NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF VICTIMS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA174/2012
[2012] NZCA 525

BETWEEN	SHANE ALLAN HARRIS Appellant
AND	THE QUEEN Respondent

Hearing:	1 November 2012
Court:	White, Allan and Lang JJ
Counsel:	M Starling and K McCoy for Appellant K E Salmond for Respondent
Judgment:	13 November 2012 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal against sentence is allowed.

B The concurrent sentences of ten years imprisonment on two of the charges of sexual violation are quashed and concurrent sentences of nine years imprisonment are imposed on those charges.

C The minimum term of five years imprisonment is quashed and a minimum term of four years imprisonment is imposed in its place.

REASONS OF THE COURT

(Given by Lang J)

[1] Mr Harris pleaded guilty in the District Court to four charges of sexual violation, seven charges of indecently assaulting a female victim under the age of 12 years, one charge of doing an indecent act on a girl under the age of 12 years, one charge of indecent assault upon a girl aged between 12 and 16 years, and three charges of doing indecent acts on a girl aged between 12 and 16 years.

[2] None of the offending came to light as a result of complaints made to the police by any of the victims. Instead, the police first became aware of it after Mr Harris voluntarily disclosed the offending whilst undertaking treatment at the Kia Marama Special Treatment Unit for sexual offenders at Rolleston Prison. Mr Harris was at that stage serving a sentence of imprisonment imposed on other charges.

[3] On 2 March 2012, Judge Moran sentenced Mr Harris to concurrent sentences of ten years imprisonment on two of the sexual violation charges. He also ordered Mr Harris to serve a minimum term of imprisonment of five years on those charges. He imposed concurrent sentences of between four and a half years and seven years imprisonment on the remaining charges.[1]

[4] Mr Harris appeals to this Court on the ground that the sentence is manifestly excessive. He also appeals against the minimum term of imprisonment that the Judge imposed.

Facts

[5] The offending that gave rise to the charges occurred between 1998 and 2005, and involved eight separate child victims.

[6] The offending against four of the victims occurred between 1998 and 2002, when Mr Harris took on a role as a teacher at a church Sunday school. During church-related events Mr Harris gave the victims piggy-back rides. He took these

---

[1] *R v Harris* DC Christchurch CRI-2011-076-1211, 2 March 2012.

opportunities to touch their genital and anal areas on the outside of their clothing. He also digitally penetrated one of the victims whilst carrying her on his back in this way.

[7] The remainder of the offending occurred between 2000 and 2005. During this period he befriended the family of one of the victims, and would invite her into the sleepout in which he was living. On these occasions he masturbated in front of the victim. He also put his hands inside her underpants, and touched her on the outside of the vagina.

[8] During this period Mr Harris also became involved in a relationship with the mother of another victim. He sometimes looked after the victim when her mother was out of the house. He took advantage of these occasions to masturbate in front of the victim, and to touch her vagina on both the outside and inside of her clothing.

[9] Mr Harris became involved with the family of the remaining two victims during this period. The victims' father encouraged Mr Harris' religious beliefs, and this led to Mr Harris visiting the family two to three times a week. Whilst there, he assisted in bathing the girls and putting them to bed. When reading bedtime stories to one of the victims, Mr Harris put his hands inside her clothing and rubbed her stomach. He also put his hand under her underpants and rubbed the outside of her vagina. On two further occasions he put his hands inside the victim's underpants, and put his fingers inside her vagina.

[10] His most serious offending, however, was in relation to the other victim, who suffered from Down's Syndrome and operated at a low intellectual level. Mr Harris performed several indecencies on this victim. He rubbed her vagina, both on top of and underneath her clothing, on several occasions. He lay on top of her and simulated having sex with her on two occasions, and masturbated in front of her on several occasions. He also performed oral sex on the victim on one occasion, and got her to perform oral sex on him on two further occasions. Finally, he had sexual intercourse with her. This founded a charge of sexual violation by rape.

The sentence

[11] The Judge identified the aggravating features of the offending as comprising the breach of trust, the level of harm caused to the victims and their families, the elements of predation and grooming inherent in the offending, the fact that multiple victims were involved and the prolonged nature of the offending. He viewed the vulnerability of Mr Harris' victims, and particularly the victim who suffered from Down's Syndrome, as an additional aggravating factor.

