

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: ORDER MADE IN NZHC [2020] 1271 AT [86] PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF CO-OFFENDER PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA50/2023  
[2023] NZCA 625**

BETWEEN CAREY JOHN MARSHALL  
Appellant

AND THE KING  
Respondent

Court: Wylie, Mander and Muir JJ

Counsel: G H Vear and E E McClay for Appellant  
B D Vanderkolk for Respondent

Judgment: 7 December 2023 at 11 am  
(On the papers)

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**JUDGMENT OF THE COURT**

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**The application for an extension of time to appeal is granted.**

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**REASONS OF THE COURT**

(Given by Mander J)

[1] Mr Carey Marshall pleaded guilty in the Palmerston North High Court to four representative charges of sexual violation by unlawful sexual connection,<sup>1</sup> and representative charges of indecent assault on a child under 12 years,<sup>2</sup> bestiality,<sup>3</sup> and knowingly making an objectionable publication.<sup>4</sup> On 8 June 2020, he was sentenced by Doogue J to an effective sentence of 16 and a half years' imprisonment and ordered to serve a minimum period of 10 years.<sup>5</sup>

[2] An appeal against sentence is required to be filed within 20 working days after the date the sentence was passed.<sup>6</sup> Mr Marshall did not file his notice of appeal until 30 January 2023, some two and a half years after the expiry of the period for filing an appeal. He now seeks an extension of time.<sup>7</sup> His application for leave was directed to be dealt with separately from the substantive appeal.

[3] Mr Marshall argues the cause of the delay was the result of difficulties securing counsel and that his appeal, which rests on a submission the sentence was manifestly excessive, has merit. The application for an extension of time is opposed by the Crown. It says the sentence was appropriate in all the circumstances.

### **Reasons for delay**

[4] Mr Marshall has filed an affidavit in support of his application for an extension of time. He asserts he met with his counsel immediately after sentencing and they agreed he should appeal. Mr Marshall maintains he understood from that meeting that his counsel would take the necessary steps to advance an appeal and visit him at prison for that purpose. He says he repeatedly attempted to contact his counsel about his appeal by telephone and email, and that after doing so his counsel undertook to visit him but never did.

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<sup>1</sup> Crimes Act 1961, s 128(1)(b) and 128B — maximum penalty of 20 years' imprisonment.

<sup>2</sup> Section 132(3) — maximum penalty of 10 years' imprisonment.

<sup>3</sup> Sections 143 and 66 — maximum penalty of seven years' imprisonment.

<sup>4</sup> Films, Videos, and Publications Classification Act 1993, ss 123(1) and 124(1) — maximum penalty of 14 years' imprisonment.

<sup>5</sup> *R v Marshall* [2020] NZHC 1271 [sentencing notes].

<sup>6</sup> Criminal Procedure Act 2011, s 248(2).

<sup>7</sup> Section 231(3).

[5] Over the course of 2020 and the following year, Mr Marshall, at times with the assistance of Corrections officers, made further efforts to follow up with his counsel and to contact the Legal Aid Agency. There are some Corrections Department records that support Mr Marshall's claims that he sought to progress his appeal but was unable to secure the necessary legal assistance.

[6] In around December 2022, it appears a formal application for legal aid was filed. Mr Marshall met with newly assigned counsel in January the next year and this resulted in a notice of appeal being filed by the end of that month. Conduct of Mr Marshall's application to appeal was reassigned to the Public Defence Service in May 2023.

[7] Apart from signalling a note of caution regarding Mr Marshall's self-reporting of his efforts to contact his former counsel, the Crown does not seek to contest Mr Marshall's account. It accepts it is not prejudiced by the delay, notwithstanding its length, but it seeks to oppose the application on the basis of its merits.

### **The offending**

[8] Mr Marshall's sexual offending was extremely serious. It involved the prolonged sexual abuse of a young child over some three years, when she was aged between four and seven years. The nature and extent of the sexual offending covered by the representative charges involved various forms of oral sexual connection that occurred on a daily basis, and the regular digital and penile penetration of the child's anus that, at Mr Marshall's instigation, often included the participation of a co-offender. These and other sexual acts were sometimes filmed or photographed, and the child was often subjected to various other indignities. It is apparent the child became normalised to this sexual abuse such was its regularity over a long period of time.

[9] The bestiality offending took place separately on multiple occasions and involved a number of dogs. It did not include the child but Mr Marshall's co-offender was described by the sentencing Judge as a victim of this offending.<sup>8</sup>

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<sup>8</sup> Sentencing notes, above n 5, at [3].

[10] Unsurprisingly, the effects on the child have been profound. She has suffered physical and psychological damage. There are grave fears for her long-term mental and social wellbeing as a result of what she has experienced.

### **The sentence**

[11] A significant list of aggravating features were identified by the Judge.<sup>9</sup> These included the vulnerability of the four-year-old victim, the breach of trust, the involvement of a co-offender, the scale of the offending that involved associated acts of degradation, the frequency and degree of the violations, the planning and premeditation in organising opportunities to offend, and the serious harm caused to the victim. After reviewing these factors and referring to the guideline judgment of *R v AM*,<sup>10</sup> the Judge settled on a starting point for the representative charges of unlawful sexual connection of 18 years' imprisonment.<sup>11</sup>

[12] In respect of the representative bestiality charge, the Judge concluded that a sentence of five years' imprisonment should be added. This resulted in a total starting point of 23 years' imprisonment.<sup>12</sup> However, because of totality considerations, that was reduced to a starting point of 20 years and six months' imprisonment.<sup>13</sup> A 20 per cent discount was applied to reflect Mr Marshall's guilty pleas, which led to the final sentence of 16 years and six months' imprisonment.<sup>14</sup>

[13] The Judge found the sentencing purposes of accountability for the harm done to the victim, denunciation and deterrence, and the need to protect the community required the imposition of a minimum period of imprisonment, which resulted in a non-parole period of 10 years.<sup>15</sup> Notwithstanding being satisfied there was clear evidence indicating a significant risk of reoffending,<sup>16</sup> the Judge declined the Crown's application for a sentence of preventive detention. The Judge considered there was a

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<sup>9</sup> At [25]–[31].

<sup>10</sup> *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

<sup>11</sup> Sentencing notes, above n 5, at [45].

<sup>12</sup> At [47].

<sup>13</sup> At [48]–[49]; and Sentencing Act 2002, s 85(2).

<sup>14</sup> Sentencing notes, above n 5, at [52]–[53].

<sup>15</sup> At [53].

<sup>16</sup> At [75].

need to afford Mr Marshall the opportunity to address the underlying causes of his offending before resorting to such a sentence.<sup>17</sup>

### **Extension of time to appeal: relevant principles**

[14] This Court's discretion to extend the time allowed for filing a notice of appeal is to be exercised with regard to the importance of the principle of finality in litigation which the statutory time limit is designed to achieve.<sup>18</sup> Relevant considerations to be taken into account include whether the delay is adequately explained, and whether there are compelling reasons to extend time.<sup>19</sup> The Court may have regard to the seriousness of the charges, the merits of the proposed appeal, the effect on others, and prejudice to the Crown.<sup>20</sup> The overarching consideration must always be the interests of justice.<sup>21</sup>

### **Analysis**

#### *Delay*

[15] In the absence of any direct challenge to Mr Marshall's evidence or steps taken by the Crown to investigate how matters unfolded after sentencing, the information provided by Mr Marshall about the reasons for the delay stand on their face. While we find it difficult to understand why Mr Marshall did not progress matters with the Legal Aid Agency before December 2022, after receiving no satisfactory response to his enquiries over the prior two and a half years, the Crown responsibly does not claim any prejudice from this delay.

[16] That does not, by itself, allay concerns regarding the erosion of the principle of finality, nor the interests of the victim and her family in the criminal proceedings having been completed. However, it is to be acknowledged the ambit of the appeal is limited to the length of the sentence, which will remain of considerable length even in the event of a successful appeal.

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<sup>17</sup> At [76].

<sup>18</sup> Criminal Procedure Act, s 231(3); *R v Knight* [1998] 1 NZLR 583 (CA) at 587; and *R v Lee* [2006] 3 NZLR 42 (CA) at [103].

<sup>19</sup> *Ellis v R* [2019] NZSC 83 at [15].

<sup>20</sup> At [15].

<sup>21</sup> *Knight*, above n 18, at 587; *Lee*, above n 18, at [96]–[99]; and *Ellis*, above n 19, at [15].

