**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA43/2021**
**[2021] NZCA 531**

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| BETWEEN | CRAIG LEE MCDONALD<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 1 September 2021 |
| Court: | Gilbert, Duffy and Peters JJ |
| Counsel: | A J Bailey and R J T George for Appellant<br>M G McClenaghan for Respondent |
| Judgment: | 14 October 2021 at 10 am |

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**JUDGMENT OF THE COURT**

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**A** **The appeal against sentence on the six sexual violation by unlawful sexual connection offences is allowed.**

**B** **The concurrent sentences of 10 years' imprisonment for those offences are set aside and substituted with concurrent sentences of eight and a half years' imprisonment.**

**C** **The sentences on the remaining offences remain as they are.**

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## REASONS OF THE COURT

(Given by Duffy J)

[1] Craig Lee McDonald pleaded guilty in the District Court at Christchurch to 12 charges of historic sexual offending against two victims, MG and AK. They comprised four charges of sexual violation by unlawful sexual connection (USC) with MG and two such charges with AK.[1] The remaining six charges were indecency with a girl under 12 — involving four charges of doing an indecent act[2] and two charges of inducing a girl under 12 years to do an indecent act[3] in relation to both MG and AK.

[2] On 20 January 2021, Judge Neave sentenced Mr McDonald to an end sentence of 10 years' imprisonment with no minimum term of imprisonment (MPI).[4] Mr McDonald now appeals against that sentence on the ground that it is manifestly excessive.

### Background

[3] The guilty pleas were entered on the morning of the scheduled trial, following the withdrawal of three charges of sexual violation by rape of AK,[5] and the amendment of one charge of sexual violation by unlawful sexual connection with AK from a representative charge to a specific charge.

[4] Three of the four charges of unlawful sexual connection with MG involved digital penetration of MG's genitalia. Two of these charges were representative and the third was specific. The fourth was a representative charge of unlawful sexual connection which involved Mr McDonald performing oral sex on MG's genitalia. He also committed two indecent acts on MG and induced her to commit one indecent act on him. The charges for one of the indecent acts and the inducement were representative and the remaining indecent act was a specific charge.

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1 Crimes Act 1961, ss 128(1)(b) and 128B: maximum penalty of 20 years' imprisonment.
2 Section 133(1)(b) [repealed in 2005]: maximum penalty of 10 years' imprisonment.
3 Section 133(1)(c): maximum penalty of 10 years' imprisonment.
4 *R v McDonald* [2021] NZDC 839 [Sentencing judgment].
5 Crimes Act, s 128(1)(a) and 128B: maximum penalty of 20 years' imprisonment.

[5] One of the two charges of unlawful sexual connection with AK involved digital penetration of AK's genitalia and the other involved Mr McDonald performing oral sex on AK's genitalia. Both were specific charges. He also committed two indecent acts on AK and induced her to commit one indecent act on him. One of the indecent acts was a representative charge. The other charges were specific.

[6] MG was aged between eight and 12 years and AK between 10 and 11 years at the time of the offending. Both were young relatives of Mr McDonald. The offending occurred between 1 January 2000 and 1 January 2005, at times when the appellant was living with one or the other victim and her family. During this time, Mr McDonald was frequently trusted as their relative to babysit the victims and their siblings while their parents were out of the home.

[7] Mr McDonald lived with MG and her family between January 2000 and June 2002. On one evening, after MG had bathed and changed into her pyjamas and was watching television in the living room with her siblings, Mr McDonald was sitting on a couch behind her. He began touching, tickling and massaging MG's back. He then moved his hands under her top and massaged her breast area.

[8] During August 2002 MG's mother held a fancy-dress birthday party in the garage at the family home. Mr McDonald was present. During the evening he entered MG's bedroom and approached her while she was asleep in bed. Having woken her up, he put his hands under the pants she was wearing and rubbed her vagina and clitoris.

[9] Between 1 September 2002 and 31 December 2004, on about 30 occasions, Mr McDonald babysat MG. On those occasions he would supply her with her favourite ice cream. He would then lie her on her back on the couch and commence removing her clothing. Whenever she protested, he told her it was okay and would offer her money, before continuing to remove her clothing. He would touch her breasts with his hands, rub his fingers on the inside and outside of her vaginal area and lick this area with his tongue. He would also place her hand around his penis and induce her to masturbate him until he ejaculated. Afterwards he would tell MG it was their "little secret".

[10] Also, at multiple times during the babysitting occasions Mr McDonald would enter the bedroom of MG and her siblings while they were in bed. While he was saying goodnight to her and the other children, he would put his hand down MG's pyjama pants and rub her vagina and clitoris.

[11] Mr McDonald lived with AK and her family between June 2004 and November 2004 when AK was aged between 10 and 11 years. He lived in a sleep-out at the family home. On an occasion when AK was lying on her mother's bed Mr McDonald entered the bedroom and rubbed her genital region on the outside of her clothing.

[12] In November 2004 the family moved to a new address, at which time Mr McDonald would visit and stay over most weekends. Around this time AK had broken her leg and it was in a cast. Between November 2004 and January 2005 Mr McDonald looked after AK while her mother was away from the home. He would enter AK's bedroom naked and, while she lay on her bed, he would take her hand and induce her to masturbate his penis. He then removed her clothes and touched her breasts, after which he placed his finger inside her vagina.

[13] Also, between November 2004 and January 2005, Mr McDonald entered AK's bedroom at night, lowered the sheets and removed her pyjama pants and underwear. He spread her legs apart and licked the outside and inside of her vagina.

**District Court sentencing**

[14] The Judge began his judgment by recognising the offending involved a significant abuse of trust and authority, and that it had occurred over a long period of time.[6]

[15] With reference to this Court's guideline judgment in *R v AM*, for sexual violation offences,[7] the Judge placed the offending in band three, which warrants a starting point of between nine and 18 years' imprisonment.[8] The Judge identified

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6 Sentencing judgment, above n 4, at [2].
7 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
8 Sentencing judgment, above n 4, at [12].

the relevant culpability factors as being the range of the offending, its repetition and scale, the number of victims, the significant breach of trust from someone in a position of responsibility within the family, and the vulnerability of the victims, including their ages and AK's inability to escape while her leg was in a cast. The offending had a significant effect on the victims and had caused them ongoing harm. The Judge found there was an element of grooming present.[9] However, he rejected the notion that planning and premeditation were involved. Instead he characterised the offending as "highly opportunistic" and described Mr McDonald as someone who had taken advantage of the numerous opportunities given to him through the role he played in the victims' lives.[10] Overall, the Judge found there were a significant number of aggravating factors that were "present to a high degree".[11] He adopted a starting point of 12 years' imprisonment for all the USC offending against both victims.[12]

[16] Next the Judge gave three separate discounts for mitigating factors. First, he gave a discount of three months for Mr McDonald's willingness to participate in a restorative justice process.[13] The Judge subtracted this figure from the starting point of 144 months and arrived at a sentence of 141 months.[14] Second, he gave a 10 per cent discount (which he rounded up to 15 months) for an "eleventh hour" guilty plea.[15] He reasoned that a low discount was appropriate given that the complainants had already travelled to Christchurch in expectation of giving evidence at a trial. However, he acknowledged the value of a guilty plea in that it validated the victims' allegations, indicated a sense of responsibility for harm caused and saved the victims from the ordeal of a trial.[16] Third, a "modest credit" (unspecified) was given for Mr McDonald's lack of previous convictions at the time of offending.[17] This resulted in an end sentence of 10 years' imprisonment on the USC charges.

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9 At [10]–[11].
10 At [14].
11 At [18].
12 At [21].
13 This equates to approximately two per cent of the 12-year starting point.
14 Sentencing judgment, above n 4, at [21].
15 At [16] and [22].
16 At [16]–[17].
17 If the Judge followed the approach that he took with the first discount he would have then deducted the 15 months discount from 141 months, which would have brought the sentence down to 126 months. Given he ultimately arrived at a sentence of 120 months this suggests the last discount was six months, which is approximately five per cent of 126 months.

