

sentence was dismissed in the High Court.² Mr Leyco was granted leave by this Court on 18 June 2024 to bring a second appeal.³

[2] Leave to bring this appeal was granted because it was considered seriously arguable that the causative contribution to the offending of sexual abuse suffered by Mr Leyco in his childhood was not adequately considered in the District or High Courts.⁴ That is the sole ground of appeal before us.

Background

[3] We take the factual background and summary of the decisions of the lower courts from the leave judgment:

- [3] Between October 2017 and October 2022, Mr Leyco:⁵
- (a) uploaded (exported) 11 publications (videos) depicting child sexual exploitation material (CSEM) to an overseas social media platform using various usernames and distributed them using private messages and chat groups;
 - (b) uploaded (exported) 117 publications (115 videos and two photographs) depicting CSEM to an overseas cloud storage provider;
 - (c) downloaded (imported) 15 publications (videos) depicting CSEM;
 - (d) made 28 objectionable publications (videos) using a screen recording application to record videos depicting CSEM;
 - (e) possessed 237 publications (230 videos and seven photographs) depicting CSEM across an electronic device and a cloud account; and
 - (f) possessed a copy of the video of the Christchurch masjidain attack.

[4] These publications included videos of a male child performing fellatio on an adult male, videos of an adult male inserting his erect penis into the anus of a male child, an eight-minute-long video depicting the rape and torture of a male child, a video of an adult male stroking the penis of a male child, and a video of a male child having intercourse with a female child. Of the 408 CSEM publications Mr Leyco variously dealt with, 399 of them were videos that fell within “Category A” of the categorisation adopted by the Sentencing

² *Leyco v New Zealand Customs Service* [2023] NZHC 3556 [High Court judgment].

³ *Leyco v New Zealand Customs Service* [2024] NZCA 234.

⁴ At [19].

⁵ Based on the agreed summary of facts.

Council for England and Wales — the most serious category — which is defined as involving images of children involving penetrative sexual activity or images involving sexual activity with an animal or sadism.⁶

[5] Mr Leyco pleaded guilty to 16 representative charges as follows:

- (a) three charges of knowingly distributing objectionable publications;⁷
- (b) one charge of making objectionable publications;⁸
- (c) seven charges of knowingly exporting objectionable publications;⁹
- (d) one charge of knowingly importing objectionable publications;¹⁰ and
- (e) four charges of knowingly possessing objectionable publications.¹¹

District and High Court decisions

[6] In sentencing Mr Leyco, Judge Maxwell adopted a global starting point of seven years' imprisonment,¹² allowed a 25 per cent discount (21 months) for early guilty pleas,¹³ and a five per cent discount (4.2 months) to reflect the combined factors of remorse and the challenges Mr Leyco would likely face in prison.¹⁴

[7] A report by a registered clinical psychologist was tendered to the Court for the purposes of sentencing. Amongst other matters, it recorded that Mr Leyco had reported being sexually abused at age five by a friend's older teenaged brother. The abuse ceased when Mr Leyco's family relocated that same year.

[8] Counsel for Mr Leyco sought a discount on sentencing in respect of the causative contribution of Mr Leyco's abuse on the offending. The Judge found "that no compelling link is drawn between that and this particular offending".¹⁵ The Judge concluded that she did "not see a strong causative connection between what [Mr Leyco] said happened as a five-year-old and what [Mr Leyco] said to the psychologist as the reason for the offending".¹⁶

⁶ Sentencing Council for England and Wales *Sexual Offences: Definitive Guideline* (1 April 2014) at 76. This Court in *Wittig v R* [2021] NZCA 100 at [34] endorsed use of the guidelines' categorisation of CSEM in the New Zealand context in regard to their description of the kinds and relative seriousness of objectionable material.

⁷ Films, Videos, and Publications Classification Act 1993, ss 123(1)(d) and 124(1).

⁸ Sections 123(1)(a) and 124(1).

⁹ Customs and Excise Act 2018, s 390(1)(a).

¹⁰ Section 390(1)(a).

¹¹ Films, Videos, and Publications Classification Act, ss 131(1) and 131A(1).

¹² District Court judgment, above n 1, at [24].

¹³ At [26].

¹⁴ At [36].

¹⁵ At [34].

¹⁶ At [35].

[9] Mr Leyco’s appeal to the High Court was on the basis that the end sentence of four years and 10 months’ imprisonment was manifestly excessive because the starting point adopted was excessive; remorse should have been dealt with separately from hardship as a foreign prisoner (Mr Leyco is Filipino); he had prospects of rehabilitation for which a discount was appropriate; and the Judge wrongly considered Mr Leyco’s personal background did not contribute causatively to his offending.

[10] O’Gorman J was satisfied that the global starting point of seven years’ imprisonment was justified and there was no error in respect of the five per cent discount to reflect the combined factors of remorse and isolation while in prison.¹⁷ The Judge reviewed the psychological report but considered the District Court Judge’s conclusion was reasonable that Mr Leyco’s experiences of abuse as a five-year-old “cannot be categorised as causative within the sense required by the Supreme Court in *Berkland*”.¹⁸ She therefore saw no basis for concluding that the Judge made an error on that issue.

The appeal

[4] Mr Olsen, counsel for Mr Lecyo, submits:

6. In this appeal, the sole issue is whether Judge Maxwell should have allowed a reduction for Mr Leyco’s background. The learned District Court Judge erred by not considering the rationale for Mr Leyco’s isolation and reliance on CSEM, which was driven by childhood trauma from his sexual abuse. But, more fundamentally, the learned Judge applied the wrong test. O’Gorman J, in error, endorsed the reasoning of Judge Maxwell.

[5] Mr Olsen contends that Mr Leyco’s sentence should be reduced by 12 months to result in a sentence of three years and 10 months’ imprisonment.

[6] The Supreme Court in *Berkland v R* discussed the importance of an offender’s background in assessing culpability for their offending.¹⁹ Mr Olsen points to the Supreme Court’s linking of agency with deprivation.²⁰ Relevant deprivation may be a causative contribution to offending and thus lessen culpability.

[7] Sexual abuse in childhood can be a causative contribution to sexual offending in adulthood. Mr Olsen refers to some of the many cases where this has been

¹⁷ High Court judgment, above n 2, at [31]–[32].

¹⁸ At [35]–[37], referring to *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

¹⁹ *Berkland v R*, above n 17, at [91] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

²⁰ At [91] and [109] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

recognised by the higher courts and where sentences have been reduced accordingly, often in the 10 per cent to 15 per cent range.²¹

[8] Mr Olsen submits that in Mr Leyco's case, the lower courts erred in not according him such a discount. Mr Leyco told Dr Rogers, a registered clinical psychologist, that as a five-year-old in the Philippines, he was sexually abused by a friend's older teenage brother. Mr Leyco reported he was forced to perform oral sex on his abuser and that on one occasion there was an attempt at rape. The abuse ceased when, that same year, his family moved away. Dr Rogers draws a likely connection between this abuse and Mr Leyco's much later use of CSEM. Mr Olsen relies on Dr Rogers's opinion.

[9] Judge Maxwell, in the District Court, considered that Dr Rogers's report did not cause the Judge to see "a strong causative connection" between what reportedly happened to Mr Leyco as a five-year-old and his offending.²² Mr Olsen submits the Judge erred in that all that is required is a causative connection.

[10] O'Gorman J, on appeal, said:²³

[35] I have reviewed the pre-sentence psychological report describing Mr Leyco's background information, early history including the self-reported allegation of sexual abuse when he was five years old, his subsequent schooling and employment and the factors leading to the present offending. Mr Leyco is 40 years old. He says he experienced some nightmares about his sexual abuse until the age of 12. He then experienced a resurgence of his trauma memories since his early twenties. It seems that he did not commence watching CSEM until approximately 2016, which he attributed to feelings of curiosity. His use of CSEM increased in response to "boredom and feeling isolated", which was exacerbated during the COVID-19 lockdown period in 2020 and 2021 when his mood deteriorated after experiencing relationship issues with his partner. Within that context, Mr Leyco reported that he began to access age-appropriate pornography and CSEM on a daily basis.

[36] Dr Rogers reports that Mr Leyco's early environment was positive and pro-social, but his experience of sexual abuse as a five-year-old does appear to have had a profound impact on his mental wellbeing and his social and sexual development. This appeared to contribute to development of low self-worth and difficulties trusting and developing connections with others. In

²¹ Referring to *Berkland v R*, above n 18; *McCaslin-Whitehead v R* [2023] NZCA 259; *B (CA589/2022) v R* [2023] NZCA 499; *T (CA185/2020) v R* [2020] NZCA 635; *McLean v R* [2024] NZCA 298.

²² District Court judgment, above n 1, at [35].

²³ High Court judgment, above n 2.

the face of those negative emotions, pornography became a coping strategy. Following his move to New Zealand in 2015, he began to watch CSEM.

[37] I consider that Judge Maxwell's conclusion is reasonable [being] that the appellant's experiences of abuse as a five-year-old cannot be categorised as causative within the sense required by the Supreme Court in *Berkland*. I therefore see no basis for concluding that the Judge made an error on that issue.

[11] Mr Olsen submits that O'Gorman J erred in not correcting Judge Maxwell's application of a stricter test than the law requires, and placing weight on the period between the sexual abuse and the index offending.

[12] The Crown's response is that the Judges in the lower courts were entitled to find that given the complexity of the factors that led to the offending, a causative connection between the self-reported abuse and the offending is not established. Even if it were, Mr Leyco's high level of agency should limit greatly any discount.

Discussion

[13] We must allow Mr Leyco's appeal if we are satisfied there is an error in the sentence and a different sentence should be imposed.²⁴

[14] First, we are satisfied that the starting point of seven years' imprisonment adopted by Judge Maxwell and affirmed by O'Gorman J was within range. This was the view of this Court in granting leave to appeal²⁵ and the issue is solely whether a reduction should have been given in respect of the reported childhood sexual abuse.

[15] In our view there is no obvious causative contribution by Mr Leyco's childhood abuse to his offending.²⁶ Mr Leyco's early life appears to have been a socially sheltered or isolated one. He came to New Zealand in 2015 and had a limited

²⁴ Criminal Procedure Act 2011, s 256(2).

²⁵ High Court judgment, above n 2, at [30]; and leave judgment, above n 3, at [18].

²⁶ We will accept that the abuse occurred. There is no reason, in this case, not to.

social life. His social isolation was intensified by the COVID lockdowns. We accept the Crown's account:²⁷

25. Dr Rogers summarised Mr Leyco's self-reported history of pornography use as follows:

22. While Mr Leyco mentioned intermittent use of age-appropriate, heterosexual pornography from age 14 until his late 20's, he reported that he also began to access "gay porn" thereafter. He reported that his pornography use increased in 2014 while he was unemployed in the Philippines for eight months. According to Mr Leyco, while his pornography use decreased to once weekly after arriving in New Zealand in 2015, he began to view more deviant content in 2016 including child pornography which appeared related to his increased isolation and limited social interaction. He mentioned that his pornography use also increased during the covid-19 pandemic ("it got deeper and deeper...lockdown made it worse...I developed an addiction during lockdown").

...

33. ... He indicated that he commenced watching child pornography in approximately 2016, which he attributed to feelings of curiosity. Within this context, he described a preference for material depicting male children aged between 15 to 16 years old. Despite this, Mr Leyco admitted to viewing material depicting children as young as five years old during his index offending, and to creating a Facebook account and joining online chat groups where CSEM was shared. He also attributed his making of CSEM via screen recordings, to his increasing pornography use.

34. Mr Leyco reported that his use of CSEM which increased in response to boredom and feeling isolated, was exacerbated during the Covid-19 lockdown period in 2020 and 2021 when his mood deteriorated and he experienced relationship issues with his partner ("she wanted to see me...I had planned a vacation but couldn't go because of travel restrictions"). Within this context, Mr Leyco reported that he began to access age-appropriate pornography and CSEM on a daily basis.

26. This is largely consistent with the information contained in the principal PAC report, recording Mr Leyco's self-report that his interest in adult pornography started when he was around 25 years old and, over time, the material became boring, and he started to search for "less mainstream pornography". However, he told the author of the principal PAC report that he had viewed child pornography for the first time at age 30 (he told Dr Rogers he began viewing CSEM in 2016 — when he would have been about 33 and after he had arrived in New Zealand). He said he viewed the material as a masturbation aid and his preference was for "young boys".

²⁷ Footnotes omitted.

[16] Mr Baker for the Crown submits:

29. While Dr Rogers's report helps to explain how that experience contributed to his feelings of shame, low self-worth, impaired ability to develop connections with people and subsequent use of adult pornography to explore his sexuality and meet his sexual needs, the alleged causative contribution between his abuse and his persistent viewing, sharing and creating of CSEM over a sustained, five-year period is not easy to discern. Rather, it is plain from the psychological report that the offending was driven by his self-reported curiosity and fantasy; exacerbated during the COVID-19 lockdown due to boredom, increased isolation, relationship issues and low mood; normalised through the sharing of CSEM online; and reinforced by the sexual gratification derived from his offending.

[17] It is true, as Mr Olsen submits, that some of the CSEM Mr Leyco dealt with mirrors the abuse he suffered. But a lot does not. In any event, we do not think that matters. What does matter is that for a period of five years, Mr Leyco made decisions hundreds of times to offend. Further, his offending was not limited to locating and downloading CSEM for his own gratification. He exported it for others to use.

[18] We also consider it relevant that one of Mr Leyco's offences related to possession of the video taken by the Australian terrorist who carried out the terrorist attack on Christchurch Mosque masjidain. Mr Leyco's abuse as a five-year-old has no causative contribution to this offending.

[19] In short, we well understand why the Judges in the lower courts did not find a causative link between Mr Leyco's reported sexual abuse and his much later offending, notwithstanding Dr Rogers' report.

[20] We acknowledge also that the decision as to whether the personal background of an offender causatively contributed to their offending is a judicial one and that experts' reports may inform it but not dictate it.

[21] Nevertheless, in this case Dr Rogers's report is clear and takes into account the factors that diminish the likelihood of a causal contribution. Judge Maxwell overstated the test and O'Gorman J, although referring directly to *Berkland*, did not correct the Judge. In our view, Mr Leyco should have been given a discount for the causative contribution to his offending identified by Dr Rogers.

[22] In view of the matters we discuss at [15] to [18], the discount must be a low one and not within the range of the cases discussed by Mr Olsen. Taking into account the five per cent discount allowed by Judge Maxwell for Mr Leyco's remorse and the challenges he will likely face in prison as a foreign national, we fix the discount as a further five per cent. We will reduce the sentence by four months. We acknowledge this is close to tinkering.

Result

[23] The appeal is allowed.

[24] The sentence of four years and 10 months' imprisonment is quashed. A sentence of four years and six months' imprisonment is substituted.

Solicitors:

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