

**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

**CA714/2011
[2012] NZCA 212**

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|---------|-------------------------------|
| BETWEEN | DYLAN BRUCE HOOD Appellant |
| AND | THE QUEEN Respondent |

Hearing: 14 May 2012

Court: Randerson, Keane and Asher JJ

Counsel: C W J Stevenson for Appellant
K A L Bicknell for Respondent

Judgment: 28 May 2012 at 10 a.m.

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B The appeal against sentence is allowed.**
- C The sentence of six years' imprisonment is quashed. A sentence of five years' imprisonment is substituted on each of the three counts of violation, to be served concurrently.**
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REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] Dylan Bruce Hood was convicted of three counts of sexual violation by unlawful sexual connection between 1 January 2007 and 31 January 2008, and on 12 October 2011 sentenced to six years' imprisonment. He was convicted after a trial before a jury.

[2] The victim was at the time aged between six and seven years. Mr Hood was aged between 14 and 15 years, the offending commencing when he was approximately 14 years and five months old. He was at the time of sentence 19 years old.

[3] Mr Hood is the son of an associate of the victim's parents. They took on something of a mentoring role towards Mr Hood, aiding him in obtaining some part-time employment. He stayed in the family home at various times over a period in excess of one year, often overnight.

[4] There were five counts laid against Mr Hood, four concerning the victim. In relation to the three counts on which he was convicted, the first related to an occasion when the victim was allegedly asleep lying on her stomach on her bed. Mr Hood allegedly got onto the bed waking her. He pulled off her clothing exposing her buttocks and genitalia. He allegedly removed his penis from his trousers and placed it between the victim's buttocks coming into contact with her anus. It is alleged that he was unable to insert fully his penis into her anus, but that he moved it up and down in the buttocks area simulating sexual intercourse. This continued for some time before he got off the bed and left the bedroom.

[5] The second alleged occasion was at the victim's father's work premises. The victim was present on the particular day and went downstairs to use the bathroom.

The appellant saw her go downstairs and followed her and entered the bathroom. He pulled the victim's trousers down exposing her buttocks and genitalia. He positioned the victim so that she was lying over the toilet seat on her stomach and then removed his penis from his trousers. He separated the victim's buttocks and attempted to insert his penis into her anus. He then placed his penis in between her buttocks area and began moving it in and out simulating sexual intercourse. The appellant carried on for some time before stopping and leaving the toilet.

[6] On the third occasion he entered the victim's bedroom where she was sleeping. In a process that was largely the same as that alleged in relation to the earlier count relating to activities in her bedroom, he placed his penis between her buttocks and simulated sexual intercourse.

[7] In the complainant's evidential interview on 26 March 2010, which was her evidence-in-chief, she described his actions and this exchange occurred:

HAYES: Okay, and what ... when his D.I.C.K was in your bum, how did he get in your bum?

[VICTIM] He just put it in the part where my poohs come out.

She indicated that the same action took place on the three occasions.

Conviction appeal

Background

[8] In his summing up Judge Treston stated that in relation to the charge of sexual violation by unlawful sexual connection the Crown must prove four essential ingredients. The Judge said this in relation to the first ingredient:¹

... One, first, there was a sexual connection between the accused and the complainant. A sexual connection is defined as including connection affected by the introduction into the anus of a person by part of the body of another person. So here the allegation is anal connection, as I have said, by the accused's penis into the anus of the complainant ... The degree or extent of introduction is irrelevant. If there is an introduction at all, no matter how

¹ *R v Hood* DC Wellington CRI-2010-291-98, 17 August 2011 at 8–9.

slight or for how slight of time, that will suffice. So that is the first thing: there has to be a sexual connection.

He then went on to refer to the other ingredients of intention and lack of belief on reasonable grounds of consent.

[9] In due course during their deliberations the jury sought to view the DVD of the interviews, and asked this question:

Could we please have clarification of unlawful sexual connection ...
“Introduction of his penis into her anus” does this mean penetration into the anal canal or penis in surrounding area[?]

[10] After consultation with counsel the Judge had the DVD interviews played again to the jury. He then responded to the question as follows:

[2] Mr Foreperson, members of the jury, we have now viewed again [the victim] and Dylan’s videos as you requested. Your question that you handed up last night is one which I have discussed with counsel in the presence of the accused, of course, and just for completeness let me read it out to you. “Could we please have clarification of unlawful sexual connection?” Also, next sentence, “‘Introduction of his penis into her anus,’ does this mean penetration into the anal canal or penis in surrounding area?”

[3] The law provides as follows. Sexual connection includes connection effected by the introduction into the anus of one person of a part of the body of another person. I will say that again. Sexual connection includes connection effected by the introduction into the anus of one person of a part of the body of another person. Such introduction need only be to the slightest degree. Touching the anus with the penis is not enough.

[11] The next day the jury asked a further question which read verbatim as follows:

Can we have in writing your answer about our previous question on counts 2 – 4 and is the application of pressure, touching or introduction into as asked in our previous question counts 2 – 4.

[12] Counsel and the Judge struggled with the meaning of this question. It did not make sense. After an inconclusive discussion with counsel, the Judge had his earlier answer to the question typed up. He called the jury back in and said to the jury:

Thanks for your communication which I read: “can we have in writing your answer about our previous question on counts 2 to 4? And is the application of pressure touching or introduction into, as asked in our previous question, counts 2 to 4?” Couldn’t quite follow that.

What I'll do is, I've had typed up, with the approval of counsel, what I said in answer to your last question. I think the simplest thing to do, rather than enter into a dialogue with you, which is inappropriate, is simply for you to go and have a look at that, and if you have any other queries let us know.

[13] An unknown speaker is then recorded as thanking the Judge. The jury retired. After he had done this counsel for Mr Hood (who was not counsel who appeared on this appeal) asked to see the Judge again. He expressed some reservations about the Judge's responses to the questions. The Judge did not communicate further to the jury who in due course returned their verdicts.

[14] In this appeal the sole submission on the conviction appeal was that the Judge's responses to the two questions were inadequate. Mr Stevenson for Mr Hood argued that the jury wanted to know what introduction of the penis into the anus actually meant; whether it meant penetration into the anal canal or surrounding areas, and whether the application of pressure was sufficient. He submitted that there had been a failure to direct the jury on that inquiry accurately. He submitted that pressure on the anus as distinct from penetration would not be enough to sustain the charge, but the jury was never told that.

[15] Ms Bicknell for the Crown submitted that there was no error, and no possibility that the appellant may have been convicted for something that did not amount to sexual violation by anal penetration, and that the answers to the jury questions were entirely appropriate.

Discussion

[16] The definition of sexual connection in s 2(1) of the Crimes Act 1961 is:

sexual connection means—

- (a) connection effected by the introduction into the genitalia or anus of one person, otherwise than for genuine medical purposes, of—
 - (i) a part of the body of another person; or
 - (ii) an object held or manipulated by another person; or
- (b) connection between the mouth or tongue of one person and a part of another person's genitalia or anus; or

- (c) the continuation of connection of a kind described in paragraph (a) or paragraph (b).

[17] Section 2(1A) now specifically provides that for the acts covered by paragraph (a) “introduction to the slightest degree is enough to effect a connection”. The Judge’s answer to the first question exactly reflected this wording. He also went further and stated that touching the anus with the penis was not enough. So the jury knew that if the penis only touched the anus it was not sexual connection, but that introduction into the anus, however slight, was enough. There is no error in this description which accords to the words in the Act. It is comprehensible and sufficiently detailed to be meaningfully applied to the facts of the case.

[18] It is difficult to discern the meaning of the second question. The Judge’s response was not to enter into a dialogue with the jury. He stated that he could not quite follow their question. He provided his earlier answer in writing, and invited any other queries after the jury had considered it. This was in our judgment the correct course to take. It presented the jury with a simple test and avoided speculative attempts at further definition, while giving the jury the chance to ask more questions if, after they had considered his written words, there was still uncertainty or confusion.

[19] Mr Stevenson suggested that the Judge should have put some definition of “anus” to the jury. However, there was no evidence before the Court as to what was the anus. There is no definition of the word in the Crimes Act, or any other established definition. Mr Stevenson said that the word “anus” could be subject to further definition just as the word “genitalia” could be broken up into various elements. We do not consider that the comparison is apt. While a number of elements can constitute genitalia, there is only one anus.

[20] In the end Mr Stevenson’s submission was not so much that there was any error in the words the Judge used, but rather that he should have said more. What more he could have said was not specified and we are unable to see how the Judge could have improved his response. It is easy to understand the difference between something resting on the outside of the anus and something being introduced inside it. Nor do we consider that the two questions indicated any confusion on the part of

the jury. Plainly they wanted to have a clear understanding of what was necessary to establish sexual connection. The lack of any further queries indicates that on reflection of the written further direction, they decided that they had a comprehensible and satisfactory answer from the Judge.

[21] This being the only point pursued on appeal, the appeal against conviction fails.

Sentence appeal

Background to sentence appeal

[22] Before Judge Treston both Crown and defence saw the range of the starting point as that governed by rape band two set out in *R v AM (CA27/2009)*² where the range of penalty is 7 to 13 years. The Crown submitted that the starting point should be 10 to 12 years because of the victim's young age, the harm she suffered, the abuse of trust and the scale of the offending. It was accepted that a discount for youth of up to 40 per cent was proper. For the appellant it was submitted that the appropriate starting point was seven years at the lowest end of band two. The appellant sought a discount for his youth to bring the sentence within the home detention range and a sentence of home detention was urged.

[23] Judge Treston took the starting point to be nine years' imprisonment. He noted that the introduction of Mr Hood's penis into the anus of the victim was minimal and of short duration. There were no physical injuries or question of ejaculation. He noted the young age of the victim, her vulnerability, elements of breach of trust, harm to the victim and multiple offending. He fixed a starting point of nine years' imprisonment and considered that a 30 per cent discount for personal factors was appropriate.

[24] In this appeal Mr Stevenson submits that the nine year starting point was very high. He submitted that six years should have been the starting point with

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

deductions for lack of convictions and youth. He submitted that the end sentence should have been four years' imprisonment.

The starting point

[25] Given there were three aggravating factors, this offending was properly placed in band two of the *R v AM* rape bands. However, it is clear that the jury's view was that the degree of penetration was slight, as is indicated by the jury questions about the required degree of penetration. The evidence of the victim, in particular her lack of reference to any pain, indicates that the violence inherent in the act was at a comparatively low level. This slight level of penetration must be recognised in fixing the starting point. The culpability for the offending itself is relevant in fixing not only the band, but the place in the band.

[26] The Judge referred to a breach of trust while recognising that this was "not in perhaps the usual way". There was technically a breach of trust in that Mr Hood was an older person alone with a young child. However, given Mr Hood's age at the time of offending being between 14 and 15 years and the fact that he appears to have had no particular responsibilities in relation to the victim, this was at best an aggravating factor to a low degree only.

[27] There were, however, three more clear aggravating factors. The first was the vulnerability of the victim by virtue of her age (six to seven years). The second factor was harm to the victim. Although there was no violence beyond that which is inherent in the offending, the victim's mother had noted distinct behavioural changes in the victim from the time of the assaults. She describes the events as having changed their lives and having caused the victim significant emotional harm. The third aggravating factor was the scale of the offending. There were three incidents over a period of over a year.

[28] The assessment of the place in band two had to reflect the lower level of culpability arising from the slight penetration and absence of particular violence or infliction of pain. It also had to reflect the nature of the three aggravating factors which increased culpability to a moderate degree only. Together, these factors

placed the offending towards the bottom of rape band two. Mr Hood's actions cannot be compared, for instance, to multiple abuses of trust by adult relatives. Nor can they be compared to violations involving full penetration, or the infliction of violence beyond the sexual act, or pain or fear. There is some similarity to the case of *R v W*³ which was put forward in *R v AM* as an example of a case with a starting point at the lower end. In that case there was simulated intercourse and one act of oral contact between a boxing trainer on several 11 – 16 year old boys.

[29] So we differ from the careful analysis of the Judge and place the offending at the lower end of band two, rather than towards the middle. We consider that the nine years' imprisonment was too high, and that eight years' imprisonment was the correct starting point.

Personal factors

[30] We turn to the appropriate discount. The Judge stated that the discount he chose for personal factors was 30 per cent, but in fact applied a one-third discount. Had this been for youth alone, we would see no basis to interfere with the assessment. At between 14 and 15 years of age Mr Hood was more vulnerable and susceptible to negative influences and impulses than an adult.⁴ His personal culpability was lower and this had to be recognised in assessing the relevant mitigating factors. A full one-third discount was the appropriate recognition for his youth. If one-third is taken off the starting point for youth it is reduced to five years and four months' imprisonment.

[31] Mr Hood defended the charges and continued to maintain his innocence to the probation officer. He was 19 when he was sentenced, some five years after the offending. He had some minor convictions for other matters but no convictions for sexual offences either prior to the subject offending or in the period of several years between then and the date of his conviction. The Judge referred to this good record, and appears to have recognised it by including it as part of the "30 per cent" discount.

³ *R v W* CA87/93, 4 June 1993.

⁴ *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].

[32] While we agree with the Judge that no discount for remorse could be given, we consider that a separate discount over and above the one-third for youth was warranted for Mr Hood's good character. This should have been treated as a mitigating factor warranting a separate discount beyond the one-third. In our assessment that particular discount should have been the reduction of a further four months from the term of imprisonment, reducing it to a term of five years' imprisonment.

Result

[33] The appeal against conviction is dismissed.

[34] The appeal against sentence is allowed.

[35] The sentence of six years' imprisonment is quashed. A sentence of five years' imprisonment is substituted on each of the three counts of sexual violation, to be served concurrently.

Solicitors:
Crown Law Office, Wellington for Respondent