NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS 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

CA62/2018
[2019] NZCA 165

BETWEEN	JOHN DAVID SHANNON Appellant
AND	THE QUEEN Respondent

Hearing: 23 July 2018

Court: Williams, Brewer and Thomas JJ

Counsel: C J Tennet for Appellant
R K Thomson for Respondent

Judgment: 17 May 2019 at 9.30 am

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Williams J)

[1] Following a jury trial in the District Court at Rotorua, the appellant was found guilty of 11 sexual offences against four complainants aged between six and nine years. They included multiple counts of rape, unlawful sexual connection and indecent assault.

[2] On conviction, the appellant was sentenced to 18 years and six months' imprisonment with a minimum period of imprisonment (MPI) of nine years.[1]

[3] The appellant appeals against that sentence.

[4] The first six charges related to a single complainant SG, who was between seven and nine at the time. The offending covered a three-year period between 2007 and 2010, during which the appellant was between 51 and 55 years old.

[5] The remaining five charges related to three girls — SA aged six years, TA aged seven years and ST who was nine. These charges covered a four and a half month period between 2015 and 2016 during which the appellant was 60.

[6] The appellant's notice of appeal was filed over a month out of time. He requires an extension of time for filing his notice of appeal. While the appellant has not provided an explanation for the delay, given the length of the sentence in issue, we grant the application.

Offending against SG: 2007–2010

[7] This offending involved four counts of rape; one of unlawful sexual connection by the appellant inserting his penis into SG's mouth; and one representative count of indecent assault. The representative count involved repeated touching and rubbing of the inside of SG's legs over the majority of the timeframe of these charges. As Judge MacKenzie noted:[2]

> [4] … All the offending took place at [the appellant's] home. [SG] would go to visit or stay with [him]. She felt unable to tell anyone about what happened, as she said she had been threatened by [him]. As a consequence, she dealt with this in her own childlike way. This was by not showering and soiling herself so that [he] would stay away from her.

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1 *R v Shannon* [2017] NZDC 25202.
2 *R v Shannon*, above n 1.

Offending against SA, TA and ST: 2015–2016

[8] There were three charges in relation to SA:

(a) one representative indecent assault charge for multiple occasions on which the appellant placed his penis on SA's bottom;

(b) one charge of unlawful sexual connection by penile penetration of her mouth; and

(c) one representative charge of rape encompassing about eight separate events, all of which occurred in the appellant's bedroom.

[9] There was one charge of indecent assault in relation to TA. She did not give evidence. Rather the conviction was based on the evidence of SA who said she walked into the appellant's bedroom one day and saw him with his penis on TA's bare bottom.

[10] Finally, there was one further charge of indecent assault in relation to ST, who spent a night in the appellant's bed and woke to find his hands down her pants "touch[ing] her privately".

Sentencing

Starting point

[11] The Judge identified a starting point in relation to the lead offending which she took to be the rape and unlawful sexual connection offending against SG and SA.[3] Aggravating factors included:[4]

(a) the scale of the offending — multiple sexual violations over two separate extended periods;

(b) the degree of violation;

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3 *R v Shannon*, above n 1, at [19].
4 At [20]–[26].

(c) breach of trust in a quasi-familial context;

(d) victim vulnerability due to their young age and the wide age gap between the victims and the appellant;

(e) premeditation to a "certain extent", as the complainants were away from their families and alone in the appellant's home;

(f) threats of repercussions to SG if she reported the offending; and

(g) profound harm to all complainants.

[12] The Judge located the offending in rape band four in *R v AM (CA27/2009)* and adopted a starting point of 16 years imprisonment accordingly. [5]

Uplift and totality

[13] The Judge then considered the appropriate uplift for the indecent assaults against all four complainants, but with particular reference to the offending in relation to SA for whom the incidents were numerous and relatively serious.[6] While the Judge considered that an appropriate starting point for the offending against SA could have been three years if sentenced separately from the lead offending, and overall uplift for all indecent assaults could have exceeded three years, to uplift to that extent would have offended the totality principle. [7] An uplift for all indecent assault offending of two and a half years was adopted.[8]

