

**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**

**CA400/2012  
[2012] NZCA 465**

BETWEEN                      V (CA400/2012)  
                                         Appellant

AND                              THE QUEEN  
                                         Respondent

Hearing:            8 October 2012

Court:                Stevens, Chisholm and Venning JJ

Counsel:            B J Hesketh for Appellant  
                                 F E Cleary for Respondent

Judgment:        12 October 2012 at 11.00 am

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**JUDGMENT OF THE COURT**

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**A        The appeal is allowed.**

**B        The sentence of eight years imprisonment is quashed and a sentence of  
         four years and nine months imprisonment substituted.**

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**REASONS OF THE COURT**

(Given by Stevens J)

**Introduction**

[1]        The appellant pleaded guilty to 10 charges of sexual offending against his younger sister. He was sentenced by Judge Spiller in the Hamilton District Court to eight years' imprisonment.<sup>1</sup> He now appeals against the severity of that sentence.

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<sup>1</sup>        *R v V* DC Hamilton CRI-2011-059-1365, 7 June 2012.

[2] The appellant submitted that the starting point adopted by the sentencing Judge was too high and that insufficient allowance was made for youth, subsequent good character, rehabilitation and remorse. For these reasons, the appellant submitted that the overall sentence was manifestly excessive.

[3] For the reasons that follow, we consider that the appeal should be allowed and the appellant's sentence reduced. There were errors of principle in the construction of the sentence resulting in the starting point being too high. Insufficient discounts were applied for mitigating factors. Moreover, a mitigating factor that ought to have been applied to reduce the starting point was only applied in relation to whether or not a minimum term of imprisonment should be imposed. As a result the sentence was manifestly excessive.

## **Background**

[4] The offending in question occurred over a period of between three to five years from 1996 to around 2001.<sup>2</sup> At the time the offending commenced the complainant was approximately five years old and the appellant was approximately fourteen years old. During this period the appellant and the victim lived together with their parents and two brothers. As the eldest child, the appellant was frequently left to babysit his three younger siblings.

[5] The appellant's sexual offending against his sister took place on a regular basis. The sentencing Judge recorded that at one point the offending occurred at least once every fortnight. The appellant told his sister that "this is what big brothers and little sisters do" and instructed her not to tell anyone about the offending.

[6] The appellant's actions came to light when the complainant disclosed the offending in 2005. This eventually led to prosecution as a result of which the appellant pleading guilty to the following charges:

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<sup>2</sup> The duration and timing of the offending was disputed. Prior to sentencing Judge Burnett was asked to determine whether a disputed facts hearing on this issue was required. The Judge concluded that no such hearing was necessary and the sentencing should take place on the basis that the offending occurred "over a course of at least three years, possibly up to five years, roughly in the period 1996 to 2001": *R v V DC Hamilton* CRI-2011-059-13657, 7 June 2012. Counsel for the parties accepted this approach in the District Court.

- (a) Sexual violation (inducing the victim to perform oral sex on his penis in a woodshed).
- (b) Doing an indecent act on a girl under 12 (inducing the victim to masturbate his penis in the woodshed).
- (c) Sexual violation (oral connection with the victim's vagina in the appellant's bedroom).
- (d) Sexual violation (oral connection with the victim's vagina in the lounge).
- (e) Sexual violation (inducing the victim to perform oral sex on his penis in the lounge).
- (f) Sexual violation (inducing the victim to perform oral sex on his penis in the garage).
- (g) Doing an indecent act on a girl (inducing the victim to masturbate his penis in the garage).
- (h) Sexual violation (oral connection with the victim's vagina on a number of occasions) (representative charge).
- (i) Sexual violation (inducing the victim to perform oral sex on his penis) (representative charge).
- (j) Doing an indecent act on a girl under 12 (inducing the victim to masturbate his penis on a number of occasions) (representative charge).

