NOTE: PUBLICATION OF NAMES, 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

CA634/2022
[2023] NZCA 483

	BETWEEN	BRUCE ALEXANDER MILNE Appellant
	AND	THE KING Respondent

Hearing:	30 August 2023
Court:	Miller, Ellis and van Bohemen JJ
Counsel:	J M Ablett-Kerr KC and CPF Smith for Appellant R P Bates for Respondent
Judgment:	31 August 2023 at 10.00 am
Reasons:	4 October 2023

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed.

C The concurrent sentences of two years and four months' imprisonment on charges 3 and 4, and of one year and six months' imprisonment on charges 1 and 2, are quashed.

D In substitution, concurrent sentences of one year and eight months' imprisonment on charges 3 and 4, and of one year and one month's imprisonment on charges 1 and 2, are imposed.

REASONS OF THE COURT

(Given by van Bohemen J)

[1] Following a jury trial, Bruce Milne was found guilty on four charges of indecency between a man and a boy under the age of 16 years for historic sexual offending in the 1980s.[1] Mr Milne was sentenced by Judge Turner in the District Court at Dunedin to two years and four months' imprisonment.[2]

[2] Mr Milne appealed both his conviction and sentence.

[3] We heard argument on 30 August 2023. Later that day, we delivered a results judgment in which we dismissed Mr Milne's appeal against conviction, allowed his appeal against sentence, quashed the sentence imposed by the District Court and imposed a new sentence in substitution.[3]

[4] We now give our reasons.

The offending

[5] We adopt the District Court Judge's summary of the offending when sentencing Mr Milne:

> [3] The offending occurred on two separate occasions in Dunedin between 1980 and 1981 and in Naseby between 1985 and 1986. The Naseby charges were brought on a representation basis.
>
> [4] You were a work and drinking colleague of the victim's father. It was through that association you met the victim, the victim then living with his father on a full-time basis. As a visitor to the home, you engaged in behaviour which the victim, now an adult, believes was grooming-type activity, for example leaving cigarettes for the then 10-year-old to smoke.
>
> [5] Between January 1980 and January 1981, you offered to have the victim, then 10 years of age, stay overnight at your house. There, you supplied alcohol and cigarettes to the victim, who recollected waking up in bed the following morning without underwear and possibly with no clothes on at all. You were lying behind him touching his penis and/or genitals and the victim's hand was on your penis. You ejaculated. That activity was the basis of charges 1 and 2. You then returned the victim back to his father's house later that day.

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1 Crimes Act 1961, ss 140(1)(a) and 140(1)(c).
2 *R v Milne* [2022] NZDC 22590 [Sentencing notes].
3 *Milne v R* [2023] NZCA 414.

> [6] There was ongoing contact between you and the victim's father and the victim after that event, more so after the victim's father and, later, his grandmother, died. At this point, the victim was homeless. His mother did not want him and, as a result, the victim was placed into State care. This led to a number of foster homes and placement in boys' homes. The only persons who showed an interest in the victim were you, who kept in contact, particularly during Christmas and holiday times, and a local minister and his wife.
>
> [7] In 1985, the victim, then 15, went to stay with you at your house in Naseby. During this time, you shared a bed. The victim was induced to masturbate you and you touched his penis. This activity occurred on multiple occasions and was the basis of charges 3 and 4.

[6] It is relevant also to set out the next paragraph of the Judge's sentencing notes:

> [8] You did not give a statement to police when 42 years later the victim complained to the authorities, nor did you give evidence at trial, which was your right. Your defence was run on the basis that the allegations made by the victim were untrue, he had fabricated them. The jury rejected that assertion and accepted the evidence of the victim.

Grounds of appeal

[7] In his notice of appeal, Mr Milne said the verdicts were against the weight of the evidence and the Judge's summing up was unfair. He said the sentence was manifestly excessive; the starting point was too high and the Judge gave insufficient credit for mitigating factors.

[8] In submissions in support of the appeal against conviction, Mr Milne's counsel, Mrs Ablett-Kerr KC, focused on the fairness of the Judge's summing up, having regard to:

(a) the fact that inadmissible evidence had come before the jury and the manner in which the Judge had dealt with that issue in his summing up; and

(b) the effectiveness of the Judge's direction under s 122(2)(e) of the Evidence Act 2006 concerning the reliability of the complainant's evidence in the context of the directions that preceded and followed that direction.

[9] Mrs Ablett-Kerr also addressed inconsistencies in the victim's evidence about the location of an address in Dunedin, the layout of another address and other issues which, it was submitted, showed the complainant to be unreliable and lacking in credibility.

[10] On the appeal against sentence, Mrs Ablett-Kerr said the Judge should have adopted a starting point of no more than two years' imprisonment and should have given Mr Milne a discount of 20 per cent for previous good character and a further discount of 20 per cent for health and age.

Appeal against conviction

[11] Under s 232(2) of the Criminal Procedure Act 2011, the court must allow the appeal if, having regard to the evidence, the jury's verdict was unreasonable or a miscarriage of justice has occurred for any reason. Otherwise, the Court must dismiss the appeal.[4] A miscarriage of justice includes any error, irregularity or occurrence in the trial that has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial.[5]

Section 122 of the Evidence Act

[12] Section 122 of the Evidence Act provides:

> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
>
> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
>
> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
>
> …
>
> (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.

