

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

**IN THE DISTRICT COURT
AT HAMILTON**

**CRI-2015-039-000222
[2016] NZDC 4048**

NEW ZEALAND POLICE
Prosecutor

v

MARSHAL BRASHER
Defendant

Hearing: 9 March 2016
Appearances: Sergeant A McBeth for the Prosecutor
M Wright for the Defendant
Judgment: 9 March 2016

NOTES OF JUDGE M L S F BURNETT ON SENTENCING

[1] Mr Brasher, you are 43 years of age and you are here today for sentence having been found guilty following a Judge alone trial on five counts of indecent assault on a young person and one of indecent assault on a person over the age of 16 and it carries a maximum penalty each of seven years' imprisonment. A three strikes warning applies for each charge and you have already been given your first strike warning.

[2] So in relation to the charges the first victim in time is your cousin, Nevada Jepson. The second victim in time is your niece, 16 year old Carmella Horne. That is a representative charge and she is the daughter of your sister and the third victim in this matter is the 15 year old Alissa. She is your biological daughter and at the time of the offending lived with you and her mother. The fourth victim was a young visitor to the house on the last occasion, the young girl staying overnight.

[3] So the circumstances in relation to the first victim are that between 1 February and 28 February 2004 when Nevada was 18 she was living [location details deleted] and at that time you were also living and working there. On the particular occasion the victim was at her home address where she was living with a family member and you were visiting the house with other family members. The victim went to bed alone and she had her own bedroom. She woke later to find you lying on the bed next to her against her back and she woke and you had her hand underneath her t-shirt and bra, rubbing her breasts and stomach and attempting to go lower. You grabbed at her pants attempting to remove them and at the time not surprisingly the victim felt scared and continued to resist and to prevent you from opening her legs and removing her pants and after a period of time you stopped and left the room and the house.

[4] Then in relation to the second matter, between 9 October 2011 and 15 May 2014 you had regular contact with your niece at numerous family gatherings and at the time the victim was aged between approximately 13 and 15 years of age. And under the guise of avuncular and family greetings and hugs, you would persistently put your hand on her bottom and grope her and you repeated this conduct even if she walked by and you could be unobserved. On one occasion in family company you isolated her by a parked car and tried to grope her vagina area.

[5] Then between the dates of 17 January 2013 and 2014 the third victim, your biological daughter who was aged 14 on the first occasion that was before the Court she had stayed away from home without you or her mother's knowledge or consent and when she returned home, you took her into your bedroom, pushed her back onto bed trying to remove her pants, repeatedly forcing her back onto the bed when she tried to get up. You unbuttoned her pants and tried to remove them while she kept grabbing her pants and trying to pull them back up, pleading with you to stop and she thought you would rape her as a demonstration of what you kept saying could have happened to her. She continued to resist you removing her pants and your conduct was interrupted by the arrival of one of your sisters.

[6] Then between 17 January 2014 and 21 August 2014 when she was aged 15 during this period when she would on occasion take a bath in the bathroom, you

would enter the bathroom and on occasions talk to her about her developing body and wanted to look at her breasts, demanding that she show you. She would, not surprisingly, reject this and tell you to get out. On one occasion you crouched down next to the bath and grabbed at her breasts. She had covered herself using her arms and had turned herself to her side to prevent you from physically touching her and you did this on two occasions when in the bathroom and on one occasion after having attempted to grab her breasts when she was shielding herself from you, you cynically stood up to walk away from the bath and when she was momentarily relaxed, you turned back, reached out and grabbed her breast. Also during this period when she would be lying in bed, you would come in under the guise of talking to her or giving her a hug from behind. You would put your hand on her stomach and begin rubbing it and work your hand down towards the top of her pants and underneath her pants under the guise of some sort of innocent conversation. On one occasion you proceeded to put your hand down the top of her pants towards her vagina, so close to her vagina that she said this to the Court, she wondered if you knew her vagina was there and at times she would wake up to find you in her bedroom, even lying on her bed.

[7] Then between 1 August and 22 August 2014 the young victim who was a friend of Alissa had occasion to stay overnight. At the time this victim was 16. She was a friend of your daughters and staying overnight. This victim woke up to find you in her bedroom. You had come back into the house following [occupation details deleted] and your daughter was in the kitchen making breakfast for your two young sons. You attempted to make conversation with this young victim telling her that she should stay over more often. She text Alissa to come into the bedroom and get her and Alissa did and told you to leave the bedroom. This victim immediately got up and went into the lounge where the two young boys were eating their breakfast and she sat on the couch. You sat immediately next to her brushing your hand down her thigh and touching her leg with your hand. She asked you what you were doing and told you to stop and then you slid your hand underneath her bottom and cupped her buttock with your hand. You were disturbed by your daughter coming back into that room. She observed you removing your hand. She was naturally very upset and told you to go back to work. The young friend was also

upset and contacted her father to come and get her which he did and that is how the offending came to light.

[8] Looking at those matters, the pre-sentence report records that you still maintain your denial of the offending in its entirety. You are assessed as having a high risk of re-offending and of being at high risk of harm to others. A sentence of imprisonment is recommended.

[9] Mr Wright on your behalf acknowledges that there is no credit for remorse because you do not accept the offending and there is no remorse either. He submits that this is offending not at the high end, that there was limited skin to skin contact. It is accepted that imprisonment is an inevitable outcome given the offending circumstances and the accumulation of the offending and in particular in respect of offending against your daughter.

[10] The prosecution point to the fact that there is very little mitigation and that there is no acceptance or remorse.

[11] The aggravating features of the offending are the extent of harm to the victims. The victim impact statements made sad reading. Your conduct has divided the families as is a common outcome in the case of secret sexual offending. Your daughter has been rejected by her mother and her older sister who support you. Hence your young daughter is now deprived of the natural love and affection she could otherwise expect from her mother and her sibling and indeed from other members of the family and such alienation adds terribly to the sad burden of the young victims.

[12] As for the other young family members the victims speak of fear and isolation, divisions within the family and verbal abuse from your siblings and of course the loss of natural love and support from within their families and the wider family. So the extent of harm to victims of such offending is always extensive and is exacerbated by the removal of the natural love and affection from other members of the family which young people need. They need the support as you would expect of any parent or sibling within their wider family structure, they are denied this.

[13] There is also, of course, the abuse of trust. You were an older relative, male relative, either an older cousin or an uncle and a father. There is the vulnerability of the victims. They are faced with an older predator within the family, they are isolated and they know that the consequences of revealing your offending will have extraordinary repercussions and of course they are youthful as well. There is the premeditation on your behalf in disguising the offending and isolating the victims. There is skin to skin contact as well.

[14] As for mitigating features of the offending, there is none. There is no guideline judgment for this type of offending. However the Court of Appeal in *R v H* in 2005 does state that whilst there cannot be a tariff for such a broad variety of offending such as make up the charge of indecent assault, the range of imprisonment is somewhere between six months and two years and in *R v S* a Court of Appeal decision of 2006 the Court stated:

Imprisonment will usually be the only appropriate sentence for sexual offending against children.

[15] Cases considered are *Kumar v R* [2014] NZCA 489. Mr Wright on your behalf has referred me to *R v Johnson* [2010] NZCA 168; *Faapua v R* another Court of Appeal decision of the same year; *R v Misileki* [2008] NZCA 513; and *R v Burdett* [2009] NZCA 366.

[16] Defence submissions identify the lead charge as those against your daughter. In written submissions, Mr Wright has submitted that there was an element of discipline in the event that took place in your bedroom. I do not accept that any right thinking father would attempt to discipline a young teenager, male or female, in that way of trying to remove clothing and forcing them back on the bed in that sort of way. I do not accept that at all. Whilst I accept that the events in the bathroom might not have been prolonged, they were nevertheless persistent and in relation to touching your daughter, she described your hand as being “right there” and she indicated with her finger, being so close to her vagina, it caused her to wonder if you actually realised she had a vagina which of course is a reflection also of her youthfulness and extreme vulnerability.

[17] The approach to sentencing is a starting point of the offending against your daughter with an uplift for the other offending and Mr Wright acknowledges that imprisonment is an inevitable outcome and seeks a starting point set out in the written submissions.

[18] As I say I have not accepted the defence gloss on some matters and at the end of the day a starting point not too far apart is appropriate but includes an uplift. I would take the lead offence against your daughter to be a start point of between 20 months and 24 months with an uplift of six months for the other offending which would be a starting point of between 24 and 30 months in total and I am satisfied that the end sentence is two years and four months taking into account all of the offending.

M L S F Burnett
District Court Judge