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IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CRI-2022-463-128
CRI-2022-463-136
[2022] NZHC 2692

	BETWEEN	SOLICITOR-GENERAL Applicant/proposed appellant
	AND	JAYDEN DESMOND MEYER Respondent

Hearing: 11 October 2022

Appearances: MF Laracy and BCL Charmley for the Applicant/proposed appellant
RM Adams and JW Howell for the Respondent

Judgment: 18 October 2022

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 18 October 2022 at 2.15pm

Registrar/Deputy Registrar

Date.....

Solicitors: Crown Law Office, Wellington/Auckland

To: R Adams, Tauranga
J Howell, Tauranga

Introduction

[1] Mr Meyer faced a range of charges in the Youth Court for serious sexual offending involving five victims. This included four charges of sexual violation by rape against four of the victims. Mr Meyer was 16 years old at the time of his offending and his victims were 15 years old. Mr Meyer pleaded not guilty to the charges, his position being that the sexual conduct in question was either consensual or he had a reasonable belief in consent. Following trial in the Youth Court, the Youth Court Judge found all of the charges proven.

[2] On the Crown's application, Mr Meyer was then convicted and transferred to the District Court for sentencing. The District Court Judge (being the same Judge who had presided over the proceedings in the Youth Court) sentenced Mr Meyer to nine months' home detention (with a range of special conditions), 12 months' post-detention conditions, together with judicial monitoring.

[3] The Solicitor-General considers the sentence is manifestly inadequate and that it requires correction on appeal. The appeal was filed some six weeks out of time and accordingly leave to appeal is required. An unusual feature of this case is that the Crown's position throughout the proceedings in the lower courts was that a sentence of imprisonment was not appropriate. It endorsed a sentence of home detention.

[4] As at the date of this judgment, Mr Meyer has served just over three months of his nine-month sentence of home detention, and is approximately six months through a 12 month youth sexual offending rehabilitative programme.

Background – Mr Meyer's offending

[5] The charges against Mr Meyer comprised the following:

(a) sexual violation by rape x 4;[1]

(b) sexual violation by unlawful sexual connection (anal) x 1;[2]

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1 Crimes Act 1961, ss 128(1)(a) and 128B. Maximum penalty 20 years' imprisonment.
2 Sections 128(1)(b) and 128B. Maximum penalty 20 years' imprisonment.

(c) sexual violation by unlawful sexual connection (oral) x 1;[3]

(d) sexual violation by unlawful sexual connection (digital) x 2;[4] and

(e) indecent assault x 2.[5]

[6] As noted, Mr Meyer's offending was against five victims, to whom I will refer in this judgment as S, T, U, V and W. As also noted, all were aged 15 years at the relevant time. All of them, together with Mr Meyer, were part of a wider group of friends.

[7] The following is a summary only of the events giving rise to the charges.[6]

Offending against S (July to August 2020)

[8] Mr Meyer and S had 'hooked up' in about July 2020. Their relationship had involved prior consensual sex. On a third occasion when S visited Mr Meyer's home, they had consensual sex in his bedroom. After that consensual act, Mr Meyer wanted sex again but S said "no". Despite her protestations, Mr Meyer proceeded to have sex with S, giving rise to the charge of rape.

[9] Mr Meyer then said he wanted to have oral sex with S. Although she initially acceded, S then indicated she did not want to. Nevertheless, Mr Meyer forced his penis into S's mouth, and forcefully pushed her head towards him. S continued to say she did not want to do this, but Mr Meyer did not stop. This gave rise to the charge of sexual violation by unlawful sexual connection (oral).

Offending against T (August 2020)

[10] Mr Meyer had been in a relationship with T for a period of time, during which consensual sexual activity took place.

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3 Sections 128(1)(b) and 128B. Maximum penalty 20 years' imprisonment.
4 Sections 128(1)(b) and 128B. Maximum penalty 20 years' imprisonment.
5 Section 134(3). Maximum penalty seven years' imprisonment.
6 I note that many aspects of Mr Meyer's offending are already in the public domain: see for example "Teenager Jayden Meyer sentenced to nine months' home detention after raping four 15-year-old girls" *The New Zealand Herald* (online ed, Auckland, 6 September 2022).

[11] The charges in connection with T concern events on a single evening after the relationship had ended. T went to Mr Meyer's house to return a hoodie. Consensual sexual intercourse occurred while Mr Meyer's father was out. After Mr Meyer's father returned and while T and Mr Meyer were in his bedroom, Mr Meyer set up his phone in view of his bed so that he could film what happened next.[7] Despite T's protestations and her saying stop, Mr Meyer proceeded to penetrate her vaginally and then anally with his penis. These events gave rise to one charge of sexual violation by rape and one charge of sexual violation by unlawful sexual connection (anal).

Offending against U (August 2020)

[12] Mr Meyer indecently assaulted and sexually violated U in a park near a Halloween party that both had attended. U had had no significant contact with Mr Meyer until this event. She was a virgin. U approached Mr Meyer in the park to see if he was okay after an event that upset him at the party. While she was sitting next to him, Mr Meyer unzipped the onesie he was wearing and put U's hand on his penis. This gave rise to one charge of indecent assault.

[13] Mr Meyer then started kissing U while she said "no". She then told him she had her period and had "a thing" with another boy. Mr Meyer nevertheless pulled down her skirt, pulled down her underwear and removed her tampon. Failing penetration against a fence, Mr Meyer put U on the ground on top of some sticks and put his penis inside her vagina for some time. This gave rise to a charge of sexual violation by rape.

Offending against V (8/9 January 2021)

[14] Mr Meyer and V had been in a sexual relationship some time prior to the offending. On the night of the offending, Mr Meyer and V were in the back of a car following a party. Mr Meyer put V's hand down his pants, giving rise to a charge of indecent assault. He also put his other hand under her underwear and tried to put his fingers inside her vagina. She moved away but not before the tips of his fingers

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7 There is no reference in the materials before the Court that any such film was produced during the trial in the Youth Court.

penetrated her. This gave rise to a charge of sexual violation by unlawful sexual connection (digital).

Offending against W (8/9 January 2021)

[15] W and Mr Meyer were in a relationship two years prior to this offending, during which there had been some consensual sexual contact between them. After the same party referred to in the context of offending against V, Mr Meyer and some others ended up at W's home. W and Mr Meyer were in the same bed with one other person. W woke up to find Mr Meyer "fingering" her. She stretched and moved to demonstrate to him that she was waking up, prompting Mr Meyer to stop. This gave rise to a charge of sexual violation by unlawful sexual connection (digital).

[16] W went back to sleep, but she later woke to find Mr Meyer having sexual intercourse with her from behind. While she had been wearing pyjamas and underwear when she went to sleep, these were pulled down when she awoke. After Mr Meyer pulled out, W went and slept in another bedroom.

Factual background – court process

[17] Given Mr Meyer's age at the time of his offending, the proceedings were conducted in the Youth Court.[8] It is helpful to set out the progress of the proceedings through the Youth Court, which provides context to Mr Meyer's later sentencing in the District Court.

[18] The Judge's judgment (in the Youth Court) on whether the charges against Mr Meyer had been proven was delivered in February 2022.[9] The Judge found all of the charges proven. Counsel for Mr Meyer, Ms Adams, advises that following that decision, the Crown confirmed that it would not be seeking a sentence of

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8 The parties agree, and I accept, that to the extent they are referred to in this judgment, there is no prohibition on reporting of aspects of the proceedings in the Youth Court, given this judgment is not a "report of proceedings under Part 4" of the Oranga Tamariki Act 1989 for the purposes of s 438(3) of that Act.

9 [Redacted].

imprisonment. There is no suggestion on behalf of the Solicitor-General that that is incorrect.[10]

[19] As is customary in the Youth Court, following the charges being found proven, a Family Group Conference (FGC) was held on 16 March 2022. It is not necessary to record the outcome of the FGC, other than to note that the conference endorsed the Youth Court's direction that a SAFE assessment and psychological assessment be carried out, and that the FGC was adjourned pending receipt of those assessments.

[20] To interpolate by way of background, SAFE operates the largest community-based clinical assessment and intervention service in New Zealand for those with concerning and harmful sexual behaviour. This covers both adults and youths, with specifically targeted youth programmes. Before a youth is accepted into the SAFE programme, SAFE conducts an assessment to determine whether the SAFE programme is the right place to provide the help the youth needs. This is the "SAFE assessment" endorsed at the March 2022 FGC.

[21] By way of further background, if a youth is accepted into the SAFE programme, that programme can include:

(a) weekly one-on-one therapy with a programme clinician;

(b) weekly group therapy sessions;

(c) monthly family sessions;

(d) a three-day intensive therapy camp held off-site;

(e) three-monthly case reviews involving parents and other interested parties (including, in a case of this kind, Oranga Tamariki and the Crown or police); and

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[10] It is also consistent with the content of the Crown's later submissions on sentencing in the District Court: see [46] below.

(f) a comprehensive safety plan being put in place (which can include, as it did in this case, a prohibition on contact with females under the age of 18 years (other than with informed adult supervision), monitoring of online activity and restrictions placed on social activities).

[22] As noted above, a psychological assessment was also endorsed at the FGC. Again by way of background, pursuant to s 333 of the Oranga Tamariki Act 1989, at any stage of proceedings taking place before the Youth Court, the Court can direct that a medical, psychiatric and/or psychological report be prepared.

