**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**

**CA454/2017**
**[2018] NZCA 632**

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| BETWEEN | MICHAEL HARRIS<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 11 September 2018 |
| Court: | Miller, Winkelmann and Williams JJ |
| Counsel: | W D McKean for Appellant<br>M J Lillico and K L Kensington for Respondent |
| Judgment: | 21 December 2018 at 11.30 am |

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed.**

**B The sentences are quashed.**

**C An end sentence of five years and four months' imprisonment is imposed, consisting of the discrete sentences set out at [51] of this judgment.**

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**REASONS OF THE COURT**

(Given by Winkelmann J)

[1] Mr Harris offended against 18 different complainants between 2005 and 2014. He was convicted, following guilty pleas, of 42 charges as follows:

(a) 15 charges of indecent assault, an offence under s 135 of the Crimes Act 1961 with a maximum penalty of seven years' imprisonment;

(b) 12 charges of disabling by stupefaction, an offence under s 197(1) of the Crimes Act with a maximum penalty of five years' imprisonment;

(c) one charge of attempted disabling by stupefaction, an offence under ss 197(1) and 311(1) of the Crimes Act with a maximum penalty of two and a half years' imprisonment;

(d) seven charges of making an intimate visual recording, an offence under s 216H of the Crimes Act with a maximum penalty of three years' imprisonment; and

(e) seven charges of possession of an intimate visual recording, an offence under s 216I of the Crimes Act with a maximum penalty of three years' imprisonment.

[2] In sentencing Mr Harris, Fogarty J utilised a starting point of nine years' imprisonment, but then reduced that to eight years to take account of Mr Harris' guilty plea and his remorse.[1]

[3] Mr Harris appeals his sentence on two grounds:

(a) the starting point was too high, two years greater than the maximum sentence for indecent assault and out of step with other sentences for low level but extensive sexual offending; and

(b) insufficient recognition was given for the guilty plea, remorse and the time he spent on restrictive bail conditions.

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1 *R v Harris* [2017] NZHC 1519 [Sentencing notes] at [24]–[28].

[4] Mr McKean, counsel for Mr Harris, asks this Court to re-sentence Mr Harris, and when doing so, to take into account the forfeiture ordered since the date of sentencing.

**The offending**

[5] Most of Mr Harris' offending occurred in a backpackers' hostel Mr Harris ran between 2012 and 2014 (the Lodge). Seventeen complainants of the offending were guests of the Lodge, aged between 19 and 30. The offending involved a pattern of behaviour. Mr Harris would give the complainants a drink, who would then experience a rapid onset of tiredness. Some awoke during the night to find Mr Harris lying down behind them but pressed against them (which is colloquially referred to as "spooning", an expression we adopt). Some recalled Mr Harris telling them that he loved them. Some recalled a light flashing, as if a camera were being used. Others could not recall the offending at all.

[6] The offending against J occurred in a different time frame and different context. J was a family friend. The initial offending occurred sometime between 2005 and 2007, when J was around 15 years of age. J accompanied Mr Harris on a trip and the two stayed in a motel room together. In the middle of the night J awoke to find Mr Harris in bed with him, spooning him from behind. Mr Harris' explanation was that he was cold and J was "like a hot water bottle".

[7] Mr Harris offended further against J in a later time period. Between 2010 and 2012, when Mr Harris was staying with J, Mr Harris would prepare J a drink of chocolate milk or juice and dissolve temazepam (a sleeping pill) into it. J would become unconscious and would wake up wearing only boxer shorts, despite going to sleep fully clothed.

[8] The police were ultimately alerted to the offending by one of the complainants who had stayed in the Lodge. When they executed a search warrant, they found electronic equipment containing numerous photographs of young European males. The photographs showed young men who appeared to be in a comatose state, most in their underwear, although some fully clothed. These photographs revealed that

Mr Harris would sometimes move clothing, bedcovers, or hands when photographing the complainants in order to expose their lower torso.

