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THE SUPREME COURT OF
THE NORTHERN TERRITORY

SCC 20833824

THE QUEEN

and

MARK RODNEY CAPELL

(Sentence)

OLSSON AJ

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON MONDAY 12 OCTOBER 2009

Transcribed by:
Merrill Legal Solutions

HIS HONOUR: Mark Rodney Capell, you have, by your pleas of guilty, admitted to two separate offences, both of which were committed between 1 January 2005 and 1 March 2006 in Palmerston and elsewhere in the Northern Territory.

First, you admit that you did, without legitimate reason, intentionally expose a child, to whom I will simply refer as ABP, being a child under the age of 16, to an indecent photograph, namely, a photograph of an erect penis. Second, you admit that you attempted to procure ABP, a child under the age of 16 years, to have sexual intercourse either in the Northern Territory or elsewhere. Convictions will be recorded against you in respect of each of those offences.

You should understand that the first offence carries a maximum penalty of imprisonment for 10 years; and that the second carries a maximum penalty of imprisonment for 3 years.

The facts related to the commission of the offences are not in dispute.

ABP was born on 23 July 1993 and, at the time of the commission of the offences, was residing with her paternal grandmother, stepfather and two brothers at an address in Bakewell. You are her paternal uncle and were born on 28 October 1971.

At the time of certain of the offending conduct, you were a troop sergeant with a cavalry regiment of the Australian regular army. You were second in command of the troop and a crew commander of one of the troop vehicles.

In about December 2005, you were posted to Kapooka in New South Wales to instruct recruits at the Recruit Training Centre. Sometime in about the middle of 2005, ABP commenced receiving text messages from you on her mobile telephone. She was then 12 years of age. The messages asked whether she wanted to have sex with you. You also telephoned her to ask whether she would have sex with you and whether she wanted to come to the nude beach with you.

She consistently responded to you in the negative, to which you would then pose the question, "Why not?". She would then usually respond, "Because you have a wife to do it with and I don't want to have it with you, we're related." At about the same time, you also asked if ABP wanted pictures of your penis to which you referred as being your six-inch long. In fact, you sent her images of your penis on some 10 to 15 occasions.

It is estimated that during the period between 28 January and 27 March 2006 alone, you contacted ABP on some 76 occasions by voice and 13 occasions by means of SMS texts. ABP deleted those texts.

On 2 November 2008, you were arrested in Queensland on a Northern Territory arrest warrant. On 4 December 2008, you participated in an electronic record of interview with the police during which you denied the

allegations. However, you stated that you had had two postings to Darwin: the first between December 1995 and December 1999; and the second between January 2004 and December 2005. The last time that you had seen ABP was in December 2005; that you were residing at the Coonawarra Naval Base with your wife and two children while living in Darwin and that you were an instructor at Kapooka during 2006 and 2007.

On 4 December 2008, you were charged and bailed to appear in the Darwin Court of Summary Jurisdiction on 16 December 2008. You were, therefore, initially in custody for some two days. You were committed for trial following a committal hearing at which ABP was not required to attend and give evidence. Initially, this matter was listed for a special sitting in July 2009 and ABP was summoned to attend as a witness. However, you elected ultimately to plead guilty to the two charges on 28 July 2009 as a consequence of which the special sitting was not required.

It follows that although you are entitled to some discount in sentence for your pleas, this is necessarily less than the discount to which you would have been entitled for timely pleas. It must be said at the outset that quite apart from her young age, there is no suggestion that ABP, at any stage, encouraged or purported to consent to your conduct. She has declined to supply a Victim Impact Statement and the obvious inference to be drawn is that, fortunately, your conduct has had no long-term adverse impact on her.

You are currently approximately 38 years of age and have a very limited prior record of offending.

On 20 May 1994, you appeared before the Bundaberg District Court and pleaded guilty to three counts of carnal knowledge of a female child under the age of 16 years. These acts took place between 4 December 1992 and 1 September 1993; they were consensual acts with a 13-year old female who ultimately became pregnant to you at that time you were 22 years of age. In the event and having regards to the relevant convictions, you were placed on probation for two years and no convictions were, in fact, recorded against you.

You were born in Bundaberg and attended school until about half way through Year 12. You subsequently attended for about one year at a TAFE pre-vocational course. You were heavily involved in a number of sporting activities with a particular emphasis upon soccer and I am told that you coached in that sport and also participated as a referee; you were an official referee of soccer during the 1988 and 1989 Arafura Games.

After spending some four years as a member of the army reserve, you joined the Australian Regular Army in 1995. Since then you have only served in cavalry units except for a posting in a training role. I have a series of written references that indicate that your army service has, in effect, been exemplary. It is to your credit that you have attained the responsible rank of Senior NCO and have been particularly successful, it appears, in training other soldiers. There is, of course, a separate reference from Ms Lamb that refers to your general good character.