[23] Pursuant to s 333, the Judge directed that a psychological report be prepared in relation to Mr Meyer. That report was completed on 19 April 2022. Key aspects of it included that:

(a) At the time of the preparation of the report, Mr Meyer still denied his offending.

(b) In the context of the proceedings against him, Mr Meyer had had 20 sessions of psychological therapy with a registered psychologist (commencing in March 2021), the psychologist gaining the impression that Mr Meyer gained a lot of "kudos" from female attention, and that a core part of his identity was seeing himself as an attractive sexual partner. During that assessment, Mr Meyer was assessed as psychologically resilient.

(c) Formal testing revealed no marked elevations, including clinical psychopathology.

(d) Mr Meyer's interest in and motivation for treatment was described as "somewhat lower than is typical of individuals being seen in treatment settings".

(e) Mr Meyer had no symptoms consistent with any mental health diagnosis.

(f) Mr Meyer's parents were very supportive of his account of the sexual activity being consensual.

(g) Mr Meyer presented as a "mixed risk profile" for sexual offending. The number of victims, the use of physical force and seriousness of the offending added to his risk profile.

(h) Protective factors included the lack of wider antisocial elements in Mr Meyer and his peer group and family, as well as the absence of "other obvious difficulties". Those factors were said to reduce Mr Meyer's risk profile and increase his chances of benefitting from therapy.

(i) In the absence of engaging in therapy, Mr Meyer's high functioning profile was said to have the potential to increase his risk profile.

(j) Mr Meyer's denial of his offending was not assessed as a salient risk factor.

(k) The report concluded that in order to reduce Mr Meyer's risk of re-offending, the most critical feature of any sentence needed to be him attending and engaging in comprehensive specialised treatment for sexually abusive behaviours, ideally with his parents involved. The Auckland SAFE programme was considered appropriate.

[24] In relation to the point made at (j) above, given Mr Meyer's denial of his offending (and that clearly being of concern to the Judge),[11] it is helpful to set out the relevant extract from the psychological report:

> It is important to note that denial in offenders is not a salient risk factor. Denial is more often common than not in this population, and treatment providers are typically experienced and skilled at working with the dynamics around denial. Given Jayden's psychological profile and his social and family context, his current level of denial is understandable, albeit highly unpalatable to victims, their families, and members of the judicial process.

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[11] See [50] below.

> It is also important for the judiciary to understand that Jayden's apparent lack of remorse and emotionally detached persona can be a typical expression of a young offender in denial. It can also be an understandable coping mechanism of a youth who is overwhelmed by the intensity and gravity of the situation in which he finds himself. Youth sex offenders who have not gone through treatment, are typically ill equipped to understand the full impacts of their behaviour on their victims, they usually don't know how to properly apologise and appropriately express remorse.
>
> The extent of denial in Jayden's parents, the significant social backlash against Jayden, and the protracted, adversarial court process (which in circumstances like these can entrench denial), means that Jayden will unlikely admit his offending outside of a safe and carefully managed therapeutic context.

[25] The SAFE assessment was completed on 21 April 2022 and concluded that Mr Meyer was suitable for intervention with the SAFE network. The assessment, like the psychological report, reflected Mr Meyer's continued denial of his offending. It recommended individual weekly intervention, weekly group therapy, monthly family sessions and three-monthly system review meetings. The programme was recommended to take place over a 12 month period.

[26] A second FGC was held on 22 April 2022. There was no agreed outcome as to disposition of the proceedings: Ms Adams on behalf of Mr Meyer recommended that disposition take place in the Youth Court, while the Crown recommended a transfer to the District Court for sentencing. It was, however, agreed that the recommendations in the SAFE assessment and psychological report be implemented.

[27] A social worker's report and plan followed, also dated 22 April 2022. The report recommended disposition in the Youth Court rather than a transfer to the District Court for sentencing. The report noted that Mr Meyer was remorseful that the victims and their families had had to engage in the court and family group process (though I observe that it did not record remorse for the victims for what had happened). The report also observed that since the allegations had become public, Mr Meyer had been targeted by members of the public, bullied and threatened to the point that given concerns for his safety, he had been relocated to an address in the greater Auckland area. The report went on to note that Mr Meyer initially attended school in that new area, but once the school was notified of the charges and the community became aware of the position, he was again targeted and threatened, and since then had been

completing correspondence school. The report recorded that the resulting stress caused Mr Meyer to develop pericarditis requiring hospital treatment.

[28] The social worker report also reported the position of the victims, recording that:

> [The Detective supporting the victims] was able to advise on behalf of the victims and their families, they were initially very angry and wanted to see Jayden sentenced to a term of imprisonment via the District Court, failing that they would like to ensure Jayden receives professional help and counselling, so it doesn't happen again.

[29] The report noted that a Harmful Sexual Behaviour Safety Plan had been drafted in September 2021, and that since that time, Mr Meyer had been adhering to that plan.

[30] The report also recorded that "Jayden accepts he is guilty of the offences before the Court. Jayden is aware that the charges are serious and warrants appropriate consequences". Like the Judge, I observe this apparent acceptance of his offending is in contrast to the contents of the SAFE assessment and psychological report.

[31] In the context of these reports, the Crown then made submissions in the Youth Court on appropriate means for disposition, and in particular, whether the seriousness of the charges warranted the matter being transferred to the District Court for sentencing. The Crown's memorandum dated 23 May 2022 stated:

> The Crown respectfully disagrees with the recommendation in the social work report. It seeks an order pursuant to s 283(o) and 290 of the [Oranga Tamariki] Act for Jayden to be brought before the District Court for sentence on the basis this provides the least restrictive outcome when balanced with the gravity of the offending and the need for an intensive therapeutic intervention over a period of time the Youth Court will be unable to provide.
>
> Jayden is over 15 years and has had very serious charges proved against him. The offending involves five victims. Jayden continues to deny his offending and significantly, lacks insight. Jayden's parents also doubt the validity of the verdicts of the Court.

[32] The Crown's memorandum then referred to the nature of the offending, which it described as "at the very serious end of sexual offending involving five victims and 10 charges of sexual violation and indecent assault". The Crown then addressed the factors the Youth Court must consider when determining whether to transfer a

proceeding from the Youth Court to the District Court for sentencing (pursuant to s 284 of the Oranga Tamariki Act). In terms of the seriousness of the offending, and by reference to the Court of Appeal guideline judgment for sentencing in cases of sexual offending, *R v AM (CA27/2009)*,[12] the Crown submitted that the charges of rape could attract a starting point of between six to eight years' imprisonment in each respect, though acknowledged that a totality adjustment would be required. In relation to the interests of the victims, the Crown submitted:

> Ultimately, the victims want Jayden to get help but all acknowledge there should be some punitive aspect to any sentence imposed to hold him accountable for the harm to them and taking the matter to trial.

[33] The Crown noted the key aspects of the s 333 psychological report and concluded its submissions on disposition as follows:

> The Crown submits that when taking all the s 284 factors into account, a transfer to the District Court for sentencing is the least restrictive outcome.
>
> The District Court sentencing options would provide more robust sentencing options and can provide for judicial monitoring to ensure there is strict compliance and efficacy in Jayden's treatment programme. The Youth Court sentencing options do not provide the necessary sanctions to meet the seriousness of Jayden's offending and harm to the victims.
>
> The only option available to meet the seriousness of the offending in the Youth Court would be nothing short of supervision with residence (6 months) followed by supervision (12 months). This has not been considered by the social worker in her report.
>
> *In the District Court, the Court would be permitted to impose the following sentences:*
>
> *a. Home detention with special conditions and judicial monitoring; or*
>
> *b. Community detention combined with intensive supervision and judicial monitoring.*
>
> (Emphasis added.)

[34] The Crown's submissions did not address how a sentence of home detention or community detention would be available in the context of the potential starting point referred to at [32] above.

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[12] *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

[35] Counsel for Mr Meyer, Ms Adams, filed a memorandum endorsing the proceedings remaining in the Youth Court, submitting that the sentencing options available in that Court were appropriate. Ms Adams noted that Mr Meyer had begun his SAFE programme in May 2022. She accepted that the offending was of a very serious nature, though submitted that was not determinative in all of the circumstances. Ms Adams submitted that the greatest public interest was in the rehabilitation of Mr Meyer so that any risk of reoffending was comprehensively addressed.

[36] The Judge delivered a comprehensive decision on transfer on 3 June 2022.[13] He noted the seriousness of Mr Meyer's offending. He stated:

> [71] Your interest and the public interest converge in the need for you to receive significant therapy in an effort to prevent future offending. It is clear that absent significant therapy, that is a real possibility.

[37] The Judge also expressed concern at Mr Meyer's attitude, which he described as "[a]t best you accept the findings of the Court are binding on you".[14] He stated that the proposals for disposition in the Youth Court were "significantly lacking in provisions to hold you accountable, and arguably to reflect the public interest other than in rehabilitation".[15] He also noted that the psychological report recommendation that the proceeding remain in the Youth Court "does not materially address the significant question of accountability".[16] The Judge stated:

> [83] If your offending is not addressed and you do not successfully complete treatment, there is a real risk that further members of the public, likely young women of a similar age to you, will be victimised by similar offending. Holding you accountable in a meaningful manner in addition to providing rehabilitation is likely to reduce that risk.

