IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2022-404-000141
[2022] NZHC 1627

BETWEEN	GRAHAM DUNCAN SNELL Appellant
AND	THE QUEEN Respondent

Hearing: 4 July 2022

Counsel: J-A Kincade QC and WJS Mohammed for Appellant
TCT Riley and KFR Karpik for Respondent

Judgment: 12 July 2022

JUDGMENT OF DOWNS J

This judgment was delivered by me on Tuesday, 12 July 2022 at 9.30 am.

Registrar/Deputy Registrar

Solicitors/Counsel:
Crown Solicitor, Manukau.
J-A Kincade QC, Auckland.
WJS Mohammed, Auckland.

The case

[1] Graham Snell imported and possessed 306 objectionable publications involving the sexual abuse of children. He was sentenced to a term of two years and five months' imprisonment. Mr Snell appeals. He contends the sentence should not have been greater than two years' imprisonment, then commuted to home detention. The respondent argues the sentence is commensurate with the gravity of the offending.

[2] The area is difficult (beyond its subject matter). The maximum penalty was doubled in 2015 to mark Parliament's condemnation of an "evil that abuses and re-victimises some of the most innocent and vulnerable amongst us".[1] Yet, no guideline judgment exists, the relevant case pool remains small, and, as another Judge has observed, "it is not easy to discern a line of consistent authority in this area".[2] Case comparison is also "difficult … given the varying circumstances and the different combinations of charges that are often brought".[3]

[3] This judgment attempts to grapple with these issues in determining Mr Snell's appeal. It is offered as something approaching guidance, at least until the Court of Appeal or this Court says more.

Background

[4] On 15 January 2020, Mr Snell, a teacher, arrived at Auckland International Airport after a one-year sabbatical in the United Kingdom. Mr Snell said he had nothing to declare. A Customs officer searched Mr Snell's baggage, which contained a mobile telephone. The phone was examined by an electronic forensic investigator. This revealed objectionable publications depicting the sexual abuse of children, all of which were accessible for Mr Snell to view. Mr Snell was interviewed by Customs while still at the airport. He said he knew material of this nature was illegal, then exercised his right to silence. Mr Snell was arrested. The phone and a laptop were further examined.

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1 (2 April 2015) NZPD 2891.
2 *R v Lawes* [2018] NZHC 2448 at [30] per Wylie J.
3 *Robinson v Police* [2017] NZHC 2655 at [50]. Mander J made the same point in *Webb v R* [2016] NZHC 2966 at [57].

[5] Before discussing their content, readers should know our case law places some reliance on sentencing guidelines in the United Kingdom. These divide objectionable publications into three categories: A, B and C:

(a) A is the most serious. It captures penetrative sexual activity with a child or young person; sadistic sexual activity upon children; and bestiality involving children.

(b) B is the next most serious. It captures non-penetrative sexual activity with a child or young person.

(c) C is the least serious. It concerns objectionable publications outside categories A and B.

What was on the phone

[6] Customs found 306 objectionable publications: 285 still images and 21 video files. Associated date and time stamps "identified that the defendant has had an interest in the material since at least April 2018".[4]

[7] Fifty images show child abuse within category A. I give three examples:

(a) A naked girl between the age of 7 and 10 is shown performing fellatio on an animal.

(b) A naked girl between the age of 5 and 9 is shown tied to a chair. Her mouth is gagged. An electronic device is strapped to her vagina.

(c) A naked girl between the age of 4 and 7 is shown sitting on the floor. A chain is attached to her vagina with clips.

[8] Ten videos record child abuse within category A. I give two examples:

(a) A 13-minute, 59 second video. The summary of facts says:

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4 Summary of facts, para 7.

> The video starts with a female child between the ages of 4 and 8 giving fellatio to an adult male whilst he performs cunnilingus on the child. She then lays over the male's lap with her bottom up in the air and he uses a phallic object to penetrate the child's anus. She is moved to sit next to the male with the item still inserted in her anus, the male and the child kiss and the camera moves down to show the child's legs spread and vagina now exposed, the male's hand is now on the phallic object continuing to penetrate her anus. The scene changes and the child is performing fellatio on the adult male. He then begins to manually stimulate himself with his hand while the child sits in front, the child receives direction from a person off-camera to touch the male's testicles she does so until the male ejaculates into the child's mouth and over her face. She is again directed by a person off-camera to perform fellatio to the adult male. The video ends with the child waving to the camera with ejaculatory fluid still on her face.

(b) A 33-minute, 47 second video. The summary says:

> A video of a female child between 6 and 12 years old wearing a t-shirt while giving fellatio to an adult male. She then takes her t-shirt off and continues to give fellatio. In the next scene the female child is rubbing her clitoris before inserting her fingers and a phallic object into her vagina, she continues at the direction of the adult male's hand to insert the item into her anus, the child continues to penetrate her anus with the object whilst rubbing her vagina. The child then uses her fingers to penetrate her anus before the return of the phallic object to penetrate her anus again. The adult male inserts his penis into the child's anus, the anal intercourse continues until the end of the video where the camera briefly panning up to show the child's body and face.

