this Court said in *R v AM*, more than one incident or extended abuse over a prolonged period of time is more serious.<sup>33</sup> The sexual offending took place on two separate occasions, and Mr McCullough used blackmail in relation to both occasions and throughout the period of the offending.

[47] We do not consider the Judge erred in his analysis of the culpability assessment factors. While the aggravating factors were present to a more serious degree in respect of the second incident, the same factors were present in respect of the first incident and continued throughout the course of the offending.

**Did the Judge err in his approach to sentencing the two incidents of sexual offending?**

[48] Mr McKenna criticised the Judge’s approach in assessing separately the starting point in relation to each of the two incidents, before considering them globally. He submitted that it was inappropriate for the Judge to refer to what the starting point would have been if he were dealing with the first and second incidents on a stand-alone basis.

[49] Both Mr McKenna and Mr Baker submitted the appropriate approach was to deal with all the sexual offending and blackmail together as an ongoing course of conduct.

[50] The Judge set out the factors that were relevant to all of the sexual offending, noting that the first incident was slightly less serious than the second because it did not involve anal penetration, but that it did involve an element of detention in that the victim was locked in the car. He also referred to the “new deal” being struck in relation to the second incident.

[51] As this Court has said repeatedly, what matters is not how a sentence is constructed but the appropriateness of the overall outcome.<sup>34</sup> We have considered whether the Judge’s approach could have resulted in a higher starting point than if the more orthodox approach of taking a lead charge and then uplifting for further

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<sup>33</sup> *R v AM*, above n 8, at [47].

<sup>34</sup> *W (CA190/2012) v R*, above n 11, at [54].

offending were taken. In the circumstances of this case, we do not consider that to have been so. The Judge discussed appropriate starting points as nine years on the second incident and eight years on the first. He stated clearly that those were the starting points he would have taken were he dealing with each incident on a stand-alone basis.

[52] The Judge then explained that it was appropriate to deal with the sexual offending together, noting it began on 17 October 2020 and lasted until the early hours of 2 November 2020. He said he was dealing with it on a global basis and that, having stood back and assessed it in this way, a starting point of 12 years' imprisonment was warranted. He very deliberately did not approach the starting point by adding the two starting points together (which totalled 17 years).

[53] In any event, if the orthodox approach were taken and the second incident treated as the lead offence, on the Judge's approach a starting point of nine years' imprisonment was warranted. An uplift of three years to reflect the first incident cannot be criticised.

[54] We are satisfied the fact the Judge considered what the individual starting points in respect of each incident would have been, had they been considered separately, did not lead him into error.

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

[55] The Judge considered it somewhat artificial to place the offending into a band but said it was somewhere on the cusp of the highest end of band two or lowest part of band three of *R v AM*.

[56] Mr McKenna acknowledged that, despite his various criticisms of the way in which the sentence was calculated, the real issue was whether the result was manifestly excessive. In his submission it was, and that was because the 12-year starting point for the sexual and blackmail charges was too high. He submitted that the cases used as examples in *R v AM* suggested this case fell at the lower end of band two and not

on the cusp of bands two and three.<sup>35</sup> In his submission, a number of the cases cited by this Court in *R v AM* which were described as falling at the lower end of band two were relatively serious, involving sexual offending accompanied by physical violence and threats of it.<sup>36</sup>

[57] We begin by briefly discussing the bands for sexual violation where the lead offence is rape, penile penetration of the mouth or anus or violation involving objects, as set out in *R v AM*.

*Rape band one: 6–8 years*

[58] This band will be appropriate for offending at the lower end of the spectrum, where the aggravating features are either not present or are present to a limited extent.<sup>37</sup>

*Rape band two: 7–13 years*

[59] This band is appropriate for a scale of offending and levels of violence and premeditation which are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.<sup>38</sup>

*Rape band three: 12–18 years*

[60] This band encompasses offending accompanied by aggravating features at a, relatively speaking, serious level. Rape band three is appropriate for offending which involves two or more of the factors increasing culpability to a high degree, such as a particularly vulnerable victim and serious additional violence, or more than three of those factors to a moderate degree. Particularly cruel, callous or violent single episodes of offending involving rape will fall into this band.<sup>39</sup>

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<sup>35</sup> *R v AM*, above n 8.

<sup>36</sup> At [98].

<sup>37</sup> At [93].

<sup>38</sup> At [98].

<sup>39</sup> At [105].

*Rape band four: 16–20 years*

[61] The same sorts of factors that place offending towards the higher end of rape band three will apply here but it is likely that the offending in rape band four will involve multiple instances of offending over considerable periods of time rather than single instances of rape.<sup>40</sup>

*Analysis*

[62] In Mr McKenna's submission, the offending fell within the lower end of band two of *R v AM*.<sup>41</sup> He referred the Court to two cases: *R v Gillies* and *W (CA190/2012) v R*.<sup>42</sup>

[63] In *Gillies*, Mr Gillies visited the victim's home and made sexual advances to her which were rejected. He violated the victim by digital penetration and raped her. Mr Gillies and the victim then engaged in a consensual sexual relationship for approximately two weeks. When the victim attempted to end the relationship, Mr Gillies reacted violently. He came uninvited to the victim's house where he raped and assaulted her, causing physical injuries. He remained at the home and raped her again approximately one hour later, this time also violating her by anal penetration. Mr Gillies went to sleep and raped the victim again the following morning. He then demanded \$5,000 from the victim in order to get him to walk away from the relationship. In order to establish a starting point, the High Court addressed the three rape offences which occurred after the victim attempted to end the relationship. A starting point of 10 years' imprisonment was reached, uplifted by one year to take account of the earlier sexual offending and by six months to take into account the blackmail.<sup>43</sup>

[64] Mr McKenna submits the offending in *Gillies* was at a higher level than the present case as a result of the presence of actual physical violence and physical injury as well as psychological manipulation in the form of blackmail.