[38] The Judge then addressed each of the factors under s 284 of the Oranga Tamariki Act. He noted the seriousness of the offending, and that other Youth Court cases of serious sexual offending in which disposition had been retained in the Youth Court were not to the scale involved in this case (stating that he had been unable to locate a case of this seriousness retained in the Youth Court). Consistent with the Crown's memorandum on disposition, the Judge observed that "[a] starting point in

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13 [Redacted] [Transfer decision].
14 At [72].
15 At [77].
16 At [79].

the order of eight years' imprisonment would arguably be required, significantly uplifted for totality."[17]

[39] Ultimately, the Judge did not consider the proposed disposition in the Youth Court adequate, in particular to hold Mr Meyer accountable for his offending. He stated that "[t]he victims' views that a therapeutic intervention is required could be accommodated, but there is insufficient accountability."[18] The Judge went on to state:

> [106] The alternative, convicting and transferring you to the District Court will provide the same opportunity for therapeutic interventions, but potentially for two years under a sentence including intensive supervision. It also provides for the prospect of greater accountability, in the form of community work and/or community or home detention, more commensurate with the requirements of accountability and community protection. It would also enable judicial monitoring. Such a course will however undoubtedly have long-term effects for you.

[40] In all of the circumstances, the Judge concluded that transfer to the District Court was appropriate.

[41] It will be apparent from the above summary of events in the Youth Court that, following the charges being proven, it was never suggested by the Crown that a sentence of imprisonment was an appropriate sentencing outcome.

[42] Also on 3 June 2022, the Judge issued a minute seeking a pre-sentence report and requesting that the matter be ready for sentencing on 13 July 2022. The Judge recorded:

> I request that the pre-sentence report consider the prospects of, in particular:
>
> (a) Community and/or home detention at his mother's address in Auckland.
>
> (b) Intensive supervision with judicial monitoring, including all of the proposals within the SAFE programme.
>
> (c) Community work.
>
> (d) In addition, any matters thought appropriate by the probation officer.

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17 At [87].
18 At [101].

[43] The pre-sentence report was provided on 8 July 2022. The report noted that Mr Meyer had not previously appeared before the courts. In terms of Mr Meyer's attitudes, the report recorded that "Mr Meyer appeared to minimise the seriousness of the offending", though that from his engagement with the SAFE programme to that point, "he has gained insight into his offending". The report recorded that Mr Meyer had been diagnosed with depression and anxiety for which he was receiving medication. Mr Meyer's risk of reoffending was assessed as "medium", though if he were not to engage with the necessary interventions and programmes, his risk assessment would increase to "high". The report concluded:

> Home Detention is considered the most suitable option for risk mitigation, supporting, and addressing his offending related factors with oversight from Community Corrections, as well as serving a punitive option.

[44] I pause to note that this recommendation was consistent with the options flagged by the Judge in his minute of 3 June 2022, referred to at [42] above.

[45] In the lead-up to sentencing, formal victim impact statements were obtained. I have read all of those statements. They are impressive and demonstrate maturity and insight. It is not necessary or appropriate that I go into the details of them, given victim impact statements necessarily include sensitive and highly personal information concerning victims of offending of this type. Nevertheless, it is clear that there has been ongoing emotional harm and distress, and in some cases physical effects, on the part of the victims. They understandably sought accountability in and a punitive element to any sentence imposed on Mr Meyer. A common theme was a concern at the risk of other young women being subject to similar offending by Mr Meyer and therefore the need for rehabilitation.

[46] The parties then filed (brief) submissions on sentencing, no doubt reflecting the earlier process in the Youth Court and their submissions on transfer. Turning first to the Crown's submissions, the Crown stated:

> *It has been acknowledged throughout the proceedings that a sentence of imprisonment would be inappropriate* in all the circumstances and a focus on rehabilitation is required.
>
> Having considered the pre-sentence report and the apparent and continued lack of insight, *the Crown submits a sentence of home detention with special*

> *conditions for a period of 12 months combined with judicial monitoring is the most appropriate sentence*.
>
> Judicial monitoring will ensure the engagement in and efficiency of the SAFE programme is continued and closely monitored.
>
> (Emphasis added.)

[47] The Crown's sentencing submissions again referred to the Court of Appeal guideline judgment in *R v AM* and endorsed a potential starting point of between six to eight years' imprisonment, with a totality adjustment. Again, however, the Crown's submissions did not address how the Court would move from that starting point to an end sentence of two years' imprisonment or less, which would enliven the jurisdiction to impose a sentence of home detention.[19] Nor did the submissions address the statutory presumption contained in s 128B of the Crimes Act 1961, namely that a sentence of imprisonment will ordinarily follow a conviction for sexual violation.

[48] Ms Adams' sentencing submissions endorsed a sentence of home detention with special conditions, and in particular those that would enable Mr Meyer to complete the SAFE programme (which as noted earlier he had been engaged in since May 2022). She submitted that judicial monitoring was not required.

[49] Sentencing took place in the District Court on 13 July 2022. In his sentencing notes, the Judge referred to the parties' respective submissions, noting that both endorsed a sentence of home detention with special conditions.[20] In referring to the Crown's submissions the Judge stated:

> [3] The Crown submits at this stage that a sentence of imprisonment, despite that being the ordinary consequence and indeed one of many years, a sentence of imprisonment would not be appropriate and a sentence of home detention with judicial monitoring is the most appropriate sentence. They provide authorities for the proposition that ordinarily a substantial sentence of imprisonment is appropriate and they are undoubtedly correct.

[50] The Judge then discussed the pre-sentence report and recorded his ongoing concern in relation to Mr Meyer's attitude to his offending.

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19 Sentencing Act 2002, s 15A.

20 *R v Meyer* [2022] NZDC 13157 at [3]–[4].

[51] The Judge did not conduct an orthodox sentencing exercise, that is, by setting a starting point(s) for Mr Meyer's offending (global or otherwise, and applying the principle of totality), and then applying uplifts or discounts as appropriate for aggravating and mitigating factors. No doubt against the backdrop of the earlier decisions in the proceedings, the Judge did not elaborate on why he accepted the parties' submissions that a sentence of home detention was the appropriate outcome, despite his acceptance that a substantial sentence of imprisonment would ordinarily be imposed. He concluded that a sentence of nine months' home detention rather than 12 months was an adequate response, when added to 12 months' post-detention conditions together with judicial monitoring. He sentenced Mr Meyer accordingly.[21]

[52] There matters seem to have rested for a time. Relevantly for matters discussed later in this judgment, the statutory timeframe for either party to appeal against the sentence expired on 10 August 2022.

[53] On 6 September 2022, media reported on Mr Meyer's sentencing. This then led to significant protest and further media attention.

[54] The Solicitor-General's subsequent application for leave to appeal out of time and notice of appeal state that the matter first came to the Solicitor-General's attention on 7 September 2022. I interpolate to note that Ms Laracy, senior counsel for the Crown on the appeal, stated that the matter had not been referred to the Solicitor-General for review before it came to her attention on 7 September 2022.[22] Ms Laracy also emphasises that the Solicitor-General's proposed appeal is not in response to the media and social outcry (stating that it would be quite wrong to seek to appeal on that basis), but because the Solicitor-General considers the sentence is manifestly inadequate and requires correction.

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[21] The special conditions of home detention and the post-detention conditions include Mr Meyer not associating with or contacting the victims of his offending; not associating or otherwise having contact with any person under 16 years of age (except in the presence and under the supervision of an approved informed adult); not to enter any schools, parks or areas where children congregate; to attend a psychological assessment and complete any treatment and/or counselling as recommended by the assessment (to the satisfaction of a probation officer and the SAFE programme); not to undertake any employment, voluntary work or training without prior written approval of a probation officer; to attend and complete the SAFE programme to the satisfaction of a probation officer; and upon request, to make available to a probation officer any electronic device capable of accessing the internet.

[22] I proceed on the basis that this is because the Crown had endorsed the sentence imposed.

[55] On 9 September 2022, the Crown Solicitor for Tauranga, who had appeared for the Crown throughout Mr Meyer's proceedings in the lower courts, issued a public statement explaining why the Crown had endorsed a sentence of home detention.

[56] I again pause to note that I have referred in the preceding paragraphs to the Crown Solicitor for Tauranga appearing for the Crown throughout Mr Meyer's proceedings, and the Solicitor-General bringing the present application for leave to appeal out of time (and, if granted, the appeal). It is worth explaining that there are not two Crown "entities" or parties in play in this case. The Crown for present purposes is indivisible and thus, in short, the Crown is the Crown.[23] In this context, Ms Laracy accepted that the Crown's change in stance between Mr Meyer's proceedings in the Youth Court and then the District Court on the one hand, and the High Court on the other, represents a "significant u-turn".

[57] The Crown's application for leave to appeal out of time and notice of appeal were filed on 22 September 2022. Ms Laracy responsibly accepts that this is substantially out of time.

[58] The proceeding was originally listed for hearing on 22 October 2022, but given the obvious need for the matter to be determined as quickly as possible, the hearing was brought on at an earlier date, 11 October 2022. In the interim, Mr Meyer filed a cross-appeal against the decision to transfer the proceeding from the Youth Court to the District Court for sentencing. It was agreed that I would hear argument on the application for leave to appeal out of time, and the proposed appeal and cross-appeal, at the 11 October hearing.

