

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

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S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE DISTRICT COURT
AT ROTORUA**

**CRI-2016-069-000949
[2018] NZDC 1054**

THE QUEEN

v

[LEWIS RAKENA]

Hearing: 23 January 2018

Appearances: A Gordon for the Crown
M Simpkins for the Defendant

Judgment: 23 January 2018

NOTES OF JUDGE A J S SNELL ON SENTENCING

[1] Mr [Rakena], you were found guilty by a jury of sexual violation by rape and now face sentence. The maximum penalty for that offence is 20 years imprisonment.

[2] The circumstances of the offending are that you and the victim consider yourselves cousins, despite being part of a more extended family. The victim was [age deleted] years old at the time of the offending and you were [age deleted] years old. On [date deleted], the victim was staying at your address, as you were going to assist her with [details deleted] the next day. During the evening, the two of you walked around and smoked some synthetic cannabis. Originally there were a couple of other

people there and then the two of you were alone. You returned to your bedroom where she was staying.

[3] At various times you talked about personal issues important to you and at trial, we clearly heard evidence that you expressed your feelings for her, which she had told you very, very clearly that she had feelings for you but only as a cousin. Once she had fallen asleep, you became aroused. You kissed her before pulling her underwear to one side and then you penetrated her genitalia with your penis, which resulted in her waking up. The penetration was not for long and you immediately withdrew and apologised at the time.

[4] You come before this Court with no previous convictions at all. You have read the victim impact statement and there is no doubt that there is quite considerable ongoing harm to the victim from your actions. She has struggled to sleep. She struggled in her relationship and that ended. She struggled to keep employment. She has had suicidal thoughts and blamed herself for what you did. She feels guilty about the breakdown in the relationships between members of her own family and your family, and these sort of actions and these sort of incidents inevitably lead to friction with the wider members of both families, and that is exactly what has happened here. She says that she has lost her trust in people and she finds it difficult to go out in public and to deal with the matters that occurred to her.

[5] To assist me, I have a pre-sentence report and that says that you have a very limited emotional maturity and very limited life experience, and I think, in an indirect way, that is one of the emphasis that your counsel puts in his submissions, is your lack of maturity. He says, and I quote from his paragraph 7, that:

“The current offending involved a single incident and the prisoner has no previous convictions. It appears that he has limited emotional maturity and is lacking the cognitive repertoire to identify social cues. He does not appear to have any real insight into his offending, however not because he denies the offending, but rather as a result of his naivety and his genuine belief that the victim consented.”

[6] Mr Simpkins has moved on partially from there to say that you accept that she was not consenting and that you had a mistaken belief.

[7] I heard the evidence at trial and what I accept is that there were no signals of consent at all, and that is clear. It is clear from the evidence that was heard at trial and it is clear from the jury's verdict that they simply did not accept that version of events.

[8] The pre-sentence report goes on to say that your ability to appropriately express remorse or comprehend insight and your limited emotional maturity also affects your aptitude to fully understand the depths of the potential short and long-term impact your actions had on the victim. It says that you do not appear to believe you should be held accountable beyond an apology, and really what I interpret the report is saying is reflecting your genuine naivety and inexperience in these sort of situations, and that came across quite strongly at trial.

[9] I have received three letters from you. One was a letter to the victim, addressed to me, which is an apology. There was a second letter written, which I have read, which you called "forward-thinking", and then a third letter which was "reflection", relating to how you thought on matters. There are two letters from members of your whanau in support of you. I have taken those into account and I give them as much weight as I can.

[10] The Crown sees a starting point for this offending as around seven years imprisonment. They see it as having a lower to middle position in the rape bands identified in *R v AM*¹, the tariff case, relating to sexual violation by rape.

[11] Your counsel identifies this matter as falling within band 1 and he submits that the starting point should be between six and six and a half years imprisonment.

[12] When it comes time to sentence you, in terms of the purposes of sentencing, I need to hold you accountable for your offending. I need to promote in you a sense of responsibility for what you have done and the ongoing effects of that. I need to uphold the interests of the victim of this offending, and I need to sentence you in a way that denounces this type of behaviour and acts as a deterrent to others, generally and also personally to you, for this type of behaviour.

¹ *R v AM* [2010] NZCA 114.

[13] In terms of the principles of sentencing, I take into account the gravity of the offending, the comparative seriousness of the type of the offence. I take into account sentencing you consistently with appropriate sentencing levels for similar offending, and I recognise that I must impose the least restrictive outcome that is appropriate in all of the circumstances that arise in this case, in accordance with the hierarchy of sentences available to me.

[14] I identify the aggravating features of the offending. First and foremost, there is the vulnerability of the victim. The victim at the time of this offending was asleep. You kissed her. You then positioned yourself over her. You pulled her underwear to the side and you penetrated her vagina with your penis. There can be no issue of consent when someone is asleep and in your original interview that was played at the jury trial, you all but recognised that she was asleep at the time of penetration.

[15] There is an aspect of breach of trust. You are her [age deleted] year old cousin. You had had a close relationship for a number of years. It is a familial relationship and she was entitled to think that she was safe staying at your home. There is obviously the extent of the harm, which is identified in the victim impact statement which I have been through and which you have read.

[16] The tariff case is *R v AM*. That identifies various bands for rape. Band 1 is offending where the range starts between six and eight years and it goes on to rape band 2, and band 3, and band 4. Rape band 1 is appropriate for offending at the lower end of the spectrum, where the aggravating features are either not present or present to a limited extent. In my view, this is band 1 offending. While there are aggravating features, the aggravating features that are present are present to a lower degree than in some cases.

[17] I have been referred to a number of cases, including *R v Akuhata*², *B v R*³, and *R v Clifford*⁴. I have also referred to *R v Taylor*⁵ and *R v Keretene*⁶.

² *R v Akuhata* [2017] NZDC 1388.

³ *B (CA862/11) v R* [2012] NZCA 602.

⁴ *R v Clifford* [2011] NZCA 360.

⁵ *R v Taylor* [2017] NZDC 4602.

⁶ *R v Keretene* [2016] NZDC 10554.

[18] My view is primarily, because this victim was asleep and was vulnerable, and because of the breach of trust involved, that a starting point of six years, six months imprisonment should be imposed. That is towards the very lowest end of band 1, and I think to go any lower than that would be to invite an appeal in this case.

[19] I turn to whether there are any personal aggravating features. There are none. So there is no uplift to that starting point.

[20] I turn to whether there are any personal mitigating features. While you are only 23, this is your first offence of any kind. You are entitled to call on that good character at this time. You are also entitled to call upon the naivety that is expressed in the pre-sentence report, and that was evident at the trial. I give you what I consider to be a very generous discount, but it reflects my interpretation of this case and the naivety involved, and that is a discount of 12 months from that starting point.

[21] That reduces the starting point from six years, six months to five years and six months. That 12 months also takes into account the remorse that you have identified through the letters that you have provided, but in cases where matters are defended, such as these, there can only be a limited amount of discount for remorse.

[22] There are no further discounts that can apply to you and the overall sentence that is involved here and that will apply to you for this offence is five years, six months imprisonment.

A J S Snell
District Court Judge