

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF  
COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

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

**CA168/2008  
[2008] NZCA 184**

**THE QUEEN**

v

**CRAIG FRANCIS NEROJ**

Hearing: 19 June 2008  
Court: Chambers, Priestley and Winkelmann JJ  
Counsel: B R Green for Appellant  
K Raftery for Crown  
Judgment: 26 June 2008 at 11.30 am

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**JUDGMENT OF THE COURT**

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**The appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Winkelmann J)

**Introduction**

[1] Following a jury trial in the District Court before Judge Neave the appellant was found guilty of one count of sexual violation by unlawful sexual connection and

one count of indecent assault on a girl under the age of 16. He was sentenced on 20 March this year to a term of imprisonment of two years and six months. He appeals on the ground that the Judge misdirected himself in holding that he had no jurisdiction to impose a sentence of home detention.

### **Factual background**

[2] In October 2006, the appellant, then aged 36, went to the home of the 15 year old victim. She was there with her friend, also 15 years old, a 24 year old boarder and a two year old child. The victim and her friend ate dinner while the appellant was in the lounge with them, drinking bourbon. Shortly afterwards, the boarder left the house.

[3] The appellant began play fighting with the victim's friend, pinning her to the couch by her shoulders. The victim, feeling uncomfortable, left the room. The appellant followed her, embraced her, kissed her and touched her breasts. He held the victim on the ground. She escaped his grip but he pursued her around the house, trying to touch her, hug her and kiss her. He put a \$20 note into her bra. He attempted to put his hand down her pants on more than one occasion.

[4] In the victim's bedroom, he grabbed the victim by her right wrist and forced her hand into his pants. The appellant put his hand inside the victim's pants several times, touching her vagina. During this part of the assault, the appellant briefly inserted his finger into her vagina.

[5] Following conviction the appellant has maintained his initial account provided to police that on the day in question he had walked toward the toilet and collided with the victim as she was walking out of the toilet. His claim is that the victim got "fresh" with him and tried to hug and kiss him.

### **Judge Neave's sentencing notes**

[6] The sentencing Judge had before him a pre-sentence report including an appendix providing detailed information about the suitability of home detention and community detention for the appellant. The report writer noted that the appellant has parenting responsibilities in relation to his youngest child, a three year old boy. The child's mother, the appellant's ex-wife, has mental health issues so that the appellant had to be involved both in parenting his son and in providing support to his ex-wife. At the time the report was prepared, the appellant was living in his home with his new partner and her sister. Concern was expressed by the report writer that the two other occupants of the proposed address were supportive of the appellant's proclamation of innocence. The appellant said he was willing to attend programmes aimed at reducing further sexual offending however, the report writer noted that his denial of the offending could render him unsuitable for such programmes. The appellant was identified as being at low risk of re-offending and a sentence of six months home detention was recommended.

[7] The Judge also had available to him a statement from the victim as to the impact of the offending upon her. She said that since the offending she has moved out of her bedroom; she no longer wants to go into that bedroom because of what the appellant did to her. In the months following the incident her school grades deteriorated and she found it hard to concentrate at school. She recounted the impact of having to give evidence at trial and that she now feels insecure around males and cannot handle their attention.

[8] The Judge described the offending by the appellant as sustained and opportunistic, but out of character. As to aggravating factors, the Judge identified that the victim was 15 at the time and was in her home, a place in which she was entitled to feel safe. But he considered that the lasting effects on the victim did not appear to be great at that stage. He identified no mitigating factors in relation to the offending and few in relation to the offender. He noted in particular that there was no clear demonstration of remorse, nor any real willingness to address the issues which undoubtedly existed. He did however treat the appellant as a first offender in light of the fact that although he had some history of minor offending, it was of

“some antiquity”. He also took into account that the appellant had been under personal stress in the light of the situation involving his ex-wife and child. He concluded:

Unfortunately even in combination I just do not consider that they amount to sufficient reduction to bring you within a range of penalties where home detention is an option. Under the statute I am only entitled to do that if I would sentence you to a term of two years, and I think the sentence at that level would be sending simply the wrong message as to the seriousness of this offending.

I am aware of the decision of the Court of Appeal in *R v Hill*. It is hard to work out exactly what that decision is telling us, and even then the sentence there which the Court of Appeal converted to the maximum term of home detention was two years three months, which is right on the cusp, I just do not believe I can get down that low.

[9] The Judge then gave the appellant credit of six months for the mitigating factors he had identified.

## **Discussion**

[10] It is clear from that part of the sentencing notes quoted at [8] above that the Judge considered he was entitled to impose a sentence of home detention only if he would otherwise have sentenced Mr Neroj to a sentence of imprisonment of two years or less. The Judge, in saying that, must have thought that s 15A of the Sentencing Act, as inserted by s 10 of the Sentencing Amendment Act 2007, applied. If the Judge was directing his mind to that section, then it is understandable he was puzzled by this court’s decision in *R v Hill* [2008] NZCA 41. In fact, s 15A did not apply: it applies only to offending occurring on or after 1 October 2007. The appellant’s offending occurred in October 2006. His eligibility for home detention was accordingly governed not by s 15A but rather by a transitional provision, namely s 57 of the Sentencing Amendment Act 2007. That section reads as follows:

If an offender is convicted of an offence committed before the commencement of section 80A, the court may sentence the offender to home detention if -

- (a) the court would have had the power to sentence the offender to imprisonment if it were dealing with the offence immediately before that date; and

- (b) the requirements of section 80A are satisfied; and
- (c) the offender consents to the imposition of home detention.

