

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,
OCCUPATION AND IDENTIFYING PARTICULARS OF APPELLANT
PURSUANT TO S 200 OF THE CRIMINAL PROCEEDURE ACT 2011.**

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA527/2023
[2023] NZCA 606**

BETWEEN	B (CA527/2023) Appellant
AND	THE KING Respondent

Hearing:	6 November 2023
Court:	Katz, Mander and Osborne JJ
Counsel:	C J Bernhardt and M P A Tarsau for Appellant H D L Steele and K D J Robinson for Respondent
Judgment:	30 November 2023 at 9.30 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The sentence of four years' imprisonment is quashed and substituted with
a sentence of three years and six months' imprisonment.**
- C We make an order suppressing the appellant's name, address, occupation
and identifying particulars pursuant to s 200(2)(f) of the Criminal
Procedure Act 2011.**
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REASONS OF THE COURT

(Given by Mander J)

[1] Mr B was convicted by a jury in the Auckland District Court on two charges of performing an indecent act on a young person (including a representative allegation),¹ and a charge of sexual violation by unlawful sexual connection.² He was sentenced by Judge Fitzgibbon to four years' imprisonment.³ Mr B appeals that sentence on the basis it was manifestly excessive. He maintains the Judge erred by adopting an excessive starting point and failing to extend appropriate credit for mitigating factors.

Background

[2] The three offences were committed when the 15-year-old victim was living in the same house with her great aunt, who she described as her "Nan", and Mr B, who was referred to by the victim as "Uncle" and is the great aunt's cousin. The offending started on an occasion when the victim's Nan was at work and the victim and Mr B were in the kitchen together. He pulled the victim onto his lap and touched her breasts. Following this first offence, when her Nan was away at work and the victim alone at home with Mr B, he would touch her breasts on almost a daily basis.

[3] One evening, when the victim's Nan was away overnight, Mr B got into the victim's bed and hugged her from behind. He said he would like to make out with her. Nothing further happened that evening. However, the following morning, when the victim was leaving for school, Mr B asked her for a hug. After receiving a hug, Mr B asked the victim for another. On this occasion, he pulled her onto his lap and put his fingers under her underwear and into her genitalia.

[4] The victim met with a school counsellor that same morning and disclosed to her what had occurred and what Mr B had been doing to her when her Nan was not at home.

¹ Crimes Act 1961, s 134(3) — maximum penalty of seven years' imprisonment.

² Section 128(1)(b) and 128B — maximum penalty of 20 years' imprisonment.

³ *R v [B]* [2023] NZDC 18094 [District Court judgment].

The District Court sentence

[5] Adopting the unlawful sexual connection charge as the lead offence, the Judge identified this offence as falling at the cusp of bands one and two identified in the guideline judgment of *R v AM* (CA27/2009), concluding ultimately it fell at the lower end of band two, attracting a starting point of between four and 10 years' imprisonment.⁴ A starting point of four and a half years' imprisonment for the unlawful sexual connection charge was adopted.⁵ This was uplifted by a further six months' imprisonment for the two indecent act charges.⁶

[6] A 10 per cent discount was applied to reflect Mr B's personal circumstances outlined in a psychiatric report and other material made available to the Court. The Judge declined to apply a reduction for previous good character. This appears to have been because Mr B had one previous conviction from 1990 for careless driving causing injury.⁷ A further five per cent credit was provided for time spent on restrictive bail conditions.⁸ After a three-month adjustment for totality, this resulted in the end sentence of four years' imprisonment.⁹

The appeal

[7] Mr B alleges the four-year sentence was manifestly excessive. He relies on three grounds:

- (a) the starting point of four and a half years' imprisonment applied in respect of the lead charge of unlawful sexual connection was too high;
- (b) the Judge failed to extend to him any discount for previous good character; and
- (c) the reduction made for the time Mr B spent on restrictive electronically monitored bail (EM bail) while on remand was insufficient.

⁴ At [24]–[25], citing *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750.

⁵ At [27].

⁶ At [30].

⁷ At [4] and [32].

⁸ At [32].

⁹ At [33].

[8] We consider each of these grounds in turn.

Starting point

[9] Mr B argued his offending fell within the “mid-higher” end of band one of the *R v AM* guidance (two to five years’ imprisonment) for offending of this type.¹⁰ He rejected the Judge’s categorisation of the offence as being within the bottom of the second band (between four to 10 years’ imprisonment), notwithstanding the overlap between the two bands.

