IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA612/2022
[2023] NZCA 487

BETWEEN	ROBERT JOHN BROWN Appellant
AND	THE KING Respondent

Hearing:	18 July 2023
Court:	Brown, Thomas and Moore JJ
Counsel:	Appellant in person J E Mildenhall for Respondent
Judgment:	5 October 2023 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal out of time is granted.

B The appeal is allowed.

C The sentence of preventive detention is quashed and replaced by a sentence of four years' imprisonment.

Table of Contents

REASONS OF THE COURT

(Given by Thomas J)

Introduction

[1] Following a Judge-alone trial in the District Court, Robert Brown was found guilty of four charges of sexual connection with a young person.[1] He now appeals his sentence of preventive detention with a five-year minimum period of imprisonment (MPI) imposed by the High Court.[2]

---

1 *R v Brown* [2020] NZDC 1624. Crimes Act 1961, s 134(1); maximum penalty of 10 years' imprisonment.

2 *R v Brown* [2020] NZHC 3320 [Judgment under appeal].

[2] He seeks leave to appeal that sentence, approximately one year and nine months out of time, on the ground that it was manifestly excessive.[3] The Crown opposes the application for leave and the appeal itself.

[3] The primary basis for the Crown's opposition to the application for an extension of time is that the proposed appeal lacks merit. Mr Brown's explanation for the delay of almost two years is that he had been waiting for the Criminal Cases Review Commission to report to him following their investigations into his 2006 and 2008 convictions. While an appeal against sentence filed almost two years out of time would ordinarily require a more compelling case for leave, given Mr Brown has been sentenced to preventive detention we consider it appropriate that leave is granted and, for the reasons we discuss, we do not consider the appeal is without merit.

Background

[4] Aside from the most recent offending, Mr Brown has 13 previous convictions for sexual offending, primarily against children and young people, dating between 1995 and 2006.

1995 offending

[5] In December 1995, Mr Brown was working with the 14-year-old male victim on a high-country station. During a break, he massaged the victim's legs, removed the victim's shorts and underwear and touched his penis. Mr Brown asked the victim if he could perform oral sex on him. The victim refused and left. Mr Brown was convicted of indecently assaulting a male aged between 12 and 16. He was sentenced to a suspended prison sentence and nine months' supervision.

2004 and 2005 offending

[6] In 2004 and 2005, Mr Brown offended against three boys aged between 13 and 15.[4] Mr Brown had known the first victim for several years. He gained the trust of the victim's parents and the victim began to spend time at his house, sometimes

---

3 Court of Appeal (Criminal) Rules 2001, r 11.
4 *R v Brown* HC Napier CRI-2005-020-1382, 26 June 2006.

staying overnight. When the victim was 13, Mr Brown touched his genitals and held him down when he tried to escape. Mr Brown masturbated the victim and performed oral sex on him. He told the victim not to tell anyone and gave him $50. On several other occasions over the following year, Mr Brown masturbated the victim and performed oral sex on him.

[7] Mr Brown offered the second victim, aged 15, a job in his contracting business. Mr Brown began sending the second victim text messages which were sexual in nature and eventually offered him money in exchange for oral sex, which the victim declined. Mr Brown kissed the second victim on the head, told him he loved him and rubbed his thigh on an occasion they were together in a car.

[8] The third victim, also aged 15, was working for Mr Brown when Mr Brown rubbed his genitals over his trousers while they were together in a car. Mr Brown instructed the third victim to stop the vehicle and then put his hands and mouth on the victim's penis. Afterwards he forced the victim to kiss him and told him he would give him $100 if he did not say anything. Mr Brown was convicted of four charges of sexual violation by unlawful sexual connection, four charges of indecent assault on a boy aged between 12 and 16 and one charge of inducing a boy aged between 12 and 16 to do an indecent act. He was sentenced to nine years' imprisonment with an MPI of six years.[5] He appealed against his conviction and his appeal was dismissed by this Court.[6]

2005 and 2006 offending

[9] Mr Brown offended against two other victims in 2005 and 2006.[7]

[10] The first victim was aged 15 at the time he was working for Mr Brown's contracting company. When they were driving to jobs together, Mr Brown asked him personal sexual questions which he tried to avoid. While sitting behind the victim on a tractor one day, Mr Brown rested his arm on the victim's leg a number of times despite the victim moving his leg away. Mr Brown then began rubbing the victim's

---

5 At [70] and [78].
6 *R v Brown* [2007] NZCA 585.
7 *R v Brown* HC Napier CRI-2005-020-3954, 30 July 2008.

penis through his pants. He was convicted of indecent assault on a young person under 16.

[11] The second victim was aged 22. He and Mr Brown were in prison at the same time. Mr Brown rubbed the victim's thigh and buttocks on one occasion, and on another he hugged the victim and rubbed his penis against him. He was convicted of two charges of indecent assault.

[12] For this offending, Mr Brown was sentenced to six months' imprisonment to be served cumulatively on the existing term of nine years' imprisonment for the previous offending.[8]

Index offending

[13] The most recent offending occurred between July and September 2018. Mr Brown, who was then 56 years old, met the 13-year-old victim on the Grindr app.

[14] Grindr is a social networking app for gay, bisexual, transgender and queer people. It utilises location-based technology to allow people of a similar sexual preference and in the same location to meet up, generally for sexual purposes. Grindr's terms and conditions require users to be at a minimum 18 years old. However, no evidence of age is required other than the user affirming that they are over 18.

[15] The first contact on the app was a message from Mr Brown to the victim asking if he would take money for sex. They then exchanged several messages, including nude photographs. Mr Brown asked the victim his age, and the victim said he was 18. Mr Brown said he was in his 40s.

