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COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE
ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA610/2013
[2014] NZCA 121**

BETWEEN ANDREW ROBERT EDWARD NELSON
Appellant

AND THE QUEEN
Respondent

Hearing: 11 March 2014

Court: Wild, Goddard and Clifford JJ

Counsel: AJD Bamford for Appellant
P K Feltham for Respondent

Judgment: 3 April 2014 at 2.30 pm

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, Andrew Robert Edward Nelson, was found guilty by a jury in the Nelson District Court on charges of assault with a weapon, indecent assault, sexual violation (digital penetration) and rape.

[2] Mr Nelson was sentenced on 26 July 2013 by the trial Judge, Judge Zohrab, to eight years and three months' imprisonment.¹

[3] Mr Nelson now applies for an extension of time to appeal. Mr Nelson's appeal is that his sentence was manifestly excessive. Mr Nelson says the Judge failed to give adequate weight to his mental health as impacted, amongst other things, by a history of sexual abuse. Mr Nelson says his mental health was a causative factor in his offending and mitigated his culpability to a greater extent than the Judge recognised.

[4] The Crown did not oppose an extension of time being granted, Mr Bamford having explained how the delay arose. We grant an extension.

Facts

[5] The events which gave rise to the charges on which Mr Nelson was found guilty occurred in the early morning hours of Tuesday 14 February 2012.

[6] Mr Nelson had met his victim, at the time of the offending his partner, in December the previous year. That relationship had begun following internet contact, in which Mr Nelson and his victim had shared their experience of suffering from lymphoma.

[7] In the weeks prior to the offending, Mr Nelson had been in Auckland with his victim and her seven year old son. She was receiving treatment for her lymphoma. They had returned to Nelson on 10 February, and at the time of the offending were living together, with the victim's son.

[8] Over the days preceding Mr Nelson's offending he and his victim had discussed the state of their relationship. On Monday 13 February Mr Nelson's victim indicated to him that she did not want to continue that relationship. She simply wanted the two of them to remain as friends. She made that decision due to her ill health. She wanted to get well before progressing the relationship any further.

¹ *R v Nelson* DC Nelson CRI-2012-042-434, 26 July 2013.

[9] As the Judge recorded in his sentencing notes, Mr Nelson – who was being treated by his GP for depression at the time – was understandably upset. Although Mr Nelson agreed to end the relationship, the Judge noted he had left the property and spent time in the vicinity of the Cathedral steps contemplating the unfortunate way things were turning out.

[10] Mr Nelson returned to the property and asked his victim if he could stay in her bed that night. She agreed reluctantly.

[11] Once in bed, Mr Nelson had tried to initiate some physical intimacy. His victim had clearly indicated she did not want that. Then, in the early hours of the morning, Mr Nelson got up and went into the kitchen. He took a knife from the knife block and hid it in his boxer shorts. He returned to the bed. Mr Nelson touched his victim in an attempt to initiate sex, but she rolled away from him. Mr Nelson said to her that he wanted sex, but his victim said no. Mr Nelson then drew out the knife, and presented it. As the Judge put it, Mr Nelson made it abundantly clear to his victim that the matter would not end until he had had some sort of sex with her.

[12] Mr Nelson's victim put the knife on a bedside table and agreed, under duress and without true consent as the jury's verdict showed, to allow Mr Nelson to have sexual contact (digital penetration) and intercourse with her. Once Mr Nelson had finished having sex with his victim, he got up and dressed himself. He then rang the Nelson police and told them that he had a knife, that he had held that knife to his victim's throat and had had sex with her. Mr Nelson was found by the police upon their arrival at the address, along with his victim.

The challenged sentencing decision

[13] Judge Zohrab, following this Court's decision in *R v AM*,² fixed a starting point sentence of eight years and nine months' imprisonment. He identified that sentence as being at the top end of *R v AM*'s band one, and the lower end of band two. Relevant aggravating, or culpability, factors identified were the degree of

² *R v AM* [2010] 2 NZLR 750 (CA).

premeditation (evidenced by the deliberate obtaining and subsequent use of the knife); and the incredible vulnerability of Mr Nelson's victim, an ill woman (a diabetic, who had had two liver transplants, and who was suffering from lymphoma which had affected her genital area), which vulnerability was known to Mr Nelson. Mr Nelson does not challenge that starting point, except as it may be affected by personal mitigating factors.

[14] The Judge declined any credit for remorse, as had been sought by Mr Bamford. The Judge said that he did not accept any remorse expressed by Mr Nelson as genuine. Rather, the Judge said he had been struck by Mr Nelson's lack of insight into his offending and its impact on his victim. Mr Nelson's phone call to the police showed he knew what had happened at the time, but had subsequently tried to rewrite events and persuade himself of his innocence. A plea of guilty would have shown his remorse was genuine. Whilst Mr Nelson was regretful for the position he found himself in, he did not display remorse.

[15] The Judge then allowed a reduction of six months for Mr Nelson's personal situation and circumstances. This was a reference to Mr Bamford's submission that sexual abuse suffered by Mr Nelson as a youth, together with other aspects of Mr Nelson's personality, referred to in a report prepared for ACC in connection with a claim by Mr Nelson, contributed to, and mitigated, his culpability for his offending. In allowing that six months credit, the Judge observed that credit for those circumstances had to be limited.

[16] On that basis, an end sentence of eight years and three months was arrived at. The Judge finally determined that to be the appropriate response to Mr Nelson's offending when assessed on a totality basis.

Case on appeal

[17] As he had before Judge Zohrab, Mr Bamford argued before us that Mr Nelson's personal circumstances mitigated the criminality of Mr Nelson's offending to a greater extent than had been identified by the Judge, either when he set the starting point, or when he allowed the six months' discount. Mr Bamford referred in particular to the impact of the sexual abuse Mr Nelson suffered as a child

and other aspects of his personality – borderline personality disorder and a history of chronic dysthymia.

[18] In making those submissions, Mr Bamford pointed to the principles set out in ss 8(a) and (i) of the Sentencing Act 2002 and relied on:

- (a) a psychiatric report on Mr Nelson’s fitness to plead prepared in March 2012; and
- (b) a report prepared for ACC in July 2013 following Mr Nelson’s report of sexual abuse during his childhood.

[19] Mr Bamford submitted Mr Nelson’s mental state should have resulted in a 20 to 25 per cent reduction from the eight years and nine months’ starting point identified by the Judge, that is between 21 and 26 months. Mr Nelson’s end sentence should therefore have fallen in the range of six years and seven months to seven years’ imprisonment.

[20] The Crown recognised the potential relevance of mental illness to culpability and sentencing. The Crown argued, however, that the Court did not here have any expert evidence to assess or link those mental characteristics to Mr Nelson’s offending. Moreover, the ACC report had been prepared sometime after Mr Nelson’s offending, not for sentencing purposes, and itself contained references to embellishment.

[21] The trial Judge had been well placed to assess this issue and had given the appropriate – limited – credit.

Analysis

[22] As the decision of this Court in *E(CA689/10) v R* makes clear,³ mental disorder falling short of exculpating insanity may mitigate culpability, and hence sentence. If causative of the offending, it moderates the offender’s culpability. It may also render less appropriate, or more subjectively punitive, a sentence of

³ *E(CA689/10) v R* [2010] NZCA 13, (2011) 25 CRNZ 411 at [68].

imprisonment. It may be relevant because of a combination of those reasons. Sentencing does have an essentially moral base. As such, mental disorder may mitigate moral fault and, accordingly, criminal culpability. But, at the same time and as the Crown submitted, care has to be taken when assessing the causative impact and mitigating effect of mental illness on offending. The material before the Judge comprised the two reports we have referred to in [18] above.

[23] In the first of those reports, Dr Erik Monasterio, a consultant psychiatrist, concluded that Mr Nelson was fit to plead. In doing so, Dr Monasterio recorded Mr Nelson's report of a difficult childhood subject to physical, sexual and psychological abuse by his stepfather, and how Mr Nelson had described a lifelong history of deficits in interpersonal relationships and episodic alcohol abuse. The doctor noted that, although Mr Nelson had not had any past contact with Specialist Mental Health Services, he had reported a lifelong history of recurrent mood disturbance, generally in the context of psychosocial stressors. He had described frequent suicidal thoughts.

[24] Dr Monasterio assessed Mr Nelson's symptoms of mood disturbance as reactive to relationship stress, fear of rejection and lack of emotional reciprocity. There was no evidence of past or present symptoms of psychosis or of specific anxiety syndromes.

[25] The second report referred to in [18] above was prepared for the ACC by Mr Matthew Manderson, a clinical psychologist, when Mr Nelson was in custody following conviction. The report was prepared to assess possible treatment following Mr Nelson having, in prison, reported sexual abuse to an ACC counsellor.

[26] Mr Manderson, like Dr Monasterio, recorded Mr Nelson's account of sexual abuse by his stepfather, a poor relationship with his mother and unsatisfactory interpersonal relationships. Mr Manderson undertook a psychometric assessment of Mr Nelson. Mr Nelson's profile showed elevations across most measured events. Overall "his profile showed elevations in both trauma and self scales suggesting a complicated trauma presentation". Mr Manderson thought that an assessment of complex trauma due to multiple factors resulting in borderline personality disorder

best described Mr Nelson's difficulties. He described a history of chronic dysthymia,⁴ with periods of depressed mood secondary to either relationship or employment stress.

[27] Mr Manderson assessed that Mr Nelson's presentation involved some embellishment, whilst he continued to under-report his offending.

[28] In our view, the Judge recognised the mitigating factor of Mr Nelson's personal situation in an appropriate way, given those materials. As the Crown noted, that material, and in particular the ACC report, essentially constituted a detailed narrative of Mr Nelson's own reporting of his life history, and the psychological and personality difficulties he had suffered throughout his life. There is no assessment, however, of the extent to which those matters were causative of, and hence in Mr Nelson's case properly mitigating of, his offending. The Judge's assessment was one necessarily made in the round. In our view, for the Judge to have gone further would have required him to have been presented with an assessment more targeted at the process of sentencing, and more directed at the issues relating to culpability that process involves, than those two reports were.

[29] We are therefore of the view that the Judge did not err in not allowing Mr Nelson the quantum of discount Mr Bamford argued for. On that basis, we are satisfied that Mr Nelson's sentence was not manifestly excessive.

Result

[30] Mr Nelson's appeal is dismissed.

Solicitors:
Bamford Law, Nelson for Appellant
Crown Solicitor, Wellington for Respondent

⁴ Dysthymia is a serious state of chronic depression which persists for at least two years but is less acute than a major depressive disorder.