[12] The Judge took two of the sexual violation charges as being the lead charges. These were the charges of raping the victim suffering from Down's Syndrome, and the charge alleging penile penetration of her mouth. He considered this offending fell within rape band two of the guideline judgment of this Court in *R v AM*,[2] and that a starting point of ten years imprisonment would be appropriate. Viewed in totality, the Judge considered the offending fell well within band three identified in *R v AM*. He therefore adopted an overall starting point of 14 years imprisonment.

[13] Mr Harris had three previous convictions for offending involving indecent behaviour. The Judge viewed those convictions as being historic, and declined to increase the starting point for that reason.

[14] The Judge then reduced the sentence by 25 per cent to reflect the early guilty pleas. He also applied an additional discount of approximately five per cent to reflect the fact that Mr Harris had disclosed the offending voluntarily. This produced the end sentence of ten years imprisonment. The Judge also concluded that principles of accountability, deterrence, denunciation and community protection justified the imposition of a minimum term of imprisonment of one-half of the end sentence.[3] He therefore ordered Mr Harris to serve a minimum term of five years imprisonment before being eligible to apply for parole.

---

[2] *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

[3] Sentencing Act 2002, s 86.

Issues on appeal

[15] Counsel for Mr Harris did not take issue with the starting point of 14 years imprisonment that the Judge selected. He submitted, however, that the end sentence of ten years imprisonment was manifestly excessive having regard to the following factors:

(a) When fixing the end sentence on the present charges, the Judge failed to take into account a sentence of two years four months imprisonment that Mr Harris was already serving.

(b) The Judge ought to have applied a greater discount to reflect the fact that Mr Harris had voluntarily disclosed his offending.

(c) The Judge was wrong to conclude that a minimum period of imprisonment was justified.

(d) In setting the length of the minimum term, the Judge failed to take into account the sentence of imprisonment Mr Harris was already serving.

Did the Judge fail to take into account the sentence of imprisonment Mr Harris was already serving when he fixed the end sentence on the present charges?

[16] This issue arises because Mr Harris had been sentenced on 26 May 2010 to two years four months imprisonment on three charges of possessing and/or copying objectionable materials. Although he was initially eligible for parole on these charges on 7 March 2011, he had not been released on parole by the time he was sentenced on the present charges.

[17] Counsel for Mr Harris submitted that, in order to properly apply totality principles, the Judge was required to step back and determine an appropriate end sentence taking into account both the present offending and also that giving rise to the sentence of imprisonment Mr Harris was already serving. Taking that approach,

counsel contended an end sentence for the present offending that resulted in Mr Harris being imprisoned for no more than ten years for all his offending would have been appropriate.

[18] We consider this submission to be answered by the Crown's argument that the starting point of 14 years imprisonment may be regarded as generous to Mr Harris having regard to the aggravating features of his offending. They were such that the offending could easily be classified as falling within the upper reaches of band three in *R v AM*, which requires a starting point of between 12 and 18 years imprisonment. Offending in that band is accompanied by aggravating features at a relatively serious level. It is appropriate for offending involving two or more of the factors increasing culpability to a high degree, or more than three of those factors to a moderate degree.[4] At least five aggravating factors were present here. As a result, the offending could readily have justified a starting point of 15–16 years imprisonment.

[19] It could also be argued that the offending fell at the bottom of rape band four identified in *R v AM*. Offending falling within this band calls for a starting point of between 16 and 20 years imprisonment, and is likely to involve multiple offending over considerable periods of time rather than single instances of rape.[5] Although Mr Harris faced just one charge of sexual violation by rape, he also faced three charges of sexual violation by digital and oral penetration. In addition, he pleaded guilty to numerous indecencies committed over a considerable period against eight separate victims.

[20] These factors persuade us that, even if the sentence imposed in respect of the earlier offending had been taken into account, the end sentence of ten years imprisonment for the present offending does not offend totality principles.