Mitigating factors

[14] The Judge considered two possible mitigating factors: lack of relevant prior offences and remorse.[9] She concluded no discounts could be justified on either basis.[10] As to prior offences, the Judge noted that the appellant had a prior historical

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5 At [32]; and *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
6 At [34].
7 At [38].
8 At [38].
9 At [40].
10 At [40]–[42].

sex offending conviction and so could not qualify for a discount (although no uplift could be justified).[11] In relation to remorse, the pre-sentence report noted that the appellant continued to deny the more serious charges ("I touched with my hands, but I did not rape") and denied any offending of any kind against one of the four complainants.[12] No remorse discount could therefore be justified.[13]

[15] The Judge therefore imposed a final sentence of 18 years and six months' imprisonment.[14]

MPI

[16] The Judge found that all four of the s 86(2) of the Sentencing Act 2002 factors were engaged in this case: accountability for harm, denunciation, deterrence (both specific and general) and community protection.[15] She adopted an MPI just short of 50 per cent at nine years.[16]

Submissions

[17] The appellant advanced three arguments:

(a) the starting point for the lead offending was manifestly excessive by reference to comparative cases and in relation to the facts of his offending;

(b) the uplift for the indecent assaults was manifestly excessive; and

(c) the final sentence was manifestly excessive due to (a) and/or (b), or on the basis of totality.

[18] There was no appeal against the MPI but it was submitted that if sentence is reduced, then the MPI should be reduced proportionately.

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11 At [40].
12 At [42].
13 At [42].
14 At [42].
15 At [45].
16 At [47].

Analysis

Starting point

[19] There can be no doubt that this was a case in which fixing the starting point by reference to *R v AM* rape band four was appropriate. As this Court said in *R v AM*:

> [109] Perhaps the paradigm case of offending within [band four] is that of repeated rapes of one or more family members over a period of years … Offending of this nature, especially that involving children and teenagers will attract starting points at the higher end of this band …

[20] A starting point of 16 years on facts broadly analogous to those in the present case has been adopted in sentencing decisions in the High Court and confirmed on appeal by this Court on a number of occasions.[17] Here the victims were all young children, the lead offending involved repeated rapes and serious unlawful sexual connections over a period of years in one case and months in another. The mix of factors in each case will always be unique, but the elements in this case made a 16-year starting point relatively orthodox. The description in *R v AM*, cited above at [19], of band four offending suggests in fact the starting point could have been higher without criticism.

Uplift

[21] We do not consider the uplift adopted to have been excessive either in its own right on or a totality basis. As the Crown submitted, the significant indecent assaults on SA could alone have justified a three-year sentence and the indecent assaults on the other three complainants might have carried sentences of one or perhaps two years.[18]

[22] Overall, a two and a half year uplift could not be described as excessive, and still only produces a final sentence at the mid-point of band four. Another judge might have adopted a slightly lower uplift for the additional offending, but that does not make the choice the Judge made in this case wrong in principle.

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17 See for example *R v Martin* [2017] NZHC 1571; *Roberson v R* [2013] NZCA 642; and *R v Gordon* [2009] NZCA 145 at [8].

18 See *O (CA643/2009) v R* [2010] NZCA 609; and *F (CA844/2013) v R* [2014] NZCA 390.

Sentence structure

[23] We do not, however, endorse the way the Judge structured the sentence. Subdividing the offending against SG and SA by considering the indecent assault charges separately, and in conjunction with the indecent assault charges in relation to TA and ST, risked either understating the seriousness of the overall offending against each of SG and SA or, conversely, overstating it through double-counting. It also risked failing to appreciate properly the significance of the separate offending against TA and ST.

[24] A more orthodox approach, especially considering the approximately five years between the offending against SG and the offending against SA, would have been to assess separately the offending against those victims, decide the combined starting point allowing for totality, and then consider the extent to which offending against TA and ST should add to the starting point.

[25] Under this approach, the offending against each victim is assessed in its entirety and the overall offending is properly assessed against the totality principle.

[26] Nevertheless, in this case the experienced Judge reached an end sentence within the range available to her. There was no error in the sentence imposed.

Result

[27] The application for an extension of time is granted.

[28] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent