NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CRI-2023-463-83
[2023] NZHC 3759

BETWEEN	MELVIN ANTHONY BOX Appellant
AND	THE CROWN Respondent

Hearing: 28 November 2023

Appearances: M Simpkins for the Appellant
A McConachy for the Respondent

Judgment: 18 December 2023

JUDGMENT OF HARVEY J
[on appeal against sentence]

This judgment is delivered by me on 18 December 2023 at 4.30 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Solicitors/Counsel:
Simpkins Legal Limited, Rotorua
Gordon Pilditch, Crown Solicitors Office, Rotorua

Introduction

[1] On 9 August 2023, Melvin Box was sentenced in the Rotorua District Court to two years, three months' imprisonment on a representative charge of sexual intercourse with a girl under 12.[1] He now appeals his sentence on the basis that a discount for cultural matters should have been granted. The appellant argued that if a discount had been provided, his sentence would have reduced to a term of imprisonment of two years or less. If that had occurred, then the appellant submitted a sentence of home detention should have been imposed.

The offending

[2] The offending occurred between 1978 and 1982 in and around Taupō. At the time, the victim was between six and nine years of age while the appellant was between 14 and 18 years old. He lived in Taupō with his parents at a family homestead. The victim and the appellant are known to each other. The first sexual offence with the victim took place when she was six and the appellant was between 14 and 15. He had sexual intercourse with the victim who hid underneath the bed afterwards before being found by an aunt.

[3] The second act occurred when the victim was seven and the appellant was between 15 and 16 at Four Mile Bay, Taupō. The appellant had sexual intercourse with the victim in the back of a van.

[4] The third occasion was when the victim was nine and the appellant was between 17 and 18 and both were at an address in Taupō. The appellant drove the victim to a bus stop near the Taupō rubbish tip and had sexual intercourse with her.

District Court decision

[5] The Judge set a starting point of five years' imprisonment, with reference to sentencing tariffs contemporaneous with the offending. He also took account of the aggravating factors of the victim's vulnerability, the repeated instances of offending, some degree of premeditation and breach of trust.

---

1 *R v Box* [2023] NZDC 17077.

[6] A 30 per cent discount was applied to recognise the offending was committed when Mr Box was 14–18 years old, which reduced his culpability. A good character discount of 15 per cent was granted. A guilty plea discount of 10 per cent was awarded for a plea made on the morning of trial but following resolution of three charges to a representative charge.

[7] The Judge found that while the pre-sentence report found there was "some insight" into the offending it was clear there was not a full acceptance of responsibility. There was no basis for a remorse discount or for willingness to attend restorative justice. As to the cultural report, the Judge noted that Mr Box did not have a strong emotional relationship with his mother, who while not physically abusive was a strict disciplinarian. He was an "angry adolescent" but his childhood was "unremarkable in some ways". The Judge found no connection between the lack of emotional support in Mr Box's early years and the sexual abuse of the victim. Accordingly, no discount was granted.

[8] In summary, the Judge considered that the total discounts amounted to 55 per cent or 33 months. He noted it was at the "upper end considering the seriousness of this offending" and found that any further discounts would not meet the sentencing principle to hold Mr Box accountable for the harm done.

Approach on appeal

[9] The approach to sentence appeals is well-settled. The Court must allow the appeal if satisfied that there has been an error in the sentence imposed and that a different sentence should be imposed.[2] The sentence below must be shown to be manifestly excessive or wrong in principle.[3]

Submissions

[10] Mr Simpkins submitted that the Judge failed to give the appropriate weight for mitigating features that would have resulted in a non-custodial sentence. Counsel contended that the Judge failed to identify a causative contribution between factors in

---

2 Criminal Procedure Act 2011, s 250(2).
3 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30]–[35].

the appellant's background and the offending. This resulted in an absence of a discount for background factors. Mr Simpkins argued that combined, a proper consideration of these factors would have resulted in a non-custodial sentence.

[11] Counsel submitted that while gravity and culpability must be addressed, when doing so, consideration of aggravating and mitigating factors must ensure that the end sentence is just and in accordance with the gravity of the situation. Counsel cited *Moses v R* in support.[4] Mr Simpkins also referred to the Court of Appeal decision *Zhang v R* along with the Supreme Court judgment *Berkland v R*.[5]

[12] Regarding cultural background considerations, while citing *Zhang* and *Berkland*, counsel acknowledged in paragraph 26 of his submissions that the appellant's background factors are not extraordinary. Even so, he emphasised that extraordinary circumstances are not the test. Mr Simpkins underscored that causal nexus is a lower standard to an operative or proximate cause, citing *Berkland*. When a cycle of deprivation has continued it must be a sentencing consideration. Counsel contended that the Judge erred in requiring an operative or causal nexus between cultural deprivation and the offending. Mr Simpkins submitted that cultural background and deprivation in the case of the appellant required a careful examination of the specifics of the deprivation suffered. Moreover, it is evident, he contended, that the appellant's decision-making abilities that led to the offending altered significantly once cultural deprivation impacts were addressed by "forming a whānau with his wife".

[13] Counsel emphasised at paragraph 18 of his submissions that the appellant's circumstances are "extraordinary" in the context of the life changing effect marrying his wife and raising his own whānau has had on him. Mr Simpkins submitted that the evidence before the Court including the s 27 report along with letters of support established that the appellant was able to claw back, in counsel's words, "the cultural aspects he was deprived as a child" and as a consequence of the impacts of colonisation on his entire family. This concluded with him ceasing offending and maintaining an offence-free life for over 40 years.

---

4 *Moses v R* [2020] NZCA 296 at [8].
5 *Zhang v R* [2019] NZCA 507; and *Berkland v R* [2022] NZSC 143.

[14] Mr Simpkins also sought to highlight two specific cultural deprivation factors. Counsel submitted that the s 27 report described the appellant's upbringing as being exposed to a dysfunctional and culturally deprived home life without the benefit of emotional, social or psychological stability. Without connection to culture, counsel contended, the appellant and those like him are a "non-person" in Māori epistemology. Anyone disconnected from the protection offered by the group to assist develop a pro-social identity is therefore at a disadvantage.

[15] The appellant, according to counsel, was moved around whānau without much thought as to his birth right principles including mana and rangatiratanga. The impact of colonisation on that extended whānau led to the abandonment of a Māori way of life. Accordingly to Mr Simpkins, the upbringing the appellant received was the opposite of what would have been expected in the context of the tapu (sacred) status of a child and their right to be revered, protected, nurtured and loved. The impacts of colonisation on the appellant's wider whānau deprived him of this. The result, according to counsel, was the inevitable effect of these background factors on the appellant's ability to make good decisions.

[16] Mr Simpkins then referred to the Waitangi Tribunal's report *He Pāharakeke Rito Whakakīkīnga Whāruarua*.[6] This considered case studies highlighting the nexus between a deprived Māori child and anti-social lives of limited educational engagement, poor health, substance abuse, violence and imprisonment. Counsel submitted that the appellant was deprived of his culture as set out in the s 27 report. Mr Simpkins acknowledged that while the nexus between that report and the offending was not obvious, when a Māori child is deprived of inherent aspects of their culture, this "does lead to poor decision-making" and behaviours intended to regain control of their lives.

[17] Counsel then referred to a statement attributed to Professor Tā Pou Temara concerning the centrality of kāinga (home). Mr Simpkins submitted the appellant had no kāinga because he was a transient from the age of five being moved from his home to aunts, back and forth until his teenage years. In short, counsel contended that

---

6 Waitangi Tribunal *He Pāharakeke Rito Whakakīkīnga Whāruarua Report* (Wai 2915, 2021).

colonisation had deprived the appellant of his cultural heritage and inherent birth right to be raised in a supportive Māori environment. This then impacted on his ability to make good decisions.

[18] Mr Simpkins argued that the offending occurred during the appellant's adolescence. However, once he met his wife at age 19, his offending ceased. Accordingly to counsel, the long arm of colonisation continues to impact the lives of many Māori including the appellant. These ongoing impacts must be recognised by the courts but in this case the Judge failed to provide a discount for cultural background factors. According to Mr Simpkins, a discount in these circumstances is justified.

[19] While not diminishing the gravity of the offending, counsel submitted that a sentence of imprisonment is a disproportionately high punishment and inconsistent with the New Zealand Bill of Rights Act 1990. The least restrictive outcome in these circumstances would be home detention and would have been available had a discount for cultural background factors being provided by the Judge. That said, counsel recognised that the PAC report does not support home detention to the appellant's home address given that eight of his 10 mokopuna reside there. However, on the contrary, Mr Simpkins contended that the appellant raised his grandchildren and children without incident with the result that the home address is appropriate.

[20] Ms McConachy submitted that as the Judge did not reach the two-year threshold for imprisonment, home detention could not be considered.

[21] In addition, counsel contended that a causative contribution must be established for any cultural factors and background discount, citing *Berkland* in support. Ms McConachy argued that it is difficult for a causative contribution element to be established in this case given that the cultural report describes his childhood as unremarkable while recognising a level of emotional detachment from the appellant's mother. Further, counsel argued that a 15 percent allowance for good character was appropriate and did recognise the appellant's positive life since the offending.

[22] Accordingly to Ms McConachy, the Judge was correct to find that there was no causative contribution between background factors and the offending. Moreover,

counsel underscored that the allowances made were generous. The appellant pleaded guilty on the morning of his scheduled jury trial, two years after the charges were laid. Accordingly, Ms McConachy contended that any lack of discount for cultural reasons is ameliorated by the generous discount for the guilty plea despite its late entry.

[23] Counsel submitted that, even if the sentence is reduced to two years imprisonment, the purposes of deterrence and denunciation require a sentence of imprisonment. Ms McConachy highlighted that the offending was serious and committed against a young and vulnerable victim. Added to that is the unsuitability of the proposed home detention address. If however the Court is minded to commute the sentence to home detention, then an alternative address where no children are present will need to be considered.

Discussion

[24] As foreshadowed, this appeal is solely concerned with the argument that the Judge did not provide a discount for cultural factors which would have led to a sentence of imprisonment of two years or less. According to the appellant, what should have followed from that outcome would have been a sentence of home detention. Further, and as mentioned, the appellant seeks such detention to his home address. In support of his appeal, counsel has cited a range of materials with a particular reference to the impacts of colonisation.

[25] It is well understood that a significant body of research exists that demonstrates the deleterious and ongoing effects on Indigenous communities and individuals of colonisation in a variety of contexts as evidenced by consistently negative social indices.[7] This appeal judgment on a narrow point of law is not the place to rehearse the breadth of that evidence. Even so, it is nonetheless generally understood that some of the negative effects of colonisation include, simply as non-exhaustive examples, notions of disempowerment, dislocation and the degrading of traditional language and culture. When coupled with resource alienation on a significant scale those negative effects have contributed to intergenerational poverty, educational disengagement,

---

[7] See generally Waitangi Tribunal *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017); and Chris Cunneen and Tauri Juan *Indigenous Criminology* (Policy Press, Bristol, 2016).

unemployment, substance abuse and mental health challenges. These factors can manifest in and be linked to offending.

[26] In addition, even a cursory review from research available in the public domain of these effects on First Nations communities in Australia and North America, for example, underscores that reality, when the disproportionate rates of incarceration and engagement with the criminal justice system are considered.[8]

[27] Indeed, almost four decades ago the pioneering research of the late Dr Moana Jackson advocated for the establishment of effectively a separate but parallel system of justice to deal with Māori offenders.[9] Numerous initiatives have since then emerged including for example Rangatahi and Matariki courts, the Alcohol and Other Drug Treatment Court - Te Whare Whakapiki Wairua, Te Kooti o Tīmatanga Hou - the New Beginnings Court and the Court of Special Circumstances. There have also been changes to children and young persons' legislation and the increased application of family group conferences, restorative justice where appropriate and an expanding community involvement in the criminal justice system including specific attention to addiction and mental health risks. Added to that has been the increasing recognition of background cultural factors in the context of understanding the drivers of offending and how these may be taken account of in the sentencing process, per s 27 of the Sentencing Act 2002.[10]

[28] Turning then to *Berkland*, the Supreme Court confirmed that s 27 reports must be offender-focused and specific to that individual, and that broad and lengthy generalisations will invariably be counterproductive:[11]

> [146] The first [point] relates to formal s 27 reports. They must be case and offender focused. Generalised statements and templates are of no value and so will waste the courts' time and resources. For example, intergenerational background information,

---

8 For example, the Canadian Department of Justice "Understanding the Overrepresentation of Indigenous people in the Criminal Justice System" (13 April 2024) Department of Justice Canada <www.justice.gc.ca> records: "Many inquiries, commissions, task forces and research studies have made direct links between the historical and ongoing colonial laws, policies, processes, systems and the overrepresentation of Indigenous people in the Canadian criminal justice system." See also Zoe Stainesand John Scott "Crime and colonisation in Australia's Torres Strait Islands" (2020) 53(1) Australian & New Zealand Journal of Criminology 25.

