

**NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF  
NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF  
APPELLANT REMAINS IN FORCE.**

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

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

**CA528/2016  
[2017] NZCA 210**

BETWEEN R (CA528/2016)  
Appellant

AND THE QUEEN  
Respondent

Hearing: 2 May 2017  
Court: French, Mallon and Wylie JJ  
Counsel: T Epati for Appellant  
M H Cooke for Respondent  
Judgment: 24 May 2017 at 4.30 pm

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**JUDGMENT OF THE COURT**

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**The appeal against sentence is dismissed.**

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**REASONS OF THE COURT**

(Given by Mallon J)

## **Introduction**

[1] The appellant pleaded guilty to and was convicted of representative charges of sexual violation by rape,<sup>1</sup> sexual violation by unlawful sexual connection,<sup>2</sup> indecency with a child under 12 years,<sup>3</sup> and a non-representative charge of breaching a protection order.<sup>4</sup> He was sentenced in the District Court at Gisborne (Judge Adeane) to 12 years and nine months' imprisonment.<sup>5</sup> He appeals against his sentence on the basis that the 15 year starting point was too high, and there should have been a discount for remorse and for the time spent on restrictive electronically monitored (EM) bail.

## **The offending**

[2] The sexual offending related to the appellant's 11 year old daughter. It occurred in the family home over a 10 month period in 2013 and 2014 when her mother was out of the house at work. The offending began with the appellant kissing his daughter and touching her over the top of her clothing. It soon progressed to touching her under her clothes, raping her and making her perform oral sex on him until he ejaculated into her mouth. It occurred frequently, at least weekly. She would ask the appellant to stop and begin to cry. The appellant would tell her to shut up and not to tell her mother.

[3] After the sexual offending was disclosed, the appellant separated from his partner. A final protection order was put in place. The appellant breached this on two occasions in November and December 2014 when, in an intoxicated state, he went to his ex-partner's work and abused her, calling her "a slut and a ho".<sup>6</sup>

## **District Court sentence**

[4] The District Court Judge adopted a 15 year starting point for the sexual offending, on the basis that the aggravating features (breach of trust, vulnerable

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<sup>1</sup> Crimes Act 1961, ss 128(1)(a) and 128B (maximum penalty 20 years' imprisonment).

<sup>2</sup> Sections 128(1)(b) and 128B (maximum penalty 20 years' imprisonment).

<sup>3</sup> Section 132(3) (maximum penalty 10 years' imprisonment).

<sup>4</sup> Domestic Violence Act 1995, ss 19(2)(d), 49(1)(a) and 49(3) (maximum penalty three years' imprisonment).

<sup>5</sup> *R v [R]* [2016] NZDC 19295.

<sup>6</sup> Although there were two instances of breach, there was only one charge.

victim, harm to the victim including psychological harm, frequency and duration of the offending and premeditation) put the offending in the upper end of band three of *R v AM (CA27/2009)*.<sup>7</sup> The Judge allowed a 15 per cent discount for the appellant's guilty plea. He declined to allow a discount for remorse or for the time spent on restrictive bail.

[5] This meant an end sentence of 12 years and nine months' imprisonment on the sexual violation charges, with concurrent sentences of three years' imprisonment on the sexual conduct charge and three months' imprisonment on the breach of protection order charge.

### **Starting point**

[6] The appellant submits the case was on the cusp of bands two and three of *R v AM (CA27/2009)* and the appropriate starting point was 12 years' imprisonment. In support of this submission the appellant contends the seriousness of the offending fell between *P (CA397/12) v R* (where an 11 year starting point was upheld)<sup>8</sup> and *Abraham v R* (where a 15 year starting point was described as "well within the range").<sup>9</sup>

[7] We agree with the Crown's submission that the offending was appropriately placed in band three. As the Judge correctly identified, it involved three or more culpability factors that were present to at least a moderate degree.<sup>10</sup> We consider *P (CA397/12) v R* to be less serious than the present case because it involved a shorter duration of offending, a lesser degree of penetration and it did not involve oral sex to the point of ejaculation. We consider *Abraham v R* to be a closer comparison. The offending in that case extended over a longer period of time than the present case, but it occurred on substantially fewer occasions and the offender was a friend of the family rather than the father of the complainant. We therefore consider the 15 year starting point adopted by the Judge was available.

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<sup>7</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [105] (band three has a range of 12 to 18 years' imprisonment).