[9] Forty-eight images and 10 videos show child abuse within category B. I give five examples, the last of which involves one of the videos:

(a) A girl between the age of 5 and 7 is shown standing on a bed, while a semi-naked woman spreads the girl's buttocks. The girl is naked beyond fishnet stockings.

(b) Two girls between the ages of 4 and 7 are shown sitting in a bath. Both are licking the erect penis of a boy aged between 7 and 10.

(c) A girl between the age of 5 and 7, naked beyond fishnet stockings, is shown standing in front of two partially clothed women. One of the adults is "using her hands to spread the child's labia majora".[5]

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5 Summary of facts, para 12.

(d) Two girls between the ages of 7 and 10 are shown licking an adult's penis. One girl is holding the penis.

(e) A one-minute, 43 second video shows a girl between 8 and 12 lying on a bed. She is wearing a singlet. The girl exposes her vagina and anus to the camera.

[10] The remaining objectionable publications—187 images and one video—are within category C. I give five examples:

(a) A girl between the age of 10 and 12 is shown lying naked on a bed, filming herself with a camera. The girl exposes her chest, then buttocks and vagina.

(b) A girl between the age of 5 and 8 is shown sitting on a bed, with her legs apart. The girl exposes her vagina.

(c) A girl between the age of 4 and 7 is shown leaning on a chair, with her legs apart. She is wearing a top and skirt, but no underwear. The girl exposes her vagina and buttocks.

(d) A girl between the age of 2 and 5 is shown hunched over a blanket. She exposes her vagina and anus to the camera.

(e) A girl between the age of 5 and 8 is shown sitting on a bed. She exposes her vagina to the camera.

What was on the laptop

[11] Investigators found a folder entitled "Fitness". This folder contained various files "including publications of a sexual nature".[6] One such file documented a video captured by Mr Snell of his interactions with a woman on a pornographic website. Mr Snell sent her these messages:

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6 Summary of facts, para 15.

(a) "Needed to come back and see my little underage slut again xx".

(b) "My litte (sic) 12 yo becky on my cock xx".

(c) "want to fuck you before mummy gets home".

(d) "mmmmm our secret becky fucking you tight wet bald little 12yo pussy".

[12] Another file was a Word document entitled "Links". This document contained nine links to or using TOR. TOR is free, open-source software. It enables anonymous Web browsing and communication. TOR is commonly used by people "who have a sexual interest in children or other criminal interests, specifically to avoid scrutiny or detection by law enforcement".[7] One TOR link was to a chat forum "used by people to download, trade and exchange objectionable publications pertaining to child sexualised material, or have discussions with other people who have similar interests".[8]

[13] Mr Snell was then 40 and without any criminal history.

[14] On 16 January 2020, Mr Snell was charged with two representative charges:

(a) Possessing an objectionable publication, knowing or having reasonable cause to believe it was objectionable.

(b) Knowingly importing an objectionable publication.

[15] Each is punishable by a maximum term of 10 years' imprisonment.[9]

[16] Mr Snell pleaded guilty 10 June 2021.

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7 Summary of facts, para 19.
8 Summary of facts, para 18.
9 Films, Videos, and Publications Classification Act 1993, s 131A and Customs and Excise Act 2018, s 390(1)(a).

[17] Judge D J McNaughton examined the case law, which he described as "a very difficult exercise".[10] He adopted a starting point of four years' imprisonment. The Judge deducted 25 percent for Mr Snell's guilty pleas, noting these were not early "but resolution was offered at an early stage and ultimately accepted".[11] The Judge deducted a further 15 percent for Mr Snell's rehabilitative efforts but declined other discounts, including for good character. The Judge considered the duration of the offending, Mr Snell's acknowledged fantasies about some of his pupils and more general "sexually deviant behaviour" precluded good character discount.[12]

[18] As observed, the ultimate sentence was two years and five months' imprisonment.

A précis of the respective cases

[19] On behalf of Mr Snell, Ms Kincade QC argues the four-year starting point was much too high, primarily given decided cases in this area. Ms Kincade also argues the Judge should have given greater discounts for personal mitigating circumstances and time on bail. Ms Kincade contends the sentence should have been less than two years' imprisonment and commuted to home detention given Mr Snell's otherwise good character and rehabilitative progress.

[20] On behalf of the respondent, Mr Riley supports the Judge's analysis. He argues the sentence is commensurate with the seriousness of the offending and Parliament's doubling of the maximum penalty.

Principle

[21] An appeal in this context must be allowed if there is an error in the sentence and a different one should be imposed; in short, if the sentence is manifestly excessive.[13]

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10 *R v Snell* [2022] NZDC 8298 at [54].
11 At [56].
12 At [57].
13 Criminal Procedure Act 2011, s 250 and *Tutakangahau v R* [2014] NZCA 279.

Analysis

The starting point

[22] A long run up is necessary.