[17] Concurrent sentences of three years' imprisonment were imposed on the six indecency charges.[18] The Judge declined to impose an MPI, on the grounds that the sentence imposed was sufficient to denounce the conduct and to hold Mr McDonald accountable.[19]

**Appellant's submissions**

[18] Mr Bailey, for Mr McDonald, submits that the starting point of 12 years' imprisonment set by the Judge was manifestly excessive. He refers this Court to *R v Alletson* and *C (CA66/2015) v R* as cases involving comparable offending.[20] In *C (CA66/2015) v R* this Court placed the offending in the middle range of band two of *R v AM*, adopting a starting point of six years. *R v Alletson* pre-dated *R v AM* but is referred to in the latter decision as providing an example of the type of offending that falls within the lower range of band two.[21]

**Respondent's submissions**

[19] The Crown submits that the starting point and end sentence were within the available range.

[20] Referring to *R v AM* and the Sentencing Act 2002, the Crown submits that the following aggravating factors are present here: (a) planning and premeditation[22] — to a moderate degree; (b) vulnerability of victims[23] — to a high degree; (c) scale of offending[24] — to a high degree; (d) breach of trust[25] — to a high degree; and (e) effect on the victims[26] — to a high degree. The Crown distinguishes *C (CA66/2015) v R* and instead relies on *R (CA730/2014) v R* in which similar offending attracted a starting point at sentencing of 12 years' imprisonment, which was not disturbed on appeal.[27]

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18 Sentencing judgment, above n 4, at [23].
19 At [20].
20 *R v Alletson* [2009] NZCA 205 and *C (CA66/2015) v R* [2016] NZCA 342.
21 *R v Alletson,* above n 17; referred to in *R v AM,* above n 7, at [117].
22 Sentencing Act 2002, s 9(1)(i) and *R v AM*, above n 7, at [37].
23 Section 9(1)(g) and *R v AM*, above n 7, at [42]–[43].
24 *R v AM*, above n 7, at [47]–[49].
25 Sentencing Act, s 9(1)(f) and *R v AM*, above n 7, at [50].
26 Section 9(1)(d) and *R v AM*, above n 7, at [44].
27 *R (CA730/2014) v R* [2015] NZCA 388.

[21] The Crown further submits that the discounts imposed for mitigating factors — the late guilty plea, willingness to engage in restorative justice processes, and lack of previous convictions — were generous in the circumstances.

**Analysis**

[22] *R v AM* is the tariff case for sentencing for sexual violation offending. Relevant here are the three bands of offending for cases in which the lead charge is sexual violation by unlawful sexual connection. Also relevant are the culpability factors which enable a sentencing Judge to place the offending within the appropriate band.

[23] The key issue here is whether the Judge was right to place the offending at just below the mid-range of band three rather than the lower end of band two of *R v AM*.

[24] Band two attracts a starting point of between four and 10 years' imprisonment, and is described as follows:[28]

> This USC band is appropriate for cases of relatively moderate seriousness. It will encompass cases which involve two or three of the factors increasing culpability to a moderate degree.

[25] In comparison, band three sets a starting point of nine to 18 years' imprisonment, and is described as follows:

> [120] This band is appropriate for the most serious offending of this type. USC band three will encompass cases which involve two or more of the factors increasing culpability to a high degree, for example, a particularly young victim or an extensive period of offending. Similarly, the band will be appropriate where more than three of those factors are present to a moderate degree.

[26] Here the Judge placed the offending in band three and adopted a starting point of 12 years' imprisonment that related to all the USC offending against both victims. We see nothing wrong with the Judge taking this approach. It is consistent with *R v AM*. First, the examples given in *R v AM* of cases that fit within the lower and upper ends of USC band three include cases involving multiple victims.[29] Second, in

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28 *R v AM*, above n 7, at [117].
29 At [120]–[121].

*R v AM* this Court expressly addressed whether the inclusion of multiple victim offending in the rape band guidelines risked inadequate recognition being given to the harm caused to each victim.[30] Two solutions were identified, one of which is relevant here. This Court considered that prolonged offending involving multiple victims, particularly in a familial context, warranted higher starting points in rape band four. We see no reason why this logic should not also apply to USC offending. These factors support using the totality of USC offending against all victims as a basis for determining where to place the offending within the USC bands.

[27] We also consider the Judge was right to place the offending in band three. The scale of the offending, the age of the two young victims and their familial relationship with Mr McDonald, made this serious offending. In this regard we reject Mr McDonald's contentions that his offending was comparable to that in *R v Alletson* and *C (CA66/2015) v R*.[31]

[28] *R v Alletson* pre-dates *R v AM*. *Alletson* is relevant only because it is given as an example in *R v AM* of lower end band two offending. However, the circumstances in *Alletson* did not involve the close familial relationship that is present here. This makes all the difference. It is the familial relationship between the victims and Mr McDonald that gives rise to the breach of trust in this case, and exacerbates the victims' vulnerability and the harm they have suffered as a result of the offending.

[29] In *C (CA66/2015) v R* there was the same familial relationship between the offender and two victims as here. All charges related to two victims, one of whom was under 12 for all of the offending and the other was under 12 at the time of the first indecent assault, and aged between 12 and 16 for the balance of the offending against her. There was only one specific USC offence and one specific attempted rape offence. Both these offences involved a victim then aged between 12 and 16 years. The sentence appeal proceeded on the accepted basis the Judge had not applied *R v AM* correctly because he had taken the attempted rape as the lead offence and attempted to place that alongside band two in *R v AM*. This Court found that the lead offence

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30 At [48].

31 *R v Alletson*, above n 17, and *C (CA66/2015) v R,* above n 17.

should have been the USC charge, which it considered fell within band two.[32] This Court identified the aggravating features as including a level of grooming (provision of alcohol and cigarettes), a breach of trust as the young girls were in the appellant's temporary care, harm suffered by both victims as a result and the extended period of the offending. Those features led this Court to place the USC offending in the middle of band two, adopting a starting point of six years' imprisonment with an uplift of two years to reflect the other offending and totality.[33]

[30] The outcome of the appeal in *C(CA66/2015) v R* was very much affected by the fact there was one specific USC offence and one specific offence of attempted rape with a victim between 12 and 16 years. We accept the level of indecency offending (11 charges in total) is marginally comparable to the present case, given that one of the victims in that case was in an older age group at the time of the offending. The gravity of the lead offending was not as serious as the present case. Here, there are six USC offences, three of which are representative charges, and all involving victims under 12 years.

[31] We consider the Judge was wrong to adopt a starting point of 12 years' imprisonment. In our view he took an overly individualised approach to the five aggravating features he identified, and in doing so placed too much weight on each of them.

[32] *R v AM* provides a reminder that sentencing requires an evaluation of all the circumstances and that a "mechanistic approach is not appropriate".[34] The circumstances of this offending reveal three aggravating features of concern: the scale of the offending; the age of the victims; and their familial relationship with Mr McDonald. We have not separately recognised the vulnerability of the victims or the breach of trust involved because these are matters that are already encompassed by their young ages and their relationship with Mr McDonald. The limited degree of premeditation involved in Mr McDonald grooming MG with gifts of her favourite ice cream does not warrant discrete attention; it is inherent in the decision to place

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32 *C (CA66/2015) v R*, above n 17, at [55]–[56].
33 At [57].
34 *R v AM*, above n 7, at [36].

the offending in band three. Similarly, the harm the offending has caused the victims is properly reflected in the band three placement. As was recognised in *R v AM*, harm is inherent in sexual offending.[35] Here the psychological harm was exacerbated by the family dissension which followed the victims' complaints and Mr McDonald's initial denials. The victim impact reports show that there were family members who did not believe the complaints were true. We return to this later when dealing with the guilty plea discount.