[9] A series of photos showed J as he was progressively undressed and positioned for a number of photographs at each stage. Included within deleted images was one of J fully naked on top of the bed with J's hand placed on top of his own penis. This particular degree of exposure was unusual for Mr Harris' offending. In all other photographs the complainants were wearing, at the least, their boxer shorts. There was only one other photograph which went beyond this, capturing an image of the genitalia of one complainant exposed through a gap in the complainant's underwear. From the content of the other photographs, it seems likely that exposure was accidental in the sense that it was not intended, and not achieved by Mr Harris deliberately moving the clothing.

[10] In relation to the indecent assault charges, four of those related to moving of the bedclothes and clothing, and 11 charges related to the incidents of spooning. Although there were multiple photographs taken, only seven of those photographs had content which could be described as intimate. Those photographs give rise to the charges of making and possessing intimate visual recordings. The two we have mentioned clearly fit this description. The other five seem to have been categorised in that manner on the basis that they are shots of the torso only and for that reason could be said to focus on the genital region more than would be the case if an image of the whole of the complainant were captured.

**The sentence**

[11] The Judge agreed with counsel that it was impossible to impose a sentence per charge, rather treating the offending as one set of behaviour.[2] The Judge said that the offending involved seriously culpable conduct that warranted a significant sentence, given the sheer volume of offending, conducted in secret and largely achieved by stupefying the complainants.[3]

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2 At [23].
3 At [24].

[12] The Judge rejected the submission for Mr Harris that the offending did not involve sexual gratification.[4] He was satisfied the photographs were taken to give Mr Harris some form of gratification. Some of the indecent assaults were in the nature of unwanted touching but all involved an invasion of privacy. The Judge noted the high value the common law places on privacy.[5] Although the complainants were not physically violated, he regarded Mr Harris' offending as serious. For those reasons, he agreed with the Crown's assessment of a starting point of nine to 12 years, adopting the lower end of that range of nine years.[6]

[13] From that starting point, the Judge then allowed a 10 per cent discount for Mr Harris' guilty plea, which was entered two weeks before trial. He explained that he was satisfied the early plea was entered after an appropriate time and following the resolution of preliminary matters.[7] The Judge also allowed a discount of a further short period to account for remorse.[8]

[14] Mr Harris was therefore sentenced to eight years' imprisonment, a sentence the Judge divided as follows:[9]

(a) Four years' imprisonment on each of the disabling charges, to be served concurrently with one another.

(b) One year's imprisonment on the attempted disabling charge, to be served concurrently with the disabling charges.

(c) Two and a half years' imprisonment on the indecent assault charges, to be served cumulatively on the sentences for the disabling;[10]

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4 At [19].
5 At [20]–[21].
6 At [25]–[26].
7 At [26].
8 At [26].
9 At [30]–[31]. The Judge did not initially allocate sentences to the particular charges. Following delivery of the Judge's sentencing remarks, counsel drew his attention to the need to do so. The Judge then split the eight years' imprisonment up between the various charges in accordance with a formula agreed between counsel.
10 The sentencing notes record this aspect of the sentence differently however after reviewing other paragraphs of the sentencing notes, we are confident that the Judge intended the sentence to be expressed in this way.

(d) One and a half year's imprisonment on the charges of making and possessing intimate visual recordings, to be served cumulatively on the charges of indecent assault.

**First ground of appeal: starting point too high**

[15] Mr McKean submits that the starting point adopted was too high — it was more than the maximum sentence for indecent assault by two years, almost twice the maximum sentence for stupefying and three times the maximum sentence for both possession and making of an intimate recording. Whilst it was accepted by Mr McKean that this was serious offending of its kind, one could not say it was so bad that the sentence should exceed the maximum sentence for the most serious offence. He also submitted that the starting point does not sit well with other sentencing cases involving significantly greater sexual offending.

[16] Because of the approach the Judge took to sentencing, we find it difficult to assess the appropriateness of the starting point. The Judge took a global approach, unmoored from any considerations of the maximum sentence for any particular offence, or the offending against particular complainants. Whilst this makes the task for us more difficult on appeal, it does not necessarily follow that the end sentence arrived at was manifestly excessive. Accordingly, we have decided to undertake our own sentencing exercise.

[17] We adopt the following approach to selecting a starting point. First, we identify the offending against a complainant which is the most serious and calculate the starting point as though sentencing for offending against that person alone. We then uplift for the offending against the other complainants. It is clear that if the totality of the offending requires a sentence which exceeds the maximum penalty for that lead offence, cumulative sentences must be used.[11] We do not therefore accept Mr McKean's submission that the Judge was in error to impose a sentence which exceeded the maximum sentence for the most serious offence. It is a principle of sentencing law that the sentence imposed must reflect the totality of the offending.

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11 *R v Xie* [2007] 2 NZLR 240 (CA) at [19].

*Assessing the seriousness of the offending*

[18] In this case we consider that the most serious offending was the offending against J. He was the youngest of those offended against, the offending occurred over the longest period of time, and there were multiple instances of offending. On each occasion of offending J was drugged with a prescription drug, causing him to lose consciousness. That occurred once between 2005–2007 and several times in the period 2010–2011. We classify this as moderate to serious offending of this kind.

[19] The earliest occasion of offending involved an indecent assault by spooning. On the other occasions, J was undressed whilst he was unconscious and photographed. On one of these occasions Mr Harris arranged J so that his hand was placed over his penis.

[20] Although the indecent assaults and the intimate visual recordings were toward the least serious end of the scale of offending, it is artificial to assess them as isolated incidents. The offending against J is be viewed as a related series of actions by Mr Harris, and if so analysed is serious offending.

[21] We identify the following as aggravating features of the offending against J:

(a) The offending involved a significant degree of planning on Mr Harris' part, and hence, premeditation.

(b) The offending involved the misuse of prescription medication, carrying with it a risk to J.

(c) Mr Harris further offended against J while he was stupefied. This additional offending is a serious aggravating feature of this offending. While J was stupefied Mr Harris arranged J as if he were a mannequin, recording images of him he could view at a later time. Mr Harris used J in this way, for his own gratification. This was a gross invasion of J's privacy and an assault on his human dignity.

(d) The first offending against J occurred when he was only 15 years old.

*Relevant case law*

[22] Only limited assistance in selecting a starting point can be gained from other sentencing decisions. As the Crown observes, the usual pattern is for a complainant to be stupefied to enable sexual offending against the complainant or another. The stupefaction element of the offending is therefore typically charged under s 191 of the Crimes Act, stupefying or rendering unconscious any person with intent to facilitate the commission of an imprisonable offence.[12] The maximum sentence for offending under s 191(1) is 14 years' imprisonment, more than twice the maximum of the offence to which Mr Harris pleaded guilty.

[23] With that caveat in mind, we have had regard to the various sentencing authorities referred to us as a check on whether the Judge has, as Mr McKean submits, overestimated the overall seriousness of this offending.

[24] The Crown referred us to *Akurangi v Police.*[13] In that case the offender befriended three children, aged between nine and 10, at a playground and gave them Cogentin tablets which they consumed. There was no associated offending. Cogentin was described as a "major anti-psychotic drug".[14] The complainants required hospital treatment for two days, and suffered hallucinations and other neurological symptoms. A starting point of 18 months' imprisonment was adopted.[15]

[25] Both counsel referred us to *R v G.*[16] In that case G pleaded guilty to eight counts of aggravating wounding by stupefying, five counts of indecent assault on a child, one count of indecent assault on a girl under 12, three counts of indecent assault on a boy under 16 and two counts of assault with intent to commit sexual violation.[17] The offending took place over eight and a half years. There were six separate complainants, each of them children. There was a further complainant, an adult, who G drugged to facilitate his offending against two girls aged 10 and 12.

