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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA134/2019
[2019] NZCA 216

BETWEEN	ROWEN TUAUAU AUPOURI Appellant
AND	THE QUEEN Respondent

Hearing: 22 May 2019

Court: Kós P, Peters and Mander JJ

Counsel: H N Tunstall and A M Simperingham for Appellant
A J Ewing for Respondent

Judgment: 12 June 2019 at 11 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Aupouri pleaded guilty to one charge of sexual exploitation of a person with a significant impairment, under s 138(4) and (5) of the Crimes Act 1961. Judge Cathcart sentenced him to 18 months' imprisonment.[1]

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[1] *R v Aupouri* [2019] NZDC 4858 [Sentencing notes]. It may be noted that the maximum sentence imposed by statute for that offence is five years' imprisonment: Crimes Act 1961, s 138(4).

[2] Mr Aupouri contends that that sentence is manifestly excessive. He says, in particular, that he should have been given a greater discount for his guilty plea and expression of remorse. He says, also, that he should have been sentenced to home detention.

Background

[3] The complainant was a severely intellectually disabled young woman of 16 years. She had an IQ of just 44 and the functioning mental age of a seven year-old. At the relevant time she was staying with her brother. Mr Aupouri visited that house. When other family members were distracted, he persuaded the complainant go with him to his house, two kilometres away, leading her there by the hand. In a bedroom he attempted to remove the complainant's pants. His motivation for his doing so was sexual.

[4] He was charged, initially with rape. Before trial however the Crown conceded that that charge could not be sustained and downgraded the charge to one of sexual exploitation by sexual connection.[2]

[5] At trial the complainant was cross-examined. It was put to her that she had sought to hold the accused's hand, and that they had not gone to his house at all. At the end of the Crown case Mr Aupouri pleaded guilty to a further downgraded charge of sexual exploitation by an indecent act.

[6] In sentencing the Judge described the defence run as a "false defence", an "improper line of enquiry" and an "attempt to pervert the course of justice".[3] We agree with Ms Tunstall that that is a mischaracterisation. Mr Aupouri was entitled to put the Crown to proof. Subject to the absence of contrary confession (and the presence of "reasonable instructions"), defence counsel was entitled to put alternative factual propositions to the complainant in cross-examination.[4] If the witness accepted those factual propositions, and the jury were persuaded also, they would then have

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2 Crimes Act, s 138(1) and (3).

3 Sentencing notes, above n 1, at [5], [13] and [18].

4 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 13.10.2 and 13.13.2. See Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 380–384.

become the facts of the case. But, on the other hand, we agree with the Judge that cross-examining the complainant on the basis that her evidence in chief was untrue, will likely impair any available discount for remorse. Furthermore, to the extent a late guilty plea discount reflects some credit for remorse, it too is likely to be impaired for the same reason.

Sentence imposed

[7] In setting a starting point of 20 months' imprisonment, the Judge considered two decisions of this Court dealing with the same charge.[5] They were *R v Tapson* and *R v Stewart*.[6] *Stewart* was the most relevant. In that case the complainant was a 19 year-old intellectually impaired male. But it was a more serious case, involving physical arousal of the complainant's genitalia. It attracted a starting point of two and a half years' imprisonment.

[8] In this case the Judge acknowledged receipt of a letter expressing remorse and regret, which he found sincere.[7] But he regarded it as neutralised by the conduct of the trial: the attempt to shift responsibility to the complainant and the suggestion she had made a false complaint altogether, in light of the subsequent acceptance of responsibility.[8]

[9] Finally, the Judge considered the defendant's guilty plea, which occurred during the course of trial. The Judge considered that the "false defence" run diminished the extent of discount available for a guilty plea. In the end he allowed a discount of 10 per cent, resulting in a final sentence of 18 months' imprisonment.[9]

[10] That sentence offered the possibility of home detention. But in this case the Judge considered the need for special deterrence and Mr Aupouri's history of non-compliance with court orders and community-based sentences made him unsuitable for a home detention sentence.[10]

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5 Sentencing notes, above n 1, at [7]–[8].
6 *R v Tapson* [2008] NZCA 155, [2008] BCL 683; and *R v Stewart* [2009] NZCA 117.
7 Sentencing notes, above n 1, at [12].
8 At [13].
9 At [18].
10 At [19]–[22].

