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IN THE COURT OF APPEAL OF NEW ZEALAND

**CA262/2010
[2010] NZCA 367**

BETWEEN	JASON MICHAEL HOWE Appellant
AND	THE QUEEN Respondent

Hearing: 3 August 2010

Court: Ellen France, Gendall and Courtney JJ

Counsel: P J B Winter for Appellant
M D Downs for Respondent

Judgment: 13 August 2010 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] This is an appeal against a sentence of two years eight months imprisonment imposed in respect of charges of sexual offending against two young girls.¹ The appellant pleaded guilty to two counts of sexual violation by unlawful sexual

¹ *R v Howe* DC Manukau CRI-2008-092-19202, 7 April 2010.

connection (one a representative count) and two representative counts of indecent assault. The offences occurred between 2002 and 2003 when the appellant was aged between 15 and 16 years and the complainants aged between six and eight. The grounds of appeal were that the sentencing judge adopted too high a starting point and failed to give sufficient discount for the appellant's personal mitigating factors.

[2] One of the victims was a young relative of the appellant and the other a neighbour. In relation to the first victim, the appellant enticed the child into his bedroom on numerous occasions and on those occasions rubbed his hand against her genitalia. On six other occasions the appellant also performed oral sex on the girl. He offended in a similar way against the other child, though oral sex occurred on only one occasion.

Appropriateness of starting point

[3] The first ground of appeal is that the four-and-a-half year starting point adopted by Judge Blackie was too high and should have been not more than four years. The sentencing Judge relied on *R v AM*² as the basis for the starting point, concluding that the offending fell between the top of USC band 1 and the lower end of USC band 2. Mr Winter, for the appellant, accepted the Judge's placement of the offending within the guideline bands of *R v AM* but submitted that the starting point of four-and-a-half years' imprisonment was nevertheless too high for the circumstances of the offending and out of line with other sentencing authorities.

[4] Mr Winter submitted that a starting point of four years would have adequately reflected the overlap between bands 1 and 2 whilst imposing the least restrictive outcome in the circumstances. He suggested that the sentencing Judge had placed too much weight on the factors that he identified as significant in assessing the appellant's culpability.

[5] The first factor was that the appellant had obviously planned the opportunities in which the offending could take place. On the agreed summary of

² *R v AM* [2010] NZCA 114, (2010) 24 CRNZ 540.

facts, the appellant would entice the first victim to his bedroom during family visits where the offending would take place. The Judge said of this:

[13] ... It is not planning and premeditation to massive detail, it was just that you obviously planned the opportunities in which the offending could take place.

[6] Mr Winter, however, submitted that the appellant's behaviour, whilst repetitive, did not involve grooming or offending of a predatory nature in the sense usually associated with this kind of offending. He also relied heavily on a psychologist's report regarding the appellant's background and motivation for offending, submitting that to the extent that there was planning and premeditation it was either neutral or at the lower end of the spectrum. We consider the psychologist's assessment in more detail later. It is sufficient at this point to refer just to the psychologist's view that at the time of the offending the appellant was psycho-sexually several years younger than his chronological age and that the offending was likely to have been motivated more by sexual curiosity than sexual gratification.

[7] We consider that, even if the motivation was curiosity rather than gratification, the persistent offending over a long period meant that there must have been a degree of planning and premeditation after the initial few occasions and the Judge was right to accord some weight to this aspect. It is clear, however, from the way the Judge has described the planning and premeditation aspect that he did not give it much weight.

[8] The second aspect identified by the Judge was the vulnerability of the victims by reason of their ages. There could be no criticism of the Judge in taking into account the victims' ages. Mr Winter again raised the issue of the appellant's psycho-sexual development, suggesting that the disparity in age between the victims needed to be viewed with that fact in mind. However, in considering the vulnerability of the victims the Judge did not, in fact, refer to the disparity in age; that was something he did take into account in respect of one of the other factors to which we will come shortly. But in relation to the vulnerability of the victims he was, quite rightly, focusing on the victims' ages.

[9] The third factor was the harm to the victims; the Judge had earlier referred to the victim impact statements from the children themselves and from family members as to the effect of the offending on them. In considering this factor in setting the starting point the Judge referred to his earlier comments, adding that:

[15] ... Invariably there is harm, either for a moderate or a serious degree, when people suffer from this type of sexual activity.

[10] Mr Winter acknowledged that the true impact of the offending may not be apparent in the short-term but submitted that the degree of harm suffered by the victims was not at the high end of the scale when viewed in comparison with other offending of this type. We do not see anything objectionable in the weight placed by the Judge on this aspect. It was evident from the victim impact reports that there has been significant harm to the victims and their families.

[11] Fourthly, the Judge took into account that there was a degree of breach of trust in the sense that the appellant was much older than these children and (although not specifically referred to) clearly in a trusted position as a relative of one of the children. It was in relation to this factor that the Judge made reference to the fact that the appellant was nearly twice the age of the victims. However, it is clear that this aspect did not attract great weight. The Judge said:

[16] ... I also take into account that there was to a degree, but not a serious degree, a breach of trust.

[12] Even allowing for the appellant's delayed development in these areas we do not think that the Judge's approach to this factor was wrong.

[13] The last factor taken into account in assessing culpability was the degree of violation which the Judge regarded as "quite a considerable degree of violation ... although ... not quite as high as it would have been if there was actual physical penetration". Mr Winter did not challenge the Judge's approach to this factor.

[14] In addition, Mr Winter raised the fact that in sentencing the Judge initially referred to there being three victims. Although the Judge corrected himself on this aspect before proceeding to consider the factors just discussed, Mr Winter nevertheless expressed concern that this initial misunderstanding may have affected

his assessment as to the starting point of the sentence. There is no basis on which to think that this is the case. The Judge's approach to the factors affecting culpability and the assessment of a starting point was appropriate and there is no indication that the initial misunderstanding as to the number of victims was carried through to that aspect of the decision.