[59] Finally, I was provided with a recent judicial monitoring report on the progress of Mr Meyer's sentence. The report records that Mr Meyer is fully compliant with his sentence of home detention and is engaging well with the SAFE programme.

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[23] *Town Investments Ltd v Department of the Environment* [1978] AC 359 (HL) at 381 and 400; *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 327; and *Ministry of Fisheries v Vu* [2010] NZCA 469, [2011] NZAR 141 at [38].

Legal principles

Application for leave to appeal out of time

[60] Pursuant to s 248 of the Criminal Procedure Act 2011, a notice of appeal must be filed within 20 working days after the date of the sentence appealed against. As noted earlier, the statutory timeframe for filing an appeal in this case expired on 10 August 2022.

[61] A leading decision on the approach to be taken to determining applications to extend time is the Court of Appeal's decision in *R v Knight*.[24] The Court summarised the test as follows:[25]

> The touchstone is the interests of justice in the particular case. The discretion must be exercised in accordance with the policy underlying the legislative provisions. The feature which provides the reason for the time-limit for appealing set by s 388(1) is the interest of society in the final determination of litigation. That necessarily carries through as a powerful consideration in determining whether leave should be granted under s 388(2) to appeal out of time. The overall interests of justice in a particular case may call for balancing the wider interest of society in the finality of decisions against the interest of the individual applicant in having the conviction reviewed. Also relevant is "the respect which is traditionally shown for the liberty of the subject" (*R v Hawkins* [1997] 1 Cr App R 234 at p 239).

[62] The Court went on to outline particular factors which should be taken into account when considering whether to grant an extension of time to appeal:[26]

> Amongst the considerations which will also be relevant in that overall assessment are the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown.

[63] I note that the reference to the absence of prejudice to the Crown clearly envisages that in most cases, an application for leave to appeal out of time is pursued by the offender and not the Crown.

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24 *R v Knight* [1998] 1 NZLR 583 (CA), confirmed in *R v Lee* [2006] 3 NZLR 42 (CA).
25 At 587.
26 At 589.

[64] At least in the context of applications by an offender for leave to appeal out of time, the Court of Appeal has more recently stated that applications for extensions of time will routinely reduce to the reasons for the delay and the merits of the proposed appeal.[27]

[65] As to applications for leave to appeal out of time by the Crown, in *R v MacKay*, the Court of Appeal stated:[28]

> [18] This Court has also typically been less accommodating in giving an extension of time for a Crown appeal: *R v Midwood* CA76/98 23 June 1998; *Solicitor-General v Steinmetz* CA384/03 15 March 2004 (10 days out of time too long); *R v Leger* CA22/01 17 May 2001 (35 days too long).

Principles where Solicitor-General's appeal involves potential substitution of community-based sentence with imprisonment

[66] It is also appropriate to address the principles applicable where, as here, the Solicitor-General's proposed appeal seeks to substitute a community-based sentence with one of imprisonment.

[67] The leading decision is the Court of Appeal's judgment in *R v Donaldson*, in which the Court stated that on a Solicitor-General's appeal, the appeal court will generally be reluctant to substitute a non-custodial sentence with a custodial sentence.[29] Thomas J, who delivered the judgment of the Court, stated that even if the Court determines the original sentence is manifestly inadequate, it will still be reluctant to interfere if this would cause injustice to the offender. Thomas J stated that:[30]

> In particular, the Court will be more disinclined to interfere where a community-based sentence has been imposed and conditions which were ordered have been complied with than where an inadequate custodial sentence is in issue.

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27 *Mikus v R* [2011] NZCA 298 at [26], citing *R v Slavich* [2008] NZCA 116 at [14].
28 *R v MacKay* [2007] NZCA 316.
29 *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 550.
30 At 550.

[68] Thomas J went on to state:[31]

> These principles reflect the Court's appreciation of the harsh effect of substituting a non-custodial sentence for a prison sentence. In many circumstances there can be an element of inhumanity in doing so. An offender must initially look at his or her pending sentencing with considerable trepidation and, in many cases, intense hope that a non-custodial sentence will be imposed, especially when that prospect is encouraged by their counsel. If in real jeopardy they will almost certainly be overwhelmed with relief if they in fact receive a non-custodial sentence. Although they will in all probability be advised of the right of appeal statutorily vested in the Solicitor-General and be apprehensive, they must necessarily feel elated that the primary sentencing process has been completed and imprisonment has been avoided. Hope may convert itself into confidence that the Judge's sentence will be upheld. In the meantime they have been at liberty. They have rejoined their family or friends and returned to their work and daily routine. They may have undertaken treatment or therapy where that has been recommended or stipulated as a condition, and such treatment may well be proving successful. With an appreciation of these considerations any decision to reverse a non-custodial sentence and replace it with a term of imprisonment is not lightly undertaken. The Court, indeed, is most reluctant to do so.

[69] *R v Donaldson* was not a case of Crown acquiescence in what was submitted on appeal to be a manifestly inadequate sentence. The application for leave to appeal had been filed in time.[32] The defendant in that case was a 37-year-old man who had been convicted of the rape of an 18-year-old boy and sentenced to 18 months' imprisonment, which was then suspended by the sentencing Judge.[33] The Court of Appeal considered the proper end sentence would have been in the range of three to five years' imprisonment. Despite the above observations concerning the courts' reluctance to intervene on a Solicitor-General's appeal (at least where the Court was being asked to substitute a community-based sentence with one of imprisonment), the Court described the sentence of Mr Donaldson as representing a "clear departure from the accepted sentencing pattern" and that "[n]ecessarily, it must be corrected."[34] Adopting the shortest possible appropriate sentence, and making an allowance for the time Mr Donaldson had served discharging his sentence of periodic detention, a sentence of two years and nine months' imprisonment was substituted.

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31 At 550.

32 Pursuant to s 383(2) of the Crimes Act 1961 (as then in force), the Solicitor-General needed leave to appeal, and was required to file the application for leave within 28 days of sentence (s 388(1)).

33 The Court of Appeal described the offending (at 544) as a "prolonged and degrading attack", in which the victim was repeatedly sexually assaulted over a period of one and a half hours when he was unconscious. The offending was filmed and "[a]lthough the victim was not sodomised, most other forms of sexual deviance were practised upon him."

34 At 550.

[70] The principles articulated in *R v Donaldson* were adopted and reinforced by the Court of Appeal in *R v Tipene*.[35] In that case, one defendant had pleaded guilty to manslaughter (of her child) and been sentenced to five years' imprisonment; the other defendant had pleaded guilty to ill-treating the child while in her custody and had been sentenced to 18 months' imprisonment. The Crown prosecutor had acquiesced in both sentences. The Solicitor-General then appealed (within time) on the basis that both sentences were manifestly inadequate.

[71] The Court commenced by considering whether it was appropriate for the Court to entertain a Solicitor-General's appeal to increase the sentences to well above the sentence which the Crown prosecutor had originally submitted was adequate. Of interest, the Court of Appeal referred to there having been only two other cases in that Court where the Crown had sought to increase sentences after having acquiesced in the sentences actually imposed.[36] The Court confirmed that the prosecutor's position at sentencing was only one factor to be taken into account on an appeal, though stated that in some cases it may be a matter of significance (including where a non-custodial sentence had been imposed at first instance). In this context, the Court referred with approval to the following extract from the New South Wales Court of Appeal's decision in *R v Allpass*:[37]

> The Crown is not debarred, on appeal, from taking a stance different from that taken at first instance, but this Court, in the exercise of its discretion, is entitled to take account of the fact that, at first instance, the Crown acquiesced in the course that was taken by the sentencing judge. … The weight to be given to such a consideration depends upon the circumstances of the particular case, *but it may be of considerable significance if the respondent was given a non-custodial sentence at first instance. Its weight may also vary with the degree to which the appellate courts thinks the sentencing judge fell into error*.
>
> (Emphasis added.)

[72] The Court in *R v Tipene* accordingly stated that:

> [11] We agree with the view expressed in *Allpass* … that the Crown is not debarred, on appeal, from taking a stance different from that taken at first

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35 *R v Tipene* [2001] 2 NZLR 577 (CA).

36 Referring to *R v Coleman* CA68/86, 20 May 1986 (in which the Crown's position was taken into account on appeal but the sentence was found to be justified on other grounds); and *R v Wong* CA232/89, 6 October 1989 (the Court in *Tipene* at [6] stating that in *Wong*, "the lenient sentence was maintained because of the Crown's initial attitude").

37 *R v Allpass* (1993) 72 A Crim R 561 (NSWCA) at 565.

> instance. However the fact that the Crown has taken a particular stance, with which the sentence imposed is not inconsistent, is relevant to the appearance of justice when the appropriateness of the sentence is considered on appeal. *There may be occasions when, notwithstanding a perception of injustice on the part of the Crown in changing its stance, an appellate Court may be unable to avoid the conclusion that there is an even greater perception that justice has gone wrong because the sentence imposed is so manifestly inadequate*.
>
> (Emphasis added.)

