

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR  
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY  
S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR  
IDENTIFYING PARTICULARS OF ANY COMPLAINANT UNDER THE  
AGE OF 18 YEARS PROHIBITED BY S 204 OF THE CRIMINAL  
PROCEDURE ACT 2011**

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

**CA525/2015  
[2016] NZCA 206**

BETWEEN	WAYNE ANTHONY JONATHON HOUPAPA Appellant
AND	THE QUEEN Respondent

Hearing:	3 March 2016
Court:	Ellen France P, Keane and Dobson JJ
Counsel:	B P Kilkelly for Appellant D La Hood and R Georgiou for Respondent
Judgment:	16 May 2016 at 4 pm

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**JUDGMENT OF THE COURT**

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- A     An extension of time to appeal is granted.**
- B     The appeal against sentence is dismissed.**
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**REASONS OF THE COURT**

(Given by Keane J)

[1] On 11 August 2015, Wayne Houpapa was sentenced by Judge Crosbie in the District Court to imprisonment for 14 years, six months, for sexual and violent offences against his former partner, X, and related offences, over the eight-year span, December 2006 to July 2014.<sup>1</sup> He appeals his sentence as manifestly excessive.

[2] On sentence the Judge took a starting point of 11 years, six months, for Mr Houpapa's two lead offences, two sexual violations by rape to which he pleaded guilty on the afternoon of the first day of his trial, the first in March 2011 in Rotorua, the second in April 2014 in Dunedin. In the sentence he finally imposed the Judge did not allow Mr Houpapa any related discount for plea.

[3] The Judge uplifted that starting point by two years for four assaults, and an assault with intent to injure, extending across the eight year span; and in the sentence he finally imposed discounted that uplift by 10 per cent for Mr Houpapa's plea on the morning of the first day of trial, and on account of totality. He imposed a cumulative sentence of 18 months imprisonment.

[4] Then, for Mr Houpapa's next most serious offence, abducting the younger of their two children, their son Z, then aged two, from a day-care centre on 8 July 2014, and taking him north to Christchurch, the Judge took a starting point of 18 months to two years imprisonment, which he reduced to one year on account of totality, and then by 25 per cent for plea. He sentenced Mr Houpapa cumulatively to nine months imprisonment. For a related dangerous driving offence he convicted Mr Houpapa and disqualified him from driving for two years.

[5] Finally, for three breaches of a protection order, two in July to August 2014 for sending text messages, and the third on 15 June 2015 for going to X's home in the early morning of the first day of his trial, the Judge imposed cumulative concurrent terms of nine months imprisonment.

[6] On this appeal Mr Houpapa contends that this sentence is manifestly excessive on four grounds, and in totality. He contends that it should have been no higher than 12 years, nine months, and preferably no higher than 12 years.

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<sup>1</sup> *R v Houpapa* [2015] NZDC 16013.

## **Grounds of appeal**

[7] Mr Houpapa's primary ground of appeal is that the 11 year, six months starting point the Judge took for the two sexual violations by rape should have been no higher than 10 years, six months.

[8] Secondly, he contends, the 12-month uplift for the abduction should have been no higher than six months. Thirdly, he contends, his sentences for the first two protection order breaches ought to have been concurrent and the uplift for the third and most serious breach ought to have been no higher than six months.

[9] Fourthly, he contends, he should have received a 10 per cent discount for pleading to the sexual violations on the afternoon of the first day of trial, when X was giving evidence, out of remorse and an instinct to spare her being cross-examined.

### **First ground — rape starting point**

[10] On sentence, there was no issue that Mr Houpapa's two primary offences, the sexual violations by rape, lay within band two of *R v AM (CA27/2009)*, which attracts starting points in the range seven to 13 years.<sup>2</sup> The issue on this appeal, as it was on sentence, is where within that band Mr Houpapa's offending lay.

[11] On sentence, Mr Houpapa conceded that his offences were aggravated by two factors: the harm X had suffered and the fact that there were two offences, though separated by a number of years. He contended for a cumulative starting point no higher than 10 years. He now submits that the Judge ought not to have taken any starting point higher than 10 years, six months.

[12] On sentence, the Crown contended that, apart from the two conceded aggravating factors, there were two more; each offence was committed in breach of trust and aggravated by violence in excess of that inherent in the offences. Each, individually, the Crown contended, justified a starting point in the range of seven to

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<sup>2</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 (CA) at [98].

10 years. The two together justified a cumulative starting point in the range of 11 to 13 years.

#### *Two incidents*

[13] Mr Houpapa first raped X in March 2011, when they were travelling to Rotorua to celebrate the first birthday of his niece. He did so in their van, which was set up with a mattress and bedding, after X told him that she wanted their relationship to end.

[14] Mr Houpapa told X that she would never be able to leave him. He punched her to the head repeatedly with a closed fist. He pinned her down and forced intercourse on her, continuing all the while to punch her to the head. He left her dazed and vomiting and with injuries to her head and jaw.

[15] Mr Houpapa raped X the second time in Dunedin in April 2014, after they had finally parted, when he stayed with her over Easter to see their children, and still could not accept that their relationship had ended. He became angry when X told him that it had.

[16] This time Mr Houpapa pinned X to the floor of the living room in front of their young children. He began by punching her. Then, when she fled to her bedroom, he followed her. He pinned her to the bed and forced intercourse on her, all the while punching her and twisting her legs and arms.

[17] X called out to their eldest child, Y, to ring the police. But, instead, Y came into the bedroom and X, frightened of what she might see, told her to leave. When Mr Houpapa finally stopped X told him that she was going to call the police. He packed and said he was leaving her.

#### *Judge's assessment*

[18] The Judge began by saying that each rape involved more violence than was inherent in that offence. As to the first, "there were multiple punches to the head

before and during the incident, numerous bumps to the head”; and, as to the second, the rape “was accompanied by a punch to the head”.<sup>3</sup>

[19] As to the harm X suffered as a result of these two offences, the Judge said that there was “no contest” that “the harm was real”.<sup>4</sup> As a result of the first rape, and apart from the injuries she suffered, X was left dizzy and vomiting and traumatised. During the second rape, he said, Y came into the bedroom and witnessed the offending.

[20] The Judge did not consider that there was any aggravating breach of trust, though the second rape happened during the Easter visit, which Mr Houpapa made to see the children. But that there were two rapes was aggravating, as was the fact that each involved, not just a lengthy assault, but a violation to a significant degree.

#### *Our conclusions*

[21] The Judge’s starting point for the two rapes, 11 years, six months, lay towards the centre of band two of *R v AM (CA27/2009)*; and that in our view was an entirely proportionate response to Mr Houpapa’s offending.

[22] Mr Houpapa might not, as his counsel points out, have raped X using weapons like a knife, a broomstick or a candle, all of which can figure in band two cases. But band two applies whenever there is violence, which is even relatively moderate; and the violence Mr Houpapa inflicted on X was more extreme.<sup>5</sup>

[23] Nor did the Judge, as Mr Houpapa contends on this appeal, fail to distinguish between the violence inherent in the two offences and that inherent in his persistent assaults on X throughout their relationship for which he was also for sentence. The Judge expressly distinguished between the two.

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<sup>3</sup> *R v Houpapa*, above n 1, at [67]–[68].

<sup>4</sup> At [70].

<sup>5</sup> *R v AM (CA27/2009)*, above n 2, at [98].

## **Second ground — abduction uplift**

[24] Mr Houpapa next contends that the 12-month uplift the Judge made for the abduction offence ought to have been no higher than six months because he was exercising his right as a parent and Z suffered no harm. Moreover, any risk to Z was more properly the subject of Mr Houpapa's dangerous driving offence.

### *Two related offences*

[25] On 8 July 2014, Mr Houpapa returned to Dunedin from Amberley, north of Christchurch, where he was then living. He acquired a child's car seat. He entered X's address in her absence and without her consent, and collected Z's clothing. He went to Z's day-care centre. The centre contacted X.

[26] Mr Houpapa assured X that he only wanted to see Z for a few hours and would drop him home. She reluctantly agreed. Instead, he left Dunedin with Z and headed north. On his way he spoke to a friend, to whom he admitted he had made a mistake. His friend tried to convince him to return Z to Dunedin. But he refused, as he did again when X telephoned him.

[27] At 7 pm, when Mr Houpapa was identified north of Christchurch by officers in an unmarked patrol car, he accelerated away at speeds up to 170 kilometres per hour. In Amberley itself he drove at 90 kilometres per hour. When apprehended he said he had panicked. As Z's parent he had done nothing wrong.

### *Judge's assessment*

[28] The Judge recorded that the Crown contended for an uplift of one year for this offence, whereas Mr Houpapa's counsel contended for an uplift in the range six to 12 months. The Judge adopted a 12-month uplift, which he reduced to a nine-month sentence, by allowing a full discount for Mr Houpapa's early plea, on this basis:<sup>6</sup>

[78] The abduction was separate offending. It was not committed while on bail. The child was physically unharmed but, as the Crown submits, the

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<sup>6</sup> *R v Houpapa*, above n 1.

offending was by way of particular cruelty to the child's mother, a form of retaliation for her having ended the relationship. It did involve some risk to the child at the end when the police were going to apprehend [Mr Houpapa]. On its own the starting point would be 18 months to two years but in view of the totality there will be a one year uplift.