[15] In submitting that a more appropriate starting point would have been four years Mr Winter drew our attention to a number of cases involving sexual offending of this nature. However, they do not provide any basis for thinking that the starting point of four-and-a-half years was outside the range available to the Judge. *R v MacKenzie*, in which a four year starting point was taken, involved two incidents deemed to be part of a single course of conduct involving only one child.³ In contrast the present case involved offending against two children over a prolonged period. Likewise, *R v Jackson* in which a four year sentence was regarded as appropriate on a Solicitor-General's appeal, involved a single victim.⁴

[16] In *R v C* a sentence of 18 months was imposed for offences of sexual violation against one child.⁵ However, that case is problematic because it was a Solicitor-General's appeal in which a suspended sentence was quashed and a term of imprisonment imposed which would necessarily have been at the lowest end of the available range. Mr Winter also relied on *R v Bell* in which a five-year starting point was taken in relation to offending against a single victim but within a short timeframe.⁶ The most comparable case available, as Mr Winter accepted, is *R v Alletson* which involved two young girls and a teenage offender, with the offending worse than the present case.⁷ The starting point of five years was described on appeal as being within the appropriate range for an adult offender in the circumstances of the case and the Judge made a substantial reduction for the offender's youth.

³ *R v MacKenzie* [2007] NZCA 72.

⁴ *R v Jackson* (1997) 14 CRNZ 573 (CA).

⁵ *R v C* (CA43/98), 28 May 1998.

⁶ *R v Bell* CA393/05, 28 April 2006.

⁷ *R v Alletson* [2009] NZCA 205.

[17] If one were to take the approach in *R v Alletson* the starting point of four-and-a-half years before any discount for mitigating factors (including youth) would be within the range available to the sentencing judge. In any event, as we have noted, Mr Winter accepted that the Judge's placement of the case between the top of USC band 1 and the lower end of USC band 2 of *R v AM* was appropriate.

[18] The real issue in this case, which we come to next, is the discount allowed to recognise the factors personal to the appellant.

Discount for mitigating factors

[19] The appellant's personal circumstances were canvassed in the report provided by consultant psychologist, Mr Bauer. The appellant does not have any intellectual disability. However, he suffered a number of setbacks in his early life. As a result, his speech development was delayed, he had some learning difficulties and sustained an injury when he was kicked in the testicles as a seven-year-old. For all of these reasons the appellant's social and emotional development has lagged behind his chronological age. In addition, when the offending came to light as a result of complaints by the victims the appellant sought help from a psychologist and has undertaken a substantial portion of a programme aimed at addressing this kind of offending, as a result of which he was assessed by the Probation Service as being at low risk of re-offending. In response to the factors relating to the appellant's age, personal background and efforts at rehabilitation the Judge allowed a reduction of six months which Mr Winter submitted was inadequate when considered against other similar cases.

[20] It is true that other similar cases have attracted higher discounts for such factors. In *R v Bell* a six month reduction was given for good character alone. In *R v Accused* a 30 per cent discount was given to recognise the young offender's failure to fully appreciate the gravity of his conduct.⁸ In *R v T* an effective reduction of 15 per cent was allowed for a 20-year-old offender's lack of previous convictions,

⁸ *R v Accused* (CA265/88) [1989] 1 NZLR 643.

age, remorse and efforts at rehabilitation.⁹ In *R v Alletson* a substantial discount (referred to in the sentencing notes as 30 per cent but in reality amounting to about 43 per cent) was given to reflect the offender's youth and immaturity.

[21] In the present case the six-month discount for age and personal factors equated to a discount of slightly over 10 per cent. However, in considering whether the final sentence fairly reflected the totality of the offending and the mitigating factors the overall discount allowed should be considered. The Judge gave a very generous discount for the appellant's guilty plea. Charges were laid in November 2008. The appellant was committed for trial in March 2009 and entered guilty pleas in February 2010. The Judge allowed a discount which he referred to being between 25 and 30 per cent to recognise the guilty plea, notwithstanding the delay:

[26] ...You did not plead guilty at the earliest opportunity which would have been of course following your arrest and prior to your committal for trial. If you had then I would have been entitled to give you a reduction from four years by some one-third or 33 percent.

[27] I accept what Mr Winter tells me that because of certain complications involved in this case and the issues that had to be looked at, both through the Crown and by him, and although your plea was not entered until shortly before a trial date had been set, nevertheless I am prepared to accept in your case that the discount that I should give you for a plea be higher than the 20 percent submitted by the Crown, which is basically a mathematical exercise having regard to the timing of your plea, but I should increase that to between 25 and 30 percent which results in this. That the ultimate which I consider appropriate for these charges, having regard to the balance that I have to do between the interests of the community and the interests of you, that have been expressed through your counsel, but also that need to express the abhorrence of the community to this type of conduct and the interests of protecting the young and the vulnerable such as girls of this age, that the ultimate sentence for you in relation to the sexual violation charges should be a period of two years and eight months imprisonment.

[22] Notwithstanding Mr Winter's endeavours to explain the delay in entering a plea, we consider that the discount given by the Judge for such a late plea was a very generous one. The total discount allowed to the appellant for all the mitigating features was about 40 per cent. It would have been open to the Judge to give a lower discount to recognise the guilty plea and a higher discount for the appellant's personal factors. However, the final sentence fairly reflects the offending and the

⁹ *R v T* CA139/05, 26 July 2005.

mitigating factors. There is no basis that would justify our interfering with it. The appeal is therefore dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent