NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA115/2022
[2022] NZCA 437

BETWEEN	BILL RIHARI Appellant
AND	THE KING Respondent

Hearing: 15 August 2022

Court: Katz, Wylie and Palmer JJ

Counsel: S J Gray for Appellant
J E L Carruthers for Respondent

Judgment: 15 September 2022 at 10:30 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] On 7 December 2021, the appellant, Bill Rihari, was sentenced to 12 years and nine months' imprisonment by Jagose J in the High Court at Auckland in respect of

26 charges of sexual offending against five complainants.[1] The complainants were all young girls, aged between seven and 16 years at the time of the offending. A number of the charges were representative.

[2] The offending occurred during two discrete periods. "Historical offending" was committed between 1967 and 1981 against four complainants: CD, EF, GH and IJ. More recent offending was committed between 2006 and 2008 against a fifth complainant, AB.

[3] Mr Rihari maintains his innocence but he has not appealed his convictions. He has been advised that there are no grounds on which he can do so. Rather, he appeals his sentence, arguing that it is manifestly excessive. The Crown opposes the appeal. It argues that the end sentence imposed is within the available range.

Application for an extension of time

[4] The appeal was filed approximately one month out of time. An extension of time to appeal was granted by Clifford J in a minute.[2]

Relevant facts

[5] Mr Rihari was born in 1951. He is currently 71 years of age. We adopt the Judge's analysis of the offending. We summarise first the historical offending and then the more recent offending.

The historical offending

[6] At the time of the historical offending, Mr Rihari was living in a small and relatively isolated rural community.

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1 *R v Rihari* [2021] NZHC 3334.
2 *Rihari v R* CA115/2022, 31 May 2022 (Minute of Clifford J).

(a) The offending against IJ (rape and indecency with a girl between 12 and 16 years)

[7] Sometime during the two years commencing January 1967, Mr Rihari was collecting firewood with IJ and other children. With Mr Rihari's encouragement, the other children ran up a hill. This left him alone with IJ. He told her to lie down so he could strap some firewood onto her back for her to carry. He then tore off IJ's pants. When she resisted, he punched her in the stomach. Mr Rihari then forced himself on IJ, telling her he wanted "onioni" (sex).[3] He put his penis into her vagina and, later, ejaculated on her. He threatened IJ, telling her that she would "get a hiding" if she told anyone what had happened.[4]

[8] On another occasion between January 1972 and January 1974, Mr Rihari forced IJ to the ground in some long grass. He tried unsuccessfully to penetrate her. She managed to fight him off and flee.

[9] Mr Rihari was between 15 and 22 years old at the time of this offending.

(b) The offending against EF (rape — x 3, indecencies with a girl under 12 years — x 5, indecencies with a girl between 12 and 16 years — x 2)

[10] On an occasion between September 1972 and September 1979, Mr Rihari was left in charge of EF and another young person at a residential address. When EF returned from having a bath, she found Mr Rihari sitting on a chair with no pants on. He told EF to sit on his lap and "ride the horsey".[5] She climbed onto his lap and he inserted his penis into her vagina. She did not consent. Intercourse ended only when the other young person entered the room and pulled EF off Mr Rihari's lap.

[11] On an occasion between September 1974 and September 1979, Mr Rihari told EF to go with him in a rowboat to pull in a net. Anticipating what was to come, EF drank salt water in an attempt to make herself sick. This failed. When they were out of sight from the shore, Mr Rihari told EF to "throw the anchor, you know what

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3 At [26].
4 At [26].
5 At [15].

to do".[6] He then forced EF to take his penis into her mouth. He next instructed her to bend over the boat's seat and he inserted his penis into her vagina. Shortly thereafter, he withdrew and ejaculated into her mouth. Mr Rihari threatened to kill EF's mother and rape her sisters if she reported the incident.

[12] On another occasion during the same period, Mr Rihari took EF to a bay to collect figs and oysters. He laid a cover on the ground and again said "you know what to do".[7] EF removed her underwear and lay on the cover. Mr Rihari told her she was in the wrong position and instructed her to turn onto her hands and knees. He then inserted his penis into her anus. After some time, he turned her back over, put his penis into her mouth and ejaculated.