[73] In *R v Tipene*, the Court concluded that:[38]

> We think the disparity between the sentences actually imposed and those which we think appropriate is so great that, notwithstanding the Crown's stance at sentencing, the appeal should be allowed.

[74] The original sentences of imprisonment were accordingly increased from five years to eight years' imprisonment, and from 18 months' imprisonment to two years, three months' imprisonment.

[75] The principles to be drawn from authorities such as *R v Donaldson* and *R v Tipene* have continued to be applied in more recent times. In *R v Johnson*, Mr Johnson, who was 36 years old at the time of offending, had pleaded guilty to seven counts of sexual conduct with a young person (the complainant being 15 years old at the time of the offending).[39] While there were only seven counts, the offending involved considerably more instances of sexual and anal intercourse. The Court described the relationship between Mr Johnson and the complainant as "dominating and demeaning".[40] The Court noted that Mr Johnson's expressions of remorse "did not impress the probation officer" and that the victim had suffered serious emotional harm.[41]

[76] Following Mr Johnson's guilty pleas, he was sentenced in the District Court to nine months' home detention. This was not a case of the Crown acquiescing in that sentence. On appeal, the Court of Appeal concluded that the appropriate starting point was four and a half years' imprisonment (rather than the sentencing Judge's starting point of three years' imprisonment). The Court concluded that the minimum

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38 At [14].
39 *R v Johnson* [2010] NZCA 168. Maximum penalty on each charge of 10 years' imprisonment.
40 At [6].
41 At [8]–[9].

appropriate sentence available was at least two years and four months' imprisonment, which necessarily precluded a sentence of home detention.[42] It observed that imprisonment would usually be the only appropriate sentence for offending such as Mr Johnson's.

[77] The Court nevertheless declined to re-sentence Mr Johnson to a term of imprisonment. It noted that Mr Johnson had already served five of the nine months of home detention. It stated that "[t]o carry out much of a sentence of home detention, and to then be faced with removal to prison carries with it 'a distinct element of unfairness'."[43] It noted that Mr Johnson had been fully compliant with his sentence and appeared to have made considerable progress in "turning his life around".[44] Reflecting that aspect of the Court's decision in *R v Tipene* set out at [72] above, the Court observed that there will be cases where an appellate court is persuaded that the community confidence in the administration of justice requires the imposition of a sentence of imprisonment.[45] Concluding that the case before it was not such a case (observing that it would be "extremely harsh to now impose a custodial sentence on Mr Johnson"),[46] the Court adopted the "alternative" of increasing Mr Johnson's sentence of home detention by three months (though noting that that still resulted in a manifestly inadequate sentence).

[78] In *R v Honan*, the District Court Judge had sentenced Mr Honan to 12 months' home detention for possession of methamphetamine for supply and attempting to manufacture methamphetamine.[47] On appeal, the Court of Appeal concluded that an appropriate end sentence was in the order of four and a half years' imprisonment. Despite the significant disparity between the original sentence and that considered appropriate on appeal, the Court declined to interfere with the sentence. It noted that were it to quash the sentence of home detention and substitute a sentence of imprisonment, the substituted sentence would be in the vicinity of two years' imprisonment (having regard to the fact that it was a Solicitor-General's appeal and

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42 At [29]–[30].
43 At [33], citing *R v Palmer* CA332/03, 31 March 2004 at [45(b)].
44 At [33].
45 At [34].
46 At [34].
47 *R v Honan* [2015] NZCA 94. See also *R v Honan* DC Blenheim CRI-2012-006-1533, 30 September 2014.

the time that Mr Honan had already spent on home detention). Reflecting the earlier authorities, the Court concluded that:

> [41] This outcome should not be taken as an endorsement of the approach taken by the sentencing Judge. Rather, it reflects the circumstances of this particular case, the length of the likely substituted sentence, the lack of direct victims and the other considerations mentioned in *Donaldson*.

[79] Research has disclosed only one case which bears the constellation of factors present in this case, namely what the Crown submits on appeal is a manifestly inadequate sentence; where the appeal court is being asked to substitute a non-custodial sentence with a sentence of imprisonment; the Crown prosecutor acquiesced in the first instance sentence; the offender has served a portion of their community-based sentence; and the proposed appeal is filed out of time. That case is *R v Leger*, a decision of the Court of Appeal delivered not long after its decision in *R v Tipene*.[48] It also involved a youth offender and sexual offending.

[80] Mr Leger was 18 years old at the time of offending, the victim aged 14 years. Mr Leger pleaded not guilty to one count of sexual violation by rape and was found guilty following a trial. The probation report recommended a sentence of less than imprisonment, noting Mr Leger's youth, that he had no prior criminal record, his immaturity and low risk of reoffending. The Crown prosecutor did not oppose a non-custodial sentence. Taking into account the factors addressed in the probation report, the sentencing Judge noted that an appropriate starting point would have been in the vicinity of eight years' imprisonment, but agreed with the Crown prosecutor's submission that that was "utterly inappropriate" on the facts of the case.[49] Taking into account Mr Leger's youth and naivety, and the need to balance retribution and rehabilitative considerations (observing that sending him to jail "would merely incorporate him into the criminal regime"),[50] the Judge sentenced Mr Leger to two years' imprisonment, suspended for two years, together with eight months' periodic detention, seven months' supervision and a $2,000 fine. The Judge acknowledged that suspending the sentence was an "unusual step".[51]

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48 *R v Leger* CA22/01, 17 May 2001.
49 At [11].
50 At [11].
51 At [12].

[81] The Solicitor-General sought leave to appeal against sentence, being 35 days out of time in filing the appeal. Crown counsel on the appeal accepted there was "no excuse" for the delay in filing the appeal.[52] Counsel nevertheless submitted that the District Court's end sentence was plainly manifestly inadequate, and that the Crown prosecutor had erred in failing to make submissions on either a specific starting point or a term of imprisonment.

[82] By the time of the hearing of the application for leave to appeal, Mr Leger had completed half of his sentence of periodic detention.

[83] The Court stated that despite Mr Leger's youth and comparative social immaturity, he had "committed on a much younger, and indeed under-age, girl a crime which involved serious violence".[53] The Court accepted the Crown's submission that neither youth nor an absence of previous convictions will automatically justify leniency. The Court accordingly concluded that the sentence imposed was "well below" the appropriate sentence, which in its view could not have been less than five years' imprisonment.[54] However, the Court further observed that:[55]

> … if the present appeal were to be permitted, a substantial further reduction would be necessary to reflect both the prosecutor's position at sentencing and the Crown's subsequent failure to file a timely appeal. There would also need to be a significant allowance for the portion of the periodic detention sentence already served.

[84] Blanchard J (delivering the judgment of the Court) then referred to the Court's earlier decision in *R v Tipene* and stated:

> [31] … because of the prosecutor's attitude, the respondent had very good reason to believe, when the appeal period expired, that he was no longer in peril of imprisonment. There followed a substantial period of inexcusable delay (35 days). When an appeal application was eventually forthcoming, the respondent was not told that his periodic detention was in abeyance and has continued to attend in the belief that he must do so.
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> [32] There would in our view be an appearance of injustice if this Court, in the face of this unhappy combination of events, were to countenance the Crown's application, particularly when it involves a youthful offender. We are very conscious of the position of the complainant and aware of the strength

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52 At [13].
53 At [30].
54 At [28] and [30].
55 At [28].

> of the appeal. But, in the end, it seems to us that the administration of justice is better served by declining the application. In a situation in which the Crown wishes to change its stance, particularly where it previously appeared to be accepting of a non-custodial sentence and obviously did not see that as contrary to the interests of the complainant, the Crown must be expected to comply with the s388 time limit. Some allowance could have been made for the holiday period, but the time actually taken in this case was far too long.

[85] I pause to note that I do not read this aspect of the Court's judgment as suggesting that the mere fact that a Solicitor-General's appeal is out of time is itself a reason for declining leave to appeal out of time in a case involving circumstances such as in *R v Leger* (or in this case). Rather, it is the consequences of the appeal being brought out of time that will be relevant.

The parties' submissions

[86] With that background in mind, I turn now to the parties' submissions.

The Crown's submissions

[87] Ms Laracy for the Crown accepts that substituting a term of imprisonment for a non-custodial sentence imposed on a young person is a "troubling proposition". She acknowledges those principles drawn from cases such as *R v Donaldson*, *R v Tipene*, *R v Johnson* and *R v Leger*. She also accepts that to now sentence Mr Meyer to imprisonment would feel "crushing" for him. Nevertheless, she submits that the sentence imposed by the District Court marks such a substantial departure from ordinary sentencing practice that it is nevertheless appropriate to correct it on appeal.

[88] Turning to the merits of the proposed appeal, Ms Laracy accepts that Mr Meyer's youth is a relevant factor, as is the clear engagement of rehabilitation as an operative sentencing purpose. Despite this, however, Ms Laracy submits that the sentence of nine months' home detention fails to address other relevant sentencing purposes and principles in play, and in particular, provide for the victims' interests, denunciation, deterrence and accountability.

[89] Ms Laracy submits that a further concerning feature of the sentence is that the District Court Judge failed to follow established sentencing methodology. Ms Laracy candidly accepts that the Crown prosecutor fell into the same error. Ms Laracy

emphasises that the Solicitor-General's concern at the lack of transparency in the Judge's sentencing decision is not a concern about form over substance; she notes that if a sentence of home detention was available in this case, the failings of process and methodology would be unfortunate but would not warrant an appeal. Rather, she submits that it is the failings of process and methodology which obscure what is submitted to be the clear fact that home detention was *not* an available sentence in this case.

