IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CRI-2022-463-151
[2023] NZHC 787

BETWEEN	LUKE STAINTON Appellant
AND	THE KING Respondent

Hearing: 3 April 2023

Appearances: W T Nabney for Appellant
D P Coulson for Respondent

Judgment: 6 April 2023

JUDGMENT OF JOHNSTONE J

This judgment was delivered by me on 6 April 2023 at 3 pm.

Registrar/Deputy Registrar

Solicitors:
Crown Solicitor, Tauranga

[1] Luke Timothy Stainton pleaded guilty to a charge of having sexual connection with a young person aged 15 years of age.[1] On 8 November 2022, he was sentenced in the Tauranga District Court to serve two years and three months' imprisonment.[2]

[2] Mr Stainton appeals against that sentence. The Crown opposes.

The offending

[3] At the beginning of September 2016, Mr Stainton was a 24-year-old youth leader at the Otumoetai Baptist Church in Tauranga. The complainant was a 14-year-old attending its youth group.

[4] Mr Stainton and the complainant began regular communication via text message. After a few weeks, Mr Stainton asked the complainant if she wished to engage in a relationship with him, and she agreed. The complainant had just turned 15 years old, and Mr Stainton had just turned 25.

[5] Mr Stainton and the complainant exchanged photographs of their genitalia. They proceeded to engage in sexual intercourse on a weekly basis during what the summary of facts describes as "the preceding year" but was clarified during the hearing as the succeeding year. Some of these encounters occurred inside the Otumoetai Baptist Church in the middle of the night. The relationship ended with Mr Stainton engaging in a relationship with another female.

The District Court decision

[6] Judge Cook sentenced Mr Stainton. Amongst other things, her Honour noted serious impacts on his victim, described in her victim impact statement. The victim takes the view that a range of mental health issues she has since suffered can be traced to her inappropriate relationship with Mr Stainton and its secrecy.

[7] Her Honour adopted a starting point for Mr Stainton's offending of three years and six months' imprisonment.

---

1 Crimes Act 1961, s 134(1). Maximum penalty: 10 years' imprisonment.
2 *R v Stainton* [2022] NZDC 22079.

[8] The Judge then made deductions of 25 per cent in light of Mr Stainton's guilty plea, and 10 per cent for his good character, arriving at an end point of two years and three months' imprisonment, which was the sentence imposed.

Appellant's submissions

[9] For Mr Stainton, Mr Nabney submitted that:

(a) The Judge's three-year, six-month starting point was too high. The Court of Appeal's judgments in *R v Hayward* and *Hawken v R* can be distinguished on their facts.[3]

(b) The Judge's deduction of 10 per cent for Mr Stainton's otherwise good character was too low. A deduction in the range of 15 to 20 per cent should have been applied.

(c) The Judge should not have declined a deduction for Mr Stainton's genuine remorse (citing *Hessell v R*).[4]

(d) There should have been a small discount to reflect factors identified in a psychologist's report: Mr Stainton's naivety for his age, suggesting emotional maturity and relationship experience comparable to that of his victim; and Mr Stainton's very low risk of re-offending.

(e) On this basis, the end sentence as calculated should have been below two years' imprisonment, with the consequence that a sentence of home detention should have been both available and necessary as the least restrictive, appropriate outcome. And registration on the Child Sex Offender Register would have been both discretionary and appropriately declined due to the offending's circumstances and Mr Stainton's low risk of reoffending.

---

3 *R v Hayward* [2008] NZCA 172; and *Hawken v R* [2019] NZCA 450.
4 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].

Respondent's submissions

[10] For the Crown, Mr Coulson submitted the Judge did not err, whether in respect of the selected starting point, or the deductions both as applied and rejected.

Law on appeal

[11] This Court must allow the appeal if there is an error in the sentence imposed and a different sentence should be imposed.[5] Otherwise, the Court must dismiss the appeal.[6]

[12] The sentence must be manifestly excessive before the appeal Court may substitute its own views as to the appropriate sentence. The Court will generally not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles.[7] Whether a sentence is manifestly excessive is to be assessed in terms of the final sentence given rather than the process by which it was reached.[8]

Analysis

Starting point

[13] The offender in *R v Hayward*, where the sentencing Judge adopted a three-year and six-month starting point, occupied a more solemn position of trust than that occupied by Mr Stainton. He was a friend of his victim's mother, and lived at a property where his victim was left when the mother returned to Australia. There was an understanding he would help look after the girl during the mother's absence. Further, the age disparity was more serious. He was 53 years old. His victim was 15.

