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1985**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA27/2009
[2010] NZCA 114**

BETWEEN THE QUEEN
Appellant

AND AM (CA27/2009)
Respondent

CA32/2009

AND BETWEEN AM (CA32/2009)
Appellant

AND THE QUEEN
Respondent

Hearing: 12 August 2009

Court: William Young P, Chambers, O'Regan, Robertson and Ellen France JJ

Counsel: R M Lithgow QC for AM
D B Collins QC, S B Edwards and J Murdoch for Crown
H M Aikman QC as counsel assisting the Court

Judgment: 31 March 2010 at 11.30 am

JUDGMENT OF THE COURT

- A** AM’s appeal against sentence is dismissed.
- B** Leave to appeal is granted to the Solicitor-General and the Solicitor-General’s appeal against the failure to impose a minimum period of imprisonment is allowed. A minimum period of seven years and six months imprisonment is imposed.
- C** This case may be cited as *R v AM*.
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REASONS OF THE COURT

(Given by William Young P and Ellen France J)

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Sentencing for sexual offending

[1] Sentencing for rape is currently based around what was said by this Court in *R v A*¹ even though that case, in some respects, has been overtaken by emerging evidence about, and evolving social attitudes to, rape² and gives little assistance in cases where the culpability of the offender is particularly high. As well, the structure of the guidance provided by *R v A* is now out of step with present sentencing methodology. An associated problem is that there are currently no guideline judgments of this Court in relation to sexual violation by unlawful sexual connection.

[2] We are satisfied that the time has now come for this Court to give integrated sentencing guidance for offending involving sexual violation and, as part of this exercise, to review and update the *R v A* approach in relation to rape. We have

¹ *R v A* [1994] 2 NZLR 129 (CA).

² Ministry of Women's Affairs *Restoring Soul: Effective Interventions for Adult Victim/Survivors of Sexual Violence* (Wellington, October 2009) at 31.

chosen to do so in the context of the present appeal which demonstrates some of the difficulties which have developed with sentencing in this area.

[3] In the minute which was sent to counsel before the hearing we indicated our intention to set out guidelines not only for rape and other forms of sexual violation, but also indecent assault and inducing a child to do an indecent act on a defendant. In fact, we have dealt with only rape and other forms of sexual violation. There are a number of reasons for this. The submissions we received focused on rape and sexual violation and we did not receive much assistance in relation to indecency offending. The number of cases coming to this Court where the lead offence is an indecency offence is comparatively small and we do not have a great deal of experience of sentencing in this area to draw on. In addition, the importance of the offender's previous record in setting starting points in indecency cases means that a different approach to sentencing methodology from that adopted in relation to rape and sexual violation may be appropriate in indecency cases. We intend to deal with sentencing guidelines for indecency offending at a later date.

[4] In subsequent sections of this judgment we discuss:

- (a) The role of this Court in setting tariffs;
- (b) Statutory sentencing guidelines;
- (c) *R v A*;
- (d) The problems with *R v A*;
- (e) New guidelines for rape and other sexual offending; and
- (f) The case at hand.

[5] Two sets of guidelines are provided. The first of the guidelines is for sexual violation where the lead offence is rape, penile penetration of the mouth or anus or violation involving objects. The second of the guidelines is for other violation where unlawful sexual connection is the lead offence. To distinguish the two sets of

guidelines we call the first set of guidelines the “rape” guidelines and the second set of guidelines the “USC” guidelines. The rape guidelines are found at [88] to [112] and the USC guidelines at [113] to [124].

The role of this Court in setting tariffs

[6] Because this judgment is likely to attract some public attention and in order to set the scene for an explanation of why it is now desirable to review *R v A*, it is necessary to explain briefly the role of this Court in providing sentencing guidance and how that role has evolved in recent years.

[7] Andrew Ashworth³ discusses the history of guideline judgments in England. It was not until the 1970s that the English Court of Appeal began issuing judgments containing general guidelines on sentencing for particular offences. These judgments, pioneered by Lawton LJ, are described by Ashworth as setting out:⁴

... general parameters for dealing with several variations of a certain type of offence, considering the main aggravating and mitigating factors, and suggesting an appropriate starting point or range of sentences.

[8] The earliest cited instance of a guideline judgment is *R v Willis*,⁵ a case concerning buggery and indecent assault which identified a sentencing bracket of three to five years for cases not presenting any aggravating or mitigating factors which were set out (non-exhaustively) in the judgment. A similar guideline judgment, albeit without a systematic discussion of the main aggravating or mitigating factors, was delivered in *R v Taylor*,⁶ a case concerning unlawful sexual intercourse with a girl under the age of 16.

[9] Influenced by English developments, this Court also began to give tariff guidance. In *R v Pawa*⁷ and *R v Pui*⁸ sentences imposed for rape were reduced to bring them into line with “the existing pattern of sentencing for sexual offences” and this after, in the *Pui* case, extensive review of sentencing decisions. Then, in

³ *Sentencing and Criminal Justice* (4th ed, Cambridge University Press, Cambridge, 2005).

⁴ At 38.

⁵ *R v Willis* [1975] 1 WLR 292 (CA).

⁶ *R v Taylor* [1977] 1 WLR 612 (CA).

⁷ *R v Pawa* [1978] 2 NZLR 190 (CA).

⁸ *R v Pui* [1978] 2 NZLR 193 (CA).

R v Smith,⁹ *R v Dutch*,¹⁰ and *R v Ulrich*,¹¹ there were extensive reviews of sentencing decisions in relation to drug offending. These five cases are the first (or at least amongst the first) New Zealand tariff cases. They are characterised by the assumption that consistency would flow from a proper analysis of sentencing decisions and the reinforcement of existing sentencing patterns.

[10] The leading texts on sentencing practice¹² now identify over 50 judgments as “guideline judgments”.¹³ Saul Holt, however, argues that, of these judgments, only six qualify as “genuine” guideline judgments: *R v A*¹⁴ (sexual violation by rape); *R v Terewi*¹⁵ (cultivation of cannabis); *R v Wallace*¹⁶ (dealing in Class B Controlled Drugs); *R v Mako*¹⁷ (aggravated robbery); *R v Taueki*¹⁸ (serious violence); and *R v Fatu*¹⁹ (dealing in and manufacturing of methamphetamine). *R v Hessel*²⁰ (discounts for pleas of guilty) can now be added to this list.

[11] Sometimes guideline judgments represent a judicial response to legislative change. For instance, the change in the tariff for rape which emerged from *R v A* was driven by an increase in the maximum sentence. *Taueki* resulted in part from dissatisfaction with the limited guidance which had been provided by *R v Hereora*²¹ but was also a response to the changes in policy implemented by the Sentencing Act 2002. *Fatu* was a response to the reclassification of methamphetamine from being a Class B drug to a Class A drug.

[12] Other guideline judgments have been issued when the Court has perceived a particular need for guidance. In *Wallace* sentencing guidelines for commercial dealing in Class B drugs were provided as a response to the increasing size and sophistication of commercial drug operations. Similarly, the judgment in *Terewi*

⁹ *R v Smith* [1980] 1 NZLR 412 (CA).

¹⁰ *R v Dutch* [1981] 1 NZLR 304 (CA).

¹¹ *R v Ulrich* [1981] 1 NZLR 310 (CA).

¹² Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) and Geoffrey Hall *Hall's Sentencing* (looseleaf ed, LexisNexis).

¹³ “Appellate Sentencing Guidance in New Zealand” (2006) 3 NZPGLeJ at 11.

¹⁴ *R v A* [1994] 2 NZLR 129 (CA).

¹⁵ *R v Terewi* [1999] 3 NZLR 62 (CA).

¹⁶ *R v Wallace* [1999] 3 NZLR 159 (CA).

¹⁷ *R v Mako* [2000] 2 NZLR 170 (CA).

¹⁸ *R v Taueki* [2005] 3 NZLR 372 (CA).

¹⁹ *R v Fatu* [2006] 2 NZLR 72 (CA).

²⁰ *R v Hessel* [2009] NZCA 450.

²¹ *R v Hereora* [1986] 2 NZLR 164 (CA).

revised the previous tariff case, *Dutch*, to take account of the increasing prevalence of cannabis cultivation and the development of hydroponic cultivation techniques. This revision occurred despite the fact that Parliament had not opted to change the maximum penalty since 1975. In *Mako* the Court opted to revise its previous guidance on sentencing for aggravated robbery given in *R v Moananui*.²² Although *Mako* noted that “there have been changes in kinds and frequency of criminal conduct involving this offence and in community responses to it”,²³ the key driver of the revision was the need to give more discretion to sentencing judges and refocus the sentencing exercise on a proper assessment of the true culpability and criminality present in the offending, rather than merely placing the offending into a certain category.²⁴

[13] The development of guidelines has been associated with an increased emphasis on structured sentencing.

[14] Current sentencing practice is based around a methodology which was first explicitly and authoritatively explained in *Taueki*. Under *Taueki*, the sentencing judge’s first step is to identify a starting point sentence which appropriately reflects the intrinsic seriousness of the offending. This “starting point” sentence is, at the next step, adjusted up or down to reflect circumstances which are personal to the offender (including a plea of guilty if there has been one). More recently there has been something of a development of the *Taueki* methodology in cases where there have been guilty pleas or assistance to the authorities. It is now seen as best practice to arrive at a provisional sentence which reflects all factors other than the guilty plea and/or assistance to the authorities, and then, in a third step, discount that provisional sentence to allow for those factors. All of this is explained in *Hessell*.²⁵ For ease of reference (rather than strict accuracy) we will treat this as encompassed by the phrase “*Taueki* methodology”. This methodology has been developed in respect of sentences of imprisonment and is only of assistance in determining how long such sentences should be (including notional sentences when home detention is in issue).

²² *R v Moananui* [1983] NZLR 537 (CA).

²³ At [2].

²⁴ At [31] and [70].

²⁵ At [14] and [22] – [23].

[15] Heavily structured approaches to sentencing of this nature are not universally popular (cf the “instinctive synthesis” approach favoured by the High Court of Australia, see *Makarjian v The Queen*²⁶). But structured sentencing has advantages in terms of consistency and transparency and is now well embedded in New Zealand. Indeed we are of the view that sentencing based on instinctive synthesis would not be in conformity with the Sentencing Act, in particular s 8(e) (consistency) and s 31 (the duty to give reasons).

[16] Current usage of “starting point” (ie as the sentence which appropriately reflects the intrinsic seriousness of the offending) has only become reasonably settled in the last five years or so. Previously, the expression was used in different ways, for instance as:

- (a) A sentence which was broadly appropriate for offending of the type (ie by reference to the charge) and which thus required adjustment for aggravating and mitigating features (whether intrinsic to the offending or personal to the offender);
- (b) A sentence which reflected the intrinsic seriousness of the offence and any aggravating factors personal to the offender; and
- (c) A sentence which reflected all relevant considerations other than a plea of guilty.

There are some categories of offence where it is difficult to exclude the relevance of prior convictions from the starting point assessment. Such offences obviously include instances where prior offending is, by statute, relevant to the maximum sentence (eg driving while disqualified and blood and breath alcohol offences). As well, prior convictions are treated as relevant to the assessment of the starting point for burglary, see *Senior v Police*²⁷ and *R v Lowe*.²⁸

²⁶ *Makarjian v The Queen* [2005] HCA 25, 228 CLR 357.

²⁷ *Senior v Police* (2000) 18 CRNZ 340 (HC).

²⁸ *R v Lowe* CA62/05, 4 July 2005.

Statutory sentencing guidelines

[17] The mechanism of a sentence appeal does not provide an ideal process for establishing guidance which goes beyond the facts of the case at hand. In the present case we have attempted to respond to this latter problem by the appointment of Helen Aikman QC as counsel to assist the Court. We are very grateful to her for the broad range of material which she put to us. But we remain at something of a disadvantage in that we cannot have resort to techniques (such as the issuing of exposure drafts and consultation) which are used when broadly comparable exercises are carried out by others.

