EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2018-092-007677
[2019] NZDC 20579

THE QUEEN

v

KUL VANT SINGH

Hearing:	10 October 2019
Appearances:	L Radich for the Crown M Dyhrberg and R Nand for the Defendant
Judgment:	10 October 2019

NOTES OF JUDGE T V CLARK ON SENTENCING

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[1] Dr Singh, you appear today for sentence having been found guilty after trial of one charge of sexual violation by unlawful sexual connection. The type of unlawful sexual connection that the jury found proved was the introduction of your finger or fingers into the victim's genitalia. The maximum penalty for this type of offending is 20 years' imprisonment.

[2] I am mindful, prior to embarking on my sentencing comments, that there is a presumption under our law of imprisonment for this type of offending and mention has been made of that by your counsel, Ms Dyhrberg, in her written submissions. Section 128B Crimes Act 1961 sets out that the Court must impose a term of

imprisonment unless I can be satisfied that because of the particular circumstances of a defendant or because of the particular circumstances of the offending, that is, the nature of the conduct, a term of imprisonment should not be imposed. That is a reasonably clear direction to the Court that imprisonment must be imposed unless I can find reasons why it should not be.

[3] I want to talk first of all about the facts in relation to your offending, and I am going to briefly touch upon the facts in a general way. On 15 December 2017, the victim in this matter attended at your clinic. This was her second visit. Her intention was to see a female doctor, [name deleted], who was on placement at your clinic as part of her House Officer training. The victim had already seen [the female doctor] on 12 December 2017 and had been prescribed cream to treat a suspected vaginal fungal infection. As at the date of her second visit to the clinic on 15 December 2017, there was no evidence of any kind of bacterial infection.

[4] [The female doctor] completed a second physical examination of the victim and, as I recall, further medicine relating to a vaginal fungal infection was to be given to her. This was in the form of lotion or cream.

[5] Prior to the victim seeing [the female doctor] on 15 December, in her evidence at trial she said that she had had a very brief conversation with you and that you wished to see her after she had seen [the female doctor]. When she came out of her examination with [the female doctor], she waited for you for a short period before going into your rooms.

[6] With regard to the victim and the way that she gave her evidence, I formed the impression that she was relatively naïve. Although she was an adult woman of 20 years at the time of this offending, she seemed to be naïve as to matters relating to her body, and as to what ought to happen during the course of a medical examination where she had vaginal discharge and had to be physically examined by [the female doctor].

[7] What I recall of the victim's evidence was that on the two occasions that [the female doctor] had examined her, she had been given the opportunity to undress

behind a curtain and in private. I recall she mentioned [the female doctor] using gloves, that she was told by [the female doctor] what was going to be happening physically, and then the physical examination took place. I also recall that the victim could not tolerate the use of a speculum.

[8] On 15 December 2017, when she was called into your office to see you, her evidence was that she was told to go onto the bed and that you told her to remove her pants and her underwear. There was very little conversation between the two of you as to what it was that you intended to do. The victim talked about lying on the bed, that she was covered with a blanket and was also given a pillow to hold. This meant that she could not really see what was happening. She did, however, feel that you were rubbing on her vagina and touching her on and inside the lips of her vagina. That was the nature of the evidence that she gave. She also talked about being moved around on the bed by you to some extent. She was not lying in the usual position which might be at the top of the bed, but instead had been moved down to the foot of the bed by you physically. The impression that I got from her evidence was that this was a slightly unusual set of circumstances.

[9] She said that when she undressed she was not given privacy, as she had been with [the female doctor]. Instead, you were inside the curtains with her when she was undressing. I recall that she described having her legs in the air, which was also an unusual description of how she was positioned on the bed. What I recall is that the victim remembered being in your office with you for a period of about 15 to 20 minutes, although in fairness she could not be sure about the timing.

[10] She said that once the physical examination had been completed, she sat with you briefly and you prescribed antibiotics. This was something that she was puzzled about because she was aware that there had been no bacterial infection detected at that stage. The victim's evidence was that she had been uncomfortable during the course of your physical examination of her. She was very upset and upon leaving the clinic immediately contacted her sister and complained to her sister. Later, a decision was made to complain to the Health and Disability Commissioner.

[11] Your defence to the allegation at trial was that there was absolutely no physical contact with the victim's genitalia. This was not a situation where there was very little difference between the victim's account of things and your account of things, the two accounts were quite at odds. Your position was that this was a visual examination only and that there was no physical touching of her genitalia at all.

[12] In terms of the way that the defence case was run, what was being suggested to the victim was not that she was mistaken as to what had happened to her, but that what she was complaining about simply did not happen.