[13] The jury also found that Mr Rihari had sexual intercourse with EF without her consent on at least one other occasion between May 1969 and September 1981. Further, it found that between May 1969 and September 1979, Mr Rihari forced EF to take his penis into her mouth on at least one other occasion and that he penetrated EF's anus with his penis on at least one other occasion. The jury also found that between September 1979 and September 1981, Mr Rihari forced EF to put his penis in her mouth and that he penetrated EF's anus with his penis, both on at least one other occasion. The Judge recorded at sentencing that EF's evidence was that the oral indecencies occurred over 50 times and that each of the other types of offences happened "lots of times".[8]

[14] Mr Rihari was aged between 18 and 30 years over the period of his offending against EF.

(c) The offending against GH (rape — x 3, indecencies with a girl under 12 years — x 2, indecencies with a girl between 12 and 16 years — x 4)

[15] At some time between October 1973 and October 1975, Mr Rihari called GH, then a young person, into an unoccupied house. He instructed her to sit down on a bed. He removed her pants and then used his hands to open her legs. He inserted his fingers

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6 At [16].
7 At [17].
8 At [19].

into her vagina. He rolled her over onto her front and inserted his penis into her anus, before rolling her back and inserting his penis into her vagina. GH suffered bruising and significant pain as a result. She described seeing "blood everywhere".[9] Mr Rihari told her not to tell anyone what had happened.

[16] On another occasion between October 1975 and October 1979, Mr Rihari joined GH while she was collecting eggs in an area of flax bush. He put his fingers and penis into her vagina and his penis into her anus.

[17] The jury also found that, on at least one other occasion during the same period, Mr Rihari introduced his fingers into GH's genitalia, penetrated her anus with his penis, and raped her. The Judge recorded that, at trial, GH said that each of these different types of offence occurred at least six times.[10]

[18] Mr Rihari was 22 to 28 years old over the period of his offending against GH.

(d) The offending against CD (rape)

[19] At some point in the six years before April 1980, Mr Rihari had CD follow him to an abandoned house near her home with the promise of a chocolate bar. He made her lie down on a mattress on the floor and instructed her to remove her pants. When she refused, he removed them, before removing his own clothing. He then forced CD's legs apart and inserted his penis into her vagina. After some time, CD managed to push him off her. He threatened to hurt her mother if she told anyone what had happened. He told her to get dressed and then left the house.

[20] Mr Rihari was between 23 to 29 years old at the time of this offending.

The more recent offending against AB (indecencies with a young person — x 2, sexual violation by unlawful sexual connection — x 2)

[21] Between 2006 to 2008, on at least two occasions, Mr Rihari lay on top of AB. He rubbed his penis against her vagina through her underwear, simulating

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9 At [21].
10 At [24].

sexual intercourse. Also, on at least two occasions (AB said four times over a two-month period) Mr Rihari rubbed her clitoris with his fingers.

[22] Mr Rihari was 55 to 57 years old at the time of this offending.

Sentencing decision

[23] After analysing the various materials before him, the Judge discussed his approach to the sentencing. He noted that sentencing was complicated because the offending, except in relation to AB, was historical and predated the Sentencing Act 2002. He observed that sentences for historical offending fall to be fixed by reference to the maximum penalty prescribed at the time of the offending and in accordance with then applicable sentencing patterns.[11] The Judge recorded that he would sentence the discrete instances of historical offending concurrently "on the basis of their shared nature as sexual offending against children".[12] He further indicated that he would determine individual sentences for the historical offending and the more recent offending, each to be "assessed on a lead offence/totality basis", then arrive at a cumulative, global end sentence, "capturing the overall criminality of [Mr Rihari's] offending".[13]

[24] When dealing with the historical offending, the Judge took as the lead charge the rape of EF.[14] He adopted a starting point of seven years' imprisonment for this charge. He then uplifted this by six years to 13 years' imprisonment "to reflect the totality of [Mr Rihari's] historical offending".[15] He referred to similar cases and to various observations made by this Court in relation to offending against children. He concluded that the starting point and uplift were within the applicable range "if appropriately toward its upper bound".[16] He considered that a higher adjusted starting point could perhaps be justified, but "in totality, that would risk a sentence trivialising [Mr Rihari's] offending against AB".[17]

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11 At [42], citing *R v T* (1998) 15 CRNZ 602 (CA) at 609; *Hinton v R* [2016] NZCA 269 at [91]; and *R v Fahey* CA184/00, 2 November 2000 at [5].
12 At [51].
13 At [53], citing *Harris v R* [2018] NZCA 632 at [17]; and *R v Xie* [2007] 2 NZLR240 (CA) at [16].
14 At [63].
15 At [69].
16 At [70].
17 At [70].

[25] The Judge then turned to the more recent offending. He took the sexual violation by unlawful sexual connection as the lead offence.[18] He considered that this offending fell within band two discussed in this Court's decision in *R v AM*,[19] noting the presence of four aggravating factors.[20] He considered that these factors warranted placing the offending in the middle of the band, but "having regard for totality principles, I set the starting point at the bottom of the available range" — four years.[21] This took his initial starting point sentence to 17 years' imprisonment.

[26] The Judge then turned to factors personal to Mr Rihari. The Judge:

(a) declined to impose an uplift for Mr Rihari's previous convictions;[22]

(b) declined to give a previous good character credit;[23]

(c) allowed Mr Rihari a 15 per cent discount for his age and health. He accepted that Mr Rihari's health difficulties would make a long custodial sentence appreciably harsher for him, but noted that there was insufficient medical evidence to enable him to quantify this or to conclude that imprisonment would be disproportionately severe;[24]

(d) allowed a further discount of 10 per cent for childhood and background factors. He accepted there was a causal linkage between Mr Rihari's offending and factors such as cultural disconnection, deprivation and dysfunction through colonisation, and a culture during childhood of sexual promiscuity, incest and molestation (all of which normalised sexual offending and childhood sexual abuse).[25] However, he considered that the duration of Mr Rihari's historical offending and the

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18 At [72].
19 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
20 *R v Rihari*, above n 1, at [73].
21 At [73].
22 At [75].
23 At [76].
24 At [77].
25 At [36] and [82].

more recent offending some 25 years later limited the extent to which the various cultural factors could weigh in Mr Rihari's favour;[26]

(e) declined to give a discount for Mr Rihari's youth at the time of his initial historical offending. He observed that Mr Rihari was at least 20 years old when he committed the vast majority of the historical offending;[27] and

(f) indicated that no other discounts were available, noting that Mr Rihari had not expressed remorse.[28]

[27] Allowing for the discounts (25 per cent in total) the Judge sentenced Mr Rihari to nine years and nine months' imprisonment for the historical offending and to three years' imprisonment for the more recent offending. He directed that the sentences were to be served cumulatively. The end sentence was therefore one of 12 years and nine months' imprisonment. The Judge remarked:[29]

> Standing back, I am satisfied in all the circumstances — having regard for the purposes and principles of sentencing, and especially those of particular relevance in sexual offending cases — your end sentence is just.

He declined to impose a minimum period of imprisonment.[30]

The appeal

[28] The appeal is brought pursuant to s 244 of the Criminal Procedure Act 2011. This Court must allow the appeal if it is satisfied that, for any reason, there is an error in the sentence imposed and that a different sentence should have been imposed.[31] It is for Mr Rihari to establish that there was a material error in the sentence imposed. The focus is on whether the sentence is within the appropriate range, rather than the process by which the sentence was reached.[32]

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26 At [81].
27 At [84] and [86].
28 At [87].
29 At [89].
30 At [93].
31 Criminal Procedure Act 2011, s 250(2).
32 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30] and [35]–[36].

Submissions

[29] Mr Rihari does not challenge the starting point sentences of 13 years' imprisonment adopted for the historical offending and four years' imprisonment for the more recent offending, nor that the end sentences for the discrete periods of offending were imposed cumulatively.

[30] Rather, Ms Gray, on behalf of Mr Rihari, submitted that the Judge:

(a) failed to make an adjustment for totality when he adopted the overall starting points for both the historical and the more recent offending, with the result that the starting point (and hence the end) sentence was out of proportion to the gravity of the offending; and

(b) failed to afford sufficient discounts to Mr Rihari for personal factors outlined in the s 27 report.

She submitted that, if these matters had been factored in, an end sentence in the vicinity of eight and a half years to nine and a half years' imprisonment would have been more appropriate.[33]

[31] Mr Carruthers, for the Crown, submitted that the starting points adopted and the discounts afforded were appropriate and that the end sentence was within the available range. He contended that the Judge did consider totality and that, in setting the starting points for each period of offending, he expressly adopted lower starting points than might otherwise have been appropriate to ensure that the overall starting point did not offend totality principles. Mr Carruthers further submitted that the discount for personal factors identified in the s 27 report was greater than it appeared because it was applied to the overall starting point, notwithstanding that the factors identified in the report were relevant only to the historical offending. He argued that

[33] In his notice of appeal, Mr Rihari asserted that the Judge also erred by failing to give him a discount for youth given that he was only 15 years old when the first offending against IJ occurred. This issue was not however pursued by Ms Gray. She properly accepted that it was open to the Judge not to give a discount for youth given the duration of the offending.

the total discount afforded (25 per cent) was within the available range and that, as a result, the end sentence was not manifestly excessive.

Analysis

[32] We deal first with the totality argument.

[33] Section 85 of the Sentencing Act requires that consideration be given to the totality of the offending when sentencing for multiple offences. Relevantly, it provides as follows:

> **85 Court to consider totality of offending**
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> (1) Subject to this section, if a court is considering imposing sentences of imprisonment for 2 or more offences, the individual sentences must reflect the seriousness of each offence.
>
> (2) If cumulative sentences of imprisonment are imposed, whether individually or in combination with concurrent sentences, they must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending.
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> …

[34] The essence of the totality principle is that, in arriving at the appropriate sentence for multiple offences, the sentencing judge must not only consider each offence individually, but also assess the defendant's overall culpability and determine what effective sentence is appropriate for the totality of the defendant's conduct.[34] As this Court has noted:[35]

> … it is crucial in arriving at a sentence for several offences, after considering them individually, to stand back and look in a broad way at the totality of the criminal behaviour.

[35] The total end sentence should not normally be determined by sequentially adjusting the appropriate end sentence for each individual offence in order to accommodate the totality principle (even though the sentence may be articulated in this way); rather, the analysis should be guided from the outset by an appreciation that the total period of imprisonment should be in proportion to the gravity of the overall

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34 *R v Bradley* [1979] 2 NZLR 262 (CA) at 263; *R v Strickland* [1989] 3 NZLR 47 (CA) at 50–51; and *Anand v R* [2017] NZCA 566 at [37].

35 *R v Bradley*, above n 34, at 263.

offending.[36] The Judge did not consider each offence committed by Mr Rihari individually. He considered that it would be unduly complex to do so and that it would be likely to result in a disproportionately high sentence.[37] It was open to the Judge to approach totality in this way. How a total sentence for multiple offending is constructed is a matter for individual judicial discretion and assessment.[38]

[36] Ms Gray nevertheless argued that the Judge erred by failing to make an adjustment for totality when he imposed the sentences for the historical offending and the more recent offending on a cumulative basis. She submitted, relying on *Opetaia v R*, that the Judge should have assessed Mr Rihari's overall culpability and determined what effective sentence was appropriate for the totality of his conduct.[39]

[37] We are not persuaded that the Judge failed to make appropriate adjustments for totality or that the approach taken has resulted in a manifestly excessive sentence. The Judge turned his mind to the totality principle at a number of points in his sentencing notes:

(a) The Judge's observation that sentencing each historical offence individually and cumulatively would likely result in a disproportionately high sentence shows that he was alive to the totality principle.[40] Indeed, he expressly referred in a footnote to s 85(2) of the Sentencing Act. He went on to record that he intended to arrive at individual sentences for the two periods of offending, each to be assessed on a "lead offence/totality basis".[41] He commented that: "Imposed cumulatively, [he would] arrive at a global end sentence, capturing the overall criminality of [Mr Rihari's] offending."[42] He then went on to explain that the time that had elapsed between the historical offending and the more recent offending warranted the two sentences