[18] To address these (and no doubt other) difficulties associated with the judicial development of sentencing guidelines, the United Kingdom Parliament sought initially to improve the process by establishing the Sentencing Advisory Panel which provided advice to the Court of Appeal. In 2004 it established the Sentencing Guidelines Council which, for the moment, still works alongside the Sentencing Advisory Panel, and which develops and promulgates sentencing guidelines. The Sentencing Advisory Panel and the Sentencing Guidelines Council will shortly be replaced by the new Sentencing Council for England and Wales, to be established under the Coroners and Justice Act 2009 (UK). The guidelines presently issued by the Sentencing Guidelines Council are very largely based around existing sentencing practice but the way in which they are developed allows for a wide range of public consultation. Because sentencing practice in England and Wales is very similar to our practice, the work of the Sentencing Guidelines Council has been influential in the way in which this Court deals with sentencing issues.

[19] A broadly similar system was proposed for New Zealand in the Sentencing Council Act 2007. The Sentencing Council provided for in that statute has not, in fact, been set up and is unlikely to be. But, ahead of its intended creation, a Sentencing Establishment Unit (SEU) which operated under the aegis of the Law Commission prepared a set of draft sentencing guidelines. As might be expected, these draft guidelines drew heavily from existing sentencing practice in New Zealand and were influenced by English sentencing guidelines. They were, however, intended to cover a much broader range of offending than the current

New Zealand Court of Appeal guideline cases. As we have already noted, the *Taueki* methodology was developed in relation to cases where the primary question is the length of the prison sentence. It is not particularly well suited to making decisions in cases on or below the custody threshold. For this reason, the sentencing methodology proposed by the SEU (which was intended to be of universal application) differed appreciably from the *Taueki* methodology. This means that some care is required in any assessment of what was proposed by the SEU and its potential applicability in the current sentencing environment.

[20] What is primarily important from our point of view is that the sexual offence guideline developed by the Sentencing Guidelines Council and the draft equivalent prepared by the SEU have been the subject of considerable consultation with interested parties. As this consultation is reasonably recent, it does provide us with rather more information than would ordinarily be available to the Court in a guidelines case.

R v A

[21] In order to put *R v A* in context, it is necessary to refer first to *R v Clark*.²⁹ There, and following English practice as represented by *R v Billam*,³⁰ the Court took the view that “a figure of five years should be taken as a starting point in a contested case”.³¹ The Court went on:³²

Aggravating features can include additional violence or indignities, acting in concert with other offenders, the youth or age of the victim, intrusion into a home, kidnapping, the use of weapons, prolonged abuse. That list is not meant to be exhaustive. ... Mitigating features can include a guilty plea, especially if it comes early and spares the complainant an ordeal, The youth of the rapist can also be some extenuation, subject to the need to protect the public

[22] So that case established a five year starting point for rape in the context where the expression “starting point” had the meaning explained in [16](a) above.

²⁹ *R v Clark* [1987] 1 NZLR 380 (CA).

³⁰ *R v Billam* [1986] 1 WLR 349 (CA).

³¹ At 383.

³² At 383.

[23] *Clark* was decided when the maximum penalty for rape was 14 years imprisonment. With effect from 1 September 1993, the penalty for sexual violation was increased to 20 years. The impact of the increases in maximum penalty on the appropriate starting point was reviewed by this Court in *R v A*.

[24] In *R v A* the appellant had pleaded guilty to charges of sexual violation, threatening to kill the victim, and assaulting an eight year old child. He was sentenced to nine years imprisonment, a sentence arrived at by the Judge taking a starting point of eight years, allowing three years for aggravating circumstances (the presence of a knife, with threat to kill, physical violence going beyond what was intrinsic to the offence, the presence of the child, and violence towards the child). He then reduced the sentence by two years to allow for early guilty pleas. The offender appealed to this Court against his sentence.

[25] In its judgment on the sentence appeal, the Court referred to *Clark* and noted that *Billam* was still the leading guideline case in England. The Court also observed that it must necessarily have regard to the increase in maximum penalties (referring, in this context, to *R v Spartalis*³³). After discussing the then current sentencing practice for rape in what was described as the “spirit of the recent legislative changes” the Court went on:³⁴

We think ... that in the light of the judicial experience since *R v Clark* and the knowledge of what has transpired that is to be attributed to Parliament, it should now be said that eight years is the starting point in a contested rape case.

While eight years should be the starting point, it is not necessarily the norm. Regrettably there may be seriously aggravating features, as in the present case. The cases of *Clark* and *Billam* illustrate, non-exhaustively, what some of these may be. See also, for instance, gang rape cases and what was said and done about one of them in *R v Misitea* [1987] 2 NZLR 257. There, in a case of a very bad gang rape, it was said by this Court at p 266 that, if persons shown to have been ringleaders had been convicted, sentences at or close to the then maximum of 14 years’ imprisonment might very well have been appropriate. Under the new regime the maximum of 20 years would have to be considered.

On the other hand there may be features in a particular case justifying going below, possibly even well below, the eight year starting point. Some such cases are listed in *Billam* and *Clark*. Another illustration, depending always on the particular circumstances, may sometimes occur when consent to

³³ *R v Spartalis* [1979] 2 NZLR 265 (CA).

³⁴ At 131-132.

intercourse is refused after a degree of consensual sexual stimulation. An extreme example is *R v Brookes* (1992) 14 Cr App R (S) 496, where a sentence of three years for rape was upheld on the basis that the accused was not aware of the refusal of consent until the act of intercourse had begun. The man's persistence in such cases is criminal but some allowance for the special facts may be made in sentencing.

The present judgment therefore signals an increase in the starting point for rape sentencing, and so probably in the average length of rape sentences, but is not intended to fetter sentencing Judges in assessing the gravity of particular cases. In the end, almost everything turns on the facts of the particular case. It is part of the judicial responsibility to weigh these.

(Emphasis added.)

[26] *R v A* was thus an updating of *Clark* and the expression "starting point" was used in the same sense. Also of relevance is the heavy reliance placed on the English case, *Billam*.

Problems with *R v A*

[27] As is apparent, the *R v A* approach uses the expression "starting point" in a way which is not consistent with the *Taueki* methodology. This, in itself, is of no great moment providing that counsel and the judge appreciate that fact. But it can be confusing. More importantly, the *Taueki* methodology has significant advantages over the sentencing methodology which is reflected in *Clark* and *R v A*. In particular:

- (a) The *Taueki* methodology encourages sentencing which is fairly calibrated to offender culpability and facilitates reasonable consistency of sentencing response to the full range of offender culpability.
- (b) In contradistinction *R v A* identifies a single starting point and thus contemplates a wide range of necessarily impressionistic adjustments for aggravating and mitigating factors. So it provides comparatively little helpful guidance and does not, in itself, provide a mechanism for the consistent treatment of recurrent fact patterns.

[28] There are other, and to some extent related, problems with *R v A*:

- (a) While the eight year starting point in *R v A* was intended to be capable of adjustment down for mitigating factors intrinsic to the offence – and it is possible to find cases where starting points of less than eight years have been adopted in practice, eight years has been treated as if it were the minimum available starting point, something which the Court plainly had not intended.
- (b) Sentencing outcomes tend to be closely clustered around eight year starting points. This means that sentencing for rape tends not to be closely calibrated to offender culpability.
- (c) The *R v A* guideline provides comparatively little assistance in relation to sexual violation by unlawful sexual connection.

New guidelines for rape and sexual violation by unlawful sexual connection

[29] As is apparent from what we have said, the starting point approach adopted in *R v A* requires revision. In accordance with the *Tauaki* methodology, this requires us to identify bands which, at the low end must specify what will look like a minimum starting point. We emphasise that the object of the present exercise is to provide guidance for sentencing judges.

[30] Average sentence lengths for rape have been increasing. For instance in 1996 (shortly after *R v A* was decided and the maximum penalty was increased), the average length of sentence was 87 months, whereas by 2005 the average sentence was 99 months.

[31] We were taken to a broad range of material as to overall sentencing patterns in other jurisdictions. Although the definitions of offending and associated maximum sentences make comparisons difficult, New Zealand's sentencing for sexual offending is significantly more severe than corresponding sentencing in Canada. Our eight year starting point (used, as it has been normally as a minimum) tends to result in distinctly longer terms of imprisonment than sentencing in England

and Wales for offending without any aggravating features, see *R v Millberry*³⁵ and the Sentencing Guidelines Council's *Definitive Sentencing Guideline - Sexual Offences Act 2003*.³⁶ Australian sentencing patterns vary from jurisdiction to jurisdiction, but on the whole, sentences for rape at the lower end of the culpability continuum, appear to be rather less severe than in New Zealand.

[32] We were not taken to any material that throws particular light on public attitudes in New Zealand on current rape sentencing levels generally. A recent study by the Ministry of Women's Affairs suggests that sentencing severity is not, itself, a primary consideration for rape victims.³⁷ There has also been some concern about the eight year starting point for rape which emerges from the SEU's consultation in relation to its proposed sexual violation guideline.³⁸

A common theme in consultation feedback was concern that the eight-year starting point for a contested rape was preventing offenders being held accountable for their offending at the lowest end of culpability. This concern included that knowledge of the likely penalty for cases at the lowest end was inhibiting victims from reporting an offence (particularly when the rape occurred in the context of a prior relationship) and reducing the likelihood of conviction (whether through a jury trial or otherwise). The [SEU] also considered that an 8-year starting point for cases at the lowest end of culpability was too high and that some reduction was required.

[33] We anticipate that under the reformulated guidelines, some offenders (particularly those whose offending was not characterised by aggravating features) may receive lesser sentences than would be imposed under the current practice, while others will receive longer sentences. That is an intended effect because the objective is to ensure properly graduated sentencing and avoid the current clustering of sentences around the eight-year mark. Overall sentencing levels should not change appreciably.

³⁵ *R v Millberry* [2002] EWCA Crim 289, [2003] 1 WLR 546.

³⁶ Sentencing Guidelines Council *Definitive Sentencing Guideline - Sexual Offences Act 2003* (Sentencing Guidelines Secretariat, April 2007).

³⁷ Ministry of Women's Affairs *Restoring Soul: Effective Interventions for Adult Victim Survivors of Sexual Violence* (Wellington, October 2009).

³⁸ Sentencing Establishment Unit *Explanatory Note: Sexual Violation* (Draft – July 2008) at [26].

Culpability assessment factors

[34] Before setting out the culpability assessment factors, we make two general observations.

[35] First, as this Court said in *Taueki*,³⁹ the “first point of reference” for the sentencing Judge is the Sentencing Act. Many of the requirements of the Act are mandatory and this judgment does not affect those requirements. For example, s 9 of the Act sets out a number of aggravating and mitigating factors which must be taken into account. That said, as noted in *Taueki*,⁴⁰ the guidelines set out in this judgment will provide direction in the manner of application of the requirements of the Sentencing Act.

[36] Secondly, given the wide variety of circumstances that may be encompassed by offending in this area, it is not possible to provide an exhaustive list of all the factors that may contribute to the culpability of an offender. With that caveat, in the discussion which follows we draw on various factors that have been treated as relevant in the authorities and on the approach taken in the SEU and United Kingdom guidelines. We group the various factors in a way that is intended to provide guidance to sentencing Judges. However, it is trite but important to emphasise that what is required is an evaluation of all the circumstances. Listing relevant factors and setting out bands in the way we have done does not remove the need for judgement. A mechanistic approach is not appropriate.

Planning and premeditation

[37] The degree of planning and premeditation reflects criminality (s 9(1)(i) of the Sentencing Act is to the same effect). Sexual violation of an impulsive nature, although still serious, will generally be less so than that involving grooming of a child or young person, taking steps to get a victim alone, giving the victim alcohol or drugs with a view to offending, and other predatory behaviour. As the SEU draft guidelines note, offenders who show predatory sexual behaviour may be more likely

³⁹ At [13].

⁴⁰ At [13].

to offend in an opportunistic manner. They should not be treated as lacking premeditation.

Violence, detention and home invasion

[38] There is violence inherent in any act of sexual violation. There will usually also be some associated violence, for example, pushing or pulling a victim to the ground and holding him or her down. Where the associated violence is more than mild, this is another factor which increases culpability. Further, it is necessary to assess the seriousness of the overall level of violence, whether inherent in the act of sexual violation or associated with it. The more serious the overall level of violence, the more serious the offending.

[39] The reference to violence also encompasses threats of violence or other harm to the victim and to others, the presence and use of weapons and other forms of intimidation designed to assert control or to prevent a victim from reporting the offending. Section 9(1)(a) of the Sentencing Act similarly refers to both actual or threatened violence or the actual or threatened use of a weapon.

[40] An offender may abduct or detain the victim to facilitate the offending conduct. As with violence, a level of detention is inherent in sexual offending of this nature because the victim is not free to leave. But, where the sexual violation involves detention or abduction beyond that, this too increases the seriousness of the offending. Seriousness increases as the length of detention increases.

[41] Where the offender breaks into the victim's home or is unlawfully in the home, that also increases the seriousness of the offending as s 9(1)(b) of the Sentencing Act provides.

Vulnerability of victim

[42] Section 9(1)(g) of the Sentencing Act applies. The section treats as an aggravating factor the vulnerability of the victim because of age or health or any other factor known to the offender. The United Kingdom guidelines refer to extreme

youth or old age of the victim as increasing the seriousness of the offending and also suggest that offending will be more serious the younger the child and the greater the age gap between the victim and the offender.⁴¹ Disparity in age between the victim and the offender may well be a factor in assessing the extent of vulnerability.

[43] The other situations in which a victim may be considered vulnerable are varied: mental impairment or physical frailty are two examples, a victim who is the subject of a protection order to protect him or her from the offender is another.

Harm to the victim

[44] Harm is inherent in the offending. The more harmful the offending, the more serious it is. Section 9(1)(d) of the Sentencing Act applies. Physical harm, for example, cuts and bruising, are indications that the offending is more serious. Similarly, if the offending involves unprotected sex with the risk of pregnancy or infection or if it has those effects these factors indicate more serious offending. However, this is not to downplay the psychological and other non-physical harm, for example, escalation of psychological problems and restrictions on the ability to go about the victim's daily life. The impact on others, such as children, other family members or those providing care and support to the victim is also relevant.

Multiple offenders

[45] The fact that the violation involves more than one offender acting together is a factor increasing culpability. In discussing offending more generally, the United Kingdom guidelines express this as an indication that the offending will have a more than usually serious degree of harm.⁴² The role and extent of participation of the various offenders will of course be relevant in assessing an individual's culpability.⁴³

[46] As the SEU draft guidelines suggest, gang rape may fall within the highest rape band despite the absence of other aggravating factors.

⁴¹ At [2.7] and [2.8].

⁴² At [1.20].

⁴³ *Taueki* at [42].

Scale of offending

[47] More than one incident or extended abuse over a prolonged period of time is more serious as is repeated rape or sexual violation and associated degradation or indignities. Examples of degradation include videotaping or photographing the offending and offending against the victim whilst others are present. Cruelty or callousness also make the offending more serious (s 9(1)(e) of the Sentencing Act includes “particular cruelty” as an aggravating factor).

[48] Offending against multiple victims is another aspect which increases the culpability of the offender. The Crown submits that if there are multiple victims this should lead to a departure from the guidelines. We agree with the Crown submission that there is a risk that including such offending within the guidelines may not give adequate recognition to the harm caused to each victim. However, this aspect can be addressed in two ways. First, by the recognition that prolonged offending involving multiple victims particularly in the familial context warrants higher starting points in rape band four. Secondly, by application of the provisions in the Sentencing Act relating to cumulative and concurrent sentences⁴⁴ and the totality principle.⁴⁵ In that context we note that where there are multiple victims of offending (particularly in cases where there have been offences over a number of years against multiple victims), the 20-year maximum for one offence is not the maximum available sentence able to be imposed for the series of offending.

[49] On the other hand, a realistic view is to be taken where a number of offences are committed as part and parcel of what is, in substance, a single incident. Offending in one case involving indecent assaults followed by sexual violation by rape may be no more serious than offending in another case in which the only offence committed is sexual violation by rape. What is required is a common sense approach to overall culpability.

⁴⁴ Sections 83 and 84.

⁴⁵ Section 85; *Taueki* at [46].

Breach of trust

[50] Breach of trust is recognised in s 9(1)(f) of the Sentencing Act as a factor which increases the culpability of the offender. Offending within the familial relationship involves a breach of trust and offending by a parent against his or her child is particularly serious. Other relationships of trust may arise where a person has assumed some responsibility in relation to the victim, for example, the neighbour who regularly babysits the child or the school sports coach.

Hate crime

[51] Ms Aikman submits that hate crimes against specific ethnic, religious or sexual groups may well warrant specific mention in the guidelines as a factor increasing seriousness. We agree because these matters can be a factor in sexual crime and are recognised in s 9(1)(h) of the Sentencing Act as an aggravating factor.

Degree of violation

[52] As the SEU draft guidelines suggest, seriousness increases as the degree of violation increases, for example, use of a finger as opposed to a fist, or very brief penetration as opposed to a lengthy assault. Further, the more force involved in the actual violation the more serious the offending will be.

Mistaken belief in consent

[53] There is authority for the proposition that to commit rape under a mistaken but unreasonable belief that there was consent is not a mitigating factor: *R v Hill*.⁴⁶ Obviously, one of the purposes of the rape law reforms was to make violation where there is a mistaken and unreasonable belief in consent a crime. But it does not follow or undermine that objective to say that the offender's culpability may be different in such a case. The contrast is with the position where the offender knows there is no consent. As in other areas of the criminal law, negligent acts are seen as less serious than deliberate acts. If the belief is grossly unreasonable that will not

⁴⁶ *R v Hill* CA94/02, 21 October 2002.

avail the offender. There may, however, be cases where it is plain that the belief, while unreasonable, was genuine and this factor may reduce culpability.

Consensual sexual activity immediately before the offending

[54] Individuals have the right to choose the level of sexual activity in which they wish to participate and sexual partners are obliged to respect their wishes. In *R v A* however it was recognised that, depending on the circumstances, culpability may be diminished where there was consensual sexual activity immediately prior to the offending.

[55] The SEU draft guidelines follow the *R v A* approach in that they suggest that in limited circumstances seriousness may decrease where the offender and an adult victim have engaged in consensual sexual activity just before the offending. The SEU indicated that the relevance of this factor depends on the circumstances including the type of earlier consensual activity, the similarity to what comprised the sexual violation, and the timing. The SEU draft guidelines would also make it plain that the seriousness of the non-consensual act may outweigh any mitigating effect of the prior consensual activity.

[56] The United Kingdom guidelines take a similar approach noting first that all of the non-consensual offences:⁴⁷

... involve a high level of culpability on the part of the offender, since that person will have acted either deliberately without the victim's consent or without giving due consideration to whether the victim was able to or did, in fact, consent.

[57] The United Kingdom guidelines go on to say that planning an offence suggests a higher level of culpability than "an opportunistic or impulsive offence".⁴⁸

The guidelines continue:

2.20 In *Millberry*, the Court of Appeal established that the offender's culpability in a case of rape would be 'somewhat less' in cases where the victim had consented to sexual familiarity with the offender on the occasion in question than in cases where the offender had set out with the intention of committing rape.

⁴⁷ At [2.16].

⁴⁸ At [2.19].

2.21 Save in cases of breach of trust or grooming, an offender's culpability may be reduced if the offender and victim engaged in consensual sexual activity on the same occasion and immediately before the offence took place. Factors relevant to culpability in such circumstances include the type of consensual activity that occurred, similarity to what then occurs, and timing. However, the seriousness of the non-consensual act may overwhelm any other consideration.

[58] The Crown opposed the inclusion of this factor as a mitigating feature primarily on the ground that it undermined the non-consensual nature of the violation and so reduced its seriousness. Ms Aikman supported the United Kingdom and SEU approach essentially on the basis there may be a correlation with lack of premeditation.

[59] This is a difficult and controversial issue. On balance for the reason advanced by Ms Aikman we adopt the SEU's approach. This has been the law in New Zealand at least since *R v A*. Further, after extensive consultation, this is the position adopted by both the United Kingdom and the SEU.

[60] We do not envisage that this factor will have a great deal of impact in many cases. The focus is on assessing the seriousness of the offending. The sentencing judge has to proceed on the basis that the act constituting the offence was non-consensual or the belief in consent unreasonable. The totality of the behaviour comprising the sexual violation then has to be considered.

Offending against person with whom offender is in or has been in a relationship

[61] Culpability is not reduced by any sense of entitlement associated with a current or previous relationship. As this Court has said, there is no separate regime for sexual violation of a spouse or partner or those who have previously been in a relationship.⁴⁹

The views of the victim

[62] To what extent should sentencing be influenced by the views of the victim? This arises most acutely where the victim is seeking a lenient sentencing response.

⁴⁹ *R v Tikitiki* CA195/96, 10 August 1998; *R v H* (CA248/02), 31 October 2002 at [15].

[63] Where sexual offending occurs within a family or social group, victims are frequently under pressure either not to involve the criminal justice system or to withdraw from it. Defying this pressure can have adverse consequences in terms of family or social rifts and resulting ostracism. The circumstances of the present case, discussed at [140] below in which C has suffered as a result of the fracturing of the wider family, are not untypical. Unsurprisingly, judges often treat victims' calls for leniency with caution, seeing them as likely to be the result of illegitimate family or social pressure. Giving effect to such calls may lead to increased pressure on other victims. Judges are required to treat like cases alike. (See s 8(e) of the Sentencing Act 2002.)

[64] On the other hand, it is not easy to see why a judge should ignore a claim by victims that the harm suffered was minimal, at least where the judge is satisfied that illegitimate pressure has not been brought to bear on the victim. To do so would be patronising. As well, disregarding a victim's view in this context is likely to reduce the number of cases of rape which are prosecuted. No general rule can be set out. Judges will need to look at each case keeping in mind that some calls for leniency are a result of pressure. In addition, crime is a public wrong and so the victim's views are a factor that, like others, normally cannot overwhelm the outcome.

The proposed bands

[65] We accept the Crown submission that it is appropriate to have one set of bands where the lead offence is rape, penile penetration of the mouth or anus or violation involving objects and a separate set of bands for other cases of violation where another form of unlawful sexual connection is the lead offence. This equates with the SEU's approach. While the SEU draft guidelines do not contemplate two sets of bands, they provide one set of sentencing levels within each band for penile penetration of the mouth, genitalia or anus or use of objects and another for other forms of violation.

[66] We need to explain first the grouping of the various forms of violation together in the first set of bands and secondly the separation out of other forms of sexual violation.

[67] As to the first grouping, *R v A* applied to rape. In a number of subsequent cases the Court has made the point that there should be no difference in approach in sentencing to forced anal intercourse or to violation by the use of an object. In *R v Tawha* this Court said there was “no warrant” for any different response to forced anal intercourse than for rape.⁵⁰ A similar approach was applied to the use of an object in *R v Castles*.⁵¹ Observations along the same lines in relation to violation by anal penetration were made in *R v Tavinor*,⁵² *R v Tai*,⁵³ *R v K (CA425-426/98)*,⁵⁴ and *R v Baird*.⁵⁵ More recently, in *R v RHA (CA63/07)*⁵⁶ it was suggested that *R v A* might be expected to apply by analogy to sexual violation by anal intercourse and by the use of an object.

[68] In terms of the number of bands, one of the factors suggesting a generic sentencing response is that all forms of the offending proscribed in s 128 carry a maximum sentence of 20 years. Further, an approach which treats these forms of violation as broadly similar in the sentencing context is consistent with the purpose of the rape law reforms. That is because one of the objects of the rape law reform exercise was to recognise that any act of sexual violation involves, as this Court put it in *R v Accused CA265/88*, “an act of violation to the body of another involving at the very least an invasion of privacy and loss of personal dignity”.⁵⁷

[69] The United Kingdom guidelines in applying the starting points in *Millberry* to all non-consensual offences involving penetrations of the anus or vagina or penile penetration of the mouth, state that, “It is impossible to say that any one form of non-consensual penetration is inherently a more serious violation of the victim’s sexual autonomy than another”.⁵⁸

[70] In addition, as Ms Aikman submits, there are dangers in focusing on the mode of violation in isolation from other aggravating factors. The combination of factors is critical.

⁵⁰ *R v Tawha* CA396/02, 26 February 2003 at [19].

⁵¹ *R v Castles* CA105/02, 23 May 2002.

⁵² *R v Tavinor* CA313/94, 27 March 1995.

⁵³ *R v Tai* CA251/97, 22 July 1997.

⁵⁴ *R v K (CA425-426/98)*, 3 May 1999.

⁵⁵ *R v Baird* CA278/04, 25 November 2004.

