

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CRI-2016-009-2960
[2018] NZDC 5147**

THE QUEEN

v

KIM MICHAEL DAVID BARWELL

Hearing: 16 March 2018

Appearances: C Lange for the Crown
Defendant appears in Person supported by A Williams as Amicus Curiae

Judgment: 16 March 2018

NOTES OF JUDGE J A FARISH ON SENTENCING

[1] Mr Barwell, it is important that I traverse some of the matters I have already traversed with you when I gave you the sentence indication in June of last year. You can remain seated, thank you.

[2] You are 52 years of age and you pleaded guilty on the eve of trial to 60 charges of obtaining by deception. It relates to a period of approximately six months when you obtained just over \$91,000 from an elderly complainant; a man and his wife, but principally the man who was [over 80 years old].

[3] Immediately prior to you pleading guilty, Judge Butler heard an application for a third sentence indication which he refused and also, he was asked to rule on some propensity evidence which was going to be adduced at your trial. Due to time constraints, he was not able to give a ruling in relation to the propensity evidence.

[4] At the time the sentence indication was sought, the Crown acknowledged that if a plea was to be entered, they would not have any objection to a discount of 15 percent being given to you off the starting point that I had indicated in June. That does not bind me because the sentence indication I gave you in June lapsed seven days after that sentence indication, and I can remember you were very strong in your advice to me that you were not going to accept the sentence indication. That followed on from an earlier sentence indication that you had sought from Judge Saunders in November of 2016.

[5] So, I need to sentence you today and that sentence indication I gave to you, it is not binding on me, but having said that, it does not really alter what I said to you, to a large extent. What I did not know at the time that I gave you the sentence indication was the effect on the victim of your offending and I noted at the time that I did not have access to that material, although I was aware that the effects upon the victim were likely to be significant and I was right about that, and I am not sure whether you have had the ability to read, or have read to you the victim impact report from the victim of this offending, it really emphasises his vulnerability and your deception. He told me this:

“I’m an honest man. I have worked my entire life without question and I would literally give a stranger the shirt off my back if they asked. People who know me, know that I will always help the person in need. That is who I am. That is what I believe in and I always want to give the benefit of the doubt to those who are struggling. You almost destroyed me. You took away my belief, my trust, my savings and more. You deceived me and eventually intimidated me by pressuring me into giving you more and more because if I didn’t, what then? You made me believe if I failed to follow through, I would never get any money back and I feared for my safety and for my family.”

[6] He then goes on to tell me about the effects of the offending, how it made him feel sick to the stomach, how he could not sleep from worry. He said,

“The pressure and stress put on me and my wife has been extremely tough. This has not only affected my own health, but hers as well. This is a time of our lives at [retirement ages], we are supposed to be relaxing and enjoying the time we have left. You changed that. You made us think at one point that we ourselves might be homeless because of what you did,”

and as a result of your offending, namely, they had to re-mortgage their home to get themselves out of debt, and they should not have ever been placed in that position by your offending.

[7] When I spoke to you in June of last year, I set out at paras [6] onwards, the circumstances of your offending and I am going to read them into the record today.

“All of your offending related to your interaction with this elderly gentleman. He is a normal man, but as I said at the time, he suffers from both cognitive and memory lapses which are typical of people of his age. You initially approached him at [location deleted] in [date deleted] 2015 and greeted him as though he was a long-lost friend. He did not recognise you, but given your interaction with him, he decided to acknowledge and accept that perhaps he did know you and he had simply forgotten.”

“You then set about a fictitious story which is one of your normal modus operandi, that is, in relation to having an accident, damaging your vehicle and being stranded, that you did not have enough money to get your vehicle to the garage.”

“Eventually, you convinced the victim to give you some money and he gave you the money that he had on him and he kindly offered to drive you, and on the way you stopped at an ATM machine in Papanui and you obtained in total on that occasion, \$650. You then set about over the next six months, obtaining the confidence and trust of this elderly gentleman and over a six-month period, with different tales of woes and calamities, you obtained cash in excess of \$91,000 and the amounts are set out in a spreadsheet.”

[8] One of the things I have done to prepare for the sentencing today, Mr Barwell, is to review how much money on a weekly basis you were obtaining from this gentleman and on occasions it was well in excess of \$2000. That is important because you asked me to take into account the fact that you repaid \$750, initially, by way of a contribution of \$30, and then every fortnight you were making contributions of \$50. Well, frankly, that does not indicate that you saw this as a loan. It is part of the overall deceit that you had set up with this elderly gentleman. To repay \$91,000 will take you in excess of 75 years. So, it is fatuous to suggest that that was a loan.

[9] In terms of assessing this seriousness of your offending, I had to take into account a number of factors. Firstly, I accept that there was no premeditation in relation to your first contact with this elderly gentleman. It was opportunistic. However, after your first approach there was premeditation and planning so that you were able to obtain such a large amount of money over a relatively short period of

time. The second aggravating feature was this victim was incredibly vulnerable. As I said, he is incredibly trusting. He is an honest person. He does not see that people as dishonest as you and as deceptive as you would be as culpable in terms of misleading him and scamming him out of \$91,000. The third aggravating feature is, of course, the large amount of money and there is no possibility that that can be repaid. I note your letter to me and what you said in the pre-sentence report that you wished to repay that money. As I said, it would take you in excess of 70 years to repay that money at the rate of \$50 per fortnight.

[10] The next aggravating feature is, as I have said, there is no ability for this victim to have \$91,000 repaid. You have already over \$7000 outstanding in relation to very similar offending from 2013 with no payments having been made since your release.

[11] The other matter that I have turned my mind to is, what was the \$91,000 used for? There is no proof that it was used in any comprehensive way. There is simply no money left and you went through \$91,000 in six months which is a large amount of money to spend within such a short period of time.

[12] So, I adopt the starting point that I gave to you in June, that is, of three and a half years' imprisonment. The next issue I need to consider is what uplift is appropriate bearing in mind your significant criminal history and it is significant.

[13] I went back through the 58 pages of your prior convictions. You have 328 prior convictions for obtaining by deception which started in 1983. You have had a myriad of different sentencing options ranging from supervision, imprisonment with release conditions, community work, and quite lenient sentences, however, none of those sentences have brought about a change in your behaviour. In addition to the 328 convictions for obtaining by deception, there are nearly 50 other convictions for dishonesty including thefts, shoplifting, and in the very early days, burglaries. So, you can be described not only as a recidivist offender, but in my view a public menace.

[14] Having said that, however, I need to make sure that any uplift is proportionate to the starting point that I have indicated, so I will adopt the same uplift as I indicated to you in June which is of 12 months, so we are four and a half years' imprisonment.

I then need to turn my mind to this issue of credit and the only credit, Mr Barwell, that you could obtain is that by way of a guilty plea. Now in June, I want to read to you what I said, and it is at para [18] of the sentence indication:

“The other issue for me to then consider, is what credit is available to Mr Barwell now. When he appeared before Judge Saunders in November of 2016, Judge Saunders was willing to give him 20 percent credit out of 25 percent which is available in relation to the Supreme Court decision of *Hessell v R*¹. I have reminded myself of what *Hessell v R* says. The credit of 25 percent maximum credit is available as an acknowledgement of real remorse. The 25 percent credit is normally only provided to people who are genuinely remorseful and given at a very early stage of the proceedings,”

and then I traversed what you had done since you had been in custody.

“Since Mr Barwell has been in custody since March 2016, there have been a number of applications before the Court. He has applied for straight bail. He has applied for EM bail on two occasions, although I note now that were three occasions, the first of which was heard before me which I declined on 19 May, then appeared before Judge McDonald on 4 August when another EM bail application was filed. That was declined. He then appealed those two decisions and that appeal was refused by the High Court on 10 August 2016.”

[15] I was told in June that there was another EM bail application pending. You first elected Judge Alone Trial but after Mr Glover became incapacitated, you then elected Jury Trial and Mr Davis was engaged in counsel. After I had given you the sentence indication in June, your relationship with Mr Davis came to an end. You then said that you would represent yourself and Mr Williams, who appeared today as counsel to assist, was then appointed. Prior to you pleading guilty, you sought yet again another sentence indication and were opposing the propensity application which the Crown had sought in relation to your trial

[16] The Crown in written submissions have indicated that they would not be opposed to me giving you 15 percent which was what I indicated to you in June of 2017. On any principal led basis, Mr Barwell, that is not available to you. If you had accepted the sentence indication at that earlier stage, the 15 percent would have been available to you, but to give you 15 percent today would undermine the whole premise of *Hessell v R*. However, having said that, I do need to acknowledge that by your pleas of guilty you saved the victim of your offending significant stress and trauma from

¹ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607

having to give evidence at trial. So, I am prepared to give you 7 percent credit from that starting point of four and a half years' imprisonment which is a reduction of four months.

[17] I have turned my mind to the matters you have raised with me, not only through Mr Williams, in relation to what you say is mitigation. I do not accept either of those matters reduce your offending or mitigate your offending. I am sorry, though, to hear that your son passed whilst you have been in custody, and I am sorry to know that you were unable to attend his funeral. If that is a catalyst for change then that would be a positive thing. However, at the moment, you are at very high risk of re-offending given your history to date and if ever there was an occasion, you are the person whose image should be posted at every shopping mall, at every supermarket where you have preyed on vulnerable people, with a big notice up saying, "Do not give money to this man." That will be the only way in my view that your risk of offending will be lessened because people will have knowledge that you are a fraudster and that you are someone who cannot be trusted. Your word cannot be trusted.

[18] As I said to you in June, in my view, a minimum period of imprisonment should be imposed. If you were to be released at one-third of that sentence which is four years, one month's imprisonment, then in my view that would not be sufficient to denounce and deter your offending, but more importantly keep the public safe from your offending. Having said that, however, I am not going to uplift that minimum period of imprisonment. I will keep it to the 22 months that I indicated to you in June. Although, again, you have made an offer to repay the money, I see that as simply being laughable given the large amount of money that you obtained from the victim.

[19] So, in terms of the sentencing, I have imposed four years, one month's imprisonment. You have a minimum non-parole period of 22 months and I make no order for reparation given the very large amount of money that you obtained by deception from the victim.

J A Farish
District Court Judge