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ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA732/2012
[2013] NZCA 139**

BETWEEN	BB (CA732/2012) Appellant
AND	THE QUEEN Respondent

Hearing: 18 April 2013

Court: Harrison, Allan and Clifford JJ

Appearances: J A Westgate for Appellant
M J Inwood for Respondent

Judgment: 7 May 2013 at 10.15 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Allan J)

Introduction

[1] BB was found guilty following a two day trial in the Invercargill District Court, of five representative counts of sexual violation by unlawful sexual connection and one representative count of sexual conduct with a young person under the age of 16 years. The complainants were his two stepsisters.

[2] When sentencing BB, Judge Crosbie, the trial Judge, adopted a starting point of seven and a half years imprisonment for the totality of the offending.¹ From that starting point he deducted 37 months to reflect BB's youth at the time of the offending and his previous good record. That produced an end sentence of four years and five months imprisonment on each of the sexual violation charges.² A concurrent sentence of three years imprisonment was imposed on the remaining charge.

[3] BB now appeals against that sentence on the grounds that it is manifestly excessive, in that:

- (a) the starting point was too high;
- (b) the discount for youth and previous good character was insufficient; and
- (c) there ought to have been a discrete discount for the time BB spent on bail awaiting trial.

Background

[4] BB and the complainants met in 1998, when their parents began a relationship. At that time he was aged nine years and the complainants were four and five years respectively. The Crown case is that his offending against the complainants began not long after the new family was established. It commenced with inappropriate touching, later escalating to oral sex performed by BB on his stepsisters, and digital penetration of them. The younger complainant was also required to masturbate him and perform oral sex on him.

[5] The charges related only to the period from 10 July 2004, when BB turned 14 years, to 16 November 2007, when he was 17 years three months old. The

¹ *R v [BB]* DC Dunedin CRI-2010-012-2424, 17 October 2012.

² The Judge's sentencing notes record that the sentence imposed was four years seven months imprisonment and argument proceeded on appeal on that basis. However, the warrant signed by the Judge correctly records the length of the term as four years five months imprisonment.

offending occurred both while the children's parents were out and BB was babysitting, and also at times when the parents were at home, but otherwise occupied. On occasions it was accompanied by threats and actual violence in the form of hitting and punching. The offending ceased in 2007 after the girls reported one incident to their father and stepmother.

The starting point

[6] Judge Crosbie adopted a starting point of seven and a half years imprisonment by reference to the tariff authority for sexual violation sentencing, *R v AM*.³ He placed the case in band two of the starting point bands identified in *R v AM*, which the Court of Appeal described as:⁴

... appropriate for a scale of offending and levels of violence and premeditation which are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is appropriate for cases which involve two or three factors increasing culpability to a moderate degree.

[7] Judge Crosbie's starting point of seven and a half years imprisonment placed this case virtually at the bottom of band two, which mandates starting points of between seven and 13 years imprisonment. Mr Westgate accepts that the sentencing Judge identified the appropriate band, but argues that this case ought to be placed at the very bottom of band two, and that the starting point ought not to be higher than seven years imprisonment. He referred us to *Lennon v R*⁵ and *Hood v R*,⁶ in which starting points of nine years six months and eight years imprisonment respectively were determined by this Court to be appropriate in substitution for the slightly higher starting points fixed by the sentencing Judge.

[8] Ms Inwood referred us to two further authorities in which this Court approved starting points of nine years imprisonment.⁷

³ *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750.

⁴ At [98].

⁵ *Lennon v R* [2012] NZCA 551.

⁶ *Hood v R* [2012] NZCA 212.

⁷ *Overton v R* [2011] NZCA 648 and *V v R* [2012] NZCA 465.

[9] All four of these cases involved sexual offending by a youthful offender against younger relatives. *Lennon* and *Hood* involved anal penetration and so were arguably more serious than this case. *V v R* was similar to the present case. *V* was sentenced on the basis that he was aged between approximately 14 and 17 years, and the complainant (his younger sister) was aged between five and seven years. The offending entailed sexual violations (oral sex induced and given) and making the complainant masturbate him. So the scale and character of the offending was somewhat similar to the present case. However, in *V*, the offending was rather more opportunistic, and there were no threats or violence of any kind.

[10] The starting points fixed or approved by this Court in those cases lead us to the conclusion that the starting point of seven years six months imprisonment selected by Judge Crosbie in the present case was, if anything, lenient. It is really not tenable to accept on the one hand that this is a band two case for sentencing purposes, yet on the other to contend that the starting point ought to have been seven rather than seven and a half years imprisonment. The Judge's chosen starting point was well within the range available to him.

Discount for youth and good record

[11] The Judge allowed a 40 per cent discount from the starting point in order to cover both BB's youth at the time of the offending, and the absence of previous convictions. Mr Westgate submits that this allowance was inadequate, and it should have been at least 45 per cent. It is well established that in appropriate cases young offenders may be entitled to substantial discounts where the offending can be explained to some extent by reference to the youth of the offender.⁸

[12] As Ms Inwood submits, the cases to which we have earlier referred each discuss the appropriate level of youth discount. Levels of between 20 and 40 per cent were allowed on appeal for youth and good character, in combination in some cases with additional factors which BB lacks, such as remorse and associated

⁸ See for example *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77] and the cases referred to above.

promising prospects of rehabilitation. In the present case BB continues to deny the offending, and is unremorseful.

[13] Although discounts for youth and good character vary widely, a discount of 40 per cent is towards the upper reaches of the available range, and we can discern no proper reason for interfering with the Judge's approach.

Allowance for period on bail

[14] BB was on bail from the time of his arrest in May 2010 until the date of his sentencing, a period well in excess of two years. Mr Westgate submits that the Judge ought to have taken this extensive period into account by allowing a discount from the starting point.

[15] We accept that compliance with a restrictive bail regime can be taken into account in mitigation of sentence, but there is no absolute right to a discount. It is a matter for assessment by the sentencing Judge in the circumstances of the case. Factors which will often be taken into account are the extent to which a person's freedom of movement has been curtailed by the bail conditions, the period of time during which the offender was on bail subject to those conditions, and whether there is a record of any breaches.

[16] We accept Ms Inwood's submission that a discount is usually only warranted where the conditions are very restrictive and the offender's freedom of movement has been significantly impinged upon and there have been no bail breaches.⁹

[17] Mr Westgate referred us to *R v Gray*.¹⁰ There, this Court upheld the sentencing Judge's decision to allow a three month discount from a starting point of three years imprisonment for cannabis offending. But that was a case in which Mr Gray had been subject to a 24 hour curfew for a significant period. BB's case was quite different. He was initially released on bail in May 2010, with conditions relating to residence, and non-contact with the complainants and persons under the

⁹ See *Winklemann v R* [2010] NZCA 215 at [21] and *R v Edwards* [2008] NZCA 205 at [19].

¹⁰ *R v Gray* [2008] NZCA 224.

age of 16 years. There was a degree of uncertainty over further conditions as to abstaining from alcohol and producing his passport. There was at least one breach of the residence condition.

[18] These bail conditions are not of a type that normally attracts an allowance for time spent on bail. They did not significantly impinge upon BB's freedom of movement or his ability to maintain a normal life.

[19] Mr Westgate conceded that Judge Crosbie was not asked to make a separate allowance at the time of sentencing in order to reflect the long period spent on bail. In the absence of a compelling argument in favour of a separate discount on that ground, we do not consider it open to Mr Westgate to raise the matter now.

Result

[20] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent