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IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA708/2020
[2024] NZCA 298

BETWEEN	PAUL ELVIS RAWIRI MCLEAN Appellant
AND	THE KING Respondent

Hearing:	6 March 2024
Court:	Ellis, Gault and Cull JJ
Counsel:	J S Jefferson for Appellant M J R Blaschke for Respondent
Judgment:	5 July 2024 at 11.00 am

JUDGMENT OF THE COURT

A The application to adduce fresh evidence is granted.

B The appeal is allowed.

C The sentence of 11 years' imprisonment is set aside.

D A sentence of nine years and ten months' imprisonment is imposed.

REASONS OF THE COURT

(Given by Ellis J)

[1] Mr McLean seeks a reduction of his sentence of 11 years' imprisonment,[1] which was imposed on 6 November 2020 after a jury found him guilty of two charges

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1 *R v McLean* [2020] NZDC 23133 [Sentencing notes].

of sexual violation by unlawful sexual connection,[2] two charges of indecent assault,[3] and two charges of doing an indecent act on a young person under 16 years of age.[4] He filed an appeal against conviction and sentence. He abandoned his appeal against sentence and this Court dismissed his conviction appeal.[5]

[2] In 2023, this Court reinstated his sentence appeal because information about Mr McLean's personal circumstances, described in a recently obtained s 27 cultural report, was not available to the sentencing Judge in 2020.[6]

[3] The Court recorded counsel's advice that it is only since he has been in custody that Mr McLean has had an opportunity to address the abuse he suffered during his early childhood in state care. This was a result of his "custodial access to 'rehabilitative programmes and other interventions intended to effectively assist the rehabilitation and reintegration of offenders into the community'".[7] Mr McLean had never disclosed he was a victim of sexual abuse to either his trial counsel or appellate counsel. The Court noted Mr McLean's explanation that "[i]t was always something that I blocked out, that I hid. I was ashamed of it and too embarrassed to talk to anyone about it."[8]

[4] The Court concluded:

> [13] The appeal is reinstated for the purpose of taking into account submissions and evidence concerning personal mitigating circumstances able to be advanced by Mr McLean. We record Mr Jefferson's acknowledgement there will be no argument directed against the starting point adopted by the sentencing Judge.

[5] Two reductions are now sought: one for his personal background factors, and one for the impact of his sentence on his children.

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2 Crimes Act 1961, ss 128(1)(b) and 128B; maximum sentence 20 years' imprisonment.
3 Section 135; maximum sentence seven years' imprisonment.
4 Section 134(3); maximum sentence seven years' imprisonment.
5 *McLean v R* [2022] NZCA 114.
6 *McLean v R* [2023] NZCA 578 [Reinstatement decision].
7 At [9].
8 At [9].

[6] Mr McLean seeks formally to admit the s 27 report, together with his solicitor's letter in support of his historic claims of abuse while in state care, as fresh evidence on appeal. We deal with this application first.

Fresh evidence on appeal

[7] We begin by observing that, given this Court has already granted Mr McLean leave for the express purpose of permitting consideration of material of the kind contained in the s 27 report and the letter (both of which were available at the time of the reinstatement decision), it would be a strange result to decline to admit the report now.

[8] Nonetheless, Mr Blaschke for the Crown says the report and letter should not be admitted. He accepts that the report is fresh but says it is not cogent. He contends that Mr McLean's continued denial of his offending means his own account of being an abuse victim cannot be taken into account as a mitigating factor to the extent it might otherwise be.

[9] In *Berkland v R*, the Supreme Court admitted a s 27 report despite its contents not being fresh and in the absence of any reason for the failure to adduce it at sentencing. The Court stated that "it is nonetheless important that courts have access to in-depth background information in sentencing, especially where lengthy terms of imprisonment are in contemplation".[9] As we have said, this Court reinstated Mr McLean's appeal in the interests of justice to "enable any causative aspects of his late-comprehended background to be taken into account on a reinstated appeal against sentence".[10]

[10] We therefore grant leave to admit the s 27 report together with the solicitor's letter. The report is fresh and, for reasons discussed below, we consider it is cogent. To decline the admission of this fresh evidence would be both disproportionate and contrary to the interests of justice in our view.

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[9] *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [174].
[10] Reinstatement decision, above n 6, at [11].

The sentencing decision

[11] The sentencing Judge identified the unlawful sexual connection offences as the lead offences. He summarised the offending as occurring in 2017 after a social event, where the two siblings, aged 16 and 12, were sleeping.[11] Mr McLean, aged 33, knew the parents of the victims and was also staying at the venue. As the older victim was lying down in the sleeping area, Mr McLean lay down beside her and indecently touched her on the bottom and chest. He later began touching the younger victim's stomach and penis, digitally penetrated the victim's anus, and then penetrated the victim's anus with his penis, causing significant pain. In terms of duration, the trial Judge found at sentencing that there was a "sustained act of anal intercourse".[12]

[12] The Judge placed the offending in the middle to upper end of band two of *R v AM* [13] after identifying the following aggravating factors: the victims' vulnerability due to their age, they were sleeping or about to sleep, one of them was under the influence of alcohol, there were multiple victims, and the offending involved a breach of trust to a minimal degree.[14] The Judge adopted a starting point of 10 years' imprisonment for this offending and added a one-year uplift for the remaining offending, resulting in an 11-year global starting point.[15]

[13] The Judge then considered mitigating factors and found that he did "not have any further information which allow[ed] [him] to properly reduce that sentence".[16] He did not allow a discount for remorse as Mr McLean denied the offending.[17] Mr McLean was registered on the Child Sex Offender Register.

The appeal

[14] As noted earlier, Mr McLean seeks on appeal two discrete discounts: one for the causative matters said to be identified in the s 27 report and another for the impact of his incarceration on his two dependent children. We address each in turn.

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11 Sentencing notes, above n 1, at [2]–[4].
12 At [7].
13 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [90].
14 Sentencing notes, above n 1, at [9]–[11].
15 At [15]–[16].
16 At [18].
17 At [18].

Personal background factors

[15] Mr Jefferson, consistent with his acknowledgement recorded in the reinstatement decision, takes no issue with the Judge's adopted starting point for the sentence assessment. He seeks a discount to the sentence for Mr McLean's mitigating personal factors canvassed in the s 27 report and suggests that a 30 per cent discount is appropriate.

[16] The principles for sentence reductions are found in s 8 of the Sentencing Act 2002. Section 8(i) directs the Court to consider various personal circumstances, namely "the offender's personal, family, whanau, community, and cultural background in imposing a sentence … with a partly or wholly rehabilitative purpose".

[17] The s 27 report identifies a predisposition to sexual offending arising from Mr McLean being "severely neglected" as a child and a victim himself of sustained sexual abuse from the age of three. The history of Mr McLean's time (and abuse) in care is detailed (at least in a preliminary way) in his lawyer's letter. The s 27 report further identifies the pathway from state care to prison, cultural deprivation, early and prolonged use of substances, an undiagnosed learning disorder, and unsuccessful schooling as causative contributions to the offending. More particularly, the report observes that those who have experienced sexual abuse are at a higher risk of being sexual abusers themselves. The report records that Mr McLean scored nine out of ten on a vulnerability to sexual offending scale as a result of his adverse childhood experiences.

[18] Mr Blaschke opposes a discount for personal background factors. He says discounts are usually given to sexual offenders who have suffered abuse because it signals rehabilitative potential. He submits that Mr McLean's continued denial of his offending is a significant impediment to his rehabilitation and thus a discount should not be given.

[19] In our view, that submission is not a complete answer to this aspect of the appeal. In *Zhang v R,* this Court has held that evidence of deprivation identified in a s 27 cultural report which has a "demonstrative nexus" with the offending may provide

a basis for a discount on sentencing[18] and in *Poi v R,* this Court observed that a discount is appropriate because such deprivation may reduce an offender's moral culpability for their offending.[19] So the fact that an offender continues to deny their offending does not, in itself, prevent a Court from identifying a possible nexus between the offending and any mitigating factors identified in a s 27 report. However, as this Court observed in *T v R*, any discount is likely to be less generous where there is a continued denial of offending. [20]

[20] In that case (where T denied serious sexual offending but his s 27 report detailed that he suffered sexual abuse when he was aged eight years old and had also suffered significant grief from the deaths of his adoptive father, eldest brother and three-year-old son), the Court held that a "modest discount of just over 10 per cent is appropriate to recognise the background factors that have led the appellant to where he is today".[21]

[21] In this case, we accept that the sustained abuse suffered by Mr McLean as a child, identified in the s 27 report, can be seen as an operative or proximate causative factor and provides a demonstrative nexus to this offending in a way that diminishes Mr McLean's culpability. However, as in *T v R*, his continued denial of offending warrants the reduction to be less than generous. We consider a modest discount of 10 per cent is appropriate.

Mr McLean's children

[22] Mr Jefferson submits that a discrete 10 per cent discount should be given for the effect of the sentence on Mr McLean's young twin daughters, who are now aged around 12 or 13.

[23] The s 27 report describes the birth of Mr McLean's twin daughters as a "life altering event" for him. It records that he felt that he had a loving family for the first time in his life, gave up his job to care for the girls full-time, and thrived in the role.

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18 *Zhang* v *R* [2019] NZCA 507, [2019] 3 NZLR 648 at [162].
19 *Poi v R* [2020] NZCA 312 at [24]–[27].
20 *T (CA185/2020) v R* [2020] NZCA 635 at [25].
21 At [25].

Mr McLean explained to the report writer that he wanted to make sure they got everything that he did not during his childhood and assumed the role of primary carer to ensure a safe environment. His custodial sentence has been extremely difficult for both Mr McLean and his daughters.

[24] Mr McLean was the primary caregiver of his daughters until his conviction and there is a close relationship, it is submitted, between his rehabilitation and his relationship with his children.

[25] The Crown opposes any discount for the effect on Mr McLean's children on the grounds that his denial of the offending undermines the contention that Mr McLean's relationship with his children is important to his rehabilitation.

[26] In *Philip v R*, the Supreme Court reinforced the obligation on sentencing courts to recognise the importance to a child of their familial relationships during sentencing. The Court said:[22]

> [52] The provision for such discounts reflects both s 8(h) and (i) of the Sentencing Act. Section 8(h) requires the court to take into account circumstances of the offender that would mean an otherwise appropriate sentence "would, in the particular instance, be disproportionately severe". Section 8(i) directs the court to consider various personal circumstances, namely, "the offender's personal, family, whanau, community, and cultural background in imposing a sentence … with a partly or wholly rehabilitative purpose". A sentencing approach which recognises the importance to a child of the familial relationship is also supported by the United Nations Convention on the Rights of the Child (Children's Convention). The Children's Convention emphasises the importance for children of growing up in a family environment and imposes an obligation on courts to treat the best interests of the child as a "primary consideration".

[27] The Court approved a discrete discount to Mr Philip's sentence for drug offending, to recognise his importance in his young son's life and the link between his relationship with his child and his rehabilitative prospects.[23] The Court reiterated this Court's comments in *Campbell v R* that it was "uncontroversial" to say that the impact

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22 *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 (footnotes omitted).
23 At [54].

imprisonment has on an offender's children is a relevant factor in considering their personal circumstances.[24]

[28] Mr McLean has undoubtedly been an important presence in his daughters' life prior to his incarceration. It is relatively unusual for a male offender to have been a sole caregiver and that fact differentiates this case (in a positive way) from even that of Mr Philip, who shared the caregiving role with his partner and, like her, had been sentenced to home detention to recognise that role.

[29] We nonetheless agree with the Crown that it is not possible to justify a further in sentence reduction on account of Mr McLean's children in the absence of some acknowledgement by him of his offending. We are not persuaded that any further reduction is appropriate here.

Adjusted sentence

[30] We are satisfied that the global starting point of 11 years' imprisonment warrants a reduction of 10 per cent for personal background factors. The sentence of 11 years' imprisonment is set aside and we substitute a sentence of nine years and ten months' imprisonment accordingly.

Result

[31] The application to adduce fresh evidence is granted.

[32] The appeal is allowed.

[33] The sentence of 11 years' imprisonment is set aside.

[34] A sentence of nine years and ten months' imprisonment is imposed.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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[24] At [50], citing *Campbell v R* [2020] NZCA 356 at [41]. At [51], the Supreme Court noted that this approach is consistent with the Court of Appeal's earlier judgment in *R v Harlen* (2001) 18 CRNZ 582 (CA).