SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2019 0047

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

TARKAN POLAT (a pseudonym)[1] — Respondent

JUDGES:	MAXWELL P, BEACH JA and CROUCHER AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	6 March 2020
DATE OF JUDGMENT:	25 June 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 174
JUDGMENT APPEALED FROM:	[2019] VCC 92 (Judge Wilmoth)

CRIMINAL LAW – Appeal – Sentence – Crown appeal – Incest (four charges), sexual penetration of child under 16 – Sentence of 6 years' imprisonment on each incest charge – Cumulation of 9 months of each sentence – Total effective sentence 9 years and 3 months' imprisonment, non-parole period 6 years – No challenge to individual sentences – Whether orders for cumulation resulted in inadequate total effective sentence and non-parole period – Objectively serious offending – Breach of trust, abuse of parental authority – Psychological manipulation – Offending persisted over long period – Increased culpability with successive offences – Respondent sentenced as serious sexual offender on two incest charges – Presumption of cumulation – Whether orders for cumulation reflected separate criminality of individual offences – Appeal allowed – Orders for cumulation set aside – Resentenced to 12 years and 6 months' imprisonment, non-parole period 9 years – *Sentencing Act 1991* ss 6D, 6E.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Ms D Piekusis QC with Ms A Roodenburg	Ms A Hogan, Solicitor for Public Prosecutions
For the Respondent	Ms S Flynn QC with Dr J McColl	Victoria Legal Aid

[1] To ensure that there is no possibility of identification of the victim of the sexual offending, this judgment has been anonymised by the adoption of a pseudonym in place of the name of the respondent.

MAXWELL P
BEACH JA:

Summary

1 On 24 September 2018 the respondent ('TP') pleaded guilty to four charges of incest in relation to his stepdaughter ('A') and one charge of sexual penetration of a child under 16. The latter offence was committed against a girl ('B') who was the daughter of family friends of TP and his wife. On 8 February 2019 TP was sentenced as follows:

Charge on indictment	**Offence**	**Maximum**	**Sentence**	**Cumulation**
1.	Incest[2]	25 years	6 years	Base
2.	Incest	25 years	6 years	9 months
3.	Incest	25 years	6 years	9 months
4.	Incest	25 years	6 years	9 months
5.	Sexual penetration of a child under 16[3]	10 years	3 years	1 year
Total effective sentence:		9 years and 3 months' imprisonment		
Non-parole period:		6 years' imprisonment		
6AAA statement: 10 years' imprisonment with a non-parole period of 7 years' imprisonment				
Other relevant orders: TP was sentenced as a serious sexual offender in respect of charges 3 to 5. *Sex Offenders Registration Act 2004* – reporting for life. 464ZF forensic sample order.				

2 The Director of Public Prosecutions has appealed against the sentence. The Director does not challenge the individual sentences, having taken the view that they were within range. She contends, however, that the orders for cumulation on charges 2, 3 and 4 were wholly outside the range and resulted in a total effective

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2 Pursuant to s 44(1) of the *Crimes Act 1958*.

3 Pursuant to s 45(1) of the *Crimes Act 1958*.

sentence and non-parole period which were both manifestly inadequate.

3 Although each of charges 1 to 4 concerned a single act of incest, it was accepted that the act giving rise to charge 1 had been repeated two to three times per week over a period of years and that the act giving rise to charge 4 was repeated over two years. Those matters were put before the sentencing judge to provide context for the charged acts. The Director submits that the offending became more serious over time, both because of its persistence and because of TP's psychological manipulation of A in the later period.

4 According to the Director's submission, the cumulation of only 9 months of each of the sentences on charges 2, 3 and 4 was wholly inadequate to reflect the separate criminality involved in each offence. The Director pointed out that, although TP was sentenced as a serious sexual offender on charges 3, 4 and 5, the cumulation ordered on charges 3 and 4 was the same as that on charge 2. This showed, it was said, that the judge had failed to give effect to the different requirements applicable to the sentencing of a serious sexual offender.

5 For the reasons which follow, we would allow the appeal. In our view, it was not reasonably open to her Honour to make the orders for cumulation which she did. This was extremely serious offending and those orders failed to recognise both the separate criminality of each offence, and TP's increased culpability on each successive occasion of offending against his stepdaughter. Moreover, the manifestly inadequate orders for cumulation led to a manifestly inadequate total effective sentence and non-parole period.

6 We would set aside the orders for cumulation with respect to the sentences imposed on charges 2, 3 and 4 and substitute orders that there be cumulation of 18 months, 24 months and 24 months respectively. The result is a total effective sentence of 12 years and 6 months, and a non-parole period of 9 years.

Factual background

7 The circumstances of the offending were as follows. TP married A's mother in December 2000, when A was 4 years old. Between 2002 and 2007 (when she was aged between 6 and 11 years), A woke up to TP kneeling at her bed, touching and penetrating her vagina with his fingers, having moved her pyjama bottoms and underwear to her knees (charge 1). This occurred two to three times per week and continued until late 2008 (context).

8 Between 2003 and 2008, A was in the lounge room playing a PlayStation game. TP sat behind her on the beanbag and started to play the game with her. He then inserted his fingers into her vagina (charge 2).

9 From late 2008 onwards, TP would come into A's bed in the middle of the night. He would lay next to her, touching and penetrating her vagina with his fingers. Sometimes she would be awake, sometimes asleep. Sometimes he would stay for a while, but he never stayed the whole night. Sometimes he would remove his shorts and 'spoon her' naked. He would try to place her hand on his penis and she would feel his hard penis pressing against her back and bottom (context).

