NOTE: PUBLICATION OF NAME, 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

CA609/2018
[2019] NZCA 265

BETWEEN	JEFFREY TROON Appellant
AND	THE QUEEN Respondent

CA646/2018

BETWEEN	LEWIS ERU CRAIG Appellant
AND	THE QUEEN Respondent

CA662/2018

BETWEEN	TERI TE WAIMARAMA THOMPSON Appellant
AND	THE QUEEN Respondent

Hearing:	9 May 2019
Court:	Courtney, Lang and Whata JJ
Counsel:	C J Tennet and S J Fraser for Mr Troon C J Nicholls for Mr Craig E A Hall for Mr Thompson M J Lillico for Respondent
Judgment:	27 June 2019 at 3.30 pm

JUDGMENT OF THE COURT

The appeals against sentence are dismissed.

REASONS OF THE COURT

(Given by Lang J)

[1] Mr Troon, Mr Thompson and Mr Craig were charged with the abduction and sexual violation of a 17 year old complainant. During the course of their trial the Crown obtained leave from Clark J, the trial Judge, to amend the charges to charges of indecent assault.[1] The defendants then entered guilty pleas to those charges. This brought their trial to an end.

[2] On 5 October 2018, Clark J sentenced all three appellants to terms of imprisonment.[2] Mr Troon was sentenced to four years and two months' imprisonment,[3] Mr Thompson was sentenced to four years and six months' imprisonment,[4] and Mr Craig was sentenced to two years and seven months' imprisonment.[5] There were two other defendants who also pleaded guilty — Mr Whitinui and Mr Holland — but they have not appealed their sentences.

[3] The appellants advance appeals against sentence on the ground that a series of errors resulted in the Judge imposing sentences that were both wrong in principle and manifestly excessive.

Background

[4] The appellants were sentenced in accordance with an agreed summary of facts that the Crown prepared when it obtained leave to amend the charges. This records

---

1 *R v Thompson* HC Wellington CRI-2016-091-2957, 30 August 2018 (Ruling No 4 of Clark J).
2 *R v Thompson* [2018] NZHC 2608 [Sentencing Notes].
3 At [103].
4 At [53].
5 At [75].

that the complainant did not know any of the defendants before the incident giving rise to the charges.

[5] On the evening of 28 October 2016, the complainant was driving her vehicle in Paraparaumu when she noticed a white utility motor vehicle following her. She could see that the occupants of the vehicle were making hand gestures towards her.

[6] The complainant drove to her address in Paraparaumu with the other vehicle following behind. When she got out of her vehicle, two of the occupants of the white utility spoke to her. She then got into the other vehicle and sat on Mr Craig's knee in the front passenger seat of the vehicle. Mr Troon and Mr Thompson were sitting in the rear seat along with another man, Mr Whitinui. The vehicle was driven by a fifth man, Mr Holland.

[7] The vehicle drove to Mr Troon's address. On arrival Mr Troon gestured for the complainant to follow him into his bedroom. He closed the door and pushed the complainant onto her knees. He then held her head with one hand and put his penis into her mouth without her consent. He also partially pulled her pants down.

[8] At this point some of the other occupants of the vehicle entered the room. One of these men smacked the complainant on her buttocks. Mr Troon then told the others to get out on the basis that it was "his turn". The men then left the room.

[9] The summary records that Mr Troon sat on the bed and made the complainant continue to perform oral sex on him. The other men then came back into the room and one of them removed the complainant's top. The men also slapped the complainant on the buttocks again .

[10] At this point Mr Craig placed his penis in the complainant's mouth without her consent. Mr Thompson did the same, before taking a beer bottle and inserting it into the complainant's vagina. As this occurred the complainant was asking the men to stop.

[11] The summary records that Mr Troon then picked up a home-made tool similar to a screwdriver. As he was preparing to insert this object in the complainant's vagina, to which the complaint was saying no, then one of the other men objected and he stopped. This incident was followed by Mr Whitinui touching the complainant's genitalia. Mr Troon then inserted his penis into her vagina. At this point the complainant told Mr Troon she needed to go home. He said "let's finish" and would not let her go.

[12] When the complainant was eventually allowed to leave, she was driven away from Mr Troon's address in the white utility motor vehicle accompanied by Mr Craig and Mr Holland. After they dropped her off in a suburban street the complainant was able to telephone the manager of the boarding house where she was staying. He then took her home.