⁵⁶ *R v RHA (CA63/07)* [2007] NZCA 301 at [19].

⁵⁷ *R v Accused (CA265/88)* [1989] 1 NZLR 643 at 653.

⁵⁸ At [2A.2].

[71] It has to be recognised, however, that one of the difficulties in terms of an appropriate sentencing response is that sexual violation covers such a variety of circumstances and so, inevitably, varying degrees of seriousness. It also has to be noted that sentencing patterns have tended to be lower for digital penetration and for some forms, at least, of oral sex.⁵⁹ The same approach is adopted in the United Kingdom where the guidelines provide for lower sentences for penetration by, for example, fingers or the tongue where no physical harm is sustained by the victim.

[72] To illustrate the approach taken, in *R v M* the Court did not set a tariff but suggested that starting points of between two and five years represented the range for digital penetration at that time.⁶⁰ This Court has subsequently made it plain that these starting points applied to a single violation by way of digital penetration: *R v K (CA558/08)*.⁶¹

[73] It would be wrong to suggest that violation by digital penetration and oral violation (not involving penile penetration of the mouth) is always less serious. This was recognised by this Court in *R v Singh*,⁶² a digital violation case, that involved a very violent attack on a stranger that caused significant injury. The Court observed that an argument based on the suggestion that anything which did not involve penile violation “will necessarily be treated less seriously cannot be tenable”.⁶³ The Court continued:⁶⁴

There will be situations where lesser penalties for non-penile penetration are appropriate, but any rigid categorisation is unhelpful. As the circumstances of this case clearly demonstrate, it is the total circumstances which need to be assessed and it is the combination of them which will indicate the appropriate sentencing levels.

[74] In *R v Tranter* the Court said that the two to five year *R v M* range should not be seen as limiting the options available to the sentencing Judge.⁶⁵ The indication was that a starting point of less than two years would, however, rarely be appropriate

⁵⁹ *R v RHA* at [19].

⁶⁰ *R v M* [2000] 2 NZLR 60 (CA) at [9].

⁶¹ *R v K (CA558/08)* [2009] NZCA 107.

⁶² *R v Singh* CA160/02, 26 November 2002.

⁶³ At [21].

⁶⁴ At [24].

⁶⁵ *R v Tranter* CA486/03, 14 June 2004 at [95].

while a starting point of more than five years “may well” be appropriate in more serious cases.⁶⁶

[75] Given the wide range of offending and of culpability we have concluded that it will prove more helpful to sentencing judges to separate out these categories. As will be seen, we accept the Crown submission that at the higher end of the spectrum, sentences for digital penetration or oral sex (not involving penile penetration of the mouth) should come close to those for penile penetration or penetration with an object.

[76] Equating penile penetration of the mouth with other forms of penetration is a change in sentencing practice. In that context, we note that in sentencing and at appellate levels there is often a lack of clarity as to what type of activity is included under the descriptor “oral sex”. On our approach, it will need to be clear what activity is involved.

[77] Offending of the sort covered by these bands, as we have indicated, can vary in seriousness in terms of both the offender’s culpability and the effects on the victim. However, each of the bands assumes a level of unlawful activity and that any form of sexual violation involves serious offending. The seriousness of this offending is reflected in both the 20-year maximum term of imprisonment and the presumption of imprisonment. Section 128B(2) of the Crimes Act 1961 provides that persons convicted of sexual violation must be sentenced to imprisonment unless, “having regard to the matters stated in subsection (3)” the court considers imprisonment should not be imposed. The matters in s 128B(3) are “(a) the particular circumstances” of the offender and “(b) the particular circumstances of the offence, including the nature of the conduct constituting it”.

[78] In a sentencing exercise, inevitably, degrees of seriousness have to be stated and the sentencing judge has to make that assessment. Where offending or an aspect of it (for example, an aggravating factor) properly falls at the lower end of the spectrum, the sentencing Judge needs to state that. Such an assessment does not mean the offending is not being treated as serious in itself; as with sentencing in all

⁶⁶ At [95].

areas, the process requires a court to make often invidious comparative assessments in relation to events which on any view are unacceptable and often disturbing.

[79] In considering the culpability of offending in a particular case, we emphasise that what is required is an evaluative exercise of judgment. We see judges as having a reasonable degree of latitude in this exercise. Sentencing judges will have a range of information before them and, after trial, will have more information than can be gleaned from the record. In assessing the gravity of offending judges must, of course, do this in a fact-specific way focusing on the culpability of the offender and the effect on the victim and, as a corollary, they must not reason by stereotype or seek to turn responsibility for the offending back on the victim, in terms of “she asked for it” or other excuses based on rape myths.⁶⁷

[80] These guidelines are to be applied in the same way regardless of the gender of the offender or of the victim. That reflects the gender-neutral definition of “sexual connection”.⁶⁸

[81] Because of the evaluative nature of the sentencing process, we have tried to maintain a degree of flexibility and as in *Tauaki*,⁶⁹ we have provided for some overlap in the margins of the bands.

[82] In terms of the very top of the highest band for the rape guidelines, we have taken the same approach as in *Tauaki* in that this band goes to the maximum term. In this respect, we are taking a different approach than that of the Crown and from Ms Aikman both of whom submitted that the top of the highest band should fall a little below the 20-year maximum. They saw taking a slightly lower end point as emphasising the ability to depart from the bands in extreme cases and to acknowledge the nature of the maximum sentence available whilst still reflecting the availability of that penalty to the sentencing judge. We agree that, from a practical perspective, it is more difficult to achieve consistency if the bands are very wide.

⁶⁷ See, for example, PS Rumney “Progress at a Price: The Construction of Non-Stranger Rape in the *Millberry* Sentencing Guidelines” (2003) 66 MLR 870 at 873-876 and 883-884; H Clark “Judging Rape: Public Attitudes and Sentencing” (ACSSA Newsletter 14 June 2007) at 20; and Mel Smith and Warren Young *Rape Study* (Department of Justice, Wellington, 1983) Volume 1 at 7–8.

⁶⁸ *R v L* [2006] 3 NZLR 29 (CA) at [36] and [39]; *R v Herbert* CA70/98, 21 May 1998; *R v A* [2003] 1 NZLR 1 (CA).

⁶⁹ *Tauaki* at [35](b).

However, there will be cases where the offending is within the most serious of cases or close to the most serious, in which case, in terms of s 8(c) and (d) of the Sentencing Act, the maximum term or a term near to the maximum should be imposed.

[83] There will also be cases which are so unusual that they will require a starting point outside of the guideline (ie, below the bottom of band one). Where a judge departs from the guidelines, reasons should be given for the departure.

[84] The proposed bands set out ranges of starting points, not final sentences. In the usual way, that starting point will be adjusted up or down to reflect circumstances personal to the offender. It is at this stage that mitigating factors such as youth, mental disability, and earlier good character will be taken into account. It is important that judges do not diminish this aspect of sentencing. Sentences should reflect personal factors. The point of the guidelines is not to impose a straitjacket on sentencing judges – quite the reverse. As explained in *Hessell*,⁷⁰ the reduction for a guilty plea should be made as the final step in the sentencing process after the otherwise appropriate sentence has been determined, ie, after other mitigating factors have been taken into account.

[85] One of the factors in determining placement within a band will be the role of the offender. There will be cases which fall within the most serious band even though the offender is only convicted as a party because of his or her role in inciting, for example, a particularly brutal or cruel rape.⁷¹

[86] Finally, the guidelines do not deal with preventive detention or with the imposition of minimum periods of imprisonment. Consideration of the imposition of these sentences is always a part of the sentencing exercise.⁷²

[87] With these factors in mind, we now describe the proposed sentencing bands for sexual violation.

⁷⁰ At [14].

⁷¹ *Mako* at [64].

⁷² *Tauaki* at [53] - [54].

The bands for sexual violation where the lead offence is rape, penile penetration of the mouth or anus or violation involving objects (the rape bands)

[88] We have followed the approach which is now familiar in cases like *Taueki* of setting out bands within which ranges of starting points are provided. As is apparent from our earlier discussion,⁷³ our role in these matters is not a legislative one but is rather to provide guidance for sentencing judges. In developing these proposed bands, we have, with the assistance of counsel surveyed existing case law on current sentencing patterns. We have also taken into account work done by the SEU following its consultative exercise. The objective, as we have said, is to assist in achieving consistency of approach and properly graduated sentences which reflect the overall culpability.

[89] The Crown proposed three bands for rape offending, with ranges as follows: band one, 6 to 9 years; band two, 8 to 14 years; and band three, 13 to 19 years. The ranges we have adopted are broadly consistent but we have included a fourth band to reflect the seriousness of particular types of offending.

[90] The bands for sexual violation where the lead offence is rape, penile penetration of the mouth or anus or violation involving objects are:

- (a) Rape band one: 6-8 years;
- (b) Rape band two: 7-13 years;
- (c) Rape band three: 12-18 years; and
- (d) Rape band four: 16-20 years.

[91] For each of the bands we include examples which may assist with the application of the culpability principles set out above: at [34] to [64]. The examples are a convenient way of providing illustrations of factual scenarios. The use of earlier cases is not a commentary on the appropriate sentencing outcome in those cases. It will generally not be helpful to revert back to the actual outcome in those

⁷³ At [29].

cases which may well involve a different sentencing regime or a different approach to starting points. Finally, we note that when we refer to the lower end of a band, that encompasses a range from the bottom to the middle of the band. Similarly, a reference to the higher end of the band incorporates a range from the middle to the top of the band.

[92] In the interests of brevity, we use “O” and “V” to describe the offender and the victim respectively in the examples.

Rape band one: 6-8 years

[93] This band will be appropriate for offending at the lower end of the spectrum; that is, offending where the aggravating features are either not present or present to a limited extent. Rape band one is not an appropriate band for offending where the level of violence is serious, the case involves an extended abduction, a victim who by reason of factors such as age (children or elderly persons) or mental or physical impairment is vulnerable or an offender acts in concert with others. Where none of the factors referred to above at [37] to [52] which increase the seriousness of the offending are present a starting point at the bottom end of this band would be appropriate. Where one or more of these factors is present to a low or moderate degree, a higher starting point within the band would be required.

EXAMPLES OF CASES WITH STARTING POINTS AT THE LOWER END OF RAPE BAND ONE:

- *R v Murphy*:⁷⁴ O had been drinking and came home at dawn to find a man and a woman whom he did not know asleep in his bed. O tried to wake them and asked them to leave. The male did so. The female, V, said she woke to find a man attempting to have sexual intercourse with her. She said she thought it was the man who left the room (the two having met the previous evening) and sexual intercourse took place. When V got up and could see the man in bed she realised it was O and left the room and made her complaint.
- *R v Pehi*:⁷⁵ O and V were in a relationship for about six months. After some kissing in the early hours one morning in V’s bedroom, O, by then extremely drunk, assaulted V and then engaged in non-consensual activity culminating in rape. V was annoyed with O but said she would have been willing nonetheless to have sex with O that night.

⁷⁴ *R v Murphy* CA310/96, 26 September 1996.

⁷⁵ *R v Pehi* CA86/06, 31 October 2006.

- *R v Hill*:⁷⁶ O and V became intoxicated whilst at a party. They shared a taxi ride home in the early hours of the morning and went to V's house where they drank more alcohol and talked. V asked O to leave after he said he loved her. She left the room and returned having changed into pyjama shorts and a top. O was still there and V told him again that he should leave. O pushed V into a cane basket causing minor scraping and bruising to V's thigh. O removed V's clothing and then penetrated her very briefly before stopping and apologising for his conduct.

[94] The encounters in these three cases were relatively brief and the degree of violation correspondingly brief. There was no additional violence in *Murphy* and although both *Pehi* and *Hill* involve a level of violence, it is relatively less serious than the degree of violence seen in many cases. In *Pehi* there is an element of prior consensual conduct although limited to some kissing. Given the aggravating factors referred to above were not present or were present to a very low degree, these cases are appropriately placed in the bottom of rape band one. To illustrate how the intensity of the factors is relevant, if the effect on the victim in *Hill* (bruising and scraping) had been more significant, the application of the guidelines would lead to placement higher up the band.