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12 Crimes Act 1961, s 191(1)(a).
13 *Akurangi v Police* HC Auckland AP1597, 17 December 1997.
14 At 2.
15 At 5 and 6.
16 *R v G* [2014] NZHC 2801.
17 At [2].

[26] The offending involved grooming of the children. G fed them sleeping tablets in milkshakes, and either looked at or touched their genitals whilst they were unconscious. The particular sleeping pill used caused one of the young complainants to hallucinate.[18] The most serious offending was against B. G groomed B over a number of years, behaviour which included plying him with alcohol and telling him stories with sexual themes. He began sexually offending against B when B was 10 years old. G would give B a sleeping pill to stupefy him before sexually offending against him; offending which included masturbating B, attempting to perform oral sex on B and attempting to anally penetrate B whilst he was sleeping. The Court adopted a starting point of five years for the offending against B, and uplifted it by three and a half years to reflect the totality of the overall offending.[19]

[27] In *R v Arvand* the appellant was found guilty of two counts of stupefying, six counts of stupefying with intent to facilitate the commission of an offence, three counts of kidnapping, four counts of sexual violation by unlawful sexual connection, four counts of indecent assault and one count of burglary.[20]

[28] Mr Arvand would befriend young Asian women, some to the extent of forming a relationship with them. He would then spike drinks he offered them. They became sleepy, dizzy and suffered memory loss. He would then sexually offend against them. He also took his victims' credit cards and PIN numbers. A sentence of 13 years' imprisonment was imposed on appeal; seven years' imprisonment (concurrent) on the unlawful sexual connection charges and six years' imprisonment (concurrent) on the stupefying charges, to be served cumulatively.[21]

[29] The offending in each of *G* and *Arvand* was far more serious than the offending by Mr Harris. It was serious sexual offending. The stupefaction offending also was more serious. In each of these cases the offender was convicted under s 191(1) of the Crimes Act, stupefying or rendering unconscious any person with intent to facilitate the commission of an imprisonable offence. As set out at [22], the maximum

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18 At [4].

19 At [39] and [41].

20 *R v Arvand* (2003) 20 CRNZ 742 (CA). This Court allowed an appeal against conviction in respect of three of these counts but it does not appear from the judgment which counts these were. The difference is immaterial for our purposes.

21 At [111].

sentence for that offending is 14 years' imprisonment, more than twice the maximum of the offence to which Mr Harris pleaded guilty.

[30] The Crown submits that not much can turn on that distinction, since the majority of Mr Harris' complainants were also indecently assaulted. It is the case that once he had stupefied his complainants, Mr Harris indecently assaulted and took intimate images of them. But the charge of which he was convicted did not entail as an element that he stupefied them with intent to further offend against them. We cannot sentence him on the basis that there was that additional criminality in his offending.

*Our approach*

[31] We take the indecent assaults committed against J as the lead offences as we view them as the most serious offending. Taken in isolation the indecent assaults would be at the less serious end for offences of this nature, but as noted above at [21] there are significant aggravating features to the offending. We consider that a starting point of four years' imprisonment is appropriate, having regard to the stupefying and intimate visual recording offending that took place alongside the indecent assaults.

[32] We uplift that starting point by three years to reflect the offending against the other complainants. Again, the indecent assaults against the other complainants would, on their own, be considered low-level offending, warranting a modest sentence. However, the stupefying and intimate visual recording escalates the indecent assaults significantly in seriousness. A higher sentence is also needed to properly account for the significant invasion of privacy, the moderate breach of trust, and the significant number of complainants involved. This leads to an overall starting point of seven years' imprisonment.

[33] In terms of how the sentence is structured, we consider it appropriate to achieve this seven-year starting point by imposing a three-year sentence for this other offending against the backpackers, cumulative on the sentence imposed in respect of the offending against J. Imposing cumulative sentences in this way is necessary to reflect the totality of the offending against J and the other complainants. We return to the detailed structure of this sentence below.

**Second ground of appeal: inadequate discount for mitigating factors**

[34] Mr McKean argues the Judge erred in:

(a) failing to take into account time spent on restrictive bail conditions;

(b) failing to give a greater discount for Mr Harris' remorse; and

(c) failing to give a full discount for guilty plea.

*The Judge's approach*

[35] The Judge allowed a 10 per cent discount for a guilty plea given shortly before trial.[22] He also accepted that Mr Harris had shown genuine remorse, rounding the discount for guilty plea up to a 12-month discount, and arriving at a sentence of eight years' imprisonment.[23]

[36] The Judge noted also that Mr Harris was subject to forfeiture proceedings and reserved leave for Mr Harris to apply to the Court for a variation of sentence depending on the outcome of those proceedings.[24] He made no allowance for the time spent by Mr Harris on restrictive bail conditions.

*Bail conditions*

[37] Mr Harris was granted bail shortly after his arrest to an address in Auckland, where he remained on bail for a period of almost two years. It was a condition of his bail that he not return to the town where his business, being the Lodge, was located. That meant he had to engage a manager. The manager initially engaged did a poor job, and he was unable to supervise her adequately. He was not allowed to use the internet and so had to manage business matters over the phone. He applied for a variation of bail to enable him to return to the town to ready the business for sale, but that application was declined. While he accepts that he could not, in all of the circumstances, be involved in running the hostel, he says the overall conditions were

22 Sentencing notes, above n 1, at [26].
23 At [26].
24 At [29].

unnecessarily restrictive and the refusal to vary bail aggravated this. When the business was sold, he lost much of the investment he had made in the business.

[38] Mr Harris also says that he was subjected to oppressive bail checks, with police waking him as many as five times a night to check he was complying with the conditions imposed. He was also subject to a night time curfew, although that allowed him to work during the day. Mr Harris' uncontradicted evidence is that he was subject to oppressive bail checks at night. Ultimately Mr Harris applied for a variation to remove the curfew checks, an application that was successful.[25]

Analysis

[39] The Court is required to recognise time spent on electronically-monitored bail, however Mr Harris was not subject to electronic monitoring.[26] Discount has been given for time spent on a 24-hour curfew, but Mr Harris' curfew was a night time curfew only and allowed him to work during the daytime. His account of the curfew checks undertaken by police is concerning, but not something which can be reflected in a discount to sentence. The use of bail checks to harass a defendant is however a serious matter, one which Mr Harris may pursue through the Independent Police Complaints Authority if he so wishes.

[40] The condition that Mr Harris stay away from the town in which the Lodge was located was inevitable. He had offended against 17 complainants there, at least one of whom was a local. His offending no doubt damaged his business, a damage which would have been exacerbated by his absence. But ultimately all of this flowed from his offending. We do not consider it requires recognition in the form of a reduction of sentence.

*Guilty plea*

Mr McKean submits that a discount for guilty plea of greater than 10 per cent should have been allowed as the plea was entered after the Crown had reviewed its case and reduced the more serious offences of aggravated wounding under s 191(1)(a) of the

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25 *R v Harris* HC Whangarei, CRI-2014-029-961, 8 October 2015.
26 Sentencing Act 2002, s 9(2)(h).

Crimes Act to offending under s 197(1). A year earlier Mr Harris had tried to get the Crown to withdraw the aggravated wounding charges, and if they had, Mr McKean submits, the matter would have resolved. It was therefore the Crown that changed its position shortly before trial, and accordingly a discount in the order of 20 per cent can easily be justified.

