

**IN THE DISTRICT COURT  
AT WELLINGTON**

**CRI-2016-091-001415  
[2018] NZDC 4738**

**THE QUEEN**

v

**[ROCCO CALDWELL]**

Hearing: 12 March 2018  
Appearances: C Gisler for the Crown  
V Nisbet for the Defendant  
Judgment: 12 March 2018

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**NOTES OF JUDGE A-M J BOUCHIER ON SENTENCING**

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[1] Mr [Caldwell] appears for sentence today on 12 March following a trial which commenced in the District Court in Wellington where he pleaded guilty halfway through the complainant's evidence-in-chief and the charges before the Court which pleas were entered were doing an offensive act upon a young person, sexual violation by rape, sexual violation by unlawful sexual connection.

[2] Now in the Crown's submission they note his previous history which is attached but of course it is not relevant as they acknowledge to be before the Court although some of it was committed whilst on bail.

[3] The Crown have submitted that a starting point in the vicinity of nine to 10 years' imprisonment for the totality of the offending is submitted to be appropriate and that at first, when they made their submissions in writing, which they have spoken to today, they submitted that a discount of no more than five percent should be given for

the guilty plea and remorse. They have however addressed that further in their oral submissions and I will come to that when I review those.

[4] Looking at the aggravating factors of the offending, the Crown submission is that there was planning and premeditation and again this was addressed in the oral submissions today, that despite the comments to the contrary to the pre-sentence report writer, the Crown submission still remains that this was premeditated and to a high degree and as they submit, there were Facebook messages and that also he told her to delete those Facebook messages and whereby he told her when he was at home alone, offered to buy her alcohol and drugs and suggested that they have what he called their own fun. So the Crown does not accept what was not raised in the restorative justice process and that was the issue of those Facebook messages, so they still submit to the Court that there was a degree of premeditation by the defendant.

[5] The second aggravating feature is the vulnerability of the victim and that is that she was very vulnerable owing to impairment from alcohol and synthetic cannabis consumption which he promoted and by reason of her age and by reason of her obvious relationship which is clearly a breach of trust because the defendant is her [relative] and she had been close to him and her parents had sought his assistance in having his help to deal with teenage issues that they were having with her and her behaviour. There is also harm to the victim which is set out in her victim impact statement. Obviously, of course, as had been acknowledged harm inherent in such offending. There are, in the Crown submission, no offence-related aggravating factors and I accept that.

[6] As far as previous convictions, as the Crown have already acknowledged they are not relevant for present purposes and the discount they have already referred to, which they suggest can be extended but they have not submitted to what extent. They acknowledge, of course, that given the timing of the plea, the complainant did not have to be cross-examined.

[7] They then set out the well-known tariff case of *R v AM*<sup>1</sup> and it is the submission of the Crown that this falls within band 2 of that case where the starting points are said to be from seven to 10 years of imprisonment.

[8] As to sentence, they also refer to the fact that the indecent act upon a young person is a registerable offence under the Child Sex Offender Registration Code and so in terms of today, the Crown submits the Court must explain to him that he is registerable sex offender.

[9] The defence submissions have also been filed but I will just go to the next of the list of documents I have received which is the victim impact statement and what the complainant said was, “Before this happened to me I loved work, I was smart, I was really up there at school, I was always at school, loved being around family and friends and then as a result of this I lost all that, I gave up my two passions in life, [details deleted], stopped wanting to be around my family, lost friends, made others who weren’t the right sort and began taking drugs and becoming intoxicated and staying away from home.” She does say fortunately that now she has been on track again, [details deleted] but lost a whole year of her life due to what had occurred.

[10] The report from the restorative justice is a lengthy one and it is interesting from the perspective, as Mr Nisbet has said, that he has not come across one like this before, and certainly as he is very experienced counsel, I accept what he said. There were a number of people who were present at this, not only the facilitator but various other people with experience in restorative justice were involved, along with the family and clearly a great deal of effort has gone into this restorative justice process which, when one looks at it, does appear to have been of benefit to all of those involved.

[11] The defendant was put on the spot about his decision making. I agree with the Crown that they have pointed out that the Facebook messages were not brought up but certainly he was put on the spot about his decision making and of course he acknowledges the wrongfulness of his decision making on that day and therefore it is certainly seen from the report that there has been significant benefit for the family in

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<sup>1</sup> *A v M* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750

participating in this process and certainly it is one of the most detailed that I too have seen.

[12] So in terms then of sentencing, the defence submissions before the Court note the following: First of all the defence have pointed to when the defendant was drug free and in the past, assisting the family by encouraging the complainant to attend and undertake her schooling and it is submitted today that he certainly acknowledges the breach of trust being serious but his prior relationship with the complainant was one of [family members] and that is all.

[13] He was of course affected by synthetic cannabis on the day which the defence acknowledge, as they should, provides no excuse but simply provides an explanation of the sudden and wrong criminal decision to sexually violate the victim. They acknowledge that the defendant has struggled to acknowledge what he has done and confront his actions in an honest and open way but submit that he has done so and that that is reasonably rare.

[14] They submit that his late plea of guilty does deserve consideration because the complainant did not have to be cross-examined, the evidence-in-chief was presented to the Court by way of video and then there was an adjournment for counsel for the defence to discuss the situation with the defendant and after that the acknowledgement of the wrongdoing and the criminality occurred. That the starting point, referring to the Crown's submissions, the defence have highlighted their view that the premeditation was not in the category stated by the Crown but that the offending occurs and falls into either the top of band 1 or the bottom of band 2 but in their submissions, there was not too much difference between the top of the first band and the bottom of the second and of course the defendant acknowledges that the start point is imprisonment, therefore it is submitted by the defence a starting point of between six and seven years would be appropriate with a discount of up to 20 percent for lack of previous history and his early guilty plea.

[15] I consider that the aggravating features here are there was communication, it is clear from the Facebook messages, in my view. Whilst accepting that, it is not clear to me that there had been any prior reports of sexualising the relationship between the

parties on the part of the defendant but certainly prior to this offending, there is the communication in the Facebook messaging.

[16] Obviously the breach of trust is a factor of which the Court must take into account as an aggravating feature and the vulnerability and that vulnerability is due to the relationship and the age of the complainant and also plying her with illegal drugs and of course she was underage to drink alcohol as well.

[17] There are no mitigating features of the offending in my view. There are no aggravating features by way of prior convictions which the Court should take note of the defendant and the mitigating factor is the plea of guilty, even though it was at a late stage. I am of the view that given the successful restorative justice process which has been gone through, that a discount which is greater than that to which the Crown suggests of five percent should be given but not as great as 20 percent as the defence suggest but in my view, taking all those factors into account, that a 15 percent discount should be given which incorporates the guilty plea, the restorative justice process and the remorse that has been expressed to defence counsel obviously, in the pre-sentence report obviously and also to the Court today.

[18] So I am of the view that this falls within the bottom end of band 2 of *R v AM* and I am of the view that a start point of seven years' imprisonment is appropriate and I am just going to do the math on the 15 percent. So that then takes it, less the 15 percent to six years' imprisonment and that is what is imposed and then as the Crown submitted to the Court, I must explain to the defendant that he is a registerable offender in respect of the child sex offender registration process.

A-M J Bouchier  
District Court Judge