EXAMPLES OF CASES WITH STARTING POINTS AT THE HIGHER END OF RAPE BAND ONE:

- *R v Wirangi*:⁷⁷ O, 38, was a friend of 16 year-old V's family and was asked to look after the home of a relative in which V was staying. One night after watching videos with her, he exposed himself. V asked him to leave. She went to bed and was awoken by O removing her clothes. He raped her and then masturbated in front of her before leaving.
- *R v Stusky*:⁷⁸ O, male, 31, and V, a 16 year-old girl, were part of a group who had spent the afternoon drinking alcohol. They had met that day for the first time. O and V ended up alone together. O grabbed V, pushed her into the bushes, removed her lower clothing and despite her struggles, raped her.
- *R v H (CA248/02)*:⁷⁹ O and V, both adults, had been in a somewhat volatile relationship. V at one point had obtained a protection order. Early one morning, O rang V and said he wanted to come and talk to her. V declined but was later woken by V at the door. O pushed his way into the house and would not allow V to leave. He forced her on to a bed where he had oral sex and raped her. She eventually escaped.

⁷⁶ *R v Hill* CA94/02, 21 October 2002.

⁷⁷ *R v Wirangi* [2007] NZCA 25.

⁷⁸ *R v Stusky* [2009] NZCA 197.

⁷⁹ *R v H (CA248/02)*, 31 October 2002.

[95] The victim's youth and the age disparity are concerning features of the first two of these cases. In *Wirangi*, the other features taking the offending higher up band one than the three cases discussed at [93] are the breach of trust (the victim was effectively in his care) and the range of sexual activity. The features of concern in *Stusky* are the particular impact of the offending on the complainant and the element of abduction. *R v H (CA248/02)* would attract a higher starting point again within the band because of the more extensive nature of the sexual activity and the fact that the offending involved forced entry into the complainant's home.

[96] We have said that cases may fall outside the bottom of the band because of their unusual fact pattern and an illustration of a case in that category is:

- *R v Greaves*:⁸⁰ V, 17, invited O to her flat and they engaged in sexual intimacies. It was accepted that sexual intercourse was initially consensual. However, V changed her mind during the act and asked O to stop. He did not stop until the act of sexual intercourse was completed.

[97] Our comments at [78] about the need for sentencing judges to make an assessment of degrees of seriousness and explain that assessment will be particularly relevant to cases at the lower end of rape band one and those falling below this band.

Rape band two: 7-13 years

[98] By comparison with rape band one, this band is appropriate for a scale of offending and levels of violence and premeditation which are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.

EXAMPLES OF CASES WITH STARTING POINTS AT THE LOWER END OF RAPE BAND TWO

- *R v Dunick*:⁸¹ O, male, and V, female, had been friends for about six weeks. V invited O to her house. The visit was preceded by text messages with some sexual content. On O's arrival, V rejected his advances. O removed V's clothing before he digitally penetrated her, causing her pain, and then penetrated her with his penis. He made her kneel on the bed and again

⁸⁰ *R v Greaves* [1999] 1 Cr App R (S) 319 (CA).

⁸¹ *R v Dunick* [2008] NZCA 482.

penetrated her while slapping her buttocks. O made a number of derogatory sexual references to V. V eventually escaped.

- *R v Batt*:⁸² V, a 38 year old woman, was working as a night porter in a hotel. O stayed a night as a guest of the hotel. In the early hours of the morning, he got V into his room on a subterfuge, told her he had a knife and raped her. He then left the hotel by a fire escape.
- *R v Castles*:⁸³ V, male, and the seven male Os were classmates and attended a party together. V and some but not all of the Os were drinking heavily. After an earlier incident in which V was held down and his eyebrows shaved, V went to sleep in a bedroom. The Os found a broomstick, smeared Vicks VapoRub on it and then attempted to insert the broomstick into V's anus. They were initially unsuccessful and desisted when V almost woke. Thirty minutes later, the Os reentered the room and acting according to a plan, forced the broomstick 10cm into V's anus, causing considerable injury.
- *R v W (CA87/93)*:⁸⁴ O, male, offended against several boys, aged 11 to 16, over a ten year period. O was a boxing trainer/coach and invited boys he was training to stay overnight, taking the opportunity to offend against them. The majority of the offending involved masturbation of the Vs, followed by simulated intercourse to ejaculation. A single sexual violation charge consisted of mutual oral contact.
- *R v Anderson*:⁸⁵ O, 22, whilst intoxicated told his sister he wanted to do something like murder or rape. Later that evening O saw V, an 18 year-old female, walking home. O sexually propositioned her, and as she tried to walk away, he pulled her into an empty section. He covered her mouth with his hand and pushed her violently to the ground when she tried to get up. He masturbated, fondled her and then raped her. As he did so V started crying and told him she was the mother of a young child. He withdrew, apologised and asked her to give him a chance to run away before calling the police. She agreed and began to walk with O following behind her. She then ran home and sought assistance.
- *R v Stojanovich*:⁸⁶ O was the father of V's sibling. V, female, 17, moved in with him not long before the rape but appears to have viewed him as a father figure, calling him Dad. V was drinking heavily at the time. O invited V to accompany him while he was away on a business trip, buying her alcohol on the way. They went to a motel room with a queen and a single bed. O purchased more alcohol, which V drank. He invited her to lie on the queen bed, which she did in the apparent expectation he would sleep on the single. She fell asleep and woke to find O touching her breasts and fondling her. He then penetrated her with his fingers and went on to rape her from behind.

⁸² *R v Batt* [1987] 1 NZLR 760 (CA).

⁸³ *R v Castles* CA105/02, 23 May 2002.

⁸⁴ *R v W (CA87/93)*, 4 June 1993.

⁸⁵ *R v Anderson* CA199/05, 2 November 2005.

⁸⁶ *R v Stojanovich* [2009] NZCA 210.

- *R v Takiari*:⁸⁷ V, 19 and visually impaired, was walking home. O followed her. O grabbed V from behind and directed her into nearby school grounds. O kissed V and then told her to lie down. He lay on top of her, forced her legs apart and then began to remove her lower body clothing. O kissed V on the genital area over her underwear and then directed her to remove her underwear. O then performed oral sex on V. He fondled her breasts and then raped her. O also rubbed his penis between her buttocks and forced her to perform oral sex on him until he ejaculated. O then directed the complainant to get dressed, told her to go home and not to tell anyone.

[99] The cases of *Dunick* and *Batt* are on the cusp of rape bands one and two. In *Dunick* the combination of the increased level of violence, the range of sexual activity, and associated degradation in our view would take this offending into the bottom of rape band two rather than the top of rape band one. In terms of *Batt*, we see the threatened use of a knife and the associated trickery (indicating premeditation) to get the complainant alone with him as taking this offending into the lower end of rape band two.

[100] The aggravating features of *Castles* include persisting with the offending and the painful nature of the activity. In addition, the case involves a group attack.

[101] *R v W* involves a single incident of sexual violation but multiple victims, breach of trust, and an extensive period of offending. This combination places the offending into rape band two.

[102] The combination in *Anderson* of elements of premeditation and abduction, some, although comparatively limited, violence and the variety in the sexual activity would warrant a starting point at the lower end of rape band two. Similarly, it is the mix of an element of grooming, breach of trust, and various indecencies which would place the offending in *Stojanovich* within this band but, again, towards the lower end. The culpability of the offending in *Takiari* results from the combination of elements of abduction and of predatory behaviour, a vulnerable victim and the fact that she was forced to face various indecencies.

⁸⁷ *R v Takiari* [2007] NZCA 273.

- *R v Baird*:⁸⁸ O, male, and V, female, had been in an off and on relationship. Events turned sour one evening when O began to question V about a previous relationship. O then set upon V in a rage leaving V bruised, with cigarette burns and a finger needing splinting. O threatened to kill V, tied her to the bed after other degrading incidents, inserted a candle into her vagina and lit it, made her masturbate with the candle and then had anal sex with her.
- *R v Hannagan*:⁸⁹ V was O's de facto partner. O arrived home drunk one night. His sexual advances to V were rebuffed. He then backhanded V across the face, telling her "make sure you tell the cops it was a backhander, not a closed fist". O then punched V in the mouth and inflicted further violence on her as well as throwing her to the ground and threatening to kill her. O then forced his penis into V's mouth, had vaginal intercourse with her, and endeavoured to achieve anal penetration. This took place over two hours.
- *R v Morris*:⁹⁰ The offending took place over a period of one and a half to two hours in the early hours of the morning. V and O met after leaving a party. She agreed with his suggestion that they hitchhike into the city. They had one ride and were seeking another when O grabbed V, threw her into some bushes and then forced her to have anal intercourse. She was screaming with pain and struggling when O hit her around the head and became more violent. He performed a further act of intercourse while causing V to feel threatened by a piece of wood he was holding. He said he intended to keep her there all night. She managed to escape and was assisted by a passing motorist. V became pregnant as a result of the rapes, suffered psychological harm and also received bruising and marks to her body.
- *R v Palmer*:⁹¹ The male O "stalked" the female V over a period of about 18 months. In the early hours of one morning he broke into her house. V had taken medication and was in a deep sleep. O removed her pants and had sexual intercourse with her while she was still asleep. He then fondled her genitals and breasts. She awoke when he became over forceful and managed to flee. V required counselling after the offending, had sold her house, and had problems sleeping and suffered from nightmares.
- *R v V (CA442/94)*:⁹² O, 25, smashed a window to gain entry to a retirement home unit. He entered the bedroom and raped V, 77, threatening to kill her when she screamed.

⁸⁸ *R v Baird* CA278/04, 25 November 2004.

⁸⁹ *R v Hannagan* CA396/04, 9 June 2005.

⁹⁰ *R v Morris* [1991] 3 NZLR 641 (CA).

⁹¹ *R v Palmer* [2000] 1 NZLR 546 (CA).

⁹² *R v V (CA442/94)*, 23 May 1995.

[103] In *Baird* the relevant features are the level of violence, use of threats, and the nature of the sexual activity with the additional degrading aspects warranting higher placement in this band. The combination of violence, numerous incidents of sexual violation and effect on the victim place the offending in *Morris* at the high end of this band. *Hannagan* involved violence and threats. The multiple sexual violations add to the seriousness of the offending.

[104] In *Palmer* the level of premeditation when combined with the fact the offending involved home invasion and, as well, the effect on the victim put this offending into the top of rape band two. The particular vulnerability of the victim and the home invasion aspect puts *R v V* into rape band two.

Rape band three: 12-18 years

[105] This band will encompass offending accompanied by aggravating features at a, relatively speaking, serious level. Rape band three is appropriate for offending which involves two or more of the factors increasing culpability to a high degree, such as a particularly vulnerable victim and serious additional violence, or more than three of those factors to a moderate degree. Particularly cruel, callous or violent single episodes of offending involving rape will fall into this band as is demonstrated by *R v Singh*,⁹³ one of the examples set out below.

EXAMPLES OF CASES AT THE LOWER END OF RAPE BAND THREE

- *R v Amohanga*:⁹⁴ O, 17, rang V's doorbell one evening inquiring about an address. V, 77, answered in her nightgown and gave him the information. O then went to the back of the house, took a screwdriver from the garage and entered the house through a window. He beat V with the screwdriver, causing extensive bruising and a cracked rib, demanding money and threatening to kill her, then raped her. V was left with partial deafness in one ear.
- *R v Tipene*:⁹⁵ O entered the female and male Vs' tent with a knife. He woke the Vs, using the knife to threaten them and demand money. He forced his penis into the female victim's mouth. His threats were such she thought she was going to die. O then began to digitally penetrate her in a painful way

⁹³ *R v Singh* CA348/05, 26 April 2006.

⁹⁴ *R v Amohanga* [1989] 2 NZLR 308 (CA).

⁹⁵ *R v Tipene* [2009] NZCA 343.

before raping her, requiring her to perform oral sex on him again threatening her with the knife. He then had vaginal intercourse with her, forced her to perform oral sex on him while licking her vagina, and then masturbated into her mouth. He also required the female V to perform oral sex on her partner.

