

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

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS, OF ANY COMPLAINANT(S)/ PERSON(S) UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS [OR NAMED WITNESS UNDER 18 YEARS OF AGE] PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

**IN THE DISTRICT COURT
AT PALMERSTON NORTH**

**CRI-2016-054-002133
[2018] NZDC 1314**

THE QUEEN

v

[ADAM MACDONALD]

Hearing: 26 January 2018

Appearances: K van der Plas for the Crown
S Winter for the Defendant

Judgment: 26 January 2018

NOTES OF JUDGE L C ROWE ON SENTENCING

[1] [Adam MacDonald], you appear for sentence having been found guilty by a jury of one charge of neglect of a child, two charges of assault on a child, one of injuring that child with reckless disregard for her safety and four charges of assault with a weapon.

[2] I have received helpful written submissions from the Crown and from your lawyer and I have heard from them in a detailed way today.

Facts

[3] I need to start the sentencing process by recording the facts as I found them to be arising from your trial in relation to each charge.

[4] Charge 1. The charge of neglect of a child consisted of you verbally and emotionally abusing [your stepdaughter – the victim] from the age of about eight years through to about 13 and a half years. This verbal and emotional abuse escalated over time especially at [location deleted]. Your abuse consisted of prolonged verbal tirades some of which were witnessed by neighbours. The verbal abuse was extreme and consisted of swearing at [the victim], yelling at her for prolonged periods on a regular basis, belittling her, calling her abusive names such as “retard” and “waste of space”. A term that was used by more than one of your neighbours in evidence was that the verbal abuse was relentless.

[5] The abuse included making [the victim] run to the gate and open it for you each day after work and swearing or verbally abusing her if she was too slow in your opinion. It included breaking items precious to her, an occasion of tipping water over her head from a spaghetti tin that she had not cleaned, verbally abusing her or punishing her when she cried or becoming more angry if she did not cry. It included instances tantamount to psychological torture or abuse such as making her hold a bucket containing weight which if she let it drop would result in physical abuse. The description of [the victim] having to hold a bucket while a recorder with nails in each end was placed between her elbows was a graphic and convincing example of this. Another example was making [the victim] eat bread with hot sauce on it as a punishment.

[6] I am less convinced that [the victim] was deprived of food by you in a way that would qualify as neglect although I accept [the victim]’s evidence that she was occasionally deprived of food as a punishment or made to wait while you, [name deleted] and your son ate.

[7] In relation to you, I also consider the appropriateness of [the victim]'s clothing on a daily basis was less relevant as you would have been at work when she was going to or from school.

[8] I accept, however, that [the victim] was required to undertake a large range of chores at times beyond her physical capabilities and was subject to verbal abuse if the chores were not carried out to your satisfaction.

[9] I am more than satisfied that your conduct in these ways qualified as neglect and abuse likely to cause emotional or psychological harm or suffering and that this was a major departure from the standards of a reasonable parent or step-parent.

[10] Charge 2 is a representative charge of assault on a child. This charge spans the period the beginning of 2011 until April 2016. This charge comprised different types of physical abuse as described by [the victim]. I find her evidence that she was repeatedly kicked was convincing. Her evidence that you would pull her ears and slap her was also convincing. Her evidence that you would hit her hands because she fidgeted was also convincing.

[11] In any event the allegations of different types of manual force applied by you on a consistent basis over that five-and-a-half-year period is consistent with her overall evidence of a sustained pattern of abuse both with and without weapons.

[12] Charge 3, a charge of injuring with reckless disregard for safety. The jury plainly rejected the version of events promoted by you that [the victim] injured her foot when riding her bicycle. In doing so the jury implicitly accepted [the victim]'s evidence that she gave this version of events in the first instance because you told her to. The violence on this occasion occurred in the hallway of your home where [the victim] often received hidings. The violence was extreme in that a fully-grown man picked up an 11 year old child by the scruff of the neck and either dropped her or threw her to the floor causing the fracture of her foot. Simply recounting this demonstrates what would have been apparent to you that such an act carried a high possibility of injury, and in this instance injury did occur. This event also occurred within an overall pattern of physical and verbal violence that [the victim] was subject to.

