IN THE COURT OF APPEAL OF NEW ZEALAND CA219/01

THE QUEEN

V

MANUELE PETELO KOLIO

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| Hearing: | 24 October 2001 |
| Coram: | Elias CJ<br>Tipping J<br>Paterson J |
| Appearances: | T M Saseve for Appellant<br>D J Boldt for Crown |
| Judgment: | 1 November 2001 |

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**JUDGMENT OF THE COURT DELIVERED BY PATERSON J**

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[1] Mr Kolio pleaded guilty in the District Court to a substantial number of charges of a sexual nature. He was sentenced to a total of 15 years imprisonment and appeals this sentence on the ground that it was manifestly excessive.

**Factual Background**

[2] The victim was the daughter of the appellant's partner. At the time the offending began, she was aged 11 years. The offending occurred over a period of 11 months, commencing in February 2000 and concluding at the end of 2000. As a

result of the offending, the 12 year old victim became pregnant and was due to give birth in September last.

[3] The appellant pleaded guilty to all 18 charges against him. There were four charges of sexual violation by rape, three of sexual violation by unlawful sexual connection, namely oral sex, four of sexual violation by unlawful sexual connection, namely digital penetration, four of abduction of a girl under the age of 16 years for sex, one of indecent assault of a girl under 12 years and two of indecent assault of a girl between 12 and 16 years. Two of the sexual violation by rape charges, three of the sexual violation by unlawful sexual connection charges, two of the abduction charges and one of the indecent assault charges were representative charges. The statement of facts was not challenged and this discloses the appellant raped the victim on at least ten occasions during the 11 month period.

**The District Court sentence**

[4] The Judge, after reviewing the aggravating and mitigating factors, determined that having regard to the totality of the offending and its consequences, the starting range was between 17 to 18 years, very close to the maximum which could have been imposed on one count of rape. He allowed a discount for the mitigating features and determined the appropriate sentence was 15 years imprisonment. This term was imposed on each of the sexual violation counts, a ten year term was imposed on each of the abduction counts and a five year term on each of the indecent assault counts. All terms were concurrent.

[5] The aggravating features which the Judge took into account were the breach of trust, the age of the victim, the involvement of the victim's mother, the pregnancy of the victim, and the extent of the offending. The mitigating features included the plea of guilty at virtually the first available opportunity and, possibly, remorse. The prisoner's remorse was conveyed to the Court through his counsel although the Probation Officer in a pre-sentence report, noted the appellant did not appear to express remorse.

**The appeal**

[6] Mr Saseve, for the appellant, submitted that the Judge's starting point was too high and an insufficient allowance was given for his early guilty pleas. These two factors led to a manifestly excessive sentence. In support of these points, counsel submitted that although the offending was "appallingly bad and unforgivable and the offending was over approximately ten months, it could not be accepted that this was the worst of the worst deserving a sentence close to the maximum prison sentence of 20 years." There were no previous convictions for sexual offending, the appellant was willing to address the root of his offending and obtain appropriate help, and he had expressed remorse for not only the suffering the victim has endured but also for the ongoing effects on the victim and her family resulting from the offending. Further, the admissions and guilty pleas were made at the earliest opportunity.

[7] Mr Boldt, for the Crown, submitted that although the sentence was among the longest finite sentences, the offending and its consequences were so serious that a sentence of this magnitude was justified. There were at least ten separate occasions on which the victim was raped, the rapes were accompanied by threats and other indecencies, the abuse was pre-meditated and involved the abduction of the victim on each occasion together with intimidation both of the victim and her mother. The victim's mother had found out about the position at an early stage but had, for some reason, done nothing to prevent it. She had on many occasions been asked by the appellant to bring the victim into their bedroom to enable him to commit the offences. As a result, the victim has not had the support of her mother. Another aggravating factor in the Crown's view, was the victim's pregnancy. In these circumstances, while accepting that the sentence was stern, the Crown submitted that it should be upheld.

**Decision**

[8] We accept that this was a serious case of repeat offending by a person in breach of trust against a relatively young person, which has had traumatic effects on

her emotionally. The effect has been exacerbated by her pregnancy. While the Judge's starting point may be seen as high, we are of the view that it was within the range available to him. While the maximum sentence for one rape is 20 years, there were four separate charges of rape admitted by the appellant and at least ten actual incidents of rape on different occasions. The maximum penalty to which the appellant could have been sentenced was therefore a lot higher than 20 years. In *R v Beri* [1987] 1 NZLR 46, this Court noted that there is no rule that the maximum penalty is to be reserved for the most devilish instance of crime that judicial imagination can conceive. It is legitimate to decide whether a case falls within a broad band or bracket comprising the worst class of cases encountered in practice. There will be variations of gravity within the class yet any case that falls fairly within it qualifies for the maximum sentence. In our view, this case falls within a class of cases which justifies a starting point near the maximum sentence for a single offence.

[9] The Judge gave a two year discount for the mitigating factors including the early guilty plea. It is not clear whether the Judge took into account remorse, particularly as the pre-sentence report suggested the appellant did not show remorse. However, the Judge did note that cultural differences may have led the Probation Officer to make this observation. This Court has noted on many occasions that there must be a real and distinct credit given for an early guilty plea. In our view, the Judge did not give a sufficient credit in this case. On a starting figure of 17 years we are of the view that the appropriate discount for the guilty plea and other mitigating factors was four years.

**Conclusion**

[10] The appeal is allowed. The concurrent sentences of 15 years imposed on each of the sexual violation charges are quashed and concurrent sentences of 13 years imprisonment are imposed in lieu thereof.

**Solicitors**
Saseve, Auckland for Appellant
Crown Law Office, Wellington