

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL JURISDICTION

Revised
Not Restricted
Suitable for Publication

CR-20-00054

DIRECTOR OF PUBLIC PROSECUTIONS

v

MICHAEL JOHNSON

JUDGE: HER HONOUR JUDGE HASSAN
WHERE HELD: Melbourne
DATE OF HEARING: 13 May 2020
DATE OF SENTENCE: 19 May 2020
CASE MAY BE CITED AS: DPP v Johnson
MEDIUM NEUTRAL CITATION: [2020] VCC 640

REASONS FOR SENTENCE

Subject: CRIMINAL LAW
Catchwords: Sentence — indecent act with a child under 16 — sexual penetration of a child under 16 — plea of guilty — no criminal history — general deterrence — denunciation — youth at the time of offending — demonstrated rehabilitation — community correction order — sex offender registration
Legislation Cited: *Sentencing Act 1991* (Vic); *Sex Offenders Registration Act 2004* (Vic)
Cases Cited: -
Sentence: Community correction order of 18 months
Section 6AAA declaration: 6 months' imprisonment and community correction order of 18 months

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Director of Public Prosecutions	Ms G McMaster	Solicitor for the Office of Public Prosecutions
For the Accused	Ms E McKinnon	Furstenberg Law

HER HONOUR:

- 1 Michael Johnson, you pleaded guilty to one charge of indecent act with a child under 16 and three charges of sexual penetration of a child under 16. The maximum penalty for both these offences is 10 years' imprisonment.
- 2 All the charges arise out of a short sexual relationship you had with the victim, Violet Beltran,¹ between 2004 and 2005. You were 18 years old and Ms Beltran was 14 years old. You have no prior or subsequent convictions of any kind.
- 3 Tendered on the plea as exhibit 1 was a 'Summary of Prosecution Opening on Plea'. In brief, the circumstances of your offending were as follows. You met Ms Beltran on the Melbourne Cup weekend of 2004 on a camping trip. During conversations, you told Ms Beltran that you were 18 years old and she told you that she was 13 years old. You had initially guessed she was 15. Ms Beltran was pleased with the attention she was getting from you, as it was the first time a young man had shown interest in her. It was also the first time you had met a girl who seemed interested in you.
- 4 When Ms Beltran was leaving with her family to return home, you gave her your mobile phone number and she gave you her home phone number. The following week, you phoned her at home and asked if you could take her to the movies. You picked Ms Beltran up in your Jeep and took her to the cinema for your first date.
- 5 A few weeks after your first date at the movies, Ms Beltran came to your home where you lived with your parents and your brother. There was a birthday celebration underway and she met some of your family, including your grandparents and your brother. Shortly after the introductions, you and Ms Beltran went to your bedroom, where you played Nintendo computer games.

¹ A pseudonym.

- 6 While sitting on the bed behind Ms Beltran, who was seated on the floor, you put your finger through the zipper of your jeans. This scared Ms Beltran initially, as she had never seen an erect penis before and thought it was your penis. After she laughed it off initially, you put your erect penis through the zipper of your jeans and said to Ms Beltran, 'Do you want to touch it? You should touch it'. Ms Beltran did not want to touch your penis but did not know what else to do, so she touched it. You showed her how to hold it and move her hand, and you were saying things to her like, 'tighter', 'looser', 'faster' and 'slower'. That is the basis of charge 1 on the indictment. You asked her to give you oral sex, but she did not do so on this occasion.
- 7 You then asked Ms Beltran if you could kiss her 'down there', meaning her vagina. You kissed her on the face, neck and stomach and then removed her underpants. You then put your tongue in her vagina and licked her vagina. You then put two fingers in her vagina and continued to lick. This is the basis of charge 2, a rolled-up charge covering both the introduction of your tongue and your fingers into Ms Beltran's vagina.
- 8 On a day after the birthday celebration at your home, Ms Beltran was again with you in your bedroom at your house, lying on your bed watching a movie. On this occasion, you got Ms Beltran to perform oral sex on you. Ms Beltran was hesitant but did what you asked and put her mouth over your penis. You told her to 'go deeper' and used your hands to push the back of her head down. This made her want to vomit. She was confused and she wanted to go home, but she did not want you to end the relationship. You did not ejaculate. That is charge 3 on the indictment.
- 9 Sometime after Ms Beltran's 14th birthday, she was in your bedroom with you and you discussed having sexual intercourse. You told her that she had 'better not be a starfish'. Ms Beltran was on her back on your bed, you were both naked, and you went and got a condom and put it on your erect penis. You placed a towel under Ms Beltran, as she was concerned that she may

bleed. You put your penis in her vagina. It hurt her and she asked you to stop. You stopped when she asked. Sometime later, sensing your frustration, she decided she would let you put your penis in her vagina. This time it went in all the way. Ms Beltran believed you ejaculated on this occasion.

10 Ms Beltran had surgery due to an ongoing and unrelated medical problem and received stitches. She was not allowed to exercise for a period of time. A week after the surgery, you drove to her house to pick her up. You then returned to your house and went into your bedroom. You put a condom on your erect penis and inserted your penis into her vagina while she was lying on your bed. Ms Beltran could feel her stitches stretching until she thought they would burst. You told her she was like a starfish because she was not moving around a lot. The sex ended when you ejaculated. These two incidents of penile–vaginal penetration are the basis of charge 4, a representative charge.

11 The relationship ended some weeks later in 2005, when Ms Beltran was suffering from anxiety and feeling sick. She told her mother about you and about having sex with you, and her mother took her to the doctor.

12 You were interviewed at the Knox Sexual Offences and Child Abuse Investigation Team on 2 May 2018 and you made a ‘no comment’ interview.

13 You pleaded guilty to the charges on the indictment on 20 January 2020, on the day of scheduled committal. The committal hearing did not commence, and no witnesses were called. This is an early plea. It has utilitarian value, as it has saved the victim, the witnesses and the community the trauma and cost of a trial. I also accept it is indicative of remorse on your part.

14 Tendered on the plea as exhibit 3 was the victim impact statement by Violet Beltran. Ms Beltran says your offending has irreversibly damaged her relationship with her mother. She says from the time her mother discovered what had happened, she was angry and unsupportive. Ms Beltran says she

was sexually and emotionally naïve when you offended against her, and that she tried to please you with no understanding of her own feelings and thoughts. She says she was completely out of her depth. Her relationship with you made her the object of destructive schoolyard gossip.

- 15 She says she suffered mental health issues and was barely able to finish year 12. She says her mother put restrictions upon her behaviour that led her to become isolated and lonely. She said she suffers from a number of mental health difficulties and that she suffered a breakdown in 2013. Ms Beltran says after 2013 she has no longer been able to work and exists on unemployment benefit. She says she lives in poverty and this compounds her distress.
- 16 Ms Beltran's statement is a reminder of the profoundly damaging consequences of premature sexual experience, which lie at the very heart of the law's absolute prohibition on sexual activity with children.
- 17 I turn now to your personal circumstances. You were born on 24 October 1986 and you are presently 34 years old. You were born in Malvern and you have an older brother. Your family home was loving and stable and your early years were uneventful. You started to experience problems when you were about 12–13 years old and attending secondary school.
- 18 In 1999, when you were about 12–13 years old and in year 7 at Knox Primary School in Wantirna, you experienced severe bullying by other students. You were a poor student and were struggling to acquire basic literacy and numeracy. Your behaviour deteriorated significantly, and you were disruptive in class and disrespectful to teachers.
- 19 You changed school and, in the second half of 2000, you attended Gippsland Grammar as a boarder for the first half of year 8. You told Dr Mathew Barth, psychologist, with whom you spoke on 30 April 2020 and who prepared a report tendered upon your plea, that if anything your behaviour only further deteriorated upon the change of school.

- 20 On 26 April 2000, you were assessed by a child psychiatrist, Dr Richard Kefford, in relation to your ongoing behavioural issues. Dr Kefford's clinical notes have not been able to be obtained but you told Dr Barth that you were diagnosed with Asperger's syndrome. As I discussed with your counsel Ms McKinnon at your plea, you will not be sentenced on the basis that you did indeed suffer with Asperger's syndrome, given there is nothing to substantiate such a diagnosis. But, notwithstanding this, it is clear that you had serious behavioural problems during your adolescence. In the second half of 2000, you were asked to leave Gippsland Grammar because of your poor behaviour. You then attended Billanook College for the second half of year 8.
- 21 In 2001, when you were only 14, you were asked to leave Billanook and did not complete year 9. This was the end of your formal education. The last full year that you were able to complete was year 8.
- 22 What perhaps may go some way to explaining the difficulties you experienced fitting in and obtaining an education were your serious deficiencies in speech and language development. You were sent for a complete speech pathology assessment in September 2000 when you were 13, about to turn 14 years old. This was to explore whether a possible underlying language disorder was contributing to your poor academic performance. The assessment revealed that your overall language ability was at six years and two months below your chronological age.
- 23 With your limited schooling, you had limited work options. You worked as a carpet cleaner and then attempted to complete an apprenticeship as a diesel mechanic before working in various labouring jobs.
- 24 You left home in 2006 when you were 20 years old. You had a couple of relationships before you met your wife Penelope in 2014. You married in 2016. You had a son in 2018 and you are expecting a second child. Your marriage is a positive and stabilising force in your life.

25 Despite your setbacks and your limitations, you have succeeded in your work life. You started your own carpet cleaning business in 2009 and this business has thrived and prospered.

26 You have the support of your family, including your wife, your parents and your brother, and the support of a number of friends. A number of references were tendered upon your plea.

27 In terms of any explanation for your offending, Dr Barth opines that it occurred in the context of your immaturity and in the context of your particular difficulties establishing and maintaining relationships. Dr Barth says:

it appears that Mr Johnson's offending behaviour occurred due to his significant social immaturity and inability to establish an intimate connection with his own peers during that time. The fact that the complainant was an underage female meant that she did not challenge his sense of inadequacy and self-doubt.

