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

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IN THE DISTRICT COURT
AT ROTORUA

CRI-2017-063-002302
[2018] NZDC 3956

THE QUEEN

v

ERIC KEVIN BAKER

Hearing:	2 March 2018
Appearances:	A Hill for the Crown A Ngapo-Lipscombe for the Defendant
Judgment:	2 March 2018

NOTES OF JUDGE M A MacKENZIE ON SENTENCING

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[1] Eric Baker, you appear for sentence today in relation to a representative charge of sexual exploitation of a person with a significant impairment.

[2] The timeframe of the offending is between [dates deleted]. That is the date range which is set out in the Crown charge. The maximum sentence is 10 years imprisonment.

[3] [The victim], is now [age deleted] years. She was [over 25 years old] at the time. She has a significant impairment. You would not have been privy at the time to the level of her intellectual functioning and challenges, but her IQ is very low, being

between 43 and 51. You did, however, know that she had a disability, because that is something you confirmed to the Probation report writer.

[4] [The victim] can only do very basic chores herself. She does not have any ability to live by herself or care for herself. She can do things like having a bath, making breakfast or getting herself dressed. She has limited communication skills and can read and write at a very basic level. Her memory is limited. She cannot complete basic tasks that are out of her normal routine. She cannot do a lot of things that most of us can do, for example, she cannot complete food or clothes shopping, has no concept of the value of money. Unless told not to, [the victim] would hang washing up outside when it was raining.

[5] [Personal details deleted].

[6] The Crown advises, and I accept, that whilst there is an established incident which happened [date details deleted], there must have been sexual intercourse between you and her on at least two occasions and on one occasion at least prior to the [month deleted] incident. That is because when she was examined after the[month deleted] incident, [the victim] was found to be pregnant and the pregnancy was terminated.

[7] On [date deleted], you found [the victim] walking in the CBD area of [location deleted]. She had some limited contact with you [details deleted]. You walked around [location deleted] talking before you convinced her to go to [location deleted] with you. She did not let her family know and the two of you hitchhiked to [location deleted]. You walked around the streets for the next three days living off food from organisations like the Salvation Army who paid for you to sleep at a backpackers hostel for one night and the other two nights, the two of you slept rough near [location deleted]. During this time, you had sexual intercourse with [the victim] on at least one occasion. Because of her significant impairment, she was unable to give full and informed consent.

[8] Her family initiated a search as they did not know where you were. She was reported missing to police [details deleted], police located the two of you at [details

deleted]. She was taken back to [location deleted] and reported the sexual offending later that day. A subsequent medical examination found that [the victim] had minor bruising on her legs, arms and genital area and some love bites on her neck. The examination also revealed that she was [details deleted] pregnant. As I have said, that pregnancy was subsequently aborted and forensic testing confirmed that you were the father of the unborn child.

[9] You told police that [the victim] was unhappy at home or at least she had reported that to you and had agreed to go with you to [location deleted]. You admitted you had sexual intercourse with [the victim], but said that it was consensual and that she was old enough. You described her ability to communicate and understand things as fine, although you knew she [impairment details deleted].

[10] You have previously appeared. Whilst I do not regard your historic conviction as relevant, I do regard as relevant your 2011 conviction for sexual connection with a young person.

[11] To set a starting point, I need to do three things. I need to consider the principles and purposes of sentencing. I need to consider the aggravating factors of the offending and I need to consider other cases in order to ascertain what the starting point should be and that is because there is not a guideline or tariff case for this sort of offending.

[12] The principles and purposes of sentencing are deterrence, denunciation, to promote in you a sense of responsibility, to provide for the interests of [the victim,] and there is an element of community protection as well. Those purposes are all important because the particular purpose of this charge is to protect those who are vulnerable because of their impairment from predatory sexual activity and therefore it has been established in other cases that a deterrent message should be given to those who take advantage of vulnerable persons.

[13] The aggravating factors of the offending are the following. Firstly, the extent of harm resulting from the offence. There is always harm that is inherent in this type of offending, however, there are two things that stand out for me and the first one is

the fact that [the victim] was pregnant and the pregnancy needed to be terminated. Mr Hill responsibly acknowledges that given [the victim's] level of mental impairment, that it is difficult to know what she would have understood or the types of emotional consequences, but the real harm in my view is the fact that she needed or had to be involved in an evasive medical procedure.

