

**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**

**CA579/2009  
[2010] NZCA 179**

BETWEEN	H (CA579/2009) Appellant
AND	THE QUEEN Respondent

Hearing: 3 May 2010  
Court: Chambers, Potter and Miller JJ  
Counsel: J Bergseng for Appellant  
M D Downs for Respondent  
Judgment: 11 May 2010 at 2 pm

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**JUDGMENT OF THE COURT**

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- A The appeal is dismissed.**
- B The fines, which were remitted without jurisdiction, are reinstated.**
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**REASONS OF THE COURT**

(Given by Miller J)

[1] The appellant appeals against a sentence of 15 years imprisonment imposed in the District Court for sustained and violent sexual offending against his stepdaughter. The issue is whether the starting point, 15 years imprisonment, was manifestly excessive. If it was, it will also be necessary to review the eight-year minimum period of imprisonment.

[2] The offending began in January 2001 with a sexual violation by digital penetration. The complainant was aged 14. That single incident was the subject of count one. The appellant then violated the complainant repeatedly in the same manner over a period of some seven months, resulting in Count 2, a representative count. The offending then stopped for a time because the complainant told her grandfather what was happening, then moved to live with her grandparents.

[3] However, in early 2003 the appellant resumed a relationship with the complainant's mother, and he moved into her home at Rotorua in April of that year. The complainant was 16. The sexual offending resumed, and soon involved rape. Until early 2006 the appellant raped the complainant about three or four times a week when he had the opportunity. The offending was not continuous because he was incarcerated on other matters for several periods during that time: from 2 July until 22 September 2003, from 7 May to 2 August 2004, and from 28 September 2004 to 4 August 2005. The rapes were the subject of Counts 3 to 5, representative counts relating to the addresses at which the family lived during the period 2003-2006.

[4] The appellant was convicted on all five counts after his second trial. (The first was the subject of this Court's judgment in *R v H* (CA59/2009).<sup>1</sup>) At sentencing the trial Judge, Judge McGuire, accepted the complainant's evidence that the offending was often accompanied by violence and that she lived in a background of fear, knowing the appellant was capable of substantial violence if she did not do as she was told. He would punch her if she showed any sign of resistance. The Judge described this as grooming by violence, and found that the appellant behaved as the "alpha male" in the household, displaying a sense of entitlement. A witness had described the appellant and the complainant as a couple, which the Judge characterised as her survival mechanism.

[5] The Judge referred to the pre-sentence report which recorded that, at the age of 36, the appellant had 49 previous convictions including some for assaults on females (there are eight) and breaches of protection orders (there are three). The

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<sup>1</sup> *R v H* (CA59/2008) [2008] NZCA 368.

report stated that he lacked victim empathy. Indeed, he blamed the complainant for the offending that occurred between the ages of 16 and 19, saying she had instigated sex and “played” him.

[6] The Judge relied on *R v Proctor* in reaching the starting point.<sup>2</sup> In that case this Court confirmed that the starting point for repeated sexual violations against children and young persons, especially those owed the offender’s care and protection, is 13-19 years.<sup>3</sup> (We note in passing that *R v AM* does not apply to this case.<sup>4</sup>)

[7] Having regard to the age of the victim when the offending began, its duration, the nature of the acts involved, the use of violence, the abuse of trust, and the impact on the victim, the Judge adopted a starting point of 15 years. He accepted that the appellant had been in custody on some occasions, but held that the abuse had continued “on and off” for some five years. There were no aggravating or mitigating factors. The end sentence was imposed on all five charges. The minimum period of eight years was fixed having regard to the violence employed.

[8] On appeal, Mr Bergseng accepted that the starting point fell within the range of 13 to 19 years, but submitted that it should have been fixed at 13 years. While the complainant was youthful, 14 when the offending began, she was not a young child. The violence was not especially serious or degrading. Importantly, there were substantial gaps; in all, there was no offending for some three and a half years of the five year period. The Judge erred by imposing a global sentence of 15 years imprisonment on all charges; those involving digital penetration ought to have received a lower sentence. The Judge thereby elevated the offending beyond the appropriate level of seriousness, implicitly treating the appellant as though the first rape had occurred in 2001 instead of 2003, when the complainant was 16.

[9] However, the Judge did not overlook the periods when the appellant was in prison (relevantly, about 16 months), or not living in her household, and he

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<sup>2</sup> *R v Proctor* [2007] NZCA 289.

<sup>3</sup> At [24].

<sup>4</sup> *R v AM* [2010] NZCA 114.

recognised that the rapes began in 2003. He regarded the gaps in offending as unimportant, for the appellant offended whenever he had the opportunity. We accept Mr Bergseng's submission that the period covered by the representative charges does matter because it affects the extent of the offending, but the evidence was that the rapes happened very regularly between 2003 and 2006, whenever the appellant was living with the family. As Mr Downs submitted, a single rape might have attracted a starting point of 10 years because of the complainant's age, the breach of trust, and the violence employed. In *Proctor*, the Court held that a 13-year starting point was generous in a case where the offending was much less extensive. In that case the 14-year old complainant was raped at least 15 times over a five-month period. And the five-year span in this case is significant because the complainant had to live with the threat of further offending throughout. Further, for the reason given by the Judge the gaps in the offending do not reduce the appellant's culpability.

[10] With respect to the violence, it was open to the Judge to conclude that the sexual offending occurred in circumstances where the complainant knew she would be beaten if she did not submit. Mr Bergseng argued that the evidence of violence did not cover the entire period. However, the evidence amply justified the Judge's conclusion that violence was the appellant's means of maintaining control over the household. Further, the complainant's explanation for submitting when she was raped on the very first occasion was that if she said something wrong she might get a hiding. If she resisted his sexual requirements, she would see his fist coming towards her. He employed both fists and feet.

[11] In the circumstances we consider that the Judge was correct to select a 15-year starting point. As Mr Bergseng accepted that there were no mitigating factors, the sentence was not manifestly excessive.

[12] The appeal is dismissed. We record that the appellant abandoned an appeal against conviction.

[13] Judge McGuire purported to remit outstanding fines. Fines may be remitted under s 88(3)(h) of the Summary Proceedings Act 1957 only if the s 88 procedure

has been complied with. It was not here. The fines were accordingly remitted without jurisdiction. See *Hunt v R* and *Peato v R*.<sup>5</sup> We reinstate them.

Solicitors:  
Crown Law Office, Wellington

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<sup>5</sup> *Hunt v R* [2010] NZCA 78 at [16] and *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [59].