

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

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS, OF APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PROHIBITED BY S 201 OF THE CRIMINAL PROCEDURE ACT 2011.

**IN THE DISTRICT COURT
AT OPOTIKI**

**CRI-2015-047-000517
CRI-2105-047-000513
CRI-2015-047-000516
CRI-2015-047-000514
CRI-2015-047-000515
[2016] NZDC 5445**

THE QUEEN

v

**TAMA PARATA
MICHAEL DYKSTRA
HEKI PHARLAIN
LUCAS HERBERT
THOMAS ANDREWS**

Hearing: 31 March 2016

Appearances: G Hollister-Jones for the Crown
G McArthur for the Defendant Parata
D Bates for the Defendant Dykstra
G Tomlinson for the Defendant Pharlain
G Tomlinson on behalf of R Gowing for the Defendant Herbert
W Nabney for the Defendant Andrews

Judgment: 31 March 2016

**RULING OF JUDGE L M BIDOIS
[ON S 106 APPLICATION]**

[1] I am dealing with five young defendants at a single sitting – Mr Tama Parata, Mr Thomas Andrews, Mr Lucas Herbert, Mr Michael Dykstra and Heki Pharlain.

[2] Mr Andrews faces sentence, having pleaded guilty to two charges of sexual connection with a young person, relating to two separate young persons. Each of the other defendants face a single charge of sexual connection with a young person.

[3] Despite some commonality, such as the fact that they all come from Opotiki, went to school here, they are known to each other, there is similar type behaviour, each is obviously to be dealt with separately.

[4] In relation to these matters I do not go into the facts in any significant way, principally to maintain the integrity of the female young persons.

[5] For Mr Parata, he and the young person had sex on three separate occasions, all consensual. Once after a party when they went to the young person's address. Both wanted it, both knew it was right. One occurred after a school ball. The young person was 14 at the time, Mr Parata was 17. The third occasion occurred at a friend's address when the young person was 15, the defendant was 18. The young person was interviewed by police. She states she was not pressured into having sexual intercourse. She did not regret it. She knew what she was doing at all times and did not want to be classed as a victim.

[6] In relation to Mr Andrews, the first young person had been in regular contact with him at school via text message and Facebook. They had sex together on five occasions over a period of time. They had discussed the matter prior to having sex and had planned the occasions that it occurred. She was 14 at the time, he was 17. At a later time he had turned 18. All occasions were consensual.

[7] The second young person, she and a friend snuck out of their house one night, met the defendant, consensual intercourse took place. They continued to contact each other via text message, Snapchat and Facebook. That young person was 14. Mr Andrews was 18.

[8] For Mr Lucas Herbert, the young person was visiting at a friend's place for a sleepover. She and the person she was staying with had been in communication with Mr Herbert and an associate via text message and social media. They made arrangements to be picked up. The young person and her friend snuck out of the house, met up with Mr Herbert and an associate. They engaged in sexual intercourse in a vehicle. She was 14, Mr Herbert was 18. That of course was consensual.

[9] For Mr Dykstra, the young person that he engaged in sexual encounter was a friend of the most recent young person I have referred to. They were picked up by Mr Dykstra and Mr Herbert and they engaged in consensual sexual intercourse in the car.

[10] Mr Pharlain, the position for him was that the young person and he were involved in a relationship for five months. They kissed. Initially when spoken to the young person said it did not go past kissing. She was subsequently re-interviewed by police. She acknowledged that she had slept one night in the same room as Mr Pharlain, that he touched her and had digitally penetrated her for a short period. She was 14, Mr Pharlain was 18.

[11] In relation to these matters each and every one of the defendants was charged and appeared in Court on 3 December last year. Four pleaded guilty on 21 January and were remanded directly through to today for sentencing and consideration of s 106 applications for discharge without conviction. The fifth defendant pleaded guilty on 4 February and was remanded through to today with a pre-sentence report being called for. All were referred to restorative justice.

[12] I subsequently released a minute directing that some community work be undertaken, that some assessment be done by a counsellor to assess whether they posed a sexual threat in the future and arrangements for emotional harm reparation were to be put in place, if the Court considered that appropriate.

[13] In relation to these matters I have a vast quantity of material relating to each of the defendants.

[14] In relation to each of them the Crown has filed written submissions and I have heard from Mr Hollister-Jones. On a general approach the Crown adopts a neutral position on whether a discharge without conviction is granted. The Crown submits that that will require a facts specific enquiry and the Court's assessment as to the exercise of its discretion.

[15] The Crown has helpfully provided the three stage test that is required and authorities that are relevant to each of the steps that the Court needs to go through.

[16] On a general analysis the Crown accepts that the facts of the present case are distinguishable from those in *R v Johnson* [2010] NZCA 168 where the usual aggravating factors such as large age disparity, abuse of trust, grooming or demeaning behaviour are not present. This situation involved school aged young persons, both male and female, engaging in consensual sexual connection, mostly on a single occasion. In relation to others on a few occasions and for one of the defendants with two separate young persons.

[17] It was accepted by the Crown that in terms of gravity and the factors that are relevant to that assessment that generally there were single occasions of sexual intercourse, no element of predatory behaviour and no significant age discrepancy. There was a general acknowledgement that each had pleaded guilty. There was remorse, apology, offers of emotional harm reparation, attendance at restorative justice or being willing to do so, counselling assessments had been done for four of the five and that there had been voluntary community work undertaken. There was then acknowledgement of the specific factors relevant to each of the defendants.

[18] For Mr Parata I have received written submissions and heard from Mr McArthur. He applies for a s 106 discharge. He says that the two have known each other for many years. There was an affection that developed between them that led to stronger deeper feelings which ended up resulting in a sexual encounter. He was 17 at the time, he withdrew from school, he withdrew socially and suffers from anxiety. He submits that given the psychological report that has been provided that he is no threat to young girls. Very remorseful. He is a highly regarded young boy in the community. A number of character references are attached.

[19] In relation to the effect a conviction will have on the defendant, matters raised are [details deleted]. He wishes to pursue a career [details deleted]. He wishes to apply for scholarship tertiary education which will be blocked through conviction. He is currently employed and he also seeks name suppression.

[20] In relation to this defendant we heard from the young person who is named in the charging document. She bravely read out her victim impact statement, for want of a better description, and shared her personal views as to how this defendant had treated her; that she was a willing participant in what occurred and she clearly does not seek a conviction as a person who has been affected by this offending. There is affidavit evidence in support of Mr Parata as well.

[21] For Mr Andrews, there are written submissions filed by his counsel. I have heard from Mr Nabney. He likewise seeks a discharge without conviction. He gives some background to the relationship between the defendant and the young person. He says that it is going to have a huge effect on his future. He is only beginning to embark on his chosen career and if convicted that will have a significant impact.

[22] Matters raised include guilty plea, 18, no previous. He passed his NCEA exams and he is now attending [name of university deleted]. He likewise seeks name suppression. Publication would cause extreme hardship to himself and family. There are again affidavits attached together with references that are relevant.

[23] For Mr Herbert, a probation report was called for him. That tells me he is 18 years of age. He showed remorse, had good insight into the effects of his offending, willingly participated in restorative justice and assessed as a low-risk re-offender. He appeared to live a structured prosocial lifestyle. He is in full-time employment [job details deleted]. He showed maturity during the interview process.

[24] I have received written submissions on behalf of his lawyer and heard from Mr Tomlinson in relation to those submissions. He likewise seeks a discharge without conviction. There is content in the submissions which puts the context of the offending into some perspective. It clearly shows that it was an informed decision by the young person. There is evidence relating to travel, work, sporting

prowess, sporting pursuits, family, the impact that has had on Mr Herbert. It is likewise supported by a number of references and assessments relating to him. There is also a psychological assessment which puts him in the low-risk category.

[25] For Mr Dykstra, I have received written submissions from Mr Bates and heard from him. He submits that a discharge without conviction should be granted. The defendant was 17 at the time. He is [job details deleted]. No previous convictions. He is extremely sorry. He is anxious about the possible consequences of a conviction. He is prepared to pay emotional harm reparation. He acknowledges he should not have engaged in this conduct. It is highly unlikely that there will be repetition. Very low risk of seriousness. He wanted to attend restorative justice. There is an absence of relevant convictions. The consensual nature of the sexual activity. Excellent background, sporting achievements, permanent employment, all support a discharge without conviction. He says that he also seeks name suppression.

[26] Finally, for Mr Pharlain, I have received written submissions from his counsel and heard from Mr Tomlinson. His submissions include a description that the summary of facts was a blunt and unremarkable description of the act that made up the completed offence whilst ignoring the more restrained behaviour of the defendant and the contributing actions of the young person. That relates to the defendant and young person being in bed together, although it is accepted that there was digital penetration for a very short period of time. There were requests for other sexual activity. The young person said no and that was respected by Mr Pharlain who did not pursue his own desires even though he would have been in an excitable state. He was prepared to respect her wishes. They met at touch. There had been text messages to go out together over a period of time. Their relationship had ended amicably without any serious sexual contact, albeit they continued to contact and then on a single night they met at an address and this encounter took place which was again consensual.

[27] He sets out his personal circumstances. He talks about the international travel situation, the labelling of the defendant as a sex offender if he gets convicted, the impact on employment options and educational options. It will impact on future

relationships that he might form with a female in the future. He was only 17 at the time. He likewise seeks name suppression.

[28] In relation to some of this offending there have been victim impact reports provided. I have of course heard directly from one of the young ladies. In relation to another, a mother and the young person provided victim impact statements. They describe generally the social impact that this disclosure has made. There has been negative impact from, as usual, uninformed parts of the community and it has had a significant impact on them. Very little of that statement it seemed to me was directed at the offending but it has been more a response to the community reaction.

[29] Another mother of a young person said that she feels that things have been blown out of proportion. The young person does not feel that she has been victimised as a result of what happened between her and Mr Pharlain, that it was only when the media got involved that it caused problems for her and the family. They wanted to resolve the matter internally but the mother felt that this has put a big rift through the town and they just want it all over and done with and so that everyone can get back to their normal life. For Mr Pharlain also there is a counselling report from Whakatohea Social Services.

[30] Each of the defendants attended restorative justice, either interview or full hearing in relation to these matters. There is some important material that has emerged from those conferences.

[31] For Mr Parata, it says that the young person attended together with her mother. Mr Parata apologised to her. The young person did not view herself as a victim and described her relationship with Tama as beautiful and both her and the mother believe that Mr Parata should not have been charged. There were comments relating to how they felt treated, which are certainly rather sad to see and as far as they were concerned Mr Parata had not done anything wrong.

[32] For Mr Andrews, the two young persons were not invited to the conference. The mother said it has not been easy for the family. No counselling had been offered to anyone as far as she was aware, that there had been a relationship between the

defendant and the young person. The defendant acknowledged his behaviour was wrong. There had been harassment within the community.

[33] For Mr Herbert, the young person attended. Mr Herbert described himself as young and dumb. His mother was concerned about wrong actions. Mr Herbert expressed remorse, offered no excuses and he wanted to meet with the victim. Apologies that the young person did not attend that conference.

[34] For Mr Dykstra, Mr Dykstra acknowledged that what he did was wrong. He described the relationship with the young person as normal. There was conversation about sex and they did it. He was sorry for his actions. He would like to meet with the victim and her family so that he could apologise to them in person. It was recognised that he had expressed genuine remorse.

[35] For Mr Pharlain, Mr Pharlain acknowledged his wrongdoing and expressed remorse. The young person was present. He apologised to her and her mother for his offending behaviour. The mother felt that Mr Pharlain was already being punished and he should be discharged without conviction. The mother said that they had agreed to come to build bridges. They did not like the name “victim” being attached to what had occurred, that this was described as a couple of kids making mistakes and went on to express concerns about what has happened within the community. There was acknowledgement of wrongdoing, apologies and genuine remorse expressed by Mr Pharlain.

[36] In relation to these matters the aggravating features that I see that are applicable to all defendants is the effects that the offending has had on the victims. I will come to that shortly. I have already referred to the victim impact statements and the references to restorative justice reports. There is the vulnerability of victims that is brought about by being underage but that has to be recognised as inherent in the charges. I need to say something shortly about the use of the term “victim” and “vulnerability”.

[37] The mitigating factors are strong. There were guilty pleas, remorse, apology, family support, restorative justice was either attended in person or pre interviews. There are offers of amends. All are first offenders.

[38] I have to assess the overall seriousness of the offending. Generally where there is a significant age disparity between offender (who is someone I view as being over 20) and school girls, sentences of imprisonment are seriously considered despite the consensual aspect of this type of offending. The traditional approach is that young people consenting need to be protected from themselves. In this case there is no significant age disparity; all participants were school students at the time, therefore all sentencing options are open to the Court.

[39] I need to comment on some matters, albeit they may well be personal opinions.

[40] There is concern expressed as to the handling of the case, particularly by the school and the police. I do not know what the mechanics were of the investigation but irrespective of that what happened was some trigger occurred that caused an enquiry, investigation to be undertaken which resulted in criminal offending being uncovered and what the focus should be on is of course that there was criminal offending and by the fact that you have all pleaded guilty there is recognition of that. It may well have been handled differently or in a better way but that is not for me to comment on because I do not have all the facts.

[41] We can be critical of such action but usually it is a subjective view. All organisations like schools, teachers, board of trustees and police have all now become pretty much risk adverse. If no action is taken and a complaint is made or the media get hold of it then generally heads roll. If decisions were made in a less risk adverse climate and given the generous attitudes of the female young participants and their families other pathways could well have been undertaken. You can blame the Roast Busters not the officials for the approach that has been taken. As already stated crimes were uncovered, prosecuted and have now been admitted. Fortunately for you there is a sentencing exercise that needs to be conducted which can consider wider issues.

[42] When a person is named in a charging document in the text part we conventionally refer to them as victims once the charge is admitted. In this case there has been reference in the summary of facts to victims and also to victim impact statements. In relation to all the material that I have seen they have all been willing participants and of course some have challenged the description of being a victim almost to the point of being insulted. I admire the tenacity of those who have stood up and have confirmed that this was consensual and that it was informed consent. [It has] certainly taken some courage and bravery for the young person to come to Court today to read out her statement and for others to take similar stands in the restorative justice process.

[43] They are however victims because of what has happened. They have been identified in the investigation. They have been subject to interviews. They have been named in the charging documents that the police laid. They have been referred to by name in the summary of facts and victim impact statements were requested. They have actually become victims of the system. They have had to disclose incidents which they would have expected to be private. It has caused huge embarrassment and I suspect some humiliation and that was again echoed this morning when personal communications, texts or whatever they are, were read by police and the person interviewed about that. For all those matters there would have been a huge expectation around privacy and there was also reference to the fact there has been very little support been offered to the young persons. If that is the case then hopefully it will be rectified.

[44] Vulnerability is always a concern when dealing with young persons. In this case there is no question of grooming or predetermined plans to embark on having sex with young persons. This is very different from the Roast Busters situation. There was no plying of alcohol, getting the young persons drunk to disinhibit their behaviour and then take advantage of them.

[45] In this case incidents of sex taking place were at the young person's own home or in a car, having snuck out of a house, during boyfriend/girlfriend relationships, et cetera. Maybe the law needs to be revisited or at least the sentencing approach to these types of things needs to be reassessed. In a lot of ways

the world has changed but underage sex has been around for a long time. I know of a relationship where a girl, under 16 at the time, sexual relationship, been married and still together after 36 years. You have heard of school yard relationships continuing for years to come.

[46] Under s 107 the Court shall not discharge an offender without conviction unless the Court is satisfied that the direct or indirect consequence of conviction would be out of all proportion to the gravity of the offence. This involves a three-step approach – gravity, consequences and proportionality.

[47] In terms of gravity consent is not a defence but is relevant to gravity. All young persons were consenting. Aspects of ignorance by defendants about the law, or at least the consequences of their actions was evident in the interviews that I have seen or the comments made. Absent vulnerability and disparity of age, the gravity is low.

[48] As to consequences, there are huge consequences. You cannot overlook the impact a conviction has on anyone, let alone a young person. You cannot overlook the impact of a conviction for a sexual offence on one's record. The impact reaches employment, study, travel, future relationships and sports. At the moment there are short-term and long-term goals for each of you. Some of you have career paths that are being determined at the present time. No-one can foresee the future but I am satisfied that employment options will be seriously harmed in relation to convictions of a sexual kind, as will study, and it is no use studying for something where a character assessment is required to hold a certificate to practice something like law or to hold an important position. There are travel restrictions on people with sexual convictions. I accept that it will have a serious impact on future relationships when you have to explain to a future girlfriend or potential spouse that you have this conviction in your background.

[49] Those are all physical things. There is the emotional stress that some of you have undergone since this prosecution. [Details deleted]. Some of you have not performed as well as you might have expected in exams and no doubt the pressures and stresses in relation to these charges have had an impact on that.

[50] One cannot undermine the impact it has on the emotional effect it has on a person. Self-esteem, depression, that labelling effect of being a sex offender. It is described as sexual connection with a young person. It does not say how old they are or how young they are. There is the wider impact on the family. We do not live in a vacuum and this type of offending people will say, unfairly and improperly, that it reflects the family, but that is not true, but that will be a consequence.

[51] As to proportionately, so there are direct and indirect consequences of a conviction. In relation to the discretion, the proportionality, all of you are young, all are first offenders, all have accepted responsibility, all have completed 50 hours of community work, which is some accountability, in a short space of time, which is consistent with all the characteristics and traits that I have seen in the reports that I have received. All prepared to make amends or have done so. All have provided some insight into the offending and none pose a future risk.

[52] We all make mistakes. The question is how big is the mistake? In this case each of you had sex with a young person. You are all young men and half of that or most of that is human nature. The young female persons seem to me to be all robust kiwi girls who are generous in their attitudes towards you. Each have reaffirmed that it was consensual informed decisions that they have made and none were forced into a position or made vulnerable.

[53] When one measures that with what has happened, in terms of the gravity and the impact it will have on your lives, in my view that would be disproportionate.

[54] Each of you will be discharged under s 106. Four of you, apart from Mr Andrews, will be ordered to pay emotional harm reparation of \$500. That will go to the young person. If that person considers that they do not want the money then that can be paid to a charity. It is not to be seen in any way as something they had asked for; it is something that I direct because they have suffered some emotional harm as a result of this offending. Not the direct consequences but the indirect of what has happened within the community.

[55] That then brings me to the issue of name suppression. The law around name suppression or the principles around name suppression have tightened up,

regrettably. The starting point is of course that there should be open coverage of offending within the community. For each of you it is well known what you have done within the community and so that negates against suppression. In relation to the charging document the Crown prosecution notice do not refer to the young persons by name, just called young persons, and so that again negates against suppression.

[56] One cannot overlook some other factors. Each of you are 17 or 18 years of age. You have all got to go out into that big wide world for many many years to come. There are enough problems out there to cope with without your name being splashed all over the media. There are huge risks of this offending being misinterpreted. That has already been demonstrated by some being called rapists. It is echoed in some of the victim impact statements where even the young persons have been victimised by the public who are misinformed and jump to the wrong conclusions.

[57] In relation to this matter there is, not only because you have received discharges without convictions which will be somewhat undermined if there was publication, but the reality is that you need to rebuild your lives after the ordeal of the last four, five months.

[58] You must all accept responsibility because what you did was criminally wrong but the reality is you have suffered enough and again I repeat this offending does not happen in vacuum, it has impacted on other family members but it also has impacted on the young person's family. In my view, when you look at overall circumstances of each and every one of your case, there is extreme hardship that has been established, given the material that I have read and the submissions from counsel and so there will be final suppression of your names as well.

L M Bidois
District Court Judge