

**THE IDENTITY OF THE ACCUSED IS PERMANENTLY SUPPRESSED TO  
PROTECT THE IDENTITY OF THE VICTIM.**

**IN THE HIGH COURT OF NEW ZEALAND  
NELSON REGISTRY**

**CRI 2012-042-473  
[2012] NZHC 3544**

**THE QUEEN**

v

**M**

Hearing: 19 December 2012

Counsel: J Webber for Crown  
J Sandston and M Vesty for Accused

Sentence: 19 December 2012

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**SENTENCE OF SIMON FRANCE J**

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[1] Mr M, you stood trial on a number of charges of sexual offending against a girl aged 15 to 16 who was living in your house at the time. You disputed any sexual activity occurred before the complainant turned 16, and said that thereafter a consensual sexual relationship occurred between you.

[2] You were convicted on some charges and acquitted on others. The pattern of verdicts is readily explicable. The complainant's denial of consent was accepted. Concerning your version of events, the jury appear to have considered it was reasonably possible you believed the victim was consenting, but rejected any suggestion that such a belief was reasonable. Hence where belief in consent was a

defence, you were acquitted; whereas on the sexual violation charges, where any belief in consent is required to be reasonable, you were convicted.

### **The convictions**

[3] The first conviction for rape relates to an incident occurring before the victim turned 16. It was the first occasion of sexual activity. The complainant's evidence, which I accept on this and on other charges, was that you gave her alcohol and cannabis. She either passed out or fell into a deep sleep. The next morning when she awoke, she felt sore, and had some bleeding inside her genitalia. Later that day you told her that you had had intercourse with her.

[4] The complainant alleged that at the time you told her about having sex with her, you indecently assaulted her. You were acquitted of this, even though belief in consent was not a defence. This is explained by confusion over whether the touching was to her breasts or buttocks. She initially said breasts, but later changed. The confusion was created (inadvertently I accept) by a line of questions which mis-stated her original evidence.

[5] This is the only offending that the complainant said occurred prior to her 16<sup>th</sup> birthday some three weeks later.

[6] The offending after her birthday lasted for about six to seven weeks. It consisted of intercourse on about five to six occasions. Accompanying the intercourse on all occasions was digital penetration, and on some occasions digital penetration of her anus. On about three occasions you also had anal intercourse with her.

[7] Finally, on one occasion, and I am unsure if it was a standalone event or a prelude to further activity on that occasion, you inserted some sort of object, probably a vibrator, into her.

[8] The offending ended because, in a change of plans, it was announced you were going to continue to live in the household. The victim became distressed at this news, and self harmed. Shortly after, she disclosed the reasons.

[9] The convictions for which you now appear for sentencing are:

- (a) rape, being the first occasion when the complainant was aged 15, and in a state of deep sleep due to you plying her with alcohol and cannabis. At the start of the trial you pleaded guilty to supplying the cannabis;
- (b) rape, being a representative charge covering the intercourse that occurred after she turned 16. I find this occurred on five to six occasions, and each occasion was an event of rape;
- (c) sexual violation by anal rape. This occurred three times.
- (d) sexual violation by digital penetration, being an activity that accompanied the intercourse;
- (e) sexual violation, being a representative charge of digital penetration of the anus, something which happened two to three times as an accompaniment to intercourse;
- (f) sexual violation, being a single occasion of inserting an object into the victim's genitalia.

[10] In relation to the offending you continue to maintain your position that there was a consensual relationship between you. This has led the probation report to classify your risk of reoffending as high. With a denial of responsibility such as yours here, there inevitably follows conclusions of lack of insight, remorse and empathy. This in turn leads to a conclusion of a high risk of reoffending. It is accordingly appropriate for me to comment further.

[11] Those who heard your evidence would have been struck by the apparent self-confidence you had in your sexual knowledge and prowess. A conclusion by the jury that you may have been blind enough to believe the complainant was consenting undoubtedly flowed from the impression you gave in the witness box. This was exacerbated by the gratuitous way you took the opportunity to describe sexual matters in unnecessary detail.