[13] I accept that the way in which the case was run meant that the victim's credibility was under challenge. I also accept what your counsel has submitted today, that it was not a severe attack in terms of the way that the challenge was put. Nonetheless it was a challenge to the complainant in terms of her credibility. It was suggested to her, as I remember, that perhaps she had consented to a visual examination, had regretted that she had done so, and thereafter had second thoughts. That was the suggested motivation for coming forward with a false complaint.

[14] Of course, Dr Singh, the jury accepted that this was a situation where there was physical touching. I must point out that with regard to a second allegation that you also inserted a plastic object into the victim's vagina, you were acquitted. That is my summary of the factual matters relevant to this sentencing exercise.

[15] Looking at what ought to be the starting point adopted for sentencing here, I have written submissions from both the Crown and your counsel. There is some distance between the parties as to exactly where this matter sits in terms of the available range of starting points for this type of offending. Each party accepts that the Court can use, and indeed must be guided by, the case of *R v AM* which is the guideline case. However, they are of very different views as to exactly where in relation to the bands, this matter sits[1].

[16] For example, Mr Radich, for the Crown, says that the appropriate starting point is one of four years' imprisonment and that the ultimate outcome should also be a term

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

of imprisonment. In support of that position, and I have been helped by his oral submissions today, he has referred to two cases. The first case is *King v R*, which involved an ambulance officer who digitally violated a 15-year-old girl that he was treating[2]. There were a number of aggravating features in that case that do not apply here. The Court on appeal upheld a starting point of 10 years' imprisonment. That is certainly not the type of aggravated offending that I am dealing with today. It is referred to, to give me an idea of sentences that have been imposed previously.

[17] The case that the Crown relies upon more heavily is that of the *Solicitor-General v Mazahrih*, where a taxi driver deliberately took a young woman to an area that she did not wish to go and thereafter digitally violated and indecently assaulted her. There was a continuation of that event where he was also violent towards her after she had escaped from him[3]. In that case the Court on appeal stated that the lowest starting point that was within range for that type of offending was four years, three months imprisonment.

[18] The Crown submits that where there is a significant breach of trust, the Court can take some guidance from the case of *Solicitor-General v Mazahrih* and come to the view that an appropriate starting point for your offending is four years' imprisonment. That would be on the cusp of bands 1 and 2 in *R v AM*. Band 1 has a range of between two years and five years' imprisonment and band 2 has a range of between four years and 10 years' imprisonment so there is a bit of a crossover. What has been put forward by the Crown is that your offending straddles the high end of band 1 and the low end of band 2.

[19] With regard to the culpability assessment features which are set out in s 9 Sentencing Act 2002 and repeated in the case of *R v AM*, the Crown submits that there was a level of premeditation to the point where you had perhaps formed an unhealthy interest in the victim. It is submitted that this was evident in text messages that you had sent to her before and after this event and what you had done was manufactured an opportunity to get her alone.

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[2] *King v R* [2015] NZCA 475.
[3] *Solicitor-General v Mazahrih* [2017] NZHC 943.

[20] There was a question raised today in oral submissions as to whether or not it was necessary for you to have seen the victim after she had already been physically examined by [the female doctor]. The Crown position is that there was a level of premeditation.

[21] The Crown say that there was no particular vulnerability insofar as the victim in this case was concerned. Further they submit that the cases put forward on your behalf with regard to the issue of a starting point are to some extent outdated. These predate the guideline case that I have been referring to and are of limited assistance. It is difficult, I accept, to find cases that will be on all fours with the same circumstances that exist in this case.

[22] There is agreement as between the Crown and defence counsel that the description of this event as offending that reflects a very slight digital penetration of an adult woman on a single occasion, is correct.

[23] With reference to the evidence that the victim gave which related to you rubbing cream on her after the initial touching, the Crown responsibly confirm and accept that that is not something that I ought to take into account. Rather, for sentencing purposes, given the verdicts returned by the jury, I should limit my attention or focus to the initial touching.

[24] In relation to the issue of previous good character, the Crown position is that your previous good character is unquestionable in terms of how you have conducted yourself up until now. However, the credit that can be afforded to you in respect of your previous good character is diluted somewhat by the credibility attack against the complainant during the course of the trial, as well as the subsequent actions that you took which culminated in misleading the Health and Disability Commissioner with regard to when your notes were made. I do recall that you accepted at trial that you had lied about that. What the Crown is saying is that nothing more than 20 percent ought to be afforded to you in terms of previous good character. No emotional harm reparation is sought, but it is likely that that would be accepted if it was to be ordered by me.

[25] Balanced against the Crown position are the matters put forward on your behalf by your counsel. As you know from the discussions that you have heard during the course of this hearing, what is put forward as an appropriate starting point here is a much lower starting point of between two years and two years, four months. That is at the bottom end of band 1 in the guideline case of *R v AM*.

