

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.

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS, OF APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PROHIBITED BY S 201 OF THE CRIMINAL PROCEDURE ACT 2011.

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2016-044-004620
THREE STRIKES WARNING
[2018] NZDC 1192**

THE QUEEN

v

[BARTOLO CHAVEZ]

Hearing: 25 January 2018

Appearances: K Lummis for the Crown
D Dickinson for the Defendant

Judgment: 25 January 2018

NOTES OF JUDGE R J COLLINS ON SENTENCING

[1] Mr [Chavez], you are here for sentence with respect to two charges of sexual violation, one of those is what is called a representative charge, and there are four charges of sexual conduct with a young person.

[2] There are probably better words to express it but we are involved in an intensely human process but at times the process will seem to all involved as

formulaic, arithmetic and uncaring to all involved. There are no winners at all in what we are doing today.

[3] Your victim, her mother, are present in Court and that is entirely appropriate. They have been deeply affected by your actions and it is appropriate that they see first hand the conclusion of the process of which they have been through or been such a part of.

[4] Your offending can be described as incremental, progressive and it became increasingly serious as your confidence grew that your victim would not disclose what was happening.

[5] You, as was your absolute right, did not make a statement to the police nor did you give evidence. Your position was that somehow your victim had fabricated her evidence as some form of reaction or revenge for you being a tough disciplinarian. But on the evidence in the trial that proposition simply did not make any sense because the uncontested evidence was that you unilaterally relaxed restrictions on her. You had relaxed things like her bedtime, access to electronic devices, watching television and so on. So it was incomprehensible that she would come forward with these matters at a time when that discipline was being relaxed on her and then have that discipline put forward as a reason why she would make up false allegations against you.

[6] You protest your innocence. Your apology letter, though, is no such thing. You have no remorse. Mr [Chavez], you might not accept the verdicts but all jurors accepted your victim's account, it is no one juror had a reasonable doubt.

[7] I turn to the summary of your offending so it is recorded in the sentencing notes, or I set out the facts on which you are to be sentenced, and I openly acknowledge that in doing that I have been much assisted by the way matters have been summarised in the Crown prosecutor's sentencing submissions.

[8] You were the victim's stepfather. You had been in a relationship with her mother for approximately [duration deleted] years and the two of you had had [[number deleted – children together]. The victim had had no contact with her

biological father and it was plain from the evidence that she gave is that she had come to regard you as Dad and she was 14 years of age at the time of this offending.

[9] In the normal course of events in a New Zealand family household, her mum would be away from home at various times of the day and during the week. [Details for leaving the home deleted], and then there was routine matters such as doing the supermarket shopping and so on. There was always going to be opportunity for this offending.

[10] Matters started in [[date deleted]. My view is that the overwhelming likelihood of what happened was that after your young victim had had chickenpox you used that as an excuse to start touching her, scratching her to ease the irritation of the recovering chickenpox. That gave you the excuse to physically touch her in that way and then that led to the sexual touching or indecent touching which, as I say, progressed. You increasingly started to touch her about her body moving to touching, fondling, squeezing her breasts, then you moved to occasions of rubbing over the top of her genitalia to the point where you started to penetrate her genitalia with your finger or fingers. And that happened from late [date deleted] through until [date deleted], so it occurred over a number of weeks.

[11] The circumstances in which she finally came forward to tell others about the offending was clearly before the jury and it is without doubt the coming forward caused her much distress and anguish. She well knew the impact that coming forward would have on those that she loved.

[12] The Crown points to a number of aggravating factors with respect to your offending. Some of those matters to some extent are inherent, that is they are a part of the offending. Some of them overlap and it is important that I do not overcount or double count aggravating factors.

[13] The aggravating factors, though, are the impact on your victim, both directly on her and other members of her family, because that is also an impact on her. She was 14 and she was your stepdaughter and she was vulnerable. Linked to that is that this offending was a very significant breach of trust on your part. It was, in a sense,

definitely premeditated. It might have started quite opportunistically but, after that, you manipulated occasions and manipulated the situation to continue to offend against her. And the offending extended over a number of weeks.

[14] There are no personal mitigating or aggravating factors with respect to you other than the issue of the fact that you have no previous convictions and I will come back to that in a moment.

[15] Your offending is covered by what is called a tariff case which is a decision of the New Zealand Court of Appeal which provides guidance to a sentencing Judge. Both the Crown prosecutor and your counsel Mr Dickinson have provided extensive written submissions.

[16] Mr [Chavez], you might feel some grievance with the jury verdicts but you cannot feel any grievance with the way in which you were represented. Both your counsel did everything that they could on your behalf and they strenuously put forward your defence and the fact that Mr Dickinson has not made lengthy submissions in Court today does not mean that he has not put in writing everything that can be argued on your behalf today.

[17] In my view, the debate on whether your offending falls at the top of band one in the tariff case of *R v AM*¹ or at the low end of band two is answered in that it falls at the lower end of band two and that is because of the combination of aggravating factors here. I have had careful regard to the comparator cases as well as the guidance provided in *R v AM* itself but I accept Ms Lummis' submission that when one combines the totality of your offending, the vulnerability of your victim, the breach of trust, the representative nature of charge 3, that is the sexual violation by unlawful sexual connection, and the harm caused, that this is a matter which has to be categorised in band two.

[18] So I set for this a starting point of six years. I initially was not prepared to grant any credit or discount from that six year starting point. However, Ms Lummis has very fairly acknowledged today that the Crown position is that you can be given a

¹ *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750

small credit for the fact that [age deleted] years of age you have no previous convictions. I am prepared to acknowledge that but only to a very, very moderate degree. So the credit for that will be one of three months.

[19] There are no other factors which warrant either an uplift or a reduction from that sentence and the end sentence will be one of five years and nine months. That sentence will apply to the two charges of sexual violation and concurrent sentence of three years will apply to the charges of sexual conduct with a young person.

[20] Finally, there are two matters that I must deal with before sentencing is concluded. Firstly is that these are offences are what are called Strike offences. All offences in New Zealand involving sexual offending of this type are Strike offences, as are all other offences of serious violence. What that means is that for this offending you will serve the sentence that I have imposed on you and you will become eligible for parole in the normal course of events. But, thereafter, if you should ever commit another Strike offence and if you are sentenced to a term of imprisonment, you would serve that term of imprisonment without parole. And, thereafter, if you ever committed a third Strike offence you would not be sentenced in this Court, you would be sentenced in the High Court where, in the absence of manifest injustice, you would be sentenced to the maximum that the law provides and if that was sexual violation then that would be 20 years which you would serve without parole. I mention the fact that you will be eligible for parole in the sentence that I am imposing in the normal course of events. I observe that I have not imposed any additional minimum period of imprisonment today. None is sought and, therefore, none is imposed.

[21] Finally, you must be registered on the child sex offenders register and I advise you of the fact of that registration and advice of that will be given to you in writing.

[22] Mr [Chavez], on the two charges of sexual violation by unlawful sexual connection, you are sentenced to five years nine months' imprisonment. On the charges of sexual conduct on a child, you are sentenced to concurrent terms of imprisonment of three years. The total term of imprisonment is five years nine months.

R J Collins
District Court Judge