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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA74/2020
[2021] NZCA 71

BETWEEN	PAUL NILS HERLUND Appellant
AND	THE QUEEN Respondent

Hearing: 17 February 2021

Court: Courtney, Wylie and Katz JJ

Counsel: PHH Tomlinson for Appellant
MRL Davie for Respondent

Judgment: 17 March 2021 at 2.30 pm

JUDGMENT OF THE COURT

A Leave to appeal out of time is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] On 13 December 2019, the appellant, Paul Herlund, was sentenced to five years and two months' imprisonment by Judge Ryan in the District Court at Auckland.[1] He had entered guilty pleas to the following charges for offending against three complainants, AB, CD and EF:

(a) two charges (one representative) of sexual connection with a young person (AB);

(b) one charge of doing an indecent act on a young person (CD); and

(c) one charge (a representative charge) of doing an indecent act on a young person (EF).

[2] Mr Herlund now appeals his sentence. He asserts that there was a variation between the sentence indication he received and the sentence ultimately imposed. He takes issue with the starting point adopted by the Judge and says that she failed both to apply the totality principle and to appropriately discount his sentence. He also says that the methodology discussed by this Court in *Moses v R* (dealing with the way in which guilty plea discounts should be factored into a sentence) should have been applied to his sentence.[2]

[3] The Crown opposes the appeal. It argues that the end sentence imposed by the Judge is within range. It says that the starting point adopted was available and that the discounts allowed were generous. It submits that the sentence imposed properly allowed for the totality of Mr Herlund's offending.

Application for leave to appeal out of time

[4] The appeal was filed 16 days out of time. The Crown did not oppose an extension of time being granted. It acknowledged that the delay is short and that there

---

1 *R v Herlund* [2019] NZDC 253 [Sentencing notes].
2 *Moses v R* [2020] NZCA 296, (2020) 29 CRNZ 381.

has been no prejudice to it. Accordingly, we grant leave for the appeal to be brought out of time.

Factual background

[5] Mr Herlund was born in June 1967. He was approximately 50 years of age at the time of the offending.

The offending against AB

[6] The complainant, AB, met Mr Herlund during the period March 2014 to March 2017. She was aged between 13 and 15 years old at the time. They spent time alone over a period of approximately a year and saw each other, on average, four times a week. Mr Herlund would pick AB up and take her to various hotels and motels within the Auckland area. They would stay at the hotel/motel for up to eight hours. While there, Mr Herlund provided AB with both methamphetamine and alcohol. He encouraged her to consume these items and became angry if she did not do so.

[7] On the first occasion, Mr Herlund gave AB "marijuana LSD paper". She took it and then passed out. When she regained consciousness, she was naked. Mr Herlund got on top of her and put his penis into her vagina. He continued to have sex with her as she fell in and out of consciousness over the next few hours.

[8] On other occasions, Mr Herlund would force AB to drink alcohol and take methamphetamine. He would insert his penis into her vagina. When he was on top of her he would hold her arms, restraining them above her head. At times he would make her sit on top of him while he penetrated her. This offending occurred up to five times on each occasion and continued until the drugs and alcohol wore off and AB became more coherent. Mr Herlund would then drop AB home.

[9] On around five occasions, Mr Herlund put his penis into AB's mouth. He held her head with one hand at the back and the other hand on her chin and moved her head up and down. He also performed oral sex on her.

[10] AB tried to stop seeing Mr Herlund. She tried ignoring his messages. He then sent her photographs of her younger brother outside his school and he told her that he would "… do what I want to do to you to your younger brother". He also told her that he would kill everyone in her home if she refused to take the drugs he offered her and he would get angry, yell and throw things around. AB was extremely scared of Mr Herlund and she continued to go with him and do whatever he wanted.

[11] On one occasion, Mr Herlund put "G" in AB's drink and told her to drink it. She refused. Mr Herlund became angry and told her "you'd better fucking drink that now". He pushed her with two hands and she fell back into a wall behind her.

[12] AB often experienced pain when Mr Herlund penetrated her and on occasion she would have a sore abdomen. The pain could last for some days.

[13] As a result of his offending against AB, Mr Herlund was initially charged with:

(a) sexual violation by rape, contrary to ss 128(1)(a) and 128B of the Crimes Act 1961;

(b) sexual violation by unlawful sexual connection, contrary to ss 128(1)(b) and 128B; and

(c) being a male, assaulting a female, contrary to s 194(b).

All charges were representative charges.

Offending against CD

[14] Between 1 August and 31 August 2017, CD was aged 15 years. Together with a friend, she went to Mr Herlund's apartment in a central Auckland residential complex. She and her friend stayed there for three to four days.

[15] Mr Herlund gave CD and her friend an alcoholic drink. CD did not want to drink it but her friend encouraged her to do so. Mr Herlund asked CD how old she was and she replied that she was only 15 years old. She recalled Mr Herlund saying

"the younger the better". She began feeling dizzy and sick and started to make her way to the bathroom. She collapsed to her knees by the bathroom door. Mr Herlund then dragged her into the bathroom by her arms, where she started vomiting. After she had finished vomiting, she stumbled to a bedroom and collapsed on a bed. When she woke up, Mr Herlund was lying next to her. He was on his side with his right arm and right leg over her. She was on her back. Both she and Mr Herlund were naked. Her body felt sore. Mr Herlund was holding a taser in his right hand. It was positioned near her face. She was scared to move in case Mr Herlund woke up and used the taser on her.

[16] While CD and her friend were at Mr Herlund's apartment, he supplied them with alcohol and methamphetamine.

[17] On another occasion, within the same three to four day period, CD, her friend and Mr Herlund were on a bed smoking methamphetamine. Mr Herlund tried to turn CD over by pulling at her jersey and attempting to put his penis in her anus. The friend left the room while CD struggled with Mr Herlund. He became angry at her for not letting him have his way, before giving up and leaving the room.

[18] As a result of this offending, Mr Herlund was charged with:

(a) attempted sexual violation by unlawful sexual connection, contrary to s 129(1) of the Crimes Act;

(b) sexual violation by rape, contrary to ss 128 and 128B;

(c) supplying methamphetamine, contrary to ss 6(1)(c) and (2)(a) of the Misuse of Drugs Act 1975; and

(d) doing an indecent act on a young person, contrary to s 134(3) of the Crimes Act.

Offending against EF

[19] Between 1 July 2017 and 31 August 2017, EF was aged 15 years. She was with a friend, aged 17 years, in central Auckland. The pair wanted to catch a bus to Wellington but they had no money. The friend suggested that they send a text message to Mr Herlund asking him for money for the bus tickets. EF sent the text message and said that she would do anything in exchange for the money, except have sex.

[20] Mr Herlund then met EF and her friend in the central city. He purchased the bus tickets for them but held onto them. He took them back to his apartment at the central city residential complex with the promise that they would get the tickets. When they were inside his apartment, Mr Herlund gave EF a drink commonly referred to as "Waz" (a mixture of alcohol and gamma butyrolactone (GBL)). Mr Herlund then sat on a couch next to EF and put his arm around her. EF's friend had told her that Mr Herlund had a taser and a loaded gun. Because of this, EF was too scared to move away from him.

[21] EF became dizzy and confused. She recalled Mr Herlund taking her to a room and putting her down on the bed. He took her clothes off before she passed out. She was unable to resist his advances because of the effect that the Waz had had on her. When she woke up, she found herself lying on the floor naked. She felt sick and her throat was sore.

[22] As a result of this incident, Mr Herlund was charged with performing an indecent act on a young person, contrary to s 134(3) of the Crimes Act.

Procedural history

[23] Mr Herlund first appeared on the various charges relating to CD and EF on 5 April 2018. He entered not guilty pleas on 26 April 2018. He appeared on the charges relating to AB on 19 December 2018 and he entered not guilty pleas to those charges on 5 February 2019. His trial was scheduled to commence on 1 October 2019.

[24] The trial commenced on that date, but after the Crown had opened its case (and before the complainants were called to give evidence), Mr Herlund offered to plead

guilty to some of the charges in return for the Crown withdrawing other charges. He also requested a sentence indication on the charges to which he was prepared to plead guilty.

[25] On 1 October 2019, Judge Ryan indicated a sentence of no more than five years and seven months' imprisonment.[3]

[26] On 2 October 2019, the Crown filed an amended Crown charge notice which reflected the plea discussions. Several charges were withdrawn, including the charge of supplying methamphetamine. Mr Herlund faced only four charges:

(a) a charge of sexual connection with a young person (AB) contrary to s 134(1) of the Crimes Act;

(b) a representative charge of sexual connection with a young person (AB) contrary to s 134(1);

(c) a representative charge of doing an indecent act on a young person (CD) contrary to s 134(3); and

(d) a charge of doing an indecent act on a young person (EF) contrary to s 134(3).

Mr Herlund entered guilty pleas to these charges on the same day. He was sentenced by Judge Ryan on 13 December 2019.

District Court Sentencing Notes

[27] The Judge referred to her sentence indication and to the summary of facts which Mr Herlund had accepted. She discussed AB's victim impact statement and Mr Herlund's previous criminal convictions. She summarised the pre-sentence report and a cultural report which had been prepared under s 27 of the Sentencing Act 2002, and she also referred to a letter she had received from Mr Herlund.

---

3 *R v Herlund* DC Auckland CRI-2018-004-2827, 1 October 2019 [Sentence indication].

[28] The Judge then turned to consider the appropriate sentence to impose. She referred to accepted sentencing methodology and to the decision of this Court in *Spearpoint v R*, which counsel had referred to and which she considered was helpful.[4] Given the offending against AB, the Judge considered that Mr Herlund's offending was worse than that in *Spearpoint*.[5] She adopted a starting point of six years' imprionment — five and a half years for the representative charge involving AB, with an uplift of six months for the specific charge of sexual connection with AB on the first occasion.[6] The Judge then turned to the offending against CD and EF. She considered that the offending against CD warranted a further uplift of 12 months and that the single offence against EF warranted an uplift of six months. This took her initial starting point to one of 90 months. The Judge then recorded as follows:

> [65] At the time [of the sentence indication] I indicated that [there] was nothing like this in your previous convictions. But as it turns out, in fact you do have some convictions for violence, in particular assault, intimidation, wilful damage and breaching a protection order. I find that threats of violence, intimidation, pushing and breaking things, formed some of the ingredients of this offence, so there should be an uplift of two months and I come then to 92 months.

[29] The Judge then turned to personal mitigating factors. She recorded that Mr Herlund had undertaken rehabilitation whilst in custody, and noted that he had been willing to engage in a restorative justice conference. She also noted that Mr Herlund had suffered a traumatic background and that he has addiction issues.[7] She observed, however, that he had used the drug to which he is addicted — methamphetamine — to ensnare two of his victims and that he had tried to inflict the "very vulnerabilities from which [he] suffered … on young and vulnerable children".[8] The Judge considered that nevertheless there was a "glimmer of hope" with regard to Mr Herlund's rehabilitative prospects and she deducted 10 per cent from her starting point, which she rounded down to nine months.[9] She then allowed Mr Herlund a discount of 25 per cent — or 20 months and three weeks — for his guilty pleas, taking

---

4 *Spearpoint v R* [2018] NZCA 518.
5 Sentencing notes, above n 1, at [62].
6 At [63].
7 At [66].
8 At [67].
9 At [68].

the end sentence to one of 62 months and one week, which she rounded down to 62 months — or five years and two months' imprisonment.[10]

[30] The Judge sentenced Mr Herlund to five years and two months' imprisonment for the offending against AB, 18 months' imprisonment for the offending against CD and 12 months' imprisonment for the offending against EF.[11] She directed that the sentences were to be served concurrently. The end sentence was therefore one of five years and two months' imprisonment. She also placed Mr Herlund on the Child Sex Offender Register, pursuant to the Child Protection (Child Sex Offender Government Agency Registration) Act 2016.[12]

The appeal

[31] The appeal is brought pursuant to s 244 of the Criminal Procedure Act 2011. This Court must allow the appeal if it is satisfied that, for any reason, there is an error in the sentence imposed and that a different sentence should have been imposed.[13] It is for Mr Herlund to establish that there was a material error in the sentence imposed. The focus is on whether the sentence is within the appropriate range, rather than the process by which the sentence was reached.[14]

Submissions

[32] Mr Tomlinson, on behalf of Mr Herlund, submitted that the Judge erred by:

(a) departing from her sentence indication. He noted that, in the sentence indication, the Judge referred to Mr Herlund's previous criminal history but commented that it was "somewhat different" and "not relevant".[15] She said that she did not intend to give an uplift for it. However, she did so when sentencing;

---

10 At [69].
11 At [69]–[70].
12 At [71].
13 Criminal Procedure Act 2011, s 250(2).
14 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30] and [32]–[36].
15 Sentence indication, above n 3, at [4].

