

**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**

**CA844/2011  
[2012] NZCA 352**

BETWEEN	M (CA844/2011) Appellant
AND	THE QUEEN Respondent

Hearing: 11 July 2012

Court: Arnold, Potter and MacKenzie JJ

Counsel: R J Stevens and H J Talbot for Appellant  
D J Boldt for Respondent

Judgment: 7 August 2012 at 11 am

---

**JUDGMENT OF THE COURT**

---

- A The appeal is allowed.**
- B The sentence of six years, nine months' imprisonment is quashed.**
- C A sentence of five years, seven months' imprisonment is substituted.**
- 

**REASONS OF THE COURT**

(Given by MacKenzie J)

## **Introduction**

[1] The appellant was, on 9 December 2011, sentenced by Judge Clapham in the District Court at Manukau to six years, nine months' imprisonment following a plea of guilty to one representative charge of sexual violation.<sup>1</sup> The appellant appeals against this sentence.

## **Background**

[2] This is a very tragic case. The victim is the appellant's aunt. She is profoundly disabled and has for many years been bedridden and totally dependent on others for her day-to-day care. She is in a persistent vegetative state and is unable to communicate in any way. She has been cared for by her sister and her family in their home. The appellant was sent to live with the family in 2000, when he was 12 years old, after his father was imprisoned. The appellant described himself as mistreated and physically abused by the family, being made to do more household tasks than the other children in the family, and having to look after the victim. On two occasions after he turned 14 years of age in August 2002, he raped the victim. On the second occasion, late in 2003, the victim's sister noticed that the victim's bedroom door was closed, which was out of the ordinary, and raised her suspicions. She entered the room and found the appellant naked on top of the victim. She pushed him off immediately before attempting to comfort her sister.

[3] The victim became pregnant, and gave birth to a daughter. The appellant was removed from the home following the rape. These events were not then reported to the police or other authorities. They came to notice in 2011 and the police commenced an investigation. On 19 April 2011, the police spoke to the appellant and he admitted to the offending. He admitted having raped the victim on at least three occasions. He voluntarily provided a DNA sample, which showed that he was the father of the child. He was charged with the offending in June 2011.

---

<sup>1</sup> *R v M DC Manukau CRI-2011-092-8749*, 9 December 2011.

## **The sentencing**

[4] At sentencing, counsel for the Crown submitted that the rape fell within band three of *R v AM* and submitted that a starting point of 12 to 13 years was appropriate.<sup>2</sup> The Judge noted the submission of counsel for the appellant at sentencing as being that the offending should be in band one, although the notice of appeal indicates that counsel had contended for a band two starting point in the range of eight to nine years.

[5] The Judge, appropriately, described this as a difficult sentencing. He noted as a central issue creating difficulty the appellant's age at the time of the offending. He also referred to what he described as an emotive and potentially inflammatory submission from the appellant's counsel about the conduct of the family in allowing the victim's pregnancy to continue.

[6] The Judge noted as culpability factors under *R v AM* the combination of the appellant being a household member involved with the care of the complainant, the breach of trust arising from that, the vulnerability of the victim and "the fact that the information that is laid is a representative charge in respect of three admitted offences". He held that the offending fell within band three, and adopted a starting point of between 12 and 13 years. The Judge then had regard to the appellant's age and allowed a four year discount, reducing the sentence to nine years (which indicates that he used 13 years as the starting point.) He then allowed a discount of 25 per cent for the appellant's guilty plea, which was made at the earliest opportunity. He noted that, though there was claimed remorse and no repetition of such conduct, he was unable to allow any further discount. He imposed an end sentence of six years, nine months' imprisonment.

## **Submissions**

[7] Counsel for the appellant submit that the sentence was manifestly excessive, and that the Judge erred in:

---

<sup>2</sup> *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

- (a) adopting too high a starting point, by giving too much weight to aggravating factors and failing to give sufficient weight to the age and circumstances of the appellant at the time of the offending; and
- (b) failing to give sufficient weight to mitigating factors, including the appellant's remorse and his attempt to engage in the restorative justice process.

[8] Counsel for the appellant submit that the starting point of 13 years' imprisonment, which placed the offending at the top of band two or the bottom of band three, was too high. Counsel accept that the victim was particularly vulnerable. They submit that some guidance can be drawn from cases involving grossly intoxicated or comatose victims. Counsel also submit that the Judge erred in regarding the offending as involving a breach of trust, and that there was no breach of trust in the traditional sense. The appellant was required to care for the victim as part of his duties in the household, but did not seek that position, and resented it. The appellant was only 12 years old when he was first required to assist with the care of the victim.

[9] Counsel also submit that the Judge gave too much weight to the fact that the offending occurred on three separate occasions. Counsel observe that the dates of the representative charge included only the period after the appellant turned 14. The appellant had said in his interview that he was around 12 years old on the first occasion of offending. The first of the three admitted incidents did not occur during the period alleged in the charge, and should have been disregarded when assessing the appellant's culpability.

[10] Counsel for the appellant submit that the appellant should have been given a greater discount for his young age at the time of the offending, of around 40 per cent. Counsel refer to a number of cases where discounts have been given for youth, including *R v Slade*,<sup>3</sup> *M v Police*,<sup>4</sup> *R v TT*<sup>5</sup> and *R v Alletson*.<sup>6</sup> In *M v Police*, Mallon J

---

<sup>3</sup> *R v Slade* [2005] 2 NZLR 526 (CA).

<sup>4</sup> *M v Police* HC Wellington CRI-2011-485-72, 21 September 2011.

<sup>5</sup> *R v TT* CA257/02, 29 October 2002.

<sup>6</sup> *R v Alletson* [2009] NZCA 205.

held that the total discount that the appellant received of 63 per cent (including for an earliest opportunity guilty plea) was “insufficient allowance for M’s immaturity at the time of the offending, that in the intervening period he had shown that he was not someone in respect of whom a deterrent sentence was necessary and that he remains a young man with potential”.<sup>7</sup>

[11] Counsel say that the appellant in this case “was clearly very immature and naive at the time of the offending”. They submit that it is apparent from the appellant’s interview with the police that he did not appreciate the nature, seriousness or consequences of his offending at the time. The appellant had a difficult upbringing. His parents separated when he was very young, and he lived initially with his father, who did not allow him to have contact with his mother. When his father was incarcerated, the appellant was sent to reside with his aunt and uncle. The appellant described being treated “like a slave” and said that he was physically abused.

[12] Counsel for the appellant also say that the sentencing Judge erred in failing to give the appellant a separate discount for his remorse. They say that the appellant expressed his remorse for his offending from the point at which he was interviewed, and at the end of his interview where he said “I’m sorry for what I’ve done ... If I could turn back time and change things I would”. Counsel also point to the pre-sentence report, which noted that the appellant “expressed contrition for his offending”. The appellant was willing to take part in a restorative justice programme, but the victim’s family declined.

[13] Counsel for the respondent submits that it was open to the sentencing Judge to select the starting point that he did. He submits that two aggravating factors in this case were extraordinary and drive the case well towards the top end of band two. The first is the victim’s comprehensive and permanent disability. Although the victim was helpless, it appears from the victim impact statement prepared on her behalf that she was aware of what was happening to her. The second is the victim’s

---

<sup>7</sup> At [24].

resulting pregnancy. Counsel submits that any pregnancy arising from a rape compounds and aggravates the seriousness of the offending significantly, and that in this case, the pregnancy was “particularly devastating”, considering the victim’s physical condition and that the victim’s family has had to raise the child.

[14] The respondent also argues that the breach of trust by the appellant was an additional aggravating factor. Counsel submits that, although the appellant did not accept a position of trust, he was part of a household, and part of his role within that household was caring for his aunt. Counsel submits that the degree of trust was substantial and “the breach could scarcely have been more profound”. Counsel also submits that an uplift was required to take account of the fact that there were two distinct rapes. He accepts the appellant’s submission that only the two incidents within the period of the indictment can be taken into account in determining culpability.

[15] Mr Boldt accepts that a discount was warranted for the young age of the appellant when he committed the offending, but submits that it is relevant that the appellant is no longer a youth. The promotion of rehabilitation is a key reason for giving generous discounts to young offenders, but the normal forward-looking aspect of the youth discount is not relevant to the appellant. Counsel submits that in any event, the discount of four years could not be described as inadequate.

[16] Counsel submits that the discount for the appellant’s guilty plea was generous, considering that the prosecution case was “overwhelming”. He says that a smaller discount would have been sustainable in the light of the comments of the Supreme Court in *Hessell v R* that the strength of the prosecution case is relevant to determining the appropriate discount for a guilty plea.<sup>8</sup>

[17] Mr Boldt submits that it was open to the Judge, in the circumstances, to regard the appellant’s expressions of remorse as “less than compelling”. Although the appellant appears to be remorseful, his letter to the Judge continues to reflect self-pity and his explanations of his offending were “not indicative of genuine insight”.

---

<sup>8</sup> *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [74].

## Discussion

[18] We address first the starting point. Several of the culpability assessment factors referred to in *R v AM*, are relevant to the assessment of the band in which this offending falls.<sup>9</sup> The most serious is the vulnerability of the victim. The victim was completely defenceless. Her total disability sets this case apart from other cases involving vulnerable victims. We do not find cases in which victims have been incapacitated by gross intoxication as providing a useful analogy to the nature and extent of the vulnerability of this victim.

[19] The second aggravating factor is the harm to the victim. The violation of her body has extended to the imposition on her of a pregnancy, with inherent risks and dangers. The medical information provided to us indicated a need for significant action to avoid thrombosis. The medical prognosis prior to birth also indicated that a caesarean section was likely to be necessary, though in the event, the child was born naturally at home. We view the harm to the victim herself from the rape and resulting pregnancy as considerable. The child herself, born without caring parents, and the family, who have to care for the child, are indirect victims of the offending.

[20] Further aggravating factors are that there were two incidents of rape with a degree of premeditation and planning, and that the respective positions of the appellant and the victim within the household give rise to an element of breach of trust, at the lower end of the scale.

[21] This combination of aggravating factors places the offending, in our view, at the higher end of band two.

[22] The Judge referred to a starting point of between 12 and 13 years. He then, without further discussion fixed the starting point at the top of that range (13 years). There are two matters that cause us to differ from the Judge on that starting point. The first is that the Judge did not give any reasons for choosing 13 years as opposed to 12 years, when narrowing his starting range to a starting point. The second is that the Judge took into account all three incidents referred to in the summary of facts,

---

<sup>9</sup> *R v AM*, above n 2.

including the incident to which the appellant had admitted before he turned 14. The appellant was to be sentenced only for the two incidents after he turned 14.

[23] For these reasons, we consider that a starting point of eleven and a half years is appropriate.

[24] The Judge allowed a discount for the appellant's age at the time of the offending of four years. He described that as generous.

[25] The extent of a discount due to the age of the offender depends largely on factors that are specific to the facts of each particular case. A reduction in sentence is in part a recognition of the reduced culpability of a youthful offender, as compared to an adult offender. In part, it is a reflection of the significant disadvantage of spending part of the offender's formative years in prison. It may also reflect the greater emphasis on rehabilitation that may be appropriate for a youthful offender. In this case, the two latter considerations must necessarily be tempered by the lengthy delay between the offending and the sentencing.

[26] We consider that, in this case, the discount of four years given by the sentencing Judge was appropriate. It is about 30 per cent of the starting point of 13 years adopted by the Judge. It is about 34 per cent of the starting point of eleven and a half years that we have adopted.

[27] That gives a sentence, before a discount for the guilty plea, of seven and a half years. The Judge gave the maximum discount allowable under the Supreme Court in *Hessell* for a plea at the earliest opportunity, of 25 per cent.<sup>10</sup> We allow a discount of a similar percentage, which (rounded) is 23 months. We do not consider that a separate additional discount for remorse is justified. That leaves an end sentence of five years, seven months' imprisonment.

---

<sup>10</sup> *Hessell v R*, above n 8.



## **Result**

[28] The appeal is allowed. The sentence of six years, nine months' imprisonment is quashed. A sentence of five years, seven months' imprisonment is substituted.

Solicitors:  
Crown Law Office, Wellington for Respondent