NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA617/2020
[2022] NZCA 411

BETWEEN	MAKSHUD AHMED Appellant
AND	THE QUEEN Respondent

Hearing:	11 May 2022
Court:	Miller, Duffy and Ellis JJ
Counsel:	C O Thorburn and C M Gisler for Appellant S K Barr and FESF Girgis for Respondent
Judgment:	29 August 2022 at 2.00 pm

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal against conviction is dismissed.

C The appeal against sentence is allowed. The order for a minimum period of imprisonment imposed in the District Court is quashed.

REASONS OF THE COURT

(Given by Miller J)

[1] Mr Ahmed was convicted of sexual offending against a boy who was aged between 12 and 15 at the time. His defence was that the behaviour he was accused of did not happen. On appeal he says that the Judge gave inadequate directions on consent. He also appeals the minimum period of 50 per cent imposed on the sentence of 11 years' imprisonment.[1]

The charges

[2] Mr Ahmed was a school caretaker. The complainant, M, was a pupil at the school. They met after M's family immigrated to New Zealand from the Middle East in 2008, when M was around 11 years old. Mr Ahmed, who is from Fiji, introduced the family to the school and assisted them with language and integrating into New Zealand society.

[3] The Crown alleged that in 2009 Mr Ahmed groomed M with compliments and treats. He introduced sexual behaviour by talking about pornography and exposing himself to M, inviting him to join in masturbation. M declined, but soon afterward Mr Ahmed took him to the toilet and performed oral sex on him. Thereafter, the Crown alleged, Mr Ahmed continued to perform oral sex on M several times a week. In 2011 M left to attend college, but he continued to visit Mr Ahmed at his former school. The offending was said to have continued until 2012, but it became less frequent in 2011 and in 2012 it occurred only occasionally.

[4] Two of the instances of Mr Ahmed performing oral sex on M were the subject of specific charges, numbered 1 and 2. They were said to have occurred respectively in 2009 and 2009 or 2010, when M was still a pupil at the school. M turned 13 in 2010. Charge 3 was a representative charge covering the period from 1 January 2009 until 31 December 2012. These were all charges of sexual violation by unlawful sexual connection.

[5] The Crown alleged that in 2009 or 2010 Mr Ahmed attempted sexual violation by penile penetration of M's anus. He stopped because M complained of pain. This was the subject of charge 4. Mr Ahmed then induced M to penetrate Mr Ahmed

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1 *R v Ahmed* [2019] NZDC 19007 [Sentencing notes].

in turn. This was the subject of charge 5, sexually violating M by unlawful sexual connection between Mr Ahmed's anus and M's penis.

[6] Lastly, the Crown alleged that Mr Ahmed induced M to perform oral sex on him between 2009 and 2010. Charge 6 was a representative charge of sexual violation by unlawful sexual connection between Mr Ahmed's penis and M's mouth. M said that he did this two or three times because Mr Ahmed insisted it was "time to return the favour".

[7] When interviewed Mr Ahmed denied that he had done anything wrong and otherwise exercised his right to silence.

[8] The complainant was aged 22 at trial before Judge Johnston and a jury in 2019.

The trial

[9] We confine our discussion of the trial to those aspects relevant to consent or reasonable belief in it.

[10] In opening the prosecutor took the jury briefly to the elements of the offence, including consent and reasonable belief in it. The prosecutor highlighted the disparity in age — Mr Ahmed was about 50 when the offending started — and suggested that no reasonable person in his position could have believed he had the complainant's true consent. Defence counsel opened by telling the jury that none of the alleged events happened.

[11] The Crown called M and a number of witnesses who corroborated aspects of his account, including witnessing evidence of sexualised behaviour and favouritism toward some boys. Other witnesses deposed to M's disclosures. Mr Ahmed's wife, from whom he was separated by the time of trial, confirmed that he used to take a group of boys to sports. The school principal confirmed that he had a designated area at the school and access to it on weekends.