(b) adopting a starting point in relation to the charges against AB which was too high, and which was based on errors in the summary of facts and in the charging documents;

(c) failing to consider the totality principle contrary to s 85 of the Sentencing Act; and

(d) affording insufficient discounts to Mr Herlund.

[33] Mr Tomlinson also noted that the Judge followed the then-standard practice of first deducting available discounts from the starting point sentence before giving a further discount for the guilty pleas, and that this practice has been recast by the decision of this Court in *Moses v R*.[16] He argued that Mr Herlund should get the benefit of the *Moses* approach.

[34] Mr Davie, for the Crown, acknowledged that the Judge should not have applied a two-month uplift to her starting point because of Mr Herlund's prior convictions, but argued that this uplift did not make the end sentence imposed manifestly excessive. He observed that the Judge sentenced in accordance with an agreed summary of facts, and submitted that both the sentencing Court and this Court on appeal should proceed by reference to that same summary. In any event, he argued that the factual differences now alleged by Mr Herlund would not have made any difference. He submitted that the starting point for the offending against AB of six years' imprisonment was within the available range. He further submitted that the uplift of 18 months to recognise the offending against CD and EF was unexceptional. He argued that the global discount of approximately 33 per cent allowed by the Judge was generous (the 25 per cent discount for the guilty pleas in particular). He submitted that Mr Herlund was not entitled to any additional discounts for his alleged methamphetamine addiction and for other matters mentioned in the cultural report. He argued that no further reduction was required for totality, because the sentence of five years and two months' imprisonment properly reflected the totality of Mr Herlund's offending. He submitted overall that there is no basis on which to disturb the sentence imposed.

---

16 *Moses v R*, above n 2.

Analysis

[35] We deal with each of the points raised by Mr Herlund in turn.

[36] First, the sentence indication was given pursuant to s 61 of the Criminal Procedure Act. It was binding on the Judge unless further information became available to her after the sentence indication was given but before sentencing, and she was satisfied that that information materially affected the basis on which the sentence indication was given.[17]

[37] No further information became available to the Judge in this case. She had Mr Herlund's criminal history at the time she gave the sentence indication. She indicated that she did not consider that it had any relevance to the index offending and recorded that she would not uplift the sentence to take it into account. It appears that the Judge changed her mind. When she sentenced Mr Herlund, she considered that some of his previous convictions were relevant and uplifted her sentence by two months to take those convictions into account. She did not first consult with counsel and offer Mr Herlund the opportunity to withdraw his guilty pleas. She should have done so. The Judge was not entitled to uplift her starting point sentence to take into account Mr Herlund's previous convictions.

[38] Where an appellant establishes that a Judge failed to sentence in accordance with a sentence indication, the conviction should generally be quashed to allow the defendant the opportunity to exercise the right to change his or her plea, albeit that this is not a statutory requirement.[18] Before us, Mr Tomlinson did not suggest that Mr Herlund wished to vacate his pleas and the submissions were confined to the sentence imposed. Accordingly, we have treated the appeal as a sentence appeal rather than as an appeal against conviction.

[39] We now turn to the Judge's starting point sentence of six years' imprisonment for the offending against AB.

---

17 Criminal Procedure Act, s 116(2).

18 See for example *Te Namu v Police* [2013] NZHC 3443; *Te Tau v Police* [2015] NZHC 1716; and see generally *R v Gemmell* [2000] 1 NZLR 695 (CA).

[40] Mr Tomlinson argued that there was an error in the summary of facts on which the Judge sentenced. He submitted that the date when the offending was said to have occurred was moved back by a year — from 15 March 2015 to 15 March 2014 in the final summary of facts and charge notice. This, Mr Tomlinson argued, is contrary to AB's evidential video interview. According to Mr Tomlinson, AB said: "I think it must have been when I was 14 nearly 15", and "it would have been in between … I was 14 and 16 so in between there". When she was asked when the first offence happened, she responded: "I was about, I'd say 14 and a half". However, AB turned 14 on 15 March 2015.

[41] Mr Tomlinson also argued that the summary of facts cannot be right because Mr Herlund was in custody for much of the period referred to in the summary. He produced Mr Herlund's custodial records as provided by the Department of Corrections. He argued that the only time the offending against AB could have occurred within the time window set out in the summary of facts was when Mr Herlund was in the community — namely a seven-month period between 11 November 2015 and 17 June 2016, and a one-week period in October 2016. He argued that the Judge must, in sentencing, have been influenced by the duration and frequency of the offending and the age of the victim at the time.

[42] We do not consider that there is anything in these points. Mr Herlund accepted the summary of facts when he entered his guilty pleas. He did not seek to challenge it through a disputed facts hearing, pursuant to s 24 of the Sentencing Act. This Court has held that, where counsel have reached agreement regarding the factual summary on which a guilty plea is to be entered, sentencing must proceed on the basis of that summary, and any appeal against sentence must similarly be decided by reference to the facts contained in the summary.[19] We can see no reason to depart from this approach.

[43] Further, we do not consider that it would have made any difference to the sentence imposed if Mr Herlund had provided the Judge with his Department of Corrections custody records prior to sentencing. The agreed summary of facts said

---

[19] *Pokai v R* [2014] NZCA 356 at [30].

that the offending occurred within the specified period, and "over the course of approximately one year". That Mr Herlund was in and out of custody during the three-year period set out in the agreed summary of facts and that the offending may not have occurred within an uninterrupted period of one year does not affect the position to any great extent. Precisely when the offending occurred within the specified timeframe and the precise age of the complainant at the time is of no great moment. Clearly, there was repeated offending against AB and she was under the age of 16 years at the time.

[44] Turning to the starting point adopted by the Judge, we note that there is no tariff or guideline judgment dealing with offending under s 134 of the Crimes Act. It is noteworthy that, on 20 May 2005, Parliament increased the maximum penalty for the offence of sexual connection with a young person under s 134(1) from seven years to 10 years' imprisonment. It also provided that consent is not a defence to the charge except in defined circumstances.[20] This Court has observed that, in combination, these legislative changes form part of prophylactic regime designed to increase protection for young persons in positions of vulnerability. By recalibrating the general starting point of eight years' imprisonment for a contested rape case[21] to the new maximum penalty of imprisonment of 10 years under s 134, the starting point on conviction for sexual connection under s 134 should be four years' imprisonment for moderate offending.[22]

[45] Mr Herlund's offending against AB had a number of aggravating features. There was the significant age difference: Mr Herlund was approximately 50 years old and AB was somewhere between 13 and 15 years old. She was vulnerable to his advances. He plied her with alcohol and drugs in order to achieve his end. He threatened her. He physically assaulted her when she failed to comply with his demands. The offending was repeated and prolonged. He pursued her when she tried to break the relationship off. He threatened violence to her brother and her family. There was clear premeditation by Mr Herlund and it is clear from AB's victim impact

---

20 Crimes Amendment Act 2005, s 7.
21 *R v A* [1994] 2 NZLR 129 (CA) at 131–132.
22 *R v H (CA94/08)* [2008] NZCA 237 at [12]–[17]; and *R v Johnson* [2010] NZCA 168 at [12]–[17].

statement that the offending has had profound adverse consequences for her. It was not moderate offending and it requires a condign sentence.

[46] There are a number of decisions of this Court where not dissimilar starting points to that taken by the Judge have been adopted for broadly similar offending. For example, in *Philpot v R*, this Court adopted a starting point of five and a half years' imprisonment on the lead charge of having sexual intercourse with a minor and then uplifted that sentence by one year for a second charge, and by a further year for offending against another victim.[23] The Court noted the predatory targeting of the victims, the use of alcohol to procure sexual favours, the age differential and the repeated nature of the sexual contact. In *Pene v R*, this Court upheld a starting point of five years for the lead charge under s 134(1), where there was a high level of premeditation, breach of trust, the victims were vulnerable and there was significant harm to the victims.[24] The Court considered that the offending was predatory and that grooming was involved. The end sentence imposed was six years and three months' imprisonment. In *R v H (CA94/08)*, there was a single victim.[25] The sentencing Judge had adopted a starting point of three and a half years. This Court observed that that was generous, and that the starting point could have been at least five years. It considered that the offending was in the medium to serious category, involving a breach of trust, a vulnerable victim, multiple incidents, significant age disparity and damaging effects on the victim. In *R v Brunie*, this Court adopted a starting point sentence of seven years' imprisonment where there was a single victim, significant premeditation, age disparity, vulnerability and persistence in pursuing the victim.[26] In *Spearpoint*, this Court approved a starting point of five and a half years' imprisonment for offending against a single victim, over a two-month period.[27]

[47] We agree with the Judge that Mr Herlund's offending was serious, and that a starting point sentence of six years' imprisonment for the offending against AB was appropriate.

