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

CA197/2018
[2019] NZCA 189

BETWEEN	DONALD KEITH WILD Appellant
AND	THE QUEEN Respondent

Hearing: 10 April 2019

Court: Clifford, Katz and Thomas JJ

Counsel: E R Fairbrother QC for Appellant
K A Lummis for Respondent

Judgment: 29 May 2019 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence is quashed and substituted with a sentence of 18 months' imprisonment.

REASONS OF THE COURT

(Given by Thomas J)

[1] On 15 March 2018 Donald Wild was sentenced[1] to two years and two months' imprisonment on one charge of doing an indecent act on a girl under 16[2] and one representative charge of doing an indecent act on a girl under 12.[3]

[2] Mr Wild appeals on the ground the sentence was manifestly excessive because the Judge erred in adopting a starting point of two years and three months' imprisonment.

The offending

[3] On 28 January 2012, the first complainant, L, was 12 years old and was staying at her grandmother's home. Mr Wild was also living there. L was lying on a hammock at the back of the property when Mr Wild approached her, rubbed his penis, which was inside his pants, against the side of her body, leaned into her face and said, "I want to put my cock in you". She pushed him away and told him to "fuck off", but he held on forcefully. He left but came back shortly afterward. He told L to "come on" and tried kissing her. He eventually left. These events led to the conviction on the charge of doing an indecent act on a girl under 16.

[4] The second complainant, Z, was friends with Mr Wild's daughter and would often visit their home. Between 1 August 2013 and 31 August 2015, Z was aged between nine and 12. On two occasions Mr Wild touched her on her thighs, breasts and stomach over her clothes while she was on the couch. He also tried to put his hands in her shorts and take off her shirt. He told Z not to tell anyone or the touching would continue. On one occasion he stopped only when his daughter came into the room. These events led to the conviction on the representative charge of doing an indecent act on a girl under 12.

District Court decision

[5] Judge Cathcart began his sentencing comments by discussing the impact of the offending on both victims, saying their interests were paramount. He referred to

---

1 *R v Wild* [2018] NZDC 5086.
2 Crimes Act 1961, s 134(3); maximum penalty seven years' imprisonment.
3 Section 132(3); maximum penalty of 10 years' imprisonment.

Mr Wild's prior convictions for this type of offending and then recorded the essential facts as he viewed them, having been the trial Judge.[4]

[6] The Judge considered the aggravating factors were that the offending against Z occurred over a period of time and the offending against L on a single day; the complainants' young ages; and the nature of the touching.[5]

[7] The Judge referred to what he considered to be comparator cases, including *Waiapu v R*,[6] *Shaw v R*[7] and *O (CA643/2009) v R*.[8] He concluded that, based on the aggravating factors, threats made to Z, the impact on the victims, and the totality of the offending, the appropriate starting point was two years and three months' imprisonment.[9]

[8] The Judge imposed an uplift of two months' imprisonment for Mr Wild's relevant prior convictions.[10] Mr Wild was sentenced in 1992 to five years and 11 months' imprisonment on three charges of unlawful sexual connection with a female aged between 12 and 16 which had occurred between 1987 and 1990. On the same day, he was sentenced to a concurrent term of one year on one charge of indecent assault of a female under 12 which had occurred in January 1982.

[9] The Judge noted Mr Wild was the sole breadwinner for his family and had pro-social support. He allowed a discount of three months' imprisonment in recognition of these factors.[11]

[10] This resulted in a sentence of two years and two months' imprisonment. The Judge noted that, by operation of law, Mr Wild would be subject to registration under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016.[12]

---

4 *R v Wild*, above n 1, at [1]–[4].
5 At [10].
6 *Waiapu v R* [2016] NZHC 2491, [2016] NZAR 1561.
7 *Shaw v R* [2014] NZCA 322.
8 *O (CA643/2009) v R* [2010] NZCA 609.
9 At [14].
10 At [17].
11 At [19]–[20].
12 At [22]–[23].

Approach to appeal

[11] An appeal against sentence is an appeal against a discretion and must only be allowed if the court is satisfied that there has been an intrinsic error in the sentence and a different sentence should be imposed.[13] The focus is on the final sentence and whether it was within the available range, rather than the exact process by which it was reached.[14]

[12] If a sentence is the product of a starting point which is manifestly excessive but is ameliorated by allowances made for mitigating factors, this Court will be disinclined to intervene, so long as the final sentence is within range.[15]

Was the starting point too high?

