

**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

**CA715/2011
[2012] NZCA 85**

BETWEEN	NOOAPII NOOVAO Appellant
AND	THE QUEEN Respondent

Hearing: 21 February 2012

Court: Randerson, Potter and Simon France JJ

Counsel: L Freyer and N P Chisnall for Appellant
K A L Bicknell for Respondent

Judgment: 9 March 2012 at 12.30 p.m.

JUDGMENT OF THE COURT

- A Extension of time to appeal is granted.**
- B The appeal is allowed to the extent that the minimum period of imprisonment of five years, two months and two weeks is quashed and substituted with a minimum period of imprisonment of four years and two months.**
-

REASONS OF THE COURT

(Given by Potter J)

Introduction

[1] The appellant entered guilty pleas to one charge of rape, five charges of sexual violation by unlawful connection and two charges of an indecent act on a young person. He was sentenced by Judge Gibson¹ to ten years five months imprisonment. He was ordered to serve a minimum period of imprisonment of five years, two months and two weeks. He appeals against that sentence.

[2] The appellant seeks an extension of time for filing the appeal. This is not opposed by the Crown and is granted.

Background facts

[3] The summary of facts on the basis of which the appellant entered his guilty pleas records that the offending occurred in the period of two months between 1 December 2010 and 31 January 2011. The victim of the offending was a 13 year old girl. The appellant was 52-53 years old at the time.

[4] The appellant is the de facto partner of a female relative of the complainant and was in a position of trust. At the time of the offending the girl lived at the appellant's house with the appellant and other family members.

[5] The house had three bedrooms and a downstairs laundry but the family, including the appellant and the girl, slept in the lounge.

[6] The offending occurred on two separate occasions. In the first incident, the appellant sidled up against the girl as she slept on her stomach. He slid his hand into her boxer shorts and inside her underwear. He rubbed his hand up and down the girl's buttocks and rubbed his finger around her anus. He moved his hand from her anus around to her genitalia and penetrated her genitalia with his fingers. He moved his finger in and out of her genitalia and used his free hand to masturbate himself to the point of ejaculation.

¹ *New Zealand Police v Noovao* District Court Auckland CRI-2011-004-8674, 1 September 2011.

[7] At this the girl woke confused and scared. The appellant then pulled down her boxer shorts and underwear to her knees and positioned himself on her back. He forced his penis between her buttocks and into her anus. At that point the appellant heard a door being closed and stopped. He put his clothes back on and left the lounge.

[8] The second incident occurred a week or two later. The girl was again woken by the appellant while she was sleeping in the lounge. He ran his hand along her body, slid his hand inside her underwear and inserted his finger into her genitalia. As he did this he took her hand and placed it on his penis. He told the girl not to make any noise and to follow him outside. She was reluctant to follow him so he took hold of her hand and he led her outside the house and downstairs to the laundry which was accessed by an external door.

[9] In the laundry the appellant repeatedly told the girl to take off her pants. She refused and the appellant forcefully removed her pants. He kissed her on both cheeks and on the mouth. Then he repeatedly told her to lie down on a mat on the floor. She refused but after repeated demands from the appellant she acquiesced and lay down on the laundry floor. The appellant licked his fingers and inserted them into her genitalia. He removed his clothing and forcibly positioned his body on top of the girl. He forced his penis into her genitalia, moving it in and out for three to four minutes before ejaculating over her vagina. This caused significant pain and bleeding to the girl. When footsteps were heard in the upstairs living area the appellant stopped what he was doing, hurriedly put his clothes back on and told the girl to get up and get dressed.

The sentencing decision

[10] After briefly summarising the facts, Judge Gibson referred to the victim impact report for the complainant and a separate report by the girl's mother. He described the girl's report as disturbing, noting her distress and embarrassment. He referred to the mother's observations of the girl's deterioration in conduct as a result of the trauma inflicted on her by the appellant's offending.

[11] He noted the pre-sentence report recorded that the appellant accepted responsibility for his offending and expressed remorse and his apologies. The Judge referred to the appellant's very limited criminal history and said that this offending was largely out of character for the appellant.

[12] The Judge then referred to the tariff judgment of *R v AM*.² He considered the appellant's offending was at the bottom of band 3 in *R v AM*, noting that band 3 allows for starting points of between 12 and 18 years. He adopted a starting point of 14 years imprisonment on the lead charges of sexual violation by rape and anal intercourse, but which also took into account the other lesser charges.

[13] The Judge considered the only discount to which the appellant was entitled was a full 25 per cent discount for his early guilty pleas.

[14] The Judge said he was not prepared to recognise a credit for remorse. He noted the appellant was remorseful, but he did not accept it was to the point which required discrete recognition in sentencing.

[15] Applying the 25 per cent discount for the guilty pleas he reached an end sentence of ten years and five months imprisonment.

[16] The Judge referred to the Crown's submission that a minimum non-parole period was required to denounce the appellant's conduct, to hold him accountable for the harm he did to his victim and to act as a deterrent to others. He ordered that the appellant serve a minimum non-parole period of one-half of the end sentence.

Appellant's submissions

[17] The appeal was narrowly focused. The appellant submitted that the Judge failed to mitigate the sentence for remorse shown and to take into account evidence of his previous good character, as required by s 9(2)(f) and (g) of the Sentencing Act 2002. The length of the final sentence was challenged because of the alleged failure of the Judge to allow for these mitigating factors.

² *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

[18] The appellant's written submissions specifically stated that the ground of appeal in the notice of appeal that the minimum period of imprisonment was either too long or ought not to have been imposed, was not pursued. It was accepted that the minimum period of imprisonment ought to be 50 per cent of the final sentence, though the length of the final sentence should be reduced.

[19] Regarding the first ground of appeal, it was submitted that many factors pointed to Mr Noovao being genuinely remorseful. Reference was made to his acceptance of full responsibility for his offending in the pre-sentence report, and to his reported attempt to approach the SAFE Child Sex Offender Programme but that he was unable to attend because he could not afford the cost. Further, that he wrote a letter of apology to the victim.

[20] As to the appellant's good character, it was noted that he had only two convictions for unrelated offending in 2002 and 2004, and that at the time of the offending he was working fulltime for the Auckland City Council. He was supporting his family financially and was a responsible, contributing member of society. It was noted that in the pre-sentence report the appellant was assessed as presenting a low risk of re-offending.

[21] The appellant submitted that from the starting point adopted by the sentencing Judge of 14 years imprisonment, he should have applied a discount of 10-15 per cent for remorse and previous good character in addition to the accepted discount of 25 per cent for the early guilty pleas.

Crown's submissions

[22] The Crown submitted that the sentence imposed properly reflects the culpability of the appellant and the seriousness of the offending in accordance with *R v AM*. The Crown noted that the full discount of 25 per cent for the guilty pleas was allowed.

[23] As to remorse, the Crown referred to the authority of *Hessell v R*³ that a sentencing credit for remorse is appropriate only when on a proper and robust evaluation of all the circumstances, the appellant's remorse is demonstrated. It was submitted that a proper and robust evaluation of all the circumstances led the Judge to conclude that the appellant had not demonstrated remorse for his offending to an extent that warranted an allowance as a separate mitigating factor in terms of s 9(2)(f). Nor, the Crown submitted, was the Judge in error in concluding that the appellant's good character, in the form of his limited criminal convictions, did not warrant a discrete discount as a separate mitigating factor in terms of s 9(2)(g).

[24] The Crown submitted that the end sentence of ten years and five months imprisonment was not manifestly excessive.

Discussion

[25] No issue was taken by the appellant with the starting point of 14 years imprisonment adopted by the sentencing Judge. It was at the higher end of the range the Judge considered appropriate for the appellant's offending, but at the lower end of the range in band 3 in *R v AM* which, it was accepted on sentencing, applied to this offending.

[26] We note that the discount for the guilty pleas of three years and seven months was 25.6 per cent. Another Judge may have considered that a limited discount should have been given for the appellant's expressions of remorse and his previous good, though not unblemished, record. However, the appellant's letter of apology, dated just two days before sentencing, was somewhat equivocal in stating that what he had done was "stupid, dumb and sick", that he was "not a violent man and a rapist", and "Let[s] move forward and get on with our lives".

[27] This was serious offending involving a significant breach of trust. We consider that while the end sentence of ten years five months imprisonment was stern, it was not manifestly excessive.

³ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].

[28] However, we invited further submissions in relation to the minimum period of imprisonment ordered on sentence, namely 50 per cent of the end sentence of ten years five months imprisonment.

[29] The appellant's supplementary submissions questioned whether the statutory test under s 86 of the Sentencing Act for imposing a minimum period of imprisonment was met in the circumstances of the case. In the alternative, it was submitted that the length of the minimum period of imprisonment, being 50 per cent of the end sentence, is manifestly excessive.

[30] The appellant maintained his primary ground of appeal that the Judge had erred in concluding the appellant had not demonstrated genuine remorse. However, it was further submitted that while the inherent seriousness of the offending will necessarily trigger the inquiry under s 86(2), the fact that the offending is grave cannot of itself automatically require the imposition of a minimum period of imprisonment. It was submitted that while serious, the appellant's offending did not have the repetitive and extended hallmarks where the "routine" outcome is the imposition of a minimum period of imprisonment.

[31] If a minimum period of imprisonment was required, it was submitted that the period should be well below 50 per cent of the end sentence because the appellant's early guilty plea, remorse, insight into his offending and positive rehabilitative prospects need to be taken into account.

[32] The Crown submitted that the Judge did address particular reasons for the imposition of a minimum period of imprisonment; to hold the appellant accountable, and in finding that the normal parole period would not be sufficient for the purposes of deterrence and denunciation. The Crown submitted that while Judge Gibson did not make repeat or particular reference to the mitigating factors or personal circumstances of the appellant when he imposed the minimum period of imprisonment, it does not follow that he erred or that the minimum period of imprisonment is excessive.

[33] As this court said in *R v Gordon*,⁴ it is necessary for sentencing Judges to devote separate attention to the circumstances of the offender at the second stage of the inquiry, when a minimum period of imprisonment is being considered, as well as reconsidering all of the sentencing principles in ss 7, 8 and 9 of the Sentencing Act.

[34] In imposing the minimum period of imprisonment the Judge determined that the purposes of sentencing in the Sentencing Act, namely denunciation, deterrence and holding the appellant accountable for the harm he did to the victim, could not adequately be recognised if he were to be released on parole after serving only one-third of the sentence. He then said he considered “appropriate” a non-parole period of one-half of the sentence he imposed.

[35] We consider that the Judge erred by focussing on the purposes of accountability, denunciation and deterrence without taking into account the absence of any need to protect the community from this offender⁵ and without specifically factoring into his consideration the appellant’s personal mitigating features.

[36] We consider a minimum period of imprisonment of approximately 40 per cent of the end sentence to be sufficient to meet the purposes of accountability, denunciation and deterrence, given the appellant’s full acceptance of responsibility for this offending as noted in the pre-sentence report, his expressions of remorse (somewhat limited as they may be), his previous largely good record, and the probation officer’s assessment that he presents only a low risk of re-offending.

Result

[37] We allow the appeal to the extent that the minimum period of imprisonment of five years, two months and two weeks is quashed and substituted with a minimum period of imprisonment of four years and two months.

Solicitors:
Crown Law Office, Wellington for Respondent

⁴ *R v Gordon* [2009] NZCA 145 at [44]-[46].

⁵ The appellant is assessed at low risk of re-offending in the probation report.