

**IN THE DISTRICT COURT
AT NEW PLYMOUTH**

**CRI-2016-043-001432
[2018] NZDC 1941**

THE QUEEN

v

RICKY DEAN MCLENNAN

Hearing: 5 February 2018
Appearances: C Clarke and J Bourke for the Crown
S Hughes QC for the Defendant
Judgment: 5 February 2018

NOTES OF JUDGE A A ZOHRAB ON SENTENCING

[1] Mr McLennan, you are for sentence having been found guilty at trial of the following charges.

[2] With respect to [victim 1] charges 1 and 2 are representative charges of indecency with a boy under 12, it carries with a maximum period of 10 years' imprisonment. Charges 3 and 12 were representative charges sexual conduct with a child under 12, once again 10 years' imprisonment is a maximum. Charge 4 was sexual violation by way of unlawful sexual connection, that was the anal penetration carrying with it a maximum of 20 years' imprisonment. Charges 5 and 7 sexual violation by unlawful sexual connection, those with the oral sex charges carrying with them 20 years' maximum imprisonment. Then charge 6 sexual conduct with a young person under 16, maximum penalty of seven years' imprisonment.

[3] With respect to [victim 2] charges 16 and 17 both representative sexual conduct with a young person under 16 carrying with it a maximum penalty of seven years' imprisonment.

[4] You also pleaded guilty to charges 18 and 19 representative charges of supplying a Class C controlled drug, namely cannabis.

[5] Before coming into Court today I have had the opportunity of reading quite a bit of material about you. As well as being able to review the evidence that I heard with the jury, I also now have detailed victim impact statements from both [victim 1 and victim 2] and the detective in charge has read those today.

[6] I have detailed written submissions from the Crown and they advocate in their written submissions for a start point of a prison sentence in the range of nine and a half years through to something like 12 years. They acknowledge that you should be given a discount for your youth and other factors that are detailed in the psychologist's report. They do not, however, suggest that any discount for remorse would be appropriate.

[7] Your lawyer has also filed detailed written submissions and has touched on those today. She suggests that a start point of seven years' imprisonment would be more appropriate. She urges that I consider giving you a significant discount for youth, also for your remorse, the additional hardship of prison and built into that effectively is the information which I have in the form of a report under s 38 Criminal Procedure (Mentally Impaired Persons) Act 2003 as to disposition. I have a report from a registered clinical psychologist which provides a wealth of information about your background and circumstances. It includes your family history, your medical history, your forensic and criminal history and provides a window into how it is you have got to be before the Court today.

[8] So whereas the Crown advocate for a prison sentence, as I say, of somewhere between nine and a half to 12 years with a discount for youth and other matters, your lawyer suggests that the end result would be something like three and a half years' prison.

[9] I also have a probation officer's report which tells me about your background and circumstances. Through no fault of the Probation Service they did not have the same level of detail of information that is available via the psychologist's report.

[10] I just want to turn briefly to the facts. In 2005, having been beaten by your father who had only recently come into your life in any meaningful way, you were befriended by [victim 1] and his family [relationship to victim deleted]. At that stage [victim 1] was 10. Just as you, based on the psychologist's report, the probation officer's report and also Ms Hughes' submissions and as became clear in the course of the trial, had been left to your "own devices" to bring yourself up pretty much along with various state interventions, [victim 1] had been pretty much been left to "his own devices". You were older than [victim 1].

[11] I appreciate the contents of the s 38, report and the assessment of people as to how you appeared at the time, and I bear in mind your own assessment of how you saw yourself, and your position in the world, and how you compared with your peers. But certainly it was clear from the evidence that I heard at trial, and from [victim 1's] victim impact statement, that he very much looked up to you. He also was vulnerable, but he looked up to you and whilst you may not have towered over him necessarily physically, you certainly were seen by him to be much older, and he looked up to you because of his own vulnerabilities.

[12] What happened was that over a period of time you normalised sexual behaviour with him. You got him to masturbate your penis, you did the same to him. You got him to perform oral sex on you, and this all culminated on your committing anal sex upon him. There was a significant age difference between the two of you and he was young.

[13] As far as [victim 2] was concerned, you induced her to masturbate you and you also touched her breasts as well, and then there was the added layer of the supplying of the cannabis. This happened over a significant period of time, particularly as far as [victim 1] is concerned.

[14] Now in terms of the impact upon the victims, they gave evidence and it was clear from the manner in which they gave their evidence in Court that it was incredibly difficult for them. They were clearly stressed by having to give evidence in front of strangers in a Court environment.

[15] [Victim 1] has confirmed that in his victim impact statement. As well as touching briefly on the abuse that he suffered at your hands, he noted the stress that was caused by coming to New Plymouth having to relive details of what had happened, and as a consequence of having to prepare for trial he has been told that the [medical details deleted] which he suffered for the very first time were as a consequence of the stress. He talks about your behaviour having a major effect on him. Whilst he has regrettably been sexually abused by others, the abuse that he suffered at your hands was the first time that he had been abused in that fashion, and so whilst there have been other misfortunes for [victim 1], he believes that your abuse of him made it more likely that he would be abused by others. Now that is only his personal insight, but that is something that troubles him very much. He has thought about all sorts of things to deal with the impact of the abuse and he has had suicidal thoughts on many occasions. He hopes that you will take responsibility for what you have done, but it is pretty clear from reading the report that your conduct has had a significant impact upon on how his life has played out and continues to have a significant impact upon his life and also relationships as well.

[16] As far as [victim 2] is concerned she considered you a friend. Looking back now she considers that the abuse that she suffered at your hands impacted upon her. Also she believes the introduction by you to her of cannabis and alcohol has also had a significant impact upon how her “life has played out”. She found the whole trial process very traumatic, it brought up things that she had tried to conceal but also she felt anxious and overwhelmed by the Court process, and not surprisingly so having been asked to relive matters in front of strangers.

[17] I am not going to go through all of the submissions that have been filed by both the Crown and also your lawyer. I have been provided with detailed written

submissions and they have referred me to the guideline case of *R v AM*.¹ because that gives guidance to this Court as to how to approach sentencing in cases such as this. The Crown say that in terms of the cases referred to in that case, looking at comparable cases and looking at the aggravating features, that band 2 is the appropriate categorisation of your offending. What that case tells us is that rape band 2 is appropriate where there are two to three culpability factors present to a moderate degree and those factors can include the scale of offending, the premeditation and a vulnerable victim and starting points of between seven and 13 years' imprisonment are appropriate.

[18] The Crown have referred in their submissions to a detailed range of cases, each of which is different on their own facts. The purpose of referring me to various cases, and the same for your lawyer as well, is that the Court as best it can tries to achieve some consistency in sentencing, meaning that for similar offending there should be similar responses from the Courts to provide some sort of consistent approach. I am not going to go through each of those cases in detail.

[19] In terms of aggravating factors, those are things which make your offending worse, the Crown have provided me with a list of those and they suggest the following are present. They have referred to potential offending while subject to sentence, that is unclear to me and I put that completely to one side and I do not see that as any way impacting on sentence.

[20] The factor that they very much emphasise though is the extent of the harm resulting from your offending, and which they say is evident from the victim impact statements. I have just touched very briefly on the victim impact statements but you would have seen the pain that they were suffering in the witness box. Hopefully you would have listened to what they had to say in the victim impact statements when they were read and hopefully you will have a little bit more insight given what I have learnt about you in the s 38 report, because a number of similar things seem to be said in the report that talks about you, which have been stated by both [victim 2] and also [victim 1] as to how it made them feel, the sorts of ongoing problems it has caused in their life

¹ *R v AM (CA27/2009)* [2010] NZCA 114

and how it has made them more vulnerable, well particularly [victim 1], more vulnerable to abuse by others.

[21] So I accept that the impact upon both [victim 1] and also [victim 2] has been significant, and whilst I appreciate and accept that they have had other issues in their life which have contributed to some of the problems that they have suffered, particularly as far as [victim 1] is concerned, you were the first person to abuse him, so that is something that he is unable to escape. As far as [victim 2] is concerned she looked up to you, she regarded you as a friend and you have introduced her to alcohol and also drugs which have caused her problems in her later life.

[22] The Crown also suggest that there was an abuse of trust in relation to [victim 1]. This is not like a parent or a step-parent, or anything like that, so it is not as serious as that, but you were older. He looked up to you, so there is a degree of abuse of trust to that extent, but I bear in mind what your lawyer has said though in terms of your own particular issues, and that both of you were “making a way in the world” so you did not ask, as it were, to be in charge of him, you two were just left to your own devices.

[23] The Crown characterise [victim 2] and also [victim 1] as vulnerable because of their ages, particularly [victim 1] due to his young age and the disparity as between you and him. As I have already noted, your lawyer points out, and quite properly so, your degree of immaturity so that does factor in, to a degree, to reduce the seriousness of that particular aggravating factor. But you cannot discount the fact that there was a significant age disparity, and it is quite normal for children in that situation when you have that age disparity for that always to be a mark, or a point of differentiation, and for the younger person to look up to the older person, and we have got both [victim 1] and also [victim 2] looking up to you. Not as significant as some of the other cases where we have got people who are much, much older, right, but you were still considerably older, and he was a lot younger when you first met, and he certainly looked up to you.

[24] The Crown highlight that there was a significant level of premeditation on your part. They say that the offending, particularly against [victim 1], was predatory in

nature and involved grooming. I accept that there was a significant degree of premeditation because this happened over a period of time, and on a repeat basis. I appreciate that the most serious offence of the anal sex was a one-off only, and was not pursued as long as it could have been. But it was still a significant and serious offence and there was a degree of progression. We have got the masturbation, we have got the oral sex and then moving onto the more serious offending. This is all happening over a period of time, against a back-drop of a supply of alcohol and also cannabis as well. And I accept that you were doing to him what you had seen done effectively within a wider environment, and heard about, and what had been done to you, but as you know that does not excuse what has happened.

[25] In terms of the scale of offending, I accept that it was heading towards the serious range because we have got two victims, two complainants. The abuse for both occurred over a reasonably significant period of time, particularly for [victim 1], just over a year and a half in respect of him.

[26] And, of course, the scale of the offending has to affect your degree of culpability, your degree of fault or blameworthiness. Whilst you do have a significant range of previous convictions I put those completely to one side because of the time of this offending, and your age, and those sorts of circumstances. More particularly, none of those convictions are relevant to this sort of offending. So if you had other sexual offending, that would be relevant, but you do not, so I put completely to one side.

[27] The Crown in their submissions acknowledge your age, the contents of the probation officer's report and they acknowledge your difficult upbringing and background and circumstances, and the contents of the s 38 report, and they accept that you would be entitled to a significant discount for that.

[28] In their original written submissions, as well as asking me to take a start point of nine years, six months through to 12 years, they also urged me to consider imposing a minimum period of imprisonment, rather than your being eligible to apply for parole after a third. However, they have stepped back from that now though because of the contents of the s 38, report so they do not ask me to do that. So all of those matters,

all of those aggravating factors and I accept that there are those aggravating factors albeit to slightly different degrees.

[29] In terms of Ms Hughes' submissions, she reminds me about your background and circumstances. As far as the offending itself is concerned she reminds me of the backdrop against which all of this occurred. Prior to all of this you had been failed by, she describes it, "countless adults" in your life and the consequence of all of that meant that you were inappropriately sexualised, you were unable to identify and understand those feelings and why it was and how it came to be that your acting upon those sexualised feelings. You sort of had a "warped view" basically of normality, through no fault of your own, because of the way that you had been brought up from a very young age, the sexual abuse within the wider family and right from the "get-go" you were very much at risk. It is not suggested that that any way excuses what you have done, but it is a simple explanation for how it is that you have got to where you are.

[30] What seems to be clear from the reports is that you were confused and distressed as to why it was that you were acting in the way that you were with both [victim 1] and also [victim 2], and you were never happy after the sexual encounters, and were angry and upset, and Ms Hughes reminds me of the contents of the reports and says the explanation for that can be found in your miserable upbringing.

[31] She takes issue with the Crown categorisation of the banding and putting it in band 2. She takes issue with the gap in the age, she says it is not as extreme as the cases that are referred to in *R v AM* and also in the respective submissions. There was no violence beyond the crimes themselves. There was no real escalation of the offending of the type that can be seen of the more extreme offending in some other cases and she reminds me of your immaturity.

[32] She says in her submissions that the Court and also the victims can be confident that you will not be a repeat offender in a sexual way because you have got some insight into where you are. Over more recent times you have had the birth of a child, and often it is touted by offenders as being an opportunity for change, an area of change, but I accept that you have made a real change in your life. You have had good employment up until the point where you were remanded in custody, that has been a

real turning point for you. You are in a solid relationship. You have a young child who gives you something to live for, and you emphasise that you do not want your child to have the sort of life that you had. And I accept that those are genuine statements on your part and I accept that you have made some real changes in your life, so I acknowledge that as well.

[33] So the issue is trying to fix a start point because as I say what the Courts have to do if at all possible is achieve some consistency in fixing the start point and as I say I have and I get guidance from the *R v AM* decision.

[34] In my view, and I bear in mind that there is some overlapping between band 1 and 2, in my view your offending falls within band 2 because of the culpability factors that are present. I have reflected upon Ms Hughes' submissions with respect to that, but the inescapable factors in my view, which mean that I have to fit it within band 2, are as follows:

- (a) The extent of the harm was significant for both complainants, and that is evident from the victim impact statements.
- (b) They were vulnerable because of their age. I appreciate that you had a significant degree of immaturity and that seems to be borne out, not only by what I heard in Court but also borne out by how others saw you in the s 38 report as well, but there was still a significant age gap, particularly between you and [victim 1] and also [victim 2] as well.
- (c) There was a significant level of premeditation on your part. This happened over a significant period of time, and there was a progression in the nature of what you did, particularly with [victim 1].
- (d) Also the scale of the offending was serious. We have got the two victims, [victim 1] in particular and when I say, "[victim 1] in particular," I am not meaning to downplay the offending against [victim 2], and the impact or effect upon her, but there are still two people who

are suffering as a consequence of what you did, and these were significant events for them.

- (e) And we have got, as I say, the physical acts themselves particularly culminating in the anal sex as well.

[35] So it is an issue of fixing what is an appropriate start point. In my view the start point advocated for by the Crown in their written submissions of nine and a half years through to 12 years is too high. I fix a start point of nine years' imprisonment as being the appropriate start point, taking into account all of those aggravating factors, and I stand back and looking at it as a start point for the sorts of offending which you have been found guilty of against [victim 1 and also victim 2], and when you consider the maximum penalties of 20 years for the violations, in my view that seems to be a reasonably reasonable approach in terms of fixing a start point.

[36] Where things, however, get more problematic is trying to work out what is an appropriate discount for some of the other factors which are undoubtedly present. Because we have got your youth, and I think as part of that I can build into that the information that I have got from the s 38 report and the issues that you were struggling with, and also there is this issue of the abuse that you have suffered, and then there is this issue of what is appropriate by way of remorse. You were 17 through to 18, 19 potentially at the time of this offending. There are comments from a paediatrician as to how you presented back at the age of 14. There was obviously lots of interventions from various state authorities, so I accept that you were very immature and young.

[37] I accept also, and I am not going to go through in open Court all of the detail in the reports, but there have been extreme issues with respect to abuse and neglect in your family, and you were left very much to bring yourself up, so it is not surprising in some ways that you have got a number of the issues that you have got. That does not excuse it, but that does explain to a degree and I think anybody reading in particular the s 38 report would be struggling not to recognise and adopt a compassionate approach to dealing with you because of, as I say, that background and your circumstances. Because whilst I do not necessarily have experts' reports which say I can categorically say that because of the abuse that you suffered you have gone on to

do that, I think I can take judicial notice of that fact that it is hardly surprising that a young man such as yourself has acted in this way, given the gravity of the depravity in your background, and how you have been left to bring yourself up. So it is a question of how to reflect that, because this is very serious offending.

[38] In my view I think the appropriate way to do it is as follows. I take a start point of nine years' prison. In my view you should be entitled to a credit of 25 percent for your youth. I will also give a further 10 percent credit for the abuse that you have suffered at the hands of multiple people, because undoubtedly that has impacted upon the way that you have behaved, and how you have normalised this sort of behaviour at that time.

[39] There is one other issue to deal with and that is the issue of remorse. The Crown are effectively saying it is too little too late, there would have been some weight to be attached to the issue of remorse if you had pleaded guilty and saved [victim 1] coming to Court and [victim 2] coming to Court, and there is something to be said in that, because whilst I appreciate that there were a number of charges that were not proven, there is some weight to be attached to what the Crown says.

[40] But balanced against also there is some weight in what Ms Hughes says in that it is not unusual for people found guilty of this sort of offending still to be protesting their innocence, notwithstanding the verdicts of the jury. We have a situation here where you have written letters of apology, but I think the key thing to be found there is an acceptance on your part that these things actually happened, and hopefully that will carry some weight, albeit limited weight, I am sure with [victim 2], and also [victim 1], but at least they know that you accept that you have committed the physical acts so that would at least hopefully provide them with some comfort. So I think that I could give a discount of some five percent for that.

[41] Mr McLennan, I got to the point where I took a nine year start point on the lead offences of sexual violation. In my view you should be entitled to credit of 25 percent for your youth, 10 percent for the abuse that is suffered and how that has impacted upon your life and your conduct and then five percent for remorse. So that gives me a discount there of 40 percent on the original nine years. That then takes me to

five years and four months on each of the sexual violation charges. Standing back and looking at it that seems to me to be a proportionate response to very serious offending which has had a significant impact upon the other two people involved in it.

[42] The Crown asked for a minimum period of imprisonment. Now once again taking a compassionate approach, as I have done in terms of the discounts that I think are appropriate I do not think a minimum period of imprisonment is required. It is often normally imposed in such cases, but I bear in mind your youth at the time of the offending, also the positive steps that you had taken immediately prior to trial in terms of employment and also your family situation. Also your acknowledgement of the physical acts in terms of your letters of apology, and your desire to improve your situation for your child, so all of those matters, in my view, mean that at this stage I do not think it appropriate to impose a minimum period of imprisonment. I think that would send out the wrong message to you, and obviously the contents of the reports that I have got will be made available to the prison sentence so that things can be done in prison to further build upon the steps that you have taken to try and improve your circumstances.

[43] On each of the other matters you are sentenced to 12 months' prison all running at the same time as the five years four months on the sexual violation charges.

A A Zohrab
District Court Judge