---

23 *Philpot v R* [2015] NZCA 212 at [41]–[43].
24 *Pene v R* [2010] NZCA 143.
25 *R v H (CA94/08)*, above n 22.
26 *R v Brunie* [2009] NZCA 300.
27 *Spearpoint v R*, above n 4.

[48] The uplift of 18 months to recognise the offending against CD and EF was clearly open to the Judge. The offending against CD in particular was serious. It involved the use of drugs to overcome her resistance, and Mr Herlund offended against her on multiple occasions over a period of three to four days. It would have been open to the Judge to impose a cumulative sentence for the offending against both CD and EF. It was distinct offending, not connected in time or circumstance. She did not do so. Mr Herlund has benefited from this.

[49] In our view, the discounts allowed by the Judge were extremely generous. Indeed, we do not consider that Mr Herlund was entitled to a 25 per cent discount for his guilty pleas. A discount of this magnitude should only be given when the guilty plea is entered at the first reasonably available opportunity. Mr Herlund's guilty pleas were not offered promptly. As Mr Davie noted, Mr Herlund had it in his power to resolve matters at a much earlier stage by admitting the sexual contact with the victims. Instead, he dragged matters out until the trial was underway. AB had been required to come to Court and she would have had to steel herself in anticipation of giving evidence. The Crown was put to the cost of preparing for trial. It also had to litigate unsuccessful defence applications for severance, for an order under s 44(1) of the Evidence Act 2006 in relation to CD's and EF's past sexual experience, and to dismiss the charges relating to CD.[28] Given the lateness of Mr Herlund's pleas, a discount of five per cent at best may have been appropriate — certainly not 25 per cent.

[50] We turn to the availability or otherwise of further discounts.

[51] The s 27 report records that Mr Herlund had a largely stable upbringing, thanks to his mother. His father was more of a disciplinarian and seems to have been more a "hands off" parent. Mr Herlund starting smoking marijuana at the age of 15 years, and has led a peripatetic lifestyle in recent years. His mother believed that he suffered from ADHD, and according to Mr Herlund he has been formally diagnosed with that condition as an adult. Mr Herlund also believes that he suffers from post-traumatic stress disorder and that he is in need of mental health support. The report writer considered that parental disengagement, unresolved grief and family disconnects,

---

[28] *R v Herlund* [2019] NZDC 16968 [Pre-trial rulings].

Mr Herlund's addictions and gambling and his association with pro criminal contacts "may" have contributed to his offending.

[52] The report writer's conclusions are speculative. There is no evidence of any causal connection between Mr Herlund's upbringing and the offending. Insofar as we can gauge, the offending seems to have been driven more by Mr Herlund's sexual desires than by any deprivation or social dislocation as a child or when growing up.

[53] We have considered Mr Herlund's methamphetamine addiction. Where addiction is relied on, the onus is on the defendant to establish the fact of addiction. Self-reporting is rarely enough to discharge the evidential burden.[29] Mr Herlund has produced no reliable evidence. The primary references to his addiction to methamphetamine are in the s 27 report, and it appears to be largely based on Mr Herlund's self-reporting. The s 27 report writer was not medically trained and no tests were administered to assess Mr Herlund for addiction.

[54] In any event, addiction which is not causative of offending is of little mitigatory relevance.[30] In the absence of evidence, we are not satisfied that Mr Herlund is entitled to any further discount for his addiction, because there is no evidence before us to satisfy us that such addiction as he may have to methamphetamine caused the offending. Rather, the agreed summary of facts suggests that the drug was used to facilitate the offending, along with threats and violence. Mr Herlund appears to have offended because of his sexual interest in young girls. We note his comment in relation to the offending against CD — "the younger the better" — referred to above at [15]. We also note that in the Provision of Advice to Courts report, it is noted that Mr Herlund, while denying that he was sexually attracted to persons under 16, did say that when he is seeking a sexual partner, he does "prefer younger".

[55] We decline to provide any further discounts to Mr Herlund.

[56] We now turn to totality.

---

29 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at at [148].
30 At [147].