[13] When the police interviewed Mr Craig, he denied the allegations and declined to make a statement. Mr Thompson also declined to make a statement. Mr Troon contended that any sexual contact had been consensual.

The sentences

[14] Mr Troon ultimately faced two charges of indecent assault. These related to the incidents in which he had placed his penis in the complainant's mouth and then subsequently inserted his penis in her vagina.[6] The Judge took a starting point of five years imprisonment to reflect Mr Troon's culpability on both charges.[7] She then deducted four months to reflect rehabilitative efforts and a further six months, or just over ten per cent, to reflect the guilty pleas.[8] This produced the end sentence of four years and two months' imprisonment.[9]

[15] Mr Thompson also faced two charges of indecent assault. These related to the incidents in which he had inserted a beer bottle into the complainant's vagina and then inserted his penis into her mouth.[10] The Judge took a starting point of five years

---

6 Sentencing Notes, above n 2, at [89].
7 At [94].
8 At [99] and [102].
9 At [103].
10 At [35].

imprisonment on both charges and then deducted six months, or ten per cent, to reflect the guilty pleas.[11] This produced the end sentence of four years six months imprisonment.[12]

[16] Mr Craig faced a single charge of indecent assault resulting from the fact that he had inserted his penis into the complainant's mouth without her consent.[13] The Judge took a starting point on this charge of three years imprisonment.[14] She applied a reduction of one month to reflect the fact that Mr Craig had been subject to reasonably restrictive bail conditions for approximately four months.[15] She then applied a further discount of four months, or just over ten per cent, to reflect the guilty plea.[16] This produced the end sentence of two years seven months imprisonment.[17]

The events that led to the amendment of the charges

[17] In order to understand several of the arguments advanced on appeal it is necessary to set out the events that led to the Judge granting the Crown leave to reduce the charges from abduction and sexual violation to indecent assault.

[18] The trial commenced on 20 August 2018. At that stage the defendants faced a total of 65 charges. These included sexual violation by rape, abduction with intent to have sexual connection, and sexual violation by unlawful sexual connection.[18]

[19] The complainant began giving evidence on Wednesday 22 August 2018. Her evidence did not conclude until shortly before the luncheon adjournment on Monday 27 August 2018. At that point the Judge agreed to a request by counsel for a longer luncheon adjournment than would usually be the case.

[20] At approximately 3.20 pm counsel advised the Judge they were engaged in negotiations designed to resolve the case. This would involve the preparation of a new

---

11 At [40] and [52].
12 At [53].
13 At [55].
14 At [64].
15 At [72].
16 At [73].
17 At [75].
18 Crimes Act 1961, ss 128, 128B and 208.

summary of facts and an amendment of the existing Crown Charge Notice to substitute charges of indecent assault for the existing charges of abduction and sexual violation. Counsel also asked the Judge to provide a sentence indication notwithstanding the fact that the trial was already well underway. Ms Carter, counsel for the Crown, initially proposed that counsel would make submissions in relation to the sentence indication later that afternoon.

[21] The Judge eventually agreed to provide a sentence indication but not until the following morning at 9.30 am. The jury was then sent away until 11 am the next day. Later the same afternoon the Judge issued two minutes to counsel. In the first minute she indicated she was no longer prepared to give a sentence indication because s 61 of the Criminal Procedure Act 2011 only permits a sentence indication to be given at the request of the defendant made prior to the commencement of the trial. In the second minute the Judge advised counsel that it should not "be simply assumed" that she would grant leave to amend the charges in the manner foreshadowed by the Crown earlier that afternoon.

[22] Counsel saw the Judge in the absence of the jury the following morning. Ms Carter then made lengthy submissions in support of the Crown's application to amend the charges. The overall tenor of these was to the effect that resolution of the proceeding by amendment of the charges and entry of guilty pleas was in both the public interest and the best interests of the complainant even though she had already completed her evidence and was about to travel overseas. Counsel and the Judge knew the complainant had a very troubled past and was presently at risk of committing suicide. Ms Carter told the Judge she had discussed the proposal with the complainant and the complainant had indicated that the best outcome for her was validation of her allegations. The Crown considered this could be achieved through guilty pleas entered to charges of indecent assault even though this would obviously result in the defendants receiving lesser sentences than would be the case if they were found guilty of the existing charges.

[23] Ms Carter acknowledged there was evidence upon which the jury could find the defendants guilty of the existing charges but also conceded the Crown faced some hurdles in proving those charges. In addition, Ms Carter advised the Judge she had

discussed the proposal with the Crown Solicitor at Wellington and Ms Carter considered it was compatible with the requirements of the Crown Prosecution Guidelines.[19] Ms Carter described the steps the Crown had taken thus far as being "a very considered approach".

[24] Before Ms Carter went on to address the issue of sentence the Judge outlined concerns she held regarding the Crown's proposal. She acknowledged the benefit of the proposal from the perspective of the complainant but pointed out that the interests of the complainant were not the only factor to be taken into account. The Judge considered the public interest was engaged because the defendants were now in the charge of the jury, and the jury had heard the complainant give evidence about acts that amounted to sexual violation. The Judge pointed out that the integrity of the criminal justice process from the perspective of both the jury and the public at large needed to be considered. The fact that the summary of facts was likely to differ from the evidence the jury had already heard was significant in this context.

[25] The transcript records that the following exchanges then occurred:

> **THE COURT TO MS CARTER**:
>
> …
>
> A. So in the main [the summary of facts] does accord with what the complainant said. But the real issue is that in essence it is sexual violation as opposed to indecent assault. But of course, indecent assault is effectively a lessor example of that same conduct. So, it does, it is an indecent assault. It just also, it is a sexual violation, and in response to your comments about the jury, of course, the jury have only heard from the complainant, so they do not know what other evidence what other evidence is there, which is going to come into the balance, ultimately, when they have to decide their verdicts. So, in essence the, as I said, the validation will be therefore the complainant. I accept that that is not the only consideration. There is the public interest, and the public is whether the public need to be protected from these particular defendants because a maximum penalty as for, as is for the indecent assault is not as high for the sexual violation, and as *I have indicated these defendants do not have previous for this type of behaviour and what the Crown would be submitting for Thompson, the sentence would be a sentence of imprisonment in any event. One accepts he has been in custody for quite a significant period of time now. So that may well offset, and for the other defendants then the, for Mr Troon and Mr Craig, and for Mr Whitinui, a sentence of*

[19] Crown Law Office *Solicitor-General's Prosecution Guidelines* (1 July 2013) [Prosecution Guidelines].

electronically monitored sentence, so there is still a form of detention albeit not in custody.

Q. Is it appropriate for the Crown to be addressing what position the Crown might take on sentencing at this stage?

A. *I do not think there is an issue with everybody knowing, it does not bind the Court. The Court, it is the Court that makes that decision. But I am just explaining to Your Honour that even with the factors, the public interest factors, that has been considered and the Crown would be submitting that the sentence is imposed whilst not being incarcerated in a prison would involve the defendants being subject to electronically monitoring. So, there would be some protection for the public in that way, and as I say these are not defendants who have got previous history for this type of offending*. So, I am just really addressing the public interest aspect of the resolution that is being suggested, and it is not unusual that a case may well not end up proceeding fully to the jury for them to return verdicts, as Your Honour will know as trials progress. So, there is nothing unusual about that. So, I hope those two matters address the concerns that Your Honour had. If there is anything else that I can address at this stage, then obviously I will.

(Emphasis added).

[26] The Judge then reiterated that the public interest also lay in seeing jury trials progress with a sense of integrity, but she acknowledged the proposal may not compromise that principle. At that point the Judge called on Mr Antunovic, counsel representing Mr Craig at the trial. The following exchange then occurred:

Mr Antunovic: Morning, Ma'am. Not a great deal that I need or want to say unless I can assist you, but except that since late yesterday after there has been a lot of discussion and a lot of careful consideration given, I am sure, by each of the defendants in their own position. Can I say to you and Mr Craig has a desire to try and resolve this matter if it is possible and he is very interested in the proposed resolution. But Your Honour will understand he is 27 now. There are risks for him in proceeding, obviously. *There are supposed perceived risks for him in resolving it, and what would assist him, Ma'am, is if you were able to give some kind of indication that you might adopt, be prepared to adopt the Crowns position on sentencing, which for him, as I understand it is that there would be a starting point of two years' imprisonment should he plead guilty to the charge of indecent assault, that a discount of around 15% then for his plea of guilty, which might then, ordinarily, result in the imposition of a sentence of 10 months' home detention if the Court considered that that in the end was the appropriate way to deal with the matter, and if he had some assurance that that could well be the ultimate outcome, that*

I think he would be prepared to resolve matters today, Your Honour.

The Judge: Well I cannot give an assurance that it would be, but if you mean what you say, Mr Antunovic, that an assurance is sought that it could be.