[13] Charge 4 is a charge of assault with a weapon. This comprised you striking [the victim] on the back with a rolling pin. This occurred when you were attempting to strike her on the backside or hip but missed and hit [the victim] on the back. [The victim]'s allowance that you were not trying to hit her back demonstrated her credibility as a witness. It demonstrated she was not out to get you. The excruciating pain this caused was not intended by you on her account but the blow with the rolling pin was certainly intended and again this occurred within the context of a pattern of physical and verbal abuse.

[14] Charge 5, a charge of assault with a weapon, in this instance a rubbish bag. This incident is noteworthy because of the level of detail provided by [the victim] in evidence as to the circumstances in which the rubbish bag was thrown at her. The rubbish bag was supposed to have been filled by her with flammable items for burning only. When you found non-flammable items in the bag you reacted physically in much the same way that you reacted on other occasions. On this occasion, you threw the bag at [the victim], it hit her in the face and caused a minor cut to her lip.

[15] Charge 6 is a charge of assault on a child. Again this incident is noteworthy because of the level of detail provided by [the victim] as to the circumstances in which this assault occurred. [The victim] described your reaction when she was unable to see an item in your bedroom that you wished her to pick up. It would be understandable that she had a heightened sense of panic due to the previous and ongoing abuse and this in itself may have caused her to not see what you were pointing at. You reacted by pushing her head down towards the item you wanted her to pick up and in doing so caused her head to come into contact with a child's plate which broke and cut her head. The cut to [the victim]'s head was not intended by you but was caused by your physical abuse of her in the circumstances described.

[16] Charge 7 is a charge of assault with a weapon. In this instance you repeatedly struck [the victim] with a towel rail that had already been broken from previous instances when you had hit her with this item. [The victim]'s description of the way in which she cowered from your onslaught was convincing and clearly believed by the jury. [The victim] was assaulted to the point where she had to be kept off school for

two days due to the pain and bruising to her arm from warding off these blows. This was a serious instance of assaulting a child with a weapon.

[17] Charge 8, also a charge of assault with a weapon. The jury's verdict confirms that the jury believed [the victim]'s account of the circumstances in which she was struck on the feet with a meat tenderizer. This is a particularly concerning episode of abuse and deliberate torture of a child that has serious sadistic overtones. The hits to her feet with a meat tenderizer followed her letting the bucket drop that you had placed in her hands.

Victim impact

[18] I have regard to victim impact in this case. You have heard the victim impact statements read today by [the victim] and by her father. It is clear your conduct has caused ongoing anxiety for her. It has caused her to suffer debilitating flashbacks and ongoing psychological and emotional trauma. She has required counselling for these things. This is harm that you have visited on her. She strikes me as a somewhat resilient young woman in all of the circumstances and a very brave young woman to have given evidence in the way she did and to have read her victim impact statement to the Court.

Starting point factors

[19] I need to assess the factors across these offences that are relevant to sentencing.

[20] The Crown invites me to approach sentencing on a global basis across all offences. I am not sure the authorities support that approach but I will refer to relevant factors across all offences, then consider the neglect charge and then the impact of the violence charges on sentencing.

[21] Here the relevant factors for sentencing and assessing a starting point sentence are:

- (a) Some of your violence involved the use of weapons.

- (b) You caused physical harm on occasions from use of weapons for assaults. They included the broken foot, bruising, cut lip and bleeding nose.
- (c) Your offending clearly caused psychological and emotional harm to [the victim]. The nature of that harm was captured by the witness to whom she turned for refuge and comfort who described the way in which she reacted when you came to pick her up to take her home.
- (d) There is the nature of the psychological abuse, in this instance yelling, swearing, derogatory conduct.
- (e) The length of time over which this conduct occurred, at least five years.
- (f) The regularity of this abuse. In the words of the witnesses it was relentless. This would have been harrowing and miserable for a child who was in your care. It was at times almost a daily occurrence, it certainly occurred several times per week while living at [location deleted].
- (g) There is the vulnerability of [the victim]. She was aged between eight and 13. She was small, she was completely powerless. The people who had power in this household were you and your wife. [the victim] acted the way she did and responded the way she did because of the lack of power that she had in this situation. She was completely reliant on you and [name deleted – the defendant's wife].
- (h) Arising from this is the extreme breach of trust that occurred here. [The victim] was entitled to your protection not your abuse.
- (i) Some of your offending involved elements of cruelty or torture. I have referred to the instances of making her eat hot sauce as a punishment or holding the bucket with weights in it. The penalty for dropping it was to be hit on the foot with a mallet.

- (j) You had her lie to authorities and others about what caused her foot injury and you could do that because your abuse of her ensured she would not do otherwise.

Neglect charge

[22] Looking firstly at the charge of neglect. This is the most serious of the charges in terms of maximum penalty and I have regard to the length of time, the type of abuse and the unrelenting nature of it.

[23] The Crown and your lawyer have referred to various cases. The most helpful of these cases in assessing a starting point is the case of *M and Z v R*¹. In that case a starting point of two and a half years' imprisonment for 18 months of abuse, which I consider to be less serious than in this case, was regarded by the Court of Appeal as light.²

[24] I also refer to cases prior to the amendment to s 195 which occurred in March 2012. They are the cases *R v Mead*³, *R v Wilson*⁴ and *T v R*⁵. Counsel have also spent some time analysing a case called *Frantzetis v R*⁶. I find that case less helpful for the reasons that, firstly, it did not set out to discuss appropriate tariffs. It was simply an assessment made by a sentencing Judge in that case having heard all of the facts at a Judge alone trial of the appropriate penalty. I also note that some of the allegations made in that case were not accepted by the trial Judge who was also the sentencing Judge.

[25] I have identified a difficulty with the Crown and your lawyer about charge 1 in that the timing of that charge between the beginning of 2011 and half way through 2016 spans the reform of s 195. This was highlighted in the case of *M and Z v R* and the different elements that apply to the pre-reform and post-reform charge.

¹ *M and Z v R* [2017] NZCA 274.

² Para [50]

³ *R v Mead* CA146/01.

⁴ *R v Wilson* [2018] NZCA 100.

⁵ *T v R* [2012] NZCA 570.

⁶ *Frantzetis v R* [2015] NZHC 710.

[26] The position it seems we have got to is that I ought not do anything about it at this stage other than note it as an issue. It was not picked up at the time of your trial or prior. I propose to address it in much the same way as the Court of Appeal did in *M and Z v R*:

- (a) Your conduct prior to 19 March 2012 when the reforms took effect would have been admissible at your trial regardless.
- (b) Your conduct since 19 March 2012 was part of a continuum of abuse that started before then.
- (c) If anything, your conduct escalated over time particularly following the move to [location deleted], and as evidenced by the specific acts of violence which were charged and found proved between 2013 and 2016. In other words, by far the most serious abuse occurred following March 2012.
- (d) Finally, this is a stronger case to conclude that there was no miscarriage of justice than in the case of *M and Z v R*. The bulk of your offending was clearly in the later period whereas the time period in *M and Z v R* spanned four years but only 18 months of that was after the reform. In that case it had no effect either on the verdict or conviction or on the sentence that was imposed.

[27] I also have regard to the comments of the Law Commission in relation to the increase in penalty for neglect of a child which occurred in March 2012. The Law Commission in its report, and I refer here to what was analysed in *M and K v R*,⁷ proposed a new maximum prison term of 10 years and for amongst other things this was invoked in response to what was often extremely unpleasant and grave offending that may have occurred over a considerable period. As the Law Commission said:

The resulting consequences may well extend beyond physical injury to the long-term psychological trauma and/or developmental issues. The penalty needs to be sufficiently high to address the culpability of such cases.

⁷ *M and K v R* [2016] NZCA 53.

[28] The Law Commissions' comments in that regard were clearly adopted by Parliament when the maximum penalty was increased from five years to 10 years' imprisonment.

[29] Having regard to the cases I have referred to, the maximum penalty and the comments of the Law Commission, I consider the neglect charge by itself could easily allow a starting point of two and a half to three years' imprisonment.

Violence Charges

[30] As for the violence offences, the Crown is right in that they are intertwined with the psychological abuse and I find that they underscored your psychological abuse. The psychological abuse was made worse because when violence was threatened, even by a gesture or raising of the voice, [the victim] knew you meant it and that violence would inevitably come. It was the inevitability of your violence that led her to run away and seek help when she did in 2016.

[31] When analysing the violence charges I have regard to the cases of *Nuku v R*⁸ and *R v Taueki*,⁹ which are often referred to, and the factors identified in those cases. In this case, the relevant factors include your use of weapons, the time over which the violence occurred, the injuries caused, the breach of trust that was involved, the vulnerability of [the victim] and, importantly in relation to the charge of injuring, your concealment of what had actually occurred and enlisting [the victim] in that act of concealment.

[32] The injuring charge by itself would easily attract a starting point of two years' imprisonment. The other charges where injury was caused could attract starting points of up to 18 months' imprisonment. The manual assaults in charge 2 are by way of a representative charge and close to the maximum penalty of two years could be properly engaged. Here I consider that an increase of two to two and a half years altogether for the violence offences would not be excessive. If I did that it would result in a starting point for all offences of four and a half to five years' imprisonment.

⁸ *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39, (2012) 26 CRNZ 106.

⁹ *R v Taueki* [2005] 3 NZLR 372 (CA).

Overall starting point

[33] Your lawyer urges a starting point overall of three to three and a half years' imprisonment. The Crown says it should be between five and five and a half years' imprisonment.

[34] As a matter of totality, however, I regard a starting point of four and a half to five years as too high. As I have noted some elements of these offences shade into each other. There would be an element of double counting. I also compare your case with the case of *C v R*¹⁰. The assaults in that case were, in my estimation, probably worse. They were assaults on two boys but over a much shorter time period. The victims were of a similar age to [the victim]. That case, however, did not involve a charge of neglect.

[35] I also have regard to the submission that your lawyer has made that the offending was brought about by a lack of parenting skills and that you were under stress both in terms of your personal circumstances but also your financial circumstances. Mr Winter has described you as having a high level of frustration through this time.

[36] I consider, however, that those issues do not excuse your conduct in a clear or demonstrable way. Fundamentally, what you lacked through this time towards [the victim] was basic kindness, empathy and regard for the suffering you were visiting upon her.

[37] I consider the appropriate starting point overall, when I analyse both the neglect charge and the violence charges, is four years' imprisonment.

Mitigating factors

¹⁰ *C v R* [2015] NZCA 33.

[38] I now turn to mitigating factors. You have no previous convictions. You have, throughout this period, been gainfully employed and you employ others. I have received letters from people who contract to your business and also from one of your employees who would clearly lose his job if you went to prison. Ironically, he described your exemplary conduct towards your son [name deleted] and also your employee's son. I say this is ironic because one of the matters [the victim] referred to was your disparity of treatment of your son [name deleted] and her.

[39] I consider you are entitled to some credit for your good character. The Crown has suggested I need to temper this by virtue of the fact that this offending occurred over a long period of time. The Crown submission is essentially that your character has been something of a mask for a considerable period of time while you perpetrated physical and psychological abuse on your step-daughter.

[40] There is also the issue of remorse. I consider you are entitled to limited, if any, credit for remorse. Perhaps you are entitled to some credit for your efforts to reform as referred to by Mr Winter but that also needs to be kept in perspective because you deny most of this offending. The only thing you really acknowledge is unspecified raising of your voice or unspecified verbal abuse and even that was minimised in your report as simply being a characteristic of a person with a loud and rough exterior.

[41] As the pre-sentence report notes you shift the blame for your conduct to your young victim. It is in that context that I read your family violence intervention report. The comments that you were "willing to address" your issues and "genuinely change" your behaviour and lifestyle are at the moment window dressing when you fail to own your conduct.

[42] The purposes of sentencing today include denouncing such conduct towards children, deterrence of others and sending a very clear message to everybody that such abuse of children will not be tolerated. But in your case it is also to hold you accountable for your conduct because you presently do not do so.

[43] For your mitigating factors, particularly your good character as referenced by the letters I have received and having regard at least to the start you have made

addressing your issues I deduct nine months from the starting point. You, however, receive no deduction for plea. You made your young victim give evidence and you continue to call her a liar.

Sentence

[44] The end sentence will, therefore, be three years, three months' imprisonment made up as follows:

- (a) On the charge of neglect, charge 1, three years, three months' imprisonment.
- (b) Charge 2, the charge of assault on a child on a representative basis, 18 months' imprisonment.
- (c) Charge 3, that is the charge of injuring, two years' imprisonment.
- (d) Charge 4, the charge of assault with a weapon that being the rolling pin 18 months' imprisonment.
- (e) Charge 5, assault with a rubbish bag, eight months' imprisonment.
- (f) Charge 6, assault by pushing [the victim's] head onto the plate, eight months' imprisonment.
- (g) Charge 7, assault with a weapon which is the hitting with the towel rail, 18 months' imprisonment.
- (h) Charge 8, the charge of assault with the meat tenderiser in the circumstances that I have described, 18 months' imprisonment.

[45] All terms will be served concurrently.

L C Rowe
District Court Judge