

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

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA828/2010
[2011] NZCA 227**

BETWEEN H (CA828/2010)
 Appellant

AND THE QUEEN
 Respondent

Hearing: 2 May 2011

Court: Wild, Venning and Courtney JJ

Counsel: K R Pascoe for Appellant
 C J Lange for Respondent

Judgment: 26 May 2011 at 11:30 AM

JUDGMENT OF THE COURT

A The appeal is dismissed.

**B Order prohibiting publication of names or identifying particulars of the
 parties and the children (or any identified parts of the evidence).**

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] The appellant pleaded guilty to three representative counts of sexual offending between against three complainants who were relatives. The offending occurred between 2003 and 2005 when the complainants were aged between four and eight years and the appellant aged between 14 and 16 years. Keane J sentenced the appellant to 10 years imprisonment on each charge to be served concurrently, with a minimum term of imprisonment of five years. The appellant appeals that sentence on the grounds that it is manifestly excessive because the Judge:

- (a) gave insufficient credit for the appellant's age at the time of the offending;
- (b) gave insufficient credit for the appellant's intellectual disability; and
- (c) made an error in calculating the 20 per cent discount stated to apply in recognition of the guilty plea.

Sentencing in High Court

[2] The offending occurred during visits by the appellant and his mother with his relatives and also on occasions when the appellant was left alone to babysit the younger children.

[3] The first victim was aged between six and eight years during the course of the offending. The offences included an occasion where the appellant told the victim to suck his penis and when he refused the appellant pulled down the victim's pants and pushed his penis into the victim's anus. There were other occasions of similar offending and some on which the appellant threatened the victim with a knife.

[4] The second victim was aged between four and six years over the course of the offending. The first offence related to an occasion when the appellant took the victim into the bathroom and threw him into a wall so that the victim struck his head. He then pulled off the victim's pants and put his penis into the victim's anus. The

last occasion occurred when the victim was in his bedroom asleep. The appellant lay on him. The victim woke up. The appellant held the boy down, pulled the victim's pants down and put his penis into the victim's anus, threatening him with a knife at the time.

[5] The third victim was aged between five and eight years. The first incident of abuse occurred when the appellant pushed the victim face down onto a bed, pulled down his pants and put his penis into the victim's anus.

[6] The impact on the three victims was significant, as is to be expected. It has led to behavioural changes and all the children recall the fear they felt at the time, not only as a result of the sexual abuse, but also because of the threats of violence.

[7] In sentencing, Keane J took a starting point of 16 years, placing the offending at the cusp of the *R v AM* bands 3 and 4.¹ In taking that starting point the Judge was influenced by the disparity in age between the appellant and the victims and the fact that the offending occurred over a period of two years. The Judge noted the use by the appellant of his greater strength, the threats of violence and the use, on occasions, of a knife. For these reasons the Judge considered that the starting point should be one that had a deterrent effect not just generally but in relation to the appellant himself because he had not fully accepted responsibility for the offending.

[8] The Judge then discounted the starting point by two years to reflect the appellant's age at the time of the offending and by a further two years to reflect the appellant's intellectual disability. From the resultant term of 12 years the Judge allowed a further discount of 20 per cent to reflect the guilty plea. The end result was a sentence of ten years imprisonment on each charge to be served concurrently.

[9] Finally, the Judge imposed a minimum period of imprisonment of five years. The basis for the imposition of the minimum period of imprisonment was the appellant's failure to fully acknowledge the offending and indicate his willingness to receive counselling and treatment. Had the appellant done so, the Judge considered

¹ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

that the statutory minimum coupled with the sentence imposed could have sufficed to hold the appellant accountable, to denounce, deter and protect the community.

Discount to reflect youth

[10] It is accepted that a youthful offender may be entitled to a discount in sentence to reflect his or her age. The range of reasons that might justify such a reduction were canvassed in *R v Mahoni*:²

The principle that for a variety of reasons, youth may lead to a reduction in an otherwise appropriate sentence is well established... It should be noted that the principle is not founded solely on consideration for young persons; there is benefit to the community in ensuring that the chance of rehabilitation is not shut out, and in reducing the prospect of a youthful offender emerging from prison a more hardened criminal than he went in. However, the principle is not absolute and there are situations where it must deal to the public interest... Further, an allowance would be made more readily in a case having features encouraging leniency, for example where the event could fairly be described as youthful indiscretion, something plainly resulting from immaturity; or an impulsive action immediately regretted; or a first offence by someone with good prospects...