### **Sentencing**

[7] The parties were agreed that the lead charge was that of sexual violation occasioned by the appellant inducing the complainant to perform oral sex on his penis.

[8] The Judge first considered the correct placement of this case within the bands set out by this Court in *R v AM*.<sup>3</sup> The culpability factors were identified as: the degree of planning and premeditation; the vulnerability of the victim; the harm to the victim; the scale of the offending; and the breach of trust. Applying these factors, the Judge placed the offending at the top of rape band 2 or bottom of rape band three. A starting point of 12 and a half years imprisonment was adopted. An uplift of one year was added to the initial starting point to reflect the totality of the offending.

[9] Because it is relevant to the discussion which follows, we set out in full the reasoning of the Judge in setting the starting point for the offending:

[12] What I have to do in terms of what the Court of Appeal has said, is to isolate what are called culpability factors or responsibility factors and I isolate the following culpability factors. First of all, the degree of planning and premeditation that took place over this extended period of time; the vulnerability of the victim, that she was a child roughly five, six, seven years of age at the time; the harm to the victim which has been outlined in the victim impact statement; the scale of the offending, that this took place over a lengthy period of time; and the breach of trust. These are all factors isolated by the Court of Appeal which I consider to apply to your case. However, I do take account of your lawyer, Mr Hesketh's argument that to place your offending at band 4, that is the most serious level, is to place it too high. Instead, I place your level of offending at the top of band 2, bottom of band 3, so therefore I fix my starting point in relation to the lead offences as 12 and a half years.

[13] It is commonly accepted by your lawyer and also the Crown that there has to be an uplift to reflect all of the offending together and therefore there is an uplift of one year. So the starting point, and I do emphasise [Mr V], the starting point is not the end point, the starting point for your offending is one of 13 and a half years' imprisonment.

[10] The Judge then considered the appropriate discount for the appellant's age. He concluded that any such discount should be "of a limited degree".<sup>4</sup> A discount of one and a half years imprisonment from the starting point was applied.

[11] As a final step the Judge applied a discount of four years for the appellant's guilty plea and remorse leaving an end sentence of eight years imprisonment. The Judge stated:

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<sup>3</sup> *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

<sup>4</sup> At [16].

Then I take account of the fact that you have pleaded guilty and in terms of the law you are entitled to a discount for that. Also the fact that you have expressed remorse. Here I pay a tribute to your courage, [Mr V], in reading out your letter of apology here today which expressed real remorse for what you have done to your sister and your family as a whole and I do acknowledge that. So taking the guilty plea and your remorse together, I deduct a further four years from your prison sentence. So, [Mr V], that brings your prison sentence back to eight years.

[12] Finally, the Judge decided that no minimum period of imprisonment (MPI) should be imposed. He considered that the mitigating factor of good character between the offending and the time of sentencing was such that no MPI was needed. He concluded:<sup>5</sup>

... here I take account of what your lawyer has said, that you have in a large sense since this offending lived an offence-free life, that you are a good person essentially in the sense that you are a loving husband and father to your child. I do take account of your good character as I am entitled to do in terms of the Sentencing Act. In the light of these factors I do not impose a minimum period of imprisonment.

### **Submissions for the appellant**

#### *Starting point*

[13] For the appellant Mr Hesketh submitted that the Judge placed too much emphasis on the isolated culpability factors, and ignored the reality that either overlap existed between some of the features or that the features were only present to a limited extent. In particular, counsel submitted that the Judge was wrong to find that the offending involved planning and premeditation, whereas the psychiatrist's report from Dr Peter Dean indicated that the offending was motivated by the appellant's hypersexuality during his teenage years.

[14] Similarly, counsel submitted that the Judge was wrong to find that the offending constituted a breach of trust. The appellant was not a paid adult babysitter, and he did not orchestrate opportunities to offend. Instead, his offending was opportunistic. Counsel therefore submitted these errors led the Judge to adopt the starting point that was too high. Counsel submitted that the offending properly fell

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<sup>5</sup> At [17].

within band 2 of *R v AM* and that a starting point for the totality of the offending should have been around nine years.