[14] The second aspect of harm is the victim impact statement which has been provided to the Court from [the victim's close family member]. It is a compelling statement and shows that there were significant ripples caused by this offending, not simply for [the victim] but for all around her. They were extremely concerned about the fact that [the victim] had gone missing, particularly given they were fully aware of her degree of functioning in the community. There has been a huge emotional toll on everyone, including [the victim] because she has had to have police interviews, forensic examinations, doctors' appointments and an appointment with a psychologist. Although she may well not have understood a lot of what was going on, those things have had a significant impact on her emotionally. I regard in an overall sense therefore there to have been significant harm.

[15] This is a case where [the victim] was extremely vulnerable due to her cognitive difficulties. Again, that is reflected in the nature of the charge, but what the cases do say is that a Judge looks at a person's level of impairment.

[16] [The victim] has very low intellectual functioning. Her level of functioning is consistent with a five to seven year old child. She was [age deleted] years old at the time and it is clear from everything that I have read that she was a person who was particularly vulnerable.

[17] Whilst you might not have known the complete ins and outs of all of that, you must have known that she did have some deficits because you had known her [details deleted] and you acknowledged, as I have noted, that you knew that she did have a difficulty, albeit not the full extent.

[18] The extent of the offending is the next aggravating factor. The Crown say that you had full sexual intercourse with [the victim] on at least two occasions and I will

sentence you on that basis. It is clear that you must have had sexual intercourse of a penetrative nature with [the victim] before the [date deleted] [location deleted] trip because she was [details deleted] pregnant at the time and you were the father.

[19] There is, I accept, a degree of premeditation or grooming. It is difficult to understand the full extent of the relationship due to [the victim's] cognitive limitations, however, Mr Hill submits that there were a number of interactions between the two of you and that the trip to [location deleted] needs to be seen in its own context. There is clearly some degree of premeditation in an overall sense, but it is exploitive because if this was all on the level, you would have taken [the victim] home and some appropriate arrangements would have been made to go to [location deleted].

[20] I accept therefore the Crown's submission that this was a situation which involved exploitation.

[21] In terms of the starting point, both Mr Hill and Ms Ngapo-Lipscombe have referred me to a number of cases. I need to look at other cases because there is no tariff case which sets out bands for this type of offending such as there is for rape or unlawful sexual connection offending. The tariff judgment for that type of offending *R v AM*[1] does not apply to this particular offence.

[22] The Crown submit that the starting point should be in the vicinity of five to six years. Ms Ngapo-Lipscombe says it should be in the vicinity of four to five years. She seeks to distinguish the cases which the Crown have referred me to.

[23] I am not going to go over each and every case. I am going to highlight some matters which I consider to be relevant to my assessment of the starting point. That will involve reference to some cases. The first case, and what seems to be the most well known case, is *R v McNally*[2] where there was sexual intercourse by a mature man with a woman who had a mental age of around 12 years old. She had a number of deficits, including being profoundly deaf and virtually no ability to communicate. There was intercourse on a number of occasions and the victim fell pregnant. At the

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[1] *R v AM* [2010] NZCA 114.
[2] *R v McNally* CA441/92, 6 April 1993.

time, the term of imprisonment, which was the maximum, was seven years imprisonment. The end sentence on appeal was three years imprisonment, but that was a Solicitor-General appeal and in fact the Court of Appeal said that they would not have intervened if the District Court had imposed a sentence of four years imprisonment. That of course means that the starting point in this situation is not as low as four years imprisonment, given that the maximum penalty now is higher for this offending and now carries a maximum term of imprisonment of 10 years.

[24] There are two other cases which I consider to be relevant. One is *R v Wilson*[3] referred to in the Crown submissions, and another case *R v McInnes.*[4] *R v Wilson* had some features which are relevant to your sentencing exercise. The victim had a very low level of functioning and her level of disability was to the extent that she behaved like a child aged about five years old.

[25] The issue in that case, as noted by the High Court, is that there is not much authority and as was noted in *R v Wilson,* that *R v McNally* indicated a four year sentence would have been appropriate and given that Parliament had now increased the maximum since *R v McNally* by about 40 percent, it would indicate that an appropriate starting point for an offence of this nature is in the region of five and a half years imprisonment.

[26] In *R v Wilson* itself, the starting point taken was in the region of six years or more, but there were some differences there.

[27] The *McInnes* case that I have considered has some slightly different features, but the short point is that the starting point adopted in that case was five and a half years. The extent of the offending was slightly more serious, but the victim did not become pregnant in that case and I consider that looking at *R v McNally*, *R v Wilson* and *R v McInnes*, the starting point I intend to adopt is therefore five and a half years imprisonment.

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[3] *R v Wilson* HC [location deleted] CRI-2006-019-5529, 7 June 2007.
[4] *R v McInnes* [2015] NZHC 3279.

[28] I have carefully considered the Crown's submissions that this is something that could be considered like sexual intercourse with a young person and I have reviewed those authorities and that gives me some comfort that a starting point of five and a half years, given the particular vulnerabilities of [the victim], is a starting point which meets the sentencing needs and the aggravating factors that I have referred to.

[29] The next question is whether there should be an upward adjustment to that starting point to take into account your 2011 conviction. The answer to that is that, yes, there should be an uplift, given its proximity to this offending and the need for deterrence, given the particular purpose of this legislation and that the purpose of an uplift can be to ensure that there is a deterrent sentence imposed. Therefore, I uplift that five and a half year starting point to a starting point of six years imprisonment.

[30] I now turn to mitigating personal factors. In her written submissions, Ms Ngapo-Lipscombe has sought to persuade me that there should be a downward adjustment for remorse. Remorse is inherent in a guilty plea and I accept that you pleaded guilty at an early opportunity and that you are entitled to the full credit for that guilty plea of 25 percent, but that is always the last credit to be factored in. The real issue is whether there is remorse of a genuine nature which can lead me to apply a separate downward adjustment for remorse.

[31] I read your letter. I have read the pre-sentence report, ignoring the comments about the Kia Marama programme and I have now read the updated letter. Remorse needs to be seen in its own particular context. Whilst you say you take full responsibility, you said to Probation that you do not know why she did not speak up and that from the perspective of Probation, it is their view that you have sought to minimise the extent of the offending and have justified your behaviour to indulge your sexual behaviour.

[32] I cannot consider that remorse is genuine. I am not sure that you fully understand the issues here or understand that this was a very vulnerable person who could not speak up. The summary of facts clearly shows the degree of [the victim]'s vulnerability and whilst I fully accept that you could not have known in [date deleted] the full extent of her disability and vulnerability, clearly you knew enough to

understand that she was a person who did not function well in society and had some significant deficits. It is clear, and must have been clear from the summary of facts at least, that [the victim] could not and would not have been able to speak up.

[33] I find myself unable to give you a separate credit for remorse in the circumstances. The only credit which I can see available to you is a credit for a guilty plea. You are entitled to a full 25 percent credit for that which is 18 months from that 72 month start point, which is six years. That leaves an end sentence of 54 months which is four and a half years imprisonment to be imposed in relation to the charge relating to [the victim].

[34] The next issue is the breach of protection order. That is a separate and discrete offence. It happened weeks after this offending came to light because the date is [date deleted], you were in custody and you wrote to the victim, [the second victim], a former partner of yours. She found a letter in her mailbox and the letter said that you had joined the Headhunters and threatened to hurt anyone if they were to hurt your baby. You told [the second victim] not to tell the police due to the protection order. She was fearful of this, understandably so, particularly the reference to a gang and the threat to hurt anyone.

[35] The issue for the Court is whether there should be a cumulative term imposed in relation to that charge or whether it should be concurrent. It is separate in nature to the sexual offending and therefore a cumulative term of imprisonment is warranted.

[36] Balanced against that is that I need to apply the totality principle. That means that I need to look at all the offending in the round, stand back and consider whether, if I imposed a term of imprisonment on top of the four years, that would offend against the totality principle. Whilst I do regard the breach of protection order to have some serious features because it involves a threat and significant emotional harm, it is an incident of emotional abuse. It was designed to instil fear in [the second victim] and that worked.

[37] I am not going to impose a cumulative term of imprisonment. I am going to impose a concurrent term of imprisonment, bearing in mind the totality principle.

[38] In terms of CRN ending 1043, in my view, given the serious psychological harm that it was designed to achieve, I regard the starting point to be six months imprisonment. There is a credit for your guilty plea, so that is an end sentence of four months imprisonment which is concurrent with the offending in relation to [the first victim].

[39] Eric Baker, you are now formally sentenced to four years and six months imprisonment in relation to charge 1 in the Crown charge notice, sexual exploitation of a person with significant impairment.

[40] In relation to CRN ending 1043, you are sentenced to four months imprisonment which is to be served concurrently with the four years, six months sentence.

M A MacKenzie
District Court Judge