[16] On the evening of 1 July 2018, Mr Brown picked up the victim from his address and drove with him back to Mr Brown's address. On the way, Mr Brown asked the victim his age, to which the victim replied that he was 18. Mr Brown made no further enquiries with the victim about his age.

---

8 At [49]–[50].

[17] Mr Brown asked the victim if he was absolutely sure he was okay with having sex. The victim affirmed that he was. Mr Brown gave the victim $200 in cash. At Mr Brown's house they had sexual intercourse, including oral and anal sex.

[18] While driving the victim home, the victim asked Mr Brown to buy him some cigarettes and gave Mr Brown some money. When Mr Brown asked why he could not buy them himself the victim replied he suffered from social anxiety.

[19] On nine further occasions between July and September 2018, Mr Brown picked up the victim, took him to his address, and engaged in both anal and oral intercourse with him.

Judgment under appeal

[20] Doogue J considered the aggravating features present in the index offending were the significant age gap and the fact that penetrative intercourse occurred on a number of occasions. She adopted a starting point of three years and six months' imprisonment.[9]

[21] The Judge considered two aggravating factors warranted an uplift of six months. These were Mr Brown's previous convictions and the fact that the offending occurred while Mr Brown was subject to an extended supervision order (ESO). She considered there were no mitigating factors. This resulted in a finite sentence of four years' imprisonment. The Judge also noted she would have imposed an MPI of two years to hold Mr Brown accountable for the harm he had caused, to denounce his conduct and to protect the community.[10]

[22] The Judge then turned to consider preventive detention. She considered the health assessors' reports from Ms Boyd, Dr Young and Dr Leslie as required by s 88 of the Sentencing Act 2002. The Judge also considered a psychiatric report from Dr Lehany, commissioned by Mr Brown's counsel.

---

9 Judgment under appeal, above n 2, at [19]–[20].
10 At [22]–[24].

[23] The Judge considered that Mr Brown's history showed a clear pattern of serious sexual offending against boys over a significant period of time. Including the current offending, he had 17 convictions for sexual offending — against seven different victims, aged between 13 to 22.[11]

[24] The Judge referred to Dr Lehany's characterisation of the current offending as a "reduction in frequency and severity of sexual violence". While the Judge agreed it might be possible to say the current offending did not represent an increasing pattern of offending, it nonetheless fit within Mr Brown's pattern of offending. He sought out a pubescent boy (while the victim said he was 18, the Judge emphasised the trial Judge found Mr Brown did not take reasonable steps to confirm this), and repeatedly engaged in sexual conduct with him. From another perspective, the current offending was an escalation as it involved repeated anal penetration.[12]

[25] While the Court had not heard from the victim of the current offending, who chose not to provide a victim impact statement, it was obvious that sexual offending of this nature causes extremely serious harms to victims and the wider community. The Judge also noted the impact on victims of the earlier offending who described their lives as being ruined and their complete loss of trust in adult men, as well as the significant impact his offending had on their families.[13] She rejected the submission that the current offending did not cause serious harm to the victim and noted his unwillingness to provide a victim impact statement was not to be interpreted as being proof no harm had occurred. It could not be said a 13-year-old was not vulnerable. The harm was exacerbated by the fact the offending occurred on a regular basis over three months. The money and gifts given to the victim after each incident would have further normalised the offending.[14]

[26] The Judge was satisfied there was sufficient information indicating a tendency to commit serious sexual offending in the future. She noted that Ms Boyd concluded there was a high risk Mr Brown would engage in future sexual offending and that Dr Lehany did identify a range of vulnerabilities likely to increase the risk of further

---

11 At [31].
12 At [43].
13 At [44].
14 At [45].

sexual violence.[15] The Judge said Mr Brown showed limited insight into his current offending — including telling Dr Lehany that he did not consider the victim to be a victim and that they were in a relationship, which he would seek to continue if released from prison.[16]

[27] The Judge said Mr Brown continued to minimise his culpability.[17]

[28] Mr Brown also showed limited insight into his past offending, emphasising to Dr Lehany that the victim of his 1995 offending was "happy to keep working for [him]" and denying much of his 2004 to 2006 offending, accusing the victims of lying and considering himself to be a victim of miscarriages of justice. The Judge recorded that Mr Brown blamed victims and often enticed victims with money or employment, which he distorted as an act of generosity rather than a grooming process.[18] He showed clear and extreme minimisation of past offending and attitudes which condone sexual violence.[19] Dr Lehany and Ms Boyd both noted Mr Brown had trouble establishing intimate and non-intimate relationships, which contributed to his risk of offending.[20]

[29] Balanced against this, Dr Lehany highlighted three factors that may lower Mr Brown's risk of reoffending: his supportive relationship with his sister; that there had not been an escalation in sexual violence; and his age. However, the Judge was not persuaded any of these factors sufficiently addressed his risk of reoffending.[21] She could not be satisfied that Mr Brown's support network, consisting of his sister and the local Lions Club, would provide sufficient protection for the community, especially given that the current offending occurred while he was subject to an ESO.[22]

[30] The Judge was not persuaded by Dr Lehany's characterisation of the current offending and considered it to be very serious.[23] The Judge said that, while the courts

---

15 At [46].
16 At [47].
17 At [48].
18 At [49].
19 At [50].
20 At [51].
21 At [52].
22 At [53].
23 At [54].

sometimes decline to impose preventive detention on the basis that there is typically a reduction in sexual offending around Mr Brown's age, this was not always the case and that, given the current offending occurred when he was 57, Ms Boyd confirmed advancing age was not a protective factor for Mr Brown.[24]