*Discounts for mitigating factors*

[15] Counsel submitted that the Judge erred in finding that only a limited discount was available for the appellant's age at the time of the offending, contending that a greater discount was required. In support of this submission, counsel referred to the psychiatric report of Dr Dean that records that the offending occurred in the context of the appellant's "emerging sexuality" and stopped as the appellant developed increasing emotional maturity.

[16] Counsel also submitted that insufficient regard was paid to the fact that in the considerable period since the offending the appellant had already rehabilitated and reintegrated himself into society. The last 12 years had seen the appellant living a largely offence-free lifestyle, with only two incidents resulting in sentences of conviction and discharge and two incidents resulting in fines. The appellant now had a wife and a young child. Counsel submitted that in these circumstances a discount for good character was required. Counsel observed that the Judge had not taken this aspect into account when determining the total overall discount for mitigating factors. Dealing with this aspect of mitigating factors only under the analysis of the need for an MPI under s 86 of the Sentencing Act was an error of principle.

*Views of complainant*

[17] Finally, counsel referred to an affidavit filed by the complainant annexing a letter recording that she has now forgiven her brother and did not wish for him to go to prison. This stance was different to that taken by the victim in her victim impact statement read to the Court at the sentencing hearing. Counsel submitted that this Court ought to take account of the further information contained in this affidavit.

## Submissions for the respondent

[18] For the respondent Ms Cleary accepted that in his analysis at [12] and [13] of the sentencing decision the Judge made an error in principle. She noted that in dealing with the culpability factors at [12] the Judge referred to the “scale of the offending”. Then at [13] the Judge referred to the need for an “uplift to reflect all of the offending together”. Inevitably this resulted in an element of double counting. In any event Ms Cleary fairly acknowledged that a starting point for the offending in this case of 13 and a half years imprisonment was excessive.

[19] Ms Cleary nevertheless urged us to approach the starting point on the basis that the appellant was an adult and that the appropriate starting point was at the top of band 2 in *R v AM*.<sup>6</sup> But she accepted that the Court needed, when determining the overall culpability of the offending, to look at the overall context. She accepted that none of the cases listed as comparator cases in band 2 in *R v AM* involved offending between siblings. Therefore Ms Cleary submitted that an overall starting point taking into account the totality of the offending should be between 10 and 11 years imprisonment.

[20] So far as the discounts for mitigating factors are concerned, Ms Cleary accepted that the Judge had made an error in principle in considering rehabilitation and pro-social lifestyle in the intervening period only in relation to the MPI. She therefore accepted that it would be necessary for this Court to reassess the discounts for mitigating factors as a fresh exercise.

[21] In terms of the discount for the appellant’s age, Ms Cleary acknowledged the substantial discounts that had been upheld by this Court in *R v Alletson*<sup>7</sup> and by the High Court in *M v New Zealand Police*.<sup>8</sup>

[22] Finally Ms Cleary urged some caution regarding the current views of the complainant as expressed in the letter annexed to her recent affidavit. She submitted that there was a history of familial pressure on the complainant not to pursue the

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<sup>6</sup> *R v AM* [2010] 2 NZLR 750 (CA).

<sup>7</sup> *R v Alletson* [2009] NZCA 205.

<sup>8</sup> *M v New Zealand Police* HC Wellington CRI-2011-485-72, 21 September 2011.

charges against her brother. Therefore the apparent change of heart should be assessed in that light.

## Discussion

### *The errors of principle*

[23] We are satisfied that in constructing the sentence the Judge made three errors of principle. The first concerned the double counting when assessing the culpability of the offending. It was not open to the Judge to refer to the “scale of the offending” when fixing a starting point for the lead offence and then also to add a further year’s imprisonment for “all of the offending together”. This approach resulted in double counting.

[24] The second error concerned the assessment of the culpability factors referred to by this Court in *R v AM*. These were intended “to provide direction in the manner of application of the requirements of the Sentencing Act”.<sup>9</sup> This Court also observed that, given the wide variety of circumstances that may be encompassed by offending in this area, it is not possible to provide an exhaustive list of all of the factors that may contribute to the culpability of an offender.<sup>10</sup> The Court then added:

We group the various factors in a way that is tended to provide guidance to sentencing Judges. However, it is trite but important to emphasise that what is required is an evaluation of all the circumstances. Listing relevant factors and setting out bands in the way we have done does not remove the need for judgment. A mechanistic approach is not appropriate.

[25] In *Baldwin v R*<sup>11</sup>, this Court emphasised the need for a contextual assessment. The Court stated:<sup>12</sup>

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 the other relevant features of the offending. What is required is an evaluation of all the circumstances.

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<sup>9</sup> *R v AM* at [35].

<sup>10</sup> At [36].

<sup>11</sup> *Baldwin v R* [2010] NZCA 472.

<sup>12</sup> At [20].



[26] We consider that the Judge, having referred to a range of culpability factors, did not pause to consider how they should be viewed in the overall context of this particular offending.

[27] The third error concerned the Judge's approach to mitigating factors. As we have seen, the feature of the appellant having been rehabilitated and living an offence-free life since the time of the offending many years before was not taken into account in making an allowance from the starting point. Rather the Judge used it by taking it into account in relation to the entirely separate exercise of whether or not an MPI should have been imposed.<sup>13</sup> Such an approach is impermissible.

[28] In *Pitcaethly v R*<sup>14</sup> this Court held that mitigating factors could not be split in terms of credit between the reduction from the starting point and imposition of a lower MPI. This Court said:

[25] Ms Hughes did not dispute the starting point of 22 years taken by the Judge. The Judge was minded to allow a discount of four years from the starting point to reflect the appellant's offer to pay \$50,000 by way of reparation and some other personal mitigating factors, being his age (67) and prior good conduct. But the Judge did not consider that an end sentence of 18 years was sufficient to reflect the severity of the offending. What he did do was split that credit between a reduction of two years from the starting point, giving 20 years, and imposed a minimum term at a lower level than he would otherwise have imposed.

[26] The Crown accept that in this latter respect the Judge fell into error.<sup>15</sup>  
...

[29] More recently a similar approach to the construction of the sentence was criticised. In *Ong v R*<sup>16</sup> this Court stated:

[22] In *R v Pitcaethly*, applying *R v Nguyen* this Court allowed an appeal against sentence on the grounds that a credit that ought to have been taken into account as a reduction from the starting point was deducted from the otherwise applicable minimum term of imprisonment. The Court regarded that approach as an error in principle. With respect, we consider that Lang J made the same mistake.

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<sup>13</sup> Under s 86 of the Sentencing Act 2002.

<sup>14</sup> *Pitcaethly v R* [2010] NZCA 95.

<sup>15</sup> *R v Nguyen* [2009] NZCA 239.

<sup>16</sup> *Ong v R* [2012] NZCA 258.

[30] We consider that in the light of these errors of principle it is necessary for us to make a reassessment of the sentencing of the appellant for this offending.

*Sentence for this offending*

[31] We agree with the Judge that the offending was serious. The first step is to fix the appropriate starting point. We take into account the length of time over which the offending occurred, the vulnerable age of the victim (between five and seven years), the harm to the victim, as well as the regular and persistent nature of the offending. However, as counsel for the respondent accepted, there was no violence accompanying the offending other than that inherent in the offending itself. We differ from the Judge with regard to the degree of planning and premeditation. We consider that the appellant was left to babysit the complainant purely at the behest of the parents who were out socialising or engaged in other activities. Therefore the offending was more of an opportunistic kind. Further, we do not consider that there was present here the deep breach of trust that is likely to apply in the case of offending by a father, stepfather or uncle on a young female.

[32] We accept that the offending falls within band 2 in *R v AM*. In fixing the starting point we apply the approach of this Court in *R v AM* as follows:

[84] The proposed bands set out ranges of starting points, not final sentences. In the usual way, that starting point will be adjusted up or down to reflect circumstances personal to the offender. It is at this stage that mitigating factors such as youth, mental disability, and earlier good character will be taken into account. It is important that judges do not diminish this aspect of sentencing. Sentences should reflect personal factors. The point of the guidelines is not to impose a straitjacket on sentencing judges – quite the reverse. As explained in *Hessell*,<sup>17</sup> the reduction for a guilty plea should be made as the final step in the sentencing process after the otherwise appropriate sentence has been determined, ie, after other mitigating factors have been taken into account.

[33] Standing back and considering the overall culpability for all of the offending (on a totality basis) we consider that an appropriate starting point is nine years imprisonment. In this assessment we have taken into account the conclusions in Dr Dean's report that the offending occurred in the context of emerging sexuality.

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<sup>17</sup> At [40].

[34] We then consider the appropriate adjustments to deal with aggravating and mitigating factors. First, there is no dispute that there are no particular aggravating factors relative to the offending or the offender requiring any upward adjustment of the starting point. We then consider mitigating factors relevant to the offender. These include the age of the appellant which was between 14 and 17 years. Counsel for the respondent accepts that on appeal the appellant must be given the benefit of the most favourable view of the facts. In this context we note that the offending ceased when the appellant moved away from the family home at around the age of 17 years.

[35] Also to be taken into account are the considerable steps which the appellant has taken towards rehabilitation. In the period since the offending the appellant has obtained regular employment in respect of which positive references from work colleagues were available. Moreover he has developed a settled relationship with the woman to whom he is now married and has a young son. Significantly the appellant disclosed the offending to his partner before they were married, thereby demonstrating his willingness to put the offending in the past and be frank with his future wife. In addition, he attended voluntarily counselling sessions as part of his rehabilitation.

[36] One aspect about which we have some reservation is the timing of his expressions of remorse. In her letter to this Court the complainant made clear that what she had wanted all along was “to be heard and for the truth to come out”. She said that she gave her brother several chances to clear his conscience but he did not take these opportunities up. It was for this reason that the complainant went to the police. Then at the sentencing hearing the complainant read her victim impact statement to the Court which the Judge properly acknowledged.

[37] The complainant has now drawn back somewhat on the position stated in her victim impact statement. But we accept the submission from counsel for the respondent that it is somewhat difficult to assess the position now as she may well have felt under pressure, direct or indirect, from family members. However it is also true that the appellant expressed remorse to the Court and did so by reading out, in

the presence of his parents and the complainant, a letter of apology. The Judge paid tribute to the appellant for his courage in expressing “real remorse”.<sup>18</sup>

[38] Having regard to the particular circumstances of this case and taking into account all mitigating factors, namely, youth, rehabilitation and remorse, we consider that an appropriate discount of thirty three months (or approximately 30 per cent). This would result in a figure of six years and three months imprisonment.

[39] From this figure there needs to be deducted an appropriate discount for the very early guilty pleas. Applying the decision of the Supreme Court in *Hessell v R*,<sup>19</sup> we consider that a discount of 18 months imprisonment (or around 25 per cent) is appropriate. There is no need for any further discount for remorse as we have already taken this factor into account. This final discount results in an end sentence of four years and nine months imprisonment.

[40] Counsel for the respondent properly accepted that no question of any minimum period of imprisonment arose. We agree.

## **Result**

[41] The appeal is allowed. The sentence of eight years imprisonment is quashed and a sentence of four years and nine months imprisonment is substituted.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>18</sup> At [16].

<sup>19</sup> *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.