

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

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

**CA211/2014  
[2014] NZCA 527**

BETWEEN	ADAM MARK JOHNSON Appellant
AND	THE QUEEN Respondent

Hearing:	13 October 2014
Court:	Harrison, Asher and Lang JJ
Counsel:	E R Fairbrother QC for Appellant A F Pilditch for Respondent
Judgment:	30 October 2014 at 3 pm

---

**JUDGMENT OF THE COURT**

---

- A      The appeal is allowed.**
- B      The sentence of five years' imprisonment is quashed. It is substituted  
with a sentence of four years and six months' imprisonment.**
- 

**REASONS OF THE COURT**

(Given by Asher J)

**Introduction**

[1] Adam Mark Johnson has been convicted of one count of unlawful sexual connection in January 2013, and one count of indecent assault in late 1996 or early 1997. The two counts were to be heard separately. He was found guilty of the 2013

count after a jury trial at the Napier District Court. He then changed his plea in relation to the 1996/1997 count and pleaded guilty to an amended count of indecently assaulting a girl under 12 a short time before trial.

[2] Judge Down sentenced Mr Johnson to a total of five years' imprisonment.<sup>1</sup> The Judge adopted a starting point of four years' imprisonment on the 2013 count of unlawful sexual connection, which he applied without increase or discount for personal aggravating or mitigating factors, and two years imprisonment for the 1996/1997 count of indecently assaulting a girl under 12, to which he applied a 15 per cent discount for the guilty plea and remorse. This resulted in an end sentence of five years and seven months. The Judge applied the totality principle and considered that this end sentence was excessive. He reduced the total sentence to five years' imprisonment. The resulting end sentences were three and a half years' imprisonment for the 2013 unlawful sexual connection count and one and a half years' imprisonment for the 1996/1997 indecently assaulting a girl under 12 count.

[3] Mr Fairbrother QC for Mr Johnson submitted that the starting points were too high, and that the Judge failed to give adequate weight to remorse, rehabilitation, age and good character, and that it was unduly harsh to impose cumulative sentences.

### **The offending**

[4] At the time of the first offending in 1996/1997 Mr Johnson was 14 years old. He had been babysitting a close relative, and persuaded her that he would allow her to stay up late if she let him touch her. He placed his fingers on her vagina and rubbed the outside and inside of her vagina. After he finished he told her not to tell anyone as it was "our secret".

[5] The second offending occurred approximately 16 years later when Mr Johnson was 30 years old and had children. The second victim was six years old. Following a family barbeque it was agreed that the victim would sleep over at Mr Johnson's house because she was enjoying spending time with his son. The victim had a bedwetting problem and a mattress protector was put on the bed. Once

---

<sup>1</sup> *R v Johnson* DC Napier CRI-2013-041-128, 27 February 2014.

the children had gone to sleep Mr Johnson came into the bedroom and sat on the victim's bed. He asked her if she had wet the bed. She said that she had wet her shorts a little bit. Mr Johnson then removed the shorts and asked her to come into his room while the shorts dried. He took her through to his room and sat her on his bed and proceeded to stroke the victim's vagina. He curled his fingers into her vagina and moved them "a little bit". The victim became very embarrassed and uncomfortable and told Mr Johnson that she thought her shorts would be dry and that she should return to bed. She put her shorts on and returned to her bedroom.

### **Starting points**

[6] The lead offence was the 2013 count. In determining that the appropriate starting point was four years' imprisonment, the Judge must have placed the conduct at the top of the first unlawful sexual connection (USC) band set out in *R v AM* which has a range of two to five years' imprisonment, or the bottom of USC band two.<sup>2</sup> USC band one applies where no culpability assessment factors are present or where one or more factors are present to a low or moderate degree.<sup>3</sup> USC band two involves one or two factors increasing culpability to a moderate degree.<sup>4</sup> There were in fact three factors that were present in Mr Johnson's offending.

[7] The victim was a young vulnerable child. Mr Johnson was a 30 year old father who had been entrusted with the care of the child, and there was a gross breach of trust. Mr Johnson exploited a young child in his care for sexual purposes. The Judge described Mr Johnson's insistence that the victim's bedwetting could be accommodated as a "ruse to interfere with her" and we consider that inference to be justified.<sup>5</sup> There was therefore an element of premeditation.

[8] We consider Mr Fairbrother's submission that a two to three year starting point would have been appropriate to be unrealistic. Recognising that the assault was of short duration and without extraneous violence, the starting point was

---

<sup>2</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [113(a)]–[113(b)].

<sup>3</sup> At [114].

<sup>4</sup> At [117].

<sup>5</sup> *R v Johnson*, above n 1, at [5].

appropriately placed towards the top of USC band one or the bottom of USC band two at four years' imprisonment.<sup>6</sup>

[9] As to the 1996/1997 offending, this also related to a very young child. We will consider the age of Mr Johnson in relation to mitigating circumstances. In setting a starting point Mr Johnson's age is not a relevant factor.<sup>7</sup> This was a serious indecent assault, and a starting point of two years' imprisonment was appropriate.<sup>8</sup>

[10] In relation to whether the sentences should have been cumulative, the offences were similar in kind in that they involved sexual offending on young children.<sup>9</sup> However, the two offences were not in any way factually connected, and arose in a different manner, and in that respect they were not a connected series of offences.<sup>10</sup> Applying s 84(1) of the Sentencing Act 2002, given the 16 year gap between the offences, cumulative sentences were appropriate.

[11] Turning to the totality assessment, the Judge considered that a sentence of five years and seven months was excessive and reduced it to five years' imprisonment. This was open to the Judge, and Mr Fairbrother did not quarrel with that general reasoning.

### **Mitigating factors other than youth**

[12] Remorse and rehabilitation can be distinct from a guilty plea as mitigating factors.<sup>11</sup> The Judge did not provide for any discount for remorse or rehabilitation, and we consider he was quite right to refuse to do so. In this case Mr Johnson maintained a not guilty plea throughout and put the Crown to proof on the 2013 charge. Even in relation to the 1996/1997 offending where there was a plea of guilty shortly before trial, any remorse by Mr Johnson was very late.

---

<sup>6</sup> *Candy v R* [2014] NZCA 288 at [7]–[9].

<sup>7</sup> *Overton v R* [2011] NZCA 648 at [22].

<sup>8</sup> *R v Parker* [2007] NZCA 534 at [44] and [46].

<sup>9</sup> Sentencing Act 2002, s 84(2).

<sup>10</sup> Section 84(3).

<sup>11</sup> *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64]; *R v Kingi* [2013] NZHC 2051 at [23]; *R v Whitehead* [2013] NZHC 2017 at [34].

[13] Mr Johnson had written letters to the victims, but those letters were sent close to the time of sentencing. The provision of apology letters to victims, particularly those who have already been put through a trial, can offer scant comfort to a victim. Indeed the Judge noted the victims felt that Mr Johnson's apology and the guilty plea was "too little too late".<sup>12</sup> The probation officer in the pre-sentence report was sceptical about his remorse. She commented:

While Mr Johnson took responsibility for his actions he has no insight into the reasons why he offended twice in a similar manner over 20 years apart.

Despite expressions of remorse and efforts at rehabilitation, he was assessed as presenting a high risk of harm to others and a moderate risk of re-offending.

[14] Therefore, we can see why the Judge did not give a specific discount for remorse and rehabilitation, and will not interfere with his assessment. Moreover, Mr Johnson was not able to rely on a discount for good character. His first offending had been in 1996/1997 and in those circumstances he cannot be regarded as having a clean record.

[15] His discount for the guilty plea of 15 per cent for the 1996/1997 offending was generous. Thus, putting to one side Mr Johnson's age when he first offended, the end sentence of five years' imprisonment was well within the range.

### **Mr Johnson's age**

[16] Mr Fairbrother submitted that the Court should have recognised that had Mr Johnson been charged and convicted of the indecent assault when he was only 14, a more rehabilitative sentence might have been given.

[17] Mr Pilditch put it a different way. In his submissions he fairly recognised that there had to be a discount for Mr Johnson's age at the time of the first offending. We agree. The factors that arise when young offenders are sentenced were considered in *R v Churchward*.<sup>13</sup> While recognition of the effects of imprisonment on young persons, and the particular rehabilitative prospects of young offenders, do

---

<sup>12</sup> *R v Johnson*, above n 1, at [18] and [26].

<sup>13</sup> *R v Churchward* [2011] NZCA 531, (2011) 25 CRNZ 446.

not arise as Mr Johnson is now a man of 32, he was a young teenager when he committed the 1996/1997 offending, and more vulnerable to impulse than an adult. Discounts for youth can be between 20 per cent and 40 per cent.<sup>14</sup>

[18] We consider that the Judge should have provided a discount for youth in relation to the indecent assault charge. Given that the starting point was two years' imprisonment for the indecency charge, the appropriate discount would have been approximately 25–30 per cent. In our view, the correct reduction was six months' imprisonment.

[19] Given our acceptance of the Judge's reasoning in all other respects, the end sentence should be reduced by six months to four years and six months' imprisonment.

## **Result**

[20] The appeal is allowed.

[21] The sentence of five years' imprisonment is quashed. It is substituted with a sentence of four years and six months' imprisonment.

Solicitors:  
Crown Law Office, Wellington for Respondent

---

<sup>14</sup> *BB (CA732/2012) v R* [2013] NZCA 139 at [11]–[13] (discount of 40 per cent is within the “upper reaches of the available range”).