- *R v Singh*:⁹⁶ O violently assaulted a man and then forced him and a young woman to watch as he violently and repeatedly raped the man's mother over a period of more than twelve hours. This included at one stage loading a gun and putting it in her vagina.
- *R v Campbell*:⁹⁷ That case involved two sets of offending but, for current purposes, we refer to one of these. O, a 34 year-old male, invited V, a 14 year-old boy to his home, on a pretext. What followed included O performing fellatio and sodomising V as well as body piercing him. The next day O pushed V down on a bed and tattooed him around the genital area using a home tattoo gun. O then restrained V in a wardrobe using shackles and chains before striking V with a length of cylindrical rubber. He poured hot wax over V. After leaving him restrained in the wardrobe for an hour he sodomised him again. The offending continued on to the next night and included O holding a hot branding instrument against V resulting in a second degree burn. The following day O fellated and sodomised V again. Two days later O again pierced V's body and again beat him and sodomised him. The following day V managed to use the telephone and summoned help.

[106] Although similar in some respects to *R v V* the level of violence and the injuries sustained by the victim put *Amohanga* into this band. There are two victims in *Tipene*. The other relevant features of that case are the violence and threats, the painful penetration and the degradation associated with the female victim having to perform oral sex on her partner in the presence of the offender. As noted, the particularly cruel and callous nature of the offending in *Singh* put it into this band. In terms of *Campbell*, the length of time involved in the incident is significant. That feature, along with the violent and degrading nature of the offending plainly puts the offending in that case into rape band three.

EXAMPLES OF CASES AT THE HIGHER END OF RAPE BAND THREE

- *R v Roberts*:⁹⁸ V, aged three, was O's step-daughter. V was staying with her mother and O. O and V were waiting for her mother when she began crying. O swore at her, pushed her over causing cuts and bruising. He struck her eight or ten times, took down her pants and put his fingers into her vagina and "worked them round". Then he pushed the neck of a soft drink bottle

⁹⁶ *R v Singh* CA348/05, 26 April 2006.

⁹⁷ *R v Campbell* CA309/01, 26 November 2001.

⁹⁸ *R v Roberts* (1990) 6 CRNZ 370 (CA).

into her anus. After that, he inserted his penis into her vagina and moved her around on top of him. V suffered severe damage to the anus and genitals and was expected to have emotional problems requiring long-term rehabilitation.

- *R v Kahui*:⁹⁹ O forced his way into the female V's house on a pretext. He did not know V but had either been stalking her or had been inside her house before. O subdued V after a struggle. He threatened her with weapons and punched her about the head before beginning several hours of degrading sexual offending. O raped V on a number of occasions. He also performed oral sex on her and made her do the same to him. V was forced to use a vibrator on herself and O also digitally penetrated her. He made her dress up and watch a pornographic video. The offending was punctuated by various threats to kill and O took V with him when he left the house and forced her to stay with him until she managed to escape.

[107] In *Roberts*, the very young age of the victim together with the nature of the indignities forced upon her by someone who had responsibility for her care and the impact on her means this offending would attract a starting point towards the higher end of rape band three. The aggravating features of *Kahui* are the use of violence and threats, the fact home invasion and abduction were involved, the degrading nature and range of the sexual activity and an element, at least, of premeditation.

Rape band four: 16-20 years

[108] The same sorts of factors that place offending towards the higher end of rape band three will apply here but it is likely that the offending in rape band four will involve multiple offending over considerable periods of time rather than single instances of rape.

[109] Perhaps the paradigm case of offending within this band is that of repeated rapes of one or more family members over a period of years as is illustrated by the present case. Offending of this nature, especially that involving children and teenagers will attract starting points at the higher end of this band as indicated by the authorities discussed in *R v S (CA64/06)*¹⁰⁰ and *R v Proctor*.¹⁰¹ Gang or pack rape is another situation which is likely to fall within this band.

⁹⁹ *R v Kahui* [2008] NZCA 581.

¹⁰⁰ *R v S (CA64/06)*, [2007] NZCA 243.

¹⁰¹ *R v Proctor* [2007] NZCA 289.

- *R v N (CA88/05)*:¹⁰² Over two and a half years, O forced V, his step-daughter aged seven to nine years, to endure rape, sodomy, digital penetration and oral sexual connection. The offending came to light when V attempted to take her life.
- *R v Gordon*:¹⁰³ O, male, offended against the two female Vs, V1 (aged between eight and ten) and V2 (aged between eight and nine) whilst babysitting them. O raped V1 on two occasions, performed oral sex on her, forced her to perform oral sex on him and digitally penetrated her. O also rubbed his penis against her genitalia and exposed himself to her. O anally raped V2 twice, performed oral sex on her and forced her to perform oral sex on him, forced her to masturbate him and touched her breasts.
- *R v Martin*:¹⁰⁴ O's offending involved seven male Vs, aged eight to 22 over a 13 year period. The charges involved manual and oral stimulation and anal intercourse. O came into contact with his Vs through his involvement with various groups including Maori cultural groups and his positions as Scout leader and Minister of a local Church. He organised activities in which the boys stayed at his home and also took them camping.
- *R v Koroheke*:¹⁰⁵ The 5 male Os abducted the 15 year old female V from her house at 2 am, after luring V's partner from the house on a pretext. The Os took V to another house, where they jointly violated her over a two and a half hour period. The attack included forcing V to perform oral sex on the Os in turn while others stood around the bed watching and masturbating themselves, penetrating her with a hammer handle for a prolonged period, attempts at vaginal intercourse, rolling deodorant over her genitals, spitting on her and verbally abusing her and standing around her chanting "Sieg Heil" and barking like dogs.

[110] The case of *R v N (CA88/02)* could possibly be treated as falling within rape band three because there is one complainant but given the offending occurred over a period of years and the effect on the victim was severe it is better dealt with in this band. The same could be said for *Gordon* but the fact there are multiple victims puts it into rape band four. Both cases are characterised by a breach of trust of vulnerable victims and a wide range of offending. In *Martin* it is the combination of the period of the offending and number of victims which makes the offending serious. As well, in *Martin* there is the breach of trust.

¹⁰² *R v N (CA88/05)*, 23 November 2005.

¹⁰³ *R v Gordon* [2009] NZCA 145.

¹⁰⁴ *R v Martin* CA251/99, 12 October 1999.

¹⁰⁵ *R v Koroheke* CA189/01, 28 November 2001.

[111] In *Koroheke*, the planned abduction, high degree of degradation, youth of the complainant, and the active involvement of multiple offenders makes the offending both brutal and particularly humiliating and degrading.

EXAMPLES OF CASES AT THE HIGHER END OF RAPE BAND FOUR

- *R v E (CA433/04)*:¹⁰⁶ When O met his wife, she had a daughter V. The couple subsequently had four children. The wife and the other children were subjected to physical abuse by O over a number of years, and in the case of the children, for most of their lives. O began sexually offending against V1 when she was 11 years old and this culminated in regular rapes when she was aged between 13 and 16. O would physically and verbally abuse her if she protested. V1 became pregnant at age 15 and was forced to have an abortion.
- *R v P (CA176/04)*:¹⁰⁷ O offended against his two daughters. The offending against the eldest daughter, V1, occurred over a period of ten years commencing when she was eight. It began with O making her touch his penis, making her perform oral sex on him and digitally penetrating her. The offending progressed to frequent rapes in the last five years. The offending against the younger daughter, V2, involved an assault which occurred when she was eight years old.
- *R v T (CA445/03)*:¹⁰⁸ The offending related to O's young daughters. V1 was aged six or seven when the offending began. It began with indecent assaults and progressed to sexual violation and rape when she was 11 or 12 and continued until she was 19. O was sentenced on the basis he had groomed V1 from the outset. Some years after the offending against V1 ended, O obtained custody of V2 with the intent of repeating the process in relation to V2 which is what occurred. Both victims suffered lasting effects.

[112] These three cases (*R v E*, *R v P*, and *R v T*) share a combination of the sorts of factors which are unfortunately characteristic of this sort of offending. All of these cases involve sustained offending over a period and breach of trust of vulnerable victims with unsurprisingly severe impact on the victims.

The bands for other violation where unlawful sexual connection is the lead offence (the USC bands)

[113] For other violation where unlawful sexual connection is the lead offence the bands are:

¹⁰⁶ *R v E (CA433/04)*, 6 April 2005.

¹⁰⁷ *R v P (CA176/04)*, 7 October 2004.

¹⁰⁸ *R v T (CA445/03)*, 13 May 2004.

- (a) USC band one: 2-5 years;
- (b) USC band two: 4-10 years; and
- (c) USC band three: 9-18 years.

USC band one: 2-5 years

[114] This USC band will cover offending at the lower end of the spectrum. Where none of the factors referred to above which increase the seriousness of the offending is present a starting point at the bottom end of this band would be appropriate. Where one or more of these factors is present to a low or moderate degree, a starting point closer to the top of the band would be required.

EXAMPLES OF CASES AT THE LOWER END OF USC BAND ONE

- *R v McNicholl*:¹⁰⁹ O, male, and V, female, were friends and neighbours. V, O and V's mother had been out together. V's mother dropped the other two at V's flat. V was intoxicated and eventually went to sleep. When she woke up, O had removed her trousers and her underpants and had his face near her pubic area and his finger in her vagina. She got up and left the room. She told a flatmate and the flatmate saw that O left the flat.
- *R v Neroj*:¹¹⁰ O, male, 36, went to V's house for dinner. V, female, 15, became uncomfortable when O started play fighting with her friend. O followed V out of the room, hugged and kissed her and touched her breasts. He held her on the ground but she got away so he pursued her around the house, put \$20 in her bra and tried to put his hands down her pants. He then forced her hand into her pants, put his hand inside her pants and briefly put his fingers into her vagina.
- *R v Fisher*:¹¹¹ O, male, was at the male V's flat for a party. All were heavily intoxicated. V retired to bed with his partner, leaving O sleeping in lounge. V woke to find O had removed V's shorts and underpants and was sucking V's penis. O left when V woke.

[115] In terms of the guidelines, the relative brevity, lack of violence and limited nature of the offending in *McNicholl* put it within USC band one. The same features characterise *Neroj* and *Fisher*.

¹⁰⁹ *R v McNicholl* CA176/02, 29 October 2002.

¹¹⁰ *R v Neroj* [2008] NZCA 184.

¹¹¹ *R v Fisher* CA305/91, 18 November 1991.

- *R v MacKenzie*:¹¹² O licked the anus of an eight year old girl in his care. He was interrupted by the phone, threatened V with a jug cord for putting her clothes back on, and then penetrated her anus with his tongue.
- *R v M (CA459/99)*:¹¹³ V, a 15 year-old girl, was a friend of the male O's daughter and was staying with O on a weekend sleepover. O, V and O's daughter went out drinking. V fell asleep on couch and woke to find O touching her genitals and kissing her. V pretended to be asleep but crossed her legs in an attempt to stop him. O opened her legs and inserted his finger. He desisted when V made a show of waking up but asked if he could have sex with her. She refused.
- *R v Jackson*:¹¹⁴ O, a male psychiatric nurse offended against a female patient. Hugs and kissing led to the insertion of O's fingers into V's vagina and O ejaculating onto V.
- *R v Kincaid*:¹¹⁵ V, 15, worked as a cleaner at O's factory during the school holidays. O, 51, touched V's breasts one afternoon while she was standing on a chair painting a wall. V complained to her parents at the time, but stayed in the job because she needed the money. Three weeks later, when V and O were the last people left at work, O grabbed her, and started kissing and touching her breasts and genitalia. He said if she told anyone, she would lose her job. He took her to another part of the building, removed her pants and his own before digitally penetrating her for about two minutes and then unsuccessfully attempting penile penetration.

[116] In the case of *MacKenzie* there are two incidents but both are relatively brief. The additional feature of breach of trust warrants its placement a little higher up the band. *R v M* is similar and the offender persists despite the victim's attempts to stop him. In *Jackson*, there is a breach of the trust of a vulnerable victim and the additional degradation of the offender ejaculating on the victim. Finally, *Kincaid* could be treated as either at the top of this band or the lower end of USC band two because of the age disparity between the victim and the offender, the use of a threat, and the fact the incidents occur on more than one occasion.

¹¹² *R v MacKenzie* [2007] NZCA 72.

¹¹³ *R v M (CA459/99)* [2000] 2 NZLR 60.

¹¹⁴ *R v Jackson* (1997) 14 CRNZ 573 (CA).

¹¹⁵ *R v Kincaid* [1991] 2 NZLR 1 (CA).

USC band two: 4-10 years

[117] 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.