10 In later years, TP played the role of a boyfriend who needed A. He would require her to visit him at work and tell her that he preferred her company to that of her mother. He continued regularly to penetrate her vagina with his fingers (context).

11 In 2009, when A was between 12 and 13 years old, she was alone at TP's workplace. He picked her up and sat her on one of the tables on the main floor of the factory. He touched her vagina with his hands. He then licked her vagina all over with his tongue, penetrating her vagina (charge 3).

12 When A began seeing a boy from her school, TP was jealous and acted upset and angry with A. In 2010, when A was between 13 and 14 years old, TP knelt in front of A crying and begging to have her to himself again. She agreed, as she did

not know what else to do. TP took her to the master bedroom. He placed A on her back on the bed and took her underwear down. He lay next to her and touched her vagina with his fingers. He then began licking her vagina with his tongue, penetrating her vagina (charge 4).

13 Over the next two years, TP continued to perform similar sexual acts upon A, touching and penetrating her vagina and licking her breasts. He pressured her to agree to the sexual acts, threatening to leave her mother or to kill himself. The sexual conduct continued after A knew it was wrong, as she 'did not know how to get out of it'.

14 B was the daughter of family friends of TP and his wife. She would sometimes stay the night at TP's house, in A's bedroom. Between 2005 and 2007, B was 13 to 15 years old. During the summer holidays, she stayed the night in A's room. During the night she woke up when she felt TP's hand touching her left breast. TP then moved his hand down her stomach and started playing with the pubic hair on her vagina. He moved his hand further down on her vagina and began squeezing it gently. He then put one or more fingers inside her vagina and felt around inside, before moving the finger/s in and out. This went on for a couple of minutes until he stopped (charge 5). He then left the room without saying anything.

Assessing offence seriousness

15 On the plea, defence counsel (who did not appear on this appeal) conceded that:

> sexual offending of the kind that [TP] has pleaded guilty to is objectively extremely serious and will have lasting consequences for all the complainants and all persons involved.

Counsel submitted, however, that the case lacked some of the aggravating features found in other cases of this kind. Specifically, there was no penile or anal penetration, no attendant risk of pregnancy and no inducement to avoid detection

and reporting.

16 Counsel conceded that the seriousness of the offending was aggravated by the breach of trust and 'the brazen circumstances in which some of the offending has occurred'. She submitted, however, that the absence of other aggravating features meant that the offending could be distinguished from the most serious examples of this type of offending.

17 The prosecutor concurred in the characterisation of the offending as 'objectively extremely serious'. Particular reliance was placed on the following matters as increasing its objective gravity, namely that:

- there were two victims;
- A was aged between six and 14, and B aged between 13 and 15, at the time of the respective offences against them;
- both victims were vulnerable to TP, and were exploited by him;
- the offending in relation to A was not isolated or transitory, but spanned a period of 8 years;
- the offending had had a 'multifaceted and significant and lasting' impact on the victims and their families;
- the offending against both victims represented a gross breach of trust; and
- the offending against A was persistent, and involved a considerable degree of emotional manipulation, including acts of coercion (such as the threat to leave A's mother, or to kill himself).

18 In her reasons, the sentencing judge drew particular attention to the content of the victim impact statements as demonstrating the gravity of the offending. Her Honour summarised the statements as follows:

> Your stepdaughter describes the exploitation and manipulation of her

> psychologically in terms that focus on this very harmful aspect of your sexual abuse of her. Your threats to her that you would kill yourself and your accusations to her that she had no feelings were indeed cruel and very distressing.
>
> Fortunately she has the maturity and insight to understand that she was dissociating from her experiences with you but she still suffers from the impact of the repression of her emotions. It affects her whenever she is placed under stress and it affects her relationships with her family and with her partner.
>
> She considers that her inability to focus at school might have compromised her academic ability and she fears for the future in terms of trusting men and being able to raise children confidently. She matured sexually at a very early age and wonders if this may have resulted from the early sexual stimulation by you.
>
> Apparently this is a [phenomenon] identified by recent research which also identified increased risks of serious illness such as heart disease associated with early sexual maturation, and her comprehension of this has caused her great concern.
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> The second complainant describes similar reactions in her victim impact statement. She had to continue seeing you at family events most weekends and had to pretend nothing had happened. She experiences what she describes as a lack of control in sexual situations because she fears the consequences of saying no.
>
> She feels emotionally blocked and her relationship with her mother has suffered. She has very disturbing nightmares and consequent lack of sleep which affects her work. She fears that she will be overprotective of her young daughter as she grows older. Rumination about what happened and whether she was at fault in some way often prevents her from focussing on ordinary chores and she has to use strategies to deal with this.
>
> Your former wife addressed you directly in her victim impact statement, citing the breach of trust you perpetrated by taking advantage of being a husband and father. You caused devastation to this family, with the effects still being felt, not only by the victim herself and her mother but by your younger daughters as well.
>
> She has to carry the burden of dealing with the many and varied emotional problems you have caused. As well as having to deal with her own emotional hurt, your former wife has had to return to study and work fulltime to support her family and even to pay your debts.[4]

19 In her Honour's view, the gravity of the offending was 'obvious' from what these statements showed about 'the grave effects upon the victims'. She accepted that some aggravating features — such as the risk of pregnancy or disease — were

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4 *DPP v Polat (a pseudonym)* [2019] VCC 92 [16]–[23] ('Reasons').

absent, but went on:

