

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2014-004-013142
[2016] NZDC 3672**

THE QUEEN

v

BROCK AYTON

Hearing: 4 March 2016
Appearances: K Chang for the Crown
S D Patel for the Defendant
Judgment: 4 March 2016

NOTES OF JUDGE R J COLLINS ON SENTENCING

[1] Mr Ayton, stay seated in the meantime and at the end I will ask you to stand at that stage.

[2] You are for sentence in respect to three charges that the jury found you guilty of. They were charges 3, 4 and 5 in the Crown charge list, the jury finding you not guilty on another three charges. I simply observe at this point that there were varying reasons as to how the jury could have come to those differing verdicts, but it is not for me now to go into why that is the case. You must be sentenced in accordance with the jury verdicts.

[3] What you and everybody else in the Court need to appreciate is that sentencing today is the end of a process. The first part of that process was for a jury to decide the facts and whether the Crown had proved beyond reasonable doubt any

or all of the particular charges. As I have already noted, the jury found three of those charges proved beyond reasonable doubt.

[4] Sentencing then follows and that is the part of the process where a sanction or a penalty is imposed for your offending. It is not a process to achieve reconciliation between all the various people in this matter. It is not a process where the harm caused by your offending is to be healed. It is a process where an appropriate penalty is imposed on you, taking into account a wide range of factors that the law says have to be taken into account. It is simply beyond the power or ability of Judges to put things right for a victim. We are dealing with human affairs and that just simply is not possible. If there is one thing that Judges would wish for, but which will never eventuate, would be the ability to make things right for a victim.

[5] I need to briefly record the facts on which you are sentenced. The victim [relationship details deleted] living in suburban Auckland. As I say, I will only cover these matters briefly. There were a series of allegations. In broad terms, the three that the jury found proved were as follows. Between June 2008 or approximately that time and October 2011 you showered the complainant on a number of occasions. The shower was situated over a bathtub and screened with a shower curtain. In broad terms, and the basis on which you are sentenced, is that on a number of occasions you would rub your penis on and between her buttocks while bathing or showering her.

[6] In addition, in that same time period, there would be many occasions when she would be in your bed with you and the allegations are broadly the same in that you would rub your penis against her in the area of her buttocks and on top of the area of her genitalia. Charge number 5, which was proved as a single occasion – and Mr Patel is correct to point that out, that that was a single occasion – and again you rubbed your penis against her when in your vehicle at the car wash.

[7] The aggravating factors of the offending do overlap. Clearly, an aggravating factor is her age. She is inherently vulnerable because of her age. She was a little girl. If not implicit as a result of that, but certainly an inevitable consequence of this offending on someone of that age is that it has caused her significant harm, and

clearly that has caused a large degree of emotional trauma for others in her family. Just where the boundaries end in terms of what the law says can be taken into account in terms of harm to the victim, and just who are victims, is often difficult to delineate, and as I observed earlier we are dealing with human affairs. But Mr Patel is right to point to the decision of Chambers J in *R v Schofield* HC Auckland S5/01, 10 April 2001, and to remind a sentencing Judge that it is absolutely vital that the Judge retains objectivity and is not unduly influenced by emotion. The third aggravating factor, again which is almost inherent in the nature of this offending, is the significant breach of trust and that is the trust that a child of this age should have in someone who was in your position.

[8] Mr Ayton, I want to observe one further thing before I move on in terms of sentencing comments. It is clear from the trial, from the position that you took at trial and from the evidence that was called in the trial and from what you have told the probation officer, is that you do not accept the verdicts. That is your position and you might feel a degree of dissatisfaction, obviously, with the process and certainly the outcome. One thing I want to say is that you should feel no dissatisfaction about whatsoever, and that is the way in which you were represented by Mr Patel. You were represented by counsel with a high level of skill and conscientious endeavour, and the outcome to the extent to which it was adverse to you is no reflection on the efforts of your counsel.

[9] I observe that you have no previous convictions of any relevance whatsoever, and I treat you today as a first offender. The pre-sentence report I have read but, given that you maintain innocence, it is of limited assistance in terms of the actual outcome today.

[10] In terms of the purposes and principles of sentencing, then, they are all effectively operative today. This type of case, more than any other, brings them all into play. I am required to denounce your conduct, to hold you accountable for your offending, to deter you and others, but I am also to have regard to your rehabilitation. While you deny the offending, that will be a difficult matter indeed.

[11] I am now required to set a starting point for this offending, looking at the seriousness of it in itself and, to do that, by having regard to like cases and, then, to adjust that starting point either upwards or downwards depending on aggravating or mitigating factors as they apply to you personally. Counsel have made only brief oral submissions in Court today. That is appropriate because both counsel have filed comprehensive and helpful written submissions. They have referred me to various cases which their research suggests are the most helpful in terms of similarity to today. The Crown says that having regard to other cases the appropriate starting point here is one of four years' imprisonment. Mr Patel says that it is somewhere between three to three and a half years.

[12] In my view, I am not quite convinced that it is as serious as the case of *R v Lynch* [2014] NZHC 1788, which the Crown refers to, but I agree that it is definitely more serious than the other two cases which have been referred to, but not a great deal more so than the case of *F* (inaudible 9:43:50). Therefore, in my view, the appropriate starting point, by assessing the offending here in reference to other cases, is one of three years and three months' imprisonment.

[13] So, Mr Ayton, if you would stand please. From that starting point of three years and three months, in my view there are no factors of a personal nature which either aggravate or mitigate the offending. I accept the submission made by the Crown that the time over which this offending occurred cancels out any credit that I might otherwise have been persuaded to give for your otherwise good character and offending-free history.

[14] So, on the three charges on which the jury found you guilty, on all three you are sentence to three years and three months' imprisonment. Those terms are concurrent. That is a total of three years three months.

R J Collins
District Court Judge