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

NOTE: DISTRICT COURT ORDER IN [2023] NZDC 12359 PROHIBITING PUBLICATION OF THE NAME AND LOCATION OF THE RELEVANT FARMING STATION AND THE AREA THAT THAT STATION IS LOCATED WITHIN REMAINS IN FORCE.

NOTE: DISTRICT COURT ORDER IN [2023] NZDC 12359 PROHIBITING PUBLICATION OF THE NAME OF THE OWNER OF THE FARMING STATION REMAINS IN FORCE.

NOTE: DISTRICT COURT ORDER IN [2023] NZDC 12359 PROHIBITING PUBLICATION OF THE NAMES OF ALL CIVILIAN WITNESSES REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA387/2023
[2024] NZCA 216

BETWEEN	JEREMY CRAIG HORE Appellant
AND	THE KING Respondent

Hearing:	15 May 2024
Court:	Mallon, Lang and Moore JJ
Counsel:	M A Stevens KC for Appellant P A Norman for Respondent
Judgment:	7 June 2024 at 12 pm

JUDGMENT OF THE COURT

A The District Court order supressing the victim's age and sex is varied by consent. The age and sex of the victim are no longer subject to the order.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] The appellant was sentenced to two years and nine months' imprisonment and ordered to pay $5,000 as reparation to the victim following his convictions at trial on sexual offending.[1] He appeals his sentence on the ground that he ought to have been given a discount for remorse and for the order to pay reparation.

Background

[2] The appellant was a contractor who was engaged to assist with the autumn muster on a high country sheep station. The appellant and his three employees were invited to stay overnight at a hut on the property and to partake in social activities with other workers and the station's owner. In all there were 11 males present and one young woman. As a result of the ensuing events, the appellant was charged with male assaults female, indecent assault, assault and sexual violation by unlawful sexual connection of the young woman.[2]

[3] The charges proceeded to a jury trial in the District Court at Dunedin before Judge Robinson. At the start of the trial the appellant entered a guilty plea on the indecent assault charge. The jury found him guilty on the assault charge and the sexual violation charge and acquitted him of the male assaults female charge.

[4] In sentencing the appellant, the Judge described the offending as follows:[3]

> [4] The victim in this matter was aged 17 at the time. She was the sole female present. Including you, there were a total of 11 males present. You, at the age of 41, became quite taken with her. You were following her around, as one witness described, "like a puppy dog". I accept her evidence that for

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1 *R v Hore* [2023] NZDC 12717 [sentencing notes].
2 Crimes Act 1961, s 194(b); Crimes Act, s 135; Summary Offences Act 1981, s 9; and Crimes Act, ss 128(1)(b) and 128B.
3 Sentencing notes, above n 1.

the most part your attentions were unwanted. Apart from the victim sitting on your knee for a time, I did not really hear any evidence of her reciprocating by way of contact with you.

[5] When drilled down on the accounts to that effect, it rather seemed that the witnesses observed your conduct towards her and the reality was that she remained, but without obviously objecting. I did not hear any credible evidence of her having her arm around you, for example.

[6] I take from the evidence of [one witness] that she did seem uneasy. His words were that she was a bit "nerve wracking" and "a wee bit skittish" and certainly [another witness] expressed a degree of concern and [a further witness] expressed his concern directly to you.

[7] In terms of the assault charge by the jury's verdict, they obviously found that the victim had returned inside, that you had followed and without her consent you placed your hand on her leg. Their verdict means that I can be sure you had no honest belief that she was consenting. This was unwanted contact by you with a 17 year old girl and who, by virtue of the intoxication of everyone and by reason of being the sole female, was isolated and vulnerable.

[8] The indecent assault and sexual violation charges arise out of the same sequence of events. The victim was the first to go to bed for the night. I rather suspect that was a means of avoiding you and certainly that appears to have been [the further witness'] intention.

[9] After everyone else had gone to bed and after the lights were out and after everyone was sleeping, you got up from your bunk, navigated around [one of the males present] who was sleeping on the floor, and you went over to the top bunk that the complainant was sleeping in.

[10] You climbed up to her bunk without disturbing anyone. While there was a factual issue as to whether you had your feet on the bunk below or whether you had climbed up completely, it does not really matter. You had climbed the bunk to the extent that you could make intimate contact with her.

[11] Without her consent and, on my assessment of the evidence, while she was sleeping, you slid your hand under a number of layers of clothing that she was wearing and touched her breast. She woke to the sensation of you breathing on her face and of your hand on her breast.

[12] You then placed your other hand down her jeans and under her underwear. You did not stop there, which was the defence case. The jury plainly found that you inserted a finger into her vagina.

[13] I am entirely satisfied that you were not asking the [victim]: "Are you okay?" All the victim heard was mumbles. She was not nodding or responding to you in any way. What she did say though, and it stands for her character, is, "get off or I'll push you off", and that she gave you a netball push after which you fell to the floor.

[14] The duration of your offending was not insignificant. It was up to 10 minutes and that no one heard anything is not surprising. I heard some

> extraordinary evidence about the amount of alcohol that was consumed by those present.

[5] The male assaults female charge of which the appellant was acquitted related to an incident earlier in the evening when the victim went outside to go to the toilet. She described having come back around the trucks to find the appellant standing there. She said the appellant came up and grabbed her and was trying to drag her down with him. The appellant, who gave a video police interview that was played at trial, said he did not recall this happening at all.

[6] On the other charges, the appellant accepted in his interview that he had placed his hand on the victim's leg when they were inside the hut and one of the males present told him to "f off" and he removed his hand. On the indecent assault and sexual violation charges, the appellant said he went over to the bunk where the victim was. She was awake. He was standing on the bottom bunk, and put his hand on her breast and reached under her jeans and rubbed the side of her bottom. He denied putting his finger in or on her vagina. He said he was asking her if it was okay and after a time, no longer than 10 minutes, the victim said that maybe it was a good idea to go back to his own bed which he did. The appellant said that he thought the victim was interested from their earlier interactions that evening. In acting as he did, he said he did not know "why or what came over" him.

The sentence

[7] In sentencing the appellant, the Judge identified two aggravating factors that were present to a moderate degree: premeditation (associated with a degree of determination) and the vulnerability of the victim.[4] He considered the offending fell within band one for unlawful sexual connection.[5] He adopted an overall starting point of three years and six months' imprisonment for the offending.[6]

[8] The Judge declined any discount for the guilty plea on the indecent assault charge and for remorse.[7] He allowed a discount of 20 per cent for the appellant's

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4 At [35]–[43].
5 At [43]. See *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [113]–[116].
6 At [48].
7 At [50]–[55].

previous good character.[8] This resulted in an end sentence of two years and nine months' imprisonment, which the Judge applied to the unlawful sexual connection charge.[9] The Judge imposed shorter concurrent sentences on the indecent assault and the common assault charges.[10] He also ordered an emotional harm reparation payment fixed at $5,000.[11]

This appeal

[9] The appellant submits that the Judge made an unfair assessment of the appellant that culminated in the Judge finding that the appellant was not remorseful and giving no discount for the appellant's offer to pay reparation of $5,000. The submission is that:

(a) the Judge made no allowance for the appellant's gross intoxication that affected his judgement and provided an explanation for his out of character behaviour;

(b) the Judge minimised aspects of the victim's behaviour that formed the foundation for the appellant's mistaken belief that his attentions were welcome;

(c) the Judge was wrong to describe the victim as isolated and vulnerable because there were 10 men present (this appears to be a slip and the evidence seems to have been that there were 11 men present, including her employer and the owner of the hut, as well as her work colleagues and one of whom appointed himself as her protector); and

(d) the Judge was wrong to describe the defence as largely revolving around "rape myths" as the defence questions of the victim, contrasting what the victim said to her friends about what had occurred with what

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8 At [56]–[57].
9 At [58].
10 At [59]–[60].
11 At [62].

she said to the police, properly challenged her reliability on the key issue at trial.

[10] We disagree with each of these points. As to the relevance of alcohol, the Judge acknowledged that alcohol was likely to have been a feature in the offending when discussing premeditation as an aggravating feature of the offending, but correctly observed that this was not mitigating.[12] The appellant's offending was out of character and impaired judgement from alcohol consumption may have been a factor in this. But the Judge accepted the appellant's prior good character and that this offending was a significant fall from grace and allowed a good character discount because of this.

[11] As for the victim's behaviour that evening, the Judge was entitled to accept the victim's evidence that for the most part the appellant's intentions were unwelcome. The victim was a young woman, at the outset of her farming career, and in an all-male environment where significant alcohol was consumed. In that context, it is unsurprising that she might put up with a degree of unwanted attention in the course of the evening by not overtly objecting to it. But that did not provide a basis for the appellant to touch her breasts and put his finger in her vagina while she was asleep.

[12] As to the victim's vulnerability and isolation, the Judge put it this way:

> [39] Next is the vulnerability of your victim. I found that she was asleep. Over and above that she was 17 years of age, the sole female present. The majority of the men were present were considerably older, she was relatively isolated, she was in a remote location. I, therefore, reject your counsel's submission that her vulnerability is at the lowest level given that she had friends around her that she could call on.

[13] The Judge was right to regard the victim as vulnerable on the basis of the features he identified. The fact that during the evening the victim had someone looking out for her did not stop the appellant's determined attentions that led to the offending when she was asleep. The Judge was well placed to make his assessment of the victim's vulnerability and to also assess the victim as having put on a brave face the next day in getting on with her work.

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[12] At [36].

[14] Lastly on these points, we disagree that the Judge unfairly described the defence case as relying on "rape myths". While there was nothing improper in the defence questions of the victim as the defence were entitled to test her reliability with reference to inconsistent statements, the Judge's characterisation was apt. It is well recognised that victims of sexual offending may often not make a full disclosure of the offending when they first disclose that something occurred.

[15] Aside from these points, the question is whether the Judge was wrong not to allow a discount for remorse and for the offer of reparation. As to remorse, the Judge rejected a submission that the appellant had immediately accepted responsibility. He considered that the guilty plea to the indecent assault charge was inevitable on the basis of the appellant's police video interview. While the offer to plead guilty to that charge was made earlier, it was predicated on the other charges being withdrawn. This appeared to the Judge to be risk management rather than an acceptance of responsibility. The Judge noted that the appellant had pleaded not guilty to the other charges including the most serious charge.

[16] The Judge went on to say:

> [53] I also note your counsel's submissions before me today to the effect that your acceptance of matters can be seen from your response by way of engaging in counselling and acting to ensure that your business interests and the interests of your employees are preserved in the event that a sentence of imprisonment were to follow. Those matters do not reflect acceptance of responsibility on your part. They do not go to remorse. They go to preserving your position as best you can.
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> [54] Your counsel suggested that I could accept you are remorseful but the reality is I do not see real evidence of remorse. There is an apology letter that has been prepared and is attached to your counsel's submissions. It is dated August 2021 and that needs to be seen in the context of the denials that had already been entered on the record, you pleading not guilty and electing trial by jury a couple of months earlier.
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> [55] The apology that has been conveyed also appears inconsistent with the terms of the pre-sentence report, indicating that you do not appear to accept the jury's verdict. I say that, despite your counsel's submission, that you [respect] the jury's finding.

[17] The appellant submits that the Judge was wrong to find that he did not demonstrate remorse for the harm he caused. The fact that the appellant disputed aspects of the offending did not extinguish his ability to recognise the harm he had

caused. In his police video interview he admitted to the indecent assault (touching the victim's breast and her bottom) and he accepted the harm he had caused. His apology was written well before trial and the jury verdicts. The Judge did not mention that the appellant had told the pre-sentence report writer that he had thought about the impact of the offending on the victim and how this could impact her ability to form positive relationships with males and her future employment prospects in the male-dominated farming industry.

[18] The appellant also stresses that he demonstrated responsibility for his actions by having ceased all alcohol consumption and having attended counselling for two years. A number of references were written in support of the appellant for the Judge's consideration at sentencing. The appellant refers to the reference from a person who has known the appellant the longest who said:

> I have known Jeremy for more than 35 years and can confidently say from my personal observations of him, at work, at sport and socially this sexual offending is completely out of character. He has been upfront with me saying what he has done, and that approach is consistent with his usual integrity. He was ashamed and remorseful for his offending.