Appeal

[11] Ms Tunstall submitted that while the offending was inherently serious, involving an indecent act against a severely intellectually impaired young woman, s 16 of the Sentencing Act 2002 still required due consideration of a sentence other than imprisonment. Section 8(g) of the Act also required imposition of the least restrictive outcome appropriate in the circumstances. An available address for home detention had existed. Mr Aupouri had never previously had the benefit of an electronically monitored sentence. Although Mr Aupouri had a history of non-compliance with community-based sentences, he had a clear incentive to comply here because of difficulties he had in prison: he had been stabbed by other inmates, resulting in temporary hospitalisation.

[12] Secondly, Ms Tunstall submitted that the sentencing Judge failed to give an adequate discount for the guilty plea. Mr Aupouri had been charged with rape initially, but before trial that had been downgraded to sexual exploitation by sexual connection. Mr Aupouri was entirely entitled to defend that charge. It was materially more serious than the charge of sexual exploitation by doing an indecent act to which he eventually pleaded guilty after the conclusion of the complainant's evidence. Further, the remarks made by the Judge about the running of a false defence were wrong and in any event irrelevant to the issue of the guilty plea discount. They unfairly coloured the Judge's assessment.

[13] Thirdly, Ms Tunstall submitted that the Judge should have given a discount for remorse. The Judge found that there was genuine remorse. Mr Aupouri was willing to engage in restorative justice and willing to make an emotional harm payment. A full discount for remorse should therefore have been offered.

Discussion

[14] We will deal first with the question of the appropriate sentence length, and then turn to the question of home detention. That requires us to consider, first, the issues of the credit given for the guilty plea, and non-credit for remorse.

[15] We are satisfied that little if any credit for remorse should have been given in this case. While the Judge misdirected himself in describing the defence as a "false defence", the fact remained that the complainant, with all her disadvantages, was put through the distressing experience of having to give evidence and be cross-examined, in the course of which she was in effect branded a liar. Remorse in this case was therefore wholly after the event. We do not consider the Judge erred in declining to give credit for remorse.

[16] We turn then to the question of the guilty plea. We agree with Ms Ewing that although Mr Aupouri pleaded guilty promptly once the reduced charge was offered, that did not justify a full discount. Mr Aupouri took no earlier step to express a willingness to plead to a lesser offence on the basis of lesser offending. Had that action been taken, we consider that Mr Aupouri might have been entitled to a full 25 per cent discount. The belated acceptance of responsibility here means the maximum discount available is no more than 15 per cent. That would result in a reduction of the sentence by only one month, and we are not prepared to conclude that this modest difference means the original sentence is manifestly excessive.

[17] We turn now to the question of whether a sentence of home detention should have been imposed. The Judge was right to say that specific deterrence was required here. Mr Aupouri had received repeated prison sentences, this was a serious offence against an extremely vulnerable young woman and one that plainly might have been even more serious again. Mr Aupouri's risk of reoffending was assessed as moderate to high. His criminal history is extensive, but confined to minor dishonesty and violent offending. However, he has 17 convictions for escaping from custody, disregarding court orders, breaching release conditions, breach of supervision and failing to comply with police and District Court bail.

[18] The Sentencing Act neither presumes for nor against commutation of imprisonment to home detention. The margin of appreciation given by this Court to sentencing Judges will be substantial, because of the array of considerations requiring

evaluation and the advantage the Judge has in having conducted the trial and formed an educated appreciation of the character of the defendant.[11]

[19] In combination the need for deterrence and the woeful record of Mr Aupouri in complying with court orders stand firmly in the way of a sentence of home detention on this occasion. Although that would be a less restrictive sentence, we are not ultimately persuaded the Judge erred in declining to impose it.

Result

[20] The appeal against sentence is dismissed.

Solicitors:
Woodward Chrisp, Gisborne for Appellant
Crown Law, Wellington for Respondent

[11] *Palmer v R* [2016] NZCA 541 at [19].