Mr Antunovic: Mmm.

The Judge: Did you say, "Could", not, "Would."

Mr Antunovic: It is probably –

TheJudge: There is a big difference isn't there?

Mr Antunovic: Yes, there is. Well, it is –

Th Judge. *One is a sentence indication which I have, I was going to ask how is this different from a submission and a hearing on a sentence indication which I have said I have not going to give because I do not have the power to do that. But how could I say that it could not be the ultimate outcome. I cannot say that. It could be. I would always listen as carefully to Crown submissions as I would to any defendant submissions.*

Mr Antunovic: *Yes, I am –*

The Judge: *And here, where they aligned that is something further that I would take into serious account.*

Mr Antunovic: *Yes, thank you, Your Honour. Well that may assist.*

The Judge: Is it still an all or nothing outcome? Well, I suppose I should have directed that at the Crown, that question.

Mr Antunovic: I understand so, Your Honour.

The Judge: All right. Thank you.

Mr Antunovic: Yes, I understand, that that is so, and that the, all of the defendants, and I hope I am not speaking out of turn, are very keen to resolve this. But you will understand that they, there is an interest in their part in this trial as well, fairness for not only the complainant in, and not only a recognition of the public interest, but also the interests of the individuals who have most at stake here, which are those five men in the dock, and that, I suppose, we are all just trying to do our best for our clients.

The Judge: Yes.

Mr Antunovic: To get them as much certainty –

The Judge: Of course.

Mr Antunovic: – as possible, Your Honour.

The Judge: *And can I, I do not want to foreclose submissions, but can I indicate to all counsel that my response, so that it is necessary, counsel do not feel it is necessary to make the identical submission, and ask the identical question, that would be the case for all, well I cannot say that, sorry. When you say that this could be the ultimate outcome.*

Mr Antunovic: It would be nice –

The Judge: *I cannot foreclose any ultimate outcome including the one that you have postulated for Mr Craig. That would be to close my mind at this early stage.*

Mr Antunovic: Of course, yes.

The Judge: But I cannot give a sentence indication.

Mr Antunovic: Thank you, Ma'am.

The Judge: Thank you, Mr Antunovic.

Mr Antunovic : I do not think I can assist any further.

The Judge: Thank you.

[27] Thereafter the Judge heard submissions from the Crown regarding other cases in which charges had been downgraded after the trial had commenced. During this discussion the Judge asked Ms Carter to address the principle that the charges needed "to adequately reflect the essential criminality of the conduct and provide sufficient scope for sentencing to reflect that criminality."[20] Ms Carter advised the Judge that she considered she had already addressed this issue. She said the Crown accepted that the facts in the new summary "would amount to sexual violation", but submitted the public interest was nevertheless served by lesser charges.

[28] At the end of this discussion the Judge heard further submissions from Mr Antunovic and Ms Ord, representing Mr Whitinui, regarding other examples of cases in which a lesser charge had been substituted during the course of a trial. The Judge then asked Ms Carter whether the fact that the charges had been amended primarily as a result of the Crown's concerns about the wellbeing of the complainant would be referred to in public documents such as sentencing notes. The Judge said it was very important from her perspective to have the proposed outcome in a form that

---

20 At 8.1.

could amount to a public document. Ms Carter said the Crown would have no issue with this information being included in any sentencing decision to provide an understanding of why the Judge had agreed to the Crown's proposal.

[29] At that point the discussion moved to the mechanics of implementing the proposal, including the preparation of amended charges and the entry of guilty pleas to those charges. At the end of this discussion the Judge advised counsel that she would grant the Crown leave to amend the charges. She then adjourned to enable the Crown an opportunity to prepare the amended charges and to give defence counsel the opportunity to discuss the position with their clients. The Judge then took a 15 minute adjournment at 11.18 am.

[30] When the in chambers legal discussions resumed at 12.03 pm Mr Antunovic advised the Judge that it seemed there was a unanimous resolution. He also suggested that the defendants be arraigned in the absence of the jury so that no problem would arise if any defendant changed his mind and elected not to enter guilty pleas to the new charges. Ms Carter then presented the Judge and defence counsel with the new Crown Charge Notice and the Judge granted leave for the charges to be amended accordingly. A discussion then ensued as to whether the jury should be present or whether they should be discharged prior to the pleas being entered. The Judge ultimately agreed that pleas should be entered in the absence of the jury, after which the jury would return to the courtroom where they would be discharged after being told what had occurred.