[23] In 2007 and 2008, the Court of Appeal endorsed as a "useful guide" a United Kingdom sentencing guideline in relation to objectionable publications concerning children.[14] The guideline identified five categories, beginning with the least serious:[15]

> Level 1 Images depicting nudity or erotic posing, with no sexual activity
>
> Level 2 Images showing sexual activity between children or solo masturbation by a child
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> Level 3 Images showing non-penetrative sexual activity between adults and children
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> Level 4 Images showing penetrative sexual activity between children and adults
>
> Level 5 Images showing sadism or bestiality
>
> Offences involving any form of sexual penetration of the vagina or anus, or penile penetration of the mouth (except where they involve sadism or intercourse with an animal, which fall within level 5), should be classified as activity at level 4.

[24] The guideline recommended starting points of between six and 12 months' imprisonment for possession of level 4 or 5 imagery. The maximum penalty for possession of objectionable publications was then the same in New Zealand and the United Kingdom: five years imprisonment.

[25] Two developments changed the landscape. First, in 2014, the United Kingdom identified a new guideline using the categorisation mentioned earlier at [5]. Updated sentencing bands were also identified:[16]

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14 *R v Henderson* [2008] NZCA 305; *R v Clode* [2008] NZCA 421, [2009] 1 NZLR 312. See also *R v Zhu* [2007] NZCA 470, which had endorsed an earlier but similar version of the English guidelines.

15 Sentencing Guidelines Council "Sexual Offences Act 2003 — Definitive Guideline" (April 2007) at 109.

16 Sentencing Council for England and Wales "Sexual Offences Definitive Guideline" (April 2014) at 77.

	Possession	Distribution	Production
Category A	**Starting point** 1 year's custody	**Starting point** 3 years' custody	**Starting point** 6 years' custody
	Category range 26 weeks' – 3 years' custody	**Category range** 2 – 5 years' custody	**Category range** 4 – 9 years' custody
Category B	**Starting point** 26 weeks' custody	**Starting point** 1 year's custody	**Starting point** 2 years' custody
	Category range High level community order – 18 months' custody	**Category range** 26 weeks' – 2 years' custody	**Category range** 1 – 4 years' custody
Category C	**Starting point** High level community order	**Starting point** 13 weeks' custody	**Starting point** 18 months' custody
	Category range Medium level community order – 26 weeks' custody	**Category range** High level community order – 26 weeks' custody	**Category range** 1 – 3 years' custody

[26] Second, in New Zealand from 7 May 2015, the maximum penalty for possession of objectionable publications was doubled and the distribution penalty increased from 10 to 14 years' imprisonment.[17] Introducing the related Bill a final time, the Minister of Justice described the "creation and dissemination of objectionable material is a revolting scourge on our society. … [and] an evil that abuses and re-victimises some of the most innocent and vulnerable amongst us".[18] The Minister said the increase in the maximum penalties "better reflect the seriousness of this offending and the ease with which offenders can obtain and share these images".[19] She noted "evidence that the content of publications is getting worse and … the children involved are getting younger".[20]

[27] An offence's maximum penalty plays a very important role in the assessment of offence-seriousness. Section 8(b) of the Sentencing Act 2002 affirms this longstanding principle. A sentencing Court "must take into account the seriousness of the type of offence in comparison with other types of sentences, as indicated by the maximum penalties prescribed for the offences". Relatedly, a sentencing Court must impose the maximum penalty for the offence "if the offending is within the most serious of cases for which that penalty is prescribed", and a penalty near to the

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17 Film, Videos, and Publications Classification (Objectionable Publications) Amendment Act 2015, s 6.
18 (2 April 2015) NZPD 2891.
19 (2 April 2015) NZPD 2892.
20 (2 April 2015) NZPD 2891.

maximum "if the offending is near to the most serious cases for which that penalty is prescribed".[21]

[28] The maximum penalty for possession of an objectionable publication is now 10 years' imprisonment. The same maximum applies to other self-evidently serious crimes, including sexual ones: attempted sexual violation;[22] assault with intent to commit sexual violation;[23] incest;[24] attempting sexual connection with a child;[25] doing an indecent act with a child;[26] sexual connection with a young person;[27] attempted sexual connection with a young person;[28] and exploitative sexual connection of a person with a significant impairment.[29]

[29] Our Court of Appeal is yet to address the new maximum penalty in the context of objectionable publications involving child sexual abuse. But, in *Patel v R*,[30] a case involving imagery promoting terrorism, the Court rejected the proposition there is a hierarchy of objectionable material. The Court said:[31]

> The sentencing range is the same for each category of material. Quite plainly, and consistent with the general approach to sentencing, each case must be assessed on its own merits. The extent to which the making, possession and distribution of the material is injurious to the public good frames the issues for consideration at sentencing.

The Court emphasised "deterrence is an important purpose of sentencing for offending involving objectionable material".[32]

[30] Another feature of the regime requires mention. Section 132A(2) of the Films, Videos, and Publications Classification Act 1993[33] creates this suite of aggravating features:

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21 Sentencing Act 2002, s 8(c) and (d). Each is subject to the defendant's circumstances.
22 Crimes Act 1961, s 129(1).
23 Crimes Act, s 129(2).
24 Crimes Act, s 130.
25 Crimes Act, s 132(2).
26 Crimes Act, s 132(3).
27 Crimes Act, s 134(1).
28 Crimes Act, s 134(2).
29 Crimes Act, s 138(1).
30 *Patel v R* [2017] NZCA 234.
31 At [37].
32 At [38].
33 The Act.

> In sentencing or otherwise dealing with an offender for the offence, the court must take into account as an aggravating factor the extent to which any publication that was the subject of the offence is objectionable because it does any or all of the following:
>
> (a) Promotes or supports, or tends to promote or support, the exploitation of children, or young persons, or both, for sexual purposes.
>
> (b) Describes, depicts, or otherwise deals with sexual conduct with or by children, or young persons, or both.
>
> (c) Exploits the nudity of children, or young persons, or both.

[31] This introduces the case law, all of which post-dates the 2015 amendment.[34]

[32] In *Tilyard v Police*,[35] the defendant distributed (on a single occasion) 128 objectionable images to an undercover Police officer. Later execution of a search warrant revealed "about 700 images that could be classed as objectionable".[36] All but three images were within category C; two images were within B; and one was within A. A two-year, three-month prison sentence was imposed in the District Court.

[33] Davidson J considered the District Court's three-year starting point too high:[37]

> … In my view, a two year starting point for an image at the lower end of Category A – the worst category – is appropriate in light of a statutory maximum of 14 years and it reflects some relativity with sentencing before the 2015 amendment, but with a marked increase. A further uplift of 6 months for the two Category B images and the most represented Category C images would reflect the totality of the offending, again well above that which would have applied before the 2015 amendment. The possession charges should be sentenced concurrently, and I agree with His Honour's starting point of one year for those.

[34] The Judge allowed the appeal and substituted a sentence of 22 months' imprisonment. But, he noted, "this is a new area for sentencing of this kind and the end sentence is at the low end of the statutory range that now applies".[38]

[35] In *R v Stevens*,[39] the defendant committed several offences, including an indecent assault on a nine-year-old boy. He was found in possession of 4741

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34 I address each case in chronological order.
35 *Tilyard v Police* [2016] NZHC 1377.
36 At [4].
37 At [44].
38 At [54].
39 *R v Stevens* [2016] NZHC 1574.

objectionable publications, which he had organised into folders, and eight objectionable video files. Toogood J said the "more serious content involved penetration of the boys shown, including by adult male penises. Two of the video files involved sadism or bestiality against children".[40] More detail is not apparent, presumably because the Judge focussed on the sexual offending, which resulted in preventive detention. The Judge adopted a two-year starting point for the objectionable publication offending. *Tilyard* was not drawn to Toogood J's attention:[41]

> There do not appear to have been any High Court or Court of Appeal sentencing decisions for child pornography charges since the maximum penalty was increased. The Crown submits that, given the maximum penalty now available and the relatively low number of level 4 and 5 images in your possession, an appropriate starting point for these charges is two years' imprisonment.
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> On your behalf Ms Allen has referred me to two cases which involved similar offending, and she has accordingly suggested a starting point of between 18 and 24 months' imprisonment. I adopt the starting point of two years' imprisonment concurrent on each of the objectionable publications charges.
> …

[36] *Webb v R* involved offending before and after the 2015 amendment.[42] On any view, the case is a bad example of its kind. Among other things, the defendant "was essentially … a party to sexual offending" when making objectionable publications.[43] He also possessed and distributed objectionable publications between January 2014 and October 2015. Some of the offending occurred after the intervention of authorities in August 2014, when the defendant was first charged and bailed. Mander J held the global starting point should have been 11 years' imprisonment, not 12. He upheld the six-year sentence of imprisonment. The Judge considered several cases, noting it was "difficult to draw accurate comparisons".[44]

[37] In *Robinson v Police*, the defendant distributed 15 objectionable publications over 19 days.[45] Eleven were within category A; the remainder, category B. The defendant was found in possession of another 20 objectionable publications approximately four months later. Half of these were category A; half category B.

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40 *R v Stevens* [2016] NZHC 1574 at [9].
41 At [24]–[25].
42 *Webb v R* [2016] NZHC 2966.
43 At [60].
44 At [57].
45 *Robinson v Police* [2017] NZHC 2655.

All 35 publications were video files. In total, they were four hours and 35 minutes long. The summary of facts also referred to a "substantial" collection of child pornography not governed by the charges.

[38] The District Court adopted a global starting point of seven years' imprisonment. Fitzgerald J upheld that, while describing it as "at the upper end of the permissible range".[46] The Judge also upheld the ultimate sentence of four years and five months' imprisonment. Her Honour said:[47]

> In 2015, Parliament indicated that an even stronger approach needed to be taken in sentencing for child pornography-related offending. That was indicated by doubling the maximum penalty for possession, and increasing the maximum penalty for supply by 40 per cent. I agree with Ms Brittain that although the increased penalties are yet to be considered by the Court of Appeal in relation to child pornography, Parliament's intention has been clearly articulated and it is now for the courts to enforce it.

[39] The decision does not identify the respective contributions of each offence type to the global starting point. *Tilyard* and *Webb* were cited to Fitzgerald J; *Stevens* was not. The Judge said, "it is difficult to compare cases in this area given the varying circumstances and the different combinations of charges that are often brought before the courts".[48]

[40] In *Pattison v Police*,[49] the defendant distributed four objectionable publications to an online chat group named "daughterlover", including two video files. Two of these were in category A; one was in B; and the last was in C.[50] Execution of a subsequent search warrant revealed 874 further publications, of which 128 were in category A, 143 in B, and 603 in C. The District Court adopted a global starting point of five and a half years' imprisonment. The end sentence was four years and two months' imprisonment.

[41] Edwards J considered the offending in *Robinson* "graver" than Mr Pattison's because it involved 15 video files, and video content "is potentially more serious than

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46 *Robinson v Police* [2017] NZHC 2655 at [51].
47 At [43].
48 At [50].
49 *Pattison v Police* [2018] NZHC 2163.
50 The High Court "reclassified" these publications and those found at the home.

still images".[51] The Judge said the nature of that medium "draws the viewer into the abuse of the child in a more direct and immediate way".[52] (Mr Pattison had two video files, both of which he distributed.) The Judge then addressed the possession offending:

> [52] … Again, I consider the possession charges to be more serious than in *Tilyard*. The possession charges in *Tilyard* related to 700 images which predominantly fell within category C. In this case, the possession charges relate to 874 images with 128 images falling within category A, 143 images within category B, and the remaining images at or below category C.
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> [53] I do not consider the starting point for the distribution charge adequately reflects the gravity of the possession of these objectionable images. The possession of such images is not victimless. It involves physical and emotional harm of the most vulnerable in our society in the most degrading, demeaning and repulsive ways. The possession of such material feeds the demand which perpetuates the cycle of abuse and exploitative behaviour. I consider the number of images falling within categories A and B in this case requires separate denouncement and deterrence by way of an uplift from the starting point of three years and six months.
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> …
>
> [56] If Mr Pattison's [possession] offending was being sentenced alone, I consider a starting point of up to 18 months' imprisonment may have been justified. But taking into account principles of totality, I consider an uplift of 12 months' imprisonment appropriately reflects the gravity of Mr Pattison's possession offending.
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> [57] That brings the total global starting point to four years and six months' imprisonment. Standing back and considering the nature of the material the subject of both the distribution charge and the possession charge, I am satisfied that this starting point reflects the overall gravity of the offending and is consistent with the maximum penalties imposed for offending of this nature.
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> [58] It follows that the starting point adopted by the Judge was outside the applicable range. …

[42] The Judge concluded the sentence was manifestly excessive. She substituted three years and five months' imprisonment.

[43] In *R v Lawes*,[53] the defendant was sentenced for repeated dealings with a person under 18 for the purpose of sexual exploitation, importing objectionable publications, and possessing like publications. Unsurprisingly, Wylie J focussed on

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51 *Pattison v Police* [2018] NZHC 2163 at [48](b).
52 At [48](b).
53 *R v Lawes* [2018] NZHC 2448.

the first (that offence has a maximum penalty of 14 years' imprisonment). The Judge noted an apparent "discrepancy" in relation to the number of objectionable publications: 59 versus 296.[54]

[44] The Judge said Mr Lawes' offending was not as serious as that revealed by other cases. The defendant imported and possessed "a relatively small number of images".[55] And, while some were more objectionable than others, there was "nothing of a highly concerning nature, for example, sexual violence or bestiality".[56] Wylie J adopted a starting point of two years' imprisonment for the objectionable publication offending, having adopted an eight-year starting point for the much more serious sexual exploitation offending. The Judge noted it was "not easy to discern a line of consistent authority" in relation to the former.[57]

[45] In *Johnson v Department of Internal Affairs*,[58] the defendant possessed thousands of objectionable publications, most of which were video files. Mr Johnson curated the collection. Most of the material fell within category A. Grice J upheld, as "stern", a starting point of seven years' imprisonment.[59] Her Honour treated Mr Johnson's offending as perhaps the most serious instance of possession to date. She considered "there will be serious cases of possession that will attract a greater penalty than less serious cases of distribution".[60]

[46] This leaves *Pengelly v Police*,[61] a decision of Venning J in late 2021. Mr Pengelly and Mr Bradley lived together. A search of their home revealed 1007 objectionable publications, which had been organised and divided into folders. The defendants were sentenced for possessing these publications (and a small quantity of methamphetamine). Their collection included hundreds of video files. Of these, 280 were within category A; and 81 within B. Some within A included "death, sadism, torture and sexual exploitation of infants".[62]

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54 *R v Lawes* [2018] NZHC 2448 at [23].
55 At [31].
56 At [31].
57 At [30].
58 *Johnson v Department of Internal Affairs* [2021] NZHC 2480.
59 At [59].
60 At [50].
61 *Pengelly v Police* [2021] NZHC 2974.
62 At [31].

[47] The first-instance Judge adopted a starting point of four years and three months' imprisonment. She imposed sentences of 32 months and 25 and a half months' imprisonment. The prosecution appealed, arguing these sentences were manifestly inadequate.

[48] Venning J agreed, after covering much of the same ground as I have. The Judge saw the case as similar to *Robinson*, albeit without distribution.[63] This was offset by the defendants "far more extensive collection",[64] the "particularly gross" material involving infants,[65] the curation of the material,[66] and the fact the defendants had shown an informant one or more of the videos.[67] The Judge held the starting point should have been "at least six to seven years' imprisonment".[68] The Judge allowed the appeals. The sentences were increased to four years' imprisonment and three years and five months' imprisonment respectively.