[26] It is accepted that perhaps the cases of *R v Jackson*, *R v Fernando*, and *R v Naidu*, are only helpful to a limited extent.[4] It is submitted that these cases illustrate the approach taken by the Court when looking at breach of trust which is a significant issue in your case. It is further accepted on your behalf, that the breach of trust is of a very serious nature and second only to the type of breach of trust that might exist if there was sexual offending from one family member to another.

[27] Although there was an acceptance of a breach of trust and the harm implicit in the offending, the position advanced on your behalf was that there was no premeditation here and no particular vulnerability that the Court need take into account.

[28] It was submitted that balanced against these factors, is your previous good character in respect of which your counsel seeks a discount of 30 percent. When dealing with the Crown submissions with regard to why that level of credit would be too high, Ms Dyhrberg talked about the fact that the credibility of the complainant, although challenged, was not significantly attacked. She submitted that perhaps your actions after the event in relation to information you provided to the Health and Disability Commissioner were out of panic. She says that that should not take away from the amount of credit that you should be entitled to in relation to your previous good character and fall from grace.

[29] It is accepted by all parties, and I certainly have formed the view, that in your circumstances where you do not accept responsibility for the offending, where you say

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[4] *R v Jackson* CA 477-96, 24 March 1997 (Eichelbaum CJ, Keith and Heron JJ).
R v Fernando HC New Plymouth CRI 2004-043-002794, 15 November 2006 (Priestley J).
R v Naidu DC Wellington CRI-2009-091-002878 (Barry DCJ).

that the jury has got it wrong, that it would be problematic for me to order emotional harm reparation and I do not intend to do that.

[30] Having read through all the materials, which includes a large number of references put forward on your behalf, I note that most, if not all, of the 35 people who provided references for you seem to be aware of your circumstances. I need to come to a view as to a starting point, look at the aggravating features that I consider are present here, and then consider what discounts you may be entitled to, to come to an end point or an end sentence for you today.

[31] As I may have already mentioned, the Crown position is that a term of imprisonment should be the starting point and the end point. On your behalf, Ms Dyhrberg has accepted that whilst the starting point may well be a term of imprisonment, it is open to the Court to consider that the presumption in favour of imprisonment has been displaced, and to consider whether or not you are someone who could be sentenced to something less than a full custodial term. In the end, what she is seeking is a sentence of home detention, coupled with community work.

[32] I need to look at the culpability assessment features in *R v AM* which are mirrored by the provisions of s 9 Sentencing Act.

[33] With regard to the issue of planning and premeditation, I do not consider that your offending was spontaneous. In relation to whether or not it was necessary for you to examine the victim again on 15 December, having heard the evidence I was not entirely sure whether that was necessary. Whilst I appreciate that the evidence was something along the lines of [the female doctor] being a trainee doctor and therefore requiring a second opinion from you, it seemed to me that the physical examination of the victim had been properly concluded. As I have already mentioned, your evidence at trial was that this was a visual examination only. Of course the jury did not accept your version of events, so they must have found that there was a second physical examination of the victim. It does give rise, in my mind, to a significant question as to why on earth that second examination was undertaken by you.

[34] I do not give any weight to the issue of text messages because I did not form a clear view as to whether or not you did have an unhealthy interest in this victim, but what I am sure about is that once you had arranged for the victim to be alone with you in your exam room, you did undertake a physical examination of her in the terms that she described in her evidence.

[35] There was also the unusual situation of events happening outside of the ordinary protocols in terms of patients undressing, the position of the patient on the bed, and so on. There was no suggestion by you at trial that this was a genuine medical examination of a physical kind. As I have already mentioned, your position was that this was a visual examination only. I agree with the Crown position that there was a level of premeditation here to your physical examination of the victim in circumstances which were unusual and unnecessary, in my view.

[36] Whilst both your counsel and Crown counsel have suggested that there was no vulnerability here, I disagree with that. The victim in her evidence described being naked from the waist down, she was lying on a bed unable to see what was happening to her. She was in a position where she had her legs in the air, and it was in those circumstances that this offending occurred. Whilst I accept that, in terms of her age, she was not vulnerable, I do not accept that she was not in a vulnerable position when the offending occurred. I think physically she was, and I have also mentioned that I found her to be a particularly naive woman in terms of her own body and what ought to be happening to her during the course of a medical examination. I do find that there was a level of vulnerability here.

[37] The third matter that I take into account is the breach of trust. As has already been accepted by both parties, this was a significantly high level of breach of trust. The victim placed a high level of trust in you as a health professional, you had known her [for a number of years]. [Details deleted]. I agree with the Crown that there are very few circumstances in which a person can essentially direct another person to undress, to lie naked on a bed, for the purpose of this type of intimate examination. I agree that outside of cases of sexual offending by a family member, it is hard to imagine a more gross breach of trust. I place that aggravating feature as high, whereas

with regard to premeditation and vulnerability, I place those factors as low to moderate.

[38] It is important that I set these matters out because my views with regard to the culpability assessment features dictate where I place your offending in terms of the available range. As I have already mentioned, the Crown submission appears to be a starting point on the cusp of bands 1 and 2. Your counsel submission is that this offending is at the very bottom end of band 1. My view is that the offending falls at the higher end of band 1, but not at the highest end, and not quite at the point advocated for by the Crown. In my view, the starting point in this case should be one of three years, nine months' imprisonment.

[39] What I then need to do is consider what available discounts can be afforded to you to bring that starting point down so that I arrive at an end sentence. The most significant mitigating factor that has been put forward on your behalf is your previous good character. There is absolutely no doubt, Dr Singh, that prior to this event you had an unblemished record, you were extremely well thought of, and indeed, those sentiments still remain, notwithstanding people are aware of the position that you are now in. You enjoy a great deal of support from your family, and also from the wider community, particularly those people who you have assisted. Other mitigating factors put forward on your behalf are the care and responsibility you have for your family, the fact that you are at a low risk of further offending and that you have good support. It is submitted that a sentence of imprisonment would be disproportionately severe for someone of your age and in your circumstances and that there could be no concern about whether or not you would comply with any sentence imposed.

[40] What is sought on your behalf is a 30 percent discount for previous good character and fall from grace. Part and parcel of that submission was the prospect that the Court would impose emotional harm reparation, which is not something that I am intending to order. The distance between your counsel and Crown counsel with regard to appropriate discount is the difference between 20 percent and 30 percent.

[41] I accept the Crown's submission that there are a couple of matters that take away from your previous good character discount. One, being the fact that the

complainant had her credibility challenged at trial. I agree it was not a vehement attack, but nonetheless, it was put to her that she was making a false allegation, and certainly you would have, to some extent although it was not overt, been relying upon your own position within the community to bolster your own credibility. The second matter that I consider takes away from your previous good character discount is the fact that you accepted post-event that you misled the Health and Disability Commission by essentially failing to advise them that you had added to and changed the clinical notes relating to this event. Whether it was panic or not, it was fundamentally dishonest, and you accepted that at trial.

[42] So looking at the generous discount that is sought on your behalf, I accept that that discount would otherwise be available to you, but for the two matters that I have explained. In the circumstances, I am not willing to give you a full discount of 30 percent which is advocated for on your behalf, but instead I will afford you a discount which is around about 25 percent. This is more than what the Crown are advocating for, but less than what your counsel is advocating for.

[43] From 45 months imprisonment, I am willing to afford you a discount of 11 months' imprisonment. That brings me to an end sentence of 34 months' imprisonment, which is the equivalent of two years and 10 months.

[44] Bearing in mind the position that you have adopted in respect of the outcome of the trial, the fact that you do not accept the result and you have shown no remorse as a consequence, there are no other mitigating factors that I consider could be taken into account on your behalf.

[45] That being the case, the sentence that I impose upon you is one of two years, 10 months' imprisonment. That does not allow me to consider anything other than a full custodial term of imprisonment for you. Had the end sentence been lower I could go on to consider whether or not you were someone who could have been sentenced to a term of home detention.

[46] I have to say, Dr Singh, that even if I had come to the view that this was offending that could lead to a sentence of 24 months or less, I would not have imposed

anything other than a term of imprisonment. I do not accept that, when looking at s 128B Crimes Act 1961, the presumption in favour of imprisonment has been displaced here. There is nothing in relation to your particular circumstances or the particular circumstances of the offending and the nature of your conduct that would lead me to the view that you should not be sentenced to a term of imprisonment. I say that simply as a matter of completeness.

[47] I am not going to release my sentencing decision until we have sorted out what is happening with your permanent name suppression application. At the moment, it is very difficult to fix a date for that hearing, so I am going to adjourn that matter through to a nominal date of 10 December 2019 at 9.00 am.

Addendum

[48] As mentioned during the sentencing hearing, I have made an amendment to my sentencing notes to reflect the correct position in terms of the facts relating to physical touching. The defence at trial was that although there was an abdominal examination of the victim where touching occurred, there was no physical touching of her genitalia at any time.

[49] I have also made minor amendments to my notes to avoid repetition or to correct any grammatical errors. The decision itself and the reasons for it remain the same.

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Judge TV Clark
District Court Judge

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