

*The Queen v Tulloch* [2013] NTCCA 6

**PARTIES:** **THE QUEEN**

v

**TULLOCH, Kristy Louise**

**TITLE OF COURT:** COURT OF CRIMINAL APPEAL OF  
THE NORTHERN TERRITORY

**JURISDICTION:** CRIMINAL APPEAL FROM THE  
SUPREME COURT EXERCISING  
TERRITORY JURISDICTION

**FILE NO:** CA 9 of 2013 (21123971)

**DELIVERED:** 31 May 2013

**HEARING DATE:** 31 May 2013

**JUDGMENT OF:** RILEY CJ, SOUTHWOOD and  
HILEY JJ

**APPEALED FROM:** BARR J

**CATCHWORDS:**

CRIMINAL LAW – Crown appeal against sentence – manifestly inadequate  
– appeal allowed

CRIMINAL LAW – Sexual offences – maintaining a sexual relationship  
with a child – female offender and male victim

CRIMINAL LAW – Sentencing considerations – no difference between male  
and female offenders – female offenders sentenced in same manner as male  
offenders – not a distinguishing feature that offender female and victim male  
– consent not a mitigating factor – law exists to protect children from sexual  
relationships.

*Criminal Code* s 127(1)(a), s 131A(2) & (4), s 139A

*Clarkson v The Queen* (2011) 32 VR 361; *DPP (Vic) v Bright* (2006) 163 A Crim R 538; *DPP v Ellis* (2005) 11 VR 287; *Everett v R* (1994) 181 CLR 295; *R v GJ* (2005) 196 FLR 233; *R v Williams* (1990) 53 SASR 253; *R v Wilson* (2011) 30 NTLR 51, applied

*R v Hitanaya* [2010] NTCCA 03, considered

## **REPRESENTATION:**

### *Counsel:*

Appellant:	M Nathan
Respondent:	I Read SC

### *Solicitors:*

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*The Queen v Tulloch* [2013] NTCCA 6  
No. CA 9 of 2013 (21123971)

BETWEEN:

**THE QUEEN**  
Appellant

AND:

**KRISTY LOUISE TULLOCH**  
Respondent

CORAM: RILEY CJ, SOUTHWOOD AND HILEY JJ

EX TEMPORE

REASONS FOR JUDGMENT

(Delivered 31 May 2013)

**The Court:**

**Introduction**

- [1] This is a Crown appeal against a sentence of two years and six months imprisonment, suspended after serving six months,<sup>1</sup> imposed for the crime of maintaining a sexual relationship with a child under the age of 16 years. The crime was accompanied by the circumstance of aggravation that the respondent had sexual intercourse with the victim on numerous occasions.<sup>2</sup>

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<sup>1</sup> The trial judge fixed an operational period of three years from the date of release from custody.

<sup>2</sup> Cf s 131A(2) & (4) and s 127(1)(a) of the *Criminal Code*.

[2] The sole ground of appeal is that in all the circumstances of the case the sentence imposed by the sentencing judge was manifestly inadequate. For the reasons that follow, in our opinion, the ground of appeal is made out and the respondent should be re-sentenced.

[3] The case is appropriate for a Crown appeal.<sup>3</sup> The appeal is about maintaining adequate standards of punishment, not only for the offence of maintaining a sexual relationship with a child who was under 16 years of age but for sexual offences committed by female adults against male children.

#### **The facts<sup>4</sup>**

[4] The respondent is a female aged 34 years and the victim is a male currently 17 years of age.

[5] The respondent is a single parent who has two children one of whom is in middle school and the other is in primary school. She has received little assistance from the fathers of her children.

[6] The respondent has experienced some adverse life circumstances. She was 19 years of age when her older half-brother committed suicide. Her half-sister drifted apart from the rest of the family after her brother's death.

[7] The respondent has spent most of her adult life living with her parents as she found renting by herself, with her children, too expensive. This resulted

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<sup>3</sup> *Everett v R* (1994) 181 CLR 295 at 300; *R v Wilson* (2011) 30 NTLR 51.

<sup>4</sup> The facts are taken from the sentencing judge's sentencing remarks and the psychological report of Ms Kate Crawley dated 30 November 2012.

in stress and tension with the family from time to time, particularly when other family members stayed in her parents' home. In late 2010 when the respondent was unemployed, there was so much tension in the house that her father asked her to leave the family home for one month.

