ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF RETRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

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IN THE SUPREME COURT OF NEW ZEALAND

SC 124/2016
[2017] NZSC 165

BETWEEN	CYRUS CHRISTIAN (AKA WILLIAM JOHN TASSELL) Appellant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	N Levy for Appellant A Markham for Respondent
Judgment:	6 November 2017

JUDGMENT OF THE COURT (SENTENCE)

A **The sentence of imprisonment for a term of ten years for count 2 is quashed and a sentence of imprisonment for a term of eight years and eight months is substituted.**

B **An order is made prohibiting publication of the judgment and any part of the proceedings (including the result) in any news media or on the internet or on any other publicly available database until final disposition of the retrial. Publication in a law report or law digest is permitted.**

REASONS
(Given by O'Regan J)

Background

[1] On 26 September 2017, this Court allowed Mr Christian's appeal against conviction on two of the three counts on which he had been convicted at trial. However, the Court (by majority) dismissed his appeal in relation to one count, a specific count of rape, which was count 2 in the indictment.

[2] In relation to sentence, the judgment of the majority said:[1]

> **Sentence**
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> [74] Judge Bidois sentenced the appellant to a term of imprisonment of 13 and a half years on each of the two representative charges of rape (counts 4 and 5) and 10 years' imprisonment on the specific rape charge (count 2), such sentences to be served concurrently. The representative counts were the lead charges for sentencing purposes. The imposition of the concurrent sentence of 10 years' imprisonment for count 2 is not the subject of separate reasoning. The sentences for counts 4 and 5 are now quashed, which, in the absence of any further consideration, would leave the 10 year sentence for count 2.
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> [75] Section 386(1) of the Crimes Act [1961] provided:
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> > **386 Powers of appellate courts in special cases**
> >
> > (1) If on any appeal under section 383 it appears to the Court of Appeal or the Supreme Court that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant or pass such sentence in substitution therefor as it thinks proper and as may be warranted in law by the verdict on the count or part of the indictment on which the court considers that the appellant has been properly convicted.
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> [76] Unlike its successor provisions ss 236 and 241 of the Criminal Procedure Act [2011], it did not provide for the case to be remitted to the trial court for re-sentencing.
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> [77] We have not heard from counsel on sentence. Given the outcome of the appeal, we will provide an opportunity for counsel to make submissions as to the sentence that should be imposed in relation to count 2, in particular,

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[1] *Christian v R* [2017] NZSC 145. The majority comprised William Young, Glazebrook, O'Regan and Ellen France JJ.

> whether the 10 year sentence imposed by the Judge should stand. Once we have received and considered those submissions we will determine the sentence that should apply in relation to count 2.

[3] We have now received submissions from counsel for Mr Christian and counsel for the respondent.

[4] The Chief Justice dissented and would have allowed Mr Christian's appeal in full. On her view of the case, therefore, the need to determine the appropriate sentence for count 2 would not have arisen. However, as her view did not prevail and it is necessary for the Court to determine the sentence to be imposed for count 2, she has participated in the preparation of this judgment.

The offending

[5] The circumstances of the offending were described in the majority judgment as follows:

> [7] At the time of the events leading to the charges against the appellant, he ran a church, founded by him, in a small provincial town. The complainant's mother became a member of the church. When the complainant was aged 13 or 14, she moved to live on the appellant's property in an old house. The appellant slept in a different building on the same property.
>
> [8] Three to four weeks after the complainant moved to live in the appellant's property, the first rape occurred. The complainant said she thinks she was about 13.[2] The appellant came into the house in which she was living. She said he first lifted her upper clothing and sucked her breast (this was the basis of count 1, an indecent assault charge on which the appellant was acquitted). The complainant also said the appellant removed her pants and raped her. This was the basis of count 2, a charge of rape. She said she did not say anything to the appellant because she was too scared and did not know what to say. However, she said she did not consent and did not know what the word consent meant.

R v AM

[6] Counsel for Mr Christian and for the respondent accepted that the sentence to be imposed should be determined applying the approach taken by the Court of Appeal in *R v AM (CA27/2009)*.[3] For Mr Christian, Ms Levy submitted that the

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2 In cross-examination the complainant accepted that the incident could have happened in 1998, by which time she would have been 14.

3 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

offending was within rape band one of *R v AM*; for the respondent, Ms Markham submitted that it was offending of moderate seriousness within rape band two.

[7] In *R v AM*, the Court of Appeal said, in relation to rape band one:

> [93] This band will be appropriate for offending at the lower end of the spectrum; that is, offending where the aggravating features are either not present or present to a limited extent. Rape band one is not an appropriate band for offending where the level of violence is serious, the case involves an extended abduction, a victim who by reason of factors such as age (children or elderly persons) or mental or physical impairment is vulnerable or an offender acts in concert with others.

[8] It set a sentence starting point range of 6–8 years for that band.[4]

[9] The Court set a sentence starting point range of 7–13 years in relation to rape band two.[5] It described that band as follows:

> [98] By comparison with rape band one, this band is appropriate for a scale of offending and levels of violence and premeditation which are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.

Submissions

[10] Ms Markham submitted that the aggravating factors were the complainant's age (13 or 14),[6] the significant age disparity (Mr Christian being over 20 years older than the complainant) and the complainant's vulnerability arising from her isolation, naivety and poor relationship with her abusive mother. Mr Christian's actions were an abuse of trust, arising from his status as the complainant's de facto guardian and his position as a church "Minister".

[11] Ms Levy argued the case was similar to *R v Wirangi*,[7] which is given as an example in *R v AM* of a case where a starting point at the higher end of rape band one had applied. In *R v AM*,[8] the Court said this about *R v Wirangi*:

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4 At [90](a).
5 At [90](b).
6 See above at n 2.
7 *R v Wirangi* [2007] NZCA 25. The end sentence in that case was eight years' imprisonment.
8 *R v AM,* above n 3, at [94] (footnote omitted).

> *R v Wirangi*: O, 38, was a friend of 16 year-old V's family and was asked to look after the home of a relative in which V was staying. One night after watching videos with her, he exposed himself. V asked him to leave. She went to bed and was awoken by O removing her clothes. He raped her and then masturbated in front of her before leaving.

[12] Ms Levy said another similar case was *R v S*,[9] which was also summarised in *R v AM*. *R v S* was cited as an example of a case with a starting point at the lower end of rape band two:[10]

> *R v S*: O was the father of V's sibling. V, female, 17, moved in with him not long before the rape but appears to have viewed him as a father figure, calling him Dad. V was drinking heavily at the time. O invited V to accompany him while he was away on a business trip, buying her alcohol on the way. They went to a motel room with a queen and a single bed. O purchased more alcohol, which V drank. He invited her to lie on the queen bed, which she did in the apparent expectation he would sleep on the single. She fell asleep and woke to find O touching her breasts and fondling her. He then penetrated her with his fingers and went on to rape her from behind.

[13] In that case the end sentence was nine years' imprisonment, reflecting an uplift of one year from the starting point of eight years.[11]

[14] Ms Markham argued that the present case was more serious than both *R v Wirangi* and *R v S*, and that a starting point of ten years' imprisonment was appropriate. She argued that Mr Christian's cynical abuse of his position as a religious leader warranted specific recognition.

[15] On the other hand, Ms Levy argued that a starting point of 7–8 years was indicated, and that a six month discount should be allowed for the lengthy period of some 22 years in which no similar offending has occurred.

Our assessment

[16] We see the present offending as being at the lower end of rape band two of *R v AM*. We do not think it is substantially different from the offending described in *R v S*, (which also involved a vulnerable complainant and an abuse of trust by the offender) but the complainant in the present case was younger at the time of the

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9 *R v S* [2009] NZCA 210.
10 *R v AM*, above n 3, at [98] (footnote omitted).
11 *R v S*, above n 9, at [42].

offending. We consider the sentence of ten years' imprisonment imposed by the trial Judge is too high when count 2 is considered in isolation from the other counts, in respect of which the convictions have been quashed. We consider a starting point of nine years is appropriate.

[17] In the original sentence, Judge Bidois gave Mr Christian a small credit of six months (from a starting point of 14 years for the representative counts) "to reflect the fact that you have not been in any trouble over the last 15 odd years".[12] We are prepared to give a proportionate credit in this case of four months, which provides an end sentence of eight years and eight months.

Result

[18] The sentence of ten years' imprisonment imposed by Judge Bidois in relation to count 2 is quashed. Mr Christian is sentenced to a term of imprisonment of eight years and eight months on that count. For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in any news media or on the internet or on any other publicly available database until final disposition of the retrial. Publication in a law report or law digest is permitted.

Solicitors:
Crown Law Office, Wellington for Respondent

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12 *R v Tassell* [*Christian*] DC Tauranga CRI-2012-087-1863, 25 July 2014 at [10].