[41] This Court held in *Hessell v R* that the timing of a guilty plea ought to control the calculation of a plea discount.[27] The Supreme Court rejected this approach as overly rigid.[28] That Court held that sentencing judges must take into account all relevant circumstances surrounding entry of a guilty plea including, but not limited to, timing.[29]

[42] Here, the following circumstances are relevant in that *Hessell* sense:

(a) First, Mr Harris' plea was made late but still well before trial.[30]

(b) Second, it followed immediately upon the Crown deciding to withdraw the most serious charges of aggravated wounding and substitute charges of stupefying. This was effectively to downgrade the charges from an offence with a maximum term of imprisonment of 14 years to an offence with a maximum term of five years.

(c) Third, the Crown's case was strong but not overwhelming. Its strength came from the large number of complainants, all of whom described similar experiences. There was, however, risk to the Crown in one curious aspect of the case: once Mr Harris stupefied the complainants, the evidence of indecent behaviour on his part was limited. It might not have been straightforward to convince a jury beyond a reasonable

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27 *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298 at [14].
28 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [61].
29 At [74].
30 Mr Harris entered a guilty plea two weeks prior to trial. This can be contrasted with *Woods v R* [2011] NZCA 573 where an 11 per cent discount was awarded for a plea to manslaughter on the morning of trial. Ms Woods' plan throughout had been to run self-defence. A 10 per cent discount appears to be a standard discount for a plea on the day of trial. See also *R v Oliver* [2014] NZCA 285; and *Johnson v R* [2016] NZCA 144.

doubt of the indecency element of this form of aggravated wounding.[31] The agreement to plead guilty appears to have been mutually advantageous: the Crown achieved certainty and Mr Harris faced less serious charges.

[43] These factors come together to suggest that this was not a 10 per cent case. It is true that Mr Harris made no early offer to plead guilty even to the lesser charges. He is disqualified therefore from obtaining the benefit of discounts in the order of 20 to 25 per cent usually given in such cases.[32] But he is not in the same class as those who plead guilty to the originally preferred charges on the morning of trial, for whom a 10 per cent discount would be the orthodox response. That would be to ignore the Crown concession and therefore fail to comply with the *Hessell* directive to take account of all relevant considerations. A conditional surrender is surely not the same as an unconditional one. When that is combined with the fact that the plea was entered well before trial and that the Crown's case carried some risk, a discount of 15 per cent was properly available.

*Remorse*

[44] As to remorse, Mr McKean argues the Judge could have given a greater level of discount that the just over one month allowed. One of the complainants was present in court to read his victim impact statement. Mr Harris asked the Judge to respond to the complainant directly, and when granted leave to do so, expressed his remorse to the complainant directly. Since the Judge accepted that Mr Harris was remorseful, Mr McKean submits a separate discount should have been allowed in the order of seven to eight per cent.

[45] The Judge accepted that Mr Harris' remorse was genuine.[33] Mr Harris was therefore entitled to some discount in recognition of that fact. Rounding up the guilty

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31 Circumstances of indecency are defined as those which "would be so regarded by right-thinking members of the community generally": *R v Aylwin* [2007] NZCA 458 at [35]. Further, "the adjective 'indecent' need not apply to the act itself; it is sufficient if it applies to the circumstances accompanying the assault": *R v S* CA273/91, 20 December 1991 at 5, cited with approval in *Rowe v R* [2018] NZSC 55, [2018] 1 NZLR 875 at [44].

32 See for example *Hessell v R,* above n 28, at [73]–[75]; *Regan v* R [2012] NZCA 227 at [21]; and *Hohipa v R* [2015] NZCA 485 at [31].

33 Sentencing notes, above n 1, at [26].

plea discount by one per cent is not, we consider, adequate recognition. We therefore allow a five per cent reduction in sentence on account of remorse.

*Forfeiture*

[46] Mr Harris owned both the Lodge and the adjoining property. Both were sold at mortgagee sale. After sentencing, and on the Crown's application, Wylie J made an instrument forfeiture order under s 142B of the Sentencing Act 2002 for 25 per cent of the net proceeds of the Lodge.[34] The Crown did not seek an order in respect of the adjoining property.