[13] Mr Fairbrother QC, for Mr Wild, submitted that the starting point of two years and three months' imprisonment overstated the gravity of the offending.[16] He contended that the Judge did not address Mr Wild's culpability in any great detail, and instead commented on it in the context of Mr Wild's criminal history. Mr Fairbrother submitted that, although the offending was morally repugnant, it was at the lowest level in terms of indecent assaults of this nature.

[14] Ms Lummis, for the Crown, accepted that the starting point was stern but, in her submission, it was within the available range. In any event, said Ms Lummis, the end sentence was not manifestly excessive given the Judge could have imposed a greater uplift for Mr Wild's prior convictions and gave a generous discount for mitigating factors.

[15] There are no guideline cases for sentencing in respect of charges of doing an indecent act on a young person. We have considered the cases to which counsel have referred. Each case, of course, turns on its own particular facts, meaning care is required when drawing comparisons. We have taken note in particular of the following cases:

---

13 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482.
14 *Ripia v R* [2011] NZCA 101 at [15].
15 *R v Peters* CA12/03, 14 May 2003 at [13].
16 Sentencing Act 2002, s 8(a).

(a) *Masei v R*:[17] the victim was a 15-year-old Japanese schoolgirl who was billeted to stay with Mr Masei's family. Mr Masei touched her breasts and genital area over clothing on one occasion. He rubbed her with some pressure, using circular motions, and tried to remove her clothing. A starting point of 21 months' imprisonment was adopted.[18] Although the appeal was dismissed as the end sentence was considered stern but not manifestly excessive, this Court noted a starting point of 18 months' imprisonment was the "general starting point" for an indecent assault of this nature where the touching was described as prolonged and active.[19]

(b) *R v M (CA387/2009)*:[20] the victim was Mr M's four-year-old cousin. One night when watching television, M touched her genitalia with his hand, through skin on skin contact, removed his penis from his trousers and placed her hand on it. He made her "pinky promise" not to tell.[21] A starting point of 30 months' imprisonment was considered too high by this Court for the two charges of indecent assault and a starting point of 24 months' imprisonment was adopted instead.

(c) *O (CA643/2009) v R*:[22] the victim was between 10 and 11 years old when Mr O, her uncle, on two occasions touched the skin on the outside of her vagina with his hand. On other occasions he touched her breasts through her clothes, kissed her lips, and touched her genitals through clothing. The offending occurred on four separate days over seven months. This Court upheld a starting point of 36 months' imprisonment on the six charges of doing an indecent act on a child, although the sentence was described as stern.

---

17 *Masei v R* [2016] NZCA 481; Mr Masei was convicted of indecently assaulting a young person.

18 At [3]; a starting point of 15 months' imprisonment was uplifted by six months by the Judge in recognition of the considerable breach of trust involved.

19 At [8].

20 *R v M (CA387/2009)* [2009] NZCA 456; Mr M was convicted of two counts of indecent assault.

21 At [3].

22 *O (CA643/2009) v R*, above n 8; Mr O was convicted of six counts of doing indecent acts on a child under 12 under s 132(3) of the Crimes Act 1961.

(d) *Shaw v R*:[23] the victims were five girls aged under 13. On a single day, Mr Shaw touched a 12-year-old girl's bottom twice while in a supermarket and rubbed the crotches of a 10-year-old girl and a six-year-old girl while in a games arcade. On another day, Mr Shaw put a six-year-old girl on his knee while in a swimming pool and put his arms around her waist. On the same day he "tickled the bottom" of a seven-year-old girl as she swam past.[24] A starting point of 30 months' imprisonment on five charges of indecent assault on a child was upheld on appeal to this Court.

(e) *Waiapu v R*:[25] the victims were two girls under or of the age of 12. The first victim was Mr Waiapu's niece who was about 11 years old at the time of the offending. Mr Waiapu rubbed the inside of her thigh while babysitting her. When Mr Waiapu was staying with the second victim's family, he rubbed his hand up and down her inner thigh on top of her clothes just below her crotch. A starting point of 33 months' imprisonment for the two charges of indecent assault was considered too high by the High Court on appeal and a starting point of 12 months' imprisonment adopted instead.