[31] While it was apparent that Mr Brown made some gains from the Te Piriti programme, this treatment was obviously not successful in preventing him causing further harm through sexual offending and it was clear Mr Brown continued to lack insight into his offending.[25] The Judge was not currently satisfied that treatment (past or future) would keep the community safe from harm caused by Mr Brown's sexual offending.[26]

[32] As Mr Brown's index offending occurred while subject to an ESO, the Judge did not consider an ESO would be sufficient to protect the community.[27]

[33] The Judge noted that in 2006 and 2008 the High Court declined to impose preventive detention. The index offending demonstrated that the lengthy determinate sentence which was imposed instead, together with treatment, was not sufficient to protect the community.[28]

[34] Given Mr Brown's pattern of serious sexual offending despite various interventions, the seriousness of the harm to the community, the risk of reoffending in future, and the inability of a determinate sentence to adequately protect society, the Judge imposed a sentence of preventive detention.[29] An MPI of five years was imposed.[30]

---

24 At [55].
25 At [56].
26 At [57].
27 At [59].
28 At [61].
29 At [62].
30 At [67].

Preventive detention and extended supervision orders

Preventive detention

[35] Preventive detention is an indeterminate sentence of imprisonment and is governed by s 87 of the Sentencing Act. Its purpose is to protect the community from those who pose a significant and ongoing risk to the safety of its members.[31] If a court sentences an offender to preventive detention, it must also impose a minimum period of imprisonment, which cannot be less than five years.[32]

[36] Preventive detention may be imposed only if a defendant, who was aged 18 or over at the time of offending, has been convicted of a qualifying sexual or violent offence.[33] The court must be satisfied the defendant is likely to commit another qualifying sexual or violent offence if released at the expiry date of any sentence other than a sentence of preventive detention.[34]

[37] When considering whether such a likelihood exists, s 87(4) provides that the court must take into account:

> (a) any pattern of serious offending disclosed by the offender's history; and
>
> (b) the seriousness of the harm to the community caused by the offending; and
>
> (c) information indicating a tendency to commit serious offences in future; and
>
> (d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and
>
> (e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

Extended supervision orders

[38] ESOs are imposed under the Parole Act 2002 and have the purpose of protecting members of the community from those who, following receipt of a

---

31 Sentencing Act 2002, s 87(1).
32 Section 89.
33 Section 87(2)(a)–(b).
34 Section 87(2)(c).

determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences.[35] The Chief Executive of the Department of Corrections (the Chief Executive) may apply to the court for an ESO before the release of an offender or before the expiry of an existing ESO.[36] Consideration of preventive detention requires reports from at least two health assessors.[37] In contrast, an application for an ESO requires one report only, which must address factors relating to the risk of reoffending.[38] Section 107IAA of the Parole Act sets out the matters the Court must be satisfied of when assessing such risk, in relation to serious sexual offending, as follows:

> **107IAA Matters court must be satisfied of when assessing risk**
>
> (1) A court may determine that there is a high risk that an eligible offender will commit a relevant sexual offence only if it is satisfied that the offender—
>
> (a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and
>
> (b) has a predilection or proclivity for serious sexual offending; and
>
> (c) has limited self-regulatory capacity; and
>
> (d) displays either or both of the following:
>
> (i) a lack of acceptance of responsibility or remorse for past offending:
>
> (ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.
>
> …

[39] The term of an ESO cannot exceed 10 years and must be the minimum period required for the purposes of the safety of the community in light of the level of risk posed by the offender, the seriousness of the harm that might be caused to victims, and the likely duration of risk.[39] ESOs are subject to standard conditions plus any special

---

35 Parole Act 2002, s 107I(1).
36 Section 107F.
37 Sentencing Act, s 88(1)(b).
38 Parole Act, s 107F(2).
39 Section 107I(4)–(5).

conditions which might be imposed.[40] Standard conditions include an offender being required to report to a probation officer as and when required, obtaining prior written consent of a probation officer to a change of address or employment, and attending a rehabilitative and reintegrative needs assessment. An offender is prohibited from associating with or contacting a person under 16 years of age except with prior written approval of a probation officer and any association must be in the presence of a supervising adult.[41]

[40] A court may impose special conditions at the time the order is made on an interim basis.[42] The Parole Board may impose special conditions at any time before the ESO expires or is cancelled on application by the Chief Executive or a probation officer.[43] Special conditions must be designed to reduce the risk of reoffending, facilitate or promote rehabilitation and reintegration, provide for the reasonable concerns of victims, or comply with a court order requiring the imposition of an intensive monitoring condition.[44] They may include conditions which prohibit the offender from: using a controlled drug, psychoactive substance or alcohol; associating with a person or class of persons; and entering or remaining in specified places or areas. The offender may also be required to submit to electronic monitoring, to participate in a rehabilitation and reintegration programme, and to take prescription medication.[45] When applying for an ESO, the Chief Executive may also seek an order requiring the Parole Board to impose an intensive monitoring condition.[46] Such a condition requires an offender to submit to being accompanied and monitored for up to 24 hours a day for a maximum of 12 months. This order may only be made once, even if the offender is subject to repeated ESOs.[47]

[41] The offender or a probation officer may apply to the Parole Board for the variation or discharge of any condition of the order.[48]

---

40 Section 107J.
41 Section 107JA.
42 Section 107IA.
43 Section 107K.
44 Section 15(2).
45 Section 15(3).
46 Section 107IAB.
47 Section 107IAC.
48 Section 107O.

