IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2009-055-2828

REGINA

v

STEVEN JOHN LINDSAY

Hearing: 11 May 2010

Counsel: Adam Couchman for Prisoner
Ian Brookie for Crown

Sentenced: 11 May 2010

SENTENCING REMARKS OF HUGH WILLIAMS J.

Offence: Exploitatively doing an indecent act (4)
Exploitative sexual connection with a sub-normal person(3)

Sentence: **Imprisonment: 4 years 3 months on all charges**
[to be served concurrently]

Mr Lindsay it is customary - as I commonly say nowadays when sentencing - that people stand when they are being sentenced but inevitably sentencing remarks are getting longer and longer so you and the escort can have a seat.

Mr Lindsay:

[1] On 10 February this year you pleaded guilty to four counts. One was exploitatively doing an indecent act on a young woman with significant impairment. She was chronologically aged 19 at the time and the offence took place during a weekend in September 2008. It was the incident in the shower. You also pleaded guilty to three representative counts of having exploitative sexual connection with the same person by vaginal intercourse, anal intercourse and oral sex. You actually had pleaded guilty at the callover on 25 November 2009 so you are entitled in a reduction in the sentence for that.

[2] In formal terms, Mr Lindsay, I discharge you under s 347 of the Crimes Act 1961 on the remaining counts in the indictment. Counts 1,3,5,7,9 and 10.

[3] The facts as shown in the agreed statement of facts - and I emphasise that it was agreed for entry of the pleas - are that in about July 2008 you began a mobile phone relationship with this young woman. Her mother and her stepfather became concerned at the relationship and told you twice she was intellectually impaired and asked you to desist from any relationship with her. Despite that, you continued.

[4] On a weekend in September 2008 you picked her up at an agreed meeting place in Auckland, took her to your house together with your niece, and had vaginal and anal intercourse with her on several occasions over the weekend plus the other offences I mentioned. You also did things like buying her a dress and filming her naked.

[5] A day or two later it emerged that her parents had reported her as a missing person to the Police but you and she went to a Justice of the Peace to get a letter saying that she was not a missing person and that she did not want to return to her mother - of whom Mr Couchman said she was fearful - and took that to the Police. Your statement was that she was "consenting to everything that occurred like any 19-year-old." I will come back to that in a moment.

[6] We have Victim Impact Statements from the mother and from the young girl. The mother said at the time this young woman, although aged 19 chronologically, had a mental age of about 12 or 13. That is confirmed to a degree by the psychologist reports from Ms Breen who said that this young woman had a mild intellectual disability and she has an IQ of something in the range of 59-67. Importantly in terms of sentencing you, her knowledge of sexual matters was naive. Although she knew a little bit about sexual matters, it is clear from Ms Breen's report that her knowledge was very limited indeed and completely mistaken in certain respects. Importantly, the psychologist said that her intellectual impairment was such that she could not define consent and, as remarked to Mr Couchman during his submissions, the crucial question in that regard is whether she understood. She may have been able to say the words or not to protest at what you were doing, but the crucial question is whether she knew the nature and quality of the act and was able to appreciate what was going on between you, and the likely consequences. The psychologist's report makes it clear she was mentally incapable of that.

[7] You have quite a lengthy history of previous convictions - some 61 by my count. They are mainly alcohol and drugs or dishonesty and disorderliness but admittedly a long time ago. In 1973 there was a carrying off with a weapon charge. In 1982 and 1985 there were assaults involving injury or damage and in 1990 you were given two years jail for unlawful sexual connection and nine months jail concurrently for two indecent assaults. Apparently that was relating to your daughter. So there is a significant history of offending on your part.

[8] The Probation Service shows you came from a poor family background. At one stage you were diagnosed as a child with ADHD. You have had a most unfortunate history in many ways including being sexually abused by staff in homes to which you were sent as a child but you married a couple of times. You lack education and you have poor health, mentally and physically.

[9] The important issue for sentencing however - and Mr Couchman has met this and endeavoured to explain it - is that according to the Probation Service you have no insight into what you did, and no remorse. The Probation Service said that you passed the blame onto the victim and minimised and justified your actions, saying

that she was consenting like any other young woman of her age. The Probation Service said you had no understanding of your behaviour and a very limited understanding of the consequences.

[10] I would have to say that your instructions to Mr Couchman - and he has been careful at several stages of his helpful address to make it clear that these were your instructions he was advancing because you told him to - could be seen as maintaining that approach to this offending: minimisation of the offence and an attempt to blame the girl rather than yourself.

[11] The Crown points to your repeated offending, admittedly over a relatively compressed period, the manipulation involved in the JP's letter, your making an intimate video, the premeditation involved with grooming through the cellphone and then over the weekend. It draws my attention to cases such as *R v Whittaker*[1] and *R v Tapson*[2] where the Court of Appeal made clear that sentencing in this area must be for the protection of the mentally impaired and deterrence of those who take advantage of them.

