

**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

**CA800/2011
[2012] NZCA 240**

BETWEEN	DANIEL LEONARD WATTS Appellant
AND	THE QUEEN Respondent

Hearing: 14 May 2012

Court: Randerson, Keane and Asher JJ

Counsel: R J Hooker & M L Clark for Appellant
P D Marshall for Respondent

Judgment: 12 June 2012 at 11.30 a.m.

JUDGMENT OF THE COURT

- A The appellant is granted an extension of time to appeal.**
- B The appeal against sentence is dismissed.**
-

REASONS OF THE COURT

(Given by Keane J)

[1] On 26 March 2010, Daniel Watts was sentenced by Judge Spear in the District Court, Hamilton, to imprisonment for four years, ten months, for sexually violating one complainant, A, by raping her on 26 July 2008. He was discharged on the lesser alternative count, assault with intent to violate. He was sentenced concurrently to three months imprisonment for indecently assaulting a second complainant, B, on 9 October 2008.

[2] On 3 March 2011 this Court set the rape conviction aside.¹ It held that there had been a miscarriage of justice because Mr Watts had entered his plea without adequate advice. He had not been told that he might be able to defend the charge by contesting the adequacy of the evidence that he had penetrated A. The Court also took into account that Mr Watts had a “mild intellectual disability”.

[3] The Court directed that Mr Watts be retried on the rape count and the lesser alternative assault count. But it said that, had it been able to, it would have convicted Mr Watts of the assault as to which there was clear evidence. Following that appeal Mr Watts pleaded guilty to the assault in the District Court, Hamilton. The Crown offered no evidence on the rape, and on 6 July 2011 Judge Burnett sentenced Mr Watts to imprisonment for three years, ten months.

[4] Mr Watts appeals that sentence as manifestly excessive. The Judge, he contends, sentenced him incorrectly in three ways: she took too high a starting point, between four years, nine months and five years, three months; she wrongly assumed that his offence was aggravated by an abuse of trust; and she should have allowed him a significant discount for his intellectual disability.

[5] Mr Watts filed his notice of appeal out of time and requires an extension of time to appeal. Although his appeal was filed within time, it was, in error, filed in the Hamilton District Court and that was not rectified within time. The Crown does not oppose an extension of time.

Context

[6] Mr Watts and A each suffer from intellectual disability, A more seriously than Mr Watts, whose disability is mild. At the date of Mr Watts’ offence they and their partners were living independently, at separate addresses, with the support of the Community Living Trust. They had been friends for some years. That evening they were at A’s address celebrating her birthday.

¹ *Watts v R* [2011] NZCA 41.

[7] At about 11.30pm Mr Watts, who had drunk a large amount of alcohol, left to go to his flat to feed his cat. He repeatedly asked A to go with him and she agreed. On the way Mr Watts suggested to A that she was sexually attracted to him. She expressed outrage. He attempted to touch her hand. She resisted. At his address he began kissing her and touching her breasts, and pubic area, over her clothing. She asked him to stop. He did quite the opposite.

[8] Mr Watts pushed A into his bedroom and dragged her to the bed. He forcefully removed her pants, then his own clothing. He climbed on top of her and tried to penetrate her vagina with his penis. His penis came into contact for a few seconds with, or very near to, A's genitalia. She pushed him away, swore at him and slapped his face. He stopped, began to cry, and apologised. He put his clothes back on and they returned to her address.

[9] Mr Watts later told the police that he had "got a bit forceful" with A, that she had told him to stop and slapped his face. He denied trying to force himself on her and claimed that at her address and then at his, she had consented.

Victim impact statement

[10] In her victim impact statement A said that she had known Mr Watts for 10 years, or even longer, and that until the date of his offence they had been good friends. She had been good friends with his partner. As they walked to his flat, and at the flat itself, she said, he did not ask her whether he could touch her. He just did it and, though he did not hurt her physically, he hurt her "inner self".

[11] A explained that, as a result, she had lost Mr Watts' partner as a friend and, more significantly, she had undergone counselling once a week for six months. She said that she did not want to feel sad all her life. She did not want what had happened to her to taint the life of her partner and her son.

Pre-sentence report

[12] Mr Watts' pre-sentence report confirmed that he does suffer a mild intellectual disability and that he was placed in foster care at the age of five, after he had been abused physically and sexually by his father. Then over 10 - 12 years he received intensive specialist help from the Child, Youth and Family Service.

[13] The issue at that time, as it has been ever since, was not his disability but his sexual behaviour. Since May 2006, alone, he has undergone 54 sessions with a psychologist. He has been taught, as he was taught when young, ways to avoid offending sexually. He has never responded. More recently he has kept himself in a state of arousal by making telephone contact with sex lines and resorting to pornography. He has indecently exposed himself, groomed possible victims, and touched them indecently.

[14] Though Mr Watts has a relatively small number of previous convictions, six in ten years, most have been for sexual offences. In May 1999 he was placed under the supervision of the Department of Social Welfare for three months for indecently assaulting a girl under 12. In July 1999 he was ordered to come up for sentence if called upon within one year for an indecent act. In May 2006 he was sentenced to supervision for two years for offensive and suggestive language. In March 2011 he was sentenced to three months imprisonment for indecent assault.

[15] Mr Watts' offence against A, his report concluded, marks an escalation and it is symptomatic. Mr Watts attributes his actions to the fact that he and A had been drinking. He does not show any empathy for her or any remorse. He is at high risk of re-offending and of harming others.

Psychological assessment

[16] The psychologist, whose report the Judge also had, described Mr Watts as having inherited "a genetic vulnerability for intellectual disability", which in his case is a mild disability that "may well not have been a problem at all" had he been

brought up in a stable, caring family. But he had developed pathologically as a result of the neglect and physical and sexual abuse he had suffered when young.

[17] In his early years in care, the psychologist said, Mr Watts was regressive and unmanageable. He transgressed sexually. He was moved from home to home and school to school. He received intensive help. But that did not assist him then. Nor has the help he has received since. He still avoids taking any responsibility for his behaviour. Instead of avoiding risk, he does the opposite. He keeps himself in a state of sexual arousal by resorting to pornography, drugs and alcohol.

[18] As to Mr Watts' mental and emotional state, when he offends sexually, she said this:

It appears that Mr Watts has the ability to know and understand at the time of doing these things that it is risky or wrong to do so, but a sense of entitlement to satisfy his urges and lack of consideration for his victims allow him to make the wrong choices. Furthermore, it appears that the possibility of getting caught may add some excitement for him. On occasion Mr Watts has not received any punishment for his transgressions which may also have reinforced a notion within him that his special status excuses his behaviour.

[19] The psychologist considered Mr Watts at high risk of re-offending and at an increasingly serious level. If he were sentenced to live under the supervision of the Community Living Trust, that might convince him that he could offend without consequence. If he were imprisoned, he might be "somewhat vulnerable" to sexual exploitation or he might invite it. He might become more institutionalised. Conversely, he might learn that he will be held accountable for his wrongdoings. He might benefit from vocational training and further counselling.

Sentence under appeal

[20] In sentencing Mr Watts, Judge Burnett dismissed his suggestion that he and A had kissed each other for a significant time before he acted as he did. She preferred A's account that Mr Watts had targeted her because he was aware of her disability and thought she would not reveal his offending.

[21] She described his assault as being “as close to rape as it gets”. There was skin to skin contact between Mr Watts’ penis and A’s genitalia and before that he had fondled her breasts and pubic area. A was a vulnerable victim, as he knew. He had not simply been “opportunistic”. He had “engineered this way of being alone with A”. He had abused their friendship and A’s trust.

[22] The Judge considered that Mr Watts had a propensity to offend sexually and was at high risk of re-offending. Mitigating his offence was his guilty plea after this Court’s first decision, but his “mild disability” deserved only limited recognition. He knew full well that his conduct was illegal and he deliberately preyed upon a vulnerable woman.

[23] The Judge noted that Judge Spear had taken a seven year starting point when sentencing Mr Watts for the rape. Relying on a range of cases,² she took instead a starting point between four years, nine months and five years, three months, which she increased by three months for Mr Watts’ previous related convictions. She then allowed what she described as a full discount for the guilty plea but without specifying the amount of the discount. This resulted in the final sentence of three years, 10 months imprisonment.

Starting point

[24] Mr Watts’ first ground of appeal, that the Judge’s starting point was excessive, is complicated by the fact that she does not say what point within her range she adopted. However, assuming that the Judge did give a 25 per cent discount for his plea, and no discount for Mr Watts’ intellectual disability, her starting point must have been about five years imprisonment.

[25] Mr Watts contends that the Judge’s starting point ought not to have been any greater than four years. His principal point is that, though he assaulted A with intent to violate her, he did not penetrate her. His offence is not to be equated with sexual violation by rape.

² *R v AM* (CA27/09) [2010] NZCA 114, [2010] 2 NZLR 750; *R v Hill* CA94/02, 21 October 2002; *R v Cox* CA204/05, 7 December 2005; *R v Keen* [2010] NZCA112.

[26] Mr Watts submits that the Judge should not have treated as relevant the decision of this Court in *R v AM*³ and another case in which there was an actual violation.⁴ The Judge did refer to two cases in which assault with intent to violate was the index offence. In those cases, Mr Watts says, this Court endorsed a starting point of four years.⁵

[27] We accept that the Judge did treat as an aggravating feature of Mr Watts' assault that it was as close to rape as it gets. But in that she made no error. His offence fell short of sexual violation by a narrow margin. Had he penetrated A's genitalia, however slightly and briefly, he would have been culpable of rape under *R v AM*⁶, band one.

[28] In *AM* this Court said of the three cases it identified at the lower end of that band, "The encounters in these three cases were relatively brief and the degree of violation correspondingly brief". Furthermore, as this Court said in *R v Hassan*,⁷ assault with intent to violate attracts the same penalty as an attempt to violate and for sentencing purposes there is no significant distinction between the two. Mr Watts could equally have been charged with an attempt.

[29] Despite the fact that there are these links between assault with intent to violate and sexual violation, the Judge did not confuse the one with the other. Her starting point is not referable to *AM*, band one. She can only have struck it as a response to Mr Watts' offence. Thus she conformed with *Hassan*, which held that there is no tariff for assault with intent to violate and that a starting point must always be fact dependent.

[30] We also consider that the Judge's starting point range corresponds intelligibly with the range of starting points taken in broadly comparable cases, where assault with intent to violate is the index offence; both the two she referred to herself and those identified on this appeal.⁸

³ *R v AM* (CA27/09) above n 2..

⁴ *R v Hill* above n 2.

⁵ *R v Cox* above n 2; *R v Keen* above n 2.

⁶ *R v AM* (CA27/09) above n 2 at [94].

⁷ *R v Hassan* [1999] 1 NZLR 14 (CA) at [15]–[16].

[31] The Judge accurately identified the factors aggravating Mr Watts' offence: Mr Watts isolated A by relying on their friendship; he was not deflected when she rejected him; he isolated her at his flat and assaulted her in a very determined way in order to violate her and he had the advantage of size. It was very fortunate that she was able to repulse him.

[32] While it is not completely clear what starting point the Judge actually adopted, we consider that she was justified in taking one of approximately five years. A's vulnerability arising from her intellectual disability was a further aggravating factor, despite Mr Watts' own intellectual disability. To the extent that his disability had any place on sentence, it was only as a personal mitigating factor.

Abuse of trust

[33] Mr Watts' second ground of appeal is that the Judge wrongly saw his offending as aggravated by an abuse of trust. As will be apparent from what we have just said, we do not consider the Judge made any error in this respect.

[34] It is certainly true, as this Court has said, that abuses of trust typically arise in family or analogous relationships where adults who have responsibility for children abuse their authority and the child's trust.⁹ An abuse of friendship is clearly not in the same category.¹⁰ But an abuse of friendship, involving a breach of trust, can be aggravating in its own right.¹¹

[35] The plain fact is that Mr Watts was only able to offend against A as he did because they were friends and she trusted him. Otherwise she would never have left the security of her home and gone with him to his home. To isolate her and render her vulnerable he relied on her friendship and trust and he abused both. That did indeed seriously aggravate his offence.

⁸ *R v Hassan* above n 7; *R v Cox* above n 2; *R v Keen* above n 2; *R v Andrews* CA224/97, 29 October 1997; *R v Cottle* CA229/04, 2 November 2004; *R v M* [2012] NZHC 409.

⁹ *R v AM* (CA27/09) above n 2 at [50].

¹⁰ *R v Cox* above n 2 at [68].

¹¹ *R v G* (CA139/04) CA139/04, 13 September 2004 at [27].

Intellectual disability

[36] Mr Watts' final ground of appeal is that the Judge wrongly gave him no discount for his intellectual disability, or only a token discount. Complicating this ground is that the Judge was not explicit. But she did say that his disability deserved only “limited recognition” and we assume that is all that she gave it.

[37] Intellectual disability can result in discounts in the range of 12–30 percent.¹² It can reduce an offender's moral culpability and go to what punishment is just. There may be less need to impose a sentence that denounces and deters. It can go to the type of sentence an offender is capable of serving. There can be an issue whether imprisonment might adversely affect an offender's mental health. But all depends on the nature and severity of the disability at the time of the offence and of sentence.

[38] Mr Watts contends that his disability is not merely intellectual. He contends that it was compounded by the sexual and physical abuse he suffered when young and that it is the effect of the two combined that has impelled him to misbehave sexually ever since.

[39] Mr Watts also relies on the fact that when he was sentenced for the rape, Judge Spear reduced his sentence for this reason alone by some two years. The Judge reduced the starting point from eight to seven years in part because of Mr Watts' impulsivity. He further allowed Mr Watts a full 33 per cent discount, because of his personal difficulties.

[40] Despite that, we consider that Judge Burnett was right to allow Mr Watts' disability only “limited recognition”. The psychologist's opinion is especially telling. She considered that, even after intensive therapy, Mr Watts offends deliberately and relies on his disability to escape responsibility. Her opinion is that if he were imprisoned, that would not be to his obvious detriment. It might well be the only effective sentence.

¹² *E (CA689/10) v R* [2010] NZCA 13 at [70]–[71].

[41] In the result, we consider that, though Mr Watts is to be distinguished from a normal sexual offender, he would be entitled to no more than a 10 per cent discount on account of his disability.

Conclusions

[42] Despite the fact that the Judge did not give Mr Watts any discount for his disability, we consider that the three year, ten month sentence she imposed on him for his assault on A was not manifestly excessive.

[43] We consider the Judge was generous to Mr Watts in adopting an uplift of only three months for his previous convictions, which are significant in themselves. We consider that the starting point of five years imprisonment could have been uplifted by six months. If one deducts from that increased starting point 10 per cent for Mr Watt's disability and then from this, 25 per cent for his plea, the resulting sentence becomes three years, eight months imprisonment. That is only slightly less than the sentence the Judge imposed which we are satisfied was within range.

[44] We grant the appellant an extension of time to appeal but dismiss the appeal.

Solicitors:
Vallant Hooker & Partners, Auckland for Appellant
Crown Law Office, Wellington for Respondent