

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.**

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IDENTIFYING PARTICULARS OF COMPLAINANT(S)
AND APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S)
PROHIBITED BY SS 201 AND 203 OF THE
CRIMINAL PROCEDURE ACT 2011. SEE
<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360347.html>**

**IN THE DISTRICT COURT
AT WHANGAREI**

**CRI-2017-027-000785
[2018] NZDC 7190**

THE QUEEN

v

[D]

Hearing: 13 April 2018

Appearances: B O'Connor for the Crown
C Muston for the Defendant

Judgment: 13 April 2018

NOTES OF JUDGE D J McDONALD ON SENTENCING

[1] Mr [D], on 22 February 2018 you pleaded guilty to one charge of sexual violation, two of making an intimate video recording, and six of making an objectionable publication.

[2] I have a joint application that I suppress your name and any details that may lead to the identification of the mother and the two girls involved in this case. I consider it is an entirely appropriate application and I make a suppression order that is sought by the Crown.

[3] You were living with the two young girls' [details deleted]. They were aged [under 12 years]. On [date deleted], a cellphone was handed in by a member of the public. You had obviously lost it or misplaced it. The phone was handed in to the police. The finder located inappropriate images and recordings of young girls on it. I infer that the person who found it was trying to get an address or other number for you to get the phone back to you.

[4] On analysis of your phone, the police identified 30 video recordings. Approximately 18 of them showed the two young girls filmed during the day and while they were asleep at night. The recordings included various close-ups and focused filming on their genitalia, as well as other parts of their bodies.

[5] One of the recordings showed you digitally penetrating to a slight degree the genitalia of one of these young girls with your finger. The purpose of that seems to have been so that you could get a close-up shot of her genitalia.

[6] The summary of facts, which I say you have signed as being true and correct, outlines each of the images that were taken by you and what the young girls were doing. Occasion they were lying asleep, apart from one, you would go in in the early hours of the morning at about 2.00 am, 3.20 am, 4.20 am, lift up duvets, your phone on the camera mode under the duvets and film them.

[7] A couple of occasions you have pulled their shorts up away from the area of genitalia to get close-up footages of that area. One occasion the girls were getting dressed in the back of a car, you covertly filmed them.

[8] When spoken to about this, you stated that it was hard or difficult for you to accept what you had done. You knew it was wrong and you should not have done it. You told the police and me in a letter that you have written to me, during this time you were in a drug-fuelled, zombie-like state. Being in that state you behaved in a way that if you had been sober you would have never thought of doing.

[9] Thankfully, I am told neither of these young girls know that they were seen in these positions, nor that they had been filmed. No suggestion you downloaded any of these images onto the internet or showed them to anyone else.

[10] I take into account the purposes and principles of sentencing, to hold you accountable, to deter and denounce your conduct, impose the least restrictive, to have regard to the victim's views. I have a lengthy victim impact report from the mother. A (inaudible 15:29:42) of consciousness statement and I do not criticise her for that. She is, I take it from what she has said to me in the statement, horrified by what you did. You breached her trust, you breached her daughters' trusts.

[11] Some of the matters still in the victim impact report talk about other matters that do not impact upon the effect of your offending. Because ultimately this will be a public document, I will not go into the victim impact statement in any great detail.

[12] The mother, and I do not use her name [details deleted], so that if some member of the public reads this they will not be able to in any way trace through that who I am talking about, cannot believe that you would have done what you did. As I say, I take fully into account what she has said in it to me.

[13] The starting point. The lead charge is the sexual violation, which was digital penetration. *R v AM*¹ is the guideline judgment. It sets out culpability factors which can be used to determine what band and where in that band your offending falls.

- (a) There was limited planning and premeditation. You knew what you were doing. You waited until they were asleep and then went in to film them. You used a finger to open the vaginal entrance of one of these young girls so you could film a close-up of it.
- (b) Breach of trust. [Deleted]. You were the father figure in the family unit while you were living there.
- (c) Vulnerability. Each of the victims were vulnerable. They were young, they were asleep.
- (d) Harm to the victim. They do not know what has happened, the mother has borne the brunt of the harm of your offending and she is to be commended for doing that.

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

[14] The Crown submits that this falls within band 2 with a starting point of four to 10 years. The Crown say five to six years' imprisonment, which would include the aggravating factor of filming. Mr Muston submits a lower level, said the filming not level 4, but in band level 1. This was a minor penetration of her genitalia.

[15] In my view, your offending, slight penetration of a sleeping [age deleted] girl's genitalia for the purpose of filming her falls within band 1. Taking into account the filming of it, with the greatest respect to Ms O'Connor, I do not consider it falls within level 4. It is only a guideline in any event from the UK. A start point of three and a half years' imprisonment.

[16] In setting that, I include the aggravating factor of filming them. There must be an uplift for the charges of making a visual recording and making the other objectionable publication, which has a three and 14 year maximum, respectively.

[17] I have been referred to a number of cases, *R v [case name deleted]*², *Thompson v Police*³, *R v Davidson*⁴, and *Stewart and the Department of Internal Affairs*⁵. These cases refer to the UK sentencing guidelines. In my view, these images and one recording, I put it to one side the filming associated with the sexual violation, fall into level 1. No sexual activity, there was no real posing of these girls. They were very graphic images of [children under 12 years'] genitalia. One occasion when they are in a car. Taking into account totality that an uplift of 12 months is appropriate, making a start point of four and a half years.

[18] Personal matters. There is nothing in aggravation which calls for an uplift. In mitigation, you are entitled to 20 percent. You really had no defence to these charges in any event.

[19] I have read and considered the pre-sentence report. It identifies your attitude, your use of illicit drugs, unstructured lifestyle [details deleted]. They are unable to give me a risk assessment of further sexual offending by you.

² *R v [case name deleted]* [2018] NZCA 421

³ *Thompson v Police* [2012] NZHC 2029

⁴ *R v Davidson* [2008] NZCA 484

⁵ *Stewart and the Department of Internal Affairs* [2014] NZHC 2209

Here I have a lack of concern, genuine remorse or awareness which could lead to high risk situations.

[20] Taking all those matters into account, an end effective sentence of three years, seven months is appropriate. On the sexual violation, you will be convicted and sentenced to three years and seven months. On all the other charges, you will be convicted and sentenced to two years' imprisonment to be served at the same time.

[21] You will now be registered under the Child Sexual Register Legislation. His name is suppressed, the mother's name is suppressed, the girls' name is suppressed, where they were living, what school they might have gone to, anything like that is all blanket suppression.

D J McDonald
District Court Judge