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

CA650/2020
[2023] NZCA 394

BETWEEN	S (CA650/2020) Appellant
AND	THE KING Respondent

Hearing:	18 July 2023
Court:	Gilbert, Lang and Woolford JJ
Counsel:	M J Taylor-Cyphers for Appellant I S Auld for Respondent
Judgment:	25 August 2023 at 11 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B Appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Woolford J)

[1] On 10 September 2020, following a four-day jury trial in the Whangārei District Court, the appellant was found guilty of three charges of sexual violation by

unlawful sexual connection[1] and six charges of sexual conduct with a child under 12.[2] The complainant was the appellant's biological son. He was aged nine to 10 at the time of the offending. The offending occurred while the complainant was living with the appellant, his then partner, and their two children.

[2] On 23 October 2020, Judge D J McDonald sentenced the appellant to nine years' imprisonment.[3] He now appeals against sentence on the basis that the Judge gave insufficient discounts for childhood hardship, mental health, and addiction issues.

Circumstances of offending

[3] The appellant and the complainant's mother ended their relationship shortly after the complainant was born. He was the third child of that relationship. The complainant lived with his mother until he was about nine years of age. Oranga Tamariki then contacted the appellant and asked whether he and his partner could care for the complainant and his two older siblings as their mother was unable to do so.

[4] The complainant lived with the appellant for a period of around 18 months. The offending commenced by the appellant exposing the complainant to pornography which graduated into the appellant masturbating in the complainant's presence while watching pornography.

[5] On one occasion, while pornography was playing, the appellant rubbed his penis on the outside of the complainant's bottom and in between his buttocks. On another occasion, the appellant got the complainant to masturbate him.

[6] There were three occasions when the appellant caused the complainant to give him oral sex by getting the complainant to fondle his penis and testicles before putting his penis into the complainant's mouth. The offending ended when the complainant told the appellant he had received a vision from God telling him that it was wrong, and he refused to perform oral sex on the appellant on that occasion.

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1 Crimes Act 1961, ss 128(1)(b) and 128B.
2 Section 132(3).
3 *R v* [*S*] [2020] NZDC 22023 [Sentencing notes].

District Court sentence

[7] At the outset, the Judge adopted a starting point of 10 years' imprisonment in reliance on the guideline judgment of *R v AM (CA27/2009)*.[4] He identified a number of aggravating features in setting the starting point — planning and premeditation, abuse of trust and vulnerability, the scale of the offending, and harm to the victim.[5]

[8] The Judge then turned to look at "personal matters". He noted that the appellant had a conviction for incest with his adult daughter in 2019 for which he was sentenced to community detention and supervision. The Judge did not impose an uplift for that offending.[6]

[9] The Judge had the benefit of a report on the appellant's personal and cultural history under s 27 of the Sentencing Act 2002. He noted that it made "incredibly sad reading". The appellant had been subject to ongoing sexual abuse as a child, including, most notably, being raped by his father and brother. He also experienced regular beatings from family members, including his mother. He was expelled from school at aged 15 for giving a "horrific" beating to another boy. Following that he lived on the streets of Auckland. The Judge noted the appellant's statement as recorded in the report that he did not wish to be like his father and wanted to stop the cycle of offending going from generation to generation.[7]

[10] The Judge gave the appellant a 10 per cent discount for matters raised in the cultural report, which reduced the starting point of 10 years' imprisonment to nine years' imprisonment, which was the end sentence imposed.[8]

Admission of fresh evidence

[11] The appellant applies for leave to adduce fresh evidence in the form of a psychological report of Ms Sarah Bramhall dated 27 February 2023, some 28 months after sentencing on 23 October 2020.[9] Counsel explains that the appellant only

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4 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
5 Sentencing notes, above n 3, at [13].
6 At [15].
7 At [16].
8 At [19].
9 Court of Appeal (Criminal) Rules 2001, r 12B.

approached her towards the end of 2021 and there were then delays because of the COVID-19 pandemic and the lack of psychologists with availability to undertake assessments and make reports.