[21] The Judge was, in any event, alert to this issue because he said:[6]

> [23] I also have regard to what is called the totality principle. Given the two years and four months that you have already been sentenced to, would

---

4 *R v AM*, above n 2, at [105].
5 At [108].
6 *R v Harris*, above n 1.

> the addition of the sentence that I have imposed today be out of all proportion to your criminality? The answer is "no".

[22] We agree with the Judge's assessment regarding the issue of totality.

Did the Judge give adequate recognition to the fact that Mr Harris disclosed the offending voluntarily?

[23] Mr Harris disclosed his offending in circumstances where he knew disclosure was likely to result in new charges being laid against him. The Crown acknowledges that, had he not done so, the offending would probably have remained undetected.

[24] The Judge clearly accepted that he needed to recognise this factor by applying a separate discount. He described it as a "significant issue", and said that Mr Harris was entitled to "significant credit" because he made the disclosures "to allow the victims' voices to be heard".[7]

[25] Not surprisingly, the Crown supports the Judge's approach on this issue. We agree. It is important that those who commit sexual offences should be encouraged to disclose their offending voluntarily, particularly when voluntary disclosure by the offender is the only means by which the offending is likely to be exposed. Public policy requires voluntary disclosure of offending to be recognised. Offenders who are prepared to voluntarily acknowledge their wrong-doing also need to know they will receive concrete recognition for doing so when they are sentenced.

[26] The Judge stated that he proposed to apply a discount of 25 per cent (or three years six months) to reflect the very early guilty pleas.[8] He then said he proposed to apply a total discount of 30 per cent, or four years, to reflect both the guilty pleas and the voluntary disclosure of the offending.[9] Mr Harris therefore received a discount of six months, or just over 3.5 per cent, to reflect the fact that he had disclosed his offending voluntarily.

---

7 *R v Harris*, above n 1, at [19].
8 At [19].
9 At [19].

[27] We have already acknowledged the force of the Crown's argument that the starting point the Judge selected may be regarded as generous to Mr Harris.[10] The Crown relies on the same argument in the present context. It says the end sentence cannot be regarded as manifestly excessive once the leniency of the starting point is taken into account.

[28] That approach fails to recognise, however, the manner in which Mr Harris is likely to view the level of discount he received. He will undoubtedly consider he received very little tangible credit for the fact that he was prepared to disclose his offending voluntarily. It may lead him to doubt the wisdom of having taken that step. It may also deter others from disclosing their offending voluntarily, because they may be concerned they will not receive adequate recognition for doing so when they are sentenced.

[29] We therefore accept that the Judge was required to apply a greater discount to recognise this factor. We consider it justified a discrete discount of two years, or slightly less than 15 per cent. This produces a sentence of 12 years imprisonment before taking into account the discount to be applied in respect of the guilty pleas.

[30] Applying the same level of discount for guilty pleas as the Judge, we consider an end sentence of nine years imprisonment was therefore appropriate.

Was a minimum period of imprisonment justified?

[31] Counsel for Mr Harris pointed out that the present offending can be regarded as historic. In addition, Mr Harris has now completed the Kia Marama treatment programme satisfactorily. He therefore submitted there was no practical utility in imposing a minimum term of imprisonment at this point. He also contended the offending was not in any sense unusual, or out of the ordinary for offending of this type. In the absence of features distinguishing this offending from other offending of its type, counsel submitted that a minimum term of imprisonment should not have been imposed.

---

[10] At [18].

[32] An offender who is sentenced to more than two years imprisonment may ordinarily apply for parole after serving one-third of his or her sentence. Section 86 of the Sentencing Act 2002 permits the Court to make an order requiring an offender to serve more than one-third of the sentence before being eligible to apply for parole. It may only do so, however, where it is satisfied that the standard parole provisions will be insufficient to adequately reflect the principles of accountability, denunciation, deterrence and protection of the community.

[33] This Court has stated that a minimum period of imprisonment of around 50 per cent of the end sentence may be regarded as "almost standard for serious sexual offending against a young child".[11] In this case, the aggravating factors the Judge identified meant that all of the requirements for the imposition of a minimum term of imprisonment were met. For that reason we are satisfied the Judge was justified in imposing a minimum term of imprisonment.