28 I accept this explanation for your offending. It does not, however, excuse your offending. You were only 18 and I accept you were an immature young man with no sexual experience yourself, and with serious limitations. But, even so, you must have understood that you should not be having a sexual relationship with a girl as young as Ms Beltran.

29 You told Dr Barth you were remorseful. You have expressed remorse to friends and family members. You have participated in five treatment sessions at your own expense with Geoffrey Burrows, forensic counsellor in the Sex Offender Treatment Program. Mr Burrows says that you are at an early stage of the Sex Offender Treatment Program and further intervention is required for you to gain comprehensive insight into your offending behaviour.

30 Dr Barth found that your intelligence was in the normal range and that you did not suffer from any mental disorder. He gave the opinion that you were a low-moderate risk of sexual recidivism, given your lack of any criminal history and your sustained relationship with your wife.

- 31 I turn now to applicable sentencing principles. In addition to specifying matters to which I must have regard in arriving at an appropriate sentence, the *Sentencing Act 1991* (Vic) prescribes the purposes, indeed, the only purposes for which a sentence may be imposed. These are just punishment, deterrence, rehabilitation, denunciation, and protection of the community. A custodial sentence must only be imposed as a last resort.
- 32 I must take into account the effect your crime has had upon your victim, and I must have regard to current sentencing practices and to maximum penalties.
- 33 In this case, as in all cases of sexual offending against children and young people, general deterrence and denunciation are the paramount sentencing considerations. The law must send the clear message that sexual activity with children is reprehensible and damaging behaviour.
- 34 In your case, you were a young person yourself and the sentence I impose is heavily moderated because of your youth at the time of your offending.
- 35 I accept also that your offending was at the lower end of seriousness for offending of this kind. I do so having regard to your age and the short duration of the relationship. Also, although it is clear from the summary and from her victim impact statement that Ms Beltran was, as she herself says, 'out of her depth' and often merely trying to please you, you did not subject her to coercive or degrading acts of any kind, although your behaviour could be described as bullying or domineering at times. You also wore a condom when there was penile–vaginal sex and did not expose Ms Beltran to the risk of pregnancy.
- 36 There has been considerable delay between your offending and the matter being reported to the police and you coming before the Court. Delay is not uncommon in cases involving childhood sexual abuse. During the intervening years, you have shown yourself to be a good and worthwhile citizen. In effect, your rehabilitation has been demonstrated.

37 The prosecution submitted that, given the seriousness of the offending and the effect on Ms Beltran, a sentence of imprisonment was warranted but that the sentence could be either wholly or partially suspended, and that would be within the proper sentencing range.

38 Defence submitted that a community correction order would give proper expression to the various sentencing considerations and would support your long-term rehabilitation.

39 The prosecution in response acknowledged that a community correction order was reasonably open.

40 I had you assessed for a community correction order. Initially, I considered that an order comprising work hours only would be suitable in your case, but I was persuaded by the submissions of Ms McMaster, who appeared to prosecute, to reconsider and to impose treatment conditions to address your offending behaviour and future risk.

41 You were assessed as suitable for a community correction order and I intend to sentence you accordingly.

42 Mr Johnson, on all charges you are convicted and sentenced to a community correction order of 18 months. You will need to report to Community Corrections within two days. There will be 200 hours of community work. There will also be the condition that you participate in treatment, and 50 hours of your participation in treatment can be credited as work hours for the purposes of the order.

43 You will be subjected to supervision by Corrections. Judicial monitoring will also take place. That means you will come before me so I can see how you are going on the order. I will give you a little bit of time, given the current circumstances we are in. Judicial monitoring will take place on 23 November at 10:00am in this Court.

44 During the whole 18 months of the order, you are to report to your community corrections officer any change of address of where you live or work, and that is to be done within two clear working days of any change of that kind.

45 Throughout the order, you are to attend supervision meetings as directed and allow visits as directed, and you must obey all lawful directions of community corrections officers. You are not allowed to leave the state of Victoria without prior permission of a community corrections officer and, above all, you are not to commit any offences that could result in a term of imprisonment. And that covers just about anything, Mr Johnson. Not only serious offences — even quite mild or moderate offences carry a term of imprisonment. So, no offending of any kind. And if you breach the order, either by not complying with the conditions or offending, you can be brought back to Court and dealt with. Do you understand all of that?

46 OFFENDER: Yes, I do.

47 HER HONOUR: Ms McKinnon can speak to you about it more fully. I will make a *Sentencing Act 1991* (Vic) s 6AAA declaration. Had you not pleaded guilty and had this been a trial, I would have sentenced you to a total effective sentence of six months' imprisonment followed by an 18-month community correction order. Pursuant to *Sentencing Act 1991* (Vic) s 18, I declare that you have served nil days of the sentence I have passed, and I direct that this be entered into the records of the Court.

48 You have been convicted of three class 1 offences and one class 2 offence, and you are therefore, pursuant to the *Sex Offenders Registration Act 2004* (Vic), a registered sex offender for life.