[12] There were a number of cases referred to including *R v Stewart,*[3] *R v J.A.P.*[4] and *R v Wilson*[5] which suggest that the appropriate starting point for sentencing you is in the region of five-and-a-half to six years plus some uplift for the previous offending particularly the offending involving sexual matters and violence. But Mr Brookie accepts that you are entitled to a reduction in that term for the early pleas and suggests an ultimate sentence of something in the range of four years to four years nine months.

[13] Mr Couchman addressed me carefully on this, drawing attention to the differences in outcome where cases involve women with very severe mental impairments such as *Wilson* and those such as this, where the mental impairment is fortunately somewhat less severe.

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[1] *R v Whitaker* CA23/97 27 August 1997.
[2] *R v Tapson* [2008] NZCA 155.
[3] *R v Stewart* [2009] NZCA 117.
[4] *R v J.A.P.* CRI-2007-00083-186 High Court Wanganui, 9 June 2008, Gendall J.
[5] *R v Wilson* CRI-2006-019-5529 High Court Hamilton, 7 June 2007, Williams J.

[14] Mr Couchman, on your instructions, puts forward a different view of the events of this weekend including that she wanted to escape from her mother because she said she was fearful of her. He suggests you told her to occupy a spare bedroom and it was she who initiated sexual conduct between you. Even were that correct - and there is no proof - the fact is that you are a man in your mid-50s, she was a woman of 19. You were the adult - she was not, in mental terms. You should simply have refrained, if in fact that was the factual scenario that truly came about.

[15] Mr Couchman suggests, on your instructions, that the observations of the Probation Officer about your lacking insight and remorse were because you were talking about a different kind of offending, believing they were discussing kidnapping with you rather than the offences for which you come to be sentenced. You may have had some mistaken understanding in that regard, Mr Lindsay, but the fact is you were only seeing the Probation Officer because you pleaded guilty to these exploitative sexual charges - and that only fairly recently.

[16] As counsel have observed, there is difficulty finding cases which provide any real comparability because offending of this sort covers such a wide spectrum including differences on the facts and differences on the degree of impairment that the young women involved suffer from. But the Court of Appeal in *Tapson* has recently reiterated and I quote:

> That the real focus in cases under s 138, [the section under which you are charged] must be on how it is that the complainant is brought to the state of agreement. Be it aquiesence, participation or undertaking in rather than whether or not an accused can lay claim to an honest belief there was agreement. As was said ostensible consent may not necessarily mean there is no taking advantage.

[17] And that is really the case in this instance. Whatever the young woman's actions and words may have been you were the person who was in command. It was your obligation and responsibility looking after her that weekend to ensure you did not offend against her.

[18] In considering what should be the sentence to be imposed there are a number of factors which I have referred to already which need to be drawn together to lead to the appropriate sentence. First, of course, is the disparity in age - some 37 years or

thereabouts - between you. Secondly, are the elements of grooming, particularly with the mobile phone before this offending took place, and the fact that you must have known from what her parents, her mother and stepfather, told you that she was intellectually disabled, naive and unworldly. You were warned off, but you deliberately continued with a relationship and now you blame her for what occurred. Also to be taken into account is the intimate video you took of her during that particular weekend. She was vulnerable, there was a significant breach of trust on your part and this was repeated offending, taking advantage of this young woman over a relatively short period. There is also the JP's letter designed to deflect the police investigation.

[19] In terms of the sentence, first of all at Mr Brookie's invitation I intend to note that the video recording you made and all photographs of the complainant need to be irrecoverably erased from your camera before it is returned. That should be by a means agreed by you and the Police, or you and Mr Couchman and the Police, but I am not sure that an order can be made or is necessary in that regard.

[20] Looking at cases such as *Stewart*, *J.A.P.* and *Wilson*, and in a sentencing decision of my own of somewhat similar offending but where consent was obtained by duress, *R v Trimble*[6] the correct starting point for sentencing you should be in the region as the Crown says of 5 to 6 years imprisonment, probably towards the upper end. Again as the Crown says there needs to be an uplift in that sentencing for your previous history, particularly the sexual history. There needs of course to be a reduction for the fact that you have accepted responsibility to the extent at least of pleading guilty to these offences and saving the necessity for a trial but that needs to be balanced against your lack of insight. In my view the correct approach to sentencing you is on all the charges to take off approximately a third for the pleas and other mitigating features. In the circumstances the sentence of the Court is that you be imprisoned for 4 years and 3 months on all charges concurrently. Stand down.

[6] *R v Trimble* CRI-2006-079-987, High Court Hamilton, 6 June 2007, Hugh Williams J.

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HUGH WILLIAMS J.

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