> However, your threats of suicide did amount to coercive and manipulative behaviour and your stepdaughter understood you to be suggesting that if she told her mother, life without you would be very difficult for the family.
>
> The aggravating features that were present include the gross breach of trust and the brazen circumstances in which the offending occurred, as well as the fact that you offended against two victims, and in the case of your stepdaughter over a long period of time, and in the context of what amounts to a type of de facto relationship, as you saw it.
>
> It is difficult to pinpoint the gravity of this type of offending, and similar cases can only provide limited guidance. The tension between objective and subjective assessment may make any conclusion a tendentious one. In this case the gravity is mid-range and in reaching that conclusion I take into account the context of frequent offending over a long period in respect of Charges 1 to 4 while emphasising that the sentence in each case is for a charge arising from one occasion.[5]

20 In relation to the offences committed against A, the Director's written case in this Court relied on many of the features referred to by the prosecutor on the plea as going to objective gravity: the duration of the offending, its frequency, the breach of trust, A's vulnerability, TP's coercive and manipulative behaviour in threatening A, and the 'significant and profound' impact on A's mental health and personal circumstances. It is necessary to deal with two of these matters which were explored in oral argument in this Court.

21 The first is the duration of the offending. The judge proceeded, as did both counsel, on the basis that the offending against A extended over an 8 year period. In this Court, senior counsel for the Director submitted that an important aspect of the seriousness of the offending, which needed to be reflected in the orders for cumulation, was that

> the offending was protracted, it occurred over some period of time, at a time when [A] was moving through childhood towards adolescence.
>
> …
>
> So it is a critical period of time in her development and her understanding of what is occurring.

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5 Reasons [39]–[41].

22 Senior counsel submitted that the offending against A became more serious over time, both by virtue of its persistence and because of TP's harmful psychological manipulation of A in the later period. This needed to be reflected in the orders for cumulation.

23 For her part, senior counsel for TP accepted that the offending could be characterised as 'recurrent' but submitted that the language of 'persistence' was not warranted. We note that the prosecutor on the plea had described the offending against A as 'persistent', but did not seek to differentiate between the successive offences. Nor did the prosecutor suggest that considerations of the kind discussed by this Court in *Director of Public Prosecutions v DDJ*[6] were engaged. In that case, the Court was dealing with charges of persistent sexual abuse of a child, and said:

> The repetition of the sexual abuse is likely to heighten the victim's fear that the abuse will occur again and to increase the damage which he or she suffers. Equally, the repetition is likely to make the offender progressively more aware of the effect the abuse is having on the victim. In each of these respects, culpability is heightened.[7]

24 In our view, there is much force in the Director's submission that when there is repeated offending against the same victim over a lengthy period of time — whether this is characterised as persistent or recurrent offending — the later offences can be viewed as becoming progressively more serious. We are not here relying on the *DDJ* analysis but on a more general — and uncontroversial — proposition, namely, that an offender who reoffends after an interval of time is more culpable on that occasion by virtue of the fact that he has had the opportunity, during the intervening period, to reflect on his conduct.[8] To decide, as TP did, to resume the sexual abuse of a child, which he knew to be wrong, was conduct calling for stronger denunciation and heavier punishment on each successive occasion.

25 In the present case, the Director disavowed any challenge to the individual

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6 (2009) 22 VR 444; [2009] VSCA 115 ('*DDJ*').

7 Ibid 452 [32] (Maxwell P, Vincent and Neave JJA).

8 *DPP v Bowd* [2019] VSCA 246, [28]–[29] (Maxwell P, T Forrest and Weinberg JJA).

incest sentences, which were identical. Nevertheless, we would uphold the Director's submission that this feature of persistence or recurrence should properly have been taken into account in assessing the appropriate orders for cumulation. It was a feature which bore directly on a recognition of the separate criminality involved in each offence.

26 The second issue concerns the frequency of the offending. According to the Director's written case:

> While the acts which are the subject of charges 1 to 4 represent separate and singular occasions, the sentencing judge accepted that these acts did not occur in isolation. The conduct the subject of charge 1 was accepted as being repeated two to three times per week until late 2008. Further, the conduct the subject of charge 4 was accepted as being repeated over two years after the charge end date of 2010. The charges were not representative or course of conduct charges, but the frequency of offending was led as context to highlight that the charged acts did not occur in isolation.[9]

27 As can be seen, the Director makes the conventional point that, although each charge alleged a single act of penetration of A, the uncharged acts provided 'context to highlight that the charged acts did not occur in isolation'. When regard is had to the sheer number of occasions on which TP penetrated A, however, the 'not in isolation' proposition seems to us to understate quite dramatically the seriousness of his offending.

28 Taking charge 1 as an example, the judge stated in her reasons that:

> Between October 2002 and October 2007 when A was aged between six and eleven [TP] would penetrate her vagina with [his] fingers as she lay asleep in her bed. Charge 1 relates to one of these occasions *and it happened two or three times a week during those years*.[10]

29 Given that the charge related to only one occasion, it was unnecessary for her Honour to be more specific about how long TP continued to offend against A at a frequency of 'two or three times a week'. But even if this only lasted for a year, there

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[9] In accordance with *R v Dunne* [2003] VSCA 150, [17] (Batt JA); *R v Reiner* (1974) 8 SASR 102, 105 (Bray CJ); *DPP v McMaster* (2008) 19 VR 191; [2008] VSCA 102.

[10] Reasons [3] (emphasis added).

would have been between 100 and 150 occasions of digital penetration. As was suggested during argument, there would seem to be a high degree of artificiality in laying a single offence charge in such circumstances. That does not, however, have any bearing on the issues before the Court.

30 The question explored in argument was whether the position would have been any different from a sentencing point of view had charge 1 been laid as a representative charge. As the decisions of this Court make clear, the offender is still only to be sentenced for the single offence the subject of the representative charge, and the fact of its being a representative charge likewise serves to preclude a contention by the defence that it was an isolated occurrence.[11]

31 The significant difference, however, is that in assessing the seriousness of the representative charge, and the offender's culpability, the sentencing judge is bound to take into account both the frequency of the sexual offending which the charge represents and the period covered by the charge.[12] Thus in *Walsh*, Maxwell P and McLeish JA said that the representative charge of incest in that case was to be viewed as

> significantly more serious, and [the offender's] culpability as significantly greater, than would have been the case if the charge of incest had been based on a single act, or a small number of acts …[13]

32 As the present case does not involve representative charges, it is unnecessary to explore this question further.

The adequacy of the orders for cumulation

33 As already noted, the Director disavowed any complaint concerning the individual sentences for incest and sexual penetration. Her submission was directed

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11 *DPP v Walsh (a pseudonym)* [2018] VSCA 172, [19] (Maxwell P and McLeish JA) ('*Walsh*'); *Crouch (a pseudonym) v The Queen* (2019) 58 VR 264, 271 [36]; [2019] VSCA 30 (Kyrou and Weinberg JJA).

12 *Walsh* [2018] VSCA 172, [20] (Maxwell P and McLeish JA).

13 Ibid [21].

at the orders for cumulation:

> [I]t was not reasonably open to the sentencing judge to have made orders for concurrency in the terms made, if proper weight had been given to all the circumstances of the offending and the offender. The result is a manifestly inadequate total effective sentence.

34 In view of the Director's strong submissions in this Court, and before the judge, about this being 'extremely serious offending', the acceptance of the individual incest sentences as being within range may be thought to be somewhat surprising. This is particularly so given the High Court's strong affirmation in *Director of Public Prosecutions v Dalgliesh (a pseudonym)*[14] of this Court's conclusion that current sentencing practices for incest did not reflect the objective gravity of this kind of offending or the moral culpability of the offender.

35 In support of her submissions on this appeal, the Director cited the following passage from this Court's decision in *Grantley (a pseudonym) v The Queen*:[15]

> Over the past two years there has been a dramatic change in the sentencing parameters for incest offences. In 2016, in *Director of Public Prosecutions v Dalgliesh (a pseudonym)*,[16] this Court upheld the Crown's submission that the sentences being imposed for incest offences of mid-range seriousness were
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> > disproportionately low when considered against the yardstick of the maximum penalty of 25 years' imprisonment, having regard to the objective gravity of the offending and the high moral culpability of the offender.[17]
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> The Court called for incest sentences to increase, saying:
>
> > In our view, current sentencing for incest reveals error in principle. The sentencing practice which has developed is not a proportionate response to the objective gravity of the offence, nor does it sufficiently reflect the moral culpability of the offender. Sentences for incest offences of mid-range seriousness must be adjusted upwards. That is a task for sentencing judges and, on appeal, for this Court. The criminal justice system can be — and should be — self-correcting.
> >
> > Incest is a crime of violence and must be so regarded. General and specific deterrence and denunciation must be given their proper

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14 (2017) 262 CLR 428; [2017] HCA 41 ('*Dalgliesh*').

15 [2018] VSCA 112 [20]–[24].

16 [2016] VSCA 148.

17 Ibid [7].

> emphasis. The long-term harm done to the victim, now better understood, must be given due weight in the sentencing calculus. Sentences must be commensurate with the seriousness of the breach of parental responsibility involved.
>
> On the current state of sentencing, there is no sufficient differentiation between worst case and mid-range offending. As we have said, sentences for mid-category offending have been constrained by sentences for worst category offending, and the sentencing range for mid-range offences has been inappropriately compressed.
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> As senior counsel for the Director correctly submitted, it is part of this Court's overarching responsibility to ensure that sentencing standards are maintained and to provide guidance as to the correct approach to sentencing. To that end, we have concluded that sentencing courts must, by increments, increase the sentences for mid-range incest offences, so that the range of sentences is uplifted and substantially expanded. The maximum penalty provides sentencing courts with ample latitude to fix sentences which properly reflect the degree of criminality involved.[18]

…

> The High Court endorsed this Court's conclusion that current sentencing practices for incest offences did not reflect the objective gravity of the offending. The majority (Kiefel CJ, Bell and Keane JJ) said:
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> > [T]he range was seen [by the Court of Appeal] to reflect a disregard of the gravity of the offending as indicated by the maximum sentence prescribed for the offence, and the moral culpability of the offender. The view of the Court of Appeal that this amounted to an error of principle was clearly correct.[19]

36 The Director's submission also stressed the need for incest sentences to give 'proper emphasis' to general and specific deterrence and denunciation. In her written case, she drew attention to the following statement of the sentencing judge:

> The nature of these charges means that general deterrence as a principle is most important and that must be reflected in the sentence. The community regards the sexual exploitation of children as abhorrent and deserving of severe punishment, particularly in circumstances of gross breach of the trust between family members.[20]

37 The Director's submission was that insufficient weight had been given to the need to deter both TP and others from committing offences of the same or a similar

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18 Ibid [128]–[131].

19 *Dalgliesh* (2017) 262 CLR 428, 445–446 [53]; [2017] HCA 41.

20 Reasons [42].

character. There being no challenge to the individual sentences, these submissions were advanced in support of the challenge to the orders for cumulation.

38 The Director's principal submission was that the cumulation of only 9 months of each of the 6 year sentences imposed on charges 2, 3 and 4 simply did not reflect the separate criminality constituted by the offending on each of those separate occasions. The criminality involved in charge 4 was said to be the greater because of the threats made by TP to A which were, as the judge said, 'cruel and very distressing'.[21]

39 The Director also relied on the fact that TP was sentenced on charges 3, 4 and 5 as a serious sexual offender. By virtue of s 6D of the *Sentencing Act 1991*, the judge was obliged to regard the protection of the community as the primary purpose of the sentences on those charges and, by virtue of s 6E, sentencing on those charges attracted a presumption of cumulation. The lack of differentiation between the cumulation order on charge 2 and that ordered on charges 3 and 4 demonstrated, it was said, that the judge had failed to give effect to the 'different requirements' applying to the sentencing of a serious sexual offender.

40 Senior counsel for TP, on the other hand, submitted that the Director's decision not to challenge the individual incest sentences had the necessary consequence that the appeal must fail. The basis of that contention was as follows. The Director having accepted that a sentence of 6 years' imprisonment on each incest charge was within the range reasonably open, it must therefore have been within the lawful exercise of the judge's discretion to impose sentences lower than 6 years on the individual charges and then to have directed a greater degree of cumulation of each sentence other than the base sentence. Had the sentence been structured in that way, it was said, the total effective sentence was likely to have been much the same as that which was in fact imposed, but there could have been no complaint about cumulation.

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21 Ibid [16].

41 We do not accept that submission. The question of whether the orders for cumulation were open to the judge is not to be addressed by hypothesising a different sentencing exercise in which lower individual sentences were imposed. On ordinary principles, this Court must start with the individual sentences actually imposed — there being no challenge to those sentences — and ask whether in the circumstances of the case the degree of cumulation of *those* sentences was within the scope of a reasonable exercise of the judge's discretion. The ultimate question, of course, is whether the resultant total effective sentence was within range. As noted earlier, the Director contends that the orders for cumulation resulted in a total effective sentence and non-parole period that were both manifestly inadequate.

42 In our opinion, cumulation of only 9 months of each of the 6 year sentences on charges 2, 3 and 4 fell well short of what was required to reflect the separate criminality constituted by the offending the subject of those charges. This was, as the Director has correctly maintained from the outset, extremely serious offending. It exemplifies with shocking clarity those features of parent-child sexual offending which make it so serious: abuse of parental authority; breach of the trust placed in the parent by the child and by the other parent; and cynical exploitation of the proximity afforded by the status of parent.[22] And these were all quite separate occasions of offending. The sentence had to reflect that. The high degree of concurrency which resulted cannot be justified, in our view. It has produced a total effective sentence that is manifestly inadequate.

43 As to the effect of s 6E, we consider that the presumption of cumulation applied with particular force to charges 3 and 4. On those occasions, TP was — as he well knew — a repeat offender. He offended a second, and a third, and a fourth time against A, knowing full well that it was wrong, and his determination to do so became greater as she tried to escape his grasp. It would seem to us to be entirely consistent with the legislative policy underpinning that section for the orders for

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[22] See, eg, *Walsh* [2018] VSCA 172, [1] (Maxwell P and McLeish JA), *Lugo v the Queen* [2020] VSCA 75, [6], [30] (Maxwell P, Kaye, T Forrest and Emerton JJA).

cumulation on charges 3 and 4 to be substantially greater than the order for cumulation on charge 2.

Conclusion

44 For these reasons, we would allow the Director's appeal, set aside the orders for cumulation with respect to the sentences imposed on charges 2, 3 and 4 and substitute orders that there be cumulation of 18 months, 24 months and 24 months respectively. That will mean a total effective sentence of 12 years and 6 months, and we would fix a non-parole period of 9 years.

CROUCHER AJA:

45 I have had the benefit of reading in draft the joint judgment of the President and Beach JA. Unlike their Honours, however, I would dismiss this appeal. My reasons follow.

46 The Director's sole ground of appeal is a complaint of manifest inadequacy in the orders for cumulation of the sentences imposed for the offences in Charges 2, 3 and 4 'and thus the total effective sentence and non-parole period'. There is no complaint of specific error. The appeal was conducted on that basis. Further, despite its being mentioned in the ground of appeal, no separate argument was addressed to the non-parole period. Accordingly, I took the Director to accept that the fate of the non-parole period would be dependent upon the fate of the total effective sentence.

47 Given the limitation inherent in the ground of appeal, irrespective of what might be said of the impugned orders for cumulation, the appeal cannot succeed unless the Director establishes that the total effective sentence is manifestly inadequate. Since I am not satisfied that the total effective sentence is manifestly inadequate, I am compelled to the view that the appeal must be dismissed.

48 The Director did not appeal against or challenge the individual sentences. Indeed, in her written case, the Director conceded that the individual sentences were 'well within range'. At the oral hearing of the appeal, senior counsel for the Director sought to alter that concession by withdrawing the word 'well'.

49 Whether or not the Director should be held to her earlier concession, she was correct to concede at least that the individual sentences were 'within range'. As grave as the respondent's offences were, each of those perpetrated against his stepdaughter was charged as a discrete offence (as was the offence against her friend). True it is that, in the case of the stepdaughter, the four offences charged were set against a background of repeated uncharged acts of a similar nature over a number of years. But they remained discrete offences. They were not charged as representative or sample counts; nor were they charged as rolled-up counts.

50 Further, while there were several other aggravating features, including those identified in the joint judgment (which I shall not repeat here), the offences lacked some of the aggravating features commonly involved in incestuous offending. For example, there was no penile-vaginal, penile-anal or penile-oral penetration, which meant that there was no risk of impregnation or of contracting a sexually transmitted disease. There was no ejaculation. There was no recording of the sexual acts, as sometimes occurs. There was no attempt at humiliation or especially degrading behaviour beyond the inherently serious and corrupting nature of incest by a stepfather against his young stepchild. Nor was there any inducement to avoid detection or reporting.

51 Importantly, there were also mitigating factors in the respondent's favour, including the following. First, the offending had ceased in 2010, which was about six or seven years before the matter was reported to police (in 2017), during which period of delay there was no other offending. Second, when his stepdaughter confronted him with the allegations in a pretext call in 2017, the respondent told her he was sorry and would take it back by taking his own life, if he could. Third, he

pleaded guilty (albeit those pleas came relatively late in the process — namely, after a committal hearing at which both complainants were cross-examined). Fourth, the judge accepted that the respondent was ashamed at, and remorseful for, what he had done and the impact his offending had on others. Fifth, he had no prior or subsequent convictions (which was to be set against the numerous uncharged acts over a long period). Finally, the judge also accepted that he had good prospects of rehabilitation, the support of friends and a capacity for employment.

52 Overall, the judge described the gravity of the offending as 'mid-range', which was not challenged by the Director. Her Honour also made it clear that, in coming to that view, she took into account 'the context of frequent offending over a long period in respect of Charges 1 to 4 while emphasising that the sentence in each case is for a charge arising from one occasion'.[23] As elusive as the distinction may be between representative offences and discrete offences (when each type of offence is set against a background of the same numerous uncharged acts), that approach strikes me as being consistent with the way in which the case was put by the Director, both before her Honour and in this Court.

53 Thus, allowing also for the maximum penalty of 25 years' imprisonment for incest, as well as current sentencing practices for such offences since *Dalgliesh*, I am satisfied that it was well open to the judge to impose sentences of six years' imprisonment on each offence in Charges 1 to 4.

54 In my opinion, that conclusion is important, albeit not critical, to the outcome of this appeal. This is because it effectively scuppers the Director's complaints about the directions for cumulation and the resulting total effective sentence.

55 To be sure, it is plain that, for a number of reasons, the judge might well have directed a greater level of cumulation. For example, the respondent's four offences against his stepdaughter were all separated in time and circumstances. While the offences in Charges 1 and 2 involved digital-vaginal penetration, occurred when the

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[23] Reasons, [41].

child was younger and were committed on separate occasions, Charges 3 and 4 involved lingual-vaginal penetration, occurred when the child was a good deal older (and perhaps more likely to be disturbed by the depravity of the abuse) and also were committed on separate occasions. The offence in Charge 5 involved a separate victim on a separate occasion (although there is no complaint about the level of cumulation in respect of the sentence for the offence in Charge 5).

56 Further, as is pointed out in the joint judgment, by virtue of s 6D of the *Sentencing Act*, the judge was required to regard the protection of the community as the primary purpose of the sentences for the offences in Charges 3 and 4 (and Charge 5), and, by virtue of s 6E, sentencing on those offences attracted a presumption of cumulation. It is also accepted that sentencing judges need to be astute not to undermine the legislative policy inherent in s 6E by applying the totality principle as if that provision did not exist.[24]

57 But, in my view, none of these considerations overcomes the submission made on behalf of the respondent — namely, given that the individual sentences were within the range available, the judge could have imposed shorter individual sentences (which were still within range), coupled with significantly greater levels of cumulation (which could not be said to be manifestly inadequate), and yet still could have produced the same total effective sentence or one of a similar order of magnitude (which would not be manifestly inadequate either).

58 In their joint judgment, Maxwell P and Beach JA reject that argument. Their Honours opine that 'the question of whether the orders for cumulation were open to the judge is not to be addressed by hypothesising a different sentencing exercise in which lower individual sentences were imposed'. They also conclude that the cumulation of nine months on each of the sentences imposed for the offences in Charges 2, 3 and 4 'fell well short of what was required to reflect the separate criminality constituted by the offending the subject of those charges'.

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[24] See *RHMcL v The Queen* (2000) 203 CLR 452, 477[76], where Gleeson CJ, Gaudron and Callinan JJ discussed to the similarly-worded predecessor of s 6E of the *Sentencing Act*.

59 I disagree, on both counts. In the same way that there is no single correct individual sentence in any given case, there is no single correct order for cumulation or resulting total effective sentence. Since the outcome of this appeal must be governed by whether the total effective sentence is manifestly inadequate, it *is* legitimate to test whether, by some other combination of orders, the judge might have arrived at that same total effective sentence — or at least one that is not so much longer as to suggest that the existing sentence is manifestly inadequate. In view of the complaint that the impugned orders for cumulation were manifestly inadequate, one such hypothetical is to consider whether, if her Honour had imposed lesser (but still appropriate) individual sentences and greater (and, on this hypothesis, also appropriate) levels of cumulation, the same total effective sentence (or one of a similar length) might have resulted.

60 As it happens, in this particular, case, consistently with the concession of the Director, I am satisfied that there could have been no legitimate complaint if individual sentences of, say, five years' imprisonment had been imposed on each of the discrete offences in Charges 1, 2, 3 and 4. Had such sentences been imposed, it would have been well open to have imposed greater levels of cumulation — say, 12 months, 15 months and 15 months in respect of the sentences for the offences in Charges 2, 3 and 4 respectively — each of which would have been adequate. Assuming that the sentence and order for cumulation in respect of the offence in Charge 5 remained the same (at 12 months), that would produce a total effective sentence of nine-and-a-half years' imprisonment — which is only three months longer than the total effective sentence the judge imposed.

61 Even if a further three months' worth of cumulation were added in respect of each sentence in respect of Charges 3 and 4, bringing each of those orders to 18 months' cumulation, thereby producing a total effective sentence of ten years' imprisonment, that still would be only nine months longer than the original sentence.

62 In my view, both of those differently structured hypothetical total effective

sentences involve adequate orders for cumulation. Further, neither hypothetical total effective sentence is sufficiently greater than the one passed by her Honour to justify a conclusion that the latter is manifestly inadequate.

63 Less still does any such analysis justify the substitution of either of those sentences or any other higher sentence of a similar length on an appeal of this nature. This is, after all, a Director's appeal based on a complaint of manifest inadequacy, and in a confined way. On such an appeal, this Court cannot, and must not, tinker. Nor is this Court empowered simply to substitute its own version of the correct sentence (unless the original sentence is manifestly inadequate).

64 Even if I am wrong in the view that it is legitimate to test whether the total effective sentence is manifestly inadequate by hypothesising shorter individual sentences and longer orders for cumulation, I am still unpersuaded that either the impugned orders for cumulation or the total effective sentence are manifestly inadequate.

65 While, in considering orders for cumulation or concurrency, courts must have regard to the separate criminality involved in each offence and apply the totality principle, but also must qualify the operation of that principle where s 6E applies, the total effective sentence still must be just and proportionate to the overall criminality involved. The total effective sentence will not meet that test unless it adequately reflects all factors in aggravation and mitigation and the various other sentencing considerations set out in the *Sentencing Act*.

66 True enough, by the application of s 6E, perhaps a higher level of cumulation might have been directed in respect of the sentences for the offences in Charges 3 and 4 than in respect of the sentence for the offence in Charge 2. In one of her particulars of the complaint of manifest inadequacy, the Director seizes on the lack of differentiation among those three orders for cumulation (each being nine months) as reflecting a failure to act on the different requirements attending the sentencing of a serious sexual offender.

67 But I do not agree, for two reasons. First, that the judge imposed the highest level of cumulation on the sentence for the offence in Charge 5 (i.e. 12 months) suggests otherwise, for that offence was also subject to s 6E but carried a much lesser penalty (three years' imprisonment, compared with six years' imprisonment on each other offence).

68 Secondly, while that difference may also be explained at least in part by the fact that the offence in Charge 5 involved a separate victim, that too would be consistent with the required approach to s 6E. For, as Osborn, Kaye and McLeish JJA said in *DPP v Bales*:[25]

> It is plain that the purpose of s 6E is to require an approach to sentencing which marks specific denunciation of each offence to which the section applies. That is particularly the case when the offending involves, as it does here, a number of different victims. The legislative policy inherent in s 6E is that the offences committed against individual victims will be separate and distinct subjects of punishment. This will generally involve orders for cumulation, moderated to the extent necessary to give effect to the principle of totality so far as that can be done consistently with the policy of the section.

69 In those circumstances, I do not accept that the decision to fix the same levels of cumulation in respect of the sentences for the offences in Charges 2, 3 and 4 reflected a failure by the judge to act on the requirements of s 6E. On the contrary, that she did direct 12 months' cumulation in respect of the sentence for the offence in Charge 5 makes it far more likely that her Honour had regard to s 6E and its policy, but that, for reasons of totality and parsimony, she considered that nine months' cumulation on each of the three sentences for the offences in Charges 2, 3 and 4 was the appropriate amount to order. There is no error in that approach, unless it is manifestly inadequate (and the resulting total effective sentence also is manifestly inadequate).

70 In any event, the impugned orders for cumulation, while modest, are not manifestly inadequate. The three orders added two years and three months to the total sentence, or three years and three months when regard is had as well to the

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[25] *DPP v Bales* [2015] VSCA 261, [44].

cumulation of the sentence for the offence in Charge 5. That is still a substantial amount, but is necessarily less than it otherwise might be because of the dictates of totality and parsimony.

71 Finally, for the reasons I have given earlier, and in the alternative to the last point, whether or not the level of cumulation on any or all of the sentences for the offences in Charges 2, 3 and 4 is or are manifestly inadequate cannot avail the Director on this appeal unless the total effective sentence is itself manifestly inadequate. And, for the reasons I have given, and for those to come, I am not persuaded that it is.

72 Senior counsel for the respondent referred to *DPP v Shearer (a pseudonym)* ('*Shearer*')[26] as an illustration of current sentencing practices for incest since *Dalgliesh* and as a comparator supportive of her submissions in general.

73 Mr Shearer pleaded guilty to four discrete charges of incest against his stepdaughter. She was aged between 11 and 14 at the time of the offending. The offence in Charge 1 was constituted by Mr Shearer sneaking into the child's bed at night when she was 11 or 12, pulling down her pants and, despite her kicking him and telling him to 'fuck off', penetrating her vagina with his penis. This caused her pain and discomfort. The offence in Charge 2 occurred when the child was 13. Mr Shearer used a similar *modus operandi* to the first offence, but this time he also held the child's arms while he penetrated her vagina with his penis. The offence in Charge 3 occurred in the same year, and again involved penile-vaginal penetration, but this time included ejaculation. Charge 4 occurred another year or so later, when the child was 14. Mr Shearer removed her underwear, held her down and penetrated her vagina with his penis while she said 'no'. The child's mother awoke to find Mr Shearer in the child's bedroom, for which he gave an incredible excuse. The next day, upon inquiry, the child told her mother of the sexual abuse, whereupon she contacted police.

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26 *DPP v Shearer (a pseudonym)* [2019] VSCA 47 (Whelan AP, McLeish and Weinberg JJA).

74 Upon his arrest, Mr Shearer admitted rubbing his penis on the child's vagina recently, but denied all other offending. DNA analysis of the child's underpants revealed the presence of Mr Shearer's semen.

75 While on remand, Mr Shearer repeatedly attempted to persuade the child and her mother to withdraw the allegations. Though he had no history of sexual offending, Mr Shearer had an extensive criminal history for violence against women, including a conviction for manslaughter of his then partner in the 1990s, by stabbing her to death while intoxicated.

76 In the County Court, the judge imposed individual sentences of four years' imprisonment and three orders for cumulation of 18 months each, thereby making a total effective sentence of eight-and-a-half years' imprisonment.

77 On a Director's appeal in 2019, Whelan AP, McLeish JA and Weinberg JA, in a joint judgment, upheld the complaint that the individual sentences were manifestly inadequate. As to the second ground, which complained that the orders for cumulation 'operate[d] on an inadequate base sentence [and] resulted in a total effective sentence that is manifestly inadequate', their Honours accepted that proposition, but, in light of the success of the first ground, found it unnecessary to consider the ground further. The Court substituted individual sentences of six years' imprisonment and directed cumulation of 12 months, 21 months and 21 months respectively of the sentences for the offences in Charges 2, 3 and 4 upon the base sentence for the offence in Charge 1. This made a total effective sentence of ten-and-a-half years' imprisonment.

78 While it was not alleged that these four discrete offences were set against a context of numerous uncharged acts of a similar nature, in my opinion, each offence was significantly more serious than the four offences of incest in the present case and, collectively, those offences were more serious than the respondent's five offences, even allowing for the context of numerous uncharged acts over a longer period of time. Each of Mr Shearer's four offences involved penile-vaginal

penetration of a child, two involved ejaculation, two were committed against the protestations of the child, and at least two involved the use of force. Further, Mr Shearer's attempts to have his wife and the child withdraw the allegations were much worse than the respondent's pathetic threat of suicide. Mr Shearer's offending ceased because he was caught red-handed and arrested soon thereafter, whereas the respondent stopped offending and then, when his former stepdaughter contacted him on a pretext call six or seven years later, he admitted his behaviour and apologised to her. Finally, Mr Shearer had a history of violence against women, including a conviction for manslaughter, whereas the respondent had no prior or subsequent convictions.

79 While no two cases are ever truly alike and other sentences are not precedents to be applied or distinguished, in my view, the foregoing comparison shows that *Shearer* lends powerful support to the Director's concession that the individual sentences imposed upon the respondent were within range (or well within range). Hence the validity of the hypothetical differently structured total effective sentences.

80 On the other hand, this Court's orders for cumulation upon resentencing Mr Shearer are perhaps closer to the level of cumulation that the Director submits should have been ordered in the respondent's case. Further, the Court made a point of imposing heavier cumulation upon the sentences that attracted s 6E. That said, those orders, in total, were no different from those ordered by the sentencing judge. The ultimate difference in resentencing resulted wholly from the increases in the individual sentences, and, in particular, from the increase in the base sentence by two years. Of course, there is no suggestion that the base sentence — or any other individual sentence — is to be increased in the respondent's case. And, to repeat, the duration of the orders for cumulation is irrelevant to the outcome of this appeal unless the total effective sentence is held to be manifestly inadequate.

81 That this Court, on re-sentencing Mr Shearer, fixed a total effective sentence of ten-and-a-half years' imprisonment also lends powerful support to the view that the total effective sentence imposed upon the respondent is not manifestly inadequate.

This is because, first, as I have said, I regard Mr Shearer's overall criminality for his offending as manifestly worse than the respondent's. Second, Mr Shearer had far less compelling personal circumstances than the respondent, most particularly because he was an offender with a history of violence against women who cravenly sought to pressure the child and her mother to drop the charges. In fact, while recognising the limits of comparison, the total effective sentence imposed by this Court in *Shearer* suggests that the total effective sentence imposed upon the respondent in the trial court is not even modest, but is instead unimpeachable.

82 Senior counsel for the respondent was right to refer to *Shearer*. *Dalgliesh* does not dictate that sentencing has become an unconstrained free-for-all. Current sentencing practices are still relevant to sentencing, and in assessing whether a sentence might be within or outside the sound exercise of the sentencing discretion, albeit such practices are just one factor among many. Further, *Shearer* was a case in which several incest cases decided since *Dalgliesh* were referred to the Court and discussed.[27] The Court went on to conclude that the individual sentences imposed at first instance failed to have proper regard to what was said by both the High Court, and by this Court, with respect to sentencing for the offence of incest.[28] As a result, it represents a very considered and helpful guide to sentencing for this type of offending.

83 Thus, whichever way it is assessed, the total effective sentence is not manifestly inadequate. Accordingly, the appeal should be dismissed.

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[27] The Court referred to *DPP v Dalgliesh (a pseudonym)* (2017) 271 A Crim R 1; *DPP v Tewksbury (a pseudonym)* (2018) 271 A Crim R 205; *McCray (a pseudonym) v The Queen* [2017] VSCA 340; *Carter (a pseudonym) v The Queen* (2017) 272 A Crim R 170; *DPP v Walsh (a pseudonym)* [2018] VSCA 172; *Phillips (a pseudonym) v The Queen* [2018] VSCA 114; and *Thrussell (a pseudonym) v The Queen* [2017] VSCA 386. (See *DPP v Shearer (a pseudonym)* [2019] VSCA 47, [41], [48].)

[28] *DPP v Shearer (a pseudonym)* [2019] VSCA 47, [49].