*Merits of the appeal*

[17] Mr Marshall seeks to prosecute his appeal on the basis the sentence was manifestly excessive. He has identified four grounds:

- (a) the starting point for the sexual offending was too high;
- (b) the uplift for the bestiality offending was excessive;
- (c) insufficient credit was afforded for aspects of mitigation, including his guilty pleas and “personal history of trauma” that was said to be relevant to his offending; and
- (d) the MPI was excessive.

[18] The starting point of 18 years’ imprisonment adopted by the Judge for the sexual violation offending straddles bands three and four of the guideline judgment of *R v AM*, that sets out graduated categories for this type of sexual offending.<sup>22</sup> Those bands respectively provide for starting points of 12–18 years imprisonment and 16-20 years’ imprisonment.<sup>23</sup> The former band encompasses offending which involves two or more aggravating factors that increase culpability to a high degree, or more than three factors to a moderate degree and will include single episodes of offending which are particularly cruel, callous or violent.<sup>24</sup> The latter band will include factors that place offending within the higher end of band three but will also include multiple instances of offending over considerable periods of time.<sup>25</sup> A paradigm case of offending of this type was described as being where repeated rapes by a family member have been committed over a period of years. Where such offending involves children it will attract a starting point at the higher end of band four.<sup>26</sup>

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<sup>22</sup> *R v AM*, above n 10, at [90].

<sup>23</sup> At [90].

<sup>24</sup> At [105].

<sup>25</sup> At [108].

<sup>26</sup> At [109].

[19] The Crown argues there is no merit in the appeal and that the sentence was an appropriate and proportionate response to the offending. In regard to the sentence for the sexual offending against the child, it points to the sentencing Judge's identification of multiple aggravating features which it submits led to the accurate identification of a justifiable starting point having regard to the applicable bands described in *R v AM*. In regard to this issue, both parties referenced a number of broadly similar cases of serious sexual offending in support of their respective positions.<sup>27</sup>

[20] We observe that no two cases are the same and, invariably, the circumstances of each will vary. The key consideration will remain whether the starting point is reconcilable with the guidance provided by this Court in *R v AM* and comparable with the described features set out in the identified bands for serious sexual offending, which necessarily involve some degree of overlap. Because of other considerations that bear on our decision, it is not appropriate for us to say more at this stage in the context of an application for leave. However, we are bound to observe that, had this been the sole identified ground of appeal, it would unlikely have justified leave.

[21] The other grounds of appeal that include the uplift for the bestiality offending, discounts for mitigating factors, at least in respect of Mr Marshall's personal background which may require closer examination, and the length of the non-parole period, we accept may be worthy of further ventilation and greater argument. However, it would be premature to explore the merits of those issues further at this stage given our ultimate decision.

## **Decision**

[22] We have decided to grant leave to extend the time for filing an appeal against sentence. Mr Marshall has been sentenced to a significant period of imprisonment, in respect of which he has no possibility of parole before the elapse of 10 years. It is not challenged that Mr Marshall, immediately after the imposition of his sentence, expressed a wish to appeal and gave instructions to his counsel to do so. The appeal was not progressed.

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<sup>27</sup> *Ellmers v R* [2013] NZCA 676; *R v N* (CA88/05), 23 November 2005; *R (CA528/2016) v R* [2017] NZCA 210; *Charteris v R* [2021] NZHC 1171; *L v R* [2021] NZCA 297; and *F (CA844/2013) v R* [2014] NZCA 390.

[23] While we have reservations regarding the reasons why that was so, Mr Marshall has been able to point to material that supports his claims of having attempted to pursue an appeal and of having made several enquiries in an effort to expedite that course. The delay is not entirely satisfactorily explained given the period of time that has elapsed but, in the circumstances, notwithstanding the importance of finality, we consider he should be given the opportunity to have his appeal heard.

[24] In essence, we consider the interests of justice favour that course when regard is had to the length of the sentence that was imposed and the considerable period of imprisonment he must presently serve before being eligible for parole. We have been careful not to express any firm views regarding the overall merits of Mr Marshall's grounds, which will be for the panel that hears the substantive appeal to address. The grant of leave to appeal should not be taken as an indication of their worth. While the delay has been lengthy, we consider there are sufficient factors relating to this particular case that favour an extension of time to bring an appeal against sentence. Leave is therefore granted.

## **Result**

[25] The application for an extension of time to appeal is granted.

Solicitors:  
Public Defence Service, Tauranga for Appellant  
Crown Solicitor, Palmerston North for Respondent