[34] We also discern from a psychologist's report prepared on 7 July 2011 that, notwithstanding the fact that Mr Harris has now completed the Kia Marama programme, he still presents as at risk of re-offending sexually upon his release. It is essential for the protection of the community that he continues with treatment and therapy for some time yet. This factor, too, justifies the imposition of a minimum term of imprisonment in the present case.

Was the Judge required to take into account the existing sentence of imprisonment when fixing the length of the minimum term?

[35] Any minimum term of imprisonment must not exceed the lesser of two-thirds of the full term of the sentence, or ten years imprisonment.[12] Counsel for Mr Harris submitted that the manner in which the Judge structured the present sentence had the effect of breaching this requirement, because Mr Harris will now be required to serve more than two-thirds of both sentences before being eligible for parole. He argued that this flows from the fact that Mr Harris had already served nearly 22 months of

---

[11] *W (CA702/10) v R* [2011] NZCA 529 at [120].
[12] Sentencing Act, s 86(4).

his existing 28 month sentence before he began serving the sentence imposed on the present charges.

[36] We do not accept this submission for two reasons. First, the wording of s 86 makes it clear that any minimum term of imprisonment may not exceed two-thirds of the full term of the sentence in respect of which the minimum period of imprisonment is imposed.[13] In the present case this meant that the minimum term of imprisonment could not have exceeded two-thirds of the sentence of ten years imprisonment that the Judge imposed. It did not require the Judge to take into account the sentence of imprisonment Mr Harris was already serving.

[37] Secondly, we do not accept in any event that Mr Harris would have been required to serve more than two-thirds of both sentences before being eligible to apply for parole. Added together, the two sentences would have totalled 12 years four months imprisonment. Two-thirds of that figure is 98 months, or eight years two months.

[38] Mr Harris would have been eligible to apply for parole on 2 March 2017, being five years from the date the present sentence was imposed. By that date, taking into account the time served in relation to the earlier sentence, and rounding it up to 22 months, Mr Harris would have spent 82 months, or six years 10 months, in prison. He would therefore have served less than two-thirds of both sentences by the time he would have been eligible for parole.

[39] We accept, however, that several factors have operated to Mr Harris' disadvantage so far as the issue of parole is concerned. He first became eligible for parole in respect of the earlier sentence on 7 March 2011. By that stage, however, he was undergoing treatment at Kia Marama and the parole authorities understandably wanted him to complete that programme before being released. His disclosure of the present offending at Kia Marama, and the new charges that were laid as a result, meant he remained in prison until he was sentenced on those charges.

[13] Section 86(1).

[40] In addition, counsel for Mr Harris advised us that disruptions caused to the court system by the Christchurch earthquake in February 2011 delayed sentencing considerably. Mr Harris intimated guilty pleas to the present charges at his first appearance on 19 July 2011, and then pleaded guilty at his next appearance on 28 July 2011. He was not sentenced, however, until 2 March 2012. During the seven month period leading up to that date, Mr Harris continued to serve his earlier sentence. For parole purposes, however, that period will not be taken into account in respect of the sentence imposed on the present charges.

[41] Although we consider that a minimum term of imprisonment of four and a half years would ordinarily have been justified, the factors to which we have just referred need to be taken into account when fixing the minimum term of imprisonment on the present charges. The fact that Mr Harris has already completed the Kia Marama treatment programme is also relevant. We consider that the principles set out in s 86 will therefore be adequately met in the present case by the imposition of a minimum term of imprisonment of four years. A minimum term of imprisonment of four years, added to the 22 months Mr Harris served for his prior offending is less than two-thirds of the total term for which Mr Harris has been sentenced for both sets of offending.

Result

[42] The appeal is allowed. The sentences of ten years imprisonment imposed on two of the sexual violation charges are quashed and concurrent sentences of nine years imprisonment are imposed in their place.

[43] The order requiring Mr Harris to serve a minimum term of five years imprisonment before being eligible for parole is quashed, and is replaced by an order requiring him to serve a minimum term of four years imprisonment.

[44] The concurrent sentences that the Judge imposed in respect of the other charges remain undisturbed.

Solicitors:
Crown Law Office, Wellington for Respondent