ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA41/2017
[2018] NZCA 136

BETWEEN	A (CA41/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	15 February 2018
Court:	Cooper, Ellis and Katz JJ
Counsel:	E A Hall and J R Spelman for Appellant K S Grau for Respondent
Judgment:	3 May 2018 at 3 pm

JUDGMENT OF THE COURT

A The application for an extension of time to file the notice of appeal is granted.

B The appeal against conviction is dismissed.

C The appeal against sentence is dismissed.

D Order prohibiting publication of name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] The appellant was found guilty, following a jury trial in the District Court, of one representative charge of unlawful sexual connection with a female under 12. The offending occurred over an extended period when the complainant, his step-daughter, was between the ages of approximately four and ten. The jury found the appellant not guilty in respect of a further specific charge of unlawful sexual connection with the complainant (digital penetration). He was sentenced to seven and a half years' imprisonment.[1]

[2] The appellant appeals his conviction on two grounds. First, he says that the verdict was unreasonable on the basis of the evidence. Second, he says that the guilty verdict for the representative charge was inconsistent with the verdict of not guilty in respect of the specific charge.

[3] The appellant also appeals his sentence. He submits that the Judge erred by setting a starting point that was too high, and failing to afford a discrete discount for his previous good character and lack of relevant previous convictions.

[4] The notice of appeal was filed out of time. The Crown does not oppose an extension. The delay is short and adequately explained. We are satisfied that it is in the interests of justice to grant an extension, and we do so.

---

1 *R v [A]* [2016] NZDC 18962.

Background

The representative charge

[5] The complainant's evidence at trial was that the offending began when she was aged between three and five and continued until she was about ten. The appellant would come into her bedroom (which she shared with other children) at night and "start doing the dirty stuff". In particular, he would touch her breasts, try to kiss her, put his hands under her pyjamas and put his fingers into her vagina. He would also try to put his penis "inside [her] bottom". The appellant would call her "baby" and tell her not to tell anyone as he did these things.

[6] Other children would often be sleeping in the bedroom (in bunk beds) when these incidents occurred. When her step-father did these things, the complainant said she would "start getting scared and freak out" and her body would shake. His actions "made [her] feel disgusting". The offending happened "a lot" but, as the months went by, he would "just do it every now and again". In response to questioning, the complainant said that the appellant had offended against her "most probably" more than 20 times.

[7] The appellant gave evidence. He said that he never touched the complainant sexually. The appellant's daughter slept in the same bedroom as the complainant at the last house in which the alleged offending had occurred (the family moved frequently). She gave evidence that she had never seen anything untoward happen. She accepted, however, that she could not know what was happening when she was asleep (although she did say the bunk beds were quite noisy).

The specific charge

[8] The specific charge (in respect of which the appellant was acquitted) related to the last time that he was alleged to have offended. The complainant's evidence was that one evening, in her bedroom, he did the same things as he had previously (including digital penetration) "until he heard the kids moving and he thought they were going to wake up so he [ran] out of the room …". Afterwards, the complainant

said that she went to her mother's room because she could not sleep. The appellant at that time was in the kitchen drinking coffee before going to work.

[9] It was put to the complainant in cross-examination that she had said in her evidential video interview that the last time the appellant offended was on a night when the police came to their home in response to an incident where the boyfriend of the appellant's daughter had caused trouble. However, other evidence (from a police officer and the appellant's employer) established that the appellant, who did shift work, had gone to work at 5 pm that day and not returned home until the following morning. He would therefore not have been home at the time when the complainant said that the offending had occurred.

[10] The complainant denied that she was lying about the incident. She said that she was telling the truth about what had happened, but could have got "mixed up" about when it occurred because she "wasn't thinking straight".

[11] In re-examination, the complainant stated that the night the appellant was making coffee in the kitchen before going to work was different to the night when the police had come to the house. In essence, her evidence was that she may have been wrong about the date when the last incident of sexual abuse had occurred.

Appeal against conviction

[12] An appeal against conviction under s 229 of the Criminal Procedure Act 2011 (the Act) must be allowed if the court is satisfied that the jury's verdict was unreasonable, or a miscarriage of justice has occurred for any reason.[2] In any other case the appeal must be dismissed.[3]

Was the verdict unreasonable, having regard to the evidence?