[12] Ms Bramhall summarises her opinion as to the appellant's risk of future sexual re-offending as follows:

> [The appellant] is assessed as a below average risk of future sexual re-offending. He has offended against [his son] ([a] prepubescent male) and engaged in an incestuous relationship with his adult daughter. While he has maintained denial of the sexual offending against his son, there is limited evidence from official information and [the appellant's] self-report that he previously led a lifestyle characterised by sexually deviant practices or presented with a persistent and problematic pattern of compulsive sexual behaviour or an undermanaged sexual drive across his lifespan. There is also no other evidence to suggest he has sought to engage in any other sexual offending with children and he did not express beliefs/attitudes normalising deviant or unlawful sexual practices. His own mental health struggles including trauma and substance use are likely to have contributed to his sexual offending.

[13] She concludes by setting out the various rehabilitative pathways available to the appellant in prison.

[14] At sentencing, however, the Judge did not make a specific finding that the appellant was at risk of future sexual reoffending. The Judge quoted the pre-sentence report which considered him to be a high risk of offending, especially against children, and that his risk of reoffending would escalate unless he completed a specialised programme for child sexual offenders, which was successfully run in a number of New Zealand prisons. In the end, however, the Judge did not attribute any weight to any risk of future sexual reoffending in sentencing the appellant.[10]

[15] As to the appellant's mental health struggles including trauma and substance use, which Ms Bramhall opines were likely to have contributed to his sexual offending, as noted above, the Judge had before him a personal and cultural report, under s 27 of the Sentencing Act. The report, compiled by Mr Andrew Baker, sets out in some detail

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[10] Sentencing notes, above n 3, at [17].

the appellant's unfortunate background.[11] This led the Judge to comment that it made "incredibly sad reading".

[16] We assess the new evidence against the settled criteria of freshness, cogency, and credibility, bearing in mind that the ultimate criterion is the interests of justice.[12] There is no question that the proposed new evidence is credible.

[17] Counsel for the appellant submits that the evidence is fresh but accepts that "it could have been fresh if adduced at the time of sentencing; the situation since has been static". No explanation has been provided as why such evidence was not tendered on sentencing. Without any indication to the contrary, we are of the view that the report could have been obtained for sentencing with reasonable diligence. It is therefore not fresh.

[18] In assessing the appellant using the Millon Clinical Multiaxial Inventory IV (MCMI-IV) tool, Ms Bramhall noted that while the appellant's profile was found to be valid and reliable, his response style suggested a tendency to present with greater psychological impairment than what he likely experiences. Mr Bramhall says this is often referred to as a "cry for help" and may reflect his overall coping response.

[19] Notwithstanding this caveat, we find the report to be cogent on the issue of the appellant's risk of future sexual re-offending.

[20] Ms Bramhall was instructed to assess the appellant's risk of sexual re-offending and identify the presence of any psychological factors, including mental health issues, that may have contributed to his index sexual offending. Ms Bramhall noted that since the time of his arrest, the appellant has continued to deny sexually offending against his son. Ms Bramhall therefore states that, "[a]s such, it is not possible to provide an explanation of his sexual offending process." Nonetheless, she goes on to hypothesise that:

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[11] It does not appear that Mr Baker's report was made available to Ms Bramhall as she does not list it as a source document for her report.

[12] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [119]–[120]; *R v Bain* [2007] UKPC 33, (2007) 23 CRNZ 71 at [34]; and *Ieremia v R* [2020] NZSC 143, [2021] 1 NZLR 168 at [36].

> [T]he index offending stemmed from poor sexual boundaries associated with the impact of his own sexual abuse, the absence of adequate sexual scripts, relationship difficulties and poor coping in the context of life stresses. He abused his position of trust and created situations where he could sexually offend, suggesting an ability and willingness to disregard the needs and vulnerability of [the complainant] in pursuit of his own sexual gratification.