It is quite clear that not only have you been an efficient soldier, but that also the service of your country as a soldier and the associated camaraderie with your service friends have always been a very important aspect of your life.

You are a married man and have two children, aged 12 and 13 years, respectively. I note that both your wife and your mother were present in Court, and that both of them remain supportive of you despite the obvious stress arising from your offences. You are said to have an excellent relationship with your children.

There can be no doubt that the convictions now recorded against you will have a devastating effect. It is inevitable that you will be dishonourably discharged from the military with a very considerable loss of financial benefits as well as the loss of your chosen career. It is obvious that you will have difficulty in obtaining future employment in those areas for which you are best equipped.

I note that you and your family have found alternative accommodation in Brisbane and that steps are being taken to attempt to restructure your finances and your life in light of your inevitable discharge from the regular army. I accept that you are very conscious of the wrong that you have done and of the shame that you have brought upon your family. It is obvious that you deeply regret your actions.

On the face of it, your conduct has been somewhat inexplicable, to say the least. The only explanation is said to be that at the relevant times you were away for extended periods on course and working long hours. Your communications were said to have been a stupid idea that simply got out of control.

It is to your credit that, when confronted with the present situation, you have been quite frank with your military superiors in what must have been a very difficult environment.

There is no established sentencing tariff for offences of the type now before me, although the maximum penalties provided indicate the view of the Legislature that they are to be treated as inherently serious. The potential for them to lead to even more serious offences and to corrupt the moral values of a vulnerable young female is obvious. What is even more reprehensible is that the offences were committed in relation to a close relative in circumstances in which your conduct, in effect, constituted a serious breach of trust.

In cases such as this, the factors of both general and personal deterrence are important considerations. This is particularly so as offences of this generic nature seem to be not uncommon and there is no doubt that there is a considerable concern within the community regarding the prevalence and potential impact of conduct of the generic type here in question. Having said

that, there are three particular features relating to your offending that are of importance for sentencing purposes:

1. That as I have now noted, no significant long-term adverse affects have apparently been occasioned to your victim. Fortunately, it does not appear that ABP was, in fact, corrupted.
2. That no relevant physical interaction occurred between you and ABP. All communication was by telephone and from a distance.
3. That your conduct has necessarily attracted very substantial practical punishment in relation to your employment and future career, quite apart from any sentence that this court might impose, and I particularly take that into account.

Moreover, it seems to me that you have probably well learned your lesson and it is not suggested that you are likely to re-offend.

Without, in any sense, trivialising your offending conduct, it seems to me that, having regard to the first two features to which I have referred, the first offence lies somewhat towards the lower end of the range of relative seriousness. However, in the case of the second offence the very large number of communications involved renders it a more serious offence of its generic type.

In the circumstances, I take as my commencement point a sentence of imprisonment for 18 months in respect of the first offence; and 12 months in respect of the second offence as being appropriate to the offending. I reduce each of those sentences by approximately 15%, to 15 months and 10 months, respectively, in recognition of your pleas of guilty, and to take into account the two days served by you at the time of your initial arrest.

Those sentences will be cumulative upon one another as to a period of six months and to run from 5 October 2009. That will result in an effective head sentence of 21 months from that date.

Having regard to the obvious legislative policy expressed in section 78BB of the *Sentencing Act*, I am prepared, however, to conditionally suspend those sentences after service of a period of three months from 5 October 2009, with an operative period of two years from the date of your release.

You should understand that if you are convicted of an offence punishable by imprisonment within the period of operation to which I have referred, you will be brought back before the Court to be dealt with under the provisions of the *Sentencing Act*, and you may have the balance of the sentence that I have imposed restored as well as being dealt with for any further offence.

Conditions of the suspension will be as follows:

1. That during the period of operation of the suspension, you be subject to supervision by Community Corrections and comply with all reasonable directions of that service, including directions as to residence, employment and participation in rehabilitation programs and services.
2. That during such period, you do not have contact, directly or indirectly, with any female under the age of 16 under any circumstances, unless in the company of an adult who is aware of your offending.
3. That during such period, you participate in assessment, counselling and/or treatment as directed by a probation and parole officer, in particular, to address sexual offending behaviour.

Mr Capell, you must understand that the sentence that I am requiring you to serve is, in fact, a quite nominal sentence for offences of this type. I have taken into particular account the very serious *de facto* punishment, that is going to occur to you as a result of the loss of your career. Do you understand that?

Yes, I think that disposes of the matter, gentlemen.