[49] One thread in these cases I have not clearly illuminated is that collection size is less important than it once was. Katz J explained why in the pre-amendment case of *Stewart v Department of Internal Affairs*:[69]

> Traditionally courts have tended to view the size of an offender's child pornography collection as a key aggravating factor. Due to developments in modern technology, however, it is now necessary to take a somewhat more nuanced view of this issue. Child pornography offending is now almost exclusively internet enabled. Cases involving hard copy print materials are rare to non-existent. The use of modern internet based technologies, such as P2P file sharing, facilitates the collection of high volumes of child pornography material with relative ease and within a short space of time. On the other hand, many offenders now appear to also be using modern technology to attempt to disguise their offending behaviour, including by storing material in the cloud. Accordingly the size of a collection in itself is now a somewhat blunt tool in assessing culpability. It is necessary to consider the size of a collection in the broader context of everything that is known about an offender's online behaviour in order to assess the appropriate level of culpability.

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63 *Pengelly v Police* [2021] NZHC 2974 at [78].
64 At [78].
65 At [79].
66 At [80].
67 At [77].
68 At [82].
69 *Stewart v Department of Internal Affairs* [2014] NZHC 2209 at [42].

[50] These remarks were endorsed by Mander J in *Webb*, Fitzgerald J in *Robinson*, and Edwards J in *Pattison*. I endorse them too.

[51] Another thread is that the offence period is also relevant. The reason is obvious. It is one thing to download an objectional publication and quickly delete it. It is another to possess objectionable publications for weeks, months or even years. A longer offence period implies greater culpability.

[52] In light of everything thus far, I make four points.

[53] First, the appellate case pool involving possession offences only (or possession and importation, which share the same maximum penalty) is particularly small: *Stevens*, *Lawes*, *Johnson* and *Pengelly*. *Stevens* and *Lawes* are not terribly informative as each defendant committed other sexual crimes. In each instance, the objectionable publication offending was almost an aside. The remaining cases, *Johnson* and *Pengelly*, are examples of very serious instances of possession.

[54] Second, moderately serious cases of possession therefore fall to be considered by reference to cases also involving distribution: *Tilyard*, *Webb*, *Robinson* and *Pattison*. Therein lies the problem, for, that offence is more serious. To compound matters, the starting points in these cases were largely constructed around the distribution offending, and the possession offending treated as an add-on. This is not a criticism; it is simply a feature of the way in which contemporary sentences are crafted when the offending involves more than one offence type and different maximum penalties.

[55] Third, with an important caveat, moderately serious possession cases appear to attract starting points ranging between 12 months—*Tilyard*—to something less than seven years' imprisonment in *Robinson*. The caveat is this: doubt attaches to whether the 12-month starting point in *Tilyard* case is truly reflective of the new regime, a point Davidson J himself alluded to. The same observation is made of the expressed starting point in *Pattison* given the apparent seriousness of the offending. More relevant is the global four and a half-year starting point in *Pattison*, which obviously needs a little downward adjustment given its inclusion of the distribution of four objectionable

publications. All of which means moderately serious possession cases should have starting points beginning at approximately three to three and a half years' imprisonment.[70]

[56] Fourth, sentencing for possession of objectionable publications requires, among other things, consideration of:

(a) The suite of aggravating factors identified in s 132A of the Act.

(b) The number of publications, bearing in mind Katz J's cautions.

(c) The nature of the publications according to the United Kingdom guideline.

(d) The offence period and curation, if any.

(e) Harm, which will usually be linked to (a), (b) and (c), and perhaps (d).

This analysis extrapolates the Court of Appeal's decision in *Patel* to the other factors already discussed.

[57] I return to Mr Snell's case. The Judge said this about the starting point:[71]

> Mr Snell, your collection of images and videos in the most serious category A classification was in my judgement extensive, 50 images and 10 videos. True there were more images in some of the other cases but that is not the only measure of gravity. It is not purely a numbers game. The nature of the images and videos in the five examples referred to under category A in the summary of facts with elements of bestiality, forced oral and vaginal sex, vaginal penetration with phallic objects, a child gagged and bound with a device and another with clips to her genitals are, as the Crown submit, at the higher end of category A offending. What is more the children depicted there are very young in the two to 12 age range and your offending took place over an extended period, one year, nine months and you were actively involved in this covert network, the TOR network for the exchange and distribution of this objectionable material.

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70 This also follows from the 10-year maximum penalty.
71 *R v Snell* [2022] NZDC 8298 at [51].

[58] Ms Kincade contends the last sentence reveals error as there is no evidence Mr Snell distributed anything objectionable using TOR or, for that matter, anything else. She says Mr Snell's "instructions" are that he only used TOR to browse for possession purposes.