[13] The jury's verdict will only be "unreasonable" if the court is satisfied that no jury, applying the criminal standard of proof, could reasonably have reached a guilty

---

2 Criminal Procedure Act 2011, s 232(2).
3 Section 232(3).

verdict on the evidence.[4] In *R v Owen*, the Supreme Court endorsed the following principles identified by this Court in *R v Munro*:[5]

> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
>
> (c) The weight to be given to individual pieces of evidence is essentially a jury function.
>
> (d) Reasonable minds may disagree on matters of fact.
>
> (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
>
> (f) An appellant who invokes s 385(1)(a) [now s 232(2)(a) of the Act] must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[14] In *R v Patel*, recently reiterated by this Court in *P (CA84/2017) v R*,[6] the Court stated:[7]

> [27] In *R v Munro* this Court discussed the circumstances in which a verdict based largely on credibility findings can be overturned on the basis of unreasonableness. The Court indicated that, where an appellate court is in no better position than the jury to assess the credibility of witnesses, it is not likely to be easy for an appellant to show that a verdict is unreasonable. This is because, in many cases, assessing credibility from a written transcript will not achieve a better result than that achieved by a jury, which has the advantage of hearing and seeing the witnesses in the course of the whole trial. Verdicts based on credibility are likely to be overturned only where there is contemporary evidence which clearly contradicts the witness or in cases of glaring improbability. Inconsistencies alone are unlikely to reach that standard.

[15] Ms Hall for the appellant submitted that the evidence is insufficient to support the jury's finding of guilt beyond reasonable doubt on the representative charge. In particular:

---

4 *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [14]–[15].
5 At [13], citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.
6 *P (CA84/2017) v R* [2017] NZCA 319 at [49].
7 *R v Patel* [2009] NZCA 102 (citations omitted).

> The allegation is a broad brush allegation without any real detail. No attempt was made by the Crown to isolate locations or specificity of any type.

[16] Ms Hall accepted that, particularly with cases of alleged sexual offending against children, representative charges can be appropriate where it is not possible to discern a discrete incident or allegation. She submitted, however, that the use of a representative charge does not mean that there need be no attempt to define the limits or occasions when offending had occurred. In this case, the evidence at trial was said to be insufficiently detailed to support a conviction. In particular:

> There was no description of how [the appellant] would physically manoeuvre himself, how his hand was able to do that, where she would be sleeping, the bed arrangements, the room layout, which specific houses this occurred in or any other detail. The core allegation is devoid of detail other than the digital penetration.

[17] Ms Hall noted that the family had lived in six different properties, but no attempt had been made to identify the specific properties where the offending had occurred, for example by describing details of the decoration or layout of the bedroom. The allegations were so general, Ms Hall submitted, that the appellant was not fairly informed of the case he had to meet. Evidence of such a general nature, she argued, is simply insufficient to discharge the onus of proof beyond reasonable doubt. Something more is required to prove a charge beyond reasonable doubt.

[18] A similar argument was advanced in *T (CA561/2014) v R*.[8] T was convicted on 29 charges, most of which related to sexual and violent offending against his wife and children. On appeal, his counsel submitted that the nature of the representative charges for unlawful sexual connection and rape of his wife were too general and made the trial unfair. The first representative charge was one of sexual violation by rape over a 12-year period in the lower North Island. The second representative charge was for sexual violation by unlawful sexual connection over the same period and in the same geographic location. The charges were intended to cover T's wife's evidence about on-going episodes throughout the relevant period of non-consensual sex. She described repeated occasions where she was forced to give T oral sex and he would then proceed to rape her by forced sexual intercourse. She

---

8 *T (CA561/2014) v R* [2016] NZCA 235.

only mentioned one occasion specifically, which occurred at one of two addresses in Palmerston North.

[19] The Court was satisfied that, with one possible exception (the Palmerston North offending), the allegations were of the generalised type that might be expected to be covered by a representative charge.[9] This Court stated that:

> [45] Inevitably the sexual abuse complaints could not be broken up into specific events at specific times and places because they occurred in a relatively regular and repetitive manner over a long time. Representative charges are now recognised as lawful in New Zealand. The enactment of the Criminal Procedure Act 2011 specifically recognises their validity in ss 17 and 20.
>
> [46] Mr Turkington's submission was that, if the Crown could not anchor the charge with some specificity as to time, place and circumstance where an act occurred then the trial was unfair. That was tantamount to a submission that representative charges should not be permitted.
>
> …
>
> [51] It is acceptable practice for representative charges to be used where there is a pattern of offending and criminal acts and for an understandable and acceptable reason the complainant is unable to distinguish between them in terms of their dates and details.