[14] But the Court of Appeal in *R v Hayward* indicated that an appropriate starting point might have been one of four years' imprisonment. The three-year and six-month starting point adopted at first instance was described as "most generous."[9]

---

5 Criminal Procedure Act 2011, s 250(2).
6 Section 250(3).
7 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36]; and *Te Aho v R* [2013] NZCA 47 at [30].
8 *Ripia v R* [2011] NZCA 101 at [15].
9 *R v Hayward*, above n 3, at [19].

[15] And the Court of Appeal has since commented, in *R v Johnson*:[10]

> [17] We consider that the four year starting point in *R v* [*Hayward*] is still a useful reference point in relation to sentencing for sexual connection with young persons, where the offending shares features present in that case. Particular aggravating features in *R v* [*Hayward*] were abuse of trust, a significant age gap between the offender and the victim, full penetrative sex on a number of occasions, and significant adverse effects on the victim. Where aggravating features in *R v* [*Hayward*] are present, a starting point of four years may be appropriate. Other aggravating factors not present in *R v* [*Hayward*] may be seen as increasing culpability. Such features could include grooming, or abusive and demeaning behaviour. Where there has been no breach of trust as in *R v* [*Hayward*] but the same aggravating features are present, a lower starting point will be appropriate. A different combination of aggravating and mitigating factors might produce yet another result. It follows that the starting point of four years should be seen as no more than a mid-point in the range of offending where there is moderate culpability.

[16] In *Hawken v R*, the Court of Appeal said that a three and a half year starting point "could not be said to be out of range."[11] Mr Nabney submitted that *Hawken* involved a greater age disparity and a victim who was in a more vulnerable state, due to having been homeless and from a difficult background. However, as Mr Coulson pointed out, Mr Stainton's offending continued over a longer period than in both of those cases.

[17] Taking into account the somewhat lesser degree of trust involved in Mr Stainton's position as a youth group leader, and the lesser age gap, when compared to the circumstances in both *R v H* and *Hawken v R*, and noting the duration of Mr Stainton's offending, Judge Cook's starting point of three years and six months' imprisonment was well justified.

Good character

[18] Mr Nabney's submission that a deduction for good character of 15 to 20 per cent should have been applied draws from Mr Stainton's lack of prior convictions, multiple character references, and from the Court of Appeal's judgments

---

10 *R v Johnson* [2010] NZCA 168, citing *R v Hayward*, above n 3.
11 *Hawken v R*, above n 3, at [24].

in *Parkin v R* (where an effective 18 per cent discount was applied), and *R v Carruthers* and *R v Webb* (where 25 per cent discounts for good character were applied).[12]

[19] However, in those cases, around 37 years, 12 years, and 12 years, respectively, had lapsed between the offending and the appellant's sentencing. And the appellants had matured during those periods from ages of around 28, 36 and 28, respectively, demonstrating their good character in the meantime.

[20] In Mr Stainton's case, around five years had lapsed from his offending, at age 25, to his sentencing. Judge Cook found him entitled to a discount, but one limited to 10 per cent, in light of the fact Mr Stainton "is still a young man."[13] In effect, Mr Stainton had not been in a position to demonstrate good character of the kind shown in *Parkin*, *Carruthers* and *Webb* to justify a more substantial discount.

[21] In this respect, I do not consider the Judge fell into error.

Remorse

[22] In this regard, Mr Nabney submitted that Judge Cook overlooked a 'remorse letter' dated 28 October 2022. Instead, her Honour drew from the PAC report writer's observations that Mr Stainton lacked any genuine insight into the harm caused to his victim, with any statement of remorse relating to the consequences of his actions on his own life and that of family members. Mr Nabney referred to the view of the Supreme Court in *Hessell v R*, that:

> [A] proper and robust evaluation of all the circumstances may demonstrate a defendant's remorse. Where remorse is shown by the defendant in such a way, sentencing credit should properly be given separately from that for plea.

[23] Mr Stainton's letter was filed with a series of letters in support from his parents, from an employer and from friends in his church. His letter appears in the same font and style as that of his parents, but in contrast to theirs is not signed. Towards the beginning of its 800-plus words, it addresses "everyone involved" as follows:

---

12 *Parkin v R* [2018] NZCA 404; *R v Carruthers* CA401/94, 10 April 1995; and *R v Webb* CA13/04, 17 June 2004.

13 *R v Stainton*, above n 2, at [33].

> [M]y actions have caused more harm than I realized. And my actions have further reaching consequences than I knew. So, to everyone involved, I am very sorry. I'm sorry for breaking your trust, for harming you, for disappointing you. I'm sorry for misusing my position. I'm sorry that I was hypocritical - while I said one thing, I did another. I'm sorry I was deceitful and wrong.

[24] Towards the end it addresses an array of those affected by Mr Stainton's actions:

> To the victim and the victim's family, I sincerely apologize (sic), I was wrong, and I have caused much harm and pain. I should have done things so much differently. I am sorry.
>
> To my family, my wife and my wife's family, I am sorry that I have put you through this. I was raised to be a good person and my actions have caused a great deal of stress and hurt so I am sorry. I hope that we can work towards forgiveness.
>
> To my friends and church, I am sorry for bringing you into this, I hope we can move forward and work towards forgiveness.

[25] These are the only passages which might be thought to address the consequences for Mr Stainton's victim of his offending. As is apparent, while the letter refers to causing her and others harm, it does not address the direct and distinctive nature of the harm he caused her. In my view, Mr Stainton's letter tends to confirm rather than contradict the PAC report writer's view outlined above.

[26] In any event, discounts for remorse typically require further acts of contrition to warrant a discount.[14] Letters of apology and other expressions of remorse are often insufficient to warrant a discrete discount. In this case, proper and robust evaluation of all the circumstances did not require that sentencing credit be given for remorse.

Psychological factors

[27] Mr Nabney referred to the report of Hans Laven, a registered clinical psychologist, which was available to the Judge at the sentencing. The report noted:

(a) Mr Stainton was naïve for his age and had poor insight into the experience and risks for the victim.

---

[14] *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [24].

(b) Despite the age gap between Mr Stainton and the victim, their emotional maturity and relationship experience was comparable at the time of the offending.

(c) Assessed by means of the STABLE-2007 instrument and more generally, Mr Stainton had a low risk of sexual reoffending.

[28] It is not clear how Mr Laven considered himself equipped to make assumptions as to the victim's emotional maturity and relationship experience so as to be able comment on its comparability with that of Mr Stainton. Be that as it may, his analysis on the question of risk stood in contrast to the view of the PAC report writer, who assessed Mr Stainton's risk as medium, given "the circumstances of the index offending and his rationalisation and minimisation of [it]."

[29] Relevantly to this aspect, Judge Cook commented:[15]

> [34] I am left with some concerns in respect of your insight into your offending and I am left with a really contradictory position in terms of the pre-sentence report and the psychologist report. In the round as I say I will give you a discount for 10 per cent for your previous good character.

[30] Mr Nabney submitted that Mr Laven's report reinforced Mr Stainton's mitigating features, gave some insight into causative factors of the offending, and required "a small discount."

[31] For the Crown, Mr Coulson submitted that Mr Stainton described his upbringing as "good", and that notwithstanding a lack of prior intimate relationships and confidence, there is no causal contribution between his background and his offending.

[32] In my view, Mr Laven's report serves to confirm that Mr Stainton's developmental stage at the time of the offending was that of an 'emerging or young adult', aged 18 to 25, as described in the Court of Appeal's recent judgment in *Dickey*

---

15 *R v Stainton*, above n 2.

v R.[16] In that case, the Court summarised expert evidence it had received to similar effect to that outlined in its prior judgment in *Churchward v R*,[17] including that:[18]

> Research from developmental and neuropsychology overwhelmingly concludes that adolescents and emerging adults … are different to adults.
>
> …
>
> Even when young people's cognitive ability is similar to that of adults, they are less able to make the same mature decisions [as adults], and are more likely to engage in risky behaviour arising from that immaturity.
>
> …
>
> [80] In addition to their susceptibility to engaging in serious criminal offending, young people are more amenable to rehabilitation than adults. "Their offending is less likely to be entrenched … and they are very likely to desist from offending as adults, especially with appropriate intervention".

[33] While *Dickey* and *Churchward* related to sentencing for murder, the Court of Appeal's view that these particular aspects of youth and consequent prospects for rehabilitation are relevant is applicable to sentencing more generally.[19] In *Rolleston v R*, the Court of Appeal referred to the mitigating factor of youth[20] as summarised in *Pouwhare v R*, and continued:[21]

> [35] The *Pouwhare* approach applies to sentencing for offending of this type, meaning that youth can be a highly significant mitigating factor and there is no fixed outer percentage. Teenagers aged between 14—16 years who have committed serious sexual offences have sometimes been extended discounts of between 30 and 50 per cent. In practice, there appears to be significant variation in the approach taken to this aspect of sentencing. This variability may recognise that, as the Court said in *Pouwhare*, youth alone cannot always radically reduce the otherwise appropriate sentence.
>
> [36] In the present case, while we accept the Crown's submission that this offending was particularly bad, we consider that was reflected in the sentence starting point and that the offenders' age should have attracted a greater reduction. The sentencing Judge placed considerable weight on the failure of either young man to take responsibility for their offending. We accept that feature, together with their regrettable attitude and lack of understanding of the impact of their offending on the victim, is indicative of a lack of contrition or remorse. However, it is equally indicative of their immaturity.

---

16 *Dickey v R* [2023] NZCA 2 at [76].
17 At [77], citing *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.
18 At [77(a)] and [77(c)]
19 Sentencing Act, ss 7(1)(h) and 8(h) and (i).
20 *Rolleston v R (No 2)* [2018] NZCA 611, [2019] NZAR 79 at [28] and [36]; and *Churchward v R*, above n 17, at [77].
21 *Rolleston v R (No 2)*, above n 20, citing *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 (footnotes omitted).

[34] In the present case, I respectfully take a similar view. Mr Stainton's offending, the nature of his response, and his risk of re-offending should have been assessed both by the PAC report writer and by the sentencing Judge against the context of his age at the top end of 'emerging adulthood', together with his particular immaturity, which in his case (as assessed by Mr Laven) appears to have continued beyond the age of 25. While Mr Stainton's attitude may have disqualified him from a deduction for remorse, it seems likely to reflect his delayed emotional development, favourable prospects for rehabilitation, and consequently low risk of reoffending.

[35] In my view, a further discount to account for these factors should have been allowed. In the absence of such a discount, I substitute my own assessment that a deduction of 10 per cent would have been appropriate.

Conclusion

[36] Applying an additional deduction of 10 per cent would have taken Judge Cook to a notional "short-term sentence of imprisonment", entitling her Honour to impose a sentence of home detention in terms of s 15A of the Sentencing Act. I consider that such a sentence should have been imposed.

[37] I have received advice from counsel that the address the subject of the PAC report dated 1 November 2022 remains available to him. On the basis of that report, I consider the conditions set out in s 80A are met.

[38] I take into account that in granting this appeal and substituting a sentence of home detention, Mr Stainton's sentence will commence on the day that sentence is imposed.[22] To date, he has served around five months of the sentence of imprisonment imposed upon him in the Tauranga District Court. On that basis, rather than the period of 12 months' home detention I would have imposed, I will substitute a sentence of four months home detention.

---

[22] Section 80X.

[39] I note that as Mr Stainton no longer sentenced to imprisonment, his automatic registration on the Child Sex Offender Register should be cancelled. In light of his low risk of reoffending I will not direct discretionary registration.

Orders

[40] Accordingly, I make the following orders:

(a) Mr Stainton's appeal is allowed.

(b) His original sentence is quashed and replaced with four months' home detention, to:

(i) commence on 6 April 2023;

(ii) be served at the address specified in the PAC report dated 1 November 2022; and

(iii) be subject to the proposed special conditions of home detention set out in that report.

_____

Johnstone J