

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CRI-2017-090-003683  
[2018] NZHC 3183**

**THE QUEEN**

v

**MONIKA RACHAEL KELLY**

Hearing: 7 December 2018  
Counsel: BM Finn for Crown  
RM Mansfield and B Kirkpatrick for Defendant  
Judgment: 7 December 2018

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**SENTENCING REMARKS OF DOWNS J**

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Solicitors/Counsel:  
Crown Solicitor, Auckland.  
RM Mansfield, Auckland.  
B Kirkpatrick, Auckland.

## **Introduction**

[1] Ms Kelly, you are for sentence on a representative charge of dealing in a person aged under 18 years for sexual exploitation.<sup>1</sup> You were to be tried by me, without a jury, on Monday, 24 September this year. On Thursday 20 September, you pleaded guilty.

## **Facts**

[2] Your victim was only 14 years old throughout the offending.

[3] You met her through a mutual friend, who was 19. You too were that age. The victim initially told you she was 15. You quickly asked her if she wanted to be a prostitute for you. The victim's life was then messy: she was "running away from home [and] having a rough patch".<sup>2</sup> She came to live with you for approximately six weeks.

[4] After the victim moved in, you again raised with her the topic of prostitution. You spoke to her about a digital application, or "App", called Seeking Arrangements. Either then or a little later, you created a profile of the victim for this App. You gave her an alias. You recorded her age as 18 or 19 years; you gave her an amended date of birth. The victim played no part in your creation or composition of her profile.

[5] You then communicated with potential customers through the App. Your offending concerns a male I call "male A".

[6] On four occasions between 19 March 2017 and 25 April 2017, you arranged for male A to use the victim sexually. My choice of the word "use" is deliberate. On each occasion:

- (a) You arranged to deliver the victim to male A, either at an office building or hotel. Normally, you would then wait for her.

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<sup>1</sup> Crimes Act 1961, s 98AA(1)(a)(i).

<sup>2</sup> Victim impact statement.

- (b) You negotiated price with male A. For example, his second occasion with the victim was to last 90 minutes. You agreed on the price of \$350. The third occasion was to be a “quickie” only. You agreed to a lesser price of \$200.
- (c) You were paid (by internet banking), and gave some of the money to the victim.
- (d) Male A had full sexual intercourse with the victim.

[7] One two occasions, you agreed another man or additional men could accompany male A, and have sexual intercourse with the victim too. But, this never happened. On one occasion, you also agreed male A could film the victim. It is unknown if he did.

[8] After the first occasion, your mutual friend and the victim told you her real age.

[9] In July 2017, you learned of the Police investigation. You arranged a meeting with those who knew of your offending. You told at least two witnesses to lie to the Police, and you prompted them as to what they should say. You provided like encouragement by posting a digital message on a social media website or application.

[10] Police interviewed you on 21 July 2017. I watched that interview as part of your disputed-fact hearing last week, about which more shortly.<sup>3</sup> You repeatedly lied during that interview.

### **Victim impact**

[11] I have read the victim impact statement. She is now 16.

[12] The victim says you took her in during a challenging time in her life—and exploited her. The victim says she felt trapped, and constantly put in situations of

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<sup>3</sup> *R v Kelly* [2018] NZHC 3161.

extreme discomfort and places she did not want to be. The victim also says those at her school know what happened, treat her differently, and cannot look at her.

[13] She struggles to trust people. She cannot now be alone in a room with a male.

### **Starting point**

[14] The parties disagree about what is called the “starting point”: the length of the appropriate prison term before things that make your offending less serious are considered. The Crown submits the starting point should be three or three and a half years’ imprisonment. Mr Mansfield, your lawyer, argues two years. In deciding this, I note your offending has aggravating features: things that make it more serious or worse.

[15] First, your offending required time, effort, and planning. You created a profile with false information, you negotiated price, and you then delivered the victim to the meeting place. Lawyers sometimes refer to this mix as premeditation. A better term is calculation; meaning your offending was calculated. Relatedly, you placed some pressure on the victim to sell herself for you. She expressed reluctance about what you were doing. You asked her to carry on. You referred to the need for money.

