

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR
IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY
S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA445/2016
[2017] NZCA 240**

BETWEEN SS (CA445/2016)
 Appellant

AND THE QUEEN
 Respondent

Hearing: 3 May 2017

Court: French, Mallon and Wylie JJ

Counsel: N Levy for Appellant
 S K Barr for Respondent

Judgment: 8 June 2017 at 3.30 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] On 19 July 2016 the appellant, SS, was found guilty of seven charges of sexual violation by unlawful sexual connection following a jury trial in the District Court at Wellington. On 5 August 2016 he was sentenced by the trial Judge,

Judge Harrop, to a sentence of 14 years' imprisonment, with a minimum period of imprisonment of seven years.¹

[2] SS appealed his sentence on the basis it was manifestly excessive.²

The appeal

[3] SS's prosecution was commenced by way of both an information filed prior to the commencement of the second stage of the Criminal Procedure Act 2011, and charging documents filed after those provisions came into force. The trial proceeded by way of indictment and the appeal falls to be determined under pt 13 of the Crimes Act 1961.³

Relevant facts

[4] The offending occurred over the period 2000 to 2005. It was against three young girls. In his sentencing notes, Judge Harrop described the offending as consisting primarily of "contact between [SS's] mouth and [the victims'] vaginas, skin-on-skin, including kissing, ... there was clearly a ritualised process where [SS] got them into [his] bed and removed their lower clothing to carry out this offending".⁴

[5] One of the victims was T. The offending against her occurred between 2000 and 2005, when she was aged between seven and 12 years. She was related to SS's former partner. The majority of the offending was over the three year period between 2002 and 2005, and it occurred on at least 100 occasions.

[6] Another victim was E. The offending against her occurred between 2004 and 2005, when she was aged five. She lived near to SS's house. The offending against E occurred once or twice each week, and in total on at least 50 occasions.

¹ *R v [SS]* [2016] NZDC 14893.

² An appeal against conviction was abandoned.

³ Criminal Procedure Act 2011, s 397.

⁴ *R v [SS]*, above n 1, at [31].

[7] SS also offended against S in 2004 to 2005, when S was aged three. She was also related to SS's former partner. The number of offences against S is unclear but it is likely that the offending against her was considerably less frequent than the offending against the other two victims.

[8] SS was aged between 38 and 44 years at the relevant times.

[9] Judge Harrop, after discussing each of the individual charges, summarised the case against SS as follows:⁵

... [SS] groomed or cultivated these young girls through a variety of behaviours to normalise both for them and their parents [his] being with them in the absence of other adults including, in particular, in [his] bedroom. [He] then offered them treats. [He] took them on outings and generally gave them a lot of attention compared to adults, following which [he] took advantage of them over an extensive period in the sexual ways which were proved.

He went on as follows:⁶

In summary, I describe your offending as being a prolonged and carefully-planned gross sexual abuse of three young girls for your own sexual gratification which, unsurprisingly, has had and will continue to have very serious adverse consequences for each of them ...

Analysis

[10] Judge Harrop referred to this Court's tariff decision for offending involving sexual violation — *R v AM (CA27/2009)*.⁷ Given the seriousness of the offending, he placed SS's offending within band 3 identified in *R v AM*, which attracts a starting point of nine to 18 years' imprisonment. He considered the primary issue was where the case sat within band 3, and this turned on identifying the relevant culpability assessment facts and considering to what degree each was present.⁸

[11] Band 3 for unlawful sexual connection offending is appropriate for the most serious offending of this type. It is for cases that involve two or more factors that increase culpability to a high degree, for example, a particularly young victim or an

⁵ At [20].

⁶ At [27].

⁷ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

⁸ *R v [SS]*, above n 1, at [24].

extensive period of offending. Similarly, the band is appropriate where more than three such factors are present to a moderate degree.⁹

[12] Here, Judge Harrop identified five features that he considered increased SS's culpability, namely:

- (a) the scale and extent of the offending;
- (b) planning and premeditation;
- (c) vulnerability;
- (d) harm; and
- (e) breach of trust.