[11] As this court explained in *Hill*, during the transitional phase, “a court’s power to sentence to home detention under s 57 is not limited to cases where a “short-term sentence of imprisonment” (currently two years or less) would otherwise have been imposed”: at [28]. All that is required, under para (a), is the existence of a power to imprison. Obviously, in this case, the requirements of paras (a) and (c) were satisfied. We need to consider whether para (b) was satisfied. Judge Neave did not turn his mind to that question, as he, of course, was focusing on s 15A, not this transitional section. Fortunately, the pre-sentence report is sufficiently detailed for us to be able to make an assessment as to whether “the requirements of section 80A are satisfied”. In light of the pre-sentence report, we are satisfied that the proposed home detention residence is suitable, that the relevant occupants of that residence understand the conditions of home detention and consent to Mr Neroj serving the sentence in the residence, and that Mr Neroj had been made aware of and understands the conditions that would apply. In short, therefore, we are satisfied that the jurisdictional requirements of s 57 have been met. What we now need to decide is whether this is an appropriate case for a sentence of home detention. We need to consider that matter afresh as Judge Neave’s rejection of home detention was based, as we have explained, on a false premise.

[12] This court made two observations in relation to the sentence of home detention in *Hill* that are relevant to the present appeal. First, the sentence of home detention reflects a perception that society’s interests are better served in some cases by the imposition of restrictions on liberty through home detention rather than imprisonment: at [33]. This court identified the benefits associated with home detention as referred to in an explanatory note to the Criminal Justice Reform Bill No 93-1, as:

Low rates of reconviction or imprisonment, high compliance rates, and positive support for offenders “reintegration and rehabilitation”: at 5.

Secondly, at [34] it was observed that the home detention provisions sit within the general context of the Sentencing Act. A sentence of home detention must therefore

be imposed in a way that is consistent with the purposes and principles of sentencing as set out in the Sentencing Act.

[13] The starting point in considering a sentence of home detention in this case is s 128B of the Crimes Act which provides:

- (1) Every one who commits sexual violation is liable to imprisonment for a term not exceeding 20 years.
- (2) A person convicted of sexual violation must be sentenced to imprisonment unless, having regard to the matters stated in subsection (3), the court thinks that the person should not be sentenced to imprisonment.
- (3) The matters are -
  - (a) the particular circumstances of the person convicted; and
  - (b) the particular circumstances of the offence, including the nature of the conduct constituting it.

[14] This presumption in favour of imprisonment overrides the presumption against imprisonment contained in s 16 of the Sentencing Act 2002 and reflects the seriousness of the offence committed by the appellant. There will be circumstances in which a sentence of home detention is appropriate notwithstanding a presumption of imprisonment. This is demonstrated in the area of methamphetamine offending. Section 6(4) of the Misuse of Drugs Act 1975 creates a presumption of imprisonment in relation to offences for class A drugs, but sentences of home detention have been imposed in relation to such offences: see *R v Hill*, and the cases referred to there at [30].

[15] The appellant puts his case for a sentence of home detention squarely on humanitarian grounds. He has significant parenting responsibilities in respect of his three year old son, and in his absence those responsibilities will devolve completely to his ex-wife, a person who struggles with mental health difficulties. Humanitarian considerations can be taken into account in the exercise of the sentencing discretion in relation to home detention. But the decision to grant home detention must be made within the context of the purposes of the Sentencing Act. We take into account the following matters:

- (a) The provisions of s 128B of the Crimes Act.

- (b) This was serious offending, which has caused long term harm to the victim.
- (c) The appellant continues to deny the offending, and the two other occupants of the proposed home detention address support him in his continued assertion of his innocence. He has taken no steps toward his rehabilitation. Although he says he will attend programmes, as the pre-sentence report writer observed, they would be of doubtful value when he continues to deny his offending.

[16] Relevant purposes of sentencing in the case of this offending are deterrence and denunciation, and the need to hold the appellant accountable for the harm done to his victim and to promote in him a sense of responsibility for and acknowledgement of that harm: s 7 Sentencing Act. We differ from the District Court Judge's view of the impact upon the victim. In her victim impact statement she speaks of on-going behavioural and emotional disturbances caused by these events. She was after all only 15 years old at the time of the offending.

[17] We conclude that allowing home detention in these circumstances would not be consistent with these identified purposes of sentencing. It follows that we are satisfied that home detention was not an appropriate sentence in this case. There being no challenge to the starting point or discount in respect of sentence, the existing sentence is confirmed.

[18] We dismiss the appeal.

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