[10] A number of sentencing decisions of both this Court and the High Court were relied upon as examples of similar offending for the purpose of a comparative analysis that was intended to demonstrate the starting point was excessive.¹¹ The Crown also referred us to a number of cases involving similar offending in response.¹² Competing submissions were made regarding the relative seriousness of the present offending with that described in the other cases. Such features as the age of the victim, the nature of the sexual acts and the circumstances of the particular offending were compared. While the offending in these cases was broadly comparable to that committed by Mr B, each case will inevitably differ. A forensic comparison with the index offending, in an effort to identify error, is likely, as we believe is the case here, to be of marginal utility. The focus needs to be on the guidance provided by this Court in *R v AM*.

[11] In that case, this Court observed that for violations where unlawful sexual connection is the lead offence and one or more aggravating factor is present to a low or moderate degree, a starting point towards the top of band one will be required.¹³ Unlawful sexual connection offending of the type to which band two applies will be for cases of relatively moderate seriousness and will encompass cases which involve two or three features that increase culpability to a moderate degree.¹⁴ We consider a number of relevant aggravating features were present in this case.

¹⁰ See *R v AM*, above n 4, at [114].

¹¹ *R v AM*, above n 4; *R v Kincaid* [1991] 2 NZLR 1 (CA); *R v C* CA43/98, 28 May 1998; *R v Bell* CA393/05, 28 April 2006; *Heke v R* [2012] NZHC 1003; and *R v H* [2016] NZHC 2705.

¹² *Rose v R* [2022] NZHC 585; *B v R (CA182/2018)* [2019] NZCA 18; *T (117/2015) v R* [2015] NZCA 572.

¹³ *R v AM*, above n 4, at [114].

¹⁴ At [117].

[12] The victim was a 15-year-old girl living in the same home with her mature relative. It was argued the sentencing Judge placed undue emphasis on the age difference between the victim and offender. However, regardless of their respective ages, Mr B was in a familial relationship with the victim and in a position of some seniority and authority. Within the household he held a level of control over the victim, which was demonstrated by the way he had previously physically disciplined her.

[13] The offending occurred when the victim's Nan was absent. In addition to the victim's vulnerability, stemming from her age and relative isolation at these times, the offending marked an obvious breach of a position of trust, which the sentencing Judge rightly recognised.¹⁵ Not only did the offending occur at a time when the victim had been left in Mr B's care but it occurred in her home, where she was entitled to feel safe. While not explicitly identified at sentencing, the offending was not entirely opportunistic. Mr B chose to interfere with the victim when her primary caregiver was absent from the house, and obviously involved some forethought.

[14] The unlawful sexual connection charge represented the culmination of a series of advances made by Mr B, marked by the repeated touching of the victim's breasts, the entering of her bed at night and, finally, the digital penetration of the victim's genitalia. We consider Mr B's culpability needs to be assessed against a continuing course of sexual conduct towards the victim that occurred over approximately a month. While the Judge rightly took the unlawful sexual connection charge as the lead offence, it would have been artificial when assessing Mr B's culpability to sever that single act from the prior offending. Subject to any issue of double-counting, we do not consider the Judge erred by having regard to this aspect.

[15] To be added to these relevant features is the considerable impact Mr B's offending has had on his victim. This has been profound. The victim has been traumatised and requires counselling to mitigate thoughts of self-harm and feelings of fear.

[16] Sentencing is an evaluative exercise and guideline judgments are not to be applied in a mechanistic way. There will often be an overlap or merging of relevant

¹⁵ District Court judgment, above n 3, at [29].

aggravating features, and the degree to which they are present in any individual case requires careful assessment. In the circumstances of the present case, we consider there were multiple aggravating features present. These include the victim's vulnerability and relative isolation, given her age and situation when her Nan was away; an obvious breach of trust by Mr B when he assumed the role of a primary caregiver on those occasions; his persistent sexual interference with the victim over an extended period that preceded the sexual violation; and the psychological damage to the teenage victim as a result of his offending beyond that inherent to its commission. In accordance with the guidance provided in *R v AM*, we consider these features were all present to a sufficiently significant degree to bear on the assessment of the gravity of Mr B's offending.

[17] An uplift of six months was added for the prior indecent acts, which resulted in a combined starting point of five years' imprisonment.¹⁶ We have already reviewed the relevance of this offending, which culminated in the act of sexual violation and provides the context in which that offence was committed. Focussing on the combined five-year starting point, we consider that, whilst perhaps stern, it does not fall outside the range available to the sentencing Judge in the exercise of her discretion. Importantly, we do not consider the Judge erred in her identification of where the unlawful sexual connection offence fell in terms of the guidance provided by *R v AM*, straddling, as it did, the high end of the first band and the lower end of the second.¹⁷ It follows that this ground of the appeal fails.