[42] An ESO and its conditions are subject to ongoing review. A sentencing court must, before the review date, review an ESO to ascertain whether there is a high risk the offender will commit a relevant sexual offence or a very high risk the offender will commit a relevant violent offence within the remaining term of the order. If an offender has not ceased to be subject to an ESO since first becoming subject to an ESO, the review date is 15 years after the date on which the first ESO commenced and thereafter five years after the imposition of each new ESO.[49] If the offender is in legal custody at any point, time ceases to run for the purpose of calculation of the review date.[50] High-impact conditions must be reviewed every two years. A high-impact condition requires the offender to stay at a specified residential address for more than a total of 70 hours during any week or requires the offender to submit to electronic monitoring that enables his or her whereabouts to be monitored when not at his or her residence.[51]

[43] An ESO's conditions are suspended and time ceases to run on the order during any period the offender is in legal custody in accordance with the Corrections Act 2004, and any subsequent period following the offender's release (if applicable) until the offender's statutory release date.[52] This also applies to an offender subject to an ESO who is sentenced to another determinate sentence of imprisonment.[53] In the case of an offender detained under a sentence of imprisonment, the ESO conditions are reactivated on the offender's statutory release date and in place of any other release conditions that would otherwise apply.[54] If an offender who is subject to an ESO is sentenced to an indeterminate sentence, such as preventive detention, the ESO is cancelled. However, if the sentence is subsequently quashed or otherwise set aside, the ESO is to be treated as if it had not been cancelled.[55]

---

49 Section 107RA.
50 Sections 107RA(7) and 107P.
51 Section 107RB.
52 Section 107P(1).
53 Section 107Q(2).
54 Section 107P(2), and in the case of an offender who is detained under a court order, on the date the offender is released.
55 Section 107Q(3).

Human rights implications

[44] ESOs and preventive detention are some of the most coercive exercises of state power in New Zealand law and engage human rights issues. New Zealand courts and international human rights bodies have found these regimes to be inconsistent with human rights.

[45] In *Miller v New Zealand*, the United Nations Human Rights Committee concluded that aspects of New Zealand's preventive detention regime breached the protection against arbitrary detention under the International Covenant on Civil and Political Rights.[56]

[46] This Court, in *Chisnall v Attorney-General*, declared that the ESO and public protection order (PPO) regimes were inconsistent with the protection against second punishment under s 26(2) of the New Zealand Bill of Rights Act 1990 and that the inconsistencies had not been justified under s 5 of that Act.[57] The case is currently with the Supreme Court.[58]

[47] A series of more recent decisions followed *Chisnall*. In *R (CA586/2021) v Chief Executive of the Department of Corrections* this Court accepted the appellant's submission that the continuation of the ESO (on its five-year review in that case) needed to be clearly justified post-*Chisnall.* Careful scrutiny and a "[s]trong justification" would be required.[59] This approach was followed in *Wilson v Chief Executive of the Department of Corrections*.[60]

[48] In *Mosen v Chief Executive of the Department of Corrections*, this Court discussed the interaction of the ESO regime with the New Zealand Bill of Rights Act. When addressing the risk analysis, in respect of ascertaining whether there is a "very high risk" that the offender will commit a relevant violent offence, the Court noted that "[t]he high bar this criterion sets reflects the public safety justification that is

---

56 *Miller v New Zealand* (2017) 11 HRNZ 400 at [8.3]–[8.6].
57 *Chisnall v Attorney-General* [2021] NZCA 616, [2021] 2 NZLR 484; and *Chisnall v Attorney-General* [2022] NZCA 24.
58 Leave to appeal and cross-appeal was granted in *Attorney-General v Chisnall* [2022] NZSC 77.
59 *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 at [53].
60 *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289 at [19]–[20].

required to be met before a person is subjected to the limits on their freedom of movement and association that an ESO entails."[61] Further, if the statutory criteria for an ESO are met, a court must balance the right not to be subject to a second penalty against the statutory purpose to protect the public from the very high risk that the offender will commit a relevant violent offence.[62]

[49] The Law Commission is undertaking a review of the laws relating to preventive detention and post-sentence supervision or detention. This review will include, but will not be limited to, consideration of whether the laws reflect current understandings of reoffending risks and provide an appropriate level of public protection; te Tiriti o Waitangi | the Treaty of Waitangi, te ao Māori perspectives and any matters of particular concern to Māori; consistency with domestic and international human rights law; and the relationship between sentences of preventive detention, ESOs and PPOs.[63] The Commission will report to the Minister responsible for the Law Commission by the end of 2024.[64]

The appeal

[50] Mr Brown is self-represented. He continues to be somewhat aggrieved by his conviction, reiterating his concern that the District Court Judge required him to "verify" the victim's age whereas the correct test was whether he had taken reasonable steps to satisfy himself of the victim's age. He repeated his complaint that the police had taken his cellphone from him. He said his phone would have provided evidence that he met the victim through Grindr, a social media app restricted to those over 18 years of age. It would also have answered other allegations made against him, for example, that he misrepresented his own age. He maintained that the second time they met, the victim showed him a form of identification which indicated he was 17 years old.

---

61 *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 at [27].

62 At [31]. See also *Bannan v Chief Executive of the Department of Corrections* [2023] NZCA 227 at [13].

63 Law Commission *Public safety and serious offenders: a review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at 4.

64 At 6.

[51] He noted that the District Court Judge herself estimated the victim's age as between 14 and 18. He told us that his convictions from 2006 and 2008 are currently being reviewed by the Criminal Cases Review Commission.

[52] Except perhaps to confirm Mr Brown's tendency to blame the victim for his offending, we take those matters no further. Mr Brown's conviction appeal to the High Court was dismissed in August 2021 and his application for leave to bring a second appeal to this Court was declined in March 2022.[65]

[53] Mr Brown spoke briefly to his sentence appeal. In his submission, the sentence of preventive detention was excessive, and the gravity of the index offending warranted a sentence of around two years' imprisonment

[54] In Ms Mildenhall's submission, for the respondent, the s 87 criteria were likely met.