[19] As to reparation, the appellant advises that reparation was offered in sentencing submissions. These submissions provided information about the appellant's income and major expenses. The submissions advised the Judge that the appellant was willing to pay reparation and did not consider he should specify a figure but accepted that it should be in excess of $1,000. The Judge did not discuss the appellant's offer of reparation but simply made the order to pay $5,000. The appellant submits this was a considerable sum, in light of his financial circumstances, which was paid in full soon after the sentencing. He submits that the Judge failed to take it into account as required by s 10 of the Sentencing Act 2002.[13]

[20] The respondent makes the point that a discount for remorse requires evidence of tangible, genuine remorse and in most cases the defendant will have pleaded guilty.[14] The respondent also notes that sympathy for an outcome is not the same as

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[13] Section 10(3) of the Sentencing Act 2002 requires the court to take into account an offer for reparation when imposing a sentence.

[14] *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [24]–[25].

remorse for the offending.[15] The respondent refers to the comments of this Court in *R v Johnson* that the weight to be given to payments is generally limited.[16] The respondent also refers to *Kohu v R* where this Court considered that an apology for acts that fell well short of what was alleged did not qualify as a sincere expression of remorse.[17]

[21] The respondent refers to several cases as illustrating the discounts that have been allowed for remorse and payment of reparation. These cases include:[18]

(a) *R v Johnson*:[19] in relation to convictions for sexual offending over a three month period, the sentencing Judge had allowed a 25 per cent discount for the defendant's guilty plea and a further 25 per cent discount for remorse "underpinned" by a reparation payment of $10,000 and a "sincere" letter of apology sent to the victim.[20] On a Solicitor-General appeal, this Court noted that the payment was unlikely to have caused "great hardship" to the offender and considered that a discount of five per cent or more could have been appropriate, but ultimately revised this discount down from 25 per cent to 15 per cent taking into account other personal factors.[21]

(b) *Wynyard v R*:[22] in relation to convictions for sexual offending against eight victims, the sentencing Judge had allowed the appellant a 10 per cent discount for remorse and reparation payments of $10,000 to each of the appellant's eight victims.[23] To pay the reparations, the defendant had sold his house.[24] This Court increased the discount to 15 per cent reflecting that the payments were demonstrative of the very real

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15 *Sweeny v R* [2023] NZCA 417 at [20]; and *Cameron v R* [2023] NZCA 157, (2023) 31 CRNZ 31 at [46].
16 *R v Johnson* [2010] NZCA 168 at [28].
17 *Kohu v R* [2023] NZCA 343 at [45].
18 Other cases relied on by the respondent were: *C v R* [2022] NZHC 1807; and *Old v R* [2023] NZHC 2369.
19 *R v Johnson*, above n 16.
20 At [10].
21 At [29].
22 *Wynyard v R* [2023] NZCA 449.
23 At [53].
24 At [53].

remorse the appellant had expressed.[25] It said this discount might have been more but the Judge's discount for the guilty pleas was generous.[26]

(c) *Poi v R*:[27] in relation to an instance of violent offending, although the defendant had not pleaded guilty, this Court considered that a five per cent discount could have been given for the defendant's genuine expression of regret, and his willingness to pay reparation for the victim's medical expenses and lost income and to participate in a restorative justice conference.[28] However, the sentence was not adjusted for this because the Judge had given a "generous 15 per cent discount for good character, well beyond the norm".[29]

(d) *Kohu v R*:[30] where this Court said that established remorse, including where a voluntary payment of reparation is made, tends to attract discounts of between five and 15 per cent.[31]

(e) *Solicitor-General v Rawat*:[32] in relation to convictions for sexual offending, where a discount of 15 per cent was reduced to 10 per cent on appeal for a defendant who had demonstrated remorse in a range of ways including through an apology, an offer to attend restorative justice and substantial payments made to charity. The Court noted that the cases where 15 per cent discounts or more had been allowed have had elements that made the remorse exceptional.[33]

[22] We consider that it would have been open to the Judge to have allowed a modest discount for remorse and the payment of reparation. It was not excluded by the appellant's not guilty pleas or his comments to the pre-sentence report writer. The appellant's acceptance of responsibility and his shame were observed by his

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25 At [56].
26 At [56].
27 *Poi v R* [2015] NZCA 300.
28 At [7].
29 At [8].
30 *Kohu v R*, above n 17.
31 At [40].
32 *Solicitor-General v Rawat* [2021] NZHC 2129.
33 At [51].

long-standing friend. They were demonstrated by the appellant having ceased drinking alcohol and his attendance at counselling. His offer to pay reparation and its prompt payment once ordered were a tangible expression of an understanding of the harm he had caused to the victim. For these matters, we consider a discount of up to 10 per cent was available to the Judge. We acknowledge that the Judge was well-placed to assess the appellant's remorse but we cannot be sure that the Judge turned his mind to whether the reparation warranted a discount as the Judge made no reference to having taken it into account.

[23] The question, however, is not simply whether a discount could or should have been given. It is also necessary for this Court to be satisfied that a different sentence should be imposed.[34] The focus is on whether the end sentence is within the available range.[35] In this case, the respondent submits that the end sentence was available to the Judge because the good character discount of 20 per cent was very generous.

[24] A good character discount reflects two purposes.[36] A defendant without prior convictions and otherwise generally of good character deserves leniency for an offence that represents an isolated fall from grace and because that fall may itself provide a degree of punishment; and a greater capacity for rehabilitation and reduced probability of reoffending may be inferred from previous good character.

[25] In the present case, both of those purposes were relevant. The Judge referred to the appellant's previous good character, that he was a hardworking person who made a real contribution to his community. The Judge described the offending as a significant fall from grace. Further, and unsurprisingly given the isolated incidence of offending by this 43-year-old man, the appellant was assessed as having a low risk of reoffending. The appellant's decision to stop drinking alcohol and to engage in counselling reinforce this. His character references attest to his hardworking, respectful and reliable nature.

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34 Criminal Procedure Act 2011, s 250(2)(b).
35 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
36 *R v Findlay* [2007] NZCA 553 at [89]–[91]; and *Taylor v R* [2017] NZCA 574 at [24].

[26] Discounts for good character for sexual offending have typically been tempered or not given at all where the offending has extended over a period of time or involved more than one victim.[37] A review of some examples of cases of single incidents of sexual offending, albeit generally more serious than the present, have granted discounts for good character that have ranged between nine per cent and 20 per cent.[38] In the latter case, *R v Bloor*, the discount was for remorse, reparation and good character.[39]

[27] Overall, we consider that the 20 per cent discount for good character was an appropriate one taking into account the appellant's remorse and payment of reparation. Put the other way, we are not satisfied that the failure to also allow a discount for remorse and reparation, in addition to the 20 per cent discount for good character, led to a manifestly excessive sentence.

Suppression

[28] The District Court made extensive suppression orders.[40] Those suppression orders include the victim's age and sex. With the consent of the victim, the District Court's suppression orders are varied by removing the victim's age and sex from their scope. Those orders are unnecessary given the statutory suppression of the victim's name, address and occupation under s 203 of the Criminal Procedure Act 2011 and the suppression orders the District Court made over the name and location of the farming station, the name of the owner of the farming station and the names of the civilian witnesses at the trial.

Result

[29] The appeal is dismissed.

Solicitors:
Crown Solicitor, Dunedin for Respondent

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37 See for example: *R v Hockley* [2009] NZCA 74 at [31]; *Britow v R* [2017] NZCA 229 at [10] and [12]; *Hamilton v R* [2015] NZCA 28 at [28]; *R v Zhang* (2004) 20 CRNZ 915 (CA) at 922; and *Taylor v R*, above n 36, at [26].

38 See *B (CA182/2018) v R* [2019] NZCA 18 at [70]–[77]; *Solicitor-General v Kaokao* [2019] NZHC 2352; *Sherratt v R* [2021] NZHC 1901 at [49]–[61]; and *R v Bloor* [2014] NZHC 2086 at [22]-[24].

39 *R v Bloor*, above n 38.

40 *R v Hore* [2023] NZDC 12359.