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S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA625/2014
[2015] NZCA 269**

BETWEEN M (CA625/2014)
Appellant

AND THE QUEEN
Respondent

Hearing: 15 June 2015
Court: Stevens, Andrews and Gilbert JJ
Counsel: F E Guy Kidd for Appellant
J E Mildenhall for Respondent
Judgment: 24 June 2015 at 3.30 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Andrews J)

Introduction

[1] After a trial in the Invercargill District Court before Judge O’Driscoll and a jury, the appellant (M) was convicted on one charge of sexual violation by rape. He

was later sentenced to imprisonment for seven years and six months.¹ He has appealed against sentence.²

Background

[2] The victim (V) was M's adult daughter. She is an alcoholic. At the time of the offending she had made some progress towards recovery, but relapsed and started drinking. She sought help. Her mother was some distance away and not able to assist. Her partner was not able to help, as he was in residential treatment. She turned to her father, M, with whom she had recently renewed contact after an earlier estrangement.

[3] When M arrived at V's home, V was intoxicated. M sat beside her while she talked about her relapse and financial difficulties. He put his arm around her and started kissing her. He then removed her top. V's next recollection was of M being on top of her, having sexual intercourse. He then ejaculated and left to go to the bathroom. At this point, V was crying and curled up on a couch.

[4] When M returned, he put V's top back on her then said they both needed to pray. V did as instructed. After praying, M told V that what had happened was a great sin, and it would destroy him if she ever told anyone. He made V promise never to tell anyone.

[5] At trial, M's defence was that V had consented to sexual intercourse or, in the alternative, that he believed on reasonable grounds that she had consented. It is clear from the jury's verdict that those defences were both rejected.

Sentencing

[6] The Judge assessed M's offending in accordance with this Court's guideline judgment in *R v AM*.³ He identified V's clear vulnerability (in that she did not resist or protest because of her intoxication), the gross breach of trust by M in offending

¹ *R v [M]* DC Invercargill CRI-2013-025-1408, 30 September 2014 [sentencing decision].

² The appellant's notice of appeal also set out an appeal against conviction. The appeal against conviction was not pursued.

³ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

against his daughter, and the significant harm caused by the offending as being serious aggravating factors.⁴ The Judge placed the offending within the lower half of band 2 of *R v AM*, in respect of which a starting of between seven and 13 years' imprisonment will be appropriate.⁵ The Judge adopted a starting point of nine years' imprisonment.⁶

[7] The Judge then turned to personal mitigating factors. He recorded that M had led an exemplary life up until that time, with no previous convictions. He referred to references and testimonials placed before him.⁷ The Judge allowed a discount of 18 months for the mitigating factors, to arrive at an end sentence of seven years and six months' imprisonment.

Was the starting point too high?

[8] Ms Guy Kidd accepted that the Judge was right to place the offending within the lower half of band 2 of *R v AM*, but submitted that the starting point of nine years was too high. She submitted that a starting point of no more than eight years and six months' imprisonment would adequately recognise the seriousness of the offending in this case.

[9] Ms Guy Kidd referred to cases where a lower starting point had been adopted in cases of more serious offending, or offending of equivalent seriousness. First, she referred to the High Court decision in *R v Chadwick*,⁸ in which a starting point of eight years and six months' imprisonment was adopted for offending which was, she submitted, less serious than that in the present case. She also referred to the High Court decision in *R v Swan*,⁹ in which a starting point of eight years was adopted for offending which, she submitted, was similar to that in this case, with an additional aggravating factor that the offender had absconded for some nine years after the offending. She submitted that the offending considered in the decision of this Court

⁴ Sentencing decision, above n 1, at [7].

⁵ See *R v AM*, above n 3, at [98]–[104].

⁶ Sentencing decision, above n 1, at [13].

⁷ At [14].

⁸ *R v Chadwick* HC Rotorua CRI-2010-063-1728, 21 October 2011.

⁹ *R v Swan* HC Christchurch CRI-2010-009-833550, 26 May 2010.

in *Pule v R*,¹⁰ (referred to in the submissions for the Crown) and in which a starting point of nine years was adopted, was more serious than that in the present case.

[10] We do not accept that the Judge erred in adopting a starting point of nine years' imprisonment. That starting point was amply justified in the particular circumstances of this case, which were not reflected in any of the sentences referred to us by way of example drawn largely from first instance sentencing decisions.

[11] In this case V, M's daughter, expressly sought M's help with her alcohol problem. M had many years' experience as a caregiver for developmentally disabled adults, and subsequently in palliative care, and care of dementia patients. While we accept Ms Guy Kidd's submission that alcohol addiction was not one of M's particular areas of expertise, he did have considerable experience in dealing with people who were in one way or another unwell and vulnerable. V was entitled to trust her father to give her the help she desperately needed. When M arrived at V's home, she was particularly vulnerable, as she was intoxicated. M abused the trust V placed in him, and took advantage of her vulnerability. Further, the severe impact of M's offending on V was clear.

Was sufficient discount given for personal mitigating circumstances?

[12] Ms Guy Kidd accepted that the discount given for personal mitigating factors is a matter for the Judge's discretion, but submitted that there is still scope for appellate oversight and correction. She acknowledged that the discount given by the Judge (which was approximately 17 per cent) was "not insignificant". However, she submitted that in the light of M's particular personal circumstances, it should have been 25 per cent. She submitted that this was particularly so in the light of the many years M had spent working as a caregiver, making a positive contribution to the community, the references and testimonials that were before the Court, and, in particular, evidence as to M's own ill-health at the time of his offending.

[13] We have already referred to M's work experience. While we recognise that he has (as the sentencing Judge recognised) made a positive contribution to the

¹⁰ *Pule v R* [2015] NZCA 154.

community and has had an exemplary record to date, it is also the case that M's particular work experience should have made him acutely aware of V's particular vulnerability when she called on him for help. Further, it appears from some of the references and testimonials submitted that the authors of those were relying on incomplete information from M as to the nature of the offending on which he was convicted. In the circumstances, while recognising that they speak highly of M, we are cautious as to the weight to be given to them.

[14] We have considered the letter from M's general practitioner, who expresses the opinion that M was "vulnerable" at the time of his offending and that M had "reconnected with his daughter to support her during her alcohol and drug rehabilitation". The doctor's letter supports our observation that M was aware of M's alcoholism, and should have been well aware of her vulnerability at the time she called for help. Further, we note that it was not submitted that M's health issues would make serving a term of imprisonment more difficult for him.¹¹

[15] The discount to be given for personal factors is always a matter for assessment by the sentencing judge, taking into account all the available information. In addition to the material already referred to, the sentencing Judge had before him a pre-sentence report, in which it was recorded that M maintained his innocence, notwithstanding the guilty verdict. There is no indication of any expression of remorse. In the circumstances, we are not persuaded that the Judge erred in the discount given for M's personal mitigating factors.

Result

[16] The appeal against sentence is dismissed.

Solicitors
AWS Legal, Invercargill for Appellant
Crown Law Office, Wellington for Respondent

¹¹ See Sentencing Act 2002, s 8(h).