

**IN THE DISTRICT COURT
AT HAMILTON**

**CRI-2017-019-006358
[2018] NZDC 451**

THE QUEEN

v

[PITA LAVEA]

Hearing: 15 January 2018
Appearances: T Clark for the Crown
G Boot for the Defendant
Judgment: 15 January 2018

NOTES OF JUDGE A S MENZIES ON SENTENCING

[1] Mr [Lavea] remain seated for the moment please, I am going to outline the matters relating to your sentencing and when I indicate what the sentence is at the end, I will ask you to stand to advise you of what the outcome is. You are appearing for sentence today in respect of four charges of sexual violation. They are charges that carry a maximum penalty of 20 years' imprisonment. They are charges that attract a three strike warning which was given in respect of each of the charges when pleas were entered on 22 November 2017. You are presently [age deleted]. You were [age deleted] when these offences were committed. You have not previously appeared before the Court. The summary that has been provided sets out the background family circumstances. You were related to the victim who came to stay briefly in the household where you resided. The offending occurred over a period between [dates

deleted] when there were four occasions upon which you indecently assaulted and sexually violated the victim.

[2] The summary records that in relation to the first of those charges, the victim was sleeping in the back bedroom of the address. You entered the bedroom. She awoke and you approached as she lay on the bed. You lowered your pants to reveal your penis and tried to take down the victim's pants. She held her arms across her body and pushed your hands away. As a result, you were unable to take her pants down. You then put your hand in her pants and underwear, rubbed her vagina then put your fingers into her vagina.

[3] On the second occasion, the victim went to the doorway of your bedroom to get some headphones. As you handed her the headphones you pulled her into the bedroom. While in a standing position you pulled up the t-shirt that the victim was wearing to reveal her breasts. You started kissing and sucking her breasts. You then put your hand in her pants, rubbed her vagina and put your fingers into her vagina.

[4] On the third occasion, the victim was sitting on the couch in the living room. You sat next to her, put your hand into her pants, rubbed her vagina and put your finger into her vagina.

[5] On the fourth occasion, the victim was walking down the hallway to the toilet. You were standing by the bedroom door and pulled the victim into your bedroom. You lifted her shirt and kissed and sucked her breasts before putting your hand into her pants, rubbing her vagina and then putting your fingers into her vagina.

[6] You acknowledged the offending when you were spoken to about this, as has been described. You said at the time what you had done was stupid and that you were sorry. The victim impact statement that has been provided for today outlines that the victim is doing her best to forget about what happened. She notes that she did not receive any physical injuries from what occurred. The impact of what has happened in terms of the family relationships has been significant and that makes the victim, in her words, "Very sad." It says she feels sick when she thinks about what happened and what impact has occurred within the overall family. It appears that she is now not

being trusted by family members and the victim impact statement goes on to talk about further very significant impacts the offending has had on the victim.

[7] A pre-sentence report has been prepared for today. The main factors identified in that report as contributing to your offending are your relationships and offending-related sexual arousal. You admitted to the probation officer that you were aware of the victim's age and said you had met her once or twice prior to the offending taking place. You did not dispute the police summary of facts and indicated that you felt angry about what you had done to the victim as well as angry at yourself. The recommendation in the pre-sentence report based upon the severity of the offending is one of imprisonment with programmes to address your offending needs.

[8] The Crown submissions have referred to the purposes and principles of sentencing as set out in the Sentencing Act 2002. The submissions note that the offending took place over that two week period in [dates deleted] and that the offending on each occasion was similar. Therefore the approach argued by the Crown is an overall concurrent sentence on all four charges. The Crown points to a number of aggravating features which are relevant in terms of the guideline decision of *R v AM*¹. Features relied on by the Crown are the planning and premeditation, the Crown says that on three of the occasions you caught the victim unaware and on the fourth occasion you went and sat beside her on a couch. The Crown says you deliberately targeted the victim and took advantage of opportunities to get her alone.

[9] The Crown says that there is an issue about the vulnerability of the victim. She was [under 16] at the time. You were aware of her age. The inquiry and discussion with the victim indicated that your behaviour scared her. The Crown points to harm to the victim as reflected in the victim impact statement and the Crown also refers to the scale of the offending, there being four occasions over the two week period in a busy family home and the Crown says that represents a relatively high level of offending given the number of opportunities that would have been available for this offending to occur. The digital penetration was the most serious aspect as well as the indecent assaults on the victim's breasts on three or four occasions. The Crown also

¹ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750

argues that there was an abuse of trust in your circumstances. You are related to the victim, [details deleted] You were older than the victim. The victim was a guest in your family home and she should have been safe and secure. Therefore the Crown says this offending involved a significant abuse of trust. The Crown's argument is that the offending is comparatively high in terms of its seriousness and your culpability is correspondingly high.

[10] The Crown has outlined in its submissions a number of cases which the Crown says assist in guiding an appropriate starting point. Those cases are *R v H*², *Bond v R*³ and *R v BSW*⁴. The first of those cases, *R v H* involved a 54 year old offender and a 13 year old victim who was the offender's niece. There was one instance of offending which was not dissimilar to the charges you have pleaded to. The starting point taken in that case was four years' imprisonment and after allowing for matters specific to that case, the end sentence imposed was three years and six months' imprisonment. Of the other two cases, in the Crown's submission the case of *R v Bond* is more comparable to your circumstances and in the case of *R v B S W* more serious. In *Bond* the starting point taken was five years and six months' imprisonment and significantly higher again in the *BSW* case.

[11] The Crown accepts that there are no aggravating features relevant to you but also argues there are mitigating factors relevant to the offending. It is acknowledged that you entered guilty pleas at an early stage and a full 25 percent discount is appropriate. In terms of the approach to be taken, the Crown submissions refer to the bands in *R v AM*. Those three bands allow for sentences in band 1 of two to five years, band 2 four to 10 years and band 3, nine to 18 years. Having regard to the features that have been described in the submissions and particularly the planning and premeditation, vulnerability and harm to the victim, scale of the offending and the breach of trust, the Crown argues that a starting point of five years to five years three months' imprisonment would be appropriate.

² *R v H* [2008] NZCA 237

³ *Bond v R* [2010] NZCA 381

⁴ *R v BSW* HC Auckland CRI-2009-044-7847, 9 March 2011

[12] Today in speaking to those submissions the Crown addressed Mr Boot's submission that the five years to five years three months is too high and suggested that if the Court considers the five years to be too high then an appropriate starting point should be four years and nine months' imprisonment. That is based on a comparison with the decision referred to of *R v H* which had a four-year starting point which would equate to the starting point advanced by Mr Boot and the Crown says *R v H* represents less serious offending than yours and therefore an uplift beyond the four years is appropriate.

[13] Mr Boot's submissions do not take issue with the overall approach that has been advanced by the Crown. However, as I have already indicated, the analysis undertaken by Mr Boot argues that a starting point of four years rather than the higher level would be appropriate. That is because Mr Boot says that the aggravating features referred to in the Crown submissions such as the vulnerability, abuse of trust are not as strong as are present in some cases. For example, Mr Boot says that while the victim was in your household, you were not the person that was directly responsible for her and that lessens the abuse of trust argument to a degree. Mr Boot has stressed that you have been upfront about this offending from the first time that you were confronted about. That has included a form of family conference which occurred after the offending came to light. You admitted your involvement, took responsibility and that was carried through into the interviews with the police. Mr Boot therefore says that beyond the 25 percent allowance for a guilty plea, there should be some further allowance for remorse. In addition to an allowance for the fact that you have not previously been before the Court, you have up to this point led a life that Mr Boot says warrants some recognition in terms of the overall sentencing assessment.

[14] This was comparatively seriously offending. Accepting that you were not the person that was directly responsible for the care of the victim, she was, as the Crown says, in your household. She was entitled to feel safe and should not have been subjected to abuse and the offending involved. There has therefore in my view been an abuse of trust. It cannot be argued given the number of charges that this was spontaneous and opportunistic. It might have started in that way but there have been four offences over a two week period. Clearly there has been an impact on the victim. I consider that your circumstances are more serious than the four year starting point

that was taken in the decisions I have referred to. I propose to take a starting point which is slightly less than the five years that the Crown advocated. I accept that the appropriate starting point that the Crown fell back to perhaps is what I regard as appropriate and that is four years nine months and that is therefore the starting point that I propose to take. That is 57 months.

[15] I do consider that you are entitled to some credit for the fact that you have not previously been before the Court. Up until this you have a clear record. I therefore propose to allow six months to reflect that. I also propose to allow a further a discrete reduction for remorse. You are getting a significant allowance in the 25 percent discount which I will allow however there are circumstances where you have been involved in the conference that I have mentioned. You have admitted your involvement from the outside and I am satisfied there is genuine remorse that has been shown on your part. I therefore propose to reduce the penalty by three months to reflect that.

[16] Those calculations then leave a first end result of 48 months' imprisonment. I intend to allow the full 25 percent for the guilty pleas that you have entered which reduces the sentence to 36 months or three years' imprisonment.

[17] The end result therefore, is that I am imposing a sentence of three years' imprisonment which will be a concurrent sentence on each of the four charges so that end sentence remains three years' imprisonment.

Judge AS Menzies
District Court Judge

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