[12] M's evidence-in-chief took the form of an evidential video. He deposed to Mr Ahmed's grooming with food and compliments, which led to a relationship of

trust. After Mr Ahmed began to introduce the topic of sex he would try to "break [M] down", telling M that he was unattractive to others. After the offending began a barrier was broken and it became a "regular thing". He kept telling M that he was doing M a favour because the offending was "the only thing you'll get" and girls would never look at him. When he got M to penetrate him he said he was "doing all this for you". As it went on M felt "more content" with what was happening. M said that he worried Mr Ahmed would begin to pick on other boys and warned Mr Ahmed not to go near them.

[13] M deposed that later on, after he left for college, the "dynamic between us switched" and Mr Ahmed became more genuine and kinder. Eventually Mr Ahmed switched his attention to other boys and M became jealous:

> And so I remember that time and I felt like, oh, okay, so – ah, I actually felt that way, I got jealous, I, I got angry, I was like, okay, so I'm like a tissue, I thought you actually wanted to, to care for me and that's how I felt back then, and he did kind of continue the – so every weekend we'd go out, me and my brothers and him would go out to the movies and we'd go, ah, to lunch or whatever and then we'll come home at, like, 5.00. Um, and like, he'd go out with us on family trips and stuff, like barbeques and stuff, and, yeah, and that was around that time.

[14] M deposed that eventually he had a breakdown after two trips with Mr Ahmed and another person. On the first trip, he was taken by Mr Ahmed to a sex worker and on the second he was encouraged to take drugs. He began counselling, which led to him breaking contact with Mr Ahmed and eventually disclosing the offending.

[15] It was not put to M in cross-examination that he had consented or that he gave Mr Ahmed reason to think he consented.

[16] Mr Ahmed gave evidence, maintaining that none of the incidents happened.

[17] In an in-chambers discussion held before closing addresses, defence counsel submitted that although he was going to focus on whether the offences happened, the jury had to be directed on consent. Counsel and the Judge agreed that the jury would not "necessarily be troubled by the consent aspect unduly" but the jury needed to consider it. On that basis, counsel indicated that he would leave it to the Judge.

[18] In her closing address the prosecutor described the first incident as a "crucial … turning point" and emphasised that M had resisted before giving in and then felt very conflicted about what had happened. Counsel emphasised that Mr Ahmed insisted on anal penetration as a "return on his investment". Turning to charge 5, penile penetration of Mr Ahmed by M, counsel suggested the element of consent should not trouble the jury because M gave in to Mr Ahmed's persistence. Counsel suggested that as a 12-year old, and in the circumstances, M was not providing true consent:

> And of course, a 12-year-old, in all of the circumstances, wasn't providing true and informed consent. He was manipulated and groomed into this situation. And there's various points within his interview that the complainant speaks out about this. He says: "After he broke through that barrier, it became a regular thing. He just had to keep up the mental pressure, just, ah, make me feel very worthless, and he'd be, like, 'I'm doing you a favour. What I'm doing to you is the only thing you'll get.' I remember feeling disgusted, but I also remember I was fully convinced that that's all I'm getting in life. I was convinced I was, like, okay, this is, I might as well do it now, 'cos this is me in training. He used to say this: 'I'm training you for your next boyfriend.'"
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> The Crown says the defendant knew that he wasn't providing true consent and, indeed, no reasonable person in his position would think that.

[19] As he had indicated in chambers, defence counsel did not touch on consent, simply telling the jury that the Judge would direct them on the elements of the charge. The address examined the evidence in detail, focusing on inconsistencies which ought to leave the jury in doubt as to whether the incidents happened at all.

[20] The Judge summed up succinctly. It is not in dispute that the summing-up and question trail correctly laid out the elements of the offences. With respect to consent, the Judge directed the jury as follows:

> [18] In respect of each charge, Mr Ahmed's central defence is a denial that any sexual activity occurred. This is not a case where he admits sexual activity but says it was consensual. Accordingly, I would suggest that your primary focus should centre on the first element on each charge. Are you satisfied beyond reasonable doubt, that is are you sure, that the sexual activity alleged in each charge actually occurred? Having said that, I am required to direct you on issues relating to consent, albeit that they are unlikely to cause you much difficulty given how the trial has unfolded.
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> [19] Consent means true consent freely given by a person who is in a position to make a rational decision. Lack of protest or physical resistance does not of itself amount to consent. Consent must be voluntarily given.

> Consent given because a person feels powerless or because they fear for their safety if they do not consent is not true consent. Mr Ahmed of course says there was simply no sexual activity.
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> [20] If you are satisfied beyond reasonable doubt that [M] did not consent, then you must still consider whether the Crown has proved beyond reasonable doubt that Mr Ahmed did not have a reasonable belief that [M] was consenting. There are two ways that the Crown can satisfy you on that subject. One would be for the Crown to satisfy you that Mr Ahmed did not in fact believe that [M] was consenting in the sense of providing a full and informed consent freely given. That is concerned with what the defendant himself thought at the time. If he did not believe that [M] was consenting, that would be enough from the Crown's point of view.
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> [21] The second way of satisfying you on that subject would be to satisfy you that no reasonable person in Mr Ahmed's shoes could have thought [M] was consenting. That is concerned with the belief of a reasonable person placed in the defendant's position. If no reasonable person would have thought [M]was consenting, that too would be enough from the Crown's point of view. The onus is of course on the Crown to satisfy one or other of those requirements beyond reasonable doubt. As I say, the key issues in this trial centre around whether or not the sexual activity actually occurred. Whilst you also need to be satisfied on the issues relating to consent, they will not likely trouble you unduly.

[21] The jury found Mr Ahmed guilty on all charges.

Extension of time to appeal

[22] The notice of appeal was filed 12 months out of time. Mr Ahmed has deposed that he did not initially understand that he could appeal his convictions. His English is fairly good, but he must concentrate to take in what people are saying. He also thought the COVID-19 pandemic had put court matters on hold.

[23] That is not a very plausible explanation for the entirety of the delay. In the circumstances, and having regard to the impact of an appeal on the complainant, the Crown does not consent to the extension of time.

[24] The appeal is however seriously arguable, and in the circumstances we think it is in the interests of justice that it be heard on the merits. An extension is granted accordingly.

The conviction appeal

[25] For Mr Ahmed, Ms Thorburn contended that the trial Judge erred in directing the jury on consent and reasonable belief in consent. Specifically, the Judge failed to correct the Crown's assertion that M could not give true consent because of his age and/or grooming, failed to highlight evidence relevant to consent and reasonable belief in it, suggested incorrectly that consent need not trouble the jury, and failed to include the now-standard direction on age and consent in the question trail.

[26] Counsel emphasised that in *Christian v R*, a majority of the Supreme Court held that circumstances giving rise to an inference of consent may include sexual conduct that is in accordance with mutual relationship expectations, developed over time.[2] She drew attention to the Court's conclusion in relation to some of the charges in that case, emphasising that the jury might have concluded that they could not rule out the reasonable possibility that the complainant consented, albeit as a consequence of grooming by the defendant.[3] Counsel emphasised that M's evidence supplied a narrative for consent, highlighting that a relationship developed in which oral sex was normal and M was able to refuse to do things he did not want to do. The offending may have been the result of grooming, but there was no force, threat or fear.

[27] For the Crown, Mr Barr accepted that the Judge was required to direct on consent and reasonable belief in consent, but submitted that the directions were adequate. The prosecutor did not mislead the jury. The Judge did not direct the jury's attention to evidence relevant to consent, but there was no evidence of anything more than an absence of resistance or protest. There is nothing in the surrounding circumstances that speaks to anything more than acquiescence. Any question of consent was most likely to arise after M went to college, but that only affected charge 3 and that charge was representative, dating from 2009. The jury having accepted M's account of the sexual activity in the first two years, the verdict on that charge was inevitable.

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2 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [46].
3 At [67].

Analysis

[28] In *Christian* the trial Judge had not left consent to the jury, telling them that the only issue was whether there was penetration. The Supreme Court held that consent must be left to the jury, though the directions need not be elaborate.[4] Directions need to ensure the jury are clear that a guilty verdict can be returned only if the Crown has proved beyond reasonable doubt that the complainant did not consent and the defendant did not believe on reasonable grounds that they consented.[5]

[29] Accordingly, the jury in this case had to be directed on consent and reasonable belief in consent, notwithstanding that the defence did not challenge M on consent or invite the jury to rely on it.