[16] Second, you facilitated the victim’s repeated exploitation: we are not concerned with a single instance of offending.

[17] Third, your victim was vulnerable. You knew that. You knew also that she was young. To be specific, you knew she was only 14 during most of your offending. I mentioned earlier a disputed-fact hearing. You told the Police you believed the victim was 15, 16 or perhaps older. But you also told them you believed she was 18. You told a clinical psychologist you did not think about the victim’s age, but you might have guessed she was over 16 but under 18. After conducting a disputed-fact hearing at which the victim testified and you did not, I am sure you knew her real age after the first incident, because this is what the victim said she and the mutual friend told you. I am sure you believed the victim was 15 when you created her profile; again, you falsely recorded her age as 18 or 19.

[18] Fourth, you arranged for the victim to engage in full penetrative sex. You also intended to expose her to even more degrading acts—group sex, and being filmed.

[19] Fifth, you took steps to obstruct the Police investigation. Your actions founded a separate charge of attempting to pervert the course of justice. This charge was abandoned as part of the plea arrangement, but on the basis it remained within the summary of facts. Similarly, you lied to the Police. Among other things, you said the victim made all relevant arrangements herself, and you had tried to dissuade her from what you characterised as *her* actions. You were the architect of this offending; the victim a young, vulnerable and reluctant participant.

[20] The cases cited by the lawyers are not directly on point—at least most of them are not. This is not criticism; the offence was created only in 2005. Three of the cases involve different charges with a lower maximum sentence.<sup>4</sup> A case called *Lata* involved the charge you face and another too, but it was much more serious.<sup>5</sup> Indeed, it is difficult to readily imagine a worse case than *Lata*. A nine-year starting point was adopted there. The Crown has appealed to the Court of Appeal. The Judge dealing with Ms Lata’s co-offender adopted a starting point of five years and nine months’ imprisonment.<sup>6</sup>

[21] Absent helpful case law, the maximum penalty is instructive. A single act of dealing in a person for sexual exploitation is punishable by up to 14 years’ imprisonment. The same maximum penalty is reserved for serious offences; for example, aggravated robbery,<sup>7</sup> kidnapping,<sup>8</sup> the deliberate infliction of grievous bodily harm,<sup>9</sup> and attempted murder.<sup>10</sup> This offence, like those, involves violation of both autonomy and dignity. It risks physical and psychological harm. Demeans. And, involves conduct no civilised society can tolerate.

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<sup>4</sup> *R v Gillanders* DC Christchurch T0313661, 3 May 2005; *Hastie v R* [2011] NZCA 498; and *R v Seil* [2018] NZDC 19126.

<sup>5</sup> *R v Lata* [2018] NZHC 707.

<sup>6</sup> *R v Sehgal* [2018] NZHC 1145.

<sup>7</sup> Crimes Act, s 235.

<sup>8</sup> Crimes Act, s 209.

<sup>9</sup> Crimes Act, s 188.

<sup>10</sup> Crimes Act, s 173.

[22] It follows the offence is serious, and your offending a relatively serious example of its kind. You diligently prostituted the victim on four separate occasions, and then sought to conceal what you had done. You knew she was young and vulnerable, because she was living with you. For these reasons, I consider the range identified by both parties inadequate. A four-year starting point is necessary, but conservative. I would have chosen a higher one but for the fact appellate guidance in this area remains outstanding.

### **Personal circumstances**

[23] You are 21. As I mentioned, you were only 19 when you committed these offences. Your home life was difficult. You told the writers of reports I have read your parents used drugs, and your mother abused you physically and emotionally. You were also sexually assaulted by a stranger when you were 14 years old. You report suffering anxiety and depression.

[24] In your last year of high school, you became pregnant. Your child's father did not support you. Nor, apparently, did your own. You left home. You then tried sex work, but not for long. You then engaged in this offending.