[31] The defendants were then arraigned on the new charges and each entered guilty pleas to them.

[32] We set this narrative out in some detail not only because it relates to some of the arguments advanced on appeal but also to highlight the difficulties that can arise where counsel seek to resolve criminal charges in this way during the course of a trial. In particular, it highlights the pressure such a process places on counsel and Judge when all are conscious that a jury is waiting to return to the courtroom.

Issues arising out of the process followed in this case

[33] Several arguments were addressed to us arising out of the process that led to the amendment of the charges and the entry of guilty pleas to the new charges. Mr Nicholls submitted on Mr Craig's behalf that the Judge was wrong to decline to give a sentence indication when asked to do so at the conclusion of the complainant's evidence. We reject that submission because it flies in the face of the plain wording of s 61(1) of the Criminal Procedure Act. Section 61(1) only permits a formal sentence indication to be given where that is requested by a defendant prior to the commencement of the trial.

[34] Ms Hall pointed out on Mr Thompson's behalf that this Court has not categorically excluded the possibility of an informal sentence indication being given during the course of the trial. In *Whichman v R,* the appellant and counsel assisting the Court had argued that such a process would be a nullity because it infringed s 61(1).[21] Counsel for the Crown submitted that the informal nature of a sentence indication did not undermine the validity of guilty pleas that followed. In that context this Court observed:

> [47] It is unnecessary for us to decide the point, although we think there is some force in [the Crown's] submission. We would not want to be taken by this judgment to exclude altogether the possibility of an informal sentence indication during trial. But if that were to occur, the judge will need to be sure that the sentence indicated and its practical implications as to duration and effect are spelled out and understood, and that there is adequate time for careful advice and consideration. That may well be difficult to achieve in a part-heard trial, particularly where witnesses are waiting to be heard or a jury is waiting to return. If circumstances preclude this standard being met, as was the case here, the request for an indication should be declined. It will then be the defendant's choice whether to plead guilty at that point, without an indication.

[35] These observations are obviously apposite to the present case. Any informal sentence indication given during this trial would necessarily have been undertaken with a minimum of preparation and whilst the jury was waiting to return. Furthermore, counsel and the defendants would not have had an adequate opportunity to consider the indication. For these reasons we do not consider the Judge can be criticised for declining to give a sentence indication during the trial.

---

[21] *Whichman v R* [2018] NZCA 519.

[36] The most significant issue that now arises, however, is that all three appellants contend they were taken by surprise at sentencing when the Judge adopted starting points of five years' imprisonment in the case of Messrs Troon and Thompson and three years' imprisonment in the case of Mr Craig. They say the Judge must have known when the discussions took place on 28 August 2018 that she would be likely to adopt starting points at around those levels. They argue the Judge should have advised them of her intentions at that time so they could have considered their positions more carefully. In particular, Mr Troon and Mr Craig contend that the Judge ought to have told them home detention was not likely to be an available sentencing option before they entered their guilty pleas. Had they known this was the case they could have continued to defend the existing charges. Mr Tennet goes so far as to suggest on Troon's behalf that a miscarriage of justice has occurred and this Court must now do whatever it takes to remedy it.

[37] We do not accept this submission for several reasons. First, we consider it highly unlikely that the Judge would have formed any views at all by 28 August 2018 regarding the appropriate starting points for the sentences to be imposed on the amended charges. She did not receive the amended summary of facts until she was discussing the proposed amendment of charges with counsel for the Crown, and the issue of the appropriate starting points for sentences to be imposed on the new charges was never raised by any counsel.

[38] More importantly, we consider the Judge made her position clear in the highlighted passages of the trial transcript set out above.[22] She was not prepared to provide a sentence indication and she was not prepared to say she would impose end sentences of the type suggested by the Crown. She explicitly said that to do so would mean she had closed her mind regarding the issue of sentence at an early stage. We consider this was entirely appropriate given the fact that the Judge had not received submissions from either the Crown or the defence, and had not had any opportunity to undertake the factual and legal analysis required in an orthodox sentencing.

---

[22] At paragraph [26] of this judgment.

[39] We consider the problems in the present case have arisen because of the enthusiasm with which the Crown promoted the amendment of charges and made known its likely stance regarding sentence. The Crown appears to have taken that approach largely because it believed it would be in the best interests of the complainant. Although the Judge said she would take into account areas in which the defence and Crown were aligned in relation to sentence, she stopped well short of endorsing the Crown's position.

[40] We therefore do not consider the process that led to the amendment of the charges led to a miscarriage of justice. Mr Thompson could not have been under any illusion as to the likely end sentence he would receive because the Crown had made it plain from the outset that he would be required to serve a sentence of imprisonment. We also consider this is what Mr Antunovic was referring to in the passage set out above at [26] when he told the Judge there were "perceived risks" in Mr Craig accepting the resolution suggested by the Crown. Finally, it is noteworthy that on 28 August 2018 Mr Troon signed a confirmation of his instructions to his counsel after he had entered his guilty pleas to the amended charges the previous day. In this he stated "I understand Judge made no indication for end sentence which leaves open imprisonment or home detention."

Were the sentences manifestly excessive?

The starting points

Mr Thompson

[41] In fixing the starting point for the sentences to be imposed on Mr Thompson the Judge observed that several features of his offending applied to all the defendants:[23]

> [39] The features that aggravate the offending are the same for each defendant. You carry some responsibility for the harm to S which she described in her victim impact statement, although of course I cannot attribute to your offending particular identifiable harm. The difference in age is a relevant factor. She was 17. You were 26. And you acted as a group of multiple offenders. Ms Hall submitted "group or multiple sex is not

[23] Sentencing Notes, above n 2.

> uncommon with young people". In my view the submission overlooks the non-consensual aspect of this occasion.

[42] The Crown had suggested a starting point for Mr Thompson of three years and six months' imprisonment.[24] The Judge disagreed. She considered a five year starting point, being approximately two-thirds of the maximum penalty, recognised the statutory principle that a sentence near to the maximum should be imposed for offending that falls within the most serious of cases for which the penalty is prescribed.[25]

[43] We largely agree with the Judge's assessment of the aggravating features of Mr Thompson's offending although we do not consider the disparity between the ages of the defendants and that of the complainant was of particular significance. All three appellants were either 25 or 26 years of age at the time of the offending but there does not appear to have been any suggestion they were aware the complainant was only 17 years of age and still at school. We do not consider it likely, however, that the Judge gave this issue a great deal of weight in fixing the starting point for any of the defendants.

[44] There is no guideline judgment of this Court for the offence of indecent assault for the obvious reason that it can be committed in an infinite variety of ways. The starting points adopted in other cases will therefore seldom provide assistance in fixing the starting point on this type of charge. The aggravating and mitigating factors relevant to the offence will therefore usually provide the greatest assistance because they inform the overall culpability of the offending having regard to the maximum sentence for the charge.

[45] The most significant aggravating factors of Mr Thompson's offending were that he committed two serious indecent assaults that involved the penetration of the complainant's mouth vagina without her consent. This occurred after the complainant had effectively been held against her will by a group of young males. Mr Thompson was also the person who initiated the offending when he led the complainant to his bedroom immediately after the group arrived at his address.

---

[24] At [40].
[25] Sentencing Act 2002, s 8(d).

[46] We consider each of the two indecent assaults fell within the most serious in terms of culpability for offending of this type. As the Judge observed, it is difficult to imagine indecent assaults more serious than non-consensual penetration of the complainant's vagina with a beer bottle and penetration of her mouth with a penis. For that reason s 8(c) of the Sentencing Act 2002 was engaged, and the Judge was required to impose the maximum penalty for the offence unless the circumstances of the offender rendered that inappropriate. The maximum sentence for each charge was seven years imprisonment.

[47] We therefore consider a starting point of at least seven years imprisonment would have been appropriate having regard to the nature of the offending and in the absence of circumstances relevant to Mr Thompson that made such a sentence inappropriate. The overall starting point of five years imprisonment was below that which should have been selected.

Mr Troon

[48] Like Mr Thompson, Mr Troon pleaded guilty to two charges of indecent assault. One involved non-consensual penetration of the complainant's vagina by his penis and the other involved the non-consensual insertion of his penis in the complainant's mouth.[26]

[49] It will be obvious from what we have already said that we consider a starting point of five years imprisonment for this offending to be lenient, and that a higher starting point was appropriate.

Mr Craig

[50] Mr Craig pleaded guilty to a single charge of indecent assault arising out of the fact that he inserted his penis in the complainant's mouth without her consent.[27] The Crown contended a starting point of two to two and a half years imprisonment

---

[26] Sentencing Notes, above n 2, at [89].
[27] At [55].

was appropriate for this charge but the Judge adopted a starting point of three years imprisonment.[28]

[51] The aggravating features of Mr Craig's offending were largely the same as those of Mr Thompson and Mr Troon, but he only faced one charge whereas they faced two. Our earlier comments relating to the application of s 8(c) apply.