[30] The Judge did leave consent/reasonable belief to the jury. He explained what those concepts mean, in terms that made it clear that consent was a live issue notwithstanding M's age. We do not accept Ms Thorburn's submission that the Judge had to correct a false impression, conveyed by the prosecutor, that a complainant of M's youth cannot consent to sexual connection. We have referred to what the prosecutor said at [18] above. The prosecutor did not suggest that there was a presumption that a 12-year-old cannot consent. Rather, the jury were invited to infer that this 12-year-old did not do so in the circumstances and no reasonable person would have thought otherwise. The Judge's directions clearly explained that consent was a question of fact for the jury to decide. The jury were correctly told that lack of protest or physical resistance does not of itself amount to consent, that consent must be voluntarily given, and that consent given because a person feels powerless or fears for their safety is not true consent.

[31] As noted at [20] above, the Judge suggested that whilst the jury had to be satisfied on the issues relating to consent, those issues would not likely trouble them unduly. This choice of words may be the result of the chambers discussion with counsel which we mentioned above. It is unhelpful because it might be taken as a commentary on the evidence, but we think that was not the Judge's evident purpose.

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4 At [35].
5 At [36].

The remark followed paragraphs in which the Judge explained that the central defence was a denial of any sexual activity and suggested that the jury focus primarily on the first element in each charge. The Judge was attempting to focus the jury on the defence case. To the extent that the jury could interpret the direction as a reflection on the quality of the evidence, the Judge had earlier directed them that if they thought he was expressing such a view they must disregard what he had said.

[32] As a matter of fact, there is evidence on which the jury could have found that the Crown had not excluded consent or reasonable belief in it. We have referred to this evidence above. Generally, M deposed to acquiescing in sexual activity, and normalising it over time, in response to Mr Ahmed's manipulation. He said that he feared for other potential victims. There was an element of bargaining, M being told for example that he needed to submit to anal intercourse in return for what Mr Ahmed had done for him. As noted, the prosecutor referred to the evidence that Mr Ahmed wanted a return on his investment. The Judge did not draw the jury's attention to this evidence.

[33] That omission was contrary to good trial practice, which the Supreme Court went on to discuss briefly in *Christian*. After specifying what directions must be given and observing that they need not be elaborate, the Court observed that the trial Judge's summary of the evidence "should draw the jury's attention to any evidence relevant to [consent and reasonable belief in it]", without inviting the jury to disbelieve the defendant's denial of any sexual encounter.[6]

[34] The question which divided the Supreme Court in *Christian* was whether the trial Judge's decision not to leave an element of the offence to the jury at all was a miscarriage of justice for the purposes of s 385 of the Crimes Act 1961.[7] The majority held that the Judge was obliged to direct the jury on consent (and reasonable belief in it), but that error did not necessarily result in a miscarriage. In relation to one of the charges, the majority found there was no evidence for consent, so no miscarriage

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6 At [36].
7 See [84]–[86] per Elias CJ, dissenting.

resulted.[8] On that approach it was not necessary to invoke the proviso to s 385.[9] (On the other charges, the majority held that the jury might have been unable to rule out the reasonable possibility that the complainant consented and held there was no room for the application of the proviso.)[10]

[35] A trial judge's obligation to leave consent (and reasonable belief in consent) to the jury, although the defendant denies the encounter happened at all and there is no evidence for consent, is attributable to its status as an element of the offence; the Crown must prove its absence.[11]

[36] The judge must also draw the jury's attention to evidence which they might reasonably accept and which, if accepted, supplies an answer to the charge, whether by sufficiently making out a defence in law or raising doubt as to an element of the offence.[12] This obligation rests on the court's unwillingness to allow its processes to be used to deliver an unjust result in criminal proceedings.[13] It was described in *von Starck v R* as part of a duty to ensure that a just result is obtained,[14] and in *R v Solomon* as a recognition of the judge's wider obligation to ensure the defendant has a fair trial according to law.[15] The obligation to leave such a defence to the jury arises although the defendant has not invoked it and may even have disclaimed it.[16]

[37] The obligation to discuss the evidence in such cases must be distinguished from the trial judge's duty to summarise the defendant's case, giving the jury a fair picture of the real matters on which it is based.[17] The defendant has the right to put the defence

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8 At [58]–[61]. Elias CJ held at [81] and [87] that the omission was an error of law capable of affecting the result and, as such, the verdicts could be upheld only by application of the proviso to s 385. The present appeal is governed by s 232 of the Criminal Procedure Act 2011, under which a miscarriage results if, inter alia, there was an irregularity which created a real risk that the outcome of the trial was affected.

9 Elias CJ took a different view of the evidence: see [109], which should be read with [94].

10 At [67]–[68].

11 See [36] and [80].

12 In what follows we refer to both as a "defence".

13 It has been traced to cases in which the defendant was charged with murder, a capital crime, but there was some evidence for manslaughter: see *R v Hopper* [1915] 2 KB 431 at 435; and *Mancini v Director of Public Prosecutions* [1942] AC 1 (HL) at 7–8.

14 *Von Starck v R* [2000] 1 WLR 1270 (PC) at 1275–1276.

15 *R v Solomon* (1979) 1 A Crim R 247 (NSWCCA) at 249.

16 *R v Tavete* [1988] 1 NZLR 428 (CA) at 430–431, citing *R v Kerr* [1976] 1 NZLR 335 (CA) at 340.

17 *R v Ryan* [1973] 2 NZLR 611 (CA) at 614; and *R v Shipton* [2007] 2 NZLR 218 (CA) at [33]–[37].

of their choice provided it is available in law,[18] and because it protects the exercise of autonomy by a person who stands in peril of conviction the right is considered fundamental.[19] The judge's immediate concern must be to ensure the jury can fairly assess the chosen defence.

[38] When summarising the case advanced by the defendant the trial judge has substantial discretion about descending into detail. The question is always what is necessary to ensure the jury understands the defendant's case. The judge must summarise the case but may be able to rely to some extent on the closing addresses of counsel for the details. In a simple case the issues will be obvious and the evidence will need little elucidation.[20]

[39] The obligation to leave to the jury a defence which is not part of the defendant's case raises different considerations. The judge must not detract from the defendant's case when doing so. For that reason, care is needed where the defendant denies the act but consent is an answer to the charge. The judge may think it wise to say only as much as is needed to ensure the jury understand the defence which the Judge is leaving to them and how it fits into their analysis of the case. It likely will not be possible to rely on the cross-examination and closing address of defence counsel to identify the relevant evidence. When identifying it, the judge must take a neutral approach. It may be necessary to remind the jury that evidence which may sustain such a defence was not challenged or developed in the witness box. Defence counsel may not have been under a duty to cross-examine in such circumstances, but the objective — a just result — may introduce considerations of fairness to the opposing party or a witness.[21]

[40] That brings us to the question on which this appeal turns. It is whether the Judge's failure to draw the jury's attention to the evidence for consent (and reasonable belief in it) may have occasioned a miscarriage of justice. Because there was some evidence for consent, we accept that this was an error or irregularity affecting the trial.

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18 New Zealand Bill of Rights Act 1990, s 25(e); *R v Cumming* [2006] 2 NZLR 597 (CA) at [42]; and *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392 at [41].

19 *R v Cumming*, above n 18, at [42].

20 *R v Shipton*, above n 17 at [36]–[38]; and *Waters v R* [2018] NZCA 84 at [8].

21 Evidence Act 2006, s 92; *Browne v Dunn* (1893) 6 R 67 (HL) at 70; *R v Dewar* [2008] NZCA 344 at [49]; *Solomon v R* [2019] NZCA 616; and *R v S (CA369/2001)* (2002) 19 CRNZ 442 (CA) at [19].

[41] We do not think that a miscarriage has resulted, for several reasons. First, the defence did not run its case in that way, preferring a clear denial of any sexual activity and a vigorous attack on M's credibility. That being so, the Judge need not give elaborate directions. The more emphasis given to the evidence for consent, which came from M, the more credence the Judge might lend to M's account and the more he might risk conveying the impression that he thought little of the defence case.

[42] Second, the jury could not have failed to appreciate that consent was in issue, and in what way. Many of the offences required M's co-operation. They included two in which M said he had penetrated Mr Ahmed or performed oral sex on him. The jury having found that the acts happened, the questions were whether M gave true consent and, if not, whether Mr Ahmed thought on reasonable grounds that M had done so. The prosecutor acknowledged that the Crown had to show M's consent was not true and informed.

[43] Third, this was a short trial and the evidence relating to consent was both clear and fresh. We have referred to it at [12]–[13] and [32] above.

[44] For these reasons we are not persuaded that there is a real risk or reasonable possibility that a different outcome would have resulted had the Judge drawn the jury's attention to the evidence.[22] This conclusion extends to charge 3, if only for the reason given by Mr Barr; it was a representative charge covering a period beginning in 2009 and the jury's verdicts show they must have accepted M's evidence about the offending in that period.

The sentence appeal

[45] Mr Ahmed's appeal against sentence focuses on the Judge's decision to impose a minimum period of imprisonment (MPI). The Judge justified that aspect of the sentence shortly:[23]

> [41] The Crown has asked me to impose a minimum period of imprisonment. They submit that minimum periods are relatively routine

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22 Criminal Procedure Act 2011, s 232(2)(c) and 232(4). See also *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1; and *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85 at [48].

23 Sentencing notes, above n 1.

> where sexual offenders are sentenced to long and finite periods. In considering whether to impose a minimum period I am mindful that the offending was prolonged, repeated and serious. When I consider the criteria in s 86 Sentencing Act 2002, a minimum period is justified in order to hold you accountable, denounce what you have done, to deter you from reoffending in a similar manner in the future and to protect the community. A minimum non-parole period of half of the end sentence is warranted.

[46] Ms Thorburn pointed out that MPIs cannot be imposed as a matter of routine.[24] It is always necessary to consider what minimum period is necessary in the circumstances of the case. In the absence of a reasoned analysis, an appellate court must assess the merits in light of the sentencing judge's views of the offending and the offender and the submissions on appeal.[25] Counsel acknowledged that the offending was serious and repeated, but submitted that Mr Ahmed has previously led a blameless life and argued that a lengthy finite sentence suffices to meet the statutory purposes.

[47] Mr Barr responded that it was open to the Judge to find that an eligibility date for parole at three years, eight months' time served was insufficient. The Judge recognised that the offending was prolonged, repeated and serious. He might have added that Mr Ahmed's continued denials and lack of remorse or empathy, to which attention had been drawn earlier in the sentencing notes,[26] lent weight to the need to hold him accountable and protect the community on his eventual release.

[48] We agree that the offending was predatory and extensive. It was also a grave breach of the trust of M and his family, and that of the school where Mr Ahmed was employed. It was extremely damaging for M, who was vulnerable. He speaks persuasively in his victim impact statement of the ongoing effects.

[49] It is also true that Mr Ahmed is without remorse. His stance at an interview with a probation officer was that M made false allegations for revenge after he would not help to cover up M's cannabis use.

[50] But there is no reason to think that the community needs more protection from Mr Ahmed than the determinate sentence provides. Nor is there reason to think he

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24 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [169].
25 See *K (CA479/2019) v R* [2020] NZCA 95 at [15].
26 Sentencing notes, above n 1, at [16].

will not engage with rehabilitation services. If he does not do so he is unlikely to be released on becoming eligible for parole. He has no previous convictions and he is now aged 62. In our opinion the lengthy determinate sentence of 11 years is sufficient in the circumstances to meet the statutory purposes.

Disposition

[51] The application for an extension of time is granted.

[52] The appeal against conviction is dismissed.

[53] The appeal against sentence is allowed. The minimum period of imprisonment imposed in the District Court is set aside.

Solicitors:
Public Defence Service, Wellington for Appellant
Crown Law Office, Wellington for Respondent