[11] However, as this Court observed in *Pouwhare v R*, age alone will not justify a reduction from an otherwise proper sentence:³

[83] In the end, a judge sentencing a young person under the Sentencing Act must always weigh the young person's age and the reasons why he or she offended, against the seriousness of his or her offending and prospects of rehabilitation. Sometimes the young person's age will be a mitigating factor of high, perhaps decisive, significance not to be circumscribed by any fixed outer percentage. Equally, there can be no warrant for saying that youth, of itself, must always prevail as the paramount value on sentence, or that youth alone can justify radically reducing the sentence which would otherwise be proper.

[12] The Judge did not identify any specific age-related factor in fixing the two year discount. It is relevant that the appellant had no previous history at the time of the offending. In the usual course, this fact might indicate that there were prospects of rehabilitation but by the time of sentencing the appellant had been convicted of attempting to kidnap a five-year-old boy. However, the fact that the prospects of

² *R v Mahoni* (1998) 15 CRNZ 428 (CA) at 436–437.

³ *Pouwhare v R* [2010] NZCA 268 at [83].

rehabilitation now seem less than they would have at the time of the offending does not exclude a discount to reflect the circumstances that existed then.

[13] There are, however, no other factors related to the appellant's age that might have justified a discount. The appellant had already served a prison term for a serious offence and, even leaving aside the question of his intellectual disability, the offending could not be characterised as youthful indiscretion or a single impulsive act. In finding the starting point the Judge was influenced by the disparity in ages between the appellant and the victims and that fact that the appellant was clearly much stronger, with the confidence to acquire and use a knife to threaten them. The use of the knife suggested a degree of premeditation at odds with a purely impulsive act born out of rough play, as suggested by the appellant's counsel at sentencing. These factors would tell against a significant reduction for age and we consider that two years was a fair discount.

[14] In making the submission that the discount allowed was inadequate, Ms Pacoe referred us to the decision in *NZ Police v C*, a Crown appeal against a sentence of two years imprisonment for serious sexual offending by a boy aged 14 years at the time of the offending.⁴ There are similarities in the nature of the offending. The appeal was allowed and a sentence of four-and-a-half years' imprisonment substituted, with recognition that allowance was justified for the offender's age. That case is, however, of limited assistance in determining whether the reduction for age allowed by the Judge in this case was appropriate because there was no discussion in *C* as to an appropriate starting point or any indication as to the discount that should be allowed for age; we note that there is no challenge to the starting point taken by the Judge in this case.

[15] We note also that Ms Pascoe invited us to consider the appellant's age and intellectual disability together on the basis that they both affected the assessment of the appellant's culpability. However, given the difficulty of assessing the appropriate impact of the appellant's intellectual disability on his sentence, we consider that the correct approach was to consider this aspect separately, as the Judge did.

⁴ *NZ Police v C* HC Auckland, 22 May 2003.

Discount for intellectual disability

[16] It was common ground that the appellant has an intellectual disability, the nature of which we discuss shortly. In cases where an offender does have an intellectual disability or mental disorder the Court is entitled to reduce an otherwise proper sentence. In *E v R* this Court summarised the rationale for such a reduction:⁵

[68] A mental disorder falling short of exculpating insanity may be capable of mitigating the sentence either because: if causative of the offending, it moderates the culpability; it renders less appropriate or more subjectively punitive a sentence of imprisonment; or because of a combination of those reasons. The moderation of culpability follows from the principle that any general criminal liability is founded on conduct performed rationally by one who exercises a willed choice to offend.

[69] All relevant considerations must, however, be taken into account in the sentencing process. Mental illness or mental impairment may affect the risk of a repetition of offending. This in turn may direct attention to issues of personal deterrence or public protection...

[17] The Judge accepted the existence of an intellectual disability and discounted the sentence by a further two years to reflect it. Ms Pascoe contended that this discount was inadequate to truly reflect the impact of the intellectual disability on the appellant's offending. Mr Lange, for the Crown, responded that, when one considered issues of risk of re-offending and community protection the discount should, in fact, be regarded as generous.

[18] The sentencing Judge had before him several reports relating to the assessment of the appellant's intellectual ability. The earliest was a report from 2001 undertaken for the purposes of assessing the appellant's eligibility for funding and support services as a person with an intellectual disability. He was aged 12 at the time and the report identified a mild intellectual disability, concluding that he demonstrated quite significant deficits in both his level of cognitive functioning and adaptive behaviour skills and these deficits had been evident from an early age.

[19] Four separate reports were obtained during 2010 in the lead-up to the sentencing on this offending. One was undertaken to assess the appellant's fitness to stand trial. Another was undertaken as part of the inquiry under s 35 of the Criminal

⁵ *E v R* [2010] NZCA 13.

Procedure (Mentally Impaired Persons) Act 2003 to ascertain whether the appellant had an intellectual disability and was in need of compulsory care. Although it appears that he did not suffer from an intellectual disability that affected his fitness to stand trial, the clear and consistent conclusion that emerged was that the appellant does have an intellectual disability.

