

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

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

**IN THE DISTRICT COURT
AT PALMERSTON NORTH**

**CRI-2016-054-000068
[2016] NZDC 14798**

THE QUEEN

v

[GERRY HOX]

Hearing: 3 August 2016

Appearances: D Davies for the Crown
O S Winter for the Defendant

Judgment: 3 August 2016

NOTES OF JUDGE D G SMITH ON SENTENCING

[1] Mr [Hox], you are for sentence today on six charges and what I have to say today is not just for you but also for [the victim] and those others that are affected by your behaviour so I will be repeating what I have said to you in part previously.

[2] You are charged that [for 4 years in the early to mid 2000s] of sexual violation by unlawful sexual connection relating to digital penetration of genitalia. Between the same dates a second representative charge of sexual violation by unlawful sexual connection of digital penetration of her anus. A third representative charge of sexual violation by unlawful sexual connection occasioned by connection between your mouth and her vagina. A fourth charge of sexual violation by unlawful sexual

connection representative charge between her mouth and your penis. A fifth charge [relating to 3 years in the early to mid 2000s] of inducing [the victim] under the age of 12 to do an indecent act and a sixth charge of sexual conduct with a child under 12 in that you did an indecent act [in a 19 month period in the mid-2000s][, namely inducing her to use a dildo. All charges are representative. The last two charges carry maximum sentences of 10 years and the four previous charges to carry maximum sentences of 20 years' imprisonment.

[3] I need to refer to the summary of facts before I move to sentencing you. From [date in the early 2000s] you were in a domestic relationship with the complainant's mother. The complainant was about seven years of age at the time. You, your partner and the complainant shared an address [in location deleted].

[4] During the time that you resided together with the complainant she had gone into your bedroom and observed you watching pornography on your computer. You invited her to watch it with you and she sat on your lap while you watched pornography together. You explained to her that this was how babies were made and enquired of her if she wanted to try it out. From then on the two of you would frequently meet together without her mother knowing and during that time you would encourage sexual activity between yourself and her. You would encourage her to undress and during those occasions would insert your fingers into her vagina and anus. You commenced kissing her on the lips, on her breasts and vagina. You proceeded to lick her vagina and encouraged her to perform fellatio on your penis. During those occasions you would frequently ejaculate in her mouth. You would frequently shower together and during those occasions the same activity would follow. She recalls that every time she had a shower from the age of nine until about 11 or 12 you would be in the shower with her and you would be putting your finger in her vagina or anus. When her mother was out of the house sexual activity between you occurred. This started with sexual conversation, watching pornography and then sexual activity. She recalls this occurring when she was about nine years of age.

[5] You were charged with this offending until the day before her 13th birthday. On two occasions you had a [dildo]. On one occasion this occurred in the bedroom. You applied lubricant and had her insert it into herself. On a second occasion you had

her place it in her mouth and suck on it before she used it on herself. You took pictures of her while you offended against her and you took pictures of her with your penis in her mouth and you took pictures of her naked body and her genitalia. Fortunately this offending came to light when a girlfriend of yours found a CD of the pictures in your possession and recognised the complainant.

[6] In sentencing a person on any charges in this Court the Judge is required to adhere to the Sentencing Act 2002. Section 7 of that Act sets out the purposes of sentencing. It is to hold the offender accountable for the harm done to the victim and the community by offending. It is to promote in the offender a sense of responsibility for and an acknowledgement of that harm. It is to provide for the interests of the victim. It is to denounce the conduct in which was involved. It is to deter you and any other persons from committing the same or similar offences and it is to protect the community from your and to assist in your rehabilitation and reintegration.

[7] The principles are set out in the Act. In sentencing the Court must take into account the gravity of the offending in a particular case including the degree of culpability. The Court must take into account the seriousness of the type of offence in comparison with other types of offences as indicated by the maximum penalties for the offences. The Court must impose the maximum penalty prescribed if the offending is within the most serious of the cases for which the penalty is prescribed unless the circumstances make that inappropriate and it must impose a penalty near to the maximum prescribed if the offending is near the most serious of the cases for which the penalty is prescribed. It must take into account the general desirability for consistency with appropriate sentencing levels and other means of dealing with offenders of similar offences. The Court is required to take into account any information provided concerning the effect of the offending on the victim and we have heard from her this morning. The Court must also impose the least restrictive outcome that is appropriate in the circumstances in accordance with the hierarchy of sentences and orders and it must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with an offender would otherwise be appropriate but would in a particular circumstance be disproportionately severe. The Court is required to take into account the offender's personal family, whānau,

community and cultural background. Finally, it must take into account any outcomes of restorative justice that have occurred – which have not in this case.

[8] In taking those principles into account the Court is required to look at the aggravating and the mitigating factors. The aggravating factors particularly in this matter are your total abuse of trust and authority in relation to the victim. The second most aggravating and equal factor is the victim's vulnerability because of her age or health. I acknowledge that the charges to some extent take account of age in the way that the charges have been laid. The third factor which is referred to in the Act is premeditation. This behaviour took place over a period of four to five years and you took advantage and the premeditation is a particular factor. The other factors the Court is required to take into account is when the offender has pleaded guilty and you have at the earliest opportunity. I am required to consider any remorse that has been shown by you and any evidence of your previous good character and any previous record in offending.

[9] Because of the requirement for there to be consistency in offending the Court of Appeal in 2010 issued a judgment of *R v AM* (CA27/2009) [2010] NZCA 114 which is a case which sets out guidelines to be dealt with in terms of offending of this type of nature. It sets out two sets of bands that relate to firstly sexual violation where the lead offence is rape, penile penetration of the mouth or anus or violation involving objects. They are referred to as the rape bands. Those bands are in four setting out various starting points for band 1 six to eight years, band 2 seven to 13, band 3 12 to 18 years and band 4 16 to 20 years. The second set of bands set out is in relation to other sexual violations and there are three bands set out. Band 1 starting points of two to five years, band 2 four to 10 years and band 3 nine to 18 years.

[10] The charges which you are being sentenced on today encompass offences which cover both sets of bands. In *R v AM* the Court of Appeal has given a number of examples of various cases and behaviour and what band is appropriate for what behaviour in terms of those matters. I am required to consider those cases and to come up with a starting point for all your offending which takes into account the bands which the Court of Appeal has set out.

[11] I have paid particular attention to the fact that these are representative charges. That the victim was only seven years of age or slightly older at the time that the offending began and the period of time that the offending took place and as I have said premeditation which is appropriate.

[12] Taking all those matters into account the appropriate starting point in my view is 11 years' imprisonment.

[13] The Sentencing Act makes it clear, as does the Supreme Court, that there are certain discounts that must be given once a starting point is taken, once any aggravating factors have been taken into account. Here, the 11 years takes into account any aggravation because of the way in which the bands are set out, so there is no increase to the 11 years.

[14] You are entitled to a discount for being a first time offender but that discount is limited given the length of time that the offending took place and the discount which I give you in terms of that is one year which is less than 10 percent.

[15] The next matter that I have to consider is any expression of remorse. I have a pre-sentence report which states that your proffered remorse is heavily weighted with statements regarding the victim's behaviour, claiming the offending began when she performed a sexual act on you while you were asleep. I do not accept that. Simply your remorse such as it is has been more due to your being found in this situation rather than a genuine concern which was expressed early in favour of the victim. I am concerned as to the fact that you retained photographs in your possession and that you had said that you have them as evidence to show her behaviour to her mother. I make no further deduction in terms of remorse.

[16] The only other matter which can assist you is the Supreme Court's decision of *R v Hessel* [2010] NZSC 135 which makes it clear that credit must be given where there has been an early guilty plea and which saves the victim from having to undergo an arduous and tortuous trial. The Supreme Court has made it clear that when the early plea is made at the earliest opportunity that a 25 percent discount should be made.

That reduces the sentence by a further two and a half years which means that the total sentence to which you are sentenced is seven and a half years' imprisonment.

[17] The probation report under s 93 seeks the following special condition which I impose:

- (a) You are to participate in any assessment for a Departmental intervention as may be instructed by a probation officer and complete recommendations made as a result of the assessment to the probation officer. That recommendation is adopted by me as we have heard from [the victim] she feels that you need assistance and that is certainly clear from the actions which have taken place.

[18] I would hope that your involvement in any programmes will assist you to fully understand the effect of your behaviour on this young lady and that when you are finally released from prison that this behaviour is something that will never occur again.

[19] On each charge, seven and a half years imprisonment is imposed.

D G Smith
District Court Judge