9 Moana Jackson *The Maori and the Criminal Justice System: A New Perspective – He Whaipaanga Hou (Part 2)* (Department of Justice, November 1988).

10 See *Solicitor-General v Heta* [2018] NZHC 2453 at [34]–[50].

11 *Berkland v R*, above n 5 (emphasis added).

> where relevant to sentencing principles and purposes, will be important, but long generalised historical dissertations will not help. *Rather, what is required is succinct summaries focused on the experience of the offender's own community. For example, if the offender is Māori, the experiences of their hapū and iwi will often have already been summarised by the Waitangi Tribunal or in Treaty settlement deeds and legislation. A connection must then be drawn between those narratives and the offenders' lived experience.* A primary purpose is to assist the judge in deciding whether causative contribution is established.

[29] Other than several generalised statements, there was no reference to the experience of the appellant's iwi Ngāti Tūwharetoa and his hapū in the context of the colonisation experience in either the s 27 report or in submissions, as contemplated in *Berkland*. In addition, while there was reference to reports of the Waitangi Tribunal, none of those mentioned were relevant to Ngāti Tūwharetoa, unlike for example *He Maunga Rongo: Report on Central North Island Claims, Stage One* or legislation such as the Ngāti Tūwharetoa Claims Settlement Act 2018.[12]

[30] The Supreme Court also highlighted the need for the presence of relevant contributory factors that amount to a causative contribution toward the offending:[13]

> Contributory mental illness can still explain why an offender is living in the chaotic or conflictual circumstances that made the offending more likely. Contributory addiction can help to explain why an offender was drawn into the commercial drug dealing environment. Contributory deprivation, including that precipitated by historical dispossession and sustained by poor educational and other intergenerational outcomes, can help to explain an offender's limited life options, poor coping skills or other criminogenic circumstances that made the offending more likely. *Where these factors do help to explain how the offender came to offend, they will amount to causative contribution and so will be relevant for the purpose of sentencing*.

[31] One of the challenges with the present appeal is the absence of evidence of the kind of deprivation contemplated by the research mentioned above and highlighted in *Berkland*. For example, there is no evidence of the appellant himself being subjected to any kind of physical or sexual abuse. There is also no evidence of the appellant being in state care or enrolled at a boarding school of the kind where abuse did occur. This is in contrast to the example of Mr Berkland where the Supreme Court did identify and underscore the relevant links:[14]

> [155] When his relationship with his ex-partner ended, Mr Berkland returned to Porirua, reconnected with some former associates and eventually joined the local

---

12 *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wai 1200, 2008).
13 *Berkland v R* above n 5, at [109] (footnotes omitted, emphasis added).
14 Footnotes omitted, emphasis added.

> chapter of the Mongrel Mob. *[His ex-partner] considered that Mr Berkland suffers from low self-esteem due to illiteracy and poor economic prospects. In her view, his poor economic prospects were also exacerbated by the responsibility and inevitable stress of having multiple children under his full-time care. She observed he carries significant unresolved childhood-related trauma, including trauma due to sexual abuse at the hands of adult visitors to his home, which he had disclosed to her years earlier during the course of their relationship.* As a result Mr Berkland had few skills for coping with emotional or economic adversity.
>
> [156] *We conclude, based on all the material reviewed, that Mr Berkland's upbringing involved multiple criminogenic risk factors including poverty, trauma, chaotic home circumstances and poor educational outcomes. Some of these factors, namely poverty, unresolved trauma, poor educational outcomes and chaotic circumstances, continued into adulthood, leading to, or exacerbating, poor resilience in the face of adversity.*

[32] In the present case, there is reference to the appellant as an "angry adolescent" due to the challenging and distant relationship he had with his mother who fostered in him a sense of dislocation in being unwanted by either herself or his stepfather. She would offer harsh criticisms and impose punishments including being locked out of the house at night in the dark for example. The appellant reported that being sent to live with an aunt was not much better because she was cold and emotionless, despite ensuring his subsistence needs were well met.