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4 Criminal Procedure Act 2011, s 232(3).
5 Section 232(4).

…

(4) It is not necessary for a Judge to use a particular form of words in giving the warning.

The inadmissible evidence

[13] The evidence against Mr Milne was principally that given by the complainant and was directed at what occurred between Mr Milne and the complainant. However, the Crown also called a witness, Ms Croft, who was the wife of the local minister referred to by the Judge.[6] The expectation was that Ms Croft would give evidence of what the complainant had said to her about the alleged offending when he was 17 and then what he had said to her 10 years later.

[14] When Ms Croft was giving her evidence in chief, the following exchange occurred between Mr Power, Crown trial counsel, and Ms Croft:

> Q. And when you were living in Christchurch do you recall if there was ever any occasion he spoke to you about Bruce?
>
> A. Yeah, that was about, it was about 10 years after we had moved there and, um, I – he – I can't even remember what it was about, I think we were reminiscing and I made a comment to him, "Oh, do you remember when you said to me when I'm old enough I'll tell you something," and we laughed and he said, "Yeah," and I said, "Well can you tell me now?" and he said, um, "Well, ah, actually…" and he, he became quite serious and told me that, um, that those times he reminded me of when I had dropped Bruce off and of the times that he had, um, been seeing Bruce at – had been engaged in sexual activity and that he'd been watching pornography and that he'd been sexually abused, um…
>
> Q. By whom?
>
> A. He said it was, um –
>
> Q. – sorry, I'm referring to a conversation about Bruce.
>
> A. Yeah, he, yeah he said he would go to Bruce's house and there would be men there.
>
> Q. No, yeah, I want to talk about just Bruce.
>
> A. Bruce. Yep. Just Bruce. Well he, yeah, the implication was that he was being sexually compromised by Bruce. …

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6 Sentencing notes, above n 2, at [6].

[15] A short time later, the following exchanges took place between defence counsel, Ms Croft, the Judge and Mr Power:

> Q. So you're not saying that [the complainant] detailed what Mr Milne supposedly had done? He didn't say anything like that, did he?
>
> A. Um –
>
> Q. – it was more of a general thing, wasn't it?
>
> A. He, he said that, um, he had watched pornography, um, he said that, um, that Bruce had men waiting for him.
>
> **THE COURT ADDRESSES MR POWER**
>
> Q. Sorry, I missed that last answer.
>
> A. Sorry?
>
> Q. Bruce had been, what?
>
> A. Been waiting (Mr Power) –
>
> A. – Been waiting for him (Witness).
>
> **THE COURT TO WITNESS:**
>
> Q. Bruce had been waiting for him?
>
> A. Had men waiting for him for sexual –
>
> Q. – that's all right, I've got it now.

[16] Immediately after the above exchange, Mr Power re-examined Ms Croft and the following exchange occurred between Mr Power, Ms Croft and the Judge:

> Q. Yes, what did [the complainant] say had happened between he and Bruce Milne? What had happened between them?
>
> A. Now this is where you're right, is that there is an element of, um –
>
> Q. – no, just listen to the question. What, if anything did [the complainant] say had happened of a sexual nature between he and Mr Milne?
>
> A. I'm just thinking. The sexual nature between he and Mr – he never went into specifics about the sexual activity with anyone. The implication was about access to others –
>
> **THE COURT**:
>
> Q. – I'm just going to stop you there. What Mr Power is asking is can you remember whether [the complainant] said that anything

specifically happened between himself and Bruce? Did [the complainant] say that Bruce had done anything specifically to him?

A. The specific thing was watching pornography with Bruce.

The Judge's direction on the inadmissible evidence

[17] When summing up, the Judge addressed Ms Croft's evidence as follows:

> [9] You have seen evidence remotely via VMR in respect of Ms Croft. I want to mention one matter about her evidence at this point. Ms Croft made a comment along the lines that: "Bruce – the defendant – had men waiting and access to others." Whatever that was intended to convey, it is totally irrelevant to this trial and I direct you to ignore that portion of her evidence, put it completely out of your mind.

[18] Later in his summing up, after he had discussed the complainant's evidence, the Judge referred again to Ms Croft's evidence as follows:

> [56] I want to turn to the evidence of Ms Croft who gave evidence of two conversations she had with [the complainant]. You will recall the first conversation was on [the complainant]'s 17th birthday and during this [the complainant] said to her that when she, Ms Croft was old enough, he would tell her some things.
>
> [57] Ms Croft also gave evidence that later, possibly 10 or more years later when she was living in Christchurch and she believed [the complainant] would have been about 28 or 29, he visited her, he had done so from time to time. On this particular occasion Ms Croft said that while they were reminiscing she reminded [the complainant] of a – of the conversation on his 17th birthday. Her evidence was that [the complainant] then became serious and said when he had been with Bruce he had engaged in sexual activity and watched pornography. Ms Croft said the details of the sexual activity were not mentioned but the implication was Mr Munro was being sexually compromised by Bruce who was the instigator of the encounters.
>
> [58] You know that Mr Milne's case is that there was no such touching, in effect he has put his case to you on the basis that Mr Munro has made up his complaint, that it is a fabrication.
>
> [59] So, in these circumstances you may be asking yourselves how are you to approach the evidence of Ms Croft of what [the complainant] told her, what is its relevance? Well the answer is this. The law allows you to hear the statements made by [the complainant] to others in order to assist you to assess whether he has indeed made up the allegations. The statement he made to Ms Croft is admitted to show consistency in what he is alleging. And if you accept Ms Croft's evidence as to what she was told, you can use those statements as evidence that the events happened.

