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ACT 1985.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA390/2012  
[2012] NZCA 543**

BETWEEN	DAVID TRIGGS Applicant
AND	THE QUEEN Respondent

Hearing: 30 October 2012

Court: Ellen France, Allan and Lang JJ

Counsel: R M Gould for Applicant  
K A L Bicknell for Respondent

Judgment: 21 November 2012 at 11 am

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**JUDGMENT OF THE COURT**

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**The application for an extension of time to file the appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Allan J)

**Introduction**

[1] The applicant pleaded guilty in the District Court to one charge of rape, one charge of sexual violation by unlawful sexual connection by digital penetration, and one charge of indecent assault. All charges were representative.

[2] On 14 December 2010, Judge Cooper sentenced the applicant to nine years imprisonment on the rape charge, six years imprisonment on the charge of sexual violation by unlawful sexual connection, and four years imprisonment on the charge of indecent assault. The sentences were to be served concurrently.<sup>1</sup>

[3] The applicant seeks an extension of time within which to appeal against sentence. Leave is required because his notice of appeal was not filed in this Court until 2 July 2012, and so is about 18 months out of time. On an application for leave to appeal out of time, the relevant considerations are the strength of the proposed appeal, whether the liberty of the subject is involved, the practical utility of any remedy sought, the extent of the impact on others affected and on the administration of justice, any prejudice to the Crown, and the wider interests of society in the finality of decisions.<sup>2</sup>

[4] An extension of time will not be granted unless the proposed appeal is meritorious.<sup>3</sup> We therefore turn to the submissions advanced on behalf of the applicant.

### **The offending**

[5] These offences occurred between July 1997 and May 2000. At the time, the applicant was aged between 50 and 53 years, and the complainant was a girl aged between seven and 10 years. The applicant was effectively a grandfather figure in her life and at times was solely responsible for her care. Most of the offending occurred in the applicant's house, where the complainant sometimes stayed, but there were also incidents elsewhere. For example, the applicant admitted raping the complainant in a tent when camping.

[6] The offences occurred with some frequency. Typically, the applicant would take the complainant into his bedroom for the purpose. The indecent assaults usually entailed the fondling of the complainant's genital area. Sometimes that was

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<sup>1</sup> *R v Triggs* DC Rotorua CRI-2010-069-2026, 14 December 2010.

<sup>2</sup> Crimes Act 1961, s 388(2); *R v Knight* [1998] 1 NZLR 583 (CA) at 587; *R v Lee* [2006] 3 NZLR 42 (CA) at [99]–[107].

<sup>3</sup> *Stewart (Lynette) v R* [2011] NZSC 62, [2012] 1 NZLR 1 at [4]; *Lee* at [106].

accompanied by digital penetration of the complainant's vagina. This behaviour often culminated in rape.

### **Appeal grounds**

[7] Ms Gould advances two principal grounds of appeal. The first is that the starting point of 15 years imprisonment selected by Judge Cooper was too high. The second is that there ought to have been a discrete discount for the applicant's genuine remorse. A supplementary ground of appeal is concerned with the applicant's health problems, which are said to render imprisonment a harsher penalty than would otherwise be the case.

[8] We consider each of these grounds of appeal in turn.

### **Starting point**

[9] In the District Court, counsel for the applicant (not Ms Gould) accepted that the case fell within the top end of band three of the categories outlined in *R v AM*.<sup>4</sup> Counsel for the Crown agreed. So did Judge Cooper. In *R v AM* this Court suggested a starting point in the range of 12–18 years imprisonment for cases falling within band three, which was considered to be appropriate for offending involving two or more of the various aggravating factors discussed in that case, so increasing culpability to a high degree, or more than three of these factors present to a moderate degree.<sup>5</sup> Among the relevant factors identified in *R v AM* are the vulnerability of the victim, the degree of harm suffered, the scale of the offending, the breach of trust and the degree of violation.

[10] Judge Cooper identified the aggravating factors in this case as a very serious breach of trust, the age and vulnerability of the complainant, the scale and intensity of the offending, and the harm to the complainant, including suicidal ideation. Ms Gould accepts that these were factors that the Judge was entitled to take into

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<sup>4</sup> *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750.

<sup>5</sup> At [105].

account, but argues that they simply take the case into the lower reaches of band three, rather than elevating it to the upper end of that band. She takes issue with the concession of counsel for the applicant in the District Court.

[11] We disagree. Indeed, we consider that this case might well have been placed in band four, which attracts a sentencing starting point of 16–20 years imprisonment. As was said in *R v AM*:<sup>6</sup>

Perhaps the paradigm case of offending within [rape band four] is that of repeated rapes of one or more family members over a period of years as is illustrated by the present case. Offending of this nature, especially that involving children and teenagers will attract starting points at the higher end of this band ...

[12] This was a bad case. The offending started when the applicant was about 50 years of age; the complainant was seven. There were repeated rapes and other serious indecencies over a period of about three years in circumstances where the applicant took advantage of the complainant's vulnerability and the trust she reposed in him.

[13] There is a substantial overlap in *R v AM* between the suggested starting points for rape bands three and four. The starting point of 15 years selected by Judge Cooper fell at the mid-point of band three, and was below the lowest point of the band four range. We consider the Judge's approach to have been entirely orthodox. The starting point he adopted was plainly available to him; it could well have been higher.

[14] We consider the first ground of appeal to be without substance.

#### **A discount for remorse?**

[15] From a starting point of 15 years imprisonment, Judge Cooper deducted two years:<sup>7</sup>

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<sup>6</sup> At [109].

<sup>7</sup> At [16].

... because of the support that you have in the community and the prospects for your rehabilitation.

From that adjusted figure of 13 years imprisonment, the Judge made a further reduction of four years for the guilty plea, a discount of about 30 per cent. This was several weeks after the delivery of the Supreme Court's judgment in *Hessell v R*, which in effect placed a ceiling of 25 per cent on a discount for a guilty plea.<sup>8</sup> The discount for the guilty plea was therefore generous.

[16] Ms Gould submits that the sentencing Judge had an obligation to consider remorse as a discrete mitigating factor, and that because he made no express reference to remorse in his sentencing remarks, he must be taken to have overlooked it.

[17] Again we disagree. The Judge expressly noted the applicant's "complete acceptance of what is said in the summary of facts".<sup>9</sup> He further observed that "... it may be that as this case [has] unfolded, you have come to realise just exactly what you have done and the enormity of it".<sup>10</sup>

[18] Certain passages in the pre-sentence report are perhaps somewhat equivocal as to the extent of the applicant's true acceptance of responsibility for his offending. But there are other indications of remorse, and in our view there is no suggestion that the Judge had significant reservations about the applicant's contrition. Judge Cooper noted in particular that the applicant had written a letter of apology, which was to be passed on to the complainant.

[19] We accept that in a proper case it will be appropriate for sentencing judges to allow a discrete discount where true remorse is evident, especially where it is evidenced in a way which might provide a degree of solace to the victim. As was said by McGrath J delivering the judgment of the Supreme Court in *Hessell*:

[64] ... Remorse is not necessarily shown simply by pleading guilty. Sentencing judges are very much aware that remorse may well be no more than self-pity of an accused for his or her predicament and will properly be

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<sup>8</sup> *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [75].

<sup>9</sup> At [7].

<sup>10</sup> At [7].

sceptical about unsubstantiated claims that an offender is genuinely remorseful. But a proper and robust evaluation of all the circumstances may demonstrate a defendant's remorse. Where remorse is shown by the defendant in such a way, sentencing credit should properly be given separately from that for the plea.

[20] While sentencing judges will often in appropriate cases make explicit and separate reference to remorse as a mitigating factor, there will also be instances in which remorse has implicitly been taken into account in an overall review of mitigating factors. We think that has occurred here.

[21] It is well accepted that there is little room in cases such as this for any significant discount on account of good character or an absence of previous convictions. Generally the sheer scale of the offending will overwhelm such considerations. Here however, Judge Cooper allowed a discount of two years in order to reflect the support of the community and the applicant's prospects for rehabilitation. Counsel for the applicant was able to provide to the sentencing Judge a number of testimonials and references which demonstrated the applicant's good standing in the community and his hitherto worthwhile life.

[22] While the Judge was entitled to take that material into account, it would not generally justify a discount of two years. The separate reference to rehabilitation prospects must, we think, have been intended to reflect the Judge's acceptance of the applicant's expressions of remorse as genuine. That being so, we think it implicit that the two year discount must have included a considerable remorse component. After all, the Judge would not have been confident about rehabilitation prospects had he not been satisfied that the applicant was truly remorseful.

[23] In the end therefore, we conclude that the Judge has made a generous allowance for remorse in the two year discount.

### **Old age and ill health**

[24] Ms Gould submits by way of supplementary argument, that the applicant, who suffers from a variety of health conditions, may be entitled to a further discount because he will find imprisonment a more severe sentence than would otherwise be

the case. This argument is not advanced as a stand-alone ground, but is intended to support the other grounds, which we have rejected. Ill health is of limited significance where there is nothing to suggest that a prisoner's health cannot be managed adequately within the prison environment.<sup>11</sup> There is no evidence here that appropriate health management will not be available to the applicant in prison.

### **Extension of time**

[25] We return to the applicant's application for an extension of time within which to file an appeal. For the reasons we have given, we consider the proposed appeal to be without merit. The ultimate sentence of nine years imprisonment was well within the available range. Moreover, no satisfactory reason has been advanced for the delay in filing the appeal. In a supporting affidavit, the applicant says that it was not until about a year after he was sentenced that he became aware that he might be able to challenge the length of his sentence. We have some difficulty in accepting that bare assertion, but in any event, because we consider that the appeal cannot succeed, we are satisfied that an extension of time must be refused.

### **Result**

[26] The application for an extension of time within which to file an appeal is accordingly dismissed.

Solicitors  
Crown Law Office, Wellington for Respondent

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<sup>11</sup> *R v P (CA593/2008)* [2009] NZCA 10.