[20] The Court noted that representative charges will be appropriate where "a continuing course of conduct is alleged, but the prosecution evidence does not enable particulars to be given of discrete instances of offending".[10] In *T v R*, the complainant was unable to recount any particular dates or locations in respect of the sex charges. She could not distinguish between the various sexual acts by providing dates, places or other details. In those circumstances, the Court held it would have been artificial for charges to have been laid to reflect, for instance, each family home, because the prosecution had no evidence distinguishing events relating to each particular home.[11] The Court did note, however, that although there was little geographic or temporal detail anchoring the complaints, T's wife was very specific about the particular nature of T's methods of abusing her.[12] For example, there was a level of detail about the

---

9 At [45].
10 At [53].
11 At [55].
12 At [58].

violence he employed against her. It was noted that this could provide a basis for a meaningful cross-examination and that T could respond by giving evidence if he chose to do so.[13] The Court concluded that:

> [60] Although the representative charges used in this case were broad, this type of charge is well-established practice in New Zealand and now expressly approved in statute. It enables charges to be laid when there has been a continuing pattern of behaviour over a prolonged period of time. In those circumstances nothing makes the use of representative charges inherently unfair when accompanied with the appropriate directions, as they were in this case. The alternative would be that an artificial focus on a particular day or place would have to be chosen for the charge, or charges would not be brought at all.

[21] In this case, in order to prove the charge of sexual violation by unlawful sexual connection, the Crown was required to prove beyond reasonable doubt that on at least one occasion during the relevant period the appellant had placed a finger or fingers in the complainant's vagina. It was common ground that the issue of consent, or reasonable belief in consent, did not arise, given the complainant's age during the period of the alleged offending.

[22] The complainant could not provide specific dates, places or other details. The complainant was, however, quite specific about what she said the appellant had done. In particular, she said that he had repeatedly entered her bedroom when she was sleeping, put his hand inside her pyjamas, and digitally penetrated her. He is also alleged to have engaged in other behaviour of a sexual nature. She described the bunk beds, what she wore to bed, and the fact that she shared a bedroom with other children. The evidence was sufficiently detailed and specific as to the alleged offending, including the key allegation of digital penetration, to provide a basis for meaningful cross-examination. The appellant cannot have been under any misapprehension as to the case he had to meet. He was able to (and did) respond by giving his own evidence refuting the allegations and calling a supporting witness. Ultimately, however, the jury rejected his evidence and preferred that of the complainant.

[23] The case was a fairly simple one — did the appellant digitally penetrate the complainant or not? The jury was adequately instructed on the burden and standard

---

13 At [58].

of proof, and the elements of the charge. We reject Ms Hall's submission that the evidence required further specificity to support a finding of guilt. The complainant gave sufficient evidence of the alleged offending that each of the elements of the charge could be found to be proved beyond reasonable doubt, if the jury assessed her evidence as credible and reliable. Any lack of specificity in the complainant's account was a matter the jury could properly take into account when assessing the credibility and reliability of her evidence. This is not a case, however, where no jury, applying the criminal standard of proof, could reasonably have reached a guilty verdict on the evidence before it.[14]

[24] For completeness, we note that Ms Hall also referred to evidence from the appellant's daughter disputing the possibility of her father offending against the complainant in the manner alleged. Ms Hall submitted that this evidence provided further support for the submission that the jury could not reasonably have returned a verdict of guilty. As with all witnesses, however, issues of reliability and credibility are matters for the jury. It was not bound to accept her evidence. It may have found that the witness lacked credibility or was unreliable. Alternatively, it may have taken the view that she simply slept through any offending and was therefore not aware of it. Further, the appellant's daughter shared a bedroom with the complainant for only part of the relevant period.

[25] The appellant has not satisfied us that no jury, applying the criminal standard of proof, could reasonably have reached a guilty verdict on the evidence. On the contrary, there was clear evidence to support the jury's verdict.

Was the verdict of guilty on the representative charge inconsistent with the verdict of not guilty on the specific charge?

[26] The appellant's alternative ground of appeal was that the verdict of guilty on the representative charge (charge 1) was inconsistent with the verdict of not guilty on the specific charge (charge 2).

---

[14] *Owen v R*, above n 4, at [14]–[15].

[27] The Supreme Court in *B (SC12/2013) v R* reviewed the legal principles applicable to appeals based on the ground of inconsistent verdicts. The majority held that a court may intervene with a jury's verdicts in circumstances where it is plain that the jury's thinking has gone awry in some fundamental way:[15]

> Where they deliver multiple verdicts which are not capable of logical reconciliation, juries give some insight into their thought processes. Logically irreconcilable verdicts may indicate that the jury's thinking has gone awry in some fundamental way: in particular, the jury may have acted on a misunderstanding of the law or reached an illegitimate compromise. In such circumstances, a court may feel it necessary to intervene in order to ensure that justice is done, despite its respect for the jury's function in the criminal justice process.

[28] As the Supreme Court noted, the purpose of an inconsistent verdict argument is to show that a jury's guilty verdict is unreasonable and should therefore be quashed.[16] Essentially the test is whether the inconsistency in the verdicts demonstrates that no reasonable jury applying its mind properly to the admissible evidence could have arrived at the different verdicts.[17] The appellant bears the onus of satisfying the court that the verdicts are inconsistent.[18] As to inconsistency, what is required is a demonstration that the jury has believed certain evidence in relation to one charge but rejected that same evidence in relation to another charge.[19] This does not mean, however, that a jury is disentitled from accepting some evidence from a witness as reliable, but not accepting other elements of that same witness's testimony.[20]

[29] There will be no inconsistency if the evidence provides a basis for the different verdicts. If there is a reasonable explanation to be found in the evidence that would have justified differential treatment as between the verdicts by the jury, then there will not be an inconsistency.[21]

---

15 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [67] (footnotes omitted).
16 At [66].
17 *R v Irvine* [1976] 1 NZLR 96 (CA) at 99.
18 *R v Wong* [2009] NZCA 440 at [27].
19 *R v Maddox* CA424/00, 1 March 2001 at [22].
20 *R v Shipton* [2007] 2 NZLR 218 (CA) at [77].
21 *R v Irvine*, above n 17, at 99–100; and *R v K* CA49/96, 13 August 1996 at 2.

[30] The Supreme Court in *B (SC12/2013) v R* referred to *R v Dhillon*, a decision of the Criminal Division of the English Court of Appeal.[22] The Supreme Court summarised a point made by the Court in *R v Dhillon* as follows:[23]

> In sex cases where sexual incidents are alleged to have occurred on separate occasions, inconsistency will not arise simply because the jury accepted part of a complainant's evidence but was not sure about other parts.

[31] In *R v Shipton*, this Court stated that:[24]

> [77] Time after time in appeals to this Court it is argued, as counsel argued here, that because the jury must have "disbelieved" a witness to acquit on one count, it was inconsistent to rely on her to convict on another count. The argument is utterly fallacious; there may be all sorts of valid reasons why the jury may be convinced by a witness on one count but not on another. To put this another way, there is no reason why credibility must be static.

[32] Similarly, in *Mahupuku v R*, this Court observed that:[25]

> … New Zealand juries are instructed to consider separate charges separately, and … they are entitled to reach different verdicts on different charges. The Judge gave this direction very firmly in his summing up. The Court must take into account the possibility that a properly directed jury conscientiously carrying out its role may find that evidence from the same witness about related offences does on some occasions prove a charge beyond reasonable doubt, and on other occasions does not.

[33] Ms Hall submitted that the only specific allegation made by the complainant was "not true" because the appellant was at work at the time of the alleged offending. That being so, she argued, there is a necessary inconsistency with the representative charge. Ms Hall submitted, in essence, that because the complainant was wrong about "the only occasion she could detail what she said had happened to her," the jury could not find that the appellant had offended against her at all.

