

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF  
COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE  
ACT 1985.**

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

**CA262/2013  
[2013] NZCA 543**

BETWEEN                      P (CA262/2013)  
   Appellant  
  
AND                              THE QUEEN  
   Respondent

Hearing:                      25 September 2013  
  
Court:                              Ellen France, Priestley and MacKenzie JJ  
  
Counsel:                      N P Chisnall for Appellant  
   M H Cooke for Respondent  
  
Judgment:                      6 November 2013 at 10 am

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**JUDGMENT OF THE COURT**

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**A    The appeal is allowed.**

**B    The sentence of three years imprisonment is quashed and a sentence of  
     two years and four months imprisonment is substituted.**

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**REASONS OF THE COURT**

(Given by Ellen France J)

**Introduction**

[1]     The appellant, who is now 21 years old, pleaded guilty to sexual offending against his sister. He was sentenced by Judge Sharp to a term of three years

imprisonment.<sup>1</sup> He appeals against sentence on the basis the starting point was too high and he was given too little discount for mitigating factors, namely, his youth and his guilty plea.

## **Facts**

[2] After their parents' separation, the appellant lived with his father and the complainant with their mother. Over the period of the offending, from December 2006 to December 2008, the complainant was aged 12–13 years and the appellant 14–16 years. When the complainant came to stay with her father over this period, the appellant would approach her at night while she slept and put his hand inside her underwear, touching her genitalia. This occurred about five times and gave rise to a representative charge of doing an indecent act on a young person. On some two or three occasions, he put his finger into her vagina. These incidents were reflected in a representative charge of sexual violation by unlawful sexual connection. The last incident took place when the complainant was 13. The appellant touched the complainant, moving his hand up her leg and then inside her underwear on her vagina. This incident was represented by a further count of doing an indecent act on a young person.

## **Approach to sentencing**

[3] The key factors identified by Judge Sharp in sentencing were, first, the need for rehabilitation and, secondly, the risk the appellant posed to the female community.<sup>2</sup> The need to ensure the appellant was in prison for a sufficiently long period so he could undertake the Te Piriti programme seems to have been a focus in setting a starting point. Judge Sharp discussed the term of imprisonment that would be necessary to ensure that the appellant “would be serving a custodial sentence for a sufficient length of time to undertake the Te Piriti programme”.<sup>3</sup> Whilst not expressly identified, the starting point must have been in the region of four years

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<sup>1</sup> *R v [P]* DC Auckland CRI-2011-090-1599, 3 April 2013. The three year term related to the sexual violation count. The appellant was convicted and discharged on the two counts of doing an indecent act.

<sup>2</sup> At [25].

<sup>3</sup> At [30] and see [35].

imprisonment.<sup>4</sup> It appears, although again not expressly stated, that a discount of a year has been adopted reflecting youth and the guilty plea.<sup>5</sup>

### **The appeal**

[4] We deal first with the appropriate starting point and then with the discount for mitigating features.

### **The starting point**

[5] The case for the appellant is that, in terms of *R v AM (CA27/2009)*, this offending comes within unlawful sexual connection (USC) band one.<sup>6</sup> That band encompasses starting points in the range of two to five years imprisonment. Mr Chisnall for the appellant says the applicable culpability factors (the scale of the offending and the vulnerability of the complainant) mean the starting point ought to have been in the vicinity of three to three and a half years imprisonment.

[6] The Crown submission is that a four year starting point was within range because the aggravating features of the offending place it within the middle to upper end of USC band one.

[7] We consider that the starting point of four years imprisonment was not available. The Crown correctly emphasises the effect of the offending on the victim who was, because of her age, vulnerable. However, Mr Chisnall is right that the latter factor only applied to a modest degree given the age difference is less than three years and both were teenagers at the time. Further, there is no suggestion the appellant had assumed any responsibility in relation to the victim. Finally, while this was not a one-off incident, the summary of facts makes it clear that there was no pattern to the offending, rather it was random and opportunistic.

[8] The Judge's assessment that a longer term of imprisonment was a means of ensuring attendance at Te Piriti has not proved an accurate one. It could not have

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<sup>4</sup> See at [30].

<sup>5</sup> See at [31] and [40].

<sup>6</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

been a factor to support an increase in the otherwise appropriate starting point. Such an assessment is also often speculative.<sup>7</sup> We consider that in this case it has led the sentencing exercise off track. A starting point of three and a half years imprisonment was appropriate.

### **Discounts for mitigating factors**

[9] The appellant submits that the discount for youth and for the guilty plea should have been greater. Mr Chisnall emphasises the need for the appellant's rehabilitation was recognised as long ago as 2007 but for a variety of reasons treatment through attendance at an appropriate programme has not been forthcoming. Mr Chisnall also emphasises that the guilty plea was entered immediately after committal and that a trial was thereby avoided.

[10] The Crown submits that any recognition that might be available to recognise the appellant's youth is more than offset by the likelihood that he will reoffend in a similar way and the need to protect the public. As to the guilty plea, Ms Cooke on behalf of the Crown notes that the plea was entered on 20 December 2011 after the presentation of an indictment containing less serious charges than those in relation to which the appellant had declined a sentence indication. The Crown emphasises that the guilty plea was not an unequivocal acceptance of guilt. That is because, at the time of entering the plea, the appellant indicated a disputed facts hearing would be necessary and in early March 2012 sought to vacate his guilty plea. Ultimately, the matter proceeded on the basis there would be no application to vacate the guilty pleas and there would be no disputed facts hearing.

[11] The Judge has not differentiated between the mitigating factors of youth and the guilty plea. However, as we shall discuss, we consider a more significant discount was warranted for these two factors than the one year afforded by the Judge.

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<sup>7</sup> This Court in *Fleming v R* [2011] NZCA 646 at [24] noted that the policies of the Department of Corrections on the access to drug and alcohol rehabilitation programmes in prison should be known to sentencing judges to be taken into account as appropriate. That observation does not provide support for the approach taken in this case.

[12] The appellant's explanation for the offending, namely, that his primary motivation was to hurt his sister, means the offending is not properly characterised as an act of youthful indiscretion.<sup>8</sup> We also agree that the appellant poses a risk of reoffending. That is apparent from the remarks of Judge Treston in sentencing the appellant in December 2010 on charges of indecent assault and of being unlawfully in an enclosed yard.<sup>9</sup>

[13] That said, the appellant was nonetheless only 14 at the time the offending started. The offending was not at the serious end of the scale and more emphasis should have been placed on the need for rehabilitation. As to the guilty plea, we consider a discount in the order of 15 per cent, was appropriate given it was entered at a relatively early stage, albeit qualified. When all of these factors are taken into account, the sentence of three years imprisonment was manifestly excessive.

[14] We consider that from a starting point of three and a half years imprisonment, a nine month discount for youth should be adopted. From that point, we accord a discount in the order of 15 per cent leading to an end sentence of two years and four months imprisonment.

[15] There was some discussion at the hearing about the need to ensure the appellant is subject on release to appropriate release conditions. Mr Chisnall's argument was that an end sentence of two years imprisonment was appropriate with this Court imposing special release conditions extending to the maximum point past the expiry date. As it transpires, the sentence we impose means that the appellant's release and associated conditions can be dealt with by the Parole Board. The appellant is eligible for parole and has been seen already by the Parole Board.<sup>10</sup> In these circumstances, it is appropriate that the Parole Board, which is already seized of the appellant's case maintains control over the process of release.

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<sup>8</sup> He said his sister had said she loved their father more than she loved him and he wanted her to feel the hurt he felt when he had been sexually abused by a family member as a child.

<sup>9</sup> *New Zealand Police v [P]* DC Waitakere CRI-2010-090-5997, 8 December 2010. We understand the victim of the indecent assault was the appellant's stepmother.

<sup>10</sup> The appellant has been in custody since December 2011.

## **Result**

[16] For these reasons, the appeal is allowed. The sentence of three years imprisonment is quashed and a sentence of two years and four months imprisonment is substituted.

Solicitors:  
Public Defence Service, Wellington for Appellant  
Crown Law Office, Wellington for Respondent