[25] After being charged, you moved back in with your parents. For the last six months or so, you have been living at your grandmother's house on electronically monitored bail. She is supportive of you. So too your mother. I have read their letters.

[26] Your son is nearly three. His care is shared by you and your mother. Oranga Tamariki had "major" concern for his welfare while he was in your sole care, but I am told by your lawyers that concern has passed.

[27] I mentioned reports earlier. I have carefully read—indeed re-read—three:

- (a) A comprehensive pre-sentence report by Mr Eden Jarrett.
- (b) A psychological report by Dr Loshni Rogers, whom you retained.
- (c) And, a cultural report from Ms Khylee Quince.

[28] The cultural report adds little to the first two, and exhibits some advocacy. But, I have not overlooked Ms Quince considers you present—in her opinion—as gullible, unworldly and easily led.

[29] Mr Jarrett, the pre-sentence report writer, says you told him you thought the victim was 16. And, you did not receive any money for the victim's services. You said the money went into your bank account only because she did not have one, and you deducted money for board. This explanation is inconsistent with the agreed summary of facts, which refers to your operation of "an illegitimate prostitution service", to your part-payment, and to your pressure on the victim by reference to money. In any event, it is not credible you had no interest in making money from the victim, even if you used it to buy food and other essentials. To be clear, I accept you were under financial pressure at the time of your offending, but the obvious should be pointed out: very few people in situations like that resort to what you did.

[30] Mr Jarrett considers you pose a "moderate" risk of re-offending, and you risk "moderate" harm. He considers you would comply with a community-based sentence, in part because of "good compliance" with electronically monitored bail conditions. He also considers you suitable for home detention. However, given the seriousness of your offending, Mr Jarrett recommends imprisonment.

[31] Dr Rogers discusses your background, as I have done. He considers you intelligent, but naive and susceptible to others' influence. Dr Rogers considers your brief sex work might have normalised your view of it. He considers your offending "indicative of poor decision making", and affected by depression and "cognitive distortions regarding the victim". Like Mr Jarrett, Dr Rogers considers you pose "moderate" risk of re-offending. But, he considers further offending is likely to be confined to "petty dishonesty". The basis for this qualification is unclear.

[32] Dr Rogers believes you are genuinely motivated to reform, and can do so. He considers a community-based sentence would be better for you. And, prison potentially detrimental.

[33] You had no convictions when you committed this offending. But while on bail, you stole four times from shops. You also drove once while suspended. These offences have little relevance today, save in relation to discount for electronically monitored bail. I will talk about that soon. Which brings me to discount for mitigating features.

### **Discount for mitigating features**

[34] Mr Mansfield argues I should discount your sentence heavily so home detention is available, and imposed. The prosecution accepts some discounts are appropriate, albeit more modest ones, and argues imprisonment is required.

[35] I begin with your age. Youth does not automatically justify leniency. Rather, discounts in this context are available because the offending was immature or impulsive; there is prospect of the offender's reform; or both.<sup>11</sup> Your offending was neither impulsive nor immature. As I said earlier, it was calculated. And sustained. However, you are young. There is prospect of reform. In this respect, I place weight on the pre-sentence report, which was written by someone wholly independent of you. Significant reduction is appropriate: 20 percent. This reduction also recognises the recent possibility of employment, and your employability more generally. It is clear you are intelligent.

[36] Mr Mansfield argues, at least in his written submission, I should also make a reduction because you were a first offender. I decline to do so. This type of discount is normally given to a much older defendant who has otherwise led a blame-free life. The relevant discount remains that for youth and the prospect of reform, which I have given.

[37] Your upbringing and background warrant modest recognition. I emphasise the word "modest". I do not accept Dr Rogers' assessment your offending is "indicative of poor decision-making", or "likely arising from naivety and cognitive distortions regarding the victim". You told Dr Rogers you did not think about the victim's age,

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<sup>11</sup> Principle was recently restated by Kós P for the Court of Appeal in *Taylor v R* [2018] NZCA 498 at [26].



and you might have guessed she was over 16 but under 18. Those statements were untrue. Moreover, Dr Rogers considers you “likely did not question the victim on her age nor consider this”. That is wrong as a matter of fact, again, because of what you told Dr Rogers. Expert opinion is only as good as the information on which it is based.