(f) *Wells v R*:[26] Mr Wells touched the bottom of a nine-year-old boy over the top of his clothes twice in a single interaction on the street in front of his home. He gave the victim money before rubbing his bottom on the second occasion. He knew the boy from passing by him on the street and had previously given him money. The High Court on appeal considered a starting point of 18 months' imprisonment for the two charges of indecent assault was warranted due to the level of premeditation and grooming, saying, without those features, 12 months would have been appropriate.

---

23 *Shaw v R*, above n 7; Mr Shaw was convicted of five counts of indecent assault on a child.

24 At [6].

25 *Waiapu v R*, above n 6; Mr Waiapu was convicted of two counts of indecently assaulting girls under the age of 12.

26 *Wells v R* [2015] NZHC 2075.

[16] In the present case, both victims were touched over their clothing, which is less intrusive than skin on skin contact. Mr Wild's comments to L and threats to Z increased the intrusiveness of the acts. The acts were of relatively short duration. There were two discrete occasions over a two-year period when the offending against Z occurred, and a single instance of offending against L, suggesting spontaneous or opportunistic offending. We consider the particular aggravating factors to be:

(a) Both victims were vulnerable due to their ages of between nine and 12 and the disparity of their ages compared with Mr Wild's age of 55 to 60 years at the time of the offending.

(b) There was a degree of abuse of trust in respect of both victims as Mr Wild was the father of Z's friend and was living with L's grandmother. Those circumstances enabled Mr Wild to be alone with the victims.

(c) Both victim impact statements describe the psychological harm felt by the victims.

(d) Mr Wild attempted to conceal the offending by threatening Z. He told her not to tell anyone or the touching would continue.

[17] We agree with Mr Fairbrother that the starting point adopted by the Judge was too high, even in light of the variation in these types of cases.[27] In our assessment, Mr Wild's offending was less serious than *R v M (CA387/2009)* and *O (CA643/2009) v R*, where there was skin on skin contact with the victims' genitalia, the victim in *R v M* being only four years old. It was also less serious than *Shaw v R*, given the five victims in *Shaw v R*, the very young age of three of them and the act of rubbing the victims' crotches. While the touching in the present case was more intrusive than that in *Wells v R*, on which the Crown relied, there was less premeditation or grooming.[28] The present case is perhaps most analogous to

---

27 *Waiapu v R*, above n 6; *Shaw v R*, above n 7; *R v M (CA387/2009)*, above n 20; *O (CA643/2009) v R*, above n 8; *B (CA65/2011) v R* [2011] NZCA 173; *Masei v R*, above n 17; and *Wells v R*, above n 26.

28 *Wells v R,* above n 26.

Waiapu v R, where the High Court considered a starting point of 12 months' imprisonment appropriate. In saying that, this case is somewhat more serious, given Mr Wild's threats to Z and that there were two incidents of offending against her. Although there are obvious differences in the facts, we consider the 18 months described by this Court in *Masei v R* to be appropriate for the present offending.

[18] For these reasons, we conclude a starting point of 18 months, as opposed to the 27 months adopted, was appropriate.

Was the sentence manifestly excessive?

[19] Ms Lummis submitted that the sentence cannot be considered manifestly excessive as a greater uplift was available for Mr Wild's previous offending of a similar nature.

[20] The Sentencing Act 2002 allows the consideration of previous convictions as an aggravating factor that may be taken into account if applicable to the case before the court.[29] The court must consider the "number, seriousness, date, relevance, and nature" of the relevant convictions.[30] Relevant prior convictions are typically considered by imposing an uplift on the starting point adopted.[31] Generally the greater the period of time elapsed between the present and previous offending, the lesser the uplift that is appropriate.[32]

[21] The decision of this Court in *Wipa v R* discussed the principles relevant to uplifts for prior offending:[33]

> [26] … a sentence ought to be based primarily on the facts of the offence for which the offender is being sentenced;[34] any uplift must be kept in proportion;[35] and the sentence must not be increased merely because of a previous conviction, for that would be to increase the sentence imposed on the

---

29 Section 9(1).
30 Section 9(1)(j).
31 *R v Taueki* [2005] 3 NZLR 372 (CA) at [8]; and *R v Mako* [2000] 2 NZLR 170 (CA) at [34]; cited with approval in *Wipa v R* [2018] NZCA 219 at [25], n 18.
32 *Cashmore v Police* [2017] NZCA 508 at [11].
33 *Wipa v R*, above n 31.
34 *R v Power* [1973] 2 NZLR 617 (CA) at 618.
35 *R v Ward* [1976] 1 NZLR 588 (CA) at 590–591; and *Tiplady-Koroheke v R* [2012] NZCA 477 at [24].