[55] In the circumstances of this appeal and Mr Brown's self-representation, we will analyse the s 87(4) considerations and the question of whether Mr Brown is likely to commit another qualifying sexual offence if released at the expiry date of any sentence other than a sentence of preventive detention.

Does Mr Brown's history disclose a pattern of serious offending?

[56] We are satisfied that the index offending fits within a larger pattern of Mr Brown's sexual exploitation of young males. He has 13 previous convictions for such offending involving six different victims, the harm to whom was significant. He used grooming behaviours on the earlier occasions, abusing the trust of victims under his direct care and supervision. The index offending represents a continuation of Mr Brown's tendency to seek sexual contact with underage males. The 12-year gap between Mr Brown's most recent previous offending and the index offending can be explained by the fact he spent nine and a half years in prison during this time and was subject to an ESO following his release in 2015. He offended within the prison environment and committed the index offending while subject to the ESO.

---

65 *Brown v R* [2021] NZHC 2086; and *Brown v R* [2022] NZCA 94.

The offending persisted for three months before it was detected. The Judge was correct to conclude that Mr Brown displayed a persistent pattern of serious sexual offending.

[57] In saying that, we acknowledge that the index offending occurred in a somewhat different context from the earlier offending. However, it remains serious offending given the victim's young age.

What was the seriousness of the harm caused by the offending?

[58] The index offending involved a significant age disparity and, although the sexual activity was ostensibly consensual, the victim agreed to participate in exchange for cash and gifts. In *Stoneham v R* this Court upheld a sentence of preventive detention notwithstanding that the qualifying offence was consensual sexual connection with a young person.[66] This Court noted that the offence under s 134 of the Crimes Act 1961 reflects a legislative assessment that young people under the age of 16 are vulnerable.[67] This Court has observed that while they may not immediately recognise the harm that has been done to them, young people who consent to sexual activity with considerably older men frequently suffer delayed psychological problems.[68]

Was there information indicating a tendency to commit serious offences in the future?

[59] The Court cannot impose a sentence of preventive detention unless it has considered reports from at least two appropriate health assessors about the likelihood of the offender committing a further qualifying sexual (or violent) offence.[69]

[60] Reports were provided to the Court from Ms Robyn Boyd, registered clinical psychologist, Dr Greg Young, consultant psychiatrist, Dr Blair Leslie, consultant forensic psychiatrist, and Dr Gordon Lehany, consultant forensic psychiatrist

---

66 *Stoneham v R* [2012] NZCA 404.

67 At [26]. See also *R v Johnson* [2010] NZCA 168 at [13].

68 *R v Johnson*, above n 68, at [13]; *R v Boyd* (2004) 21 CRNZ 169 (CA) at [41]; and *R v Davidson* [2008] NZCA 484 at [25], citing *Attorney General's Reference No 39 of 2003 (Wheeler)* [2003] EWCA Crim 3068, [2004] 1 Cr App R (S) 79.

69 Sentencing Act, s 88(1)(b).

(commissioned by the defence). Only the reports of Ms Boyd and Dr Lehany discussed risk of reoffending.[70]

Ms Boyd

[61] Ms Boyd described Mr Brown as having a somewhat isolated and lonely childhood. He was sexually offended against at 14 years old. This was an experience he described in a positive way and reinforced his perception that sex was a way of decreasing his loneliness.

[62] Ms Boyd assessed Mr Brown to be in the Average category of risk — men in the sample with the same score had a predicted rate of sexual reconviction of 57 to 74.3 per cent over five years from their release from prison. On a sexual violence risk scale, he was assessed overall as being in the Above Average risk category — estimated sexual recidivism rate for the group with the same score was 29.4 per cent after five years and at 10 years was 42.5 per cent.

[63] Mr Brown has received treatment in the past, including child sex offender treatment at the Te Piriti Special Treatment Unit. He was described as having made useful treatment gains and displayed an increased understanding of his offending, the effects of his behaviour on victims, and how to manage risk factors. However, Ms Boyd assessed Mr Brown as being at high risk of future offending as his sexual offending has endured despite engagement in intensive group-based therapy, the imposition of sanctions including imprisonment and being subject to stringent external monitoring. Mr Brown resided in the community for approximately three years after his most recent release from prison in 2015. Over this period, he was initially monitored on parole and was then subject to an ESO. This intensive monitoring was insufficient to prevent him from sexually reoffending.

[64] While advancing age can present a barrier to further sexual offending, the index offending occurred when Mr Brown was 57 years old, an age where there typically is a reduction in offending. Therefore, it appeared to Ms Boyd that advancing age has

---

[70] A psychological report dated 7 March 2020 by Dr Barry Parsonson, clinical psychologist, is also on the file.

not been a protective factor in Mr Brown's case. Mr Brown has not engaged in an age-appropriate intimate relationship so it is unknown if this could be protective of future sexual offending.

[65] Ms Boyd considered there is a high risk that Mr Brown will engage in future sexual offending, likely to be against pubescent males aged 13 to 15 years. Potential victims could be accessed via employment or a website. Future offending could also occur within the prison environment against a young adult male victim and could include indecent assault. Mr Brown prefers young sexual partners and his repertoire of skills to ensure he is engaging in legal consenting relationships appear limited. His experience of loneliness is likely to precipitate any further sexual offending, with Mr Brown possibly seeking sex from potential victims under the distortion that he is engaging in a consensual sexual relationship. This distortion is partly due to him having limited insight into the negative impact of sexual offending on victims. He may give the victim money as a means of grooming but may frame this as him being a good person.

[66] It was recommended Mr Brown complete intensive group-based treatment at a Special Treatment Unit. However, Ms Boyd cautioned that intervention is not a guarantee against future offending as Mr Brown has a history of sexual offending both post-treatment and within the prison environment.

Dr Lehany

[67] This report was prepared on the instruction of Mr Brown's lawyer.

[68] Dr Lehany critiqued the risk assessment tools used by Ms Boyd, noting they have strengths and weaknesses. He observed that it was not clear what offences Mr Brown was at a high risk of committing and that the judgment that Mr Brown had not changed as a result of treatment was not supported by his history. Although he had reoffended following treatment, the pattern of reoffending was different to previous offending, suggesting change had taken place and further change may be possible.

[69] In Dr Lehany's opinion it was not possible to give a specific risk estimate for reoffending in this case as there was not sufficient information to make a risk

prediction. It would be necessary to know the nature and outcome of any further treatment, the circumstances of Mr Brown's release and the details of any non-custodial living situation, including the nature of supervision and the characteristics of those overseeing supervision in the community.

[70] Dr Lehany acknowledged Mr Brown has a number of vulnerabilities which were likely to increase the risk of further sexual violence. Mr Brown is sexually attracted to young boys and has a long history of offending against mostly young boys under 16. The index offending occurred while Mr Brown was under supervision in the community, after serving a lengthy prison sentence and completing sex offender treatment during the sentence. Mr Brown has used physical and psychological coercion in past offending, shows clear and extreme minimisation of his past sexual offending and has attitudes which condone sexual violence. The presence of significant psychopathic personality traits increases his risk and reduces the likely effectiveness of any attempts at sexual violence treatment programmes. He has had long-term problems establishing both intimate and non-intimate relationships. His plausibility and superficial likability are linked to these psychopathic traits and add further risks. He plausibly denies his risk to others and minimises his behaviour to a degree that is not sustainable on close investigation, but which is likely to pass a superficial interaction.

[71] There were, however, more positive aspects. Dr Lehany noted that the range and severity of sexual violence appeared to have reduced and there was evidence of decreasing levels of coercion, violence or non-consensual sexual violence. Mr Brown's prior sexual offending was against multiple victims and involved clearly non-consensual behaviour. Although the index offending involved sexual violence, in that the victim could not legally consent, in all other aspects it appears to have been consensual sexual behaviour. Mr Brown has been in the community for sufficient time to evaluate his behaviour, assuming no other sexual violence has gone undetected. He has also not apparently committed any acts of sexual violence in prison since the offences in 2008. Mr Brown has a supportive relationship with his sister, which in this context is a protective factor.

[72] The change in risk factors and some reduction in frequency and severity of sexual violence suggested to Dr Lehany that the risk of sexual violence may have reduced from its level prior to Mr Brown's last imprisonment. Mr Brown's increasing age is a factor likely to reduce his risk of further sexual offending.

[73] Dr Lehany noted that further sexual offending programmes may further mitigate the risk of reoffending. He disagreed that Mr Brown's history showed treatment had not reduced sexual offending and that future treatment would be unlikely to reduce risk further. However, reducing the risk of further sexual offending would depend on robust supervision of Mr Brown and, where possible, the elimination of access to potential victims, both in the community and in custodial settings. Close community supervision, with disclosure of any relationships, would be necessary criteria for safe management in the community. Supervisors should be trained, skilled, well supervised and aware of the risks Mr Brown poses to young men and boys. With further offence-focused work and appropriate supervision, the risk of reoffending could be low.

Dr Young and Dr Leslie

[74] Dr Young and Dr Leslie are both psychiatrists. Both were of the opinion that Mr Brown does not have a mental illness. Therefore, neither was able to comment on his risk of future offending.

Dr Parsonson

[75] Although not referred to by the Judge, and we do not know whether it was before her, a psychological report dated 7 March 2020 by Dr Barry Parsonson, clinical psychologist, is also on the file. His report on Mr Brown's offending history, background and mental health was consistent with that in the other reports already discussed. He concluded that there was "some risk of reoffending" because, despite his time in Te Piriti, Mr Brown appeared to become desperate for relationships so that, as with the index offending, "he drops his guard when an opportunity to establish one arises in casual contact". Dr Parsonson recommended that, as a condition of any sentence, Mr Brown be ordered to undergo psychotherapy/counselling in relation to

the development of skills in the formation and maintenance of appropriate adult sexual relationships.

[76] Given this expert evidence, the Judge was correct to conclude that there was information indicating a tendency for Mr Brown to commit serious offences in the future. Some of that evidence referred to the mitigation of that risk by appropriate oversight and support, a topic to which we will return.

Has Mr Brown failed to address the cause or causes of his offending or failed in his efforts to do so?

[77] Although her Honour acknowledged that Mr Brown made some gains from Te Piriti, the Judge concluded that Mr Brown's previous treatment had failed. In Ms Mildenhall's submission, the Judge was correct. She pointed out that Mr Brown engaged in eight individual therapy sessions with a psychologist in 1996 and participated in intensive group treatment for child sex offenders at Te Piriti in 2011. On both occasions treatment providers recorded he made useful gains. However, both instances of treatment were followed by further sexual offending and by an ongoing denial of responsibility.

[78] Mr Brown said that he had completed various courses and his offending behaviour had improved. He appeared very focused on his wish to have a relationship, something the health assessors discuss, and said that is simply not possible in prison.

[79] Mr Brown described Te Piriti as a "great course". He had attended a relapse prevention course when in Napier until, he said, the Parole Board told him he did not need to attend any more. He said that once it ceased to be run by psychologists and was instead run by probation officers, he found it of no use.

[80] We do not consider it is entirely fair to say that Mr Brown has failed in his efforts to address the causes of his offending. As the health reports acknowledge, some progress has been made. Dr Lehany said that the judgement that Mr Brown has not changed as a result of treatment was not supported by the history provided. We also consider Mr Brown should be given some credit for his change of behaviour. By using the Grindr app, he was clearly intending to engage in consensual sexual activity.

