

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

**IN THE DISTRICT COURT
AT HAMILTON**

**CRI-2016-019-000395
[2017] NZDC 3355**

THE QUEEN

v

WIREMU MAHANA

Hearing: 20 February 2017

Appearances: T Clark for the Crown
M McIvor for the Defendant

Judgment: 20 February 2017

NOTES OF JUDGE K B F SAUNDERS ON SENTENCING

[1] Mr Mahana, I will deal with you first on the breach of release conditions. Not guilty plea vacated. On your plea of guilty you are convicted and discharged on that matter.

[2] I turn now to sentence you on the charge of sexual conduct with a young person under 16. That is laid as a representative charge, charge 2 in the Crown charge notice and it carries a maximum penalty of 10 years imprisonment.

[3] In so far as the facts are concerned, you were released from prison on [date deleted] 2015. You were subject to parole and you moved into your sister's home. Initially you slept on a mattress on the floor and then on your own volition you moved into a bedroom occupied by your [details deleted] nieces who are aged between seven and 12. Over an 11 week period, between [dates deleted] you had sexual intercourse with your niece who was aged 12, almost nightly without

contraception. She turned 13 [details deleted], became pregnant as a result of your offending, however the pregnancy was terminated.

[4] The pre-sentence report is not a positive report at all, Mr Mahana. You are assessed as posing a high risk of harm to the community, showing little insight and are assessed at high risk of re-offending.

[5] You have since then written a letter of remorse saying, "That there are no words that can express how sorry I truly am for what has happened." The Crown says that I ought to be sceptical about your remorse; it is not really genuine reflection of remorse for the harm to your family, more a lament about your own personal circumstances.

[6] A restorative justice conference was not convened, unsurprisingly, Mr Mahana. Your conduct has had a real effect on both your sister but far more importantly on the young complainant. Her victim impact statement says everything that is expected. It shows essentially what a 13 year old girl went through. It is somewhat concerning that she ends the statement by saying she is now happy to be a 13 year old girl going to high school rather than pregnant. Regrettably [details deleted] and your offending has had a real impact on her. I suspect, and this has been said in the past, that the true effect of your offending may very well not become known or come to the fore until she becomes a young adult and matures into adulthood.

[7] Aggravating features of the offending are as follows. The scale of the offending occurred over an eleven week period, I am satisfied almost nightly and, concerningly, when there were two younger siblings in the room. The abuse of trust inherent in the fact that you were her uncle, she is your niece. The age disparity, she was 12 and 13; you were 36 so a disparity there of [more than two decades]. She was extremely vulnerable, not only in terms of her age but also in terms of your relationship to her. There has been real consequences to her in terms of having to terminate the pregnancy and as I have said I am sure that time will reveal far more impact on her. She is doing the best she can to cope with what has happened to her.

[8] The only mitigating features Mr Mahana, are in respect of the mitigating fact that you pleaded guilty, I will accept at an early stage having gone through various forms of negotiations in terms of where the true culpability sat as to the extent of your offending.

[9] There is no guideline judgment for this type of offending but the legislation was increased to protect young children who are in positions of vulnerability. In a decision *R v Johnson*¹ in 2010 the Court of Appeal considered a starting point of four years should be seen as no more than a mid point in the range of offending where there is moderate culpability.

[10] The Crown submits that the aggravating features of the offending that I have already identified and having regard to a number of cases would warrant a starting point in the range of eight years having regard to decisions of *R v Tamatea*² and *Philpot v R*³. *R v Tamatea* was more serious in terms of its facts where the starting point of eight years' imprisonment was identified. The Crown submits that an uplift of nine months would be reflective of the fact that you committed this offence while subject to prison release conditions

[11] No uplift is sought for your previous convictions. It is recognised that while you do have previous convictions for serious violent offending this is your first conviction of a sexual offence.

[12] Mr McIvor, on your behalf, submits that a starting point in the range of four to five years' imprisonment is appropriate. He submits that the offending is less serious than in *R v Tamatea*. He says that your remorse is genuine and that a full 25 percent discount for an early guilty plea should be given to you. He submits that, as he must, while you did commit the offending while on post release conditions this is not a repeat of serious violent offending. He does acknowledge, realistically, the aggravating features I have already referred to.

¹ *R v Johnson* [2010] NZCA 168

² *R v Tamatea* [2016] NZHC 1412

³ *Philpot v R* [2015] NZCA 212

[13] In terms of sentencing you, Mr Mahana, the purpose of sentencing you is to hold you accountable for the harm, to promote in you a sense of responsibility, to denounce, to deter, but also to impose a least restrictive sentence. I consider that the offending is less serious than *R v Tamatea*. It is more comparable to the offending in *Philpot v R* although the offending in *Philpot v R* was persistent and occurred over a longer period. I balance that however against the greater age disparity in the present case and the fact that the sexual intercourse resulted in a terminated pregnancy.

[14] *Philpot v R* suggested a starting point in the range of five and a half to six years' imprisonment. I adopt a starting point of five and a half years' imprisonment. The fact that your offending was committed while subject to release conditions warrants a further uplift of six months' imprisonment. That then gets me to six years' imprisonment. I give you a discount of 25 percent in all the circumstances for your guilty plea and that will also take into account to some extent your remorse. That gets me to an end sentence, Mr Mahana, of four years and six months' imprisonment and that is the sentence that I impose on you now.

[15] Charges 1 and 3 are dismissed pursuant to s 147 Criminal Procedure Act 2011.

K B F Saunders
District Court Judge