<sup>8</sup> *P (CA397/2012) v R* [2012] NZCA 488.

<sup>9</sup> *Abraham v R* [2012] NZCA 521 at [18].

<sup>10</sup> *R v AM (CA27/2009)*, above n 7, at [105].

## **Remorse**

[8] The appellant submits a discrete discount should have been given for his remorse. He seeks a discount in the range of seven to eight per cent. This discount is sought on the basis of a letter the appellant provided to the Court at the time of sentencing. In this letter the appellant said he took full responsibility for his actions. He described himself as — amongst other things — a disgrace, a failure, repulsive, and a sick man who had failed to protect his family. He accepted he had destroyed his daughter’s innocence, breached his ex-partner’s trust and he was “very, very sorry”.

[9] A discrete discount for remorse should be given when a “proper and robust evaluation of all the circumstances” demonstrates a defendant’s remorse.<sup>11</sup> The Judge accepted the letter was a “frank acknowledgement of what he has done and the wrongness of it”. He also noted it was “[v]ery late”. It contrasted with the pre-sentence report which had detected “little remorse” and in which, as the Judge put it, the appellant had “taken refuge in alcoholic amnesia”. He considered “on balance” the acknowledgement in the letter did not affect the appropriate sentence.<sup>12</sup>

[10] Some judges would have allowed a small discount for what was a full acknowledgment of responsibility and the harm it had caused, and what appeared to be a sincere expression of remorse even though it came late. We are not, however, able to say that the Judge was wrong in his assessment that in all the circumstances no discount should be made.

## **Discount for time spent on EM bail**

[11] The appellant was subject to EM bail for just over a year. The conditions of his EM bail included a 24 hour curfew. There was no breach of the bail conditions or any other issues with compliance. The Judge recognised a discount would usually follow. However, he declined to allow a discount because he was imposing a

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<sup>11</sup> *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].

<sup>12</sup> *R v [R]* above n 5, at [15].

concurrent sentence for the breach of protection order and was remitting the appellant's fines.<sup>13</sup>

[12] The appellant submits the Judge was wrong to refuse a discount because his fines were remitted. He accepts a cumulative sentence for the protection order breaches could have been imposed. Relying on this Court's decision in *Hohepa v R*,<sup>14</sup> he submits a discount of nine to 12 months' imprisonment was appropriate for his time spent on EM bail, and any set-off for any uplift for the protection order breaches would not cancel out the discount.

[13] The Crown relies on the recent decision of this Court in *Parata v R* which said that time spent on EM bail is not equivalent to pre-sentence custodial remand.<sup>15</sup> The Court regarded a four month discount for 10 months spent on EM bail subject to a 24 hour curfew as "not ... inadequate", while also acknowledging that a higher discount "would not necessarily be wrong".<sup>16</sup> The Crown also refers to *Chea v R*, another relatively recent decision of this Court, allowing on appeal a discount of four months to recognise 13 months on EM bail and full compliance with all bail conditions.<sup>17</sup>

[14] The size of the discount in *Hohepa* appears to be out of step with the more recent decisions of this Court. We consider that a discount of four to six months was potentially available for the 12 months the appellant spent on EM bail, taking into account the very restrictive conditions and the appellant's compliance with its terms. We consider the remission of fines was irrelevant to whether a discount should be allowed for time spent on EM bail. We accept, however, that it would have been open to the Judge to impose a short cumulative sentence for the two breaches of the protection order. We consider no more than one to two months would have been appropriate as a cumulative sentence, given the relatively minor nature of the breaches. We therefore consider the effective offset for the concurrent sentence was less than the appropriate discount for the time spent on EM bail. However, to now

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<sup>13</sup> At [17].

<sup>14</sup> *Hohepa v R* [2015] NZCA 485 at [35].

<sup>15</sup> *Parata v R* [2017] NZCA 48 at [10]–[14].

<sup>16</sup> At [15].

<sup>17</sup> *Chea v R* [2016] NZCA 207. It is not clear that the EM bail was subject to a 24 hour curfew although this appears to have been the assumption on which this Court proceeded.

adjust the sentence because of this would be tinkering: we consider the overall end sentence was at the upper end of what was available, but we are not able to say it was manifestly excessive.

## **Result**

[15] The appeal is dismissed.

Solicitors:

Rishworth Wall & Mathieson, Gisborne for Appellant  
Crown Law Office, Wellington for Respondent