- [8] In January 2011 the respondent obtained a Housing Trust home. On moving away from her parents' home the respondent became settled and things began to improve between her and her parents.
- [9] The respondent left school half way through year 11 when she was 16 years of age. After leaving school the respondent obtained two traineeships for approximately six months each. She then obtained work testing water in a laboratory at Jabiru. In 2007 she obtained work as an indigenous tutor and support worker. She then obtained employment in a child care centre.
- [10] The respondent has been in age appropriate relationships. Her first relationship occurred when she was 16 years of age. It was with a male of the same age. Her partner moved interstate to play football and she then formed a relationship with her ex-partner's cousin which resulted in pregnancy and the birth of her son who is now 14 years of age. Her relationship with her first partner has rekindled from time to time and this has resulted in the birth of her daughter. At the time of being sentenced the respondent was not in a relationship.

- [11] The offending occurred between 1 January 2010 and 31 March 2011 when the respondent was 29 to 30 years of age and the victim was 14 to 15 years of age.
- [12] At all material times the respondent was living with her children and her parents across the road from where the victim was living with his mother and older brother. The respondent and the victim had known each other for as long as the victim could remember. The victim came to know the respondent better when she worked at his school as a teacher's aide between July 2007 and June 2010.
- [13] In late 2009 the victim began going to the respondent's house to drop off Avon products that the respondent had purchased through his mother. Over time the respondent and the victim became friends. In the evenings they would sit together on the verandah of the respondent's parents' home<sup>5</sup> sharing cigarettes and talking. Visits by the victim to the respondent's home became regular from the last school term in 2009 while the respondent was still a teacher's aide at the victim's school. After a few months of sitting with the respondent and sharing cigarettes on her verandah, the victim also started to smoke marijuana with the respondent. On most occasions that the victim went to the respondent's home he would go alone, but sometimes he was accompanied by male friends his own age.

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<sup>5</sup> Hereafter referred to as the "respondent's home".

- [14] During one evening at the beginning of 2010, the respondent and the victim were having a conversation about a girl when the respondent said to the victim, "You have a little dick". He replied, "No I do not have a little dick." Then, after the respondent made some other comment, the victim took his penis out of his pants and the respondent said, "Well it looks small. I will have to suck it." Whereupon the respondent had fellatio with the victim in the carport while he lent against the respondent's father's car.
- [15] After the first incident, the victim continued to visit the respondent regularly on her verandah but he was no longer accompanied by friends. On about 90 per cent of these visits the respondent performed fellatio on the victim, but this later changed to penile/vaginal sexual intercourse.
- [16] The first occasion of penile/vaginal sexual intercourse occurred in May 2010 when the respondent's parents and son were away on a sporting trip to Katherine. They had sexual intercourse on a mattress that the respondent had taken off her son's bed and set up in the lounge room. The victim was not asked to wear a condom and he ejaculated in the respondent's vagina. The respondent and the victim had sexual intercourse every night that the respondent's parents were in Katherine.
- [17] In the 10 month period between May 2010 and March 2011 the respondent and the victim engaged in fellatio followed by penile/vaginal sexual intercourse several times a week. Often this took place in the carport of the respondent's parents' home, but on several occasions the sexual intercourse

took place in hotel rooms booked and paid for by the respondent. On other occasions they had sexual intercourse in the respondent's car. In November 2010 the respondent and the victim stayed at the respondent's aunt's home where they had sexual intercourse on a daily basis. The same pattern of sexual intercourse occurred after November 2010 when the respondent had moved to a new address in Driver.

[18] At various times the victim expressed concern about the lack of contraception and in November 2010 the victim became concerned that he may have contracted a sexually transmitted disease. Following this, the respondent took the victim to a medical clinic where he was told that he did not have a medical condition. On another occasion, the respondent told the victim she was pregnant and she would have an abortion. This caused the victim considerable stress.

[19] Throughout the period of the respondent's unlawful relationship with the victim, she made a large number of telephone calls to him. There were times when, if the respondent could not contact the victim directly, she would contact him through his friends. Between November 2010 and March 2011 the respondent contacted the victim 1939 times by telephone. During one month, when the victim used his father's telephone, the respondent contacted him 1140 times. In contrast, the victim contacted the respondent 248 times by telephone.