[29] The Judge recognised that Mr Houpapa's dangerous driving offence formed part of the abduction and, having imprisoned him for the abduction, simply disqualified him for that secondary offence for two years.

#### *Our conclusions*

[30] We consider, as the Judge did, that Mr Houpapa's abduction offence warranted a starting point of 18 months to two years, which we note lies well within the seven-year maximum penalty for that offence.

[31] The two young children had been in X's care since birth. She and Mr Houpapa had ceased living together, and according to the agreed summary she had a parenting order. Yet Mr Houpapa travelled from Christchurch to Dunedin to abduct Z. He entered X's home without her consent. He lied to her after the day-care centre had contacted her. He persisted in his offence when his friend and X tried to dissuade him. As the Judge said, his intent can only have been retaliatory.

[32] Aggravating Mr Houpapa's offence was that he put Z at real risk by driving at such high speeds to evade the police. Whether or not their then concern that Z was unrestrained was real, the speeds to which he accelerated were inherently dangerous. The Judge described Z as then being at "some risk". We rate that risk to have been higher.

[33] That risk did not merely aggravate Mr Houpapa's dangerous driving offence. It aggravated his then still continuing abduction offence. Furthermore, in the penalties the Judge imposed he did not double count. He struck a balance between the two offences.

### **Third ground — protection order breaches**

[34] Mr Houpapa's third ground of appeal, that the nine-month concurrent terms the Judge imposed cumulatively for the protection order breaches, does, we accept, have merit as to the first two of those breaches.

[35] His first offence was on 15 July 2014, within four days after X obtained her temporary protection order. He sent X a text message saying "Can i talk to my kidz" and another that day saying "Please". Later that evening he sent her another saying "Y do we have to go to court for. Protection order not gona stop me frm seeing my kids." His second offence on 3 August 2014 was a further text in which he said:

Im sory fr evrything iv done. Ths wil b the last time u wil hear frm me eva.  
You wnt talk to me i cnt b f ...kd wif life da kids cn liv without their father. I  
hope yr happy u gt wot u wantd.

[36] Only the second of these texts was in any sense intimidating. In all three Mr Houpapa showed an understandable wish to maintain contact with his children. They did not warrant a nine-month term, even concurrently. But Mr Houpapa's third breach was of a quite different order.

[37] On the evening of 14 June 2015 Mr Houpapa travelled to Dunedin for his trial, which was to begin on the following morning. In breach of his bail he walked to the town where X was living. In breach of her protection order he knocked on her door shortly after midnight. She called the police.

[38] On sentence the Judge assumed that Mr Houpapa's counsel had agreed that this offence warranted a 12-month uplift. Mr Houpapa's counsel said on the appeal that in this the Judge was mistaken. He submitted that the offence warranted an uplift no greater than six months. All that Mr Houpapa did was to knock on X's door. She did not open it. He did not act in any aggravating way.

[39] The very fact, however, as the Judge said, that Mr Houpapa went to X's house in the early morning of the day on which she was to give evidence against him at his trial was a "contravention ... of the worst kind".<sup>7</sup> He was in breach of his bail

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<sup>7</sup> *R v Houpapa*, above n 1, at [41].



and of her protection order and his intent must have been, if not to intimidate her, then to unsettle or persuade her.

[40] The nine-month sentence the Judge imposed for this offence was warranted and, though the concurrent terms the Judge imposed for the two earlier breaches were excessive, they had no effect on Mr Houpapa's final sentence.

#### **Fourth ground — discount for plea**

[41] Finally, as we have said, Mr Houpapa contends he should have been allowed a 10 per cent discount for his plea to the two sexual violation offences at the afternoon adjournment of the first day of trial, when he spared X being cross-examined.

[42] In our view, however, it was open to the Judge not to allow Mr Houpapa any such credit. By the afternoon adjournment X's evidence was well advanced and that in itself, as the Judge said, had to be decisive. Any remorse or sympathy for X that Mr Houpapa might then have felt for X came too late to be worthy of credit.

#### **Disqualification from driving**

[43] Mr Houpapa also argued the dangerous driving sentence of disqualification for two years was excessive. There is nothing in this point. The two-year disqualification was open to the Judge in the circumstances of the offending.

#### **Result**

[44] For these reasons we consider that the sentence that the Judge imposed on Mr Houpapa, while severe, was not manifestly excessive and involved no error. An extension of time to appeal is granted but the appeal against sentence is dismissed.