The Judge's directions on memory and on the reliability of the complainant's evidence

[19] When summing up to the jury the Judge made the following observations and directions:

> [46] In considering a witness's evidence, you should also consider the time between when the witness observed a particular event or when it occurred and the time they gave evidence. This is important due to the impact of memory on a witness's ability to give evidence.
>
> [47] It may be helpful if I give you some guidance about memory given that the events referred to in this trial are said to have occurred some 42 years ago. And counsel in their addresses have referred to this issue as well. Now we know that passage of time will affect the accuracy of memory and you might not expect every detail to be the same if a witness recounts the same event twice, or many more, or more, many months or years apart. Because as we all know memories fade, details can be lost and errors in sequencing can occur. Just draw upon your own experiences in that regard. The accuracy and level of detail of a witness's memory may depend on several factors including, first, the age and circumstances of the witness at the time of the event, secondly, the time that has passed since the event, thirdly, the personal significance of the event to the witness, fourthly, the emotional content of the event, fifthly, the occurrence of other related events, sixthly, why, when and by whom the witness has been asked to recall and, finally, the kinds of retrieving cues provided at the time of recall, in other words things that jog out memory.
>
> [48] The nature and quantity of any inconsistencies between a witness's evidence and other reliable evidence will affect your assessment of the reliably – reliability of the witness's memory. If there is an acceptable explanation for an inconsistency, your assessment of reliability may well be unaffected. The opposition conclusion may be drawn if there is no acceptable explanation for a significant inconsistency. Those types of factors need to be taken into account when you are assessing the reliability and accuracy of a witness's recollection of what was said and done. Common sense and your life experience will of course assist you in this task.
>
> [49] There has been a delay of around 42 years in bringing these allegations to trial. Given that, I point out there is a particular need for caution in assessing the evidence in this case as the delay gives rise to the risk that some of the evidence you have heard may be unreliable because in this case the Crown relies on the oral evidence of [the complainant] primarily. Over the four decades since these events are said to have occurred, his memory may have faded or been unconsciously altered to the point where his recollection of events is not reliable, or because the physical locations may have altered to the point where it is no longer possible to check the accuracy of the descriptions given in the evidence. For those reasons it is necessary for you to exercise particular caution when deciding whether to accept [the complainant]'s evidence and in deciding what weight you give to it.
>
> [50] I want to turn to some general matters about assessing a witness's evidence. The following factors I am about to mention may be of assistance to you. Where was the witness when they made their observations, was the

> witness an interested party directly involved or a bystander observing from the side-line? Secondly, the relationship between the witness and others, was there any bias or prejudice exhibited by the witness, perhaps arising out of a relationship with another person involved or for some other reason? Did the witness embellish, minimise, or exaggerate their role or anyone else's role? Was the witness prepared to make realistic and appropriate concessions? The plausibility of the witness's evidence, does it make sense, is it likely that people would have acted in the way suggested? Is the evidence of the witness consistent with the other evidence or statements the witness has made? That's the internal consistency I mentioned at the commencement of the trial, and is it consistent with what other witnesses have said on the same topic, that is the external consistency I mentioned earlier. And, if there are differences, is there a reasonable explanation for that? Is there evidence to independently confirm or support what a witness has said? But I should tell you that the law does not require that the evidence of a complainant in this type of case be corroborated or supported by other evidence from a different source. In other words in relation to these charges you may find Mr Milne guilty on the evidence of [the complainant] alone, provided [the complainant]'s evidence satisfies you that the allegations, that is each essential ingredient or element of each charge, has been proved beyond reasonable doubt. Did the witness change their evidence between evidence-in-chief and cross-examination and, if so, was that change material and was there a reasonable explanation for that? And, finally, was any witness affected by consumption of alcohol or drugs?

Submissions for Mr Milne

The inadmissible evidence and the adequacy of the Judge's direction

[20] Mrs Ablett-Kerr accepted that Ms Croft's answer to Mr Power had taken everyone by surprise and, inadvertently, the problem became worse when the Judge asked Ms Croft to repeat what she had said, and Ms Croft expanded on her answer. Mrs Ablett-Kerr also accepted that the Judge would have been concerned not to draw attention to the material that Ms Croft had put in evidence. However, she submitted that the Judge's direction at [9] of the summing up ([17] above) was not sufficient to repair the unfairness caused by this material being put before the jury. Mrs Ablett-Kerr said the unfairness was exacerbated when the inadmissible material was left in the notes of evidence that were made available to the jury when they retired.

[21] Mrs Ablett-Kerr also noted that Ms Croft's evidence did not do what the Judge said it did because all Ms Croft said was that the relationship with Mr Milne had been sexualised and that Mr Milne had shown the complainant pornography — which was not in evidence.

