

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES),
OCCUPATION(S) OR IDENTIFYING PARTICULARS OF
WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202
CRIMINAL PROCEDURE ACT 2011.**

**IN THE DISTRICT COURT
AT DUNEDIN**

**CRI-2017-012-000185
[2017] NZDC 17182**

NEW ZEALAND POLICE
Prosecutor

v

CONNOR VALLI
Defendant

Hearing: 4 August 2017

Appearances: Sergeant A Cheyne for the Prosecutor
J C Turner for the Defendant

Judgment: 4 August 2017

NOTES OF JUDGE S J COYLE ON SENTENCING

[1] Mr Valli, you are here today for sentence in relation to a number of charges. The first is causing harm by posting a digital communication. It carries a maximum term of imprisonment of two years. Then in time, you face an excess breath alcohol and a careless driving charge. The careless driving is fine-only but the excess breath alcohol carries a maximum term of three months' imprisonment.

[2] While on bail in relation to those, you committed further offending of resisting police and intimidation, both of which carry three months' imprisonment and again

while on bail in relation to that, you had another drink-drive conviction and an escaping from police custody, which carries a maximum of five years' imprisonment and a charge, to which you have pleaded guilty today, it being laid in substitution for another charge under the Harmful Digital Communications Act 2015 and instead a charge of threatening behaviour under the Summary Offences Act 1981 has been laid and that carries a maximum of three months' imprisonment. As I have said, today you have pleaded guilty to that.

[3] As your counsel, Ms Turner, accepts today, the most serious charge you face is that of causing harm by posting a digital communication. You and the victim in this matter had been in a relationship for a period and during that time the victim sent photographs to you of herself in various stages of undress. Two of these photographs were of her in her bra and one was of her naked.

[4] Your relationship with her subsequently ended and you began seeing [details deleted]. [The victim] was upset about that and clearly there were issues between you about it. Your response was that you threatened that if she continued to contact you, you would post the photographs you had on a social media site and indeed, on [date deleted] June last year, you posted three images of her on the [name deleted] Facebook page advertising to sell her for a dollar. That Facebook page had, according to the summary, 77,759 members. You also tagged her by name so the images would show up on the Facebook page of her friends. She had over 1000 friends. You also attached some comments which are set out in an attachment to the summary. Those comments are offensive. I do not intend to read them out in Court but they are comments which are degrading, humiliating, as I said offensive and really entirely unacceptable. They were clearly designed to humiliate her and make her feel worthless. The victim in this matter was contacted by family friends and other friends who had seen the images posted by you. As a consequence of intervention, the images were removed by Facebook fairly promptly.

[5] The results of the images for your victim were extremely distressing. To your credit, when approached by the police, you immediately admitted what you had done. I will come back and talk about the effect on your victim shortly in more detail.

[6] In January of this year, you were driving on State Highway 8 near Beaumont. Despite the law being you cannot access a cellphone while driving, you picked up your cellphone and were trying to unlock it. You lost concentration and ended up crashing. You then drove off but one of your passengers contacted the police because they were concerned about your driving. You were subsequently stopped by the police. You showed signs of recent alcohol consumption and a breath alcohol level was found of 663 micrograms of alcohol per litre of breath.

[7] On [date deleted] this year, you were in another relationship. There was an argument between you and your [victim] which resulted in you pushing and shoving her. The police were called and while they were talking to her, that is with police present, you began yelling at her and throwing some of her personal effects at her in front of the police. The police, understandably, arrested you at that point and you became violent towards them, lashing out and kicking.

[8] In mid-June of this year, you were driving. You were stopped by police and then you took off. Eventually you were found and a breath test was undertaken, which was 363 micrograms of alcohol per litre of breath. You of course being under 20 are assessed at the youth rate.

[9] You appear, therefore, in relation to a number of charges over a number of months but with you having had no previous convictions.

[10] Finally, there is the matter to which you pleaded guilty today and the facts of this arose out of the breakdown of yet another relationship. On [date deleted], you sent a Facebook message to a friend of your victim which said:

Tell that little shit, [name deleted], she says she goes for bad boys but the cunt she cheated on me with drove away as soon as he saw me. Next time I see her, I'll do what she did to [name deleted] to her.

[11] It is clearly language that was threatening, again abusive and intimidating and quite properly is reflected in the amended charge that has been filed today.

[12] There are two PAC reports before the Court. The second recommends, in light of your ongoing offending, a sentence of imprisonment. It talks of your lack of

remorse, your ongoing impulsive nature and your ongoing offending. It is quite clear that because of those factors, your ability to comply with a community-based sentence is assessed as being poor.

[13] At the start of today's sentencing, Ms Turner asked me to adjourn the sentencing yet again so that an address could be assessed for the purpose of an electronic sentence but in light of the comments in that report, and in light of comments I will make later on, I have a clear view that notwithstanding the need to impose the least restrictive sentence in the hierarchy of sentencing and notwithstanding that you do not have any previous convictions, a custodial sentence is the only option.

[14] I come back to the impact on your victim in relation to the Harmful Digital Communications Act charge. Ms Turner described your actions as being foolish and undertaken with the influence of friends. You are symptomatic of people your age who are inextricably wedded to technology and who seem, with great frequency, to commit all sorts of thoughts to electronic means, whether by text, Snapchat, Instagram or Facebook. That is the way in which your generation communicates and as the sergeant has alluded to today, Parliament has passed this Act with the express intention of trying to regulate what was becoming a huge problem within society and that is people thinking and communicating in a manner which was harmful, degrading and abusive towards other people. With the passing of legislation, Parliament has given a clear intention that whilst we as a society can be free to communicate as we want through electronic means, that communication has to be done with respect and has to be appropriate and not in any way abusive or derogatory.

[15] Whilst the decision on that day may have been influenced by your friends, what concerns me is that prior to you engaging in this activity, you had overtly threatened her that if she did not back-off and leave you alone, this is exactly what you would do. You clearly thought about it beforehand and it was not a spur of the moment foolish decision as has been characterised by your counsel.

[16] Your actions on that day have had a huge and devastating impact on your victim. She describes it as emotionally, mentally, spiritually and socially messing her

up. She began self-harming. You made her feel scared, scared for herself and for her family, and those images of her that were communicated to you while you and her were in an intimate relationship were then put out there for the wider world to see, as what she describes as having ruined her life. She feels worthless and depressed and is embarrassed to leave home. She became extremely angry, lashing out at those around her that were trying to support her. It has affected her education and she has become bullied by others within her community. For her, your click of a button, which probably happened in an instant, has had devastating consequences on her and will continue to have those consequences for a long time.

[17] As the sergeant has highlighted to me, what the threatening charge shows is that this is a pattern of behaviour for you because some relationships down the line, when things did not go your way, you sent that message which was clearly threatening and again was abusive and humiliating and degrading of that woman and it seems to me your default position when relationships end, and with you they seem to end with great frequency, and when the women who you were in those relationships with do not behave as you think they should behave, then your innate response is to humiliate them as best you can and threaten them. That has to be extremely concerning.

[18] Clearly principles of denunciation and deterrence in terms of the Sentencing Act 2002 have to be given significant weight by me for a success of Judges have said, and most recently Judge Mabey in the *R v Brittin*¹ decision that has been referred to, the Courts need to send a clear message that this form of communication which has these devastating effects on victims cannot, should not and will not be tolerated by the Courts. I need to send a clear message as a warning to other people in society that if they are thinking or doing what you have done, they need to have their eyes wide open as to what those consequences will be.

[19] I need to take into account the interests of the victim and hopefully instil in you a sense of responsibility. To that end, Ms Turner tells me in her submissions today that you have now moved in with your mother, you have grown up, you finally

¹ *R v Brittin* [2017] NZDC 16230

understand and accept the effects of what you have done and that you are genuinely remorseful today.

[20] I am sceptical about that last issue because as I have said, there is a pattern of behaviour by you and it seems to me your remorse is really remorse at the situation you find yourself in rather than genuine remorse and empathy for the victims of your offending.

[21] I clearly need to hold you accountable for your offending and, as I have said, I need to impose the least restrictive sentence.

[22] There have been a number of cases in which the application of the Harmful Digital Communications Act has been applied. There is no guideline sentencing decision and to date there appear to be only District Court decisions dealing with sentencing under the Act.

[23] In *Police v P*², that defendant had a number of other charges, including burglary, but in relation to the Harmful Digital Communications Act offending, the Judge there adopted a starting point of six months' imprisonment. Similarly, in *Police v Burborough*³, that involved a photograph on a social media website with an offensive name attached, taken down within 30 minutes and unlikely to have been seen by many people. In that case again there was a starting point of six months' imprisonment. Similarly in *Police v Smith*, a starting point of six months' imprisonment was adopted. In *Police v Tamihana*⁴, however, there was a starting point of nine months' imprisonment imposed but that involved a sexual video of the victim sent to her mother via Facebook. In *Police v Kelly*⁵ there was a starting point of nine months' imprisonment and that involved posting what appears to have been full nude photographs of an ex-partner on Facebook.

[24] The most recent decision is that referred to of His Honour Judge Mabey QC *R v Brittin*. In that case, after a breakup, the defendant posted sexually explicit photos

² *Police v P* [2016] NZDC 18572

³ *Police v Burborough* [2016] NZDC 22470

⁴ *Police v Tamihana* [2016] DCR 240

⁵ *Police v Kelly* [2016] NZDC 12912

of the victim on a Facebook website alongside a suggestive comment, which included her name and contact details. The victim received a large number of messages from males who had seen the post and suffered significant emotional harm as a result. The Judge viewed the aggravating features as a breach of trust and significant harm to the victim. Also, an additional aggravating feature was the nature of the Facebook website which was intended to be visited by those looking for sex. In that case, a starting point of 18 months' imprisonment was adopted, with an end sentence of 12 months' imprisonment.

[25] In this case, I need to assess the gravity of your offending. Clearly the nature of the communication and the extremity of the language used is significant. The images were partially nude but were accompanied by extremely derogatory comments and advertising her in effect for sale for \$1 which in and of itself is another form of degrading humiliation. The language you also used was clearly humiliating and abusive. There clearly was a breach of trust and the age of the victim is relevant. At the time the photographs were posted she was vulnerable as you had only just broken up. You breached her trust quite clearly by posting photographs she had sent to you on social media.

[26] She has suffered significant harm as a result of your offending. I have alluded to that with the comments about self-harming, her sense of isolation, loss of confidence in life and her sense of embarrassment.

[27] It is significant, in my view, the photographs were posted to a Facebook page of the *[name deleted]* which has nearly 78,000 members but in addition to that, you tagged her in the post, which made her photos accessible to all of her Facebook friends, of which she has 1000. While the summary does not state how long the photographs remained accessible before they were taken down, it is significant they were there long enough for several of her family members and associates to see them. There clearly was a very wide catchment area which you targeted.

[28] In my view, your offending is not as serious as that in the *R v Brittin* decision, in which there was a starting point of 18 months, because in that case it included a post of the victim's personal number as well as her name. The photos were more

revealing and were specifically targeted to a website which was geared towards those looking for sex but your offending in relation to this matter, which as I have said is the lead the charge, is more serious, in my view, than the earlier cases I have referred to and that is so because of the aggravating features I have referred to.

[29] I also need to take into account your personal circumstances. Ms Turner has set those out at length. There is also a psychological assessment that has been undertaken in relation to you. I have read that before coming into Court and carefully considered it.

[30] You are young and that is a significant factor I need to take into account. You had a number of personal tragedies within your immediate family. I also acknowledge you too have suffered with mental health issues and have, at least on one occasion, attempted self-harm. Indeed, Ms Turner tells me that attempt was not long after this incident and was really what she describes as the catalyst for your ongoing subsequent offending. Quite clearly alcohol is a problem in your life and it has been the major contributing factor to all of your offending.

[31] You have a number of supportive people around you now, not least of which is your mother. The psychological report says at present you are coping relatively well with the current situation and your circumstances. There is much to be said for what Ms Turner has submitted that part of you seeming to cope may be because of your age and your gender masking what is really going on and trying to hide it in an effort to be “the man”.

[32] All those personal factors, and particularly the matters set out in the psychological report, are matters I need to give significant weight and importance to but your personal factors have to be weighed against the intent of the Act and the impact on your victim.

[33] Because of the principles in the Act, the need for strong deterrence and for you the ongoing nature of your offending and the pattern of behaviour I have referred to, I have reached a clear view that a community-based sentence, including an electronically monitored sentence, does not sufficiently meet the principles of

denunciation and deterrence. Additionally, given the matters that have been identified in the PAC report, there are serious concerns around your ability to comply with any such sentence in any event.

[34] I need to fix a starting point in terms of the culpability of your offending, taking the Harmful Digital Communications Act matter as the lead charge. Taking into account the factors I have referred to, particularly the aggravating features, I fix a starting point at 13 months' imprisonment. I then uplift it to take into account the other charges you face, the fact you were offending while on bail but recognising that some of those charges were fine-only. I uplift to reflect the totality of that other offending by nine months, arriving at a provisional sentence of 22 months' imprisonment.

[35] From that, you are entitled to a discount for your youth. Cases say that should be around 15 percent. I have rounded it up to slightly more than that in your favour. I give you a discount of four months, arriving at a provisional sentence of 18 months' imprisonment. From that, you are entitled to a discount for your guilty plea, which in terms of the decision of *Hessell v R*⁶, I give you a full credit and round up in your favour of five months, arriving at an end sentence of 13 months' imprisonment.

[36] I then need to stand back, as is accepted by the police in their submissions, and look at the totality of your offending and whether I give any further discount for your youth. Given the matters set out in the psychological report, your vulnerability and the fact of your age and the vulnerability that causes, I give a further discount and arrive at an end sentence in relation to that charge of nine months' imprisonment.

[37] Thus, in relation to the posting the Harmful Digital Communications Act charge, you are convicted and sentenced to imprisonment for nine months. I do not give you leave to apply for a sentence of home detention. I impose the standard release conditions for six months after your sentence end date.

[38] In relation to the threatening behaviour charge, you are convicted and sentenced to two months' imprisonment.

⁶ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607, (2010) 24 CRNZ 966

[39] In relation to the careless driving, you are convicted and discharged.

[40] In relation to the drink-drive charge, CRN ending 041, with the adult level, you are convicted and sentenced to one month's imprisonment and disqualified from holding or obtaining a driver's licence for six months.

[41] In relation to the second drink-drive charge, at the youth rate, you are convicted and sentenced to one month's imprisonment and disqualified from holding or obtaining a driver's licence for three months from today's date.

[42] In relation to the intimidation charge, you are convicted and sentenced to one month's imprisonment.

[43] In relation to the resisting the police, you are convicted and sentenced to one month's imprisonment.

[44] In relation to the escaping custody charge, you are convicted and sentenced to five months' imprisonment.

[45] They are to all be served at the same time so in total you are sentenced to nine months' imprisonment.

[46] The final issue is one of whether the photograph that has been taken of you can be published by media. That is opposed by you on the basis that publication of your photograph is going to cause you significant harm and vulnerability. The psychologist's report said that publishing the photo may result in you experiencing feelings of resentment and it may reduce the level of motivation for engaging in any future rehabilitative counselling requirements. The opinion of the report writer is that publication is likely to increase your vulnerability for potential self-harming behaviours, hinder your motivation to change and reduce the efficacy of any future rehabilitative efforts.

[47] I take those on board and give them significant weight but, as has been submitted by the police, it did not seem to worry you that the effect of publication of your victim's photographs would cause her to self-harm, cause her to have emotional

distress and cause her to be humiliated. This is not a question of tit for tat though. Any decision I make has to be made on a principled basis.

[48] The risks for you on the basis of that report are not definite. Rather they are suggestive that you might. In my view, there are two purposes in publishing your photograph. Firstly, to act as a deterrent aspect to you and others. That is, people need to know that if they engage in this type of behaviour, they are going to be named and shamed as it were. I can see no principled reason why that should not occur for you. Secondly, it is important, I think, for the victim to know that you cannot hide behind protecting your identity when she, as the victim of this particular type of offending, has lost her sense of privacy and privilege as a consequence of what you have done.

[49] Accordingly, I grant the application by the media to publish your photograph as they have requested.

[50] There is a final order for suppression of the name of the victim and any identifying factors.

S J Coyle
District Court Judge