IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI 2010 009 833550

REGINA

v

ANDREW JAMES SWAN

Hearing: 26 May 2010

Appearances: P A Currie for Crown
J R Rapley for Prisoner

Judgment: 26 May 2010

REMARKS ON SENTENCE OF CHISHOLM J

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[1] Andrew Swan, you can remain seated until I actually impose sentence. I will ask you to stand at that stage.

[2] You have pleaded guilty to one count of rape. The matter has been complicated by the fact that you absconded in 2001.

The facts

[3] On 17 February 2001 the complainant was at her sister's flat. The complainant had just completed a six week Army course, successfully, and was looking forward to a career in the Army. She intended to stay that night at her sister's flat and then go home to the North Island the next day. The complainant's

sister invited a number of people, including you, Mr Swan, to her flat that night. As I understand it, the purpose was to have a flatwarming and also so that the complainant's sister's friends could meet her sister. You were effectively a friend of a friend.

[4] During the night the complainant became very drunk, vomited and collapsed. At the request of the complainant's sister you took the complainant into a bedroom. In fact you did so on two occasions because she woke up on the first occasion and went back out into the living area. So that she could check on her sister, the complainant's sister left the bedroom door open. When she saw the bedroom door closed she investigated and found you under the covers with her sister. You said that you were keeping the complainant warm. Again, the complainant's sister left the bedroom door open so that she could monitor the situation. Later she found the door closed again, went inside to investigate, turned the lights on and found you having sex with her sister.

[5] It is clear from the information before me that the complainant was effectively comatose and was incapable of resistance.

Subsequent events

[6] In due course you were charged with rape and you denied the charge. Depositions were held on 25 May 2001 and the trial was scheduled for 24 September 2001. You failed to appear at a call over on 10 July 2001 and a warrant was issued for your arrest. It was not until later in 2009 that you were located in Wellington.

[7] As far as I can gather the not guilty plea entered in 2001 was carried through. A trial was set for 8 June this year and there were three call overs. On 27 April 2010, soon after Mr Rapley had been assigned as counsel at your request, you pleaded guilty.

The victims

[8] In this case there is truly more than one victim. We have heard victim impact statements read by two of the victims this morning, the complainant and her mother. Mrs Currie has read statements on behalf of the complainant's sister and her father. Clearly this offending changed the life of the victim and had a major impact on the family as a whole.

[9] From the time of the offending until you were finally apprehended the victim's life, and probably the lives of the other members of the family that I have mentioned, were effectively on hold. As I have already mentioned, the victim intended to join the Army. She had a career path ahead of her, having successfully completed a six week training course. She was 18 years of age. But the Army career did not happen. She said:

> I lost the courage to take on these challenges, and I lost my dreams. I also lost my innocence, my ability to trust men, my sense of self-worth and value, and my emotional and mental well-being.

It is clear not only from her statement but from the statements of her parents that she underwent personality change. Apart from that she clearly suffered depression and other problems. Sadly the relationship with her family also suffered.

[10] As the complainant explained the matter, an aspect that was more damaging to her was that you absconded. This left her with around nine years of uncertainty. She never felt safe, had nightmares, and it is only now that you have been apprehended that she is able to make progress in trying to overcome this awful thing that has happened to her. All of that, to my mind, is very understandable.

[11] As far as her sister is concerned, it is unnecessary for me to go into detail. She felt responsibility for what had happened and she was also fearful. Not surprisingly the parents also felt fearful for their daughter.

Your situation

[12] You are now 46 years of age. On my calculation you would have been 37 years of age at the time of offending. Before 2001 you had six previous convictions

which included low level violence but, as I said to Mr Rapley, the previous convictions are irrelevant for present purposes.

[13] Since 2001 you have not offended. I have a letter from the person that employed you during a significant part of that period who speaks very highly of you. In broad terms the probation officer was also impressed by you. He considered that the risk of re-offending was low and noted that you would be eligible for a medium intensity rehabilitation programme. His interpretation was that you were now sincerely remorseful for what had happened.

Evaluation of the offending

[14] Recently the Court of Appeal delivered a decision in *R v AM*[1] which indicates the approach that I need to adopt in sentencing you. It is necessary for me to undertake an evaluation of all the circumstances to determine the seriousness of the offending in terms of your culpability and the effects on the victim. That exercise will indicate the appropriate band and starting point for the offending.

[15] Both counsel agree that this evaluation should lead me to the conclusion that you are within band one which indicates a starting point of six to eight years. They differ, however, as to where on that band you should be placed. Mrs Currie relies on four aggravating features: the extent of harm to the victims; abuse of trust; premeditation; and the vulnerability of the victim, to justify a starting point of around eight years which would be at the top of band one.

[16] On the other hand, Mr Rapley argues that you should be placed at the bottom of band one and that the starting point should be six to seven years. While he accepts that the extent of the harm and the vulnerability of the victim are aggravating features, he disputes that the abuse of trust and premeditation fall within that category.

[1] [2010] NZCA 114

[17] My assessment is that two aggravating features are clearly established when it comes to determining which band you should be in and where in that band you should be placed.

[18] The first is the harm to the complainant in particular, but also to the other members of her family. In *AM* the Court of Appeal cautioned against downplaying the psychological and non physical aspects of harm suffered by a victim: at [44]. It is unnecessary for me to repeat what I have said about the victim impact statements we heard this morning. There was undoubtedly extensive harm to this family in a psychological sense. It was made much worse by you absconding and the victim being unable, for understandable reasons, to make a fresh start in life until the matter was disposed of. Apart from that she was fearful that you might reappear. So I would categorise harm to the victim in this case as a moderate degree of harm.

[19] The next aggravating feature that is clearly established on the information I have is vulnerability. Regrettably the complainant was extremely drunk and you knew it. She was very vulnerable and you took advantage of it. It is always difficult to rank extremes of vulnerability but I would have thought that she was extremely vulnerable.

[20] Although I do not accept that there was a breach of trust in the traditional sense or premeditation in the traditional sense, I am entitled to take into account all the circumstances when deciding the band and starting point. While it was not a breach of trust in the traditional sense and, as Mr Rapley said, your age did not play any part in the offending, the fact is that you were a good deal older than this young woman and should have known better.

[21] As far as premeditation is concerned, this was an opportunistic act. Unfortunately you did not take the message when the complainant's sister effectively warned you off the first time, and that is a fact that I can, and do, take into account.

[22] In his written submissions Mr Rapley referred to a decision of the Court of Appeal: *R v Murphy*.[2] That case was mentioned in *AM* as an example of a case at

[2] CA310/96, 26 September 1996

the lower level of category one. The Court was at pains in *AM* to emphasise that those were only examples and, on my reading of *Murphy*, it is in an entirely different category. In that case the prisoner found the victim in *his* bed, at that time with another man. After the other man left the bed she went back to sleep. It was common ground at trial that the complainant had consented, the issue being whether she was consenting to sex with the prisoner or the other man. Finally, there was no additional harm by virtue of the prisoner having absconded in that case.

[23] My overall assessment is that your offending is at the top of category one. Conceivably it could also be described as at the bottom of category two because it does have two aggravating features, but that is academic because the starting point of eight years that I adopt would arise in either situation.

Personal aggravating features

[24] There are none.

Personal mitigating features

[25] Mr Rapley has represented you very well. In terms of personal mitigating features he has argued that you should have credit for your remorse and your willingness to engage in restorative justice. I do not accept that there should be any credit above the credit for the guilty plea on account of either of those matters.

[26] First, as far as remorse is concerned, it needs to be exceptional before it can attract an additional discount: *R v Hessell*[3]at [28]. Your remorse, which I accept is now genuine, comes after an incredibly long delay for which you cannot blame anyone other than yourself.

[27] As far as the offer to engage in restorative justice is concerned, the indications I have is that this has been declined for understandable reasons. Under s10(2) of the Sentencing Act 2002 I must take into account whether or not the offer to make amends has been accepted by the victim.

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[3] [2009] NZCA 450

Guilty plea

[28] This gives rise to real difficulties in sentencing. According to the Crown *Hessell* would entitle you to a discount of 10 – 20% subject, however, to the caveat mentioned by Mrs Currie that *Hessell* accepts at [45] that reductions by virtue of mitigating factors may be smaller if the "offender prolonged proceedings before entering the plea (for example, by failing to appear for scheduled court appearances)". That is your situation. On your behalf Mr Rapley argued strongly for a discount of 20% or thereabouts.

[29] In terms of *Hessell* the 20% discount is available if the plea is entered at the first call over after committal. In your case the first call over after committal was in 2001. That was the call over that you didn't front.

[30] I cannot see any rational basis on which I should effectively approach this sentencing on the basis that the history begins with your arrest in late 2009. It is necessary to take into account the *whole* history leading to your sentencing today. Nor can I see any double counting if I take into account all factors that are relevant to determining the credit for the guilty plea in accordance with *Hessell*. *Hessell* said that a guilty plea three weeks before trial would generally attract a 10% discount. But, once I take into account the fact that there was a trial scheduled back in 2001, it is very difficult to rationally allow the 10% discount.

[31] I have to say that I have found this issue very difficult. At one stage I wondered whether there should be any discount at all for the guilty plea. But I decided that there should be for two reasons: first, the reality is that the guilty plea has meant that the complainant has been spared the ordeal of having to give evidence at trial; and, secondly, there is a late indication of remorse. What I am going to do is to allow a six month discount for the guilty plea which incorporates remorse. That is a bit over 7%. /

[32] (I ask you to stand please Mr Swan). Having started at eight years imprisonment and allowed a discount of six months imprisonment, you are sentenced to seven and a half years imprisonment.

Solicitors:	Crown Solicitor, Christchurch J R Rapley, Christchurch