[34] We reject that submission. There is nothing to suggest that the jury has believed certain evidence in relation to one charge but must have rejected that same evidence in relation to the other charge. There is a logical explanation for the different verdicts. It was open to the jury to conclude that the complainant's evidence as to

---

22 *B (SC12/2013) v R*, above n 15, at [83], citing *R v Dhillon* [2010] EWCA Crim 1577, [2011] 2 Cr App R 10.
23 *B (SC12/2013) v R*, above n 15, at [83].
24 *R v Shipton*, above n 20.
25 *Mahupuku v R* [2015] NZCA 510 at [36].

the specific charge was unreliable, because it could not have occurred on the particular day stated in her evidence. Even if the jury thought that the relevant incident may have occurred at some other time, the confusion regarding dates could well have given rise to a reasonable doubt in their mind as to the specific charge.

[35] In relation to the representative charge, however, it was open to the jury to find the complainant's evidence both credible and reliable. The jury was not required to either accept or reject the entirety of the complainant's evidence. It was open to the jury to accept some parts of the complainant's evidence, but not accept others. No inconsistency arises. The argument advanced is precisely that which was rejected in both *R v Shipton* and *R v Dhillon*.

[36] There is nothing in this ground of appeal. The conviction appeal accordingly fails.

Was the sentence manifestly excessive?

[37] An appeal against sentence under s 244 of the Act must be allowed if the Court is satisfied that for any reason there is an error in the sentence imposed and that a different sentence should be imposed.[26] In any other case the appeal must be dismissed.[27]

Did the Judge err in setting the starting point for the offence?

[38] Judge Adeane, after referring to the "unexceptional" personal circumstances of the appellant and the facts of the case, referred to the guideline case of *R v AM,*[28] which sets bands of offending based on the level of seriousness of the offending.

[39] In terms of aggravating features, the Judge found that there was an element of opportunism in the offending, but the relevant opportunities were taken on many occasions over a prolonged period. Whether or not this could properly be described as premeditation (as the Crown submitted) was not seen as material.[29] Further, the

---

26 Criminal Procedure Act, s 250(2).
27 Section 250(3).
28 *R v [A]*, above n 1, at [4]; citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
29 *R v [A]*, above n 1, at [5].

complainant was vulnerable due to her extreme youth.[30] There was a breach of trust,[31] given the appellant's role as the complainant's stepfather. There was repeated offending and psychological harm "of a real kind and a predictable kind when one considers this kind of offending and the consequences which so often are heard of after it comes to light".[32] The Judge set a starting point of seven and a half years' imprisonment.[33]

[40] Ms Hall submitted that the Judge erred in treating harm as a distinct aggravating factor, because there was no evidence of psychological harm beyond that inherent in the offence of sexual violation itself. Overall, she submitted, the starting point was too high, and was out of step with relevant sentencing levels for this sort of offending. She submitted that a starting point of no more than six years was appropriate.

[41] This Court in *R v AM (CA27/2009)* noted that harm is inherent in this sort of offending, and that the more harmful the offending, the more serious it is.[34] The Court noted that both physical harm and psychological harm are relevant, as well as the impact on other family members, children or those providing care and support to the complainant.[35] Harm has sometimes been recognised as a discrete aggravating factor for sentencing purposes. Often, however, this has only been where some specific or particular harm has been caused, over and above that inherent in the offending itself, for example where there is evidence of a complainant having become suicidal or depressed.[36] In other cases, however, the court appears to have treated harm as a discrete aggravating factor despite there being no evidential basis for concluding that the degree of harm suffered was greater than that inherent in the offending itself.[37]

[42] Here, it is somewhat unclear whether the Judge was intending to refer simply to the harm inherent in the offending itself, or whether he saw psychological harm as

---

30 At [6].
31 At [6].
32 At [7].
33 At [9].
34 *R v AM (CA27/2009)*, above n 28, at [44].
35 At [44].
36 *R v [PR]* [2016] NZHC 1192 at [30(b)].
37 See *SS (CA445/2016) v R* [2017] NZCA 240.

a discrete and additional aggravating factor. For the purposes of this appeal, however, (and in favour of the appellant) we will not consider harm as a discrete aggravating factor. Rather, we will consider the appropriate starting point solely by reference to the other aggravating features present.

[43] The Judge placed the offending in band two of *R v AM*, adopting a starting point of seven and a half years' imprisonment. The starting point for offending in band two is between four and ten years' imprisonment.

[44] Band two is for moderately serious cases, engaging two or three aggravating factors.[38] Indeed, in *C v R,*[39] (in circumstances that were more serious than the present case) this Court observed that a "defendant sexually violating a young child repeatedly over a period of years should expect to be dealt with in band three".[40]

[45] Band two was clearly appropriate in this case. The key issue is precisely where in band two the starting point falls. The complainant was very vulnerable due to her age (only four at the outset of the offending). She had no way to escape the offending, which occurred in her own home, the very place where she should have been entitled to feel safe and protected. The perpetrator was her stepfather. A very significant breach of trust was involved. The offending was also prolonged, occurring over a lengthy period of time. Given its repetitive nature, there must also have been at least some degree of premeditation. This was not "one off" opportunistic offending.

[46] We are satisfied that, taking these various matters into account, a starting point of seven and a half years' imprisonment (just above the mid-point of band two) was within the available range.

Was insufficient credit given for mitigating factors?

[47] The Judge did not give credit for any mitigating factors. The end sentence was therefore seven and a half years' imprisonment.

---

38 *R v AM (CA27/2009)*, above n 28, at [14] and [117].
39 *C v R* [2017] NZCA 58.
40 At [14].

[48] Ms Hall submitted that the Judge erred by not allowing a discrete discount for the appellant's previous good character. The appellant has no previous convictions for violence or sexual offending. Rather, his previous convictions are for dishonesty or driving-related offending. They are historical in nature, dating back over 20 years. Character references describe him as a highly trustworthy person and being of good moral character.

[49] In *Britow v R,* the sentencing Judge had expressly considered whether to give credit for Mr Britow's previous good character, but considered it was counterbalanced by the duration of the offending.[41] On appeal, this Court said that:

> [10] The Judge's approach — whereby a defendant's previous good character is essentially offset, either wholly or in part, against the duration of the relevant offending — has been approved by this Court on a number of occasions. An underlying rationale is simply that it is much more difficult to put offending behaviour that continues over a long period of time down to a momentary (and out of character) lapse in judgment by an otherwise upstanding member of the community. Prolonged offending necessarily calls good character into question.

[50] In *Britow v R*, a discount for good character was rejected on the basis that there was only evidence of an absence of previous convictions (rather than a positive contribution to society), the frequency and duration of the offending, and the defendant's continued protestations of innocence.[42] The Court noted that given that a good character discount is justified (in part) on the basis of rehabilitative prospects, a proper basis for a discount will be absent when the defendant has yet to take responsibility for his offending.[43]

[51] In *Hamilton v R,* this Court expressly rejected the submission that the sentencing Judge had erred by having regard to the duration of the offending in fixing the starting point, and then referring to it again as eroding what would otherwise have been a greater discount for good character.[44]

---

41 *Britow v R* [2017] NZCA 229.
42 At [12].
43 At [12].
44 *Hamilton v R* [2015] NZCA 28 at [28].

[52] Here, a number of character references have been provided from people who speak highly of the appellant. He has no relevant previous convictions. The offending, however, was prolonged. The complainant's evidence was that it occurred regularly over a period of six years. In his pre-sentence report, the appellant continues to maintain his innocence, claiming it "did not happen". In our view, the Judge did not err in refusing to grant a good character discount in such circumstances.

[53] We mention one final matter. The Judge gave the appellant a first strike warning under s 86B of the Sentencing Act 2002. As counsel for the respondent pointed out, this was in error, as the relevant offending had commenced prior to the coming into force of the Sentencing and Parole Reform Act 2010. Section 12(1) of that Act provides that ss 86A–86I of the Sentencing Act do not apply to "any offence committed, whether in whole or in part, before the commencement of this Act". Section 180(1) of the Act provides that a sentence that could not by law be imposed may be corrected on application by either of the parties. Section 180(4) provides that "sentence" in the section includes a record of first warning within the meaning of s 86A of the Sentencing Act. The jurisdiction to make the correction lies with the sentencing court under s 180(2).

Result

[54] The application for an extension of time to file the notice of appeal is granted.

[55] The appeal against conviction is dismissed.

[56] The appeal against sentence is dismissed.

[57] In order to protect the identity of the complainant, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.

Solicitors:
Crown Law Office, Wellington for Respondent