Is a lengthy determinate sentence preferable?

[81] In *R v Leitch* this Court suggested a higher end sentence may be justified in cases where a finite sentence is preferred over a sentence of preventive detention and where the need to protect society justifies an increase to the sentence which might otherwise have been imposed.[71] In *Carline v R*, a case involving low-level indecent assaults,[72] the original starting point of 15 months was uplifted by a further 24 months (160 per cent) to allow Mr Carline to complete a sex offenders' programme and, in this way, to offer sufficient community protection as an alternative to preventive detention.[73]

[82] This approach does not appear to have been suggested to the Judge. In any event, we are not attracted by the proposition that an otherwise appropriate starting point should be increased to enable a defendant to attend a programme. The starting point should be fixed in a principled way with reference to the index offending. It would be contrived to uplift the starting point for the purpose only of imposing a custodial sentence of sufficient length to allow Mr Brown to re-engage with Te Piriti, a programme available only to those serving a custodial sentence. Mr Brown is currently held in Linton Prison. The Te Piriti course is not offered there. We record the sad fact that, despite having been in custody for at least four years,[74] and a sentenced prisoner since 15 December 2020, Mr Brown told us he has not been offered any rehabilitative courses.

[83] Having examined the considerations in s 87(4) of the Sentencing Act it seems clear, however, that, in the absence of supervision, Mr Brown would be likely to commit another qualifying sexual offence if released at expiry of the finite sentence of four years' imprisonment arrived at by the Judge.

[84] In *R v Parahi*, this Court noted that "there has to be a significant, ongoing risk of serious harm before somebody is incarcerated indefinitely, particularly for lower

---

71 *R v Leitch* [1998] 1 NZLR 420 (CA) at 430.
72 *Carline v R* [2016] NZCA 451.
73 At [22]–[24].
74 Mr Brown said he has been in custody for four and a half years.

level offences".[75] That said, the test may be met in an appropriate case, even when the relevant offences are indecencies as opposed to sexual violations:[76]

> … that is because of the seriousness of their cumulative effect on the lives of their past victims and the likelihood of seriousness of future effect on the lives of future victims. Such cases are likely to be exceptional, and will usually turn on persistent, knowing behaviour, despite firm warnings (although that is not an absolute prerequisite), accompanied by the necessary cumulatively serious harm.

[85] When Mr Parahi was on parole from a sentence for previous sexual offending against two 12-year-old girls, he indecently assaulted a girl under 12. He had a historic conviction for rape and convictions for indecencies. This Court considered Mr Parahi's circumstances to be on the cusp of preventive detention but concluded preventive detention was not the appropriate outcome. It was the fact of the distinct possibility of an ESO being made prior to Mr Parahi's release from a finite sentence which had a "real influence" on the decision of the Court.[77]

[86] This Court has said that the possibility of an ESO must be considered when determining whether a finite sentence will provide adequate protection to the community.[78] While an ESO is not an alternative to preventive detention, it has been described as a "potential safety valve" which shores up the principle in s 87(4)(e) that a lengthy finite sentence is preferable to preventive detention.[79] In a finely balanced case, the potential availability of an ESO may tip the balance in favour of a finite sentence in the case of lower-level sexual offenders.[80]

[87] If Mr Brown were released from prison, he would still be subject to the ESO.

[88] The Judge said she did not consider an ESO would be sufficient to protect the community because the index offending occurred while Mr Brown was subject to an ESO. It does not appear, however, that there was any discussion as to the possibility of more stringent special conditions being added to the ESO and whether those would

---

75 *R v Parahi* [2005] 3 NZLR 356 (CA) at [85].
76 At [86].
77 At [88]–[90].
78 *R v Mist* [2005] 2 NZLR 791 (CA) at [100]; and *Grant v R* [2017] NZCA 614 at [52].
79 *R v Mist*, above n 96, at [101].
80 *R v Parahi*, above n 93, at [87].

adequately protect the community. Dr Lehany offered a helpful assessment addressing measures to mitigate the risk of reoffending. In our view, this aspect should have been considered more closely and the Judge would have been assisted by more analysis from the experts in this regard.

[89] We now turn to consider whether a finite sentence, together with the ESO, would adequately protect the community. We note that the special conditions can be reviewed and enhanced to reduce the risk of reoffending and promote Mr Brown's rehabilitation and reintegration.[81]

Will a finite sentence together with the ESO adequately protect the community?

[90] The remaining term of the ESO is seven years and 33 days, the conditions currently being suspended pursuant to s 107P of the Parole Act. As well as the standard ESO conditions discussed above, Mr Brown's special conditions are:

(a) To live at a specified address and not move from it without the written approval of his probation officer.

(b) To attend, participate in and adhere to the rules of a relapse prevention group to the satisfaction of his probation officer and the group facilitator.

(c) Not to enter the grounds of any schools, preschools, parks or playgrounds or other public places identified by his probation officer where children under 16 years of age are likely to congregate, unless under the direct supervision of an adult approved in writing by his probation officer or with the approval of his probation officer.

(d) To submit to electronic monitoring in the form of GPS technology to monitor compliance with any conditions relating to his whereabouts.

---

[81] See [40] above; and Parole Act, s 107K.

(e) To comply with the requirements of electronic monitoring and provide access to his residence for the purpose of maintaining the equipment.

(f) Not to stay away overnight from his approved residential address without prior written approval of his probation officer.

[91] Mr Brown said that he had never breached his ESO. That cannot be quite accurate given the index offending involved a breach of his ESO condition not to have contact with a person under 16 years of age without approval. We take it therefore to mean that he has never been convicted of a breach of his ESO.