[47] Section 10B of the Sentencing Act provides that the court must take into account any instrument forfeiture order made, or to be made, when sentencing an offender who has been convicted of a qualifying instrument forfeiture offence. Because the application had been made but had not been dealt with at the time of sentencing, Fogarty J granted leave to apply to vary the sentence upon the outcome of the application.[35] Since we will allow the appeal, and re-sentencing is therefore inevitable, we propose to address this issue rather than remitting it to the High Court for resolution.

[48] The relevant facts in respect of the instrument forfeiture order are as follows. Mr Harris purchased the Lodge and the adjoining property for $1.4 million in 2012. He invested capital of $500,000. On mortgagee sale, the net proceeds for the two properties available for Mr Harris was $112,485. Wylie J then ordered forfeiture of $17,716.38.[36] The Judge took into account that Mr Harris was serving a significant sentence, was 59 or 60 years old at the time, was a first-time offender who had pleaded guilty and expressed remorse, and that the sum forfeited would go to meet costs and would not be available to the complainants.[37]

[49] Mr McKean submits that the forfeiture order amounted to a significant penalty and the sentence should be adjusted accordingly. The Crown submits in reply that

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34 *R v Harris* [2018] NZHC 273 [Forfeiture decision] at [48].
35 Sentencing notes, above n 1, at [29].
36 Forfeiture decision, above n 34, at [48].
37 At [47].

Wylie J took into account the sentence of imprisonment in fixing the amount forfeited and so to recue Mr Harris' sentence would give him double credit. The Crown argues it is open to the Court to decline to reduce the sentence notwithstanding the making of a forfeiture order.

Analysis

[50] We do not accept that to give credit for the forfeiture order involves any element of double counting. Wylie J quite appropriately took into account that Mr Harris was to serve a lengthy period of imprisonment, and set the forfeiture at a level which did not "impose a crushing outcome on Mr Harris" disproportionate to his offending.[38] But that order operates as a penalty. The Court must weigh the fact that the penalty has been imposed in determining whether a reduction of sentence is appropriate. In this case we are satisfied that it is. The forfeiture represented 10 per cent, approximately, of Mr Harris' net worth. We consider that a reduction of three months is appropriate.

**Re-sentencing**

[51] We re-sentence Mr Harris as follows. Adopting a starting point of seven years' imprisonment, we reduce that by three months on account of the forfeiture order. We then allow approximately a 15 per cent discount on account of the guilty plea and a further discount of five per cent to take into account Mr Harris' remorse. We thereby arrive at a final sentence of five years and four months' imprisonment for all of the offending. This is imposed by means of a combination of concurrent and cumulative sentences as follows:

[38] At [48].

Offending against J

(a) Three years and one months' imprisonment on each of the charges of indecent assault in respect of offending against J to be served concurrently.

(b) Two years and two months' imprisonment on each of the charges of stupefying and of making and possessing an intimate recording of J, to be served concurrently on the sentences set out at (a) above.

Offending against remaining complainants

(c) Two years and three months' imprisonment on each of the charges of indecent assault against the other complainants. CRN14029001298 is to be served cumulatively on CRN14029001251, one of the indecent assault charges in respect of J. The remaining are to be served concurrently on the sentences set out at (a) above.

(d) Four months' imprisonment for the charge of attempted stupefying, to be served concurrently on the sentences set out at (a) above.

(e) One year and eight months' imprisonment on all other stupefying charges, to be served concurrently on the sentences set out at (a) above.

(f) 10 months' imprisonment on each of the charges of making and possessing an intimate recording in respect of offending against the other complainants, to be served concurrently with the sentences set out at (a) above.

**Result**

[52] The appeal against sentence is allowed.

[53] The sentences are quashed.

[54] An end sentence of five years and four months' imprisonment is substituted, consisting of the discrete sentences set out at [51] of this judgment.

Solicitors:
WRMK Lawyers, Whangarei for Appellant
Crown Law Office, Wellington for Respondent