The Judge's directions on reliability and memory

[22] Mrs Ablett-Kerr submitted that, given the only evidence against Mr Milne was what the complainant said had happened over 40 years ago, it was essential that the Judge gave clear directions to the jury about the need to treat that evidence with caution to ensure the trial was fair to all parties. Mrs Ablett-Kerr accepted that the Judge's directions in [49] of his summing up ([19] above) were generally in accordance with s 122(2)(e) of the Evidence Act. However, she submitted that the effectiveness of those directions was diluted by the Judge's directions on memory in [47] and [48] of the summing up and by the discursive general directions in [50] ([19] above).

The reliability and credibility of the complainant's evidence

[23] Mrs Ablett-Kerr said that the complainant had, in his evidence-in-chief and in cross-examination, incorrectly identified the house in Northumberland Street in which he said Mr Milne had assaulted him between 1980 and 1981 and, with respect to which, the complainant had claimed to be able to identify the bedroom in which the assault occurred. Mrs Ablett-Kerr said that not only was the complainant wrong about the house in Northumberland Street but that the evidence was that at that time, Mr Milne was living in a different street in a suburb some distance from Northumberland Street.

[24] Mrs Ablett-Kerr also submitted that the complainant had varied his evidence about whether, on an occasion when the complainant said he had been driven home by Mr Milne and Mr Milne had been stopped by Police, Mr Milne had been issued with a traffic ticket or a warning. In support of her overall submission that the complainant's evidence demonstrated that he would tailor his evidence to fit the case and his credibility and reliability were suspect, Mrs Ablett-Kerr pointed out that the complainant had been wrong about the number of bedrooms in Mr Milne's house in Naseby and had given evidence about a neighbour having to break up a physical altercation with Mr Milne and the complainant, when that neighbour had told the Police that he did not recall breaking up any fights between them.

Analysis of appeal against conviction

Ms Croft's evidence

[25] As Mrs Ablett-Kerr said, it is apparent that Ms Croft's evidence took the Judge and counsel by surprise. It is also apparent that Ms Croft was slow to take direction on the point and the Judge was careful not to make too much of what had happened so as not to draw the jury's attention unduly to that turn of events.

[26] While the wrongful admission of evidence may amount to a miscarriage of justice, appropriate judicial directions are often regarded as capable of negating that wrong. As the Privy Council said in *Barlow v R*:[7]

> … it is certainly not the case that a trial is rendered unfair simply because some potentially misleading evidence has been admitted. The fairness of the trial has to be judged in the light of the proceedings as a whole.

[27] We agree that the Judge's direction at [9] was short. We also consider that it would have been preferrable for the Judge to have made the direction at the point when the evidence as given and then to have repeated the direction in his summing up. The important point, however, is that the Judge gave the jury clear and unequivocal directions that this aspect of Ms Croft's evidence was irrelevant and they were to put it completely out of their minds. Given the clarity of those directions, we are satisfied that the jury would have followed the Judge's directions and would not have taken that aspect of Ms Croft's evidence into account when deliberating on their verdicts.

[28] We are reinforced in this conclusion by the question that the jury put to the Judge after they retired. That question was:

> Can you confirm that if we find the complainant to be honest, reliable and credible that this is the only evidence that we need as to whether what the complainant said happened.

[29] The Judge's written answer was as follows:

> l. It is for the Crown to prove each of the essential elements or ingredients of each charge beyond reasonable doubt.

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7 *Barlow v R* [2009] UKPC 30, [2010] 1 LRC 272 at [58].

2. The law does not require [the complainant]'s evidence to be corroborated, to be supported by other evidence from a different source.

3. You may find the defendant guilty on the evidence of [the complainant] alone, provided his evidence satisfies you that the allegations, that is each essential element or ingredient of each charge has been proved beyond reasonable doubt.

4. I remind you again of the respective cases. The Crown submits that you can accept the evidence of [the complainant] as honest, credible and reliable on the essential elements or ingredients of each charge. The defence case is that these allegations are untrue, a fabrication, and that when you look at all of [the complainant]'s evidence you cannot accept his evidence as honest, credible and reliable, and accordingly the Crown has not proved the guilt of the defendant beyond reasonable doubt.

[30] The jury's question and the Judge's answer strongly suggest that the jury was focused on the evidence of the complainant and on the key question of the credibility and reliability of the complainant, whatever they may have made of Ms Croft's evidence. We are satisfied, therefore, that the evidence introduced inadvertently by Ms Croft did not create a risk of an unfair trial. We do not think that any additional risk was created by the inclusion of Ms Croft's evidence in the notes of evidence, which were available to the jury during their deliberations.

[31] We agree with Mrs Ablett-Kerr that, contrary to what the Judge said at [59] of his summing up ([18] above), Ms Croft's evidence did not show consistency with what the complainant had been alleging. Ms Croft's evidence did not engage with the substance of the complainant's allegations. However, given our conclusions about the jury's focus on the evidence of the complainant and on his credibility and reliability, we are satisfied this error in the Judge's direction did not affect the fairness of the trial.

The Judge's directions on reliability and memory

[32] We agree with Mrs Ablett-Kerr that, given the nature of the complainant's evidence, a direction under s 122(2)(e) of the Evidence Act was necessary. We are satisfied that the directions in [49] of the Judge's summing up ([19] above) were appropriate and sufficient to meet the purposes of s 122(2)(e). We note that the Judge

did not identify the absence of defence witnesses as an aspect of prejudice in this case.[8] However, on appeal Mr Milne did not identify any witness whose absence was said to have been prejudicial.[9]

[33] However, we consider that the Judge's directions on memory in [47] and [48] ([19] above) were unhelpful. Juries can be assumed to be familiar with memory and judges should generally refrain from giving instructions on terms that bear the imprimatur of science.[10] Although we consider the directions in [47] and [48] were unnecessary, we do not accept that they were wrong or that they diluted the effectiveness of the directions in [49].

[34] The directions in [50] are along the lines of standard directions given to juries. While they were lengthy and it may have been preferable for those directions to have been separated from the directions on reliability, we do not accept that those directions, either by themselves or in combination with the directions in [47] and [48], diluted the directions in [49] or otherwise made the directions on the reliability of the complainant's evidence unfair.

The reliability and credibility of the complainant's evidence

[35] Given that the complainant's evidence was about events that occurred in the 1980s when he was aged between 10 and 15, it is almost inevitable that the complainant would have made mistakes in his descriptions of where events took place and what happened. The discrepancies in the complainant's evidence were put squarely and forcefully to him in cross-examination. We do not agree with Mrs Ablett-Kerr that the complainant altered his responses or tailored his evidence to fit the case. To the contrary, he stuck to the fundamental elements of his evidence while acknowledging that he might have had some of the details wrong.

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8 For example, the neighbour who had made a statement to the Police about what he had seen and heard at Naseby but who died before the trial.

9 In *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [49] the Supreme Court noted that:
" … in a case which is within s 122(2)(e), a judge may conclude that the ability or otherwise of a defendant to check and challenge the evidence of a complainant is material to the judge's assessment whether that evidence may be "unreliable". In other words, a judge may conclude that evidence may be unreliable for the purposes of s 122(2)(e) for reasons other than the effect of delay on the memory of the complainant."

10 *D(CA95/2014) v R* [2015] NZCA 171 at [53].

[36] The jury saw and heard those exchanges. They had the opportunity to assess and make judgements of the complainant's credibility and the reliability of his evidence. As the jury question shows, the jury knew that the honesty, credibility and reliability of the complainant were key considerations in reaching their verdicts. As the jury's verdicts show, the jury accepted that the complainant was honest, credible and reliable. We are not persuaded that it was unreasonable to do so.

Outcome of appeal against conviction.

[37] For all these reasons, we dismiss the appeal against conviction.

Appeal against sentence

[38] Under s 250(2) of the Criminal Procedure Act, the court must allow an appeal against sentence if satisfied that, for any reason, there was an error in the sentence imposed on conviction or that a different sentence should be imposed. Otherwise, it must dismiss the appeal.[11]

The sentence imposed by the Judge

[39] In setting the starting point for Mr Milne's sentence, the Judge noted that the Crown and the defence had each proposed a starting point of two years' imprisonment on all four charges.[12]

[40] The Judge considered that the aggravating features of the offending were:

(a) grooming of the victim by supplying him cigarettes and alcohol;[13]

(b) significant breaches of trust:

(i) charges 1 and 2 occurred when the complainant was vulnerable by reason of his age and because he was supplied with cigarettes and alcohol before the offending occurred;[14]

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11 Criminal Procedure Act 2011, s 250(3).
12 Sentencing notes, above n 2, at [11] and [15].
13 At [18].
14 At [19].

(ii) charges 3 and 4 occurred after the complainant's father had died, the State had entrusted Mr Milne with the complainant's care and Mr Milne had effectively made a promise to look after the complainant;[15] and

(c) the harm caused by the offending had been significant and had resulted in psychological and emotional consequences through the complainant's formative years when he had been abandoned by his mother and almost everyone else.[16]

[41] The Judge considered that the gravity of the offending and Mr Milne's culpability were high.[17]

[42] The Judge accepted that the correct approach for historical offending such as this was to fix a starting point based on sentencing levels at the appropriate time, recognising the aggravating features of the case, and to then make allowance for mitigating features.[18] The Judge then considered the decisions in *Parkin v R*,[19] *R v Kihi*,[20] *R v Richards*,[21] *R v Winton*[22] and *R v McNabb*,[23] all of which involved historic indecent assault against persons under 16 years of age. The Judge considered that Mr Milne's offending was:[24]

(a) "considerably more serious" than that in *Parkin*, where the appellant was found guilty on two charges of indecent assault against his wife's 11 to 12 year old relative, and a 22 month starting point was undisturbed on appeal;[25]

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15 At [20]–[22].
16 At [23].
17 At [24].
18 At [25].
19 *Parkin v R* [2018] NZCA 404.
20 *R v Kihi* HC Auckland CRI-2008-044-7949, 7 April 2009. (The sentencing notes incorrectly refers to *R v Kihi* HC Auckland T022304, 25 February 2003.)
21 *R v Richards* HC Auckland CRI-2010-004-6987, 15 December 2011.
22 *R v Winton* CA142/92, 9 July 1992.
23 *R v McNabb* [2017] NZDC 4405.
24 Sentencing notes, above n 2, at [27]–[37].
25 *Parkin v R*, above n 19, at [4].

(b) "at least as and, in fact, more serious" than that in *Kihi,* where the defendant was sentenced on two charges of indecently assaulting two victims aged between 12 and 16 years who were related to the defendant and a starting point of two years and six months was adopted;[26] and

(c) not as spontaneous as in *Richards*, in which the defendant pleaded guilty to two charges of indecently assaulting a 12-year-old when the victim and her mother visited the defendant and his wife, and a starting point of 18 months to two years was considered appropriate.[27]

[43] The Judge then stated:

> [38] Considering those cases, and noting that many of them involved a maximum penalty of seven years' imprisonment against the maximum you face of 10 years' imprisonment, and having regard to the aggravating features of your offending, I adopt a global starting point of two years and nine months' imprisonment. That is 33 months' imprisonment.

[44] With regard to Mr Milne's personal circumstances, the Judge took note of three references from family friends and the mayor of the region in which Mr Milne lived, which referred to assistance that Mr Milne had provided to family and friends, to the community following an extreme weather event, towards community projects and fundraising generally.[28] The Judge observed that the offending occurred 40 years ago, that Mr Milne continued to maintain his innocence, that the offending involved "clear sexual deviancy", and that Mr Milne had not taken any steps to reform his character it that regard. [29] The Judge considered that, in these circumstances, any credit must be "significantly tempered" and allowed five per cent.[30]

[45] The Judge declined to make any discount for Mr Milne's offer to make emotional harm reparation because Mr Milne did not accept that he had caused the harm.[31] However, the Judge accepted that Mr Milne's age (being then 66 years old),

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26 *R v Kihi*, above n 20, at [21].
27 *R v Richards*, above n 21, at [19].
28 Sentencing notes, above n 2, at [42]–[43].
29 At [44].
30 At [45].
31 At [47].

in conjunction with health issues, would make imprisonment more difficult for Mr Milne.[32] Accordingly, he made a further discount of 10 per cent.[33]

[46] This process resulted in an end sentence of 28 months, which made Mr Milne ineligible for home detention. The Judge then sentenced Mr Milne to concurrent terms of imprisonment of:[34]

(a) two years and four months on the representative charges 3 and 4; and

(b) one year and six months on charges 1 and 2.

Submissions for Mr Milne

[47] Mrs Ablett-Kerr submitted that the Judge erred in his assessment of the seriousness of Mr Milne's offending as compared with that in *Parkin*, *Kihi* and *Richards*. Mrs Ablett-Kerr said that Mr Milne's offending was not more serious than in any of those cases and, in any event, was not more serious than that in *Parkin.* Mrs Ablett-Kerr said that, having regard to the requirement in s 8(e) of the Sentencing Act to take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances, and to the requirement in s 8(g) that the Court must impose the least restrictive outcome that is appropriate in the circumstances, the starting point of 33 months adopted by the Judge was too high and should have been no more than two years.

[48] Mrs Ablett-Kerr also submitted that the Judge minimised unfairly the evidence of 40 years of Mr Milne's good character in a way that was inconsistent with the approach of the Court of Appeal in *Parkin* and other historic abuse cases. Mrs Ablett-Kerr said the Judge should have allowed a credit of 20 per cent for Mr Milne's previous good character and a further credit of 20 per cent for health and ages issues.

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32 At [48]–[49].
33 At [49].
34 At [54]–[55].

Analysis of appeal against sentence

The maximum penalty

[49] As a preliminary point, we address the issue of the maximum penalty applicable to the charges against Mr Milne, which the Court raised with Crown counsel at the hearing.

[50] Charges 1 and 2 concerned events that took place in 1980 when the complainant was aged 10. Both charges were laid under s 140(1)(a) of the Crimes Act 1961.[35] The particulars of the charges were:

(a) Charge 1: The defendant touching the complainant's penis and/or genitals.

(b) Charge 2: The defendant placing the complainant's hand on the defendant's penis.

[51] Charges 3 and 4 concerned events that took place in 1985, when the complainant was aged 15. Charge 3 was laid under s 140(1)(c) of the Crimes Act; charge 4 was laid under s 140(1)(a).[36] The particulars of the charges were:

(a) Charge 3: The complainant masturbating the defendant.

(b) Charge 4: The defendant touching the complainant's penis.

[52] At the times the offending occurred, s 140 of the Crimes Act provided that everyone was liable to imprisonment for a term not exceeding 10 years who, being a male, indecently assaulted a boy, did an indecent act on a boy, or induced or permitted a boy to do an indecent act on him. A boy was any boy under the age of 16 years. There was no separate offence for indecencies against boys under the age of 12 years.

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35 The Crown Charge List particularised the offending as taking place between 4 January 1980 and 3 January 1981.

36 The Crown Charge List particularised the offending as taking place between 4 January 1985 and 3 January 1986.

[53] The legal effect of the legislative evolution of s 140 since 1986 is not controversial and was recently summarised by this Court in *Wynyard v R*.[37] Because that decision accurately states our reasoning on the issue, it is convenient to cite that decision although it was delivered after the results decision in this case.

[54] This Court stated:[38]

> [27] Section 140 was repealed as from 8 August 1986 and replaced with two new provisions — ss 140 and 140A. The replacement s 140 dealt separately with indecencies against boys under the age of 12 years. The maximum penalty for such offending was a term of imprisonment not exceeding 10 years. Section 140A dealt with indecencies against boys between the ages of 12 and 16 years. It provided for a maximum term of imprisonment not exceeding seven years.
>
> [28] Sections 140 and 140A were in turn repealed as from 20 May 2005 by s 7 of the Crimes Amendment Act 2005 which substituted new provisions — ss 132 and 134. Both are still in force. Section 132 governs sexual conduct with a child, defined as a person under the age of 12 years old. Section 132(1) provides that every one who has sexual connection (which includes oral sex) with a child is liable to imprisonment for a term not exceeding 14 years. Section 132(3) provides that every one who does an indecent act on a child is liable to imprisonment for a term not exceeding 10 years. Section 134 governs sexual conduct with a young person, defined as a person under the age of 16 years. Section 134(1) provides that every one who has sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years and, under s 134(3), every one who does an indecent act on a young person is liable to imprisonment for a term not exceeding seven years.
>
> [29] Relevantly, s 6 of the Sentencing Act 2002 provides as follows:
>
> > **6 Penal enactments not to have retrospective effect to disadvantage of offender**
> >
> > (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
> >
> > (2) Subsection (1) applies despite any other enactment or rule of law.
>
> Section 6 mirrors s 25(g) of the New Zealand Bill of Rights Act 1990. It also reflects art 15(1) of the International Covenant on Civil and Political Rights to which New Zealand is a party. The effect is that when a penalty is increased after the date on which the offence is committed, but before the date of sentence, the offender is entitled to be sentenced by reference to the lesser maximum (as long as there is no indication that the increased penalty is to be

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37 *Wynyard v R* [2023] NZCA 449.

38 (Footnotes omitted).

> given retrospective effect). Equally, an offender is entitled to the benefit of any decrease in penalty enacted after the offending but before sentencing.

[55] In *Wynyard*, the Court noted that s 6 of the Sentencing Act and/or s 25(g) of the New Zealand Bill of Rights Act 1990 had been applied in the High Court in relation to what was s 140 of the Crimes Act,[39] and that it had been held that offenders who had offended against young persons aged between 12 and 16 years were entitled to be sentenced by reference to the lower penalty which came into force for such offending as from 8 August 1986.[40] However, in other cases involving 12 to 16 year old victims, and where the offending involved oral sex, it had been held that the maximum penalty could be regarded as 10 years' imprisonment.[41] The Court noted that there was no detailed discussion in the latter cases as to why 10 years' imprisonment was considered to be the maximum available sentence.[42] However, the Court was satisfied that in the case before it, which concerned a charge involving oral sex, the appellant was entitled to be sentenced in relation to that charge by reference to the lesser penalty of seven years' imprisonment.[43]

[56] Applying the above history and analysis to the present case, it is apparent that the amendments enacted in 1986 did not change the penalties for the charges against Mr Milne. The complainant was 15 at the time, so the maximum penalties for the four charges remained at 10 years' imprisonment. However, the amendments enacted in 2005 did have an impact.

[57] The 2005 amendments do not affect the maximum penalties for charges 1 and 2. Under s 132(3) of the Crimes Act, the maximum penalty for an indecent act on a child under 12 is still 10 years' imprisonment. However, under s 134(3), the maximum penalty for an indecent act on a young person under 16 is now seven years' imprisonment. It follows that Mr Milne was entitled to be sentenced on the basis that

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39 At [30].

40 At [30], citing *S v The Police*, HC Auckland CRI-2008-404-41, 23 May 2008 at [12]; *R v Tia* HC Auckland CRI-2009-092-7402, 5 October 2010 at [55]–[56] and *R v Lindsay* [2021] NZHC 2160 at [2].

41 *Wynyard*, above n 37, at [30], citing *R v Hearling* HC Auckland CRI-2008-004-010860, 6 March 2009 at [2], affirmed on appeal in *R v Hearling* [2009] NZCA 298 at [13]; and *R v Snowden* [2012] NZHC 604 at Appendix at [6].

42 Wynyard, above n 37, at [30].

43 At [31].

the maximum penalty for charges 3 and 4 was seven years' imprisonment and not 10 years.[44]

[58] It is settled law that the "penalty" referred to in s 25(g) of NZBORA and s 6 of the Sentencing Act means the maximum and not the actual penalty that might be imposed on a given offender sentenced on a given date.[45] In practical terms, the reduction of the maximum penalty from 10 to seven years may not have a significant impact where starting points under consideration are between two and three years, particularly if the starting point is not set by reference to the maximum penalty. However, in the present case the Judge does appear to have steered by the maximum penalty, which he understood to be 10 years' imprisonment for all four charges, when deciding to adopt a starting point of 33 months.[46] For the reasons set out above, that was not the maximum penalty with respect to charges 3 and 4, which the Judge considered to be the more serious charges.

The starting point

[59] Mr Milne's challenge is to the Judge's assessment of the seriousness of the offending in comparison with the offending in the cases referred to by the Judge and in which starting points of two years and six months, or less, were adopted.

[60] We agree that Mr Milne's offending was more serious than that in *Parkin*. It was less opportunistic than the offending in *Parkin*, comprised four incidents rather than two and involved abuse of trust and exploitation of a vulnerable and isolated complainant. However, we do not consider the differences between the cases justified an 11 month difference in starting points.