- [20] The Court has not been informed how the unlawful sexual relationship came to an end.
- [21] The respondent was unable to provide any motivation for entering into the unlawful sexual relationship with the victim and unable to explain how the relationship evolved from boy over the road, to confidante, to friend, to sexual engagement. The respondent described a naïve and ill-considered belief that her sexual involvement with the victim was a romantic affair or a relationship of equals.
- [22] It was the opinion of Ms Kate Crawley, who is a forensic psychologist, that it did not appear that the respondent's motivation was that of a sexual predator with the sole intention of sexual gratification. Rather, at that time she was a woman who was experiencing stress in her life, had limited coping mechanisms to deal with this, exhibited problematic emotional competence and response and was unable to appreciate boundaries and power relations inherent in a sexual liaison with a teenage boy.
- [23] It was also Ms Crawley's opinion that the respondent still does not express awareness of the nature, motivation and consequences of her offending behaviour. When seen by Ms Crawley, the respondent's insight remained poor. However, Ms Crawley assessed the respondent's risk of re-offending as low provided appropriate management strategies were put in place.
- [24] The sentencing judge found that the respondent was probably deprived of male companionship and that made her vulnerable to having a relationship

with a teenage boy. However, his Honour was unable to determine if the respondent was consciously exploiting a younger, less mature and less experienced male youth. Similarly, his Honour could not determine whether and to what extent the respondent was a victim of her own excessive romantic infatuation or whether she was in control at all times.

[25] His Honour found that the relationship the respondent maintained, and went to great lengths to maintain, was an unhealthy and inappropriate relationship, which was ultimately very damaging for the victim. The victim suffered stress. He was concerned that he may contract a sexually transmitted disease and that the respondent may become pregnant and may need to have an abortion. The respondent had a possessive and controlling obsession with the victim.

[26] The victim impact statement reveals that the victim was significantly emotionally disturbed by the unlawful sexual relationship that the respondent maintained with him. The victim felt guilty and dirty and angry and disgusted with himself. He continues to feel uncomfortable and awkward when the relationship is mentioned and he is concerned that others may think that it was disgusting for him to have been in such a relationship. He has had suicidal thoughts. He says that the relationship made him very insecure and that he developed a strong reluctance to ever become involved in another relationship. He says that the stress at the time caused him to significantly increase his use of alcohol and cannabis to numb his feelings,

and that he now struggles with alcohol and drug addiction because of what happened. He says that he still suffers from panic attacks and anxiety.

[27] It is unclear whether the respondent was genuinely remorseful about her conduct. While she told Ms Crawley that she was sorry for all the harm that she has caused her family and the victim, Ms Crawley says that “she did not express awareness of the nature, motivation or consequence of her offending behaviour, thus [her] insight at this juncture remains poor.” Her plea of guilty was a very late plea, only a few days before trial, and came after the victim and six or seven other child witnesses had given evidence and after the victim had been cross-examined over two days as to his honesty and during which it was put to him that these events did not occur.

[28] The respondent has been diagnosed as suffering from depression for which she is receiving treatment. Her depression seems to be a reaction to her anxiety about going to prison and her worry about how her children will be affected by her imprisonment.

### **Objective seriousness**

[29] The respondent was convicted of an offence which has a maximum penalty of imprisonment for 20 years. The purpose of s 131A of the *Criminal Code* is to deter adults from taking advantage of the immaturity of the young and exercising control over them for their own sexual gratification. The section protects young people from being preyed upon by adults and from entering

into sexual relations before they are mature enough to do so and to have weighed up the possible consequences.<sup>6</sup>

[30] The offending is a serious example of the offence of maintaining a sexual relationship with a child. The respondent was double the age of the victim. The respondent initiated sexual contact with the victim when he was 14 years of age by teasing him about the size of his penis. She was in a position that was not without some authority, she had known the victim his entire life and she took advantage of a friendship with a vulnerable youth. At the time she was a customer of the victim's mother who sold her Avon products and, although she was not involved in any of the respondent's classes, she was also a teacher's aide at the victim's school. The offending did not involve a momentary lapse in judgment. It was a sustained course of criminal conduct.<sup>7</sup> The sexual relationship was maintained for a period of 15 months during which the respondent had unprotected sexual intercourse with the victim more than 100 times. The *actus reus* of the offence is the commission of acts of unlawful sexual intercourse on three or more occasions.<sup>8</sup> The respondent engaged in possessive and controlling behaviour. The respondent determined when and where she had sexual intercourse with the victim and, for extended periods of the relationship, she was in almost constant contact with him by telephone. She ignored his concerns about the lack of use of contraception and on one occasion she

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<sup>6</sup> Cf *R v GJ* (2005) 196 FLR 233 at 241. See too *R v Williams* (1990) 53 SASR 253 at 254.