Aggravating and Mitigating factors

Mr Thompson

[52] Mr Thompson was 26 years of age at the time of the offending. The Judge noted that he had 38 previous convictions and had served 17 sentences of imprisonment.[29] He also showed lack of remorse for the present offending. The Judge considered these factors would ordinarily justify an uplift in the starting point, but she offset them against issues raised in a comprehensive report from a psychologist that had been made available prior to sentencing.[30]

[53] The report reveals that Mr Thompson has suffered for many years from undiagnosed cognitive issues.[31] The report describes his IQ, working memory and perceptual reasoning described as being borderline, and he is easily led by others. He is also within the low average range for adaptive functioning. This measures whether an individual displays the functional skills necessary for daily living without assistance. His verbal comprehension also fell on the cusp the extremely low range. This factor resulted in him receiving communications assistance at the trial. In addition, Mr Thompson's heavy use of alcohol and substances may have exacerbated pre-existing central nervous system vulnerabilities, some of which may now have been reversed by the period of abstinence forced on him by the period he has spent in custody.[32] Finally, Mr Thompson is at risk of foetal alcohol syndrome disorder and neurodevelopmental disorder.[33]

---

28 At [55]–[64].
29 At [48].
30 At [48].
31 At [46(a)].
32 At [46(b)].
33 At [43].

[54] The Judge accepted the Crown's submission that the report did not conclude these issues may have contributed to the present offending.[34] As a result, the Judge concluded she could not reduce the sentence to reflect the issues identified in the report. Instead she elected not to apply an uplift to reflect the aggravating factors she identified.

[55] We accept Ms Hall's submission that lack of remorse is not an aggravating factor. Rather, it is the absence of a mitigating factor. We also accept Ms Hall's submission that, although Mr Thompson has numerous previous convictions, the vast majority relate to offending that has no relevance for present purposes. He has no previous convictions for sexual offending. Furthermore, Mr Thompson's previous convictions for offending involving violence or threats of violence appear to have been sustained in a family violence context. Offending of that type is obviously serious but the present offending is very different in nature. This means we accept Ms Hall's submission that the principles justifying an uplift for previous convictions were not engaged in Mr Thompson's case.

[56] The Judge was clearly concerned to provide discrete recognition for the issues Mr Thompson faces, however, and we consider she was correct to do so. Although those issues may not have contributed directly to the present offending they are likely to cause difficulties for him in serving a sentence of imprisonment. We consider that in the ordinary course of events a discount of around ten per cent, or six months, would have been justified to recognise this mitigating factor.

[57] The other mitigating factor available to all defendants was that relating to the immediate entry of guilty pleas to the amended charges. Counsel for the defendants had contended this factor warranted the maximum available discount of 25 per cent. The Judge did not accept this was appropriate for the following reasons:[35]

> [28] The credit to be given for a timely guilty plea reflects the benefits to the justice system and to the participants, including of course complainants who are spared having to give evidence. I accept guilty pleas were entered quickly following discussions with the Crown about amendment and

---

34 At [48].
35 Sentencing Notes, above n 2.

withdrawal of charges. In *Johnson v R* a guilty plea was entered on the morning of the trial in response to a lesser charge. The Court of Appeal was satisfied a 10 per cent discount was appropriate. The victim would have already suffered the anxiety attendant on expecting to give evidence, the jury had been empanelled and the Court had already allocated significant resources to dealing with the matter.

[29] So too in this case, S not only endured the anxiety of anticipating her return from overseas for the purpose of giving evidence but was cross-examined by five counsel over a three-and-a-half day period.

[30] But I do accept there was nevertheless a benefit to S from the guilty pleas. It is a matter of record that when S had completed her evidence and there was no prospect of being recalled Ms Carter spoke to her about the outcome she would wish to have from the trial. Ms Carter said: "validation is for her the most important thing". From the professionals' point of view there was a good chance S would progress following guilty pleas, whereas otherwise there were real concerns for her safety.

[31] But the guilty pleas were not acts of self-sacrifice by any defendant. Ms Hall submitted it would have been understandable if her client had rejected the Crown offer but to his credit he chose not to await the jury verdict and to enter a plea of guilty.