[33] *R v AM* gives two examples of cases at the lower end of USC band three.[36] In *R v K (CA 558/2008)* the offender touched and penetrated his stepdaughter's genitalia with his fingers and licked her genitalia on about 50 occasions over a two-year period when she was aged nine to 10 years.[37] In *R v P* the appellant offended against three victims aged three, four and five years.[38] The offender boarded in the home of the four and five year old victims. On four occasions he kissed the five year old victim's buttocks, anus and vagina. He exposed himself to the four year old victim, having first tried unsuccessfully to remove her clothing. With the three year old victim, in a secluded area the offender pulled down her pants, touched her bottom and licked her vagina. He then rubbed his penis against her buttocks and genitalia. In *R v AM*, *R v K (CA 558/2008)* was given as an example of a case at the lower end of band three because of the numerous occasions of offending and the breach of trust. In *R v P* the concerning features increasing culpability were the number of victims and their very young ages.[39]

[34] When we consider the above examples given in *R v AM* for band three offending, we are satisfied that this offending, with its particular aggravating features, also falls at the lower end of band three. The scale of the offending is less than was the case in *R v K (CA558/2008),* although the victims' ages are comparable, and the time frame of the offending is much the same. The scale of the offending is greater here than was the case in *R v P,* but in that case the number of victims was greater, and they were younger than the victims here. So, one factor weighs against the other.

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35 At [44].
36 *R v AM,* above n 7, at [120].
37 *R v K (CA558/2008)* [2009] NZCA 107.
38 *R v P* CA86/95, 10 August 1995.
39 *R v AM*, above n 7, at [121].

What the example cases do tell us is that there is nothing about the present case that would warrant us placing it at the higher end of band three.

[35] Accordingly, in light of the reasons given above and the requirement in the Sentencing Act that the least restrictive outcome appropriate in the circumstances must be imposed, we consider the appropriate starting point is between nine and 10 years' imprisonment. We propose to adopt a starting point of nine years for all the USC offending and to uplift it by a year to take account of the indecency offending. That leads to a sentence of 10 years' imprisonment.

[36] We see nothing wrong with the mitigating factors the Judge identified, although his way of applying the discounts was contrary to that methodology set out in *Moses v R.*[40] We propose to take the same factors into account but to allocate each a percentage which will then be aggregated — in line with *Moses* — and deducted from the starting point.

[37] We consider the Judge's 10 per cent discount for the guilty plea was appropriate. Despite being given so late it avoided the victims having to give evidence at trial and saved court time and resources. More importantly, in this case it gave the victims a degree of closure that was more effective than if guilty verdicts had been obtained following trial. In her victim impact statement AK reports that there was an estrangement in the extended family with some relatives believing Mr McDonald's denial of the offending. AK states that "now the truth has finally come out, and a massive burden has been lifted off my shoulders since the guilty plea. I can finally start to slowly move on." For those members of Mr McDonald's family who had earlier placed their trust in his denials, the guilty pleas remove any room for them to doubt the convictions that followed. Guilty verdicts returned by a jury may still be rejected by family members who blindly believe in their relative's innocence. Accordingly, the guilty pleas were significant despite their late entry and therefore warranted proper recognition, which is the effect of the 10 per cent discount.

[38] We consider the Judge was correct to recognise Mr McDonald's attendance at a restorative justice conference, and his lack of previous convictions at the time of

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[40] *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [46].

the offending. For both factors we give a total discount of five per cent, which brings the total discount to 15 per cent (18 months).

[39] The result is an end sentence of eight and a half years' imprisonment on each of the offences of sexual violation by unlawful sexual connection. The sentences for the other offending remain as they are.

**Result**

[40] The appeal against sentence on the six sexual violation by unlawful sexual connection offences is allowed.

[41] The concurrent sentences of 10 years' imprisonment for those offences are set aside and substituted with concurrent sentences of eight and a half years' imprisonment.

[42] The sentences on the remaining offences remain as they are.

Solicitors:
Crown Solicitor, Christchurch for Respondent