[59] Mr Snell's instructions are not evidence and I put them aside for this reason.[72] That said, there is an element of overstatement in the Judge's remarks on this topic. The most that could be inferred from the Word document containing the TOR links is that Mr Snell had used TOR, including to a chat forum "used by people to download, trade and exchange objectionable publications pertaining to child sexualised material, or have discussions with other people who have similar interests". However, it does not follow the starting point is too high. I return to this shortly.

[60] Ms Kincade also argues nothing in the agreed summary of facts addresses the frequency Mr Snell accessed the objectionable publications. She says Mr Snell's "instructions are that he had not accessed the material since around April 2018". Again, I decline to place any weight on Mr Snell's instructions for the reason expressed earlier.[73] The summary of facts does not address access; this could, presumably, have been the subject of expert forensic analysis. However, the summary does record date and time stamps "identified that the defendant has had an interest in the material since at least April 2018".[74] Importantly, all of the objectionable publications were on Mr Snell's *phone*—not laptop—and both were seized 15 January 2020. So, the proposition Mr Snell had not accessed the objectionable publications for 20 or so months strains credulity. But, even if true, that he had not deleted them means the offence period (for possession) remains approximately 20 months.[75]

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72 Mr Snell could have addressed his use of TOR with Police or in an affidavit at sentencing. The affidavit Mr Snell filed the day before sentencing was directed exclusively at the impact of imprisonment on his family.

73 That Mr Snell said something similar to a psychologist does not change the analysis. A defendant may not testify by proxy.

74 Summary of facts, para 7.

75 The charges allege commission of offences on 15 January 2020. However, the (agreed) summary of facts identifies possession of (some) publications beginning April 2018.

[61] Ms Kincade contends the starting point should have been between two and three years' imprisonment, not four, and this figure is unsustainable given the case law discussed earlier.

[62] Application of the framework at [56] reveals the following mix. All of the aggravating factors in s 132A of the Act are engaged: the publications promote the exploitation of children and young persons for sexual purposes; depict sexual conduct with children and young persons; and exploit the nudity of both age groups. Mr Snell's collection is not small. He had 306 objectionable publications: 285 still images and 21 video files. Sixty of the publications fall within category A, including 10 video files. Fifty-eight fall within category B, including another 10 video files. It follows the collection contains a significant proportion within the most serious and moderately serious categories, and as observed, includes video files. *Tilyard*, therefore, has little applicability in any event. The offence period is at least 20 months, albeit there is no evidence of curation. But Mr Snell had used TOR, including to link to a chatroom used by others with interests in this area. Those depicted in the publications are self-evidently victims.

[63] The four-year starting point is thus unremarkable despite the Judge's observations about TOR. First, it is consistent with the post-amendment case law, particularly *Robinson* (though obviously, Mr Snell's offending is less serious than Mr Robinson's as he did not distribute material). Second, the starting point represents only 40 percent of the available maximum. The maximum is the same as that for several sexual crimes, as to which see [28]. Given legislative history and what many objectionable publications depict, this is unlikely to be a coincidence. Third, and as the Court of Appeal emphasised in *Patel*, deterrence is important in this context.

Mitigating factors

[64] The Judge had a wealth of material about Mr Snell at sentencing: several pre-sentence reports; a report from Cristina Fon, a clinical psychologist; a report from Dr Clare Brindley, a forensic psychologist; a letter from Mr Snell; and other letters and character references.[76] Ms Fon's report addressed Mr Snell's extensive sessions

[76] Mr Snell also filed an affidavit, but this did not address the offending.

with her (totalling 45 hours). Dr Brindley's addressed risk. As observed, the Judge deducted 25 percent for Mr Snell's guilty pleas and a further 15 percent for his rehabilitative efforts and prospect. The Judge declined to discount for good character. He said:[77]

> A separate good character discount is sought but given the duration of your offending here over almost two years and your well-established pattern of sexually deviant behaviour and your admission that you fantasised about sexually abusing some of the pupils you taught I just cannot discount the sentence on the basis of good character.
>
> I have carefully considered your letter which suggests that the background to all of this was this mental and physical breakdown after the breakup of your marriage and that suddenly you fell into this exploration of the dark web because your personal life was disintegrating, you were depressed. You had serious health issues, and that included surgeries and this ongoing autoimmune condition. If that was a direct cause of your offending that would be a personal mitigating factor which I would take into account at sentencing but that is not the picture that emerges from this comprehensive psychological report.
>
> It seems to me that over the years there has been a steady progression in your sexually deviant behaviour and I put to one side any moral judgement or outrage when I say that. Sexual deviance is not unlawful up to a point but you have been on this path of deviant exploration since childhood as the report explains, engaging in voyeurism, bestiality, crossdressing, engagement with pornography as an adult in the course of your marriage, live escorts and prostitutes online and your current relationship with a woman 20 years younger. The descriptions of these fantasy games the two of you engaged in, you as a daddy figure and her as the child, all paints a disturbing but consistent pattern of behaviour over decades which has led you ultimately into the arena of sexual exploitation of children albeit at a distance. So you did not just suddenly fall down the rabbit hole. You were already in it and have been in it for some years, many years.

[65] Ms Kincade contends the Judge was wrong not to discount for good character. She emphasises Mr Snell's otherwise law-abiding life and the letters emphasising his good works as a teacher and member of the community.