[32] I observe that S was unexpectedly steadfast in her evidence notwithstanding the sustained cross-examination. I say "unexpectedly" because, as everyone who was involved in the trial was aware, there was a very real possibility, right up until the point when she was sworn, that S would not be strong enough to give evidence. But she gave evidence and withstood lengthy cross-examination. I do not share counsel's view that the cross-examination significantly impacted on the credibility of the complainant. In pleading guilty each defendant avoided any possibility of a jury verdict against him in respect of charges of sexual violation attracting a maximum period of 20 years imprisonment. There is no room for regarding any of the guilty pleas as synonymous with self-sacrifice. The pleas to lesser charges presented obvious benefits to the defendants in addition to the incidental benefit to S.

[33] In the circumstances, and in light of broadly analogous cases, I consider 10 per cent discounts from individual starting points to be appropriate.

(Footnotes omitted).

[58] Discounts of greater than ten per cent are rarely given for guilty pleas entered once a trial has begun.[36] That is particularly so where a complainant has already been required to give evidence. We consider the circumstances that arose in the present case are significantly different, however, to those in most other cases where the Crown

---

[36] See for example *Harris v R* [2018] NZCA 632; *Heta v R* [2012] NZCA 267; *Opetaia v R* [2011] NZCA 621; *Woods v R* [2011] NZCA 573; *Yim v R* [2017] NZCA 421; and *O'Carroll v R* [2016] NZCA 510 at [60]–[62].

agrees to accept a guilty plea to a lesser charge shortly before the trial is about to commence. In the present case the Crown actively promoted the amendment of the charges after the complainant had completed her evidence. As we have already observed, the Crown took that step primarily because it considered such an outcome to be in the best interests of the complainant. We therefore do not regard the entry of guilty pleas as being an incidental benefit to the complainant as the Judge described.

[59] The defendants undoubtedly also gained a benefit because they received an opportunity to plead to lesser charges and thereby eliminate the risk of conviction on charges that would result in much greater sentences being imposed. We do not consider that fact detracts from the value of the pleas from the perspective of the Crown.

[60] The panel has differing views as to the appropriate level of discount in the unusual circumstances of this case. That does not matter, however, because for the reasons already given we consider the Judge selected a starting point well below that which the culpability of the offending required. As a result, no further adjustment is required to reflect either of the mitigating factors advanced on Mr Thompson's behalf because the present end sentence of four years and six months' imprisonment is plainly not manifestly excessive.

Mr Troon

[61] The Judge acknowledged that this was Mr Troon's first conviction for sexual offending and the pre-sentence report assessed him as presenting a low risk of similar offending in the future.[37] He had very few previous convictions and had undertaken employment and begun progressing towards an apprenticeship since the offending occurred. The Judge considered those factors warranted a discount, but the extent of any discount was offset by the fact that he essentially continued to deny the offending occurred.[38] He was only regretful that he had placed himself in a position in which he could be accused of the acts alleged by the complainant. The Judge therefore applied a discount of four months to reflect these factors.[39]

---

37 Sentencing notes, above n 2, at [96].
38 At [97].
39 At [99].

[62] Mr Tennet attempted to persuade us that the Judge should have applied a greater discount to reflect the positive features she identified. Again, however, these arguments cannot overcome the hurdle posed by the starting point the Judge adopted. On any view of the facts the end sentence of four years and two months' imprisonment was not manifestly excessive.

Mr Craig

[63] The Judge noted that Mr Craig had a number of previous convictions, none of which were relevant for sentencing purposes.[40] He had told the writer of the pre-sentence report that he was regarded as a good worker by his employer, but he did not provide contact details to enable this to be verified.[41] The pre-sentence report assessed Mr Craig as presenting a moderate risk of reoffending in the future because of his use of alcohol.[42] Alcohol and drug use had been a contributing factor in previous offending.

[64] Furthermore, Mr Craig had expressed no remorse for the offending and stated that the complainant had welcomed his actions.[43] He considered the complainant was as much a party to the situation as he and his associates. The writer of the report described Mr Craig's offending as being opportunistic and influenced by his inability to exercise self-control in a peer-group situation.

[65] Given those factors the Judge was not prepared to make allowance for any mitigating factors other than guilty plea and time spent subject to a bail condition requiring him to observe an evening curfew. The Judge applied a discount of one month to reflect the latter.[44]

[66] We see no reason to differ from the Judge in relation to the level of discount to be applied for mitigating factors.

---

40 At [65].
41 At [68].
42 At [69].
43 At [70].
44 At [72].

Result

[67] The appeals against sentence are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent