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COMPLAINANTS PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA461/2011
[2012] NZCA 241**

BETWEEN	OMAR ARAFAT IFRAN ALI Appellant
AND	THE QUEEN Respondent

Hearing: 16 May 2012

Court: Randerson, Winkelmann and Keane JJ

Counsel: B J Hart and D V Murray for Appellant
M D Downs for Respondent

Judgment: 12 June 2012 at 2.30 p.m.

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Winkelmann J)

Introduction

[1] The appellant was convicted following trial on two counts of sexual violation by unlawful sexual connection, two counts of performing an indecent act upon a child under the age of 12, six counts of assault with a weapon and two counts of assault on a child. All but one of the counts in the indictment were representative

charges, the time period covered by the counts being a 12 month period between May 2009 and May 2010. He was sentenced by Judge Tompkins to seven and a half years imprisonment,¹ and now appeals that sentence on the grounds that it was manifestly excessive as a consequence of the Judge having adopted too high a starting point for that offending.

[2] We record that the appellant had also appealed against conviction but this was abandoned.

Factual circumstances of the offending

[3] The victims were the appellant's step-children, A, a girl then aged between 8–9 years, and B, a boy then aged between 10–11 years. The offending occurred between May 2009 and May 2010, following the children's arrival from Australia to live with the appellant and their mother in New Zealand. The sexual offending against A involved the appellant penetrating her genitalia with his fingers while applying cream, performing oral sex upon A, and having her touch his penis.

[4] A's evidence was that she and her brother had arrived in New Zealand on 21 May 2009, and that the first time "anything happened" to her was in June 2009. The "last time" anything happened was "last week", that is the week prior to her interview on 3 June 2010. A said that the digital penetration occurred on three to five occasions and that on two or three other occasions at night, when her mother was asleep, the appellant came into her room and licked her genitalia. She also said that on two or perhaps three occasions in her bedroom or on the outside steps the appellant had her squeeze or massage his penis for one or two minutes.

[5] As to the duration of the sexual offending against A, her evidence at trial seemed to suggest it occurred at the second address at which the family lived. Although there was no clear evidence as to how long the family stayed at each of the two addresses, the evidence of B was that they stayed for a few months at the first address before moving to the second.

¹ *R v Ali* DC Hamilton CRI-2010-019-4735, 28 July 2011.

[6] B's evidence was that the appellant creamed his penis "probably twice a month" and that it began about two months after he began living with the appellant. B's account was that the offending against him occurred at both addresses.

[7] The appellant also regularly assaulted both children with a belt, wooden spoon, ruler and manually. At the evidential interview B described the assaults as "hidings".

Sentencing

[8] Judge Tompkins characterised the offending as reflecting "regular violence used as discipline interspersed with intermittent but repeated sexual offending". The Judge found that by these means the appellant created an environment where the offending could occur with a reduced expectation of discovery or apprehension on his part. The Judge accepted that aggravating factors were the particular vulnerability of the children and the breach of trust involved. The only mitigating factor he identified was the appellant's previous good character, noting the absence of previous convictions.

[9] The Judge referred to the tariff judgment of *R v AM*² and placed the offending at the top of Band 2 or the bottom of Band 3. He said that because of the way the violence meted out to the children fitted into the narrative of the sexual offending, it would be artificial to impose separate but cumulative sentences for the sexual offending and the violent offending.

[10] He adopted a starting point of eight years imprisonment, allowing a discount of six months for previous good character. The final sentence he arrived at was a term of imprisonment in respect of the two counts of sexual violation of seven and a half years imprisonment, four years imprisonment for the two charges of doing an indecent act on a child under 12, and two years imprisonment for each of the assaults with a weapon. Imprisonment for one year was imposed on each of the counts of assault on a child. All sentences were imposed concurrently, the total effective sentence therefore being seven and a half years.

² *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750.