[61] We do not agree that Mr Milne's offending was "at least as and, in fact more serious" than that in *Kihi*. Although the acts for which Mr Kihi was sentenced were

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44 The particulars for Charges 3 and 4 do not constitute sexual connection (as that term is defined in s 2 of the Crimes Act 1961), for which the maximum penalty is 10 years' imprisonment: s 134(2) of the Crimes Act 1961.

45 *Cheung v R* [2021] NZCA 175, [2021] 3 NZLR 259, at [42], citing *Davies v R* [2011] NZCA 546, [2012] 1 NZLR 364 at [55]–[57], *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 at [29]–[31] per Gault J, [57] and [77] per Blanchard J, [86]–[87] per Tipping J and [112]–[113] per Henry J, and *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145.

46 Sentencing notes, above n 2, at [38].

similar in number and nature to the acts for which Mr Milne was convicted, the circumstances of the offending for which Mr Kihi was sentenced were more serious. The offending occurred in the homes of the victims, who were related to Mr Kihi. Mr Kihi had previous convictions for sexual offending and the offending for which he was sentenced was in the context of other wider offending. The starting point of two years and six months adopted by the Judge was for the purpose of setting a determinate sentence before considering whether Mr Kihi should be sentenced to preventive detention.[47]

[62] Although the Judge did not directly compare the gravity of Mr Milne's offending with that in *Richards*, the fact he adopted a starting point of 33 months as compared to the starting point of 18 months to two years adopted by Peters J indicates that he considered Mr Milne's offending to be significantly more serious than that in that case. We do not accept that to be so. While the offending in *Richards* was more opportunistic and concerned only two incidents, one of those incidents was very serious and involved the defendant asking the victim to suck his penis and then forcing the victim's head onto his penis, causing her to choke and retch.[48]

[63] We are satisfied, therefore, that the Judge was wrong in his comparison of Mr Milne's offending with that in cases where, except for *Kihi*, significantly lower starting points were adopted than the 33 months adopted in this case. As we have already explained, the Judge was also wrong in his understanding of the maximum penalty that applied for the more serious offending and to which he referred when setting that starting point. For these reasons, we consider that the starting point was excessive. We consider that the starting point of two years' imprisonment advanced by Crown counsel and supported by defence counsel was appropriate and should have been adopted.

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47 *R v Kihi*, above n 20, at [21].
48 *R v Richards*, above n 21, at [3].

Discounts

[64] We agree with Mrs Ablett-Kerr that the discount allowed for Mr Milne's previous good conduct was insufficient and inconsistent with good conduct discounts allowed in other cases involving historic sexual offending.

[65] In *Parkin*, this Court observed that remorse was a mitigating factor in its own right under s 9(2)(f) of the Sentencing Act but its absence was not an aggravating factor.[49] The same applies to acceptance of guilt and efforts to remediate. We consider the Judge erred in his tempering of the discount for good character by reference to these considerations.[50]

[66] In *Parkin*, the Court concluded that a discount of two months or approximately nine per cent was well short of what was required. It considered four months or approximately 18 per cent was required and proportionate to the starting point.[51] In that case, the appellant's evidence of good character comprised both an absence of prior convictions (except for a careless driving charge) and evidence of numerous positive contributions to society, as well as letters from 70 referees.[52]

[67] In *Richards*, Peters J allowed a discount of 10 per cent for good character. The evidence in that case was an absence of further offending over 30 or so years and references from the defendant's partner and friends.[53]

[68] Apart from the current offending, Mr Milne's criminal history comprises one conviction in 2002 for careless operation of a motor vehicle, for which he was fined $550, and one conviction in 1984 for driving with excess blood alcohol for which he was fined $200 and disqualified from driving for six months. Given that largely blameless history and the positive references he provided, we are satisfied that the discount of five per cent was quite inadequate and that 15 per cent is a more appropriate discount.

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49 *Parkin v R*, above n 19, at [30].
50 Sentencing notes, above n 2, at [44]–[45].
51 *Parkin v R,* above n 19, at [31].
52 At [17]–[18].
53 *R v Richards*, above n 21, at [7].

[69] We do not propose, however, to adjust the discount of 10 per cent made for Mr Milne's age and health. Mr Milne is 67 years old. That is not very old. The Department of Corrections has a responsibility to care appropriately for all prisoners, including the elderly and those who have health conditions. In fact, Mrs Ablett-Kerr acknowledged that Mr Milne was being well cared for. In these circumstances, we see no case for any greater discount for age and health.

Outcome of appeal against sentence

[70] For the above reasons we are satisfied that the sentence imposed on Mr Milne should be quashed and replaced by a sentence based on a starting point of two years' imprisonment with discounts of 15 per cent for good character and 10 per cent for age and health. This results in an end sentence of one year and six months' imprisonment.

[71] Because Mr Milne's sentence began on 15 November 2022 and included two days on remand in September 2022, he had already served nine and a half months of his sentence as at the date of our hearing on 30 August 2023. He was, therefore, eligible for release on a time-served basis. It was for that reason that we issued a results decision that day and did not consider the issue of home detention.

Result

[72] For these reasons:

(a) the appeal against conviction is dismissed;

(b) the appeal against sentence is granted;

(c) the sentences imposed in the District Court are quashed; and

(d) in substitution, concurrent sentences of one year and eight months' imprisonment on charges 3 and 4, and of one year and one month's imprisonment on charges 1 and 2, are imposed.

Solicitors:
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