EXAMPLES OF CASES AT THE LOWER END OF USC BAND TWO

- *R v C (CA43/98)*:¹¹⁶ V, 11, was in effect O's step-daughter. She was entrusted to his care for a few days. O, 20, induced V to masturbate him, masturbated her and digitally penetrated her.
- *R v Bell*:¹¹⁷ V, a nine year-old girl, assisted the male O with his housekeeping in exchange for money. A number of indecent assaults took place over six months, culminating in two instances of sexual violation on the same occasion. The sexual violations involved digital penetration and licking V's genitalia. The indecencies included rubbing V's vagina through her clothing and licking and sucking her breasts. O also took indecent photographs of V and exposed himself to her and asked her to touch his penis.
- *R v Alletson*:¹¹⁸ The offending related to two female Vs who were O's neighbours. The offending occurred between 2003 and 2005 over which period O was aged between 15 and 17. V1 and V2 used to play games in a bush area belonging to O's parents. O would engineer opportunities to be with each V and the offending happened in either the bush or a disused sauna. V1 was between eight and ten years old at the time. O put his hand down her pants touching her genitalia and lay on her simulating intercourse as well as sexually violating her by digital penetration. V2, then aged six, was indecently assaulted by touching her breast and buttocks and that continued until she was eight. O also fondled her genitalia, rubbed his finger between her buttocks and induced her to fondle his penis.

[118] *R v C* and *Bell* are both at the cusp of USC bands one and two. In *R v C*, it is the breach of trust of a child and the nature of the sexual activity which puts it into USC band two. For *Bell*, the period of offending and the added indignity of the indecent photographs would put this offending into this band. Finally, in *Alletson* the two victims, the period of the offending and the element of premeditation associated with the variety of types of sexual activity take this offending out of USC band one.

¹¹⁶ *R v C (CA43/98)*, 28 May 1998.

¹¹⁷ *R v Bell* CA393/05, 28 April 2006.

¹¹⁸ *R v Alletson* [2009] NZCA 205.

- *R v Harris*:¹¹⁹ O, 47, male, offended against a 12 year old boy for around 18 months when they both resided at a caravan park. The offending involved playing with and sucking V's penis and attempting to anally penetrate V, although he did not persist with this when V pulled away. V was left severely traumatised.
- *R v Stewart*:¹²⁰ The two female Os invited V, a female acquaintance, to their house for the evening. Cannabis was smoked during the evening and V lay down on the floor where she was given a blanket and pillow by O2. O1 lay down beside V and began hugging her and touching her breasts. V objected but O1 pushed her and V struck her head. V then went to the bathroom. Returning to a dark room, she lay down again but later woke to find O1 touching her breasts. O1 bit and scratched V before threatening to kill her and kicking her in the knee and ribs. O1 then pulled down V's pants and penetrated her with her fingers and then her fist. O2 was kneeling beside V, urging O1 on.
- *R v Roach*:¹²¹ V was a relative of O's wife. O went to V's house to pick up some electronic equipment. After having a cup of coffee with V, O grabbed her and forced her down on the floor. She started screaming and he produced a pocket knife, threatening to kill her if she did not stop screaming. He took down her jeans and pants and digitally penetrated her which she found painful. He bit her wrist when she struggled. After further indecencies were inflicted, she persuaded him that if they went to her work, other sexual activity could follow. She was able to escape.
- *R v Patuwai*:¹²² O followed V and her friends when they left a pub. He took the same taxi van as she did and followed her when she got out. He dragged her across a road and pinned her against the wall, where she was violently digitally penetrated. He stopped when she begged for mercy, telling him she was pregnant. He took her blood stained shirt off her, giving her his shirt.

[119] In *Harris*, there is a large age disparity between the offender and the young victim and the duration of the offending is considerable. *Stewart* involves threats, some violence especially in the form of the assault, and offenders acting in concert. The second offender, who was convicted as a party, would receive a lesser sentence given her reduced role in the offending. In both *Roach* and *Patuwai*, the increased severity of the violence involved is a concerning feature. In *Roach*, there are also threats and degrading aspects. The second concerning aspect in *Patuwai* is the element of premeditation.

¹¹⁹ *R v Harris* CA320/93, 15 November 1993.

¹²⁰ *R v Stewart* CA515/05, 15 August 2006.

¹²¹ *R v Roach* CA375/89, 8 February 1990.

¹²² *R v Patuwai* CA199/02, 11 March 2003.

USC band three: 9-18 years

[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.

EXAMPLES OF CASES AT THE LOWER END OF USC BAND THREE

- *R v K (CA558/08)*:¹²³ O touched and penetrated his step-daughter's genitalia with his fingers and licked her genitalia. He did this on about 50 occasions over a two year period when V was aged nine to 10.
- *R v P (CA86/95)*:¹²⁴ O, 26, offended against three Vs aged 3, 4, and 5. V1 was boarding in O's home. On four occasions he removed her clothing and kissed her buttocks, anus and vagina. O was boarding with V2's family. He tried to remove her clothing but desisted and exposed himself to her when she objected. The offending against V3 occurred at a family barbecue. When O went off to a secluded area, V3 followed him, apparently without O's encouragement. O then pulled down her pants, touched her bottom and licked her vagina. He then rubbed his penis against her buttocks and genitalia.

[121] The placement of *R v K* in this band reflects the numerous occasions of offending and the breach of trust. In *R v P* the concerning features are the number of victims and their very young ages.

EXAMPLES OF CASES AT THE HIGHER END OF USC BAND THREE

- *R v H (CA101/06)*:¹²⁵ The offending involved 13 charges and eight female Vs over a 15 year period (1990–2005). The majority of the offending occurred when O babysat for families he met through church activities. The most serious charges involved O's own daughter, and commenced when she was six months old. O fondled her genitalia on at least 20 occasions, kissed her genitalia on other occasions and attempted digital penetration. He also placed his penis on V's exposed genitalia. The offending against the other victims, who ranged in age from four to 15 years, involved genital fondling, touching of breasts and digital penetration.

¹²³ *R v K (CA558/08)*, [2009] NZCA 107.

¹²⁴ *R v P (CA86/95)*, 10 August 1995.

¹²⁵ *R v H (CA101/06)*, 18 September 2006.

- *R v Grinder*:¹²⁶ O, male, offended against 13 children over a 25 year period. The Vs, aged four to 16 years, were both male and female. There were 24 charges, most representative. The historical nature of the offending meant O was charged with only one count of sexual violation (digital) however much of the conduct charged as indecent assault involved “oral contact”. It is not clear that this was non-penetrative. The other offending involved masturbating the male Vs, touching the breasts, genitalia and buttocks of the female Vs and self-masturbation in the presence of the Vs. The case does not give details of who the Vs were and how O came into contact with them.
- *R v Te Tauri*:¹²⁷ The offending involved three female Vs, aged three and a half to nine years, all children who were in daycare in the male O’s home. The most serious offending was against the three and a half year old. It continued for two and a half years. O touched her vagina, kissed and licked her vagina, made her hold his penis, and, wearing a condom, placed his penis between her thighs and simulated intercourse until he ejaculated. O admitted the kissing of the vagina occurred on at least 20 occasions, the licking on at least 10 and the simulated intercourse occurred 20 times.

[122] In *R v H*, the aggravating features of the offending are the victim impact; breach of trust particularly in relation to the offender’s own child; the vulnerability of the victims especially of the offender’s very young daughter; premeditation; and the sheer scale of the offending.

[123] The offender in *Grinder* was sentenced to preventive detention which makes the record of the case less helpful for present purposes. However, what is apparent is illustrative of the combination of factors and the levels of seriousness that will take a case into this band.

[124] Finally, with respect to *Te Tauri*, the aggravating features were the impact on the victims, the breach of trust, the range and period of charges reflected in their representative nature and the scale of the offending.

Starting date for application of the guidelines

[125] The content of this guideline does not differ significantly from what many sentencing judges have been doing in reliance on more recent appellate authority. The new guideline should be applied to all sentencing taking place after

¹²⁶ *R v Grinder* CA78/03, 26 August 2003.

¹²⁷ *R v Te Tauri* CA188/02, 15 July 2003.

31 March 2010. That was the approach this Court took in *Taueki*¹²⁸ and in *Hessell*.¹²⁹ To assist trial judges and counsel, a copy of this judgment is being emailed to all trial judges, Crown Solicitors, the New Zealand Law Society, and the Criminal Bar Association today.

[126] In those cases where sentencing indications have been given and relied on by defendants, sentencing judges should adhere to those indications rather than follow the guideline, unless the guideline yields a more favourable result than the indication.

[127] With respect to appeals filed relating to sentences imposed up to today's date, we shall continue to apply the law as set out in previous appellate authorities.

The case at hand

Overview

[128] AM faced charges alleging sexual offending against three girls (A, B and C). He pleaded guilty on arraignment to four representative counts:

- (a) Between 10 December 1999 and 30 September 2006 inducing A, a girl under 12 years, to do an indecent act upon him namely masturbation;
- (b) Between 10 December 1999 and 30 September 2006 sexually violating A (by connection between his penis and her mouth);
- (c) Between 10 December 1999 and 30 September 2006 attempting to sexually violate A by rape; and
- (d) Between 26 November 2004 and 25 November 2005 sexually violating B by sexual connection between his penis and her mouth.

¹²⁸ At [60].

¹²⁹ At [74].

He denied two further representative charges (covering the period between September 2004 and September 2006) in relation to a third girl, C, which alleged:

- (e) Sexual violation of C by unlawful sexual connection (between his penis and her anus); and
- (f) Sexual violation of C by rape.

On these counts he was tried and found guilty.

[129] He was subsequently sentenced (on 19 December 2008) by Judge McAuslan to a total of 15 years imprisonment. She did not impose a minimum period of imprisonment (MPI).

[130] AM has appealed against his sentence and the Solicitor-General seeks leave to appeal. Primarily in issue on the Solicitor-General's application is whether the Judge should have imposed an MPI.

The facts in more detail

[131] AM was born in 1950. So he was in his late forties when the offending started.

[132] He is the grandfather of the three victims. A and B lived in the same house as AM and C was a frequent visitor and often stayed over night. It was quite common for AM's grand-daughters to sleep in his room and often in his bed. Indeed sometimes more than one grand-daughter would be sleeping with him either in the same bed or at least in the same room.

[133] A started sleeping in the same room as AM in late 1999 when she was five years old. The offending against her lasted for some seven years. On most occasions this involved AM attempting to have vaginal sex with her. She was frequently forced to engage in oral sex with AM and on occasions to masturbate him (resulting in him ejaculating over her hands and body). Characteristically the offending occurred at night, especially weekends, when AM had been drinking. He

would require her to go into the bedroom with him when he arrived home. On occasions both A and C were required to sleep in AM's bed with him offending against the victims in each other's presence.

[134] B is A's sister and two years younger. The offending against her started in November 2004 (when she was eight) and carried on for a year. She was required to perform oral sex on AM on a number of occasions. This occurred in the presence of A and C on more than one occasion.

[135] C was sexually abused by AM for two years, between 2004 and 2006. The offending starting when she was nine and occurred when she visited AM and was required to sleep in his bed or on the floor. Often enough A was there too. The offending against her involved sexual violation by rape on around ten occasions and anal intercourse between five and ten times. During the course of the offending she struggled and attempted to push him off. She was threatened with a hiding if she told anyone.

The criminal process

[136] The investigative and trial process unfortunately took some time.

[137] AM was first interviewed on 24 October 2006 in relation to allegations made by A. There was a further interview on 22 November 2006 in relation to all three complainants. At the first interview AM denied all allegations of sexual misconduct but he made some limited admissions at the second interview. He was arrested and charged on 23 November 2006.

[138] His trial was originally to take place on 28 January 2008. Just before it was due to start, there was some discussion with his then counsel and the prosecutor as to the possibility of guilty pleas but nothing eventuated. In the end, the trial was put off until early August. Formal proposals as to guilty pleas did not surface until the week preceding the trial.

[139] The trial in relation to C involved a limited contest which came down to whether there was penetration, an issue which was resolved by the jury against AM.