[21] This narrative was, however, before the Judge in the form of the s 27 report, which detailed the appellant's own sexual abuse, the absence of adequate sexual scripts, relationship difficulties and poor coping in the context of life stressors. Ms Bramhall's report adds little more except for a cogent assessment of the appellant's risk of sexual re-offending. Overall, however, Ms Bramhall's report is not material to the sentence under appeal.

[22] In those circumstances, we decline to admit Ms Bramhall's report as fresh evidence.

Appellant submissions

[23] Counsel for the appellant does not take issue with the 10-year starting point adopted by the Judge, but invites this Court to increase the discount of 10 per cent for matters raised in the s 27 report on the basis that inadequate weight was given to childhood hardship (including economic hardship and cultural dislocation), and mental health and addiction issues. She submits a 20 per cent discount should have been granted, which would lead to an end sentence of eight years' imprisonment.

[24] In considering the overall adequacy of the discount, the comments of this Court in *Williams v R* are said to be relevant.[13] In the context of Mr Williams' difficult background, including the traumatic events he appeared to have suffered as a child, his removal from whānau into state care, and the inter-generational effects of colonisation and deprivation, this Court considered the 12-month discount (which was just over 10 per cent) low, "bordering on inadequate".[14]

[25] Counsel noted that in *Williams v R*, this Court referred to *Zhang v R*, *R v Rakuraku* and *Solicitor-General v Heta*, which all illustrate the importance of an

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13 *Williams v R* [2021] NZCA 535.
14 At [113].

overall assessment, taking into account social and cultural dislocation resulting from colonisation (which can result in poverty, alcohol and drug abuse, unemployment, educational underachievement and violence) as part of the sentencing analysis.[15]

[26] As to his mental health and addiction, counsel submits that the appellant exhibits mental health difficulties, including depression, anxiety, and post-traumatic stress disorder. He may meet the DSM-5 diagnostic criteria for Major Mood Disorder. He has described experiencing suicidal ideation from age 10. He reports having attempted suicide on several occasions and having been hospitalised — the most recent occasion being in 2019 after the incestuous sexual relationship with his daughter ended. He has been prescribed medication for both depression and anxiety in the past.

[27] Counsel submits that the appellant has also struggled with substance abuse. Although he has experimented with a range of drugs, the appellant says he was a "big drinker" who typically drank a bottle of wine most days, and several bottles of wine and a bottle of spirits at the weekend. He reports that he drank until he passed out, and on several occasions his children intervened after they found him choking on his vomit while he slept. The appellant reports that he completed a Salvation Army addiction programme in 2019 and says that he has abstained from alcohol since this time.

[28] Counsel submits that the link between the offending and the appellant's mental health is two-fold. First, the appellant's suicidal tendencies lead him to self-soothe with risk-taking behaviour. This means he is more likely to take risks, because of his mental health. His culpability for taking these risks is therefore reduced. Secondly, the appellant's substance abuse, in particular his regular abuse of alcohol, was a daily occurrence, contemporaneous with the offending. This is relevant to the sentencing process in the way the court recognises addiction can reduce culpability through impaired decision-making.

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15 *Williams v R* at [113] citing *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [159]–[162]; *R v Rakuraku* [2014] NZHC 3270 at [58]; *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [50].

[29] Counsel submits that, in addition, some small credit may also be factored into the sentence for the appellant's efforts towards rehabilitation and sobriety. As the Supreme Court has recently made clear in *Berkland v R*, rehabilitation and a desire to do that work is to be recognised at sentencing if for no other reason than it incentivises a defendant making efforts to reduce the risk of reoffending of his or her own volition:[16]

> [161] Sentencing Judges should encourage offenders to take up the opportunities offered by rehabilitative programmes to make the necessary changes in their lives. One way to do this is by providing material sentencing discounts when the evidence suggests that is what an offender is genuinely willing to do. Such encouragement can be an inflection point in the life of a prisoner.