[90] Ms Laracy accepts that the reason why the Judge stepped away from orthodox sentencing methodology was likely because this was seen as a continuation of the process in the Youth Court. However, Ms Laracy submits that proceeding to sentence as effectively a final step in a Youth Court process is itself a fundamental error of law. Ms Laracy refers to the Court of Appeal's decision in *Pouwhare v R*, which makes it clear that upon a transfer of a proceeding from the Youth Court to the District Court for sentencing, the youth justice principles of the Oranga Tamariki Act no longer apply and sentencing must proceed in accordance with the Sentencing Act 2002.[56] Ms Laracy submits that Mr Meyer's case did not invite an overwhelmingly rehabilitative outcome, and any such option must be grounded in evidence in any event. Ms Laracy refers to Mr Meyer's continued denial of his offending, and what seems in some of the materials to be a lower than usual motivation for treatment. Ms Laracy also notes that the Judge made no reference to the statutory presumption in favour of imprisonment for sexual violation offending, nor did he provide any reasons for how that presumption is displaced in this case. Ms Laracy refers to *Solicitor-General v Rawat* and *Asiata v R* as highlighting what she submits to be the high threshold for rebutting the presumption.[57]

[91] Turning to what an appropriate sentence would have been, Ms Laracy refers to *R v AM*,[58] submitting that even if Mr Meyer's offending falls at the bottom of band one (attracting a starting point of six to eight years' imprisonment), an uplift to reflect the totality of his offending would be required. Recognising that this is a Solicitor-General's appeal and "viewing Mr Meyer's offending through the most

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56 *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868.
57 *Solicitor-General v Rawat* [2021] NZHC 2129; and *Asiata v R* [2020] NZCA 53.
58 *R v AM*, above n 12.

favourable lens possible", Ms Laracy submits that it is inconceivable that an overall starting point of less than eight years could be reached.

[92] From an eight-year starting point, Ms Laracy accepts a "hefty" discount for youth would be appropriate, suggesting 40 per cent. She also suggests a further discount of 10 to 15 per cent to reflect prior good conduct, rehabilitative steps to date, equivocal remorse and the inevitable stress of the proceedings and the late change in approach by the Crown. Ms Laracy also proposes a further discount of six months to reflect the time Mr Meyer has already served of his home detention sentence. On the Crown's approach, this leads to an end sentence of not less than three years' imprisonment.

[93] Finally, Ms Laracy accepts that all parties (including the victims) and the public at large would want to be assured that there is adequate support to rehabilitate and reintegrate any 18 year old in the context of a custodial sentence. The Solicitor-General accordingly filed with her appeal an affidavit of William Hegan of Ara Poutama Aotearoa/Department of Corrections, which is submitted to give that assurance.[59]

Mr Meyer's submissions

[94] While in her written submissions, Ms Adams submitted that the sentencing in the District Court was "the completion of a sentencing process commenced in the Youth Court" and on that basis was principled and justified, in her oral submissions, she responsibly accepted that it was difficult to dispute the Crown submission that a sentence of home detention was not available on orthodox sentencing methodology. However, Ms Adams submits that once significant further discounts for the Crown's stance in the Youth Court and its late change in position are applied (as directed by the Court of Appeal in *R v Leger*),[60] a sentence of home detention *would* be available, on the following basis:

(a) an eight-year starting point;

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59 See further below, at [123]–[124].
60 *R v Leger*, above n 48, at [28].

(b) a 40 per cent discount for youth;

(c) a further 15 per cent discount for prior good character, remorse and rehabilitative efforts to date;

(d) a further 15 per cent discount to reflect the Crown's stance in the Youth Court and out of time change in approach; and

(e) a six-month discount for time spent on home detention to date.

[95] Adopting this approach leads to an end sentence of 23 months' imprisonment, thus enlivening the jurisdiction to impose a sentence of home detention.

[96] Ms Adams also disputes that the sentence adopted in the District Court was wholly rehabilitative in character, and highlights the restrictive nature of Mr Meyer's sentence of home detention. She further submits that appropriate weight was given to the interests of the victims, including through the outcome of the FGCs, attended by some of the victims and the Detective supporting the victims throughout the process, and by the very transfer to the District Court to enable convictions to be entered and a more restrictive sentence to be imposed. Ms Adams also acknowledges the comments in various materials before the Youth and District Courts as to Mr Meyer's denial of his offending and remorse, but emphasises the expert advice to the Court that this is neither unexpected in youth offending nor a barrier to rehabilitation.

[97] While Ms Adams acknowledges the Court of Appeal's decision in *Pouwhare v R* that the youth justice principles of the Oranga Tamariki Act no longer apply in the District Court, she emphasises the Court's statement that an offender under the age of 18 years nevertheless remains a "child" for the purposes of the United Nations Convention on the Rights of the Child. Ms Adams highlights the Court's observations that:[61]

> When sentencing a young person, therefore, a Judge should, to the extent that this is consistent with the letter of the Sentencing Act, act in accordance with the Convention and, in particular, should treat the young person's "best interests" as a "primary consideration". The Judge must treat the young person in a way that promotes his or her "sense of dignity and worth"; must

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61 *Pouwhare v R*, above n 56, at [82] (footnotes omitted).

> reinforce, the young person's "respect for the human rights and fundamental freedoms of others"; and must, as the Sentencing Act also expressly calls for, impose a sentence which "takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

[98] Ms Adams submits that the Judge's sentencing rightly took these principles into account. She also refers to subsequent authorities on the relevance of youth to the sentencing exercise, and in particular the Court of Appeal's acceptance in *Churchward v R* that a well-established body of jurisprudence and expert literature confirms that there are very significant age-related differences between young persons and adults.[62]

[99] Should the Court conclude that Mr Meyer's sentence *was* manifestly inadequate, Ms Adams emphasises that the Judge's approach to sentencing was with the Crown's endorsement throughout. Ms Adams submits that it is therefore misconceived for the Crown now to criticise the Judge for lack of transparency, reasoning and methodology in his sentencing, when the sentencing reflects the very outcome the Crown submitted at all times was appropriate. Ms Adams further says that to substitute the sentence at this late stage with one of imprisonment would be, to use Thomas J's description in *R v Donaldson*, inhumane.[63] She refers in this context to the adverse impact recent events have had on Mr Meyer's mental health. She refers to what she describes as the extraordinary vilification of Mr Meyer publicly and through social media, leading to successive changes of his home detention address (given fears for his safety), and which has left him completely socially isolated. Ms Adams submits that the sentence is in all the circumstances a real and significant punishment.

[100] Ms Adams also highlights that Mr Meyer is more than a third of the way through serving his sentence of home detention, and also nearly six months through the 12 month SAFE programme. She notes that Mr Meyer has also been subject to a rigorous safety plan since September 2021, and that he has fully complied with all conditions of that plan.

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62 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446; reaffirmed in *Rolleston v R (No 2)* [2018] NZCA 611, [2019] NZAR 79.

63 *R v Donaldson*, above n 29, at 550.

[101] Ms Adams strongly disputes that Mr Hegan's affidavit provides any assurance of adequate support for an 18 year old in the context of a custodial sentence. She notes that Mr Hegan simply identifies options and programmes which may be available for adult sex offenders, with no indication of whether any such options would be available or suitable for Mr Meyer. Ms Adams submits that placing Mr Meyer in an adult sex offender programme is likely to be harmful in any event, and notes there is no assurance Mr Meyer could even be accommodated in a Youth Unit (the only one presently operating in New Zealand being in Christchurch, which, even if a bed were available, would involve Mr Meyer being completely isolated from his family and support networks). Ms Adams further submits that Mr Hegan's opinion that "a possibility" is that Mr Meyer's SAFE programme could continue while in custody is unrealistic, contrary to the model adopted by SAFE and given without any consultation with SAFE. Ms Adams accordingly submits that a sentence of imprisonment at this juncture has a very real risk of the rehabilitative steps to date being lost.

Discussion

[102] Because one of the relevant factors in determining an application for leave to appeal out of time involves an evaluation of the strength of the applicant's case, I first address the merits of the proposed appeal.

Was the District Court sentence manifestly inadequate?

[103] As a preliminary point, I note that two of the charges against Mr Meyer are of indecent assault, which have a maximum penalty of seven years' imprisonment. Amendments were made to the Sentencing Act with effect from 1 July 2019 which prevent the courts from sentencing offenders to imprisonment or home detention if they were under the age of 18 years old at the time of the offending, *unless* the offence(s) have a maximum penalty of 14 years' imprisonment or more.[64]

[104] The effect of these provisions was not addressed at sentencing in the District Court (or on the appeal). But as a matter of principle, the provisions prevent a sentence

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64 Sentencing Act, ss 15B and 18.

of imprisonment or home detention being imposed on the two indecent assault charges on which Mr Meyer was convicted. Given the manner in which the District Court sentence was constructed, it is not clear what effect, if any, these particular charges had on the sentencing outcome. I suspect they had little to no effect. Again as a matter of principle, however, and consistent with the approach taken by the majority in *Diaz v R*, any proposed sentence of imprisonment (or home detention) cannot be uplifted because of the presence of these two charges.[65] The majority in *Diaz* stated that as a result, the injuring charge in that case was to be disregarded.[66] So too then in this case, the two charges of indecent assault. I mention this point now as it may become relevant to what an appropriate starting point could or should be. I should also emphasise that this approach is not intended to downplay Mr Meyer's offending which led to the indecent assault charges, or the resulting harm to the victims concerned. It is simply the application of the law.