[20] In a report apparently arranged by the appellant's counsel a registered clinical psychologist, Mr Dolan, concluded that the appellant had the cognitive capacity of a six to eight-year-old. The Judge specifically referred to this conclusion and accepted that the intellectual disability could justify a reduction in sentence:

[28] Your intellectual disability can also be a mitigating factor on sentence. Again, however, the issue is, as the Court of Appeal held in *R v M*⁶ whether diminished intellectual capacity or understanding is a material contributor. A lack of intellectual function alone can never of itself equate with a lack of moral guilt.

[21] Later, however, the Judge expressed some ambivalence about any link between the intellectual disability and the offending:

[42] [T]o what extent your offending was attributable to intellectual disability is very difficult to assess. The reports suggest you had a good understanding of what you were doing. Or at least you do now. However, the early report, when you were 12 years, may suggest your conduct was influenced by behavioural issues more evident then than now. I will allow in that respect also a discount of two years.

[22] Ms Pascoe submitted that there was a sufficient basis on which to conclude that the appellant's intellectual disability materially contributed to his offending. In particular, given his cognitive capacity, he must be taken to have lacked insight into what he was doing. In this regard she referred to Mr Dolan's explanation that the appellant's classification as "Mildly Delayed" meant that the appellant:

...understands the world in concrete terms. For him things are black and white with clear links between events. He understands rules and language in a very basic way but would fail to understand more complex relationships and abstract concepts (e.g. fairness versus justice or perspective over truth).

[23] Ms Pascoe also pointed to the 2001 psychological assessment which recorded the appellant's disruptive and aggressive behaviour at the age of 12. The report

⁶ *R v M* [2008] NZCA 148 at [33].

referred to frequent aggressive behaviour with threats towards staff and students at school and concerns held by school staff for the safety of both the appellant and those around him as a result of his increasing levels of aggression. Ms Pascoe submitted that this assessment showed that the appellant had a propensity to act impulsively and aggressively as an aspect of his intellectual disability and his diminished intellectual capacity should therefore be regarded as having materially contributed to the offending. On this aspect Ms Pascoe submitted that the Judge had failed to give proper weight to the extent or impact of the appellant's intellectual disability.

[24] Although Ms Pascoe was unable to provide any comparable cases from which to judge an appropriate discount to reflect the intellectual disability, she submitted that two years was inadequate.

[25] In response Mr Lange, for the Crown, submitted that the reports did not disclose any link between the intellectual disability and the offending and that, in the circumstances, the two year discount was generous. Mr Lange also pointed out that in considering the response to an intellectual disability the Court must also recognise any risk that the offender poses to the community as a result of that intellectual disability. Mr Lange submitted that that was, in fact, the position in this case. The psychiatric report provided under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 for the purposes of sentencing concluded that the appellant was classified in the high-risk group for sexual recidivism. Significant concerns were his continued denial of the offending and lack of motivation to address the risk factors for re-offending.

[26] We accept that the features of the appellant's intellectual disability, and the nature of his behavioural difficulties observed when he was 12 mean that it is highly likely that his intellectual disability did contribute to some extent to the offending. There were aspects of impulsivity about the offending and it is apparent that he lacks (and undoubtedly lacked at the relevant time) empathy for others. The Judge was justified in allowing a discount for the intellectual disability.

[27] However, we also accept Mr Lange's submission that these same factors that contributed to the offending also pose a heightened risk of re-offending. Indeed, as time has gone on aspects of the appellant's behaviour, such as the development of deviant sexual interest, cause greater concern than would have been apparent when he was 14 years old. It is especially worrying that, despite his guilty plea, the appellant continues to deny his offending and shows no willingness to engage in rehabilitation. In these circumstances, the Judge was bound to take into account the need for community protection in giving any recognition to the intellectual disability. For this reason we accept that the two year discount was within the range available to the Judge.

Calculation of guilty plea discount

[28] The Judge allowed a 20 per cent discount for the appellant's guilty plea. There is no challenge to that stated discount. The complaint is that the final sentence of ten years that was imposed reflects a discount of only 17 per cent rather than 20 per cent. It does appear that this was an inadvertent miscalculation; there is nothing to suggest that, having identified 20 per cent as the discount to be applied, the Judge did not intend to go on and apply that figure. The difference is one of five months and Ms Pascoe submitted that the Judge should properly have imposed an end sentence of nine years seven months rather than ten years. However, the sentence ultimately imposed of ten years was not, given the very serious nature of the offending, at all outside the range available to the Judge. The difference of three per cent is not sufficient to justify appellant intervention if the end sentence is otherwise within the available range.

Result

[29] The appeal is dismissed.