> previous occasion.[36] But although uplifts for recidivism are near-ubiquitous in western jurisdictions, the professional and academic literature struggles to account for them.[37] Explanations divide broadly into two: progressive loss of mitigation and recidivist premium. The progressive loss of mitigation account holds that a first offender gets a discount from the appropriate sentence for the offence and the discount is gradually removed for subsequent offences.[38]
>
> …
>
> [28] New Zealand courts have adopted a recidivist premium approach when fixing uplifts under the Sentencing Act. ... In practice the premium is treated as a matter of sentencing discretion and the court focuses on the offender rather than the offence. The usual justifications offered are retributive (past convictions evidence failure of past deterrence) or utilitarian (community protection is engaged because past offending is predictive of future offending) in nature. …

[22] The uplift of two months in this case equates to seven per cent of the 27-month starting point and 11 per cent of 18 months. Mr Wild's prior offending occurred more than 22 years before the offending the subject of this appeal. The prior offending was also much more serious than the present offending. Mr Wild served a lengthy sentence of imprisonment for his prior offending. Apart from one conviction in 1998 for driving with excess breath alcohol, Mr Wild has since been conviction-free. In our view, the uplift of two months appropriately recognises these circumstances.

[23] Mr Fairbrother responsibly accepted that the discount of three months for Mr Wild's good work ethic and "pro-social support" could be described as generous. Even had that discount not been allowed, an end sentence of 20 months' imprisonment (taking the 18-month imprisonment starting point and two-month uplift we have found to be appropriate) is well short of the final sentence of 26 months imposed in the District Court. Such a disparity means the sentence was manifestly excessive and the appeal must be allowed.

[24] It is therefore appropriate to undertake the sentencing exercise afresh. As discussed, the appropriate starting point was 18 months' imprisonment, to which

---

36 *The King v Casey* [1931] NZLR 594 (CA) at 597.

37 For a general discussion of the subject see Julian V Roberts and Andrew von Hirsch (ed) *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing, Oxford, 2014); and Andrew Ashworth *Sentencing and Criminal Justice* (6th ed, Cambridge University Press, Cambridge, 2015) at 207–216.

38 It is well articulated in the judgment of Deane J in *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 491. See also Ashworth, above n 37 [in original], at 211–214.

we add two months in light of Mr Wild's prior convictions. We regard the three-month discount for Mr Wild's good work ethic and pro-social support as unduly generous, although we recognise that the Judge was clearly impressed by the material before him in this regard. In the circumstances, a two-month discount is appropriate. This results in an end sentence of 18 months' imprisonment.

[25] As this is a short sentence of imprisonment, we need to address conditions of release. We impose the two special conditions recommended in the pre-sentence report, being:

(a) Not to associate with or contact the victims of the offending without the prior written approval of a probation officer.

(b) Not to associate or otherwise have contact with any person under 16 years of age except in the presence and under the supervision of an approved informed adult. An approved informed adult means a person who has been given prior approval in writing by a probation officer as being suitable for a purpose of this condition.

[26] In the circumstances of Mr Wild's offending, we consider there should be a further special condition requiring him to attend and complete any counselling or programme directed at the causes of his offending as required by his probation officer.

[27] Finally, as Mr Wild has effectively served his sentence, the possibility of a sentence of home detention does not need to be addressed.

Result

[28] For these reasons, the appeal is allowed. The sentence of two years and two months' imprisonment is quashed and substituted with a sentence of 18 months' imprisonment with standard release conditions, and the special conditions set out at [25] and [26] above. The conditions are to expire six months after the sentence expiry date.

[29] Registration under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 is unaffected.

Solicitors:
Crown Solicitor, Auckland for Respondent