

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 GREYMOUTH**

**CRI-2015-018-000609
THREE STRIKES WARNING
[2016] NZDC 27034**

THE QUEEN

v

CAROLINE ANNE MCLENAGHAN

Hearing: 9 September 2016
Appearances: D Orchard for the Crown
R Bodle for the Defendant
Judgment: 9 September 2016

NOTES OF JUDGE S J O'DRISCOLL ON SENTENCING

[1] Ms McLenaghan you appear before me today for sentence. I am now required to sentence you and I am now required to give reasons in open Court as to how and why I have reached the decision that I have.

[2] I heard a Judge-alone trial earlier this year that you faced a number of charges. There were some 11 charges in total, eight of unlawful sexual connection with a young person and three involving doing an indecent act on a young person. Some of the charges were representative charges, which meant that the Crown said that the type of offending had occurred on a number of occasions. You denied the offending when you were interviewed by the police. You challenged the victim through cross-

examination and put to him that the offending did not take place. I found that the Crown had proved each of the charges beyond reasonable doubt.

[3] I note in the pre-sentence report that you continue to deny that you have committed the offences. You have indicated that you intend to appeal against my verdicts. That is your right to do that. I gave my reasons in my decision why I found that the charges had been proved beyond reasonable doubt. I was satisfied of the evidence given before me by [the victim]. In addition there were a number of other witnesses that came to Court that supported the existence of an unhealthy relationship between you and the victim. There was at the time a number of people who expressed their concern about the observations that they had made and some of them expressed those concerns directly to you.

[4] In addition there was other evidence that was placed before me, in particular there was one piece of evidence from the victim which I found could only have been given if he had engaged in a sexual relationship with you. You will know what I am talking about. For those cumulative reasons that I endeavoured to express in my decision I was satisfied very firmly and clearly that the charges had been proved beyond reasonable doubt.

[5] It is your right to appeal against that decision that I have reached but you will appreciate that I have to sentence you now in accordance with the guilty verdicts that I delivered. I gave a detailed decision setting out the facts and the reasons why I found the charges proven. I am not going to go over those in detail now but I need to make some brief comments as part of the sentencing process that forms the factual basis upon which I am required to sentence you.

[6] The victim at the time of the offending [details deleted]. You were aged about [age deleted] at the time. It is clear from the evidence that I heard that you very quickly developed a close relationship with the victim. [details deleted] you engaged in sexual activity with him on numerous occasions. That sexual activity included masturbation, oral sex, the use of a vibrator and on frequent occasions full sexual intercourse. He was aged around [under 16] at the time that occurred. He is now aged around [age deleted].

[7] The victim impact report that I have read from him indicates that the relationship that you had with him damaged [relationships with people close to him]. He has had a deep fear of new people that he now meets. He has had counselling for what has occurred. I have no doubt from seeing him give evidence that he was physically mature at the time of the offending, notwithstanding his young age, but I also have no doubt that at the time of the offending he was a vulnerable, emotionally insecure and immature boy. It is always difficult to assess exactly the effects that offending may have when there may be other effects and consequences which can cause or contribute to the impact that offending and other matters can have on a victim. But in my assessment of the victim and reading the victim impact report that has been put before me it is clear that your relationship with him has had a significant detrimental effect on him.

[8] There is a pre-sentence report before the Court. You are now aged 33. You have in the report continued to deny the offending. It is therefore impossible for there to have been any assessment of risk of further offending or harm to others because of your denial.

[9] In terms of the mitigating factors your counsel has placed written submissions before me and has asked that I take those matters into account. Specifically I do take into account that you have no previous convictions. There have also been letters that have been placed before me which I have read.

[10] In terms of the aggravating factors there were multiple offences which occurred over an extended period of time. There is the age difference between you and the victim. There is the clear breach of trust that occurred [details deleted]. He was, in my view, vulnerable and there has been clear harm to him as a result of the offending.

[11] The Crown have suggested that there is an element of grooming which should be taken into account as a specific aggravating factor. It is unclear to me the period of time between [details of meeting deleted] and when the sexual offending occurred. I am not satisfied that there was what might be called “grooming” between you and him. I am satisfied that within a relatively short period of time there was a strong

relationship and an attraction which developed which resulted in sexual activity occurring at a relatively early stage.

[12] Your counsel has acknowledged that no blame can or should be attached to the victim notwithstanding what he may have done early on in the relationship it is clear that you were the adult and he was the child. He bears, in my view, no responsibility at all for this offending.

[13] In terms of the purposes of sentencing today the main purpose of sentencing is that of deterrence. Whether you are likely to offend again in the future I am not sure. You have been assessed as being at low risk of re-offending. Probation often make that assessment when there is a first offender with no previous convictions that come before the Court. One of the purposes also of sentencing is that of general deterrence so that a message is sent to others in the community that this type of conduct and behaviour will not be tolerated and a deterrent sentence is required to be imposed so that others who might think or consider engaging in similar conduct or behaviour will know that a deterrent sentence will be imposed should the offending be detected.

[14] The whole purpose of the legislation under which you have been charged is designed to protect vulnerable and young people. It is designed to ensure that those who have trust [details deleted] do not breach that trust and it is designed to ensure that there are appropriate boundaries in relationships so that sexual activity will not occur and those boundaries are breached.

[15] I do not accept your position [details deleted]. You breached the trust that was given to you [details deleted] and you overstepped the boundaries that exist between adults and children and it was clear to me that that occurred, as I have said, within a relatively short time [details deleted].

[16] It was submitted by your counsel that it was a mitigating factor that he was willing to engage in sexual activity [further details deleted]. The legislation is designed exactly to prevent young, immature and vulnerable people being abused. You should have stepped back once you became aware that there may have been any inappropriate conduct on his part.

[17] In terms of the principles of sentencing I am required to take into account the seriousness of the offending, the gravity of the offending and your culpability. The offending is serious. The sexual activity occurred on a regular occasion over a period of time. The offending is grave and your culpability is high.

[18] The Crown have submitted that the appropriate starting point is in the vicinity of four and a half to five years' imprisonment. Mr Bodle on your behalf has submitted that the appropriate starting point should be in the vicinity of between two to three years' imprisonment. Your counsel submits that gender cannot be overlooked and that the circumstances of overbearing and invasive acts by males against females is not present in this particular case and he therefore seeks a lower starting point than what the Crown seeks.

[19] Had there been overbearing and invasive acts and/or violent acts then that would be a further aggravating factor but the absence of an aggravating factor is not in law a mitigating factor. In law there is no tariff for sexual connection with a young person between 12 and 16. That is clear from a number of cases that have come before the Court.

[20] In a decision called *R v Johnson*¹ the Court of Appeal said that an appropriate starting point for offending of this type may be in the vicinity of four years' imprisonment where there is an abuse of trust, a significant age gap, full penetrative sex and where there had been significant adverse effects on the victim. Where there has been no breach of trust the Court said that a lower starting point could be imposed. The Court said that a four-year imprisonment starting point was appropriate where there was moderate culpability.

[21] Mr Bodle has submitted to me that gender is a matter that I can and should take into account. I want to make it quite clear that I reject that submission. I am required to follow decisions of Courts that are higher than the District Court. In a Court of Appeal decision called *R v Herbert*² the Court of Appeal said at page 4 that no distinction should be made between male and female offenders. In a Supreme Court

¹ *R v Johnson* [2010] NZCA 168

² *R v Herbert* CA70'09, 21 May 1998

decision in 2006 called *L v R*³ the Supreme Court upheld the *R v Herbert* decision and said children of either gender require protection from adult offenders of either gender. In a decision called *R v AM*⁴ which is the leading case for sentencing on sexual violation, and I acknowledge you are not charged with sexual violation, the Court there said that guidelines in that case were to be applied regardless of gender of offender or victim. I cannot reduce the starting point because of your gender nor can I give an additional discount because you are a female and the victim is a male so I make it quite clear that I do not do that in this case and I am bound by other decisions, which I quite frankly agree with, that gender is irrelevant. I understand exactly what Mr Bodle is attempting to say and attempting to persuade me to do but, as I have said previously, the absence of an aggravating factor is not a mitigating factor.

[22] Imprisonment is inevitable in your case. The evidence that I heard during the course of the trial was that when this offending came to light and it started to become into the public domain that was one of the things that you yourself mentioned that you would be going to jail. The sad reality of your offending, as with so much offending, is that many others suffer as a result of the offending. It is not just a matter of the offending affecting you and the victim. Offending often affects others in the community and particularly in offending of this type it affects family members significantly and in your case I have no doubt it will affect your children who will not have their mother for a period of time.

[23] You have no previous convictions and the law requires that as a principle of sentencing I impose the least restrictive sentence on you. I hope that the fact of imprisonment that I am about to impose on you will mean that others in the community, as is the purpose of deterrence, will think twice not to engage in similar conduct and to protect young persons and not engage in inappropriate sexual conduct with them.

[24] The view that I have taken is that on a totality basis for each of the charges before me the appropriate starting point is a sentence of four years' imprisonment. I then intend to reduce that. Taking into account your personal circumstances and the

³ *L v R* [2006] NZSC 18, [2006] 3 NZLR 291, (2006) 22 CRNZ 553

⁴ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750, (2010) 24 CRNZ 540

fact that you have no previous convictions I reduce that by 12 months so that the sentence that I now impose on you on each of the charges will be a sentence of three years' imprisonment.

[25] There are two further matters. The first is the issue of suppression of your name. The victim does not have any view about suppression of name. He has left it to the Court. The children's father seeks suppression of name because of the children aged [ages deleted]. There is no one else said to be in the local community with your name. You ask for name suppression on behalf of your children. The Crown submit that your name should be published. I have given a lot of thought as to whether or not I should publish your name. I have no doubt that publication of your name will be a significant penalty to you. The publication of name can often act as a deterrent. I have no doubt that publication of your name is likely to affect your children. I do not think the publication of name is likely to identify the victim. [Details deleted and] some time has gone under the bridge between when this offending occurred and the offending now. It is a sad reality, as I have said, that often children are affected because of the offending which takes part by their parents.

[26] One of the letters placed before me indicates that this is a small community. I would infer that probably many people in the community already know what has occurred and already know that you have been found guilty of these charges, particularly as you have not been present in the community in recent times since I remanded you in custody. The issue of suppression has given me real concern because I really do not know what affects and consequences publication of your name will have on your children. But in saying that if I was to suppress your name and it can be saying, "Well anyone who has got children should have their names suppressed," and that is clearly not the position. I think the publication of name is part and parcel of the consequences of your offending and I hope that there will not be any adverse consequences for your children.

[27] What I have decided to do on reflection is to suppress your name until 10.00 am next Tuesday. That will enable whoever has to be told about this matter and the fact that your name will be published to endeavour to put in what reasonable responses might be needed, whether it be with your children or with the school so that they will

be aware of what will happen after 10 o'clock next Tuesday. There will be an interim order until 10.00 am next Tuesday when the interim order will lapse and your name will be able to be published.

[28] The final matter that I am required to do is to impose a “Three Strike Warning” on you. I did not convict you earlier. You will now formally be convicted of each of the charges. Given your convictions now on the charges that I found you guilty on of unlawful sexual connection with a young person and doing an indecent act on a young person you are now subject to the three strikes law. I am now going to give you a warning of the consequences of committing another serious violent offence and receiving a conviction for that. You will also be given a written notice outlining those consequences which lists the serious violent offences.

[29] If you are convicted of any serious violent offence other than murder committed after this warning and if a Judge imposes a sentence of imprisonment then you will serve that sentence without parole or early release. If you are convicted of murder committed after this warning then you must be sentenced to life imprisonment. That will be served without parole unless it would be manifestly unjust. In that event the Judge must sentence you to a minimum term of imprisonment. Thank you, you may stand down.

S J O’Driscoll
District Court Judge