[57] The Judge did not mention this principle. She should have done so. The totality principle guides sentencing for multiple offences and whether concurrent or cumulative sentences are imposed. In arriving at the appropriate sentence for several offences, the sentencing Judge should not only consider each offence individually but also assess the offender's overall culpability and determine what effective sentence is appropriate for the totality of the offender's conduct.[31]

[58] In the present case, we do not consider that the failure by the Judge to mention the totality principle is of any great moment because we do not consider that the sentence imposed is out of proportion to the gravity of Mr Herlund's offending.[32]

[59] Finally, we turn to the application of the *Moses* methodology.[33]

[60] In the present case, the Judge, in accordance with the law as it was then understood, applied a pre-*Moses* approach. She gave Mr Herlund a discount for his personal circumstances and attempts at rehabilitation. She deducted 10 per cent (or nine months) for these matters. She then gave him a separate 25 per cent discount for his guilty pleas.

[61] In *Moses*, this Court held that a two-step methodology should be used in calculating sentences where a guilty plea is entered.[34] First, the sentencing Court should calculate the adjusted starting point, incorporating aggravating and mitigating features of the offence. Secondly, the Court should incorporate all aggravating and mitigating factors personal to the offender, together with any guilty plea discount, which should be calculated as a percentage of the adjusted starting point.

[62] Although he did not undertake a calculation, Mr Tomlinson asserted that, had the *Moses* approach been adopted, it would have reduced the sentence which would have been imposed on Mr Herlund.

---

31 *R v Bradley* [1979] 2 NZLR 262 (CA); *R v Strickland* [1989] 3 NZLR 47 (CA); and *R v Dodd* [2013] NZCA 270 at [32]-[33], citing *R v Barker* CA57/01, 30 July 2001 at [10].

32 *Kite v R* [2018] NZCA 485 at [21].

33 *Moses v R*, above n 2.

34 At [46].

[63] The decision in *Moses* was delivered on 15 July 2020. Mr Herlund was sentenced on 13 December 2019 and his appeal was filed on 10 February 2020, some months prior to release of the decision in *Moses*.

[64] Generally, changes in the law are not retrospective, particularly in the criminal context. Indeed, the New Zealand Bill of Rights Act 1990 states that penal enactments are not to be given retrospective effect to the disadvantage of an offender.[35] Conversely, an offender is given the benefit of any decrease in penalty enacted after the offence, but before sentencing.[36] Guideline judgments issued by the higher Courts are more problematic. In *Zhang*, it was observed that a change in sentencing practice does not alter the penalty provided by the legislation creating the offence, but rather is an exercise of the sentencing discretion in any individual case.[37] As a result, a change in guidelines does not amount to a change of penalty for the purposes of the relevant statutory provisions. Consequently, it held that a guideline judgment should only apply to sentences that have already been imposed if, first, the appeal against the sentence has been filed before the date the judgment is delivered and, secondly, the application of the judgment will result in a more favourable outcome to the appellant.[38]

[65] The practice adopted in the High Court has been to apply *Moses* to appeals filed before the decision was released.[39] In this Court, the argument that *Moses* should not be applied retrospectively has been rejected. It observed that: "[t]he change to sentencing practice effected by *Moses* was a situation of error correction" and that it applies retrospectively.[40]

[66] In the present case it makes no difference. As the Court made clear in *Moses*, the ultimate question is not whether an applicable guideline judgment is followed, but rather whether the sentence is a just one in all the circumstances. In answering that question, the sentencer must stand back and consider the circumstances of the offence

---

35 New Zealand Bill of Rights Act 1990, s 25(g).
36 Sentencing Act 2002, s 6.
37 *Zhang v R*, above n 29, at [190].
38 At [188]–[190]; see also *R v Vadati* CA256/05, 19 December 2005 at [8].
39 *Reihana v Police* [2020] NZHC 1786 at [9]; *Bramley v Police* [2020] NZHC 1788 at [7(a)]; *Beattie v Police* [2020] NZHC 1831 at [11] and [33]; and *Romero v R* [2020] NZHC 2740.
40 *Pearson v R* [2020] NZCA 573 at [34].

and the offender against the applicable sentencing purposes, principles and factors.[41] When this exercise is undertaken in relation to Mr Herlund's sentence, *Moses* can have no impact. The sentence imposed was just in all the circumstances, taking into account the purposes and principles of sentencing. It was not manifestly excessive.

Result

[67] Leave to appeal out of time is granted.

[68] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[41] *Moses v R*, above n 2, at [49].