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<sup>40</sup> At [108]–[109].

<sup>41</sup> *R v AM*, above n 8, at [98].

<sup>42</sup> *R v Gillies* HC Auckland CRI-2009-044-7547, 27 September 2010; and *W (CA190/2012) v R*, above n 11.

<sup>43</sup> *R v Gillies*, above n 42, at [36]–[43].

[65] In *W (CA190/2012) v R*,<sup>44</sup> the case referred to by the Judge, W and the victim had been in a relationship which came to an end after approximately 12 months. They resumed contact shortly afterwards and saw each other frequently on a friendly basis. After a few weeks, W sought to resume a sexual relationship. When the victim rejected his advances, he began to offer her bribes and threatened her, to coerce her into sexual relations. This escalated to blackmail — he threatened to send photographs showing the victim naked to her family and employer. The victim eventually submitted to sleeping with him “a couple of times”. This did not deter W, who increased his threats and demands. W then violated the victim over the course of two hours, involving vaginal and oral penetration.

[66] The sentencing Judge considered the premeditation was a significant aggravating factor, placing the case on the cusp of bands one and two. He took a starting point of eight years’ imprisonment for the rape and treated the two blackmail charges as essentially relating to one ongoing course of conduct, imposing an uplift of 15 months’ imprisonment for those two charges. This Court dismissed the appeal, saying it was serious offending and the starting point of eight years was in accordance with *R v AM* having regard to the array of aggravating features of the offending.<sup>45</sup>

[67] Mr McKenna submitted that Mr McCullough’s offending lay somewhere in between the offending in the *R v Gillies* and *W (CA190/2012) v R*. Mr McKenna contended that, bearing those two cases in mind, a starting point of nine years’ imprisonment for all the sexual offending and associated blackmail was appropriate in Mr McCullough’s case. He did not challenge the 12-month uplift for unlawfully entering a building and accessing a computer system for a dishonest purpose.

[68] We agree with Mr Baker that *Gillies* and *W (CA190/2012) v R* can be distinguished. *Gillies* involved blackmail after the rape whereas Mr McCullough’s blackmail was the precursor to the sexual offending and undertaken by him in order to achieve that. It occurred in respect of both incidents of sexual offending. Mr McCullough’s offending involved two separate incidents and greater planning and

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<sup>44</sup> *W (CA190/2012) v R*, above n 11.

<sup>45</sup> At [54].



premeditation. We also note that the starting point in *Gillies* was not subject to appellate consideration.

[69] *W (CA190/2012) v R* can be distinguished as there was only a single charge of rape and no anal penetration. Mr McCullough's offending involved two separate incidents, both involving blackmail, rape and sexual violation, and ongoing conduct over a period of approximately three weeks. We reject Mr McKenna's submission that the facts of that case are "strikingly similar" to Mr McCullough's offending.

[70] Mr Baker submitted that a starting point of 12 years' imprisonment was in the appropriate range given the aggravating features of the sexual offending. He referred to *Hart v R*, where the High Court adopted a starting point of 12 years' imprisonment for two rape charges involving a 13-year-old victim (with five blackmail charges being an aggravating factor). Although the victim was only 13, Mr Baker submitted it was of note that there were only two sexual offences. Mr Hart appealed the minimum period of imprisonment which had been imposed but did not take issue with his finite sentence.<sup>46</sup>

[71] We have carefully considered the cases to which we were referred, as well as those discussed by this Court in *R v AM*. None is directly on point, reflecting the need to assess this type of offending in its own particular circumstances. The cases discussed in *R v AM* provide guidance in relation to indicating the level of seriousness appropriate to each band.

[72] We agree that, with five culpability factors, four of them present to at least a moderate degree, the offending sits at the top of band two of *R v AM*, and a starting point for the sexual offending and blackmail of 12 years' imprisonment was within range.

[73] The ultimate question is whether the sentence was manifestly excessive. Not only do we consider the starting point was within range but we note there was no uplift in respect of 2002 offending of indecent assault, aggravating wounding by stupefying and "other disabling/stupefying". We understand no details of that

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<sup>46</sup> *Hart v R* [2017] NZCA 521.

offending were provided at the time of sentencing. We would simply observe that the nature of those charges suggests an uplift to the starting point was open to the Judge.

[74] In conclusion, we see no error in the Judge's approach and the sentence of 13 years' imprisonment for all the offending was not manifestly excessive.

## **Result**

[75] The appeal is dismissed.

Solicitors:  
McKenna King Dempster, Hamilton for Appellant  
Crown Law Office, Wellington for Respondent