

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF
COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA283/2010
[2010] NZCA 418**

BETWEEN	DINESH NATH Appellant
AND	THE QUEEN Respondent

Hearing: 2 September 2010

Court: Arnold, Keane and MacKenzie JJ

Counsel: A J Holland and K M P Noordhof for Appellant
H A Wrigley for Respondent

Judgment: 13 September 2010 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

**B The sentence of two years' imprisonment is quashed and a sentence of
15 months' imprisonment is substituted.**

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] Following a jury trial before Judge Bidois the appellant was convicted of one count of attempted sexual connection with a young person under 16.¹ He was sentenced to a term of imprisonment of two years.² He now appeals against sentence, on the grounds that the sentence is manifestly excessive and that, in any event, he should have been granted home detention.

Background

[2] At the time of the offence the appellant, a 39 year old Fijian Indian, was working in kiwifruit orchards as a member of a kiwifruit gang. At around 11 pm one evening he and a male associate walked past a house at which the 14 year old complainant was staying with several friends of her own age. The girls were sitting on the porch, talking. The appellant and his friend did not know the complainant or her friends but walked to and fro in front of the house looking at the girls. The appellant called out to them. As she could not hear what he had said, the complainant walked to the fence, whereupon the appellant told her she looked very nice and offered her \$20 for sex.

[3] The complainant declined the offer. The appellant increased the sum to \$40 which the complainant again declined, making it clear that she did not want sex at all. The appellant kept increasing the offer, until it reached \$100. The complainant repeated that she was not interested and the appellant and his friend walked off.

[4] About five minutes later they returned and the appellant again called the girls to the fence. He then handed the complainant \$80 and said “We pay you”. The complainant accepted the money and took it into the house. When she came back outside, the appellant said that he wanted to have sex. He said he wanted to “lick her vagina” and “lick her titties”. The complainant again refused. The appellant asked if he could go inside the house, but the complainant refused. The appellant then

¹ Crimes Act 1961, s 134(2).

² *R v Nath* DC Tauranga CRI-2009-047-43, 14 April 2010.

offered to take them back to his place, but again the girls refused. Finally, the appellant asked the complainant and her two friends to go into the park, which they agreed to do.

[5] The appellant again told the complainant that he wanted to have sex with her. He grabbed the complainant's wrist. She became scared and pushed him away. Seeing this, her friends came over to where she was and they all ran off. The appellant and his friend were picked up by a van. They drove around for a while looking for the girls before giving up.

[6] The police apprehended the appellant soon after. He made a brief statement in which he said that he thought the girls were 12 or 13 years old and that they had wanted money for sex. After he had given them \$30, they had run off.

[7] In sentencing the appellant, Judge Bidois declined to consider a sentence of home detention, on the basis that he understood that if such a sentence were to be imposed, the appellant would immediately be deported to Fiji. As a consequence, he would not serve any sentence for his offending.³ Rather, the Judge adopted a starting point of two and a half years' imprisonment and reduced that to two years to reflect mitigating factors.⁴

Discussion

[8] Mr Holland advanced two grounds of appeal. He submitted that the end sentence of two years' imprisonment was too high and that a sentence of home detention should have been imposed. We deal with each ground in turn.

End sentence too high?

[9] Having set out the factual background and summarised the submissions of counsel (including reference to *R v Stacey*⁵ and *R v Burdett*⁶), Judge Bidois identified three aggravating features of the offending, namely:

³ At [7] and [13].

⁴ At [27]-[28].

⁵ *R v Stacey* [2008] NZCA 465.

⁶ *R v Burdett* [2009] NZCA 366.

- (a) the effect on the victim;⁷
- (b) the fact that the offending was, to some extent at least, pre-meditated;⁸ and
- (c) the victim's vulnerability given her age and the age disparity between her and the appellant.⁹

[10] The Judge noted that there were also mitigating factors. In particular, the appellant was a first offender and his wife of 13 years was standing by him. Prior to trial, the appellant had returned to Fiji for family reasons but came back to New Zealand to attend his trial.¹⁰

[11] The Judge considered the overall seriousness of the offending. He noted the youth of the complainant (the appellant, of course, thought she was younger than she was) and the increasing offers of money for sex,¹¹ the sexually explicit language the appellant used and the impact of the offending on the complainant.¹² Despite the fact that the maximum penalty for an attempt to have unlawful sexual connection with a young person is the same as that for the completed offence (ten years' imprisonment), the Judge considered the appellant's case had to be distinguished from cases where unlawful sexual connection had occurred.¹³ Given that the appellant had been offering money as an inducement to a teenager who was unwilling to engage in sexual conduct with him, the Judge considered that he should adopt a starting point of two and a half years. In light of the mitigating features earlier identified, the Judge gave a six month (or 20 per cent) discount, producing an end sentence of two years.

⁷ At [19].

⁸ At [20].

⁹ Ibid.

¹⁰ At [21].

¹¹ At [19].

¹² At [23].

¹³ At [24].

[12] Mr Holland accepted that the offending was serious and that there was a need to protect vulnerable victims. However, he submitted that many of the culpability factors identified in *R v AM*¹⁴ were missing. In particular:

- (a) The offending in this case was impulsive rather than premeditated: there was no grooming.
- (b) Most of the conversation between the appellant and the complainant and her friends was conducted across a fence: there was no immediate threat or element of home invasion.
- (c) No alcohol or drugs were involved.
- (d) The appellant's conduct was crude rather than predatory.
- (e) While the complainant was vulnerable, she was at all times in the company of her friends and there was an adult in the house, which lessened the extent of her vulnerability.
- (f) While the victim suffered psychological harm, she suffered no physical harm.
- (g) No breach of trust was involved.
- (h) The complainant had not been sexually violated.

For these reasons, Mr Holland submitted, the offending was at the low end of the scale.

[13] In a recent decision, *R v Johnson*, this Court discussed the policy underlying, and approach to sentencing under, s 134¹⁵ and annexed a helpful summary of sentences in recent cases, including *Stacey* and *Burdett*. The Court identified the starting point for sexual connection with a young person under 16 where there was

¹⁴ *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750 at [37]-[52].

¹⁵ *R v Johnson* [2010] NZCA 168 at [12]-[17].

moderate culpability as being four years.¹⁶ In *Johnson* a 36 year old offender had consensual sexual intercourse with a 15 year old girl regularly over a three month period. He targeted the complainant and used her as his “sexual plaything”. She suffered significant psychological effects as a consequence of his conduct. The Court accepted the sentencing Judge’s starting point of three years, nine months but said that it was at the bottom of the range.¹⁷ Taking account of the offender’s guilty plea and concrete expression of remorse, the minimum available end sentence was two years, four months.¹⁸

[14] In the present case Judge Bidois adopted a starting point of two years, six months. When that starting point is assessed against the starting points adopted in other cases under s 134, we consider that it does not take sufficient account of the absence of some important culpability factors.

[15] We agree that there were significant culpability factors in the offending: the appellant was persistent in offering money in exchange for sex to a teenager who was a stranger to him and was unwilling to have sex, he was accompanied by an associate (which increases the perceived threat), he was 25 years older than the complainant, he intruded on the safety of the house at which she was staying and his actions had a significant psychological impact on her. None of these features should be minimised.

[16] However, cases such as *R v Misileki*,¹⁹ *Stacey*, *Burdett* and *Johnson* involved age disparities of between 12 and 30 years and at least one incident of full intercourse (*Stacey* and *Johnson* involved multiple incidents). Despite this, the starting points in those cases ranged from two years, six months to three years, nine months. While we accept that the maximum penalty for an attempt under s 134(2) is the same as for the completed offence under s 134(1), proper account must be taken of the fact that the offending in the present case was at the low end of the scale.

¹⁶ At [17].

¹⁷ At [22].

¹⁸ At [29].

¹⁹ *R v Misileki* [2008] NZCA 513.

[17] In light of this, we consider that a starting point of 18 months' imprisonment should have been adopted. We agree with the Judge that the appellant should receive some discount for personal mitigating factors. We would allow three months, which is slightly less than the 20 per cent allowed by the Judge. This produces an end sentence of 15 months' imprisonment.

Should home detention have been imposed?

[18] As we have said, Judge Bidois declined to consider a sentence of home detention in light of advice in the pre-sentence report that Immigration New Zealand had advised the report writer that if the appellant received home detention he would be deported from New Zealand immediately rather than at the completion of his sentence (as would occur if he were sentenced to imprisonment). The Judge said that in these circumstances the appellant "would not be subject to a penalty for [his] criminal culpability".²⁰

[19] Mr Holland submitted that the Judge had erred in adopting this approach, relying in particular on *R v Ondra*²¹ where this Court said:²²

A number of cases hold that courts in sentencing should not take into account the possibility that, if the offender is here unlawfully, he or she might be removed from the country by the Immigration Service before he or she has completed any community-based sentence imposed.

The Court referred to statements to like effect in *R v Ahlquist*,²³ *R v Zhang*,²⁴ *R v Appitu*²⁵ and *R v Sabuncuoglu*.²⁶

[20] Ms Wrigley for the Crown invited us to depart from these authorities. We decline to do so. They are well-established. Any departure from them would require a decision of the Permanent Court as there are significant policy and practical implications in the adopting the approach she urged upon us.

²⁰ At [13].

²¹ *R v Ondra* [2009] NZCA 489.

²² At [7].

²³ *R v Ahlquist* [1989] 2 NZLR 177 (CA).

²⁴ *R v Zhang* CA56/05, 24 May 2005.

²⁵ *R v Appitu* CA31/98, 29 April 1998.

²⁶ *R v Sabuncuoglu* [2008] NZCA 448.

[21] However, although we consider that he did so for the wrong reason, we consider that the Judge was right to refuse to impose a sentence of home detention. Section 15A(1) of the Sentencing Act 2002 provides that a sentence of home detention may be imposed only if the court is satisfied that the purpose or purposes for which sentence is being imposed cannot be achieved by any less restrictive sentence and it would otherwise impose a short term sentence of imprisonment (relevantly, a sentence of imprisonment for two years or less).²⁷

[22] Here the short-term sentence requirement was met. However, as this Court said in *R v Hill*:²⁸

[T]he home detention provisions sit within the general context of the Sentencing Act. Accordingly, a sentence of home detention must be imposed in a way that is consistent with the purposes and principles of sentencing as set out in the Act (and any other relevant legislation).

In terms of the purposes of sentencing,²⁹ we consider that accountability, denunciation and deterrence require a term of imprisonment rather than home detention. In terms of the principles of sentencing,³⁰ we consider a term of imprisonment is necessary to give proper recognition to the gravity of the offending and the culpability factors involved (as identified above). As this Court has said, usually imprisonment will be the only appropriate sentence for sexual offending against children or young persons.³¹ While the present offending did not proceed beyond an attempt, we see no reason to depart from that approach here.

Decision

[23] We allow the appeal. The sentence of two years' imprisonment is quashed and a sentence of 15 months' imprisonment is substituted.

Solicitors:
Crown Solicitor, Tauranga for Respondent

²⁷ See Parole Act 2002, s 4(1).

²⁸ *R v Hill* [2008] NZCA 41, [2008] 2 NZLR 381 at [34].

²⁹ Sentencing Act, s 7.

³⁰ Ibid, s 8.

³¹ See *R v M* CA197/00, 19 July 2000 at [14]; *R v S*(CA465/05) CA465/05, 11 April 2006 at [12]; *Johnson* at [30].