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36 *Haywood v R* [2015] NZCA 551 at [11]; and see Simon France (ed) *Adams on Criminal Law – Sentencing* (online ed, Thomson Reuters) at [SA85.01].
37 *R v Rihari*, above n 1, at [51].
38 *R v Williams* CA91/00, 31 May 2000 at [11]; *R v Dodd* [2013] NZCA 270 at [31]; and *R v Barker* CA57/01, 30 July 2001 at [10].
39 *Opetaia v R* [2013] NZCA 434.
40 *R v Rihari*, above n 1, at [51].
41 At [53].
42 At [53].

"each already adjusted for totality" being imposed cumulatively.[43] These various references made it clear that the totality principle guided his approach to the sentencing exercise.

(b) In considering the starting point for the historical offending, the Judge said:[44]

> [70] In my assessment, that starting point and uplift are within the applicable range, if appropriately toward its upper bound. A higher adjusted starting point could perhaps be justified. *But, in totality, that would risk a sentence trivialising your offending against AB, to which I now turn*. The Judge expressly took a lower starting point than "could perhaps be justified" for the historical offending so that he could impose a sufficiently grave sentence for the more recent offending against AB.[45] This again demonstrates that the Judge turned his mind to what should be the appropriate starting point sentence for all of Mr Rihari's offending.

(c) Similarly, when considering the appropriate sentence for the more recent offending, the Judge said as follows:[46]

> [73] I agree with the Crown the characteristics of your more recent offending bring it within unlawful sexual connection band two, having 'two or three of the factors increasing culpability to a moderate degree'. Although the presence here of at least four factors increasing your culpability otherwise could warrant placing your recent offending in the middle of that band, *having regard for totality principles, I set the starting point at the bottom of the available range.* …

Again, this demonstrates that the Judge considered the totality principle in fixing his starting point sentence for the more recent offending.

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43 At [54].
44 Emphasis added.
45 *R v Rihari*, above n 1, at [70].
46 Emphasis added.

(d) After applying the various discounts and coming to the end sentence, as already noted, the Judge said as follows:[47]

> Standing back, I am satisfied in all the circumstances — having regard for the purposes and principles of sentencing, and especially those of particular relevance in sexual offending cases — your end sentence is just.

The Judge clearly undertook a further totality assessment at the end of his sentencing analysis, to determine whether the overall end sentence was in proportion to the offending as a whole.

[38] Nor do we consider that the overall starting point of 17 years' imprisonment adopted by the Judge was excessive.

[39] Ms Gray argued that the appropriate starting point should have been around 14 to 15 years' imprisonment. She relied on three child sexual offending cases — *N (CA200/2016) v R*, *R v G* and *R v Black* — arguing that the offending in each of these cases was significantly more serious than Mr Rihari's case.[48]

[40] The Judge took the view that Mr Rihari's offending was serious. We agree with this assessment. Mr Rihari's most serious offending comprised six charges of rape (including one representative charge). There were multiple representative charges of both oral and anal penetration. As the Judge noted, there were a number of aggravating features to the offending, including the extent of the harm caused (graphically illustrated in the victim impact statements), the multiple abuses of trust, the endemic and repetitive nature of the offending (its normalisation illustrated by directions such as "you know what to do" and EF's attempts to avoid what she knew was about to happen), significant degradation and cruelty, the vulnerability of the victims and clear premeditation by Mr Rihari.[49]

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47 *R v Rihari*, above n 1, at [89].

48 *N (CA200/2016) v R* [2017] NZCA 165 (26 charges of historical sexual and violent offending against own children, 16 year starting point); *R v G* [2021] NZHC 3527 (18 year starting point, 26 charges of sexual offending against seven family members over 38 years, youngest complainant aged two and a half); and *R v Black* [2022] NZHC 140 (18 year starting point, 38 charges of sexual offending, complainants all under 12).

49 *R v Rihari*, above n 1, at [64].