Impact on the victims

[140] The legal proceeding caused deep divisions within AM's extended family. Presumably for this reason, victim impact statements in relation to A and B were not provided. C, on the other hand, did provide a victim impact statement in which she recorded her distress at being "singled out" from her cousins as being the victim who was not believed. She has also been affected adversely by loss of relationships associated with the fracturing of her extended family. As well, C has experienced nightmares, run away from home, and attempted self-harm. She has changed schools three times and has been absent frequently because she has been too scared to leave the house. She has displayed aggressive behaviour and on occasions has been involved in fighting at school. Her mother has expressed concern that C has acted and dressed in an inappropriately mature way for a 12-year old girl.

AM

[141] AM was brought up in circumstances of poverty and has had comparatively little formal education. He has, however, been in employment for most of his life and was described by those spoken to for the purposes of the pre-sentence report as being hard working. His employment history has tended to involve either manual work or the use of heavy equipment. We note that he accumulated 13 convictions between 1968 and 2007. The pattern of these convictions is indicative of some anti-social attitudes but none were serious enough to result in imprisonment or are worthy of particular comment in the present context.

[142] AM and his wife had nine children. At the time of the offending he and his wife were no longer living together for reasons which she attributes largely to alcohol abuse and associated verbal and low-key physical abuse. Despite AM's general denials of having a problem with alcohol, it seems likely enough that much of his offending, including the current offending, has been associated with drinking.

[143] AM did not seriously engage with the probation officer who prepared a pre-sentence report. He was, however, rather more forthcoming with a psychologist who concluded that he was at low to moderate risk of re-offending. This view was

informed by actuarial assessment using the Automated Sexual Recidivism Scale and Stable 2007.

[144] Some submissions were made to us (as they were to the sentencing Judge) about AM's health status. Nothing in the nature of medical evidence has been supplied. On the other hand, the pre-sentence report writer observed that "he did not appear to be of good health" and the psychologist noted:

At the time of interview [AM] said he was receiving medical attention for a painful condition in his left hip and pelvis, including Voltarin medication. He had received dental treatment by request and was on a vegetarian diet, which he said was due to difficulties in chewing hard food. His medical file confirmed these details.

[145] As well, a fellow inmate of AM felt moved to write a letter to the sentencing Judge in which he referred to AM as "elderly" and described him generally as being in ill health. All of this is at a fairly general and impressionistic level and, in the case of what the fellow inmate said, unverified. We nonetheless accept that AM's general health has been affected by his hard life, employment history and perhaps his drinking.

The sentencing remarks

[146] The Judge's general approach to the sentencing exercise is adequately captured from the following passage from her sentencing remarks:

[18] Taking everything into account, and accepting that the starting point for you in light of the authorities that bind this Court, but noting all of these cases do turn very much on their own particular effects, I am satisfied that the starting point for you is one of 17 years imprisonment on the lead offence which is one of rape. You are then entitled to credit, and the only significant credit that I consider you are entitled to is for the guilty pleas and acknowledgement of your behaviour, even if you have not acknowledged that it was unlawful. Based on that I am satisfied that the end sentence on the lead offence of rape is 15 years.

[19] I accept Mr Lawry's submission that in your particular case such a lengthy term of imprisonment could not be considered insufficient to denounce and deter your offending and given the other factors that he raised in his submission, I will accept that I should not impose a minimum period of imprisonment.

[20] Accordingly, on the representative rape charge where you were found guilty at trial, you are convicted and sentenced to 15 years imprisonment.

[21] On the representative charge of unlawful sexual connection where you were found guilty at trial, you are convicted and sentenced to 10 years imprisonment.

[22] On the two counts of sexual violation by unlawful sexual connection, where you pleaded guilty, you are convicted and sentenced to eight years imprisonment, on the count of attempted rape to 7 years imprisonment and on the count of inducing a girl under 12 years to do an indecent act you are convicted and sentenced to 5 years imprisonment.

[147] The reasons given by the Judge for not imposing an MPI (see [19]) are succinct and, in their reference to unspecified “other factors”, perhaps a little cryptic. Having regard to the Judge’s sentencing remarks as a whole, it appears that these factors were AM’s moderate to low risk of re-offending and, probably, what the Judge described (in [16]) as his “significant health issues, [his] background and the family support”. The reference to “significant health issues” is based on what was said in the pre-sentence report and, as such, was something of an overstatement. We have, however, already recorded that some of the other material before the Judge addressed AM’s health and she, of course, had seen him in person during his trial and the sentencing process.

The issues on appeal

[148] In the context of the case at hand, the head sentence imposed on AM is unimpeachable as Mr Lithgow QC realistically recognised.

[149] More problematic is the fact that the Judge did not impose an MPI under s 86 of the Sentencing Act. This is the basis of the application for leave to appeal by the Solicitor-General who maintains that an MPI of half the nominal sentence should have been imposed.

[150] In *R v Brown*¹³⁰ this Court considered in some detail the legislative history and purpose of s 86 as first enacted. Subsequently the section was amended extensively and now relevantly provides:

¹³⁰ *R v Brown* [2002] 3 NZLR 670.

86 Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment

(1) If a court sentences an offender to a determinate sentence of imprisonment of more than 2 years for a particular offence, it may, at the same time as it sentences the offender, order that the offender serve a minimum period of imprisonment in relation to that particular sentence.

(2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:—

- (a) holding the offender accountable for the harm done to the victim and the community by the offending:
- (b) denouncing the conduct in which the offender was involved:
- (c) deterring the offender or other persons from committing the same or a similar offence:
- (d) protecting the community from the offender.

[151] This section in its present iteration was considered by this Court in *Taueki* in the following passage:

[53] ... The Sentencing Act contemplates a two-stage process, involving the setting of the nominal (maximum) sentence as the first stage, and undertaking the exercise required by s 86 (where it is applicable) as the second stage (*Brown* at para [35]).

[54] That second stage itself requires a sentencing Judge to address two questions. The first is whether a minimum period of imprisonment should be imposed. If that question is answered affirmatively, it is then necessary to address the second question - how long should the minimum period be?

[55] The primary focus of the first question is the statutory test in s 86(2), as set out at para [52] above. As this Court recently noted in *R v Walsh* (CA 281/04, 19 May 2005) at para [25], the four factors referred to in s 86(2) are matters which correspond with four of the purposes of sentencing set out in s 7(1) (s 7(1)(a), (e), (f) and (g)). The question before the Court is whether serving one-third of the nominal sentence is insufficient for all or any of those four purposes. The Court must focus on those purposes when determining whether to impose a minimum period of imprisonment. The principles in s 8 and the aggravating and mitigating factors in s 9 are applicable only to the extent that they are relevant to those four purposes. For example, as the Court noted in *Walsh* at paras [26] - [28], a guilty plea may be relevant to the deterrence purpose (if the plea demonstrates insight into the offending) but may have little relevance to the community protection purpose.

[56] Once it becomes necessary to address the second question, the length of the minimum period, the Court is required to take into account (to the extent they are relevant to the particular case) all of the purposes of sentencing in s 7 and the mandatory requirements of ss 8 and 9, just as it

must take them into account in setting the finite term: *Brown* at para [34]. The setting of the minimum period of imprisonment requires similar analysis to that required for setting the nominal sentence. The factors in ss 8 and 9 are relevant to both exercises. The fact that they are taken into account in setting the minimum period, as well as the maximum period, does not lead to double counting, but rather reflects the dual exercise which the Court must undertake (*Brown* at para [36]).

[57] In cases of serious violence, where denunciation and deterrence are both important sentencing values, and where protection of the community from the offender may well be a relevant factor, it can be expected that minimum periods of imprisonment will not be rare or even uncommon. It needs to be remembered that the standard parole period for offending of this kind at the time of the decision in *Hereora* was two-thirds of the finite term. That was reduced to one-third by s 84(1) of the Parole Act. The imposition of a minimum period of imprisonment, even to the maximum extent permitted under s 86, would reinstate the two-thirds period. That is a quite different context from *Rongonui* [CA321/00, 9 May 2001], where the Court was being asked to increase the then standard two-thirds period to a greater period, and where the relevant statutory provision made it clear that it was anticipated this would happen only in the very gravest of cases. As this Court noted in *Brown* at para [21], the views expressed in *Rongonui* are no longer apt in the present legislative context.

[152] As is apparent from *Taueki*, the current version of s 86 is far less difficult to apply than its awkwardly expressed precursor which was considered in *Brown*. But some difficulties remain:

- (a) There is some circularity embedded in the wording. If a judge thought that a term of imprisonment corresponding to the default one third parole eligibility period would be sufficient for the purposes specified in s 86(2), presumably that is the sentence which would be imposed. To put this another way, it is difficult to contemplate a case where a Judge would consider that imprisonment of one third of the length actually imposed would meet those purposes. So, if a strictly literal approach were taken, the s 86(2) precondition will be satisfied in every case where a sentence of more than two years imprisonment is imposed.
- (b) Because that cannot be the correct interpretation of s 86(2), a different meaning must be attributed to the subsection.
- (c) This alternative meaning must be along the lines that a Judge can impose an MPI only if satisfied that the nominal sentence to be

imposed would not meet the s 86(2) purposes if subject to the default eligibility rules.

- (d) Usually the culpability of the offender is reflected in the nominal sentence imposed. The section does not make it particularly clear why offenders whose nominal sentence are the same (and whose culpability is thus similar) should be subject to different parole eligibility periods.

[153] The factors against imposing an MPI in the present case can be summarised as follows:

- (a) The imposition of an MPI on AM will not produce a discernible marginal deterrent effect (either on the appellant or others minded to offend in the same way) which exceeds the effect of the imposition of a 15 year sentence subject to the default parole eligibility rules (the s 86(2)(c) considerations). The only deterrence consideration which is engaged is a more general one, that the deterrent impact of very long sentences (and associated confidence in the legal system) is unacceptably eroded where an offender can, potentially, be released after serving only one-third of such a sentence.
- (b) In light particularly of AM's age and only low to moderate risk of re-offending, protection of the public from him might be thought to be safely left to the Parole Board. Accordingly, s 86(2)(d) is not obviously engaged.
- (c) The Judge's conclusion may also have reflected her assessment of AM's likely circumstances (his health as well as his age) at the expiry of one third of his sentence. Those circumstances, arguably, might be such as to affect the justice of continued imprisonment without being so serious as to warrant compassionate release.

[154] On the other hand, the considerations in s 86(2)(a) and (b), which involve the overlapping concepts of accountability, denunciation and proportionality, are

relevant given the numbers of victims and individual offences, the duration of the offending and the extent of breach of trust involved.

[155] The other factor pointing to the imposition of an MPI is the need for sentencing judges to have regard to s 8(e) of the Sentencing Act (the general desirability for consistency) both in deciding whether or not to impose an MPI and assessing the appropriate length. This was a matter addressed by this Court in *R v Gordon*.¹³¹ The need for consistency in this area was also noted in *R v Laungaue*¹³² and *R v Wellm*.¹³³

[156] A comparison with the appellate decisions from 2003 onwards of cases involving multiple counts of sexual offending against children reviewed in *Gordon* supports the Crown submission that an MPI ought to have been imposed in this case. This and the other authorities to which we were taken by the Crown suggest that the imposition of an MPI of at least half of the nominal sentence is very routine in cases of this type. Further, the totality considerations which justify capping a nominal sentence are not necessarily so cogent in terms of the proportion of the sentence which must be served. So, on a consistency basis, there is every reason why an MPI ought to have been imposed.

[157] On balance, we have concluded the s 86(2)(a) and (b) factors and the need for a consistent approach are such that an MPI should have been imposed.

[158] As to the length of the minimum period, the range of the cases reviewed in *Gordon* (excluding one case where an MPI of two-thirds was imposed) is between 46 and 58 per cent of the determinate sentence. These authorities suggest the appellants' personal circumstances were a factor in determining the MPIs should be below the maximum.

[159] Given AM's age, health and the fact he is yet to be given the opportunity of rehabilitative treatment, and applying the usual principles applicable on a Solicitor-General's appeal, an MPI of seven and a half years (50 per cent) should be imposed.

¹³¹ *R v Gordon* [2009] NZCA 145 at [17].

¹³² *R v Laungaue* CA32/06, 1 September 2006.

¹³³ *R v Wellm* [2009] NZCA 175 at [23].

Disposition

[160] For these reasons, AM's appeal against sentence is dismissed. We grant the Solicitor-General leave to appeal against the failure to impose an MPI. An MPI of seven and a half years imprisonment is imposed.

Solicitors:
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