[12] I have no doubt at all that placed in a similar situation, with a teenage girl, you would be a significant risk of luring her into a sexual activity, or imposing your will on her. It was noticeable that, even assuming your version to be true, you just could not see how unacceptable and inappropriate your conduct was.

[13] The complainant was living in your household; you were in the position of a parent or adult with responsibilities, and you exploited that. I have no doubt that, as the complainant says, you exerted situational pressure, threatening her with the consequences to the family if she revealed what was happening. You dominated her; you confused her; you isolated her from the woman who was at that point her mother figure. Your conduct was disgraceful and until you get some insight into that, you are a risk. Your counsel today indicated at sentencing that you had awareness since reading the Victim Impact Statement of the impact of your offending on the complainant. That is encouraging, and it will be important for you in your dealings with the Parole Board that you display that the insight is real, and you are willing to modify your conduct.

[14] The complainant has filed a victim impact statement which rings totally true to the manner she testified; a hurt and confused young woman who has lost all confidence, and who will be affected for a long time, if not forever.

[15] You yourself are 60 years old; you have health issues, particularly emphysema. You have two comparatively minor convictions dating back to when you were aged around 20.

[16] I accept, as counsel have identified, that lower band three is the correct range. Factors that inform that assessment include:

- (a) the age of the victim, and the significant impact it has had on her;
- (b) the vulnerability of the victim stemming from the personal circumstances behind why she was living in your household. These circumstances meant she had few options when you started acting towards her as you did. This was deliberate exploitation of her vulnerability;
- (c) related to these, the breach of trust. I do not accept your efforts to suggest you did not have a parental role. The victim was in your care, helping you and your partner to look after your younger children. You were an adult in a parental, father figure, situation. It highlights the risk you present that you did not see this;
- (d) the scale of the offending, including the range of activity. The use of an object was, I consider, an offence of specific violence.

[17] I also consider the first offence has specific features that merit noting. The complainant was 15, and effectively stupefied. One can only wonder why you did this, and then chose to tell her about the intercourse. An obvious inference, supported by the attitude you displayed, is that it was a type of grooming. It was your way of introducing her to the idea of a sexual relationship.

[18] I consider a starting point of 13 years is comfortably within the available range.

[19] For the reasons given earlier, I do not consider that the fact that you may have believed the victim was consenting is a mitigating factor. It was driven by your own self interest and self indulgence, and I have no doubt you knowingly used emotional pressure to place the complainant in this position and keep her there. In terms of *AM*, it was a grossly unreasonable belief.<sup>1</sup>

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<sup>1</sup> *R v AM* [2010] NZCA 114 at [53].

[20] I give you six months credit for your previous 40 years of offence-free living. Although I have real doubts they necessitate such a step, I allow a further six months for your health issues. No other adjustments are required and the end sentence will be 12 years' imprisonment.

[21] As for the length of time you will spend in jail, I am of the view that serving just one third of that period would be insufficient deterrence or denunciation given the circumstances of the offending and the number of occasions of offending. For the reasons given, if the opportunity presented itself, I also consider you an on-going risk. Mr Sandston addressed me about his perception from his contact with you since the verdict of your evolving understanding. I have considered that, but at this point must act on what I saw, and my assessment remains unchanged. I consider a minimum term of imprisonment of 50 per cent is required.

[22] Please stand.

- On the two counts of rape, and the sexual violation charge involving anal intercourse, I sentence you to 12 years imprisonment.
- On the sexual violation charges involving digital penetration of the genitalia and the anus, I sentence you to eight years' imprisonment.
- On the sexual violation charge of using an object, I sentence you to seven years' imprisonment.
- On the supplying cannabis charge, six months' imprisonment.

[23] All sentences are concurrent.

[24] On the charges of rape, and sexual violation by anal intercourse, I direct that you serve at least half the sentence.

[25] Name suppression is required to protect the victim's identity. Interim suppression has been in place, and I now make that permanent. This applies also to all counts discharged under s 347, in relation to the complainant and other members of the household.

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Simon France J

Solicitors:

J M Webber, Crown Solicitor, Nelson, email: [jmw@odw.co.nz](mailto:jmw@odw.co.nz)

J C S Sandston, Barrister, Nelson, email: [john@jsandston.co.nz](mailto:john@jsandston.co.nz)