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COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA322/2010
[2010] NZCA 472**

BETWEEN	NICHOLAS RAYMOND BALDWIN Appellant
AND	THE QUEEN Respondent

Hearing: 29 September 2010
Court: Asher, Potter and Asher JJ
Counsel: J H Wiles for Appellant
P K Hamlin for Respondent
Judgment: 19 October 2010 at 10am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The sentence of eight years and nine months imprisonment is quashed
and replaced by a sentence of six years and three months imprisonment.**
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REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] On 20 April 2010 Nicholas Raymond Baldwin was sentenced by Venning J on two charges of unlawful sexual connection, three of indecent acts on a boy under 12, and three of indecent acts on a boy between the ages of 12 and 16. He was sentenced to a total period of imprisonment of eight years and nine months. He now appeals that sentence submitting that it was manifestly excessive.

Facts

[2] Mr Baldwin was a school teacher. The victim first met him in 2005 when he attended the primary school where Mr Baldwin taught. In 2006 he spent a year in Mr Baldwin's Year 6 class. Mr Baldwin was aged 59 and the victim was 11. A personal relationship developed. Mr Baldwin ensured that the victim received special treatment. On one occasion after the victim had stubbed his toe during the day he took him home in breach of school protocol. A relationship developed. Mr Baldwin would arrange to meet the victim at a predetermined place outside the school grounds where he would pick him up. He took him for rides in his car and would buy him treats. The meetings were clandestine. There was no sexual contact through this year.

[3] In 2007 the victim was no longer in Mr Baldwin's class and contact continued between them. Although there are no clear details, the victim apparently had suffered some form of unrelated abuse at an earlier time and he would discuss this with Mr Baldwin. By the middle of 2007, as a consequence of the attention he was getting and the relationship that had developed, the victim had become infatuated with Mr Baldwin. He did not object when Mr Baldwin started hugging him as a way of saying thank you. At about this time the two would frequently embrace, peck each other on the cheek and kiss.

[4] This progressed to the stage where in late 2007 Mr Baldwin spoke to the victim about circumcision. Using that topic of conversation as an excuse Mr Baldwin started to fondle the victim's genitals. This progressed to the stage

where each would touch and stroke the other's genitals. This would occur at school when privacy allowed it. The touching further progressed to a stage where on a number of occasions Mr Baldwin put his hand inside the victim's underwear and swiped his anus with his finger. He took the victim to isolated areas of sports grounds in the car after school. He gave him his cellphone over weekends to enable contact and would be cross and sulk if the victim failed to contact him.

[5] By 2008 the offending had developed to incidents of mutual masturbation. The most serious offending involving unlawful sexual connection, where Mr Baldwin convinced the victim to allow him to kiss his penis. He was in due course able to convince him to reciprocate and engage in mutual kissing. The offending was only stopped in early September when concerned parents observed inappropriate conduct. The Police became involved and Mr Baldwin was arrested.

[6] Mr Baldwin denied the offending until a trial in March of this year when he pleaded guilty to the counts after the Crown had opened and the victim had been called to give evidence in chief and that evidence had been given by way of video interview. The guilty plea meant that the victim did not have to face cross-examination.

[7] Mr Baldwin was for all intents and purposes a first offender. He had been a successful and respected teacher for 40 years. He was highly regarded in his profession and was considered to have a positive influence on students. He has never married or had children. Needless to say his career came to an end as a result of the offending. When he spoke to the probation officer he expressed remorse and regret at the offending. He said he had given little thought to what was happening. While claiming to have no prior sexual interest in young boys or associated practices, he acknowledged having sexual dreams about the victim. He expressed remorse and regret in a letter to the Court, commenting on the effect of his actions on the victim and his concern at the damage his actions had caused to the reputation of male teachers. This remorse and regret was accepted as genuine.

The sentencing decision

[8] In his decision Venning J applied the guideline judgment in *R v AM*.¹ Having considered the features of offending identified by the Court of Appeal as culpability assessment factors in *R v AM*, he noted in some detail five relevant features being:

- (a) A significant degree of planning on Mr Baldwin's part leading to the offending;
- (b) The vulnerability of the victim;
- (c) The serious breach of trust;
- (d) The length of time of the offending; and
- (e) The harm to the victim.

[9] Venning J considered that there were three "aggravating features" which in his judgment were serious, being the planning, the breach of trust and the vulnerability of the victim. He observed that the offending had similarities to the case of *R v Harris*² which in *R v AM* was placed as a case at the top end of band two of the unlawful sexual connection bands. He considered that case was not markedly different and that there were other aggravating features in relation to Mr Baldwin not present in *R v Harris*, in particular the breach of trust and known vulnerability of the victim. He concluded that the offending should be categorised at the top end of band two or at the lower end of band three and he was satisfied that the start point for the unlawful sexual connection counts was nine years' imprisonment.

[10] He went on to increase that start point for sentence by one year to 10 years' imprisonment to reflect the totality of the other offending, particularly the representative counts of indecent acts and the counts involving mutual masturbation. He noted the absence of previous relevant convictions and Mr Baldwin's service to

¹ *R v AM* [2010] 2 NZLR 750.

² *R v Harris* CA320/93, 15 November 1993.

the community for 40 years as a successful teacher, while noting the disservice his actions had done to the profession. Mr Baldwin was entitled to a discount for his positive work in the community, but given that the offending arose out of his work that discount had to be tempered. Venning J applied a discount of six months for previous good character and genuine remorse, the discount suggested by Mr Baldwin's counsel. He also took into account the late guilty plea and the fact that it saved the victim from the trauma of cross-examination. He proposed a discount of between 5 and 10 percent for the late guilty pleas. In the end he deducted one year and three months from the total sentence to reach the end sentence of eight years and nine months' imprisonment. He declined to impose a minimum period of imprisonment.

The correct place in the *R v AM* bands

[11] *R v AM* sets out four sentencing bands for sexual violation where the lead offence is rape or unlawful sexual connection by penile penetration of the mouth or anus, or violation involving objects. Three bands were set out for other forms of less serious unlawful sexual connection (referred to as "USC" and the "USC bands"). We first consider whether it was correct for Venning J to set a starting point at the top of band two or the bottom of band three for the USC offending. We will then consider the further year that was added to that starting point for the lesser indecency counts.

[12] Mr Wiles submitted that Mr Baldwin's offending should have been placed in the lower part of band two of the USC bands.

The culpability assessment factors

[13] In *R v AM* three USC bands were defined. Band one, 2 to 5 years, band two, 4 to 10 years and band three, 9 to 18 years. Thirteen "culpability assessment factors" were set out.³ Five of these were referred to in the sentencing process in this case, being significant planning, victim vulnerability, breach of trust, scale of the

³ At [34]–[62].

offending and harm to the victim. Planning, breach of trust and vulnerability were particularly emphasised.

[14] There is no doubt that all five factors were present. However, when there is sexual offending against young victims there will generally be some particular victim vulnerability. It was noted in *R v AM* that specific harm is inherent in the offending.⁴ There will also commonly be in the absence of an attack, some sort of breach of trust in order to create the contact. And whenever the offending takes place over a period of time there is likely to be always some degree of planning and premeditation as meetings are set up. This is a feature of sex offending where there are more shades of grey than in, for instance, violent offending, because of the complexities of sexual interaction. It is necessary in every case to assess the extent of the culpability that can be ascribed to the particular factors for the purpose of assessing the appropriate band and place in that band.

[15] This is indeed what Venning J did. A serious aggravating factor he emphasised in the sentencing was the breach by Mr Baldwin of his trust as a teacher to his pupil. The sexual relationship was developed by Mr Baldwin initially using that trust as a platform. The trust between teacher and pupil is fundamental, and the breach was a most relevant aggravating factor.

[16] Also, we accept the assessment of a “significant degree of planning”. Mr Baldwin engaged in a deliberate course of conduct to develop a close bond. He did things that were designed to create sexual opportunities, such as buying the victim a Liverpool soccer shirt, telling the victim he had a wet dream of him wearing the shirt and nothing else, and then taking the victim to a toilet where he could wear the shirt and there was sexual interaction. He would contrive such sexual opportunities. Having said that, there is nothing to indicate the more sinister type of conduct where a young person is targeted specifically to be used later as a sexual play thing. This is reflected in the fact that the Crown withdrew a count of grooming before Mr Baldwin changed his plea.

⁴ At [44].

[17] There was some added vulnerability because of the victim's history, although there was no detail of this and it is hard to assess. There was inevitable harm to the victim, but in comparison to many of the cases referred to in *R v AM*, no physical abuse or threats. Nor does the victim impact report reveal any identifiable long term physical or psychological damage of the type often seen in such cases, although harm may manifest itself later.

[18] As to the scale of the offending, there was common ground between Mr Wiles and Mr Hamlin for the Crown as to the duration of the particular offending. They agreed that the indecencies lasted for a 20 month period and the unlawful sexual connection (being the kissing of each others' penises) for a period of approximately two months. We note that this differs from the submission made to Venning J where he records advice from counsel that the unlawful sexual connection took place over a period of five months. So the scale of the most serious offending was of this more limited duration. It only stopped because of the Police intervention. The scale of the offending is central to the general assessment of culpability.

[19] We consider there were three particular culpability assessment factors which increased the seriousness of the offending to be weighed in the sentencing process; the serious breach of trust, and at a lower order of seriousness, the planning and vulnerability.

Other factors

[20] In addition to focussing on the culpability assessment factors, for the purposes of assessing the appropriate band, it is also necessary to consider more generally other relevant features of the offending. What is required is an evaluation of all the circumstances. The Judge noted that there was no penile penetration, but that if indeed there had been the higher rape sentencing bands rather than the unlawful sexual connection bands would have applied. However, what is also relevant is that there was no penetrative conduct at all. It is a feature of many of the examples referred to in *R v AM* in relation to even the higher end of USC band one, that there is penetration by tongue or finger. It will always be a question of fact and degree, but generally a single non-violent act of sexual contact involving penetration

will be more serious than a single non-violent act of sexual contact where the contact is on the outside of the body or genitals and not penetrative. The absence of any penetrative conduct or attempt at it was relevant to the culpability assessment. It is not clear that this was given weight in the High Court.

[21] Unlawful sexual connection in band one of *R v AM* involves none of the culpability assessment factors which increase the seriousness of the offending at the lower end of the spectrum and one or more to a “low or moderate degree” at the top.⁵ USC band two applies to cases of relatively moderate seriousness⁶ involving “two or three of the factors increasing culpability to a moderate degree”. USC band three involves “the most serious offending of this type” where there are two or more of the factors to a high degree, or more than three to a moderate degree.

[22] The examples at the lower end of USC band one tend to not involve penetrative actions, while those at the lower end of USC band two do. Those in the third band involve severe penetrative offending over a long period and, generally, very young victims.

[23] Even without the breach of trust and planning we are satisfied that the scale of the offending and the victim’s age and vulnerability take Mr Baldwin’s offending beyond band one into the lower end of USC band two. The serious breach of trust together with the planning and vulnerability would take it well into the middle of USC band two, but not to the top. The offending is distinctly below USC band three offending. Even taking into account the serious breach of trust, it is not of the most serious offending of its type; rather the three particular factors increasing culpability move it from the lower end of band two to a moderate degree.

[24] Mr Hamlin sought to support the proposition that the offending was at the top of USC band two by equating it to the offending in *R v Harris*. The task of placement in a band should not become an exercise in comparing cases. Nevertheless, the examples given in *R v AM* can assist in assessing culpability and placement in the bands. The *R v Harris* facts were placed in *R v AM* at the upper end

⁵ At [114].

⁶ At [117].

of USC band two, where a starting point in the vicinity of eight or nine years was indicated. In our view the offending in *R v Harris* was more serious than in the present case. There was attempted penetration. There was playing with and sucking a 12 year old's penis by a 47 year old male over an 18 month period. They were both residents in a caravan park. The victim was left severely traumatised.

[25] The sexual activity in this case (excluding the breach of trust and degree of planning and vulnerability) can be better compared to the examples given at the lower end of USC band two of *R v AM*,⁷ where the offending involved a number of the factors increasing culpability to a moderate degree. For instance, in *R v Bell*⁸ there was offending over six months involving licking, rubbing, touching of the offender's penis, digital penetration and the taking of photographs.

Conclusion on place in the USC bands

[26] The nine year starting point, which places the offending at the top of USC band two or the bottom of USC band three was distinctly too high, even taking into account the factors increasing culpability. We see Mr Baldwin's offending, but for the breach of trust and the degree of planning and vulnerability, as being at the lower end of USC band two. This would have warranted a starting point of approximately four to five years imprisonment. However, the very serious breach of trust is a significant factor increasing culpability to the middle of USC band two, and when the degree of planning and vulnerability are added, somewhat above. This lifts the appropriate starting point to seven years six months' imprisonment.

The addition of one year for the indecency offending

[27] In *R v AM* it was stated:

[78] In a sentencing exercise, inevitably, degrees of seriousness have to be stated and the sentencing judge has to make that assessment. ...

⁷ At [117].

⁸ *R v Bell* CA393/05, 28 April 2006.

[79] In considering the culpability of offending in a particular case, we emphasise that what is required is an evaluative exercise of judgment. We see judges as having a reasonable degree of latitude in this exercise. Sentencing judges will have a range of information before them and, after trial, will have more information than can be gleaned from the record. In assessing the gravity of offending judges must, of course, do this in a fact-specific way focusing on the culpability of the offender and the effect on the victim and, as a corollary, they must not reason by stereotype or seek to turn responsibility for the offending back on the victim, in terms of “she asked for it” or other excuses based on rape myths.

[28] That judgment describes the USC bands in terms of seriousness, and provides examples of cases at points in the bands to illustrate the type of culpability that is envisaged. The conduct illustrated is the total offending and not just the offending that constitutes unlawful sexual connection. An evaluation of all the circumstances is required.⁹ This involves looking at all of the actions of the offender that are part of the train of events. Lesser offending which is often part of that train of events (such as indecencies) is part of that conduct.¹⁰ Once a place in a USC band has been fixed by this process, it does not allow for further uplifts in relation to specific aspects of that offending that do not involve unlawful sexual connection. The place in the USC bands will be already fixed to reflect that totality of the offending conduct. Any other approach would make the band assessment process artificial by removing integral aspects of the offending conduct from the assessment of culpability and place in the bands. Further, unless there is a rigid exclusion of all the non unlawful sexual connection offending, there is a risk of a double counting of the indecency conduct when there is an uplift for that offending.

[29] That appears to have happened in this sentencing. The judge properly considered all of the offending in assessing the factors increasing culpability, and the appropriate place in the bands. He referred to all the planning and the 2007 and early 2008 conduct leading up to the unlawful sexual connection in 2009. But after that assessment and allocation had been done, the indecency aspects of that same offending were again taken into account in applying a further uplift of one year. So the same conduct, already taken into account in the assessment of culpability, was assessed for a second time and an uplift resulted.

⁹ *R v AM* at [36].

¹⁰ *R v AM* at [47] and [49].

[30] We conclude, therefore, that it was incorrect to add one year to the starting point to reflect the lesser counts.

Mitigating factors

[31] There was no challenge by Mr Wiles to the reduction in sentence of one year and three months imprisonment, to reflect Mr Baldwin's good character, his remorse and the guilty pleas. We apply that deduction to the reduced starting point, given Mr Baldwin's exemplary 40 year history up to the offending, and his genuine regret for his actions. We appreciate that in percentage terms the discount thereby increases, but we think that appropriate. In the High Court it was stated that the discount for good character was tempered because the offending arose out of Mr Baldwin's work. There was an element of double counting in doing so, as the breach of trust arising from Mr Baldwin's position as a teacher had already been taken into account in fixing a higher starting point.

Conclusion

[32] If one year and three months is deducted from a seven and a half year starting point, an end sentence of six years three months' imprisonment is reached. Given the errors, it is necessary to substitute this new sentence. Further, when six years and three months imprisonment is compared to the period imposed of eight years nine months, we conclude that the sentence imposed was manifestly excessive.

Result

[33] The appeal is allowed. The sentence of eight years and nine months' imprisonment is quashed and substituted with a sentence of six years and three months.