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S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA195/2023
[2024] NZCA 155**

BETWEEN	MAXINE LEIANA GREEN Appellant
AND	THE KING Respondent

Hearing:	17 April 2024
Court:	Wylie, Mander and Jagose JJ
Counsel:	S Brickell for Appellant S S McMullan and A L Stuart for Respondent
Judgment:	9 May 2024 at 12 pm

JUDGMENT OF THE COURT

- A The appeal against sentence is allowed in part.**
- B The MPI of five years and two months is quashed.**
- C The sentence of 10 years and four months' imprisonment otherwise stands.**
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REASONS OF THE COURT

(Given by Mander J)

[1] Maxine Green was convicted of five charges of sexual offending against three complainants following a jury trial in the Auckland District Court. She was sentenced

by Judge Mary-Beth Sharp to 10 years and four months' imprisonment and ordered to serve a minimum period of half that term.¹ Ms Green appeals her sentence on the basis an excessive starting point and inadequate discounts for personal mitigating factors, combined with the imposition of a minimum period of imprisonment (MPI), has resulted in a manifestly excessive sentence.²

Factual background

[2] The offending for which Ms Green was convicted occurred over a 10-year period, between 2006 and 2016, when she was aged between 14 and 24 years. Ms Green is a transgender women, but had not yet transitioned at the time of offending.

Offending against PK

[3] From the age of eight, Ms Green began engaging in frequent sexual behaviour with a child who was five years old. The sexual conduct took various forms and included her licking the child's cheeks, masturbating in front of the child, "dry humping" both on and in front of the child, and forcing the child to participate in role-playing her sexual fantasies. Compliance was achieved by threats of physical punishment or the destruction of belongings. The child was routinely smacked by Ms Green in the stomach and had their genitalia assaulted. The offending caused the victim significant sleep deprivation as a result of being kept awake because of this sexual behaviour. It continued for many years. By the time the child was nine years of age, the sexual offending was occurring almost daily.

[4] Ms Green could not be held criminally responsible for any offending that occurred prior to her attaining the age of 14 years.³ However, she was convicted of two representative charges of indecent assault on a child and a young person for offending when she was aged between 14 and 16 years, and the child 10 to 12 years old.⁴ Because s 18 of the Sentencing Act 2002 prohibited the imposition of imprisonment on an offender aged under 18 years at the time of the offending, no uplift

¹ *R v Green* [2023] NZDC 5434 [sentencing notes].

² We note that Ms Green originally sought to appeal her conviction, but has since abandoned that appeal.

³ Crimes Act 1961, ss 21 and 22.

⁴ Section 132(3) — maximum penalty 10 years' imprisonment; and s 134(3) — maximum penalty seven years' imprisonment.

could be applied to the starting point of imprisonment taken in respect of other subsequent offending.⁵ On these charges, Ms Green was convicted and discharged.

Offending against KS

[5] Ms Green was in a relationship with KS for three years. Their sexual relationship primarily involved role-playing, which at times included Ms Green playing a character who would abuse KS's character. It was Ms Green's preference to engage in anal sex. KS found this painful and did not like it. It was not part of their ordinary sexual routine. On the occasions it occurred, KS would cry and express her dislike to Ms Green. Ms Green's response would be to tell KS to "bite the pillow" because of the pain.

[6] On one occasion in May or June 2013, Ms Green and KS engaged in sexual role-playing which involved Ms Green abusing KS in her role. It commenced with her performing anal sex on KS while she was lying on her stomach. This was painful for KS and she began to cry. She told Ms Green of the pain. KS repeatedly told her to stop and to "get out of me". However, Ms Green ignored KS and continued until she ejaculated. This resulted in Ms Green being convicted of a charge of sexual violation by way of unlawful sexual connection.⁶

Offending against KR

[7] KR lived with Ms Green for approximately six months. On two or three occasions, KR would wake in the morning to find Ms Green having sexual intercourse with her. She would remonstrate with Ms Green and push her off. KR said that each time this happened she became more upset because it occurred when she was asleep and without her consent.

[8] On one occasion in the early hours of the morning, Ms Green engaged in anal sex with KR. KR had consented to vaginal sexual intercourse but not to anal sex. It was painful, she cried and repeatedly told Ms Green to stop. KR begged Ms Green to stop but she continued until she ejaculated.

⁵ Sentencing notes, above n 1, at [15]–[17].

⁶ Crimes Act, ss 128(1)(b) and 128B — maximum penalty 20 years' imprisonment.

[9] As a result of this offending, Ms Green was convicted of a representative charge of sexual violation by rape,⁷ and a charge of sexual violation by unlawful sexual connection.⁸

Sentence

[10] The Judge expressly proceeded on the basis the starting point for the sentence could only be determined on the basis of the offending against KR and KS.⁹ The offences against KR were treated as the lead offending.¹⁰ After the identification of various aggravating features,¹¹ the Judge determined this offending fell within band two of the guideline judgment of *R v AM*, which attracts sentences of between seven to 13 years' imprisonment.¹² A starting point of 10 years' imprisonment was adopted for the offending against KR.¹³

[11] In respect of the offending against KS, the Judge also placed that offending within rape band two of *R v AM*, which she determined on a standalone basis would have attracted a starting point of eight years' imprisonment.¹⁴ That was adjusted for totality to an uplift of three years' imprisonment and resulted in a combined starting point of 13 years' imprisonment which the Judge considered adequately reflected the overall seriousness of Ms Green's offending against two vulnerable victims.¹⁵

[12] From that 13-year starting point, a 10 per cent discount was provided for the acknowledged difficulties Ms Green would encounter as a transgender woman in prison.¹⁶ A further 10 per cent adjustment was made in recognition of Ms Green's mental health difficulties.¹⁷ However, the Judge declined to afford any credit for youth or the content of a cultural report that included Ms Green's narrative of having

⁷ Crimes Act, ss 128(1)(a) and 128B — maximum penalty 20 years' imprisonment.

⁸ Sections 128(1)(b) and 128B — maximum penalty 20 years' imprisonment.

⁹ Sentencing notes, above n 1, at [17]–[18] and [21].

¹⁰ At [29].

¹¹ At [30].

¹² At [32]. See *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [90(b)] and [98]–[102].

¹³ Sentencing notes, above n 1, at [32].

¹⁴ At [28]–[29].

¹⁵ At [35].

¹⁶ At [55].

¹⁷ At [54].

experienced physical, psychological and sexual abuse at the hands of a family member.¹⁸ The Judge expressed scepticism about Ms Green’s self-reported account.¹⁹

[13] The Judge justified a 50 per cent MPI on the basis of her assessment of Ms Green’s culpability as “grave”, the scale of the offending, the “great risk” Ms Green posed to other members of the community, and the damage she had caused to her victims.²⁰

The starting point

Offending against KR

[14] The Judge identified six aggravating features of the offending against KR. These included the scale of the offending, which involved two or three instances of rape and one of unlawful sexual connection over a five-month period, including when KR was asleep in her own bed and therefore particularly vulnerable. Because of the relationship KR was in with Ms Green at the time, the offending was held to have involved a breach of trust. An element of premeditation was identified, at least in respect of the rapes that involved the repetition of non-consensual sexual intercourse when the victim was asleep. The Judge considered there was a high degree of violation and force that included two or three instances of vaginal penetration and one instance of “prolonged” anal penetration. Finally, the Judge acknowledged the considerable harm caused to KR, in particular the detrimental impact on the victim’s mental health.²¹

[15] The focus of this aspect of the appeal was largely on the three-year uplift imposed in respect of the offending against KS. However, Mr Brickell, on behalf of Ms Green, sought to make some criticisms of the Judge’s assessment of the offending against KR in support of a submission that the starting point of 10 years’ imprisonment was at the top of the available range. He argued that KR’s description of the duration of the sexual violations was inaccurate and the Judge should not have placed any reliance on it. It was also suggested the harm arising to the victim could not accurately

¹⁸ At [50] and [58].

¹⁹ At [57].

²⁰ At [63].

²¹ At [30].

be apportioned to the sexual offending in the context of a toxic relationship, rather than solely to the sexual offences, and that the offending was better described as impulsive rather than premeditated.

[16] We do not consider these points materially impact on the Judge's assessment of the offending against KR.

[17] The Judge's finding regarding the duration of the offending was limited to the anal intercourse and, while the victim gave varying estimates for how long that went on, we do not consider the Judge's description of it as having been "prolonged" was inaccurate. We accept there were other aspects of KR's relationship with Ms Green that detrimentally affected her, but we do not consider any error arises from the Judge acknowledging KR's stress disorder and the anxiety and panic attacks from which she now suffers as being associated with Ms Green's offending. As noted by the Crown, they are consequences commonly linked to offending of this nature. Insofar as there is any criticism of the Judge's identification of premeditation as an aggravating feature, the Judge qualified her comments by limiting that finding to the repetition of the offending against the victim when she was asleep. Ms Green knew KR did not consent and that she had previously been distressed by Ms Green's actions.

[18] The categorisation of rape as falling within band two of *R v AM* includes offending against a vulnerable victim and will be appropriate where two or three aggravating factors are present that increase culpability to a moderate degree.²² The Judge identified six aggravating factors. Care is always required when assessing such features because they may be present to varying degrees and involve a level of overlap. However, having regard to the nature and circumstances of Ms Green's offending against KR, we do not consider a starting point of 10 years' imprisonment can realistically be challenged as being outside the available range.²³

²² *R v AM*, above n 12, at [98].

²³ *Crowley-Lewis v R* [2022] NZCA 235 is a recent decision of this Court where a starting point of 10 years' imprisonment for comparable offending, involving a representative charge for three instances of vaginal intercourse and an episode of oral unlawful sexual connection, all while the victim was asleep, was upheld: see [22].

Offending against KS

[19] The offending against KS arose from an occasion when the victim engaged Ms Green in sexual role-playing which they had previously discussed and the victim had agreed to participate in. Anal intercourse was not part of their normal sexual activity as KS did not like it. While the victim initially acquiesced to that act, the anal intercourse became non-consensual when the victim repeatedly asked Ms Green to stop when it became too painful. However, Ms Green continued for several minutes until she ejaculated.

[20] Mr Brickell argued that, because the sexual act began as consensual conduct and only continued for a short period after consent was withdrawn, the offending should have attracted a starting point below that identified as applying to rape offending falling within band one, as described in *R v AM*.²⁴ Mr Brickell likened the offending to the example provided in that case of *R v Greaves*, where the victim changed her mind during sexual intercourse but the offender did not stop until the act was completed.²⁵ This case was cited as an illustration of offending that may fall outside the bottom of band one because of its unusual fact pattern.

[21] In further support of this aspect of the appeal, Mr Brickell referred to the approach taken by this Court in *Crump v R*, where it was held that a starting point of two years and three months' imprisonment was appropriate in a case where the sexual intercourse had initially been consensual but the appellant continued for a short period after consent was withdrawn.²⁶ Reference was also made to *Crowley-Lewis v R*, where an 18-month uplift for what was submitted to be similar offending had not attracted any adverse comment by this Court.²⁷ In reliance on these cases, Mr Brickell argued that a similar approach would have been appropriate. He submitted the offending against KS would otherwise, as a standalone offence, have attracted a starting point between two to three years and that, on a totality basis, that should have resulted in an uplift of only 18 months' imprisonment.

²⁴ *R v AM*, above n 12, at [93].

²⁵ At [96], citing *R v Greaves* [1999] 3 NZLR 273 (CA).

²⁶ *Crump v R* [2020] NZCA 287, [2022] 2 NZLR 454 at [109].

²⁷ *Crowley-Lewis v R*, above n 23.

[22] In *R v AM*, this Court identified two culpability assessment factors that potentially mitigate the seriousness of sexual offending. First, these were a mistaken but unreasonable belief by the offender that the victim had consented and, second, where consensual sexual activity had taken place between the victim and an offender immediately prior to the offending.²⁸

[23] We do not consider the first mitigatory consideration has application in this case. This is not a situation where Ms Green had a genuine but unreasonable belief KS was consenting which was capable of reducing culpability.²⁹ She knew that KS did not like or want anal sex. It would have been apparent to Ms Green that the victim was in considerable pain and she was repeatedly told to stop.

[24] The other potential mitigatory consideration is where consensual sexual activity has immediately preceded the offending.³⁰ As observed by Kós P in *Crump*, prior authority has acknowledged that in some circumstances, culpability may be diminished where there has been consensual sexual activity immediately prior to the offending.³¹ However, it was noted that this mitigatory consideration was a “difficult and controversial issue”.³² After reviewing that controversy, the Judge observed:³³

[95] What can, however, be said is that prior and proximate consensual sexual activity may be relevant to other aggravating and mitigating considerations: it may be indicative of (or contributive to) impulsivity; it may conceivably *increase* vulnerability and breach of trust; and it may possibly have a bearing, one way or the other, on extent of harm, degree of violation and whether there was a mistaken but unreasonable belief by the offender that the victim consented.

[25] The offending in *Crump* involved a brief period between the appellant realising the victim had changed her mind and the cessation of penetration which did not involve completing the act of intercourse but a belated cessation of intercourse after the appellant reached an appreciation he should not continue, albeit too late to avoid committing the crime of rape.³⁴ The offending occurred in the course of what had

²⁸ *R v AM*, above n 12, at [53]–[54].

²⁹ At [53]; and *Crump v R*, above n 26, at [93].

³⁰ *R v AM*, above n 12, at [54].

³¹ *Crump v R*, above n 26, at [94].

³² At [94], citing *R v AM*, above n 12, at [59].

³³ Footnote omitted and emphasis added.

³⁴ At [103], citing *R v Greaves*, above n 25, at [62].

started as consensual intercourse that was normal for this couple. These circumstances were held to place the case below the lowest band of offending described in *AM*, and a parallel was drawn with the English decision of *R v Greaves* to which we have earlier referred.³⁵

[26] In the present case, the Judge identified four aggravating features that led her to categorise the offending against KS as falling within rape band two of *R v AM*.³⁶ It is necessary to set those factors out in some detail:

- (a) The Judge considered KS was in a position of considerable vulnerability as a result of the nature of her relationship with Ms Green. The Judge found KS had been deliberately sleep deprived by Ms Green and that she was fearful of disobeying Ms Green as a result of her controlling and manipulative behaviours, which the Judge found were a feature of Ms Green's emotional and physical relationships.
- (b) The Judge found the offending was aggravated by a breach of trust. Linked to the vulnerability of the victim was the abusive nature of the relationship. KS was pregnant during the relationship and therefore more vulnerable, which meant the breach of trust was even greater.
- (c) In assessing the degree of the violation and level of force, the Judge described the extremely painful anal penetration as an aggravating feature to which KS was subjected "seemingly without any care, concern or consideration for [her] wants, needs or difficulties with what [Ms Green was] doing".
- (d) The Judge considered the harm caused to the victim to also be an aggravating feature. The Judge quoted from the victim impact statement:³⁷

³⁵ At [105].

³⁶ Sentencing notes, above n 1, at [26].

³⁷ We acknowledge that Ms Green uses female pronouns, but have retained the original wording of the victim impact statement.

During the incident I felt embarrassed and confused as to why he would treat me like this, I felt deeply violated and lost what little trust I had left in him. He made me feel like I didn't matter and was not valued at all.

[27] We do not consider this case is comparable with *Crump* or *Greaves*. We have come to that conclusion largely on the basis of two important considerations. First, there is no realistic foundation upon which to conclude that Ms Green had a mistaken but unreasonable belief in KS's consent when she continued with the anal intercourse after she repeatedly told her to stop. Second, while we accept the offending must be assessed on the basis there was consensual sexual activity immediately prior to the offending, the exploitative and abusive nature of the relationship, which the Judge observed was marked by Ms Green's manipulative conduct towards a victim who was frightened to disobey, largely negates the mitigating effect of this feature.

[28] Ms Green was well aware that KS did not like anal sex and found it painful. She had no empathy or respect for KS's views and was entirely indifferent to the distress caused by the sexual act she demanded KS endure. As observed by this Court in *Crump*, the prior consensual sexual activity may actually increase the vulnerability and breach of trust this type of offending represents.³⁸ In the circumstances of this case, far from being a mitigating aspect of the offending, the proximate consensual activity itself could be viewed as the product of an abusive relationship in which Ms Green took advantage of her victim. We therefore do not consider this case falls into any exceptional category that would warrant a starting point lower than the bands identified in *R v AM*.

[29] The Judge placed the offending against KS within rape band two. We have some difficulty with that classification. The Judge placed reliance, as did the Crown, on *Taylor v R*, where this Court upheld a starting point of seven years' imprisonment.³⁹ That case involved prior consensual intercourse between the victim and the appellant, but the preceding sexual activity was interrupted by the appellant leaving the address to drive another person home before returning to the bedroom where the

³⁸ *Crump v R*, above n 26, at [95].

³⁹ Sentencing notes, above n 1, at [28], citing *Taylor v R* [2021] NZCA 605.

non-consensual sexual conduct then occurred. We doubt whether the case can strictly be categorised as involving *immediate* prior consensual sexual conduct.

[30] We consider Ms Green's offending against KS appropriately fell within rape band one. While the Judge identified a number of aggravating factors which we agree should be taken into account in the overall assessment of this offending, we consider those overlapping features, which focus on the nature of KS's relationship with Ms Green, largely have the effect of marginalising the otherwise mitigating effect of the preceding consensual sexual activity.

[31] As this Court has remarked on numerous occasions, guideline judgments must not be applied in a mechanistic way. Sentencing is an evaluative exercise which will require an assessment of the particular circumstances. Discretion and flexibility will be needed to achieve justice in the individual case.⁴⁰ We consider elements of KS's vulnerability, the related breach of trust and the painful nature of the violation, which was extremely distressing for the victim, are features which in combination place the offending towards the middle to upper end of band one that would appropriately attract a starting point of at least seven years' imprisonment on a standalone basis.

[32] That is a lower starting point than that adopted by the Judge but after taking into account the adjustment for totality, we do not consider the final starting point of 13 years arrived at by the Judge falls beyond the range available to her in the exercise of her sentencing discretion. It may be viewed as stern but we do not consider it represents an erroneous evaluation of the overall seriousness of Ms Green's offending against two victims.

[33] Mr Brickell sought to draw a comparison with the starting point adopted in *Crowley-Lewis v R*.⁴¹ In that case, the appellant raped a woman with whom he was in a relationship on three occasions when she was asleep. On a further occasion, the victim awoke to find the appellant performing oral sex on her without her consent. She told him to stop but he continued to perform the sexual act. It was submitted this

⁴⁰ *R v AM*, above n 12, at [36]; *Crump v R*, above n 26, at [101]; *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [48]; and *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [28].

⁴¹ *Crowley-Lewis v R*, above n 23.

offending was more serious than the present case because the third occasion of rape came a few days after the birth of their child and the acts of rape were completed while the victim remained sleeping. The appellant in *Crowley-Lewis v R* was also sentenced for sexual offending against a second victim that occurred when consensual sexual intercourse became painful for the victim and she asked the appellant to stop. He continued.

[34] In *Crowley-Lewis v R*, a starting point of 10 years' imprisonment was held by this Court to be in the available range, although towards the upper end, for the offending against the first victim which was uplifted by 18 months for the offence committed against the second victim on the basis it had similarities with *Crump*.⁴² Mr Brickell argued an equivalent starting point of 11 and a half years' imprisonment should have been adopted in this case. We do not agree.

[35] As we have already canvassed in our review of the offending against KS, we do not see the anal sexual violation as falling into the same category of limited sexual offending with which *Crump* was concerned and which the offending in *Crowley-Lewis* was likened. We view the offending against KS in this case to be more serious. It cannot be mitigated to the same extent as it was in those cases because of the prior consensual sexual conduct. Overall, we are satisfied that, after an appropriate adjustment for totality, the 13-year starting point was legitimately available.

Lack of youth discount

[36] Mr Brickell argued that Ms Green should have received a discount for her relative youth at the time of her offending. She was aged 24 years when the offending against KR occurred and was 21 years old when she offended against KS. It was submitted that Ms Green's sexual conduct involved impulsive and immature behaviour typical of youth and that she was immature for her age, prioritising her own needs over those of her partners. It was emphasised there had been no further offending since 2016 and that Ms Green had told the cultural report writer she now feels she has matured and is not the same person who committed the offences. It was acknowledged Ms Green lies at the older end of the category of offender that may

⁴² At [22]; and *R v Crowley-Lewis* [2021] NZDC 20049 at [37], citing *Crump v R*, above n 26.

receive credit for their youth but a 10 per cent discount was suggested as being appropriate.

[37] We do not consider the Judge erred in declining to reduce the sentence on the basis of Ms Green’s age at the time of the offending. An offender’s youth is a relevant mitigating factor,⁴³ and has been consistently recognised by this Court.⁴⁴ The rationale for providing reductions in recognition of an offender’s youth include an appreciation that the offending may be the product of immaturity or youthful indiscretion, or represent an impulsive act that is immediately regretted. Young people have greater difficulty regulating their behaviour and can be subject to negative influences. It is also recognised that youthful offenders have a greater capacity for rehabilitation and that imprisonment can have a harsh and deleterious effect on young people.⁴⁵

[38] We consider the Judge was correct to conclude these rationales did not apply to Ms Green’s offending. In large part, Ms Green’s conduct represented a continuation of what the Judge described as the “isolating and controlling” way she had treated the child in order to sexually offend against that victim.⁴⁶ The subsequent offending against KS and KR cannot be categorised as the acts of an immature young person who was liable to act impulsively. To the contrary, it was the product of a deliberate course of abusive conduct that was a feature of Ms Green’s relationships.

[39] Ms Green has continued to deny her offending and demonstrated no remorse. She was a mature adult at the time of sentencing and it is not apparent she has any greater potential for rehabilitation than any other offender. Having regard to the nature and circumstances of her offending, we do not consider her age at the time she sexually violated either KS or KR reduces her culpability.

Cultural report

[40] The Judge declined to extend any discount in response to the content of a report prepared pursuant to s 27 of the Sentencing Act, and in particular for alleged sexual

⁴³ Sentencing Act 2002, s 9(2)(a).

⁴⁴ See *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405.

⁴⁵ *Dickey v R*, above n 45, at [77]–[86]; and *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [50]–[55].

⁴⁶ Sentencing notes, above n 1, at [45].

abuse she claimed to have suffered during her childhood. Ms Green provided details to the report writer of having been the victim of physical assaults, often involving the use of tools, and subjected to sexual violations by a family member that included anal penetration. Ms Green stated she resented the child against whom she offended because she felt the child took enjoyment out of the way her family member treated her, and in response she began abusing them. She claimed to have started using drugs and alcohol at a very young age as a result of this abuse and harboured guilt over her family member's fatal heart attack because she wanted him to die.

[41] Mr Brickell submitted that a further five to 10 per cent discount in addition to the 10 per cent credit applied for Ms Green's mental health difficulties should have been extended to her for this significant unresolved childhood trauma. However, the immediate difficulty with advancing such a submission is that the Judge did not believe Ms Green's entirely self-reported account of having been the victim of childhood sexual abuse at the hands of the family member. The Judge, who presided at the trial and observed Ms Green through the course of the proceeding, was sceptical of Ms Green's veracity. She considered Ms Green to be a highly manipulative person and, in the absence of corroboration, was unwilling to give any discount for the matters raised in the cultural report concerning her childhood.

[42] A person's background that has some causative connection with their offending may justify a reduction in sentence.⁴⁷ While independent evidence of such details is likely to be more cogent, accounts that rely upon self-reporting are not disqualified.⁴⁸ It will be for the sentencing Judge to decide in the individual case whether a matter of mitigation has been established having regard to all the circumstances of the case.⁴⁹ We do not consider we can effectively second guess the sentencing Judge's assessment of Ms Green's credibility. As observed by Mr McMullan, on behalf of the Crown, there were several factors that supported the Judge's scepticism.

[43] The only source of information regarding Ms Green's alleged historic sexual abuse is the information contained in the cultural report. Ms Green said nothing to the

⁴⁷ *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [108]–[111].

⁴⁸ At [129].

⁴⁹ At [129].

author of the pre-sentence report about these claims, other than that she was the victim of physical abuse by her family member for which she was receiving Accident-Compensation-Corporation-funded counselling. Nor did she disclose any childhood sexual abuse to a psychiatrist who prepared a report for the purpose of sentencing. Contrary to the reason given to the pre-sentence report writer for the counselling, she told the psychiatrist this was the result of being “sexually abused by a gang of males when she was a teenager”. Ms Green made no mention of having been sexually abused by a family member during her evidence despite being questioned about intrafamilial abuse.

[44] We also note the contradictory stances Ms Green has taken regarding her responsibility for the offending. She admitted her offending in a letter prepared for the Court and expressed her remorse. However, that admission was retracted in a subsequent affidavit in which she claimed she was coerced into falsely confessing her guilt by her former lawyer. In all the circumstances, we consider the Judge, who was best placed to make this type of assessment, was entitled to conclude the claims made by Ms Green in the cultural report lacked credibility. It follows from this conclusion that we do not consider this ground of the appeal has merit.

[45] Before leaving this issue, we note the Judge did provide a 10 per cent discount for Ms Green’s mental health difficulties. While she did not suffer from any significant mental illness, the Judge treated Ms Green as having a diagnosed borderline personality disorder which the Judge considered was consistent with Ms Green’s conduct during her relationships with the complainants.⁵⁰ To the extent the cultural report referred to Ms Green’s antisocial behaviour, polysubstance abuse and mental health difficulties which were said to be consistent with the trauma she alleged she had suffered as a child, we consider these were adequately reflected in the discount that was provided in recognition of her psychiatric difficulties.

Minimum period of imprisonment

[46] A court may impose an MPI longer than the period that would otherwise apply under the Parole Act 2002 if satisfied that period is insufficient to achieve the

⁵⁰ Sentencing notes, above n 1, at [51].

sentencing purposes of holding the offender accountable for the harm they have caused, to denounce their conduct, promote deterrence and protect the community.⁵¹ The Judge considered an MPI of 50 per cent was required. Her reasons were articulated as being the gravity of Ms Green's culpability, the scale of her offending, and that she considered Ms Green to be a recidivist offender who posed a great risk to other members of the community because of the damage she had caused to her victims.⁵²

[47] In support of the MPI, Mr McMullan argued that because of the inconsistent stances Ms Green had taken regarding her responsibility for the offending and her manipulative tendencies, there must be a degree of scepticism about any future engagement by Ms Green in rehabilitation. It was noted Ms Green has been assessed as presenting a moderate to high risk of sexual offending and that her offending was prolonged and had permeated her close relationships.

[48] We accept that Ms Green's rehabilitative prospects remain unclear. However, she presented at sentencing as effectively a first offender, having only one minor previous conviction for drug possession for which she was fined. It is apparent she has mental health difficulties, and it is recognised that because she is transitioning gender her experience in a male prison is likely to make her sentence harder to serve.

[49] In the absence of any further offending having come to light since the conclusion of Ms Green's relationship with KR in May 2016, it is not apparent there is any particular concern regarding the protection of the community which cannot otherwise be appropriately assessed by the Parole Board within the timeframes that would otherwise ordinarily apply. We appreciate the importance of denouncing serious sexual offending but we consider the lengthy sentence of imprisonment sufficiently achieves that sentencing purpose. Similarly, we believe the needs of deterrence and accountability are met by the prison term of 10 years and four months.

⁵¹ Sentencing Act, s 86(2). The non-parole period under s 84(1) of the Parole Act 2002 is one-third of the length of the sentence.

⁵² Sentencing notes, above n 1, at [63].

[50] It is apparent from the psychiatric report that Ms Green needs to address the significant personality traits which have contributed to her offending. We appreciate the challenges associated with addressing difficulties associated with a personality disorder. However, we consider that, despite Ms Green's failure to consistently acknowledge her offending, there are rehabilitative initiatives from which she would benefit that should be made available to her without delay. As outlined in the psychiatric report, these include the need for anger management, drug and alcohol counselling, criminogenic courses and sexual offending programmes. We consider Ms Green should be given the opportunity to engage in such rehabilitative interventions as soon as possible.

[51] Being of the view that an MPI is neither required nor necessary for the purposes of meeting the stipulated statutory purposes of sentencing, we do not consider a minimum period was warranted and, to that extent, we allow the appeal.

Result

[52] The appeal against sentence is allowed in part.

[53] The MPI of five years and two months is quashed.

[54] The sentence of 10 years and four months' imprisonment otherwise stands.

Solicitors:
Crown Solicitor, Auckland for Respondent