<sup>7</sup> Cf *The Queen v Hitanaya* [2010] NTCCA 03 at [72].

<sup>8</sup> Cf s 131A(3) of the *Criminal Code*.

informed him that she had become pregnant and would need to terminate the pregnancy. The impact upon the victim was significant and it is impossible to know at this stage what will be the long term impact of this relationship upon the victim. Nonetheless, the victim clearly felt degraded and humiliated by what occurred.

[31] The victim did not consent to being in such a relationship. He was too immature to do so.<sup>9</sup> There was no evidence to suggest that the victim regarded the relationship as one of boyfriend and girlfriend. Further, the fact that the victim consented to having sexual intercourse with the respondent is not a mitigating factor.<sup>10</sup> The law exists in order to protect children until they have reached a sufficient degree of maturity in life to make sensible and responsible decisions as to their own lives.<sup>11</sup> Here, there has been an extensive and sustained invasion of the victim's right not to be interfered with in such a manner. It is necessary for the courts to impose penalties which vindicate the law and deter adults from taking advantage of immature youths. It would be an aggravating circumstance if the respondent used force or threats or other means to overcome the victim's resistance but that aggravating factor did not exist in this case.

[32] It is not a relevant distinguishing feature that the respondent is a female and her victim is a male.<sup>12</sup> In the eyes of the law the respondent's conduct is no

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<sup>9</sup> Cf s 139A of the *Criminal Code*.

<sup>10</sup> *R v Hitanaya* [2010] NTCCA 03 at [35]. See too *R v Williams* (1990) 53 SASR 253 at 254 and *Clarkson v The Queen* (2011) 32 VR 361.

<sup>11</sup> *R v Williams* (1990) 53 SASR 253 at 254.

<sup>12</sup> *DPP v Ellis* (2005) 11 VR 287.

more acceptable than would be the conduct of a 30 year old male who in similar circumstances took advantage of a 14 year old girl.

[33] While the level of trust involved in this case is not necessarily equivalent to other relationships of trust such as a relationship of trust in an institutional setting, the case does fall into that class of case which involves an established relationship between an adult and a youth in which the adult influences and manipulates the relationship into a sexual relationship. The respondent had known the victim his entire life. Friendship and confidence were established before the respondent first seduced the victim.

[34] This case is in the middle to upper level of the range of such offences and little contrition and remorse has been demonstrated by the respondent. She has been very reluctant to accept responsibility for what has happened and lacks insight into her behaviour. Punishment, denunciation and general deterrence are the paramount sentencing considerations in this case.

### **Mitigating features**

[35] As to matters of mitigation, this was not a case where, from the outset, the respondent sought out the victim for the purpose of sexual gratification. The victim came into contact with the respondent as a result of delivering Avon products on behalf of his mother and they developed a friendship. The respondent does not possess an unhealthy interest in children generally and she did not use force or threats in any way. The sentencing judge was of the

opinion that the respondent was deprived of male companionship and that made her vulnerable to having a relationship with a teenage boy.

[36] The respondent is also entitled to some credit for her previous good character.<sup>13</sup> However, the credit to which she would otherwise be entitled for her previous good character is outweighed by the seriousness of the offending. The offending did not involve an isolated instance of criminal conduct. There were multiple acts of sexual intercourse with a child over an extended period of time.

### **Manifestly inadequate**

[37] In our opinion, the sentencing judge failed to take proper account of the seriousness of the offending. The sentence imposed on the respondent was so disproportionate to the seriousness of her crime as to shock the public conscience.<sup>14</sup> The sentence was plainly unjust.

[38] It is likely that the sentencing judge gave too much weight to the subjective features of this case and insufficient weight to the protracted nature of the offending, the degradation suffered by the victim and the lack of remorse and lack of insight shown by the respondent.

### **Re-sentence**

[39] The appeal is allowed and the respondent is sentenced to 4 years imprisonment. The sentence is back dated to 15 January 2013. The sentence is suspended after the respondent has served 18 months in prison.

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<sup>13</sup> *R v Hitanaya* [2010] NTCCA 03 at par [26] to par [33].

<sup>14</sup> Cf *DPP (Vic) v Bright* (2006) 163 A Crim R 538 at [10].

The operational period will be 2 years 6 months from the date of her release from prison.

[40] In sentencing the offender we have taken into account all of the matters referred to above. As a result of the offender's plea of guilty we have reduced the sentence that we otherwise would have imposed on the offender by six months.

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