[105] Turning to the substance of the appeal, I accept the Crown's submission that this was serious offending, involving five victims, four of which involved sexual violation by rape. For reasons just articulated, I put aside the two charges of indecent assault. But given the seriousness of the offending and by reference to *R v AM*, I consider the Crown's suggested starting point on appeal of eight years' imprisonment to be too low.

[106] Turning to the aggravating and mitigating features of the offending:

(a) I do not consider there to be planning and premeditation present in Mr Meyer's offending to the extent amounting to an aggravating factor.

(b) I do not consider there to be *significant* violence involved, over and above that which is inherent in the charge of rape. As the Court of Appeal stated in *R v AM*, there is violence inherent in any act of sexual violation, and usually also some associated violence, such as pushing or pulling a victim to the ground and holding him or her down.[67] I do

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65 *Diaz v R* [2021] NZCA 426 at [32].
66 At [34].
67 *R v AM*, above n 12, at [38].

not consider the associated violence in any of the four instances of rape, other than that of U, to be more than mild.

(c) The victims' age, and thus vulnerability, is an aggravating factor, but again not to a significant degree. There is no real age disparity between Mr Meyer and the victims, unlike in many cases that come before the courts. V was asleep at the time of the offending against her, and thus inherently vulnerable.

(d) There has clearly been significant and lasting emotional harm to the victims. This is not to be underestimated. But sadly, this too is inherent in most if not all cases of rape. There is no suggestion of any associated physical harm, at least caused directly by the sexual offending itself. I do not consider this factor gives rise to a separate aggravating factor.

(e) The scale of the offending is plainly an aggravating factor. There are multiple victims and some of the offending was accompanied by other sexual offending (in particular, anal intercourse and oral sex). Filming was also involved in one case. Where a rape is accompanied by other sexual offending, the Court in *R v AM* encourages a common sense approach to overall culpability for that instance of offending (rather than, for example, assessing separate starting points for each event leading to or following sexual intercourse).[68] As the Court of Appeal also noted in *R v AM*, offending against multiple victims increases the offender's culpability.[69]

(f) The Court of Appeal in *R v AM* accepted that associated consensual intercourse *can* operate as a mitigating factor in some cases but doubted whether it would have a great deal of impact in many.[70] I do not take it into account as a mitigating factor here. While there was some consensual sexual activity surrounding some of Mr Meyer's offending,

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68 At [49].
69 At [48].
70 At [59]–[60].

the Judge was clear that there was no consent in the context of the actual offending, nor any basis for Mr Meyer to have a reasonable belief that any of the victims were consenting. Nor does the fact that Mr Meyer was or had been in a relationship with some of the victims act as a mitigating factor.[71]

(g) Finally, youth does not operate as a mitigating factor at this stage of the sentencing exercise. Any discount for youth will follow when factors personal to the offender are assessed.[72]

[107] By reference to the bands discussed in *R v AM*, I place Mr Meyer's offending within band two,[73] and at the higher end of that band. This would provide a starting point in the range of 10 to 13 years' imprisonment. Given this is a Solicitor-General's appeal, I adopt a starting point of 10 years' imprisonment.[74]

[108] This starting point appears to be consistent with the Judge's own view, given in his transfer decision he observed that "if a District Court analysis is applied" the offending would sit "at the higher end of band 2 or the lower end of band 3", and that a starting point of eight years, uplifted significantly for totality, would arguably be required.[75] It is also consistent with cases to which I have been referred by counsel or which I have considered separately.[76]

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71 At [61].

72 At [84]. See also *R v LB* [2020] NZHC 94 at [29].

73 Cases involving two or three aggravating factors, increasing culpability to a moderate degree: *R v AM*, above n 12, at [98].

74 This would reflect, for example, a starting point of seven to eight years' imprisonment for the offending against T (involving sexual intercourse, anal sex, and filming), with an uplift to reflect the other offending and applying the principle of totality.

75 Transfer decision, above n 13, at [87].

76 See, for example, *Solicitor-General v Rawat*, above n 57 (starting point of nine years' imprisonment for offender 18–19 years old at the time of offending; three instances of rape of an 11–12 year old, and three instances of indecent assault); *M v New Zealand Police* HC Wellington CRI-2011-485-72, 21 September 2011 (M, when he was 14–15 years old, twice raped an 8–10 year old girl, who was part of his extended family; 22 years old at the time of charges being laid. Eight year starting point adopted); *Solicitor-General v Wiwarena* [2021] NZHC 844 (Mr Wiwarena, 21 years old, convicted of offending between the ages of 13–17 years old against three victims all a number of years younger than him; multiple instances of sexual violation by rape and sexual violation by unlawful sexual connection; starting point of 12 years adopted); *R v LB*, above n 73 (between the ages of 14 and 18 years, LB repeatedly raped his cousin, then aged between 12–16 years old; offending involved regular rapes, digital penetration and forced oral sex over a four year period; starting point of 12–13 years appropriate).

[109] Turning to personal factors, there are no suggested personal aggravating factors. In particular, Mr Meyer does not have any prior criminal history.

[110] Turning to personal mitigating factors, even adopting the generous discounts suggested by the Crown, but *prior* to taking into account further discounts that would be required given the progress of the proposed appeal (as directed in *R v Leger*),[77] a sentence of home detention is not available. Adopting the Crown's proposed 40 per cent discount in recognition of youth, together with, say, a 15 per cent discount for prior good conduct, some (equivocal) remorse and rehabilitative efforts to date, this would result in an end sentence of around four and a half years' imprisonment. The disparity between that sentence and the one imposed (which implies a sentence of imprisonment of 18 months)[78] is accordingly significant.

[111] I further observe that a discount of 40 per cent for youth as suggested by the Crown is in my view overly generous, even on a Solicitor-General's appeal. The impact of youth on sentencing was considered in detail by the Court of Appeal in *Churchward v R*.[79] The Court accepted that a discount for youth in appropriate cases ought to be given, recognising the age-related neurological differences between young people and adults and which make young people more susceptible to negative influences and more impulsive.[80] However, the Court went on to observe that:[81]

> [84] As was noted in *R v Rapira*, however, where the offending is grave, the scope to take account of youth may be greatly circumscribed. This is because the very factors that may lead young people to offend may cause concerns about future public safety. There is also the need for denunciation and deterrence, both specific to the offender and in general. This Court summarised the relevance of youth to sentencing in *Pouwhare v R* as follows:
>
> > … the fact than an offender is a young person can sometimes be given radical effect on sentence, unconstrained by any normative percentage, even where offending is serious. In other cases that is not possible. The young age of the offender cannot be accorded presumptive, let alone paramount, weight. The objective seriousness of the offending, the young person's part in it, anything aggravating and otherwise mitigating must also be weighed.

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77 *R v Leger*, above n 48, at [28].
78 Reflecting that a term of home detention is generally half the equivalent sentence of imprisonment.
79 *Churchward v R*, above n 62.
80 At [77(a)].
81 Footnotes omitted.

[112] In this case, given the multiple instances of sexual offending against five victims, Mr Meyer's conduct cannot be categorised as one-off, influenced by peer pressure or impulsive. Any youth discount must therefore be tempered for this reason.

[113] The Court in *Churchward v R* accepted, however, that a discount for youth would also recognise the difficulties inherent in a young person serving a sentence of imprisonment. The Court stated:[82]

> [85] As to the adverse effect of imprisonment on young people, this Court in *R v Slade* accepted that the effect of imprisonment on youth differs from the effect on adults. The Court in that case accepted evidence, which it described as being grounded on well-accepted professional literature, that adolescents experience high levels of depression, anxiety, suicidal ideation and self-injurious behaviour, and victimisation from other inmates whilst incarcerated.

[114] The Court also accepted that there are generally greater prospects of rehabilitation in a young person,[83] a principle of obvious relevance in this case. As noted, the most recent judicial monitoring report records Mr Meyer as engaging well with the SAFE programme.

[115] The Court of Appeal has recently observed that discounts for youth generally vary between 10 and 30 per cent (though I accept that there is no "cap" as such).[84] Reflecting that this is a Solicitor-General's appeal, a discount of no more than 30 per cent for youth would have been available in my view. This (together with the 15 per cent referred to at [110] above) results in an end sentence of five years, six months' imprisonment.