[41] The Judge referred to this Court's decision in *Anand v R*.[50] He considered it a useful, if arguably less serious, comparative case.[51] *Anand* involved five rapes and seven indecent assaults by a social worker against 10 young complainants in the 1980s.[52] This Court observed as follows:[53]

> [36] To put the present offending in perspective, each of the five rape charges would ordinarily have warranted a starting point of between five and eight years imprisonment. Each of the seven charges of indecent assault justified a sentence of between two and four years imprisonment. But for the need to have regard to totality principles, the final starting point could easily have been greater than 20 years imprisonment.
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> [37] Totality principles are designed to ensure an offender does not receive a sentence that is out of all proportion with the overall gravity of the offending. There will always be a range of appropriate sentences for historical sexual offending against multiple victims. That is an inevitable consequence of the need to select a sentence reflecting so many variable factors. In the present case the gravity of Mr Anand's offending was such that some judges may have adopted a starting point greater than 15 years. Others may have selected a sentence in line with that imposed in *R v* [*Jones*].[54] Importantly, however, neither approach would produce a sentence that was out of all proportion to the overall gravity of the offending. We have therefore concluded that the overall nature and extent of Mr Anand's offending, taken in the context in which it occurred, was sufficiently serious to render the final starting point of 15 years imprisonment within the available range.

[42] This Court has often considered the appropriate sentence for repeated sexual violations of children and young persons.[55] A number of the relevant authorities were cited by the Judge. Each case of course turns on its own facts. Given the circumstances of Mr Rihari's offending, we do not consider that the starting point of 17 years' imprisonment was out of all proportion to the gravity of the offending.

[43] We therefore consider that this first ground of appeal must fail.

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50 *Anand v R*, above n 34.

51 *R v Rihari*, above n 1, at [60]–[62].

52 *Anand v R*, above n 34, at [1] and [4].

53 Footnote not in original.

54 *R v Jones* [2015] NZHC 398 (45 charges of sexual and violent offending, starting point of 13 years and end sentence of 11 years' imprisonment).

55 See for example *R v S (CA64/06)* [2007] NZCA 243 (12 year starting point "was distinctly underweight", at [80]); *R v Kolio* CA219/01, 1 November 2001 (starting point of 17–18 years upheld); *R v T (CA251/02)* (2002) 20 CRNZ 51 (CA) (starting point of 14–18 years upheld); *R v M (CA3/04)* CA3/04, 23 August 2004 (starting point of 15 years upheld); and *R v T (CA355/2008)* [2008] NZCA 539 (starting point of 16 years upheld).

[44] We turn now to consider Mr Rihari's personal and cultural factors as outlined in the s 27 report. The report identified various background factors which were said to have contributed to Mr Rihari's offending, including:

(a) Cultural disconnection, deprivation and dysfunction through colonisation. Mr Rihari identifies as Māori. He grew up in a small and isolated village with a church but no wharenui. There were no roads and only whānau lived in the village. Dysfunction and deprivation were rife.

(b) A culture of sexual promiscuity, incest and familial childhood molestation was commonplace. Sexual offending was normalised within Mr Rihari's hapū. He reported being sexually abused as a child by two family members. He suspected that another close family member was also guilty of sexual abuse.

(c) Mr Rihari was abandoned by both his father (whom he reports he never met) and by his mother (whom he only met at the age of eight years). He was passed around whānau members until her arrival. He reports that he was beaten and abused. He was beaten at school for speaking te reo. He often sourced his own food and slept rough with his horse and dog.

[45] The Judge allowed Mr Rihari a discount of 10 per cent for these various factors.

[46] Ms Gray submitted that a discount of 20 per cent would have been more appropriate. She referred to *Williams v R*, which involved rape and family violence offending against the appellant's former partner.[56] This Court there held that a discount of just over 10 per cent was inadequate for cultural factors (including cultural and whānau disconnection, sexual abuse in state care, family violence and poverty) and that a 15 per cent discount would have been more appropriate.[57]

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56 *Williams v R* [2021] NZCA 535.
57 At [112] and [115].