[13] Ms Levy, appearing on SS's behalf, did not dispute his offending fell within band 3 in *R v AM*. She submitted, however, the Judge's overall starting point of 14 years' imprisonment was too high and the starting point should have been towards the bottom end of the band, nine years.

[14] Mr Barr, for the Crown, submitted the placement of the offending in the mid range of band 3 (slightly above the midpoint of 13 and a half years') was unremarkable, and well within range for offending of the type involved.

[15] In support of her overall premise Ms Levy argued the Judge failed to give sufficient weight to the fact the majority of the offending did not involve penetration.

[16] The lead offences for the purposes of sentencing were the charges involving contact between SS's mouth and the three complainants' genitalia. That offending did not involve penetration and we acknowledge that the presence or absence of penetrative conduct can be relevant to culpability.¹⁰

⁹ *R v AM*, above n 7, at [120].

¹⁰ *R v Baldwin* [2010] NZCA 472 at [20].

[17] This however was not a case where there was no penetrative offending at all. SS was convicted of two representative charges involving penetrative offending against T. One covered the period January 2000 to March 2002, and the other the period from January 2002 to March 2005. On these occasion SS did insert his fingers into T's vagina. It is also noteworthy that SS was convicted of a representative charge that he induced T to kiss the tip of his erect penis.

[18] We are not persuaded this was a case where the comparative absence of penetrative conduct required a lower starting point. As was noted in *R v AM*, it is wrong to suggest violation by digital penetration and oral violation (not involving penile penetration of the mouth) is always less serious.¹¹ The total circumstances need to be assessed and the combination of those circumstances indicates the appropriate sentencing level.¹²

[19] Ms Levy also argued a number of the culpability assessment factors identified by the Judge ran together — in effect they were one and the same thing.

[20] We do not consider there is anything in this argument. The Judge acknowledged the aggravating features of SS's offending did tend to run into each other. He was aware there was a danger in adopting a mathematical approach in considering the aggravating factors, and in applying the bands identified in *R v AM*. He noted it is important in sentencing that a totality view be taken, to avoid an inappropriate totting up of individual matters in a blinkered way.¹³

[21] In our judgment Judge Harrop's approach was consistent with *R v AM*.¹⁴

[22] Here the scale of the offending was serious. The offending against T spanned five years and the offending against both S and E spanned a one year period. The extent of the offending was also a serious aggravating feature.

¹¹ *R v AM*, above n 7, at [73].

¹² *R v Singh* CA160/02, 26 November 2002 at [21] and [24].

¹³ *R v [SS]*, above n 1, at [25]–[26].

¹⁴ *R v AM*, above n 7, at [36].

[23] Further, planning and premeditation were clearly relevant aggravating features that reflected SS's criminality. They are matters that fall for separate consideration.¹⁵ SS took steps to ingratiate himself with the victims' caregivers to enable him to gain access to the children. He groomed the children to normalise his behaviour. He gave treats to them. For example, T was given alcohol on occasions when she came to stay at SS's house. He cajoled or threatened them to conceal his wrongdoing. For example, he told E to keep things a secret and he got angry and gave T the cold shoulder when T rebuffed his attempts to hug her. SS's offending was clearly neither impulsive nor instantly regretted.

[24] There can be no doubt the victims were vulnerable, and they have already suffered, and will continue to suffer, significant harm as a result of the offending against them. It is also clear there was a significant breach of trust. SS was in the position of a stepfather to T. He was in the position of a step-grandparent to S, and he abused the trust of E's caregivers.

[25] We do not consider the Judge erred in his assessment of SS's culpability. We accept that, to an extent, the aggravating features do run into each other, but that does not compel the conclusion that the Judge's placement of SS's offending in the middle of band 3 was inappropriate.

[26] Both counsel referred us to various authorities.¹⁶ We do not consider much assistance can be derived from them. Two of them were discussed in *R v AM*, and each turns on its own facts. We are satisfied the sentence adopted by Judge Harrop, whilst stern, was within the available range.

[27] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

¹⁵ Sentencing Act 2002, s 9(1)(i).

¹⁶ *R v Te Tauri* CA 188/02, 15 July 2003; *R v K* (CA558/08) [2009] NZCA 107; and *Aleki v R* [2014] NZCA 473.