[66] The Court of Appeal has expressed two rationales for this discount:[78]

> ... Two things underpin this feature of mitigation: recognition a fall from grace as punishment in itself, and recognising the greater prospect for rehabilitation where community involvement and good character bears witness to a reduced probability of offending.

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77 *R v Snell* [2022] NZDC 8298 at [57]–[59].
78 *Manawaiti v R* [2013] NZCA 88, citing *R v Findlay* [2007] NZCA 553 at [91].

[67] As Mr Riley observes, whether good character discount is afforded is "very much a matter of impression" taking into account the overall sentence, the period for which the person has good character, and the extent to which the good character asserted is based solely on an absence of convictions or also includes positive contributions to society.[79] The duration of the offending is also relevant.[80]

[68] The Judge's reasoning is legitimate: Mr Snell's public life did not accord his private life. Perhaps anticipating this response, Ms Kincade contends some of the matters identified by the Judge verge on moral considerations. True, but such considerations are relevant *here*, for, character and morality are intertwined, and at the risk of stating the obvious, Mr Snell was seeking a good character discount. In any event, the offence period discussed earlier also tended against any character discount beyond that based on prospect of reform. The Judge separately addressed this, and I return to it shortly. For now, it is sufficient to observe Mr Snell's offending did not involve an isolated fall from grace. That he thought sexually about some of his pupils underscores a distinctly aberrant mindset, and one anathema to his public responsibilities.[81]

[69] Ms Kincade next contends the Judge should have afforded some discount for what she describes as "the link between the precipitating psychological breakdown and collapse of Mr Snell's personal life, and the offending".

[70] As will be apparent from the Judge's remarks above, Mr Snell provided a letter to the Judge. In very short, Mr Snell said his marriage collapsed in 2017, as did his health. Mr Snell said thereafter, and in a "mentally unstable state, I pursued several months of self-destructive nihilism". I infer this is a reference to the offending. Two letters of support from others, including Mr Snell's former wife, provide terse support for Mr Snell's self-analysis.

[71] The Judge was well-placed to assess alleged linkage between Mr Snell's personal circumstances and the offending. Notably, neither Ms Fon nor Dr Brindley

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79 *R v Hockley* [2009] NZCA 74 at [32], cited in *Manawaiti v R* [2013] NZCA 88 at [18].
80 *Bristow v R* [2017] NZCA 229 at [10].
81 A topic recorded in Mr Snell's pre-sentence report of 15 September 2021 at p 4.

endorses Mr Snell's analysis, which, as observed, is self-made. This may be because neither expert was asked to offer an opinion on this topic, but again, this serves to emphasise the self-referential nature of Mr Snell's analysis (and Ms Kincade's associated submission). And, the two other letters are from lay people. I am not persuaded of error here.

[72] Mr Snell has been on bail for approximately two and a half years. He has been required to live at an identified address; not associate or contact any person under the age of 16 years; surrender his passport; and not access the Web unless monitored by an approved person. Ms Kincade says the Judge should have discounted the sentence because of these conditions. I disagree for the simple reason the conditions have not significantly interfered with Mr Snell's liberty; they represent the minimum one would anticipate for charges of this nature.

[73] I return to rehabilitation. Mr Snell has spent much time with Ms Fon. Dr Brindley considers Mr Snell's "overall risk category and supervision priority is *at least moderate risk*".[82] Ms Kincade contends the Judge should have discounted the sentence by more than 15 percent for Mr Snell's rehabilitative efforts and progress.

[74] Discounts of this nature are also a matter of impression. Obviously, risk has some relevance. For these reasons, I consider 15 percent within range, save for one aspect. The Judge noted Mr Snell had performed voluntary work for [two charitable organisations].[83] The Judge recorded a submission he was asked to discount the sentence for voluntary work,[84] and said the 15 percent discount included this work.[85] I consider greater recognition should have been given for it, up to an additional five percent. This because Mr Snell has now given approximately 600 hours of his time to [one of the charitable organisations and served two days a week at the other]. These efforts underscore Mr Snell's rehabilitative progress and are sufficiently large to warrant additional discount.

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82 Dr Brindley's report, p 20. Emphasis in original.
83 *R v Snell* [2022] NZDC 8298 at [19] and [21].
84 At [49].
85 At [56].

[75] Adding a five percent discount to those the Judge gave produces a sentence of 26 months' imprisonment, or two years and two months.[86] Reasonable minds could differ whether this constitutes tinkering, given the sentence is two years and five months' imprisonment. I give Mr Snell the benefit of the doubt, particularly as a two-year, two-month sentence does not undermine the need for deterrence in this area. Obviously, the threshold for home detention is not reached.

Result

[76] The appeal is allowed:

(a) The sentence of two years and five months' imprisonment is quashed.

(b) A sentence of two years and two months' imprisonment is substituted.

[77] As Mr Snell is on bail, he must surrender to the Auckland High Court at **midday (12 pm), Wednesday 13 July 2022** and thereafter, begin his term of imprisonment.

……..

Downs J

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[86] The parties agreed the 25 percent discount for the guilty pleas was appropriate. I do not have sufficient information to conclude otherwise.