[30] On all personal factors, the appellant seeks a discount of 20 per cent. This is said to be consistent with this Court's decision in *Agar v R*, where on appeal a discount of 20 per cent was allowed to recognise efforts towards drug rehabilitation, and for mental health issues and other s 27 factors.[17]

Discussion

[31] In any appeal against sentence, this Court must allow the appeal if for any reason there is an error in the sentence imposed on conviction and a different sentence should be imposed.[18] In this case, counsel for the appellant submits that it was an error not to grant him a 20 per cent discount for personal mitigating factors, rather than a 10 per cent discount. As has been reiterated on many occasions, however, the focus in any appeal against sentence is on the end sentence and whether it is manifestly excessive.

[32] No issue is taken with the starting point of 10 years' imprisonment. At sentencing, Crown counsel submitted that the appellant's offending fell within band 3 of the guideline judgment of *R v AM*, that is, attracting a starting point of between 12 and 18 years' imprisonment. It submitted that a starting point of 13 to 14 years' imprisonment was appropriate. On the other hand, defence counsel submitted

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16 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.
17 *Agar v R* [2021] NZCA 350 at [52].
18 Criminal Procedure Act 2011, s 250.

that the appellant's offending fell within the upper end of band 2, that is, attracting a starting point of between seven and 13 years' imprisonment.

[33] The Judge stated that "[i]n my view, your offending was at the upper end of band 2."[19] He then proceeded to set a starting point for all the appellant's offending of 10 years' imprisonment, which is not the upper end of band 2, but the mid-point of band 2.

[34] In terms of *R v AM,* the initial band into which an offender will fall is determined by how many culpability assessment factors are considered to have been present in his offending. The judgment outlines 12 factors. The banding process is intended to promote consistency between the sentences imposed in similar situations. Allocating an initial band into which an offender will fall is, however, not an exact science and the placement of the appellant's offending at the upper end of band 2 could equally have led to a starting point of 11 years' imprisonment.

[35] As to the appellant's mental health and addiction, there was some information before this Court which was available to the Judge on sentencing. The PAC report noted that previous offending factors had been his dysfunctional family relationships, his depression, and his alcohol abuse. Having been sentenced to five months' community detention and six months' supervision on a charge of incest with his daughter, he undertook counselling for both his depression and alcohol addiction.

[36] The s 27 report also noted that the appellant was at the time of sentencing on medication for depression, which seemed to be helpful in managing his symptoms. The appellant had remained positive and alcohol free throughout the trial and although depressed, he had moved on from suicidal tendencies.

[37] The difficulty in granting a more substantial discount to take account of the appellant's mental health and addiction is that the Judge was unable to determine whether these factors contributed in any material way to the index offending and he continued to deny the offending. The PAC report writer says that the appellant

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19 Sentencing notes, above n 3, at [14].

effectively denies not only the offending, but also denies the presence of any issues. The s 27 report writer also records:

> [The appellant] believes that he is innocent and that in this case he has been set up. [The appellant] feels that the inability for him to present information crucial to his innocence, means he has not had a fair hearing.

[38] The appellant seems to suggest that the complainant's accusation was payback because the complainant had "done some things" to the children of his daughter with whom he an incestuous relationship.

[39] While more substantial discounts are available for mental health and addiction, they need to be a contributing factor to the offending in some way for an offender's culpability to be assessed as lesser than it would otherwise be if those factors were not present.

[40] It is not possible to provide an explanation of the appellant's sexual offending when he continues to deny the offending, saying he has been set up.

[41] We are therefore unable to say that the Judge fell into error when he only granted a 10 per cent discount to the appellant for the matters raised in the s 27 report in relation to his childhood hardships. While a larger discount may have been available for other more proximate factors such as mental health and addiction, the extent of their contribution to the offending remains speculative in the face of the appellant's continued denial of the offending.

[42] Finally, we note that the Judge declined an application for an order under s 86 of the Sentencing Act that the appellant serve more than one third of his sentence before he becomes eligible for parole. He rightly acknowledged that the courts need a more cogent reason for making such an order other than the need to deter and denounce.[20]

Result

[43] The application to adduce further evidence is declined.

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[20] At [18].

[44] The appeal against sentence is dismissed.

Solicitors:
Crown Solicitor, Whangārei for Respondent