[33] The appellant also reported a certain level of disengagement from schooling and left as soon as he could to find work at the age of 15 then left home a year later aged 16. He met his future wife when he was 19. In summary, the cultural report writer concluded that the appellant's childhood was "unremarkable" in some respects. That said, the writer also suggested that the appellant's unresolved emotional grief surrounding his sense of disconnection, despondency, resentment and anger as a result of feeling rejected by his mother "may provide a causative link" between his background and his teenage offending.

[34] As the Supreme Court concluded, there will also be instances where the relevance and impact of background cultural factors will begin to assume less prominence:[15]

> [110] Although causative contribution is a lower standard than operative or proximate cause, it must still be satisfied. *There will be a point at which background factors can no longer assist in explaining the offending. For example, the link between historical deprivation and the offending can be severed. To illustrate this, not all Māori still live in circumstances of relative economic, social or cultural deprivation*

---

15 *Berkland v R*, above n 5 (footnotes omitted, emphasis added).

> *today.* For some, the cycle of deprivation has been broken or, at least, much weakened. This too is important to understand, because any mitigatory effects of historical deprivation must be based on explanatory facts, not ethnic assumptions. As we will come to, the evidence of Mr Harding's background raises these issues.

[35] It was argued that because the appellant was shifted amongst relatives from time to time, this dislocation led to a disconnect with his iwi and hapū, and combined with his difficult relationship with his mother, the result that he was deprived of the whanaungatanga frameworks inherent within whānau Māori. That included, according to counsel, any understanding of cultural norms surrounding the "inviolability" of young children. That exclusion, it was contended, then affected the appellant's decision-making abilities which lead to the offending for which he had been sentenced. For these and related reasons, it was submitted, the appellant was entitled to a discount for cultural factors.

[36] Yet, overall, this set of experiences does not necessarily translate into the kinds of factors relevant to colonisation arguments in the context of discounts for cultural background considerations. The appellant was not taken out of the tribal rohe as a result of say urbanisation, let alone put into care or adopted out. In fact, the evidence makes it plain that during his childhood he remained within the takiwa of Ngāti Tūwharetoa. There is no evidence that the appellant was disconnected from his blood whānau, notwithstanding counsel's arguments regarding Mr Box's parents and grandparents' generation likely being forced to discard anything Māori including for example, te reo. As a result, counsel's arguments that Mr Box's offending can be linked to his disconnection from his iwi and hapū are not readily supported by the evidence.

[37] In addition, along with the points made in paragraphs [28] to [33] above, there is also no reference to earlier criminality, even at a low level, of substance abuse, mental health issues or any gang influence. It was therefore unsurprising that the Judge did not provide a cultural factors discount, given the particular circumstances of the appellant's case, including his background. Stepping back, I can see no error in the Judge's approach and am therefore unable to discern any grounds to interfere with his sentencing.

[38] Moreover, it is uncontested that the appellant and his victim were both minors at the time of the first offending, but there was an eight year age difference between them. As foreshadowed, the appellant engaged in sexual intercourse with a minor on more than one occasion over a number of years including after he had turned 16. As both the Judge and counsel highlighted, this is serious offending. The principles of deterrence and denunciation are therefore important considerations in the context of this offending against a vulnerable child who was in the care of someone known to her and who took advantage of that vulnerability on more than one occasion over a number of years. A sentence of imprisonment is therefore necessary to satisfy the purposes and principles of the Act, notwithstanding counsel's submissions on the effects of colonisation on decision-making and the New Zealand Bill of Rights Act. While I accept that the offending is historic, the effect on the victim was profound and remains ongoing.

[39] In any event, even if I had concluded that a discount for cultural factors was appropriate, that could not then lead to any sentence but imprisonment for the appellant for the reasons outlined.

Decision

[40] The appeal against sentence is dismissed.

Harvey J