[47] In *Zhang v R*, this Court considered the role of s 27 reports, observing that sentencing must achieve justice in individual cases and that this requires flexibility and discretion.[58] The Court further noted that ingrained systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity requires consideration at sentencing when it is shown to have contributed causatively to a defendant's offending.[59] This Court returned to the topic in *Carr v R*.[60] It confirmed that, where a cultural report contains a credible account of social and cultural dislocation, poverty, alcohol and drug abuse, unemployment, educational underachievement and violence which are features of an offender's upbringing, such matters ought to be taken into account in sentencing.[61]

[48] The Judge found that there was a causal link between Mr Rihari's cultural and personal background and his offending — particularly his historical offending.[62]

[49] We agree with the Judge that there was a causal link. There does not need to be extensive evidence of a nexus between offending and socio-economic and cultural disadvantage for a discount to be granted.[63] The assessment of whether there is a nexus between an offender's background and his or her offending should not be a mechanical exercise requiring a high threshold of proof.[64] Rather, what is required is an overall assessment, assisted by the available evidence, including that in a cultural report prepared under s 27, when determining how personal circumstances may have contributed to offending and culpability.[65] We do not agree with the Judge's observation that the various factors identified in the s 27 report are primarily relevant to the historical offending.[66] In our view, the causal link between the factors identified and Mr Rihari's offending extends to all of his offending. Mr Rihari's upbringing will have contributed to his attitudes and his behaviour even after he left his kāinga and engaged in the wider world. The fact that Mr Rihari further offended in the early

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58 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [10(a)].
59 At [159]; and see *R v Rakuraku* [2014] NZHC 3270; and *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.
60 *Carr v R* [2020] NZCA 357.
61 At [60].
62 *R v Rihari*, above n 1, at [82].
63 *Arona v R* [2018] NZCA 427 at [59], citing *Solicitor-General v Heta*, above n 59..
64 *Waikato-Tuhega v R* [2021] NZCA 503 at [51].
65 At [51].
66 *R v Rihari*, above n 1, at [81].

2000s, after leaving his kāinga, should not in our view limit the discount which should otherwise be available to him.

[50] We acknowledge Mr Rihari's difficult background, including his upbringing in an isolated and dysfunctional rural community, his disconnection from his whānau and culture, and the childhood sexual abuse he says he suffered from family members. We do have some concerns about some of the matters raised in the s 27 report. Some comments attributed to Mr Rihari do not seem to have factored into the report writer's analysis. For example, the report writer records that Mr Rihari said that, in his view, there were clear benefits from colonisation, including the changing of certain Māori customs. The report writer discounted Mr Rihari's view and concluded that he presented as "significantly impacted by the deprivation brought on Māori communities by colonialism's racist policies and tactics for assimilation". There was scope for the report writer to conclude that notwithstanding Mr Rihari's views, he was nevertheless impacted by deprivation in his community arising from colonisation, but it would have been helpful if Mr Rihari's views and the reasons for discounting them, had been explored more fully. This issue aside, we consider that the 10 per cent discount allowed by the Judge was inadequate and that a discount of 15 per cent would have been more appropriate.

[51] The Judge however gave a discrete discount of 15 per cent for Mr Rihari's advanced age and health. He accepted that inter alia Mr Rihari's health difficulties would make a long custodial sentence appreciably harsher for him. While we agree with the Judge's reasoning, we consider that the discount allowed was generous. There was evidence of Mr Rihari's medical conditions and medications but no commentary on their implications on and for a custodial sentence.

[52] Standing back and considering the total discount for personal mitigating factors in the round, we are not persuaded that the total discount allowed by the Judge of 25 per cent for personal factors was too low. In our view, the second ground of appeal must fail as well.

[53] It follows that in our view, the sentence imposed on Mr Rihari was not manifestly excessive.

Result

[54] For the reasons we have set out, the appeal is dismissed.

Suppression

[55] We have considered whether or not Mr Rihari's name should be suppressed to prevent identification of the complainants. We have concluded that this step is unnecessary. The Judge's sentencing notes are already in the public domain and Mr Rihari's name was not suppressed at that stage. Further, we have not put anything in this judgment which could lead to the complainants being identified. Accordingly, we make no order suppressing Mr Rihari's name.

Solicitors:
Crown Law Office, Wellington for Respondent