Good character discount

[18] The sentencing Court had before it a letter from Mr B's sisters that described how he had, in his counsel's words, lived a "decent, meaningful and prosocial life", including time in the Army Reserve Force. Moreover, as we have observed, Mr B is a mature man and, at the time of his offending, had acquired only one previous conviction for careless driving causing injury some 30 years ago that resulted in a fine and disqualification. It appears, however, from the Judge's sentencing remarks, that

¹⁶ At [29].

¹⁷ *R v AM*, above n 4.

she considered this sole conviction prevented her from extending any credit for Mr B's substantially unblemished past.

[19] We consider the sentencing Judge erred in arriving at that conclusion. While the assessment of personal mitigating factors such as previous good character are matters that often involve an evaluative assessment, we do not consider a sole conviction, some 30 years ago, of the type incurred by Mr B, should disqualify a mature offender who has otherwise led a law-abiding life from being able to call upon his previous good record over a relatively long period of time.¹⁸ This is not a situation where a sexual offender is seeking to rely upon a period when he was ostensibly contributing positively to society while at the same time surreptitiously offending, nor is it a situation where Mr B's good record enabled his offending.

[20] As noted in *Mayawati v R*, good character may be of less relevance where the offending is particularly serious,¹⁹ and each case will turn on its individual circumstances and that of the offender. However, we do not consider Mr B, whose risk of reoffending is assessed as low by the report writers, should, as a relatively mature person, be deprived of some credit for his previous good character. His single conviction for offending in a careless manner in the context of a road accident some three decades ago should not have that effect.²⁰ The information available to the Court indicates Mr B is a man of some idiosyncrasies but has otherwise led a law-abiding and pro-social life. He should have been afforded a specific discount for this aspect of his background, which we consider can appropriately be acknowledged by a 10 per cent credit.

Credit for time spent on restrictive EM bail

[21] Mr B was afforded a five per cent discount for time spent on remand while on EM bail. It was argued this was insufficient as Mr B had been subject to the restrictions of EM bail for some seven and a half months and an overnight curfew for a further 16 months. However, having reviewed the circumstances of the delay in

¹⁸ See *Manawaiti v R* [2013] NZCA 88 at [15]–[20].

¹⁹ At [17], referring to the discussion in *Halsbury's Laws of England* (5th ed, 2010) vol 92 Sentencing and Disposition of Offenders at [624], n 22.

²⁰ We were informed Mr B injured a cyclist while driving a truck for work purposes.

bringing this matter to trial, we consider the Judge was entitled to limit the credit that may otherwise have been provided to Mr B for the period he was subject to restrictive bail conditions.

[22] Mr B's trial was set to commence in the week of 22 March 2021. He failed to appear at the Monday trial call-over and again later that week when his trial was scheduled to start. The trial was therefore vacated and a warrant issued for his arrest. During the previous year, Mr B had decided to represent himself, which had led the Court to appoint an amicus curiae. While counsel so appointed had maintained contact with Mr B, Mr B failed to personally appear at pre-trial call-overs held towards the end of 2020. It is not entirely clear, but it appears Mr B may have adopted certain views regarding the legitimacy of the Court's jurisdiction to try him. The situation was aggravated when, after Mr B's arrest in April 2021, a new trial set for January 2022 was not able to proceed through no fault of his own, and did not finally proceed until April 2023.

[23] We consider the Crown is correct that had Mr B attended his first trial date as required, in respect of which his absence has not been explained, the proceedings would have been completed some two years earlier. As a result of his failure to comply with the terms of his bail, the victim was subjected to an extended period of delay which, no doubt, added to her stress. That unfortunate outcome can be sheeted back to Mr B's unexplained failure to comply with his obligations in March 2021.

Conclusion

[24] Leaving the original starting point of five years undisturbed, but making an adjustment for the 10 per cent credit Mr B ought to have received for his previous good record, together with the other discounts afforded to him (including the adjustment for totality), results in a sentence of three years and six months' imprisonment. That outcome represents a minor reduction to the original sentence which, given its limited effect, we may not have otherwise been inclined to make. However, because the starting point adopted was towards the highest end of the available range and the omission to extend some credit for good character was a plain

error, we consider it appropriate in the circumstances to allow the appeal for the purpose of making this small adjustment.

Result

[25] The appeal is allowed. The sentence of four years' imprisonment is quashed and in its place a sentence of three years and six months' imprisonment substituted.

[26] The victim's name and identifying details are automatically suppressed under s 203 of the Criminal Procedure Act 2011. In order to protect her identity, we make an order suppressing the appellant's name, address, occupation and identifying particulars pursuant to s 200(2)(f) of the Criminal Procedure Act 2011.

Solicitors:
Public Defence Service, Auckland for Appellant
Crown Solicitor, Auckland for Respondent