[92] We note Ms Boyd's observation that Mr Brown's sexual offending endured despite stringent external monitoring in the community pursuant to the ESO. Balanced against that is Dr Lehany's conclusion that Mr Brown's risk of future sexual offending "could be low" provided there was future treatment focused on his offending risks and "robust supervision" which eliminated his access to potential victims. Dr Leslie recommended that as part of any rehabilitation on release, Mr Brown be provided the opportunity to gain suitable employment or engage in a similar meaningful endeavour. Dr Parsonson recommended that Mr Brown undergo psychotherapy/counselling to develop skills in forming and maintaining appropriate adult sexual relationships.

[93] As recorded in the various experts' reports, Mr Brown had a challenging background, having an isolated and lonely childhood and being sexually abused in his early teenage years. It is hardly a surprise, therefore, that concerted efforts at rehabilitation are required. As noted, Mr Brown has responded to treatment and the nature of his offending has changed somewhat, being driven, as the experts note, by his desire for a consensual sexual relationship. Furthermore, the index offending occurred when he was 56–57 and he is now in his early 60s. As Dr Lehany observes, his increasing age is likely to reduce his risk of further sexual offending.

[94] Dr Lehany provided a very thoughtful report. His opinion was that a global assessment of reoffending risk being high was not justified and it was not clear what offences Mr Brown was at high risk of committing. We agree with his comment that, while Mr Brown has offended following treatment, the offending was somewhat

different from previous offending, which does suggest a change has taken place and further change may be possible. Dr Lehany discussed the need to know the nature and outcome of any further sex offender treatment programme, the circumstances of release and details of any non-custodial living situation, including the nature of supervision arrangements and the characteristics of those overseeing supervision in the community. His conclusion was that:

> 9 … Close community supervision, with disclosure of any relationships would be necessary criteria for safe management in the community. Supervisors should be trained, skilled and well supervised, and aware of the risks Mr Brown poses to young men and boys and aware of Mr Brown's ability to present himself as a victim of circumstances rather than as a sexual predator.
>
> 10. With further offence-focussed work and appropriate supervision as suggested, the risk of reoffending could be low. In my opinion a global assessment of reoffending risk without taking adequate account of supervision arrangements and future treatment response is overly simplistic and potentially misleading. Future reoffending risk will require appropriate oversight by bodies tasked with this. Decisions on timing of release to the community could also be taken in light of outcomes of further offence-focussed treatment.

[95] Rather than being incentivised to attend rehabilitative programmes in order to demonstrate he can be safely released into the community, as some suggest is the result of preventive detention,[82] Mr Brown has been in custody for four and a half years and not offered access to any such programmes.

[96] While Te Piriti is available only in prisons, we understand its relapse prevention/maintenance programme is available in the community. Mr Brown's special conditions require attendance and participation in a relapse prevention programme. Other counselling and programmes suggested by the experts to address Mr Brown's rehabilitative needs are clearly required.

[97] We return to the essential question of whether Mr Brown's release, subject to the ESO, would adequately protect the community. A sentence of preventive detention removes any risk of reoffending. As against that, the Judge concluded that a determinate sentence of four years' imprisonment would otherwise have been

---

[82] See for example *R v Bryant* CA236/03, 16 December 2003 at [23]; and *Nuku v R* [2019] NZCA 25 at [18].

appropriate. As this Court has previously observed, the notion that a person who would otherwise receive a relatively short sentence should be subject to preventive detention when, had a lengthy determinate sentence been available, he would likely not be, does not sit comfortably.[83]

[98] We are not satisfied preventive detention is proportionate to Mr Brown's offending, which would otherwise attract a sentence of four years' imprisonment. It is not the least restrictive outcome and, while we cannot decline to impose preventive detention by reason only that it is inconsistent with any provision of the New Zealand Bill of Rights Act,[84] we consider preventive detention would amount to disproportionately severe treatment or punishment.[85]

[99] It is evident that Mr Brown requires closer monitoring than was apparently employed at the time of the index offending, which continued over a period of approximately three months. Mr Brown will need close supervision in the community and the Chief Executive will no doubt wish to consider whether further special conditions should be added to the ESO. It would appear prudent, for example, for an additional special condition to address Mr Brown's use of the internet and dating apps.

[100] For these reasons, we conclude that the ESO, with appropriately tailored special conditions and close monitoring, should allow Mr Brown to remain in the community. We also note that, given the index offending, Mr Brown will be registered on the Child Sex Offender Register.[86] This requires him to report to the police about a number of matters, including in respect of his internet use and online social networks[87] and this information can be disclosed to other agencies, including the Department of Corrections.[88]

[101] The Judge noted that she would have imposed an MPI of two years to hold Mr Brown accountable for the harm he had caused, denounce his conduct and protect

---

83 *Moore v R* [2023] NZCA 286 at [93]. Similar observations were made by this Court in *R v Burkett* CA416/00, 21 February 2001 at [21].
84 New Zealand Bill of Rights Act 1990, s 4(b).
85 Inconsistent with s 9 of the New Zealand Bill of Rights Act.
86 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 9.
87 Section 16.
88 Section 43(1) and (2).

the community. Mr Brown informed us he had been in custody for two years by the time of his trial and he was sentenced in 2020. It is evident, therefore, that he has served the full sentence and an MPI is unnecessary.

[102] For the avoidance of doubt, we record that the ESO will be reactivated upon Mr Brown's release from prison.

Result

[103] The application for leave to appeal out of time is granted.

[104] The appeal is allowed.

[105] The sentence of preventive detention is quashed and replaced by a sentence of four years' imprisonment.

Solicitors:
Crown Solicitor, Christchurch for Respondent