

**IN THE DISTRICT COURT  
AT TAURANGA**

**CRI-2015-072-000007  
[2016] NZDC 3709**

**THE QUEEN**

v

**JULIAN PAYNE**

Hearing: 3 March 2016  
Appearances: S Christensen for the Crown  
C Tuck for the Defendant  
Judgment: 3 March 2016

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**NOTES OF JUDGE T R INGRAM ON SENTENCING**

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[1] Mr Payne, you are sentence today following a sentence indication which I gave on 30 September last year, in which you subsequently accepted.

[2] The matter was originally dealt with in Hamilton and following your acceptance of the sentence indication, one of my brother Judges there has taken the view that sentencing should be conducted by me, in view of the conclusions that I reached in the sentence indication process.

[3] Accordingly, you are here today for sentence in relation to three charges of indecency with a girl under the age of 12 years in each case and indecent assault.

[4] There are two charges of sexual violation by unlawful sexual connection involving a digital penetration of genitalia and one charge of sexual violation by unlawful sexual connection involving penile penetration of the anus of a girl.

[5] The circumstances of your offending are well known to you and I do not consider that any great purpose is going to be served by detailed recitation of what occurred.

[6] You are the half-brother of two victims and a cousin of the others. All these incidents relate to circumstances that arose out of the family connection and all of the victims were aged 12 years or under at the time of the offending.

[7] As far as the indecent assaults were concerned, they involved matters where you rubbed your penis between the buttocks of one of the girls.

[8] In relation to another incident, you rubbed the child's vagina on the outside of her clothing. As far as the sexual violation is concerned, there are two incidents of digital penetration of the girls and on another occasion you removed the pants from the girl and penetrated the anus of the girl with your penis.

[9] You were, at the time, just barely a teenager. You were born in 1989 and these events variously occurred on different dates between 2001 and 2007 respectively.

[10] In each case the girls were young, seven or eight years of age mostly and it goes without saying that that offending is of course serious indeed.

[11] You have no relevant convictions. Unhappily in this case I do not have the benefit of victim impact statements but for reasons which will become obvious, I have absolutely no doubt that there have been and will continue to be a psychological damage attaching to that offending in relation to each of your victims.

[12] I have received a probation report on you, which I regard as favourable. Inevitably it recommends a sentence of imprisonment, having regard to the seriousness of these charges.

[13] As I have already said, I conducted a sentence indication hearing and I have the benefit of detailed submissions from Crown and from the defence at that time and I gave a sentence indication which involved a 10 year starting point on the most

serious matter. I indicated a 25 percent reduction for guilty plea and a 40 percent reduction for your youth at the time.

[14] It is worth mentioning that you represent a very considerable problem for a sentencing Judge. The difficulties attaching to the assessment of sentence for someone in your circumstances are always significant. The reality is that you currently lead a good life, you are a working man. You have settled down, you have caused no trouble and you represent no obvious threat to the rest of the community.

[15] As against that, these offences are indubitably serious and had they been committed when you were your present age, you would be facing a substantial sentence of imprisonment in the order of eight to 10 years in my view.

[16] I consider that the practicalities of assessing sentence in your case is such that you represent an archetype for consideration of sentencing considerations for a sentencing Judge.

[17] Your offending occurred well before the leading case, which now applies in sexual sentencing, which is *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750 which came out in 2010. Although that case came out long after your offending was finished, it nevertheless seeks out, in detail, the considerations applicable to sentencing in cases of this kind.

[18] Clearly, your victims here were vulnerable, they were family members, they trusted you and you breached that trust. Although I do not have victim impact statements before me, I am prepared to accept that it is most unlikely that they will have avoided the kind of harm that I see so often in the many cases that come before me. I consider they are highly likely to have suffered psychological damage, which may well be will them for many years, or indeed, for the whole of their lives.

[19] Although there is more than one complainant and the offending was spread over a period of time, it is nevertheless in the greater scheme of things, not of a particularly large scale, this offending, the degree of violation was particularly high

in the case of one victim and in others it was reasonably high and others it was relatively low.

[20] In my view, it is helpful to consider where this offending would fall, in the bands recognised by the appellate Court in *R v AM*. Having regard to all the circumstances, I have to come to the conclusion that this case properly falls towards the lower end of band 3 for unlawful sexual connection cases, as identified in *R v AM*.

[21] I note that those guidelines were specifically identified as requiring to be applied flexibly, with an evaluative assessment of culpability in each case and it is the view I have taken that this is not a case for a simply count aggravating factors.

[22] It seems to me that the overall matrix in which this offending presents fairly falls within band 3, but not particularly high in band 3.

[23] You also, of course, present at 26 still, a young man. As the appellate Courts recognise in *Churchwood*, offending which occurs when the offender is young and in respect of which a sentence is being imposed while the offender is still relatively young, requires a Court to have a close look at prospects for rehabilitation. In your case, it seems to me that there are good prospects for rehabilitation and the research that is available, at present at least, indicates that the prospects for rehabilitation are enhanced when rehabilitation is undertaken, in the setting of a sentence of home detention.

[24] For reasons which I will explain, I do not consider that a sentence of home detention is available to me to impose upon you today, having regard to the seriousness of the matters and the matters that I am required to take into account.

[25] Nevertheless, I record that, were home detention available, in your case, I would unhesitatingly prefer to sentence you to a sentence with a primary objective of rehabilitation and that the rehabilitation carried out, at least initially, within the bounds of a sentence of home detention.

[26] The Sentencing Act 2002 requires me to take a number of matters into account. Firstly under s 7, I am required to hold you accountable for what you have done and promote a sentence of responsibility in you. Fortunately, you have accepted responsibility and I consider that you have done all that you can to accept responsibility.

[27] I need to take into account the interests of your victims, denounce your conduct, deter you and others with the sentence that I impose. The community needs protection from people inclined to commit offences of sexual nature. As s 7(1)(h) of the Act points out, I need to consider prospects for your rehabilitation and reintegration into society.

[28] Under s 8 I take account of the gravity of the offending and the comparative seriousness of the type of offence. I need to be consistent with sentences imposed in similar circumstances on others. I need to consider the effect on the victims and impose the least restrictive outcome that is appropriate in the circumstances in accordance with the hierarchy of sentences.

[29] In this case you have also offered to undergo restorative justice. That offer has been rejected by your victims.

[30] Turning to the aggravating features of the offending. Obviously your victims were very young and accordingly, very vulnerable. It is a situation in which you were trusted to look after these girls and you have abused that trust and as I have already observed, a case of this kind almost invariably results in substantial psychological harm to the victims.

[31] In mitigation, there is a good deal that can be said. Firstly you were young at the time, barely above the age of criminal responsibility. You are entitled to credit for your guilty plea, you have demonstrated good character in all other respects of your life and you have had a number of disadvantages in your childhood. You have a background yourself of some abuse.

[32] All of that, in my view, requires to be recognised by me in sentencing.

[33] In my view, the lead charge on this collection of offences is charge four, charge of sexual violation by penile penetration of the anus. Having regard to the age of the complainant and the relatively limited duration of the behaviour, it seems to me that an appropriate starting point on that charge would be a sentence of 10 years imprisonment, given that the maximum is 20 years.

[34] There are no aggravating factors applicable to that particular charge other than the ones that I have mentioned and I do not consider that any uplift is appropriate for totality over all of this offending. I regard it as being a related course of conduct, even though it was spread over a period of years.

[35] I offered you a 25 percent discount for your guilty plea. I do so for several reasons. The main one is that, despite the lateness of the plea, it was not immediately before trial but nevertheless it was well after the process of getting the case ready for trial had been undertaken. You sought a sentence indication and have accepted that indication.

[36] Having been on the bench now for something more than 10 years, I discover that I have now conducted something in the order of 85 trials involving sexual offences. Many of those with multiple complainants. I have seen more than enough of those complainants in Court and the trauma occasioned by the giving of evidence in such trials to persuade me that there is a substantial emotional advantage to the complainants and an advantage in terms of improvement in rehabilitation prospects for an offender flowing from the admission of guilt before trial, and of course a substantial advantage for the community in general in avoiding the wider financial and emotional costs of trial.

[37] All those advantages appear to me to be so substantial that I am prepared, in your case as I have in others, to offer a full 25 percent discount for a guilty plea, which I consider to be justified by the factors that I have mentioned, even though the plea has not been entered as soon as possible and in some cases the plea has not been entered until shortly before trial.

[38] It is on that basis that 25 percent discount has been offered.

[39] I turn now to the discount for your youth. That is a difficult matter in particular, *Churchward v R* [2011] NZCA 531 is a case which has received a good deal of consideration and I have certainly given it careful consideration. The authorities seem to indicate that a discount of up to 50 percent can be allowed for youth at the time of offending.

[40] In your case, some of this offending occurred when you were in your mid teens. The last offence seems to have occurred when you were about 17 years of age.

[41] In all those circumstances, I do not consider that a discount of 50 percent is appropriate. I consider that a 40 percent discount is as much as I can reasonably advance to you, given that the offending occurred over a period of time, as you were maturing and it continued until well after you reached the age of criminal responsibility.

[42] If I stand aside from those matters and consider what else I can offer by way of a discount, I have had the advantage of a supplementary memorandum from your counsel, Mr Tuck. A psychological report has been prepared by a registered clinical psychologist and it outlines for me, a number of details in relation to your childhood, your background and your psychological makeup, which certainly provides me with context for the offending.

[43] It is clear from that document that you had a number of difficulties in the course of your childhood, which many people do not and you were yourself, abused.

[44] It is also always open to a Judge to recognise an offender's otherwise good character. In your case, that good character has prevented you from offending other than in this way since your last offence for which you are being sentenced today. You have now gone some 10 years without otherwise offending.

[45] Looking at the arithmetic therefore, in relation to the most serious charge, which is the charge for, as I have indicated, I take a starting point of 10 years, which is 120 months. If I allow a 25 percent discount, that brings me to 90 months. If I

allow a further discount of 40 percent for youth, that takes it down to 54 months, which is of course four years and six months. I am prepared to allow you a further 10 percent of that for the difficulties in your childhood and your generally good character otherwise.

[46] That does not quite produce six months but I would round up the discount allowed for those factors to a total of six months and that produces an end sentence of four years.

[47] I do not consider that, in good conscience, I can offer you any further discount for other matters.

[48] Accordingly, on charge four, you will be convicted and sentenced to imprisonment for a period of four years.

[49] I note that you were too young and this offending precedes the stage at which a warning would have been required under the three strikes regime.

[50] Turning to the other sexual violation cases, I consider an appropriate starting point in all the circumstances would have been five years on those matters. I would allow again discounts of 25 percent for plea, 40 percent for youth and a further 10 percent. The arithmetic there would produce a sentence of slightly more than two years and I would reduce it to two years overall simply to round it out by a matter of weeks.

[51] Accordingly, on the two sexual violation cases, you will be convicted and sentenced to imprisonment for a period of two years. That is on charges two and six.

[52] The charges of indecent assault, again I consider the discount rating that I have mentioned applies, 25 percent for plea, 40 percent for youth and 10 percent for the difficulties of childhood and good character. Again, rounding those off in your favour, that would produce a sentence of nine months' imprisonment.

[53] Accordingly, on charges one, three and five, you will be convicted and sentenced to imprisonment for a period of nine months.

[54] As I mentioned to counsel, absent charge four, I would otherwise have found myself in a position of imposing a rehabilitative sentence under a home detention regime. I would prefer to do that because the statistical evidence supports a conclusion that your prospects for rehabilitation, for a relatively young first-time offender, are much better in a setting of home detention. For the reasons I have given, I consider that sentence if not available to me today, given the view that I have taken on charge four.

[55] For those reasons Mr Payne, you are convicted and sentenced to imprisonment as I have indicated, for four years on charge four and on the other charges, two years on the sexual violation charges, then nine months on the sexual assaults.

T R Ingram  
District Court Judge