Grounds of the appeal

[11] For the appellant, Mr Hart argues that the Judge erred in categorising this offending as in the upper end of Band 2, or towards the bottom of Band 3 in *R v AM*. Although he does not challenge the Judge's finding that the appellant created a climate of fear through the acts of violence, Mr Hart submits that it is significant that there was no evidence of violence at the time of the offending. Moreover, the offending occurred over a relatively short duration of time, approximately six months. He suggests a different method of constructing the sentence, thereby arriving at both a different starting point, and final sentence. He submits that a starting point of four and a half years for the sexual offending alone was appropriate. To this a sentence of 18 months should have been added for the assaults, with a reduction then necessary to ensure that the final sentence accurately reflected the totality of the offending,³ and to give the appellant credit for his previous good character.⁴ A sentence of four years imprisonment was therefore appropriate for all the charges.

[12] For the Crown, Mr Downs submits that however the sentence was calculated, it was one that was well within the available range. The Judge fairly characterised the offending as intermittent sexual offending combined with constant violence.

Analysis

[13] It is not in dispute that consideration of this appeal takes place within the framework of the guideline judgment in *R v AM*, in which this Court described three bands of offending for sexual violation by unlawful sexual connection, and identified aggravating features relevant to the placement of particular offending within those bands. Band 1 covers offending at the lower end of the spectrum for which the appropriate sentencing range is two to five years. Band 2 is appropriate for cases of relatively moderate seriousness, and encompasses cases involving two or three of the factors increasing culpability to a moderate degree. The sentencing range for cases

³ As required by s 85 of the Sentencing Act 2002 which provides that the total period of imprisonment must not be wholly out of proportion with the overall gravity of the offending.

⁴ Sentencing Act 2002, s 9(2)(g).

in this band is four to 10 years. Band 3 is appropriate for the most serious offending of this type. Band 3 will encompass cases which involve two or more of the factors increasing culpability to a high degree, or where more than three of the factors are present to a moderate degree with a sentencing range of nine to 18 years.

[14] We consider the Judge was correct to place this offending at the upper end of Band 2 or the lower end of Band 3.⁵ There were several features of the appellant's offending which are aggravating factors for sentencing purposes:

- (a) The victims were vulnerable having regard to their age and their relative isolation as recent entrants to the country.
- (b) The offending involved premeditation.
- (c) The offending involved violence. Mr Hart makes the point that it was not correct to identify the violence as a factor aggravating the sexual offending as it did not take place at the same time as the sexual offending. But the facts of this case are such that, as the Judge observed, it would be artificial to view the violence as being completely separate from the sexual offending. Through his violence the appellant created not only an atmosphere of domestic misery, as the Crown characterised it, but also the conditions in which he could offend for so long without detection.
- (d) The offending was repeated over a considerable period of time – we calculate it as being closer to nine months than six. Whether it was six or nine months, it is a lengthy period of time in the life of a child.
- (e) The final aggravating factor we identify is that the offending resulted in serious victim impact. In this case, not only must the children deal with the impact of violence, including sexual violence, they must do so in a fractured family, as the children are now estranged from their mother. We acknowledge that the estrangement is in part due to

⁵ Although we note that the starting point adopted was lower than the bottom of the range for Band 3 offences.

choices that the mother has made, but damage to family relations was a likely, if not inevitable result when the appellant chose to exploit the relationship between mother and children to facilitate his offending.

[15] We also accept the Crown's submission that however the sentence was constructed, the sentence the Judge arrived at was well within the range available to him. Even if the appropriate sentence is structured in the way that Mr Hart has suggested, the same end point is arrived at. If that approach is taken, a starting point of seven years for the sexual offending should be adopted having regard to the aggravating factors we have identified.⁶ To that should be added a sentence in respect of the various assaults of 18 months to two years. Applying the totality principle, we consider that a starting point of eight years is appropriate. The starting point was the only issue on this appeal, with no challenge to the reduction of six months on account of previous good character.

[16] For these reasons, the sentence imposed by the Judge was clearly within the appropriate range. The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁶ We exclude violence as an aggravating factor, for this method of calculation.