[116] Further discounts would then be required to reflect the change in Crown position and the late (proposed) appeal, and the inevitable very distressing effect on Mr Meyer. As noted earlier, the Court of Appeal in *R v Leger* mandated such discounts, though gave no guidance as to their extent.[85] Given the Crown's stance throughout Mr Meyer's proceedings in the Youth Court and then District Court, and that its appeal is well out of time, a discount of a further 15 per cent is appropriate in

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82 Footnotes omitted.
83 At [88]–[89].
84 *W (CA722/2021) v R* [2022] NZCA 422 at [61].
85 *R v Leger*, above n 48, at [28].

my view. As Ms Adams submits, this is not a case of the Crown acquiescing in a manifestly inadequate sentence, but effectively driving it from the outset. Applying all of the discounts to the 10 year starting point leads to a sentence of four years' imprisonment. There must also be a discount to reflect the time Mr Meyer has already served of his home detention sentence. Mr Meyer has spent just over three months on home detention. He has fully complied with his sentence to date. I agree that a discount of around six or so months would be appropriate. Given serving that sentence has involved additional and not insubstantial difficulties, I make an allowance of seven months. This leads to a proposed end sentence, were the appeal to be allowed, of three years and five months' imprisonment. Again, home detention remains unavailable. I also accept Ms Laracy's submission that the facts of this case would not displace the presumption in s 128B of the Crimes Act in any event.

[117] Whether the end sentence is around three years' imprisonment as suggested by the Crown or somewhat higher for the reasons just given, the Judge's sentence of home detention was manifestly inadequate. The fact the Judge did not engage in an orthodox sentencing analysis obscures the reality of this conclusion.

[118] I agree with Ms Adams that the approach the Judge instead took to sentencing reflects the context of the earlier Youth Court proceedings. But having transferred the proceedings to the District Court for sentencing, it was an error of law for the sentencing to proceed, as it seems it did, as a "completion" of a Youth Court process. In particular, as the Court of Appeal made clear in *Pouwhare v R*, once a young person is transferred for sentence to the District Court (or the High Court), the Sentencing Act purposes and principles will apply. As the Court stated, unless the Sentencing Act purposes and principles displace the youth justice principles in the Oranga Tamariki Act, the analysis the Sentencing Act calls for "would be rendered incoherent".[86]

[119] This latter observation is particularly relevant in this case. Sentencing is a public process. Given the approach adopted by the Judge (which to be fair to him, was supported by the Crown), the sentencing exercise lacked transparency, which in turn undermines public confidence in the administration of justice.

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86 *Pouwhare v R*, above n 59, at [74].

[120] The merits of the proposed appeal are accordingly strong. There is no doubt that Mr Meyer's offending was serious; indeed, it is more serious than in most of the cases discussed earlier, including in *R v Leger*.[87] These are powerful factors in favour of correction of the sentence on appeal.

[121] On the other side of the ledger, until the Solicitor-General's proposed (late) appeal, a sentence of imprisonment had never been suggested as a possible sentence in this case. I accordingly view the Crown's change in stance as more significant than in some of the cases referred to. To be clear, this point is not to "punish" the Crown; rather it is to reflect the effect such a change has on an offender. The Court of Appeal in *R v Donaldson* described the prospect in some cases of substituting a community-based sentence with a sentence of imprisonment as involving "an element of inhumanity".[88] The Court of Appeal in *R v Johnson* described it as involving "a distinct element of unfairness" and "extremely harsh".[89] This must be particularly so, in my view, when:

(a) the offender is a young person (not a factor in either *R v Donaldson* or *R v Johnson*);

(b) it was not until well after the statutory time period for appealing had passed that a sentence of imprisonment was first suggested as appropriate; and

(c) where there is evidence before the court, as in this case, that the young person's mental health is in a fragile state.

[122] As noted earlier, Ms Laracy acknowledged that to sentence Mr Meyer now to a sentence of imprisonment would feel crushing for him. Crushing sentences are unlikely to be in the interests of justice.

[123] There is a further effect of the Crown's stance and the delay in bringing the appeal. Given the delay, Mr Meyer has served just over one third of his sentence of

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87 Other than, of course, the offence of manslaughter in issue in *Tipene*.
88 *R v Donaldson*, above n 29, at 550.
89 *R v Johnson*, above n 39, at [33]–[34], citing *R v Palmer*, above n 43, at [45(b)].

home detention, though this in and of itself would not have been determinative in this case given the seriousness of the offending. But as discussed earlier, at a relatively early point, Mr Meyer was assessed for and accepted into the SAFE programme and has been participating in that programme since early May. He is therefore nearly six months into the 12 month programme. I consider this to be particularly relevant when, in addition to accountability, the need for rehabilitation is plainly engaged in this case. I draw no real confidence from Mr Hegan's affidavit that a similarly beneficial programme will be available to Mr Meyer were he now to be sentenced to imprisonment. There is no suggestion there are youth-based sexual offending programmes available in custody, and while there is no expert evidence before the Court, common sense suggests that Ms Adams' submission that placing a young person into an adult-based group sexual offending programme could be harmful is not an unreasonable one. And while Mr Hagen states that based on the information before him, the "most likely" treatment pathway for Mr Meyer would be individual treatment with a Department psychologist, he provides no details around that, including as to availability, start time or duration.

[124] Mr Hegan's suggestion that the SAFE programme could potentially continue with a clinician visiting the prison or by AVL seems, with respect, somewhat unrealistic. The SAFE programme is specifically a community-based programme and Mr Hegan's (tentative) suggestion is made without having consulted SAFE itself. I also take judicial notice of the serious difficulties currently being experienced in the custodial environment as a result of COVID-19 and now staff shortages. This continues to impact the provision of custodial services such as access to rehabilitation programmes, training and education, visits and unlock hours.

[125] I accordingly accept that to sentence Mr Meyer now to a sentence of imprisonment carries with it a real risk of undermining progress to date in rehabilitation, through his engagement in an appropriate youth sexual offending programme. This is a particularly important factor in my view.

[126] I also take into account that while the seriousness of the offending in this case called for a sentence of imprisonment, home detention is nevertheless the second most

restrictive sentence in the hierarchy of sentences,[90] and the Court of Appeal has said that it carries with it "in considerable measure" the principles of deterrence and denunciation.[91] Home detention is often perceived as an "easy" sentence, when on the contrary, it is a difficult sentence and highly restrictive of an offender's liberty. The very fact that home detention is a restrictive and particularly difficult sentence for young persons is reflected in the provisions of the Sentencing Act which prohibit the courts from imposing *any* sentence of home detention (or imprisonment) on a young person other than in cases of serious offending. Further, Mr Meyer now has a number of criminal convictions for serious sexual offending, which as the Judge noted when entering those convictions and transferring the matter to the District Court, will undoubtedly have long-term effects for him. I reiterate that Mr Meyer's offending would have ordinarily resulted in a sentence of imprisonment. But I make these points to dispel the notion that the sentence actually imposed was solely rehabilitative and could not respond at all to punitive sentencing principles, particularly in the case of a young person.

[127] Tying these threads together, and despite the manifestly inadequate sentence in this case, there is a constellation of factors which persuade me that the interests of justice are best served by the Crown's application for leave to appeal out of time being declined. Other than the case of *R v Leger* (which is now some 21 years old), it seems this constellation of factors is unique and, one would hope, unlikely to occur again.

[128] I have not reached this conclusion lightly. Indeed, this has been a difficult decision. In reaching my decision, I am also acutely aware of the position of the victims. I expect that they and their families will feel aggrieved by this outcome. However, Mr Meyer, and other young men, can be under no illusion that in the ordinary course, serious sexual offending is (absent compelling features) likely to result in a sentence of imprisonment. Further, this judgment emphasises the critical need for transparency in the sentencing process, absent which the public confidence in the administration of justice is undermined.

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90 Sentencing Act, s 10A(2)(e).
91 *R v Iosefa* [2008] NZCA 453 at [41].

Outcome

[129] Mr Meyer's sentence was manifestly inadequate. The approach to sentencing in the District Court was also irregular and contrary to established principle. Reflecting that this is a Solicitor-General's appeal, an appropriate end sentence would have been at least three years and five months' imprisonment.

[130] Despite this, the combined effect of those factors discussed at [121]–[126] above leads me to the conclusion that in the somewhat unique and unfortunate circumstances of this case, the interests of justice are best served by declining the Crown's application for leave to appeal out of time.

[131] For completeness, I note Ms Laracy's submission that if I were not minded to allow the appeal and impose a sentence of imprisonment, an alternative approach would be to allow the appeal and increase Mr Meyer's sentence of home detention to one of 12 months' home detention (as occurred in *R v Johnson*). I was initially attracted to that suggestion, but on reflection, decline to do so. It replaces a manifestly inadequate sentence with another manifestly inadequate sentence. I expect it may also be viewed as an affront to the victims.

[132] Finally, given the Crown's application for leave to appeal out of time is declined, there is no need to consider the cross-appeal against the decision to transfer the proceeding from the Youth Court to the District Court for sentencing. For completeness, I simply observe that irrespective of the outcome of the Crown's appeal (had leave to appeal out of time been granted), the transfer decision was undoubtedly the correct one. The Judge was rightly of the view that given the seriousness of Mr Meyer's offending, the sentencing options in the Youth Court could not sufficiently respond to those sentencing principles of accountability, denunciation and deterrence. Accordingly, had I granted the application for leave to appeal out of time, I would have allowed the appeal and dismissed the cross-appeal.

Result

[133] The Crown's application for leave to appeal out of time is declined.

Fitzgerald J

Addendum: This judgment was delivered yesterday afternoon, but distributed only to the parties, to enable them to consider what, if any, redactions to the judgment were required or appropriate. This judgment accordingly contains (very minor) redactions. Publication of the unredacted version of this judgment (other than to the parties) is prohibited.