[38] In any event, no unequivocal linkage emerges between anything in your background and your offending. I consider your background more explanatory than mitigatory. For these reasons, I deduct only five percent.

[39] The mere fact you have a child does not entitle you to a discount; there are no special rules for offenders who are parents. And nor should there be. However, it is open to a sentencing Judge to consider the impact of a sentence on an offender’s family, and make some adjustment.<sup>12</sup> I reduce your sentence by five percent in recognition of the likely impact on your son of your sentence.

[40] Next is discount for restrictive bail conditions. You have been on electronically monitored bail since 25 May this year, a period of almost six and a half months. No formula applies here; discount is context-dependent. You were placed on that type of bail because you breached ordinary bail on several occasions, and shoplifted. You were very nearly remanded in custody. These aspects influence my decision to limit the discount to two months.

[41] This leaves your guilty plea and alleged remorse.

[42] Your guilty plea was late. You entered it on the second to last working day before trial, having foreshadowed the possibility of a guilty plea only a little earlier.<sup>13</sup> After pleading guilty, you disputed knowledge of the victim’s age, with the result she testified at the disputed-fact hearing. She was cross-examined at that hearing on your behalf, including in relation to photographs that might have caused her embarrassment. I found the victim’s evidence truthful and accurate. You also said

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<sup>12</sup> *Ransom v R* [2010] NZCA 390, (2010) 25 CRNZ 163; and *R v Harlen* (2001) 18 CRNZ 582 (CA).

<sup>13</sup> On 10 September 2018 Mr Mansfield said the trial “may resolve”; see my Minute of that date at [4].

you did not place the victim under pressure to sell herself for you, but you abandoned this claim by the time of, or at, the disputed-fact hearing.<sup>14</sup>

[43] This mix largely vitiates the credit otherwise available for a guilty plea. You saved the taxpayer the expense of a trial, but that is all. Consequently, I confine guilty-plea discount to five percent, notwithstanding the Crown's concession a larger discount might be available.

[44] Mr Mansfield seeks additional discount at this level for remorse. I accept you have *said* you are sorry, for example, in your letter to the Court, and that you offered to participate in restorative justice. However, I am not persuaded you are genuinely remorseful, as distinct from actively seeking to present yourself in the best possible light. I consider the guilty plea and disputed-fact hearing sequence instructive. So too your untruths about the victim's age to the pre-sentence report writer and to Dr Rogers. Nor should it be overlooked you sought to interfere with the Police inquiry, by telling potential witnesses to lie, which is exactly what you did when interviewed by them.

[45] For completeness, I doubt you are unworldly, easily led and naive, as the reports suggest. Your offending does not exhibit this mix; if anything, it implies the contrary. You did not present this way when interviewed by the Police. Nor has it been my impression of you over several hearings, including a bail breach.

[46] I return to discounts, and summarise them:

- (a) 20 percent for youth, and the allied prospect of reform.
- (b) Five percent for your background.
- (c) Five percent because of the impact of the sentence on your son.
- (d) Two months because of your time on electronically monitored bail.
- (e) Five percent across the balance for your late guilty plea.

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<sup>14</sup> *R v Kelly*, above n 3, at [3].

[47] This produces a sentence of just under 31 months' imprisonment, which I round down to 30 months, meaning two and a half years.

**Home detention?**

[48] Mr Mansfield pursues home detention. And strongly. Given the sentence I have arrived at, this is not available. But, I would not have imposed it even if it were. Your offending is too serious. Denunciation is required.

**Sentence**

[49] Ms Kelly, please stand.

[50] On the charge of repeatedly dealing with a person under 18 for sexual exploitation, I sentence you to two and a half years' imprisonment.

[51] You may stand down.

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**Downs J**