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S 139 OF THE CRIMINAL JUSTICE ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA92/2014
[2014] NZCA 468**

BETWEEN	SANJAY KUMAR CHAND RANA Appellant
AND	THE QUEEN Respondent

Hearing:	22 September 2014
Court:	Harrison, Goddard and Venning JJ
Counsel:	J H Wiles for Appellant M D Downs for Respondent
Judgment:	25 September 2014 at 12.30 pm

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The sentence of nine years for rape is quashed. It is replaced with a sentence of eight years, four months.**
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REASONS OF THE COURT

(Given by Venning J)

[1] Following a retrial in the Auckland District Court Sanjay Kumar Chand Rana was found guilty of sexual violation by rape of a 13 year old girl and also of

committing an indecent act on her. Judge Field sentenced him to nine years imprisonment.¹

[2] Mr Rana appeals against sentence. He says the Judge should have provided credit for his previous good character.

Background

[3] At the time of the offending the victim was 13 years old. She is distantly related to Mr Rana. The victim's mother was taken to hospital for emergency treatment following an unrelated incident. The victim was at the hospital with her mother. Mr Rana agreed to pick her up and take her home to collect some belongings and then for her to stay with him and his wife until her mother was discharged.

[4] While the victim was at her home she showered. As she came out of the bathroom covered only with a bath towel, Mr Rana grabbed her, took her into her parents' bedroom, forced her onto the bed, groped and licked her breasts and then raped her.

The District Court sentence

[5] Judge Field took a starting point of nine years imprisonment. This was consistent with the sentence imposed by Judge Callander following the first trial. The Judge declined to make any specific allowance for Mr Rana's lack of previous convictions, which he regarded as the absence of an aggravating feature rather than a specific mitigating feature. The Judge concluded the appropriate end sentence was nine years imprisonment on the rape charge. He imposed a concurrent sentence of four years on the indecent act charge.

¹ *R v Rana* DC Auckland CRI-2010-004-19853, 13 February 2014.

The appellant's submissions

[6] Mr Rana does not take issue with the starting point of nine years for the rape. The sole ground of appeal is that the Judge departed from a settled sentencing principle by refusing to provide a discount for Mr Rana's previous good character.

[7] At the age of 38 Mr Rana had no previous convictions. A number of people had written letters in support of Mr Rana. Mr Wiles submitted that a discount in the vicinity of 20 per cent for previous good character and lack of previous convictions was required. The Judge's failure to make any such allowance had led to an end sentence that was manifestly excessive.

Respondent's submissions

[8] Mr Downs submitted that it could not be said the sentence of nine years was manifestly excessive. The Judge could have taken a higher starting point.

Decision

[9] The aggravating features of the offending, namely the vulnerability of the complainant, the abuse of a position of trust and the ongoing effect on the victim place the offending within the mid range of band 2 of *R v AM (CA27/2009)*.² It cannot be said the end sentence of nine years is, of itself, manifestly excessive.

[10] The real issue in this case is whether the sentence ought to be adjusted because the Judge made an error of principle in failing to take account of a mandatory consideration.

[11] Section 9(2)(g) of the Sentencing Act 2002 provides:

- (2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

...

- (g) any evidence of the offender's previous good character

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

[12] In *Manawaiti v R*, which was also a case of sexual violation, this Court allowed an appeal on the sole ground the sentencing Judge had failed to recognise previous good character.³ The Court applied a reduction of nine months from the starting point of nine and a half years. In *R v Hockley*, a case of historical sexual offending, this Court again allowed the appeal and adjusted the sentence to take account of, inter alia, the appellant's previous good character.⁴ In the course of its decision this Court said that a clean record was evidence of "previous good character" and thus worthy of some recognition.⁵

[13] In *Quinlan v R* this Court approved a 15 per cent discount for previous good character.⁶ The Judge had given a three month credit. While this Court observed that more credit could and perhaps should have been given for past good character the overall conclusion was that a total discount of nine months for all mitigating factors was not manifestly inadequate.⁷

[14] Mr Downs referred to the following passage from *E (CA799/2012) v R*:⁸

[108] The discount for personal mitigating factors is very much a discretionary matter for the sentencing judge. In this case, Judge Treston had the advantage of seeing the appellant at trial and was in a good position to judge what was appropriate to allow for the mitigating factors. We are not persuaded that the discount allowed was too low or that, considered in the round, the final sentence was manifestly excessive. As Ms Markham pointed out, band 2 of *R v AM* covers a range of sentences of seven to 13 years and a higher starting point might have been justified given the complainant's vulnerability and the appellant's serious breach of trust as her caregiver.

[15] Mr Downs submitted the case was similar to the present. However, importantly in that case, the Court had allowed a credit for previous good character "supported by his lack of previous convictions and a number of testimonials".⁹

[16] In light of those authorities, we accept that the Judge fell into error in treating the lack of previous convictions as an absence of an aggravating factor, rather than

³ *Manawaiti v R* [2013] NZCA 88.

⁴ *R v Hockley* [2009] NZCA 74.

⁵ At [30].

⁶ *Quinlan v R* [2013] NZCA 634.

⁷ At [40].

⁸ *E (CA799/2012) v R* [2013] NZCA 678.

⁹ At [107].

regarding it as a mitigating factor. At the age of 38 Mr Rana had no previous convictions. The Judge should have taken that factor into account as evidence of previous good character. However, we do not consider that the letters of support written on behalf of Mr Rana advance his case for any further credit. The letters are written by his family or by friends or other supporters. There is no evidence of any particularly positive contribution by Mr Rana to society generally. At its highest it can be said that, at the age of 38 he was a first offender. There is also the troubling adverse factor that he expresses no remorse for his offending and is assessed by the Probation Service of being at high risk of reoffending.

[17] In the circumstances at most a modest reduction of approximately seven and a half per cent or eight months would have been appropriate.

Result

[18] The appeal is allowed.

[19] The sentence of nine years for rape is quashed. It is replaced with a sentence of eight years, four months.

Solicitors:
Crown Law Office, Wellington for Respondent