

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF COMPLAINANTS BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF ANY COMPLAINANTS/PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA377/2016
[2017] NZCA 90**

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| BETWEEN | DANIEL BELL Appellant |
| AND | THE QUEEN Respondent |

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| Hearing: | 6 March 2017 |
| Court: | Kós P, Courtney and Williams JJ |
| Counsel: | C J Tennet for Appellant M H Cooke for Respondent |
| Judgment: | 28 March 2017 at 3.30pm |

JUDGMENT OF THE COURT

Appeal against sentence dismissed.

REASONS OF THE COURT

(Given by Williams J)

Introduction

[1] The appellant Mr Bell was charged with one charge of doing indecent acts with a girl aged 12 to 16; one charge of sexual violation by unlawful sexual

connection; six charges of indecent assault/indecent acts with girls under 12; and four representative and two specific charges of indecently assaulting children.

[2] The appellant pleaded guilty at the start of the trial to the first charge of doing indecent acts with a girl aged 12 to 16 and was found guilty by a jury on all remaining charges. The charges ranged from 1995 (when Mr Bell was 19) through to 2010 (when he was 35). Collins J sentenced the appellant to eight years' imprisonment with a five year minimum period of imprisonment (MPI).¹

[3] Mr Bell appeals against that sentence on the ground that it was manifestly excessive because:

- (a) it was out of line with comparable cases;
- (b) it failed to take into account the totality principle;
- (c) it failed to take account of the provisions of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016; and
- (d) the MPI was too long.

[4] Mr Bell was in fact already in prison when he faced trial on these charges. He pleaded guilty in 2014 to three counts of indecent assault on a nine-year-old girl in mid-2013. He received a two year prison sentence for that offending and was serving that sentence when charged with the offences for which Collins J sentenced him. This resulted in an effective sentence of nine years with a six year MPI.²

The facts

[5] The offending involved seven young girls who were aged between four and 12 when the offending started. The offending in respect of the first complainant

¹ *R v Bell* [2016] NZHC 51.

² One year served of a two year sentence plus eight years (we do not agree that the effective sentence is one of 10 years as Mr Tennet submitted as Mr Bell was entitled to mandatory release after one year of his first sentence); and as the MPI does not begin until the second sentence begins, it was effectively five years plus one year.

started in 1995 when she was 12 and Mr Bell was 19. They had regular sexual intercourse over a four year period.³

[6] The second complainant was just under five years old in January 1999 when the offending occurred. Mr Bell was a friend of her parents and was visiting the family. While the other adults were talking at the front of the house, he took her to a playhouse out of sight behind the garage. He gave her a magazine with flowers on it to read. While she was looking at it, he took her clothes off and touched her bottom and vagina with his hands.⁴ He then kissed her vagina several times.⁵ She kept looking at the magazine until he stopped and she was re-dressed.

[7] The third and fourth complainants are sisters who were aged between seven and eight, and five and seven respectively when the offending occurred between 2001 and 2005. Mr Bell was a friend of their father and often stayed at their house, sometimes babysitting them. The offending included putting his hand down their underpants and touching their vaginas;⁶ playing a “game” with both of them where he would slide his hands up to their groin area to the highest point they would allow;⁷ and following the fourth complainant into her bedroom and pulling down her pants and underwear.⁸

[8] The fifth complainant was a child with whom Mr Bell had regular contact over a long period. He was also treated as a father figure and caregiver during that time. The complainant was aged between four and nine during the offending which was between 2005 and 2009. He would take her out for a drive to various locations. He would then park the car and put his hand inside her underwear and rub the outside of her vagina.⁹

[9] The sixth and seventh complainants were the daughters of a close friend of Mr Bell. They were aged between five and seven, and five respectively during the

³ One charge of indecency with a girl aged 12–16, although a guilty plea was entered at the start of trial.

⁴ One charge of indecency with a girl under 12.

⁵ One charge of sexual violation by unlawful sexual connection.

⁶ Two charges of indecently assaulting a girl under 12 (both complainants on different occasions).

⁷ Two charges of indecently assaulting a girl under 12 (both complainants on one occasion).

⁸ One charge of indecently assaulting a girl under 12.

⁹ One representative charge of indecent assault on a child.

offending, which occurred from 2006 to 2009 (sixth complainant) and 2009 to 2010 (seventh complainant). Mr Bell would stay overnight at their home and would sometimes babysit. On multiple occasions, he took the sixth complainant into a bedroom and got into bed with her, putting his hand inside her underwear and rubbing her vagina.¹⁰ In respect of the seventh complainant, the offending occurred when Mr Bell was in bed with the complainant and her mother. While her mother was asleep, Mr Bell squeezed and rubbed the complainant's vagina, both over and inside her underwear.¹¹ He pretended to be asleep when she woke her mother and told her what he was doing.

[10] The offending in 2013 was admitted as propensity evidence in the trial before Collins J. Mr Bell was a family friend of the complainant's family. On two occasions, he rubbed her vagina when he had taken her out for a drive or a walk. On one occasion, he took her into the grounds of a church and exposed his penis. He masturbated himself while touching and rubbing her vagina.

Sentence in the High Court

[11] Though Collins J came "perilously close" to imposing preventive detention, he started his sentencing remarks by explaining that he had decided against doing so for two reasons. First, Mr Bell should be given an opportunity (not yet afforded him) to participate in a prison rehabilitative programme. Secondly, appropriate supervision on release would militate against the high risk Mr Bell poses.

[12] He then fixed a starting point of five years based on the lead charge of unlawful sexual connection against the second complainant. Collins J identified the relevant culpability factors as planning and premeditation; gross breach of trust; vulnerable victim; and significant emotional harm to her. The offending fell into the top of band one or the bottom of band two of *R v AM*.¹²

[13] He then uplifted by three years for the totality of the offending, noting the number of charges and victims, the nature of the charges and the duration of the

¹⁰ Three representative charges of indecent assault on a child.

¹¹ Two charges of indecent assault on a child.

¹² *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

offending. He also noted that when a case comes close to justifying a sentence of preventive detention, a longer finite term may be appropriate in the interests of public protection. This brought the sentence to eight years.

[14] Finally, Collins J imposed a MPI of five years, primarily for the purpose of protecting the community, and to allow Mr Bell to undergo a treatment programme for sexual offenders.

Starting point, uplifts and protection as a sentencing factor

Submissions

[15] Mr Tennet submitted that a starting point of four years would have been appropriate as the offending was at the top of band one. He submitted that the frequency of offending and number of victims are aggravating features, but those factors already put it at the top of band one, and should not be treated as additional aggravating factors.

[16] He also submitted that the three year uplift inappropriately relied on dicta from the decision of this Court in *R v Leitch*, that an uplift can be applied for public protection.¹³ Extended supervision orders (ESOs) now exist for the purpose of public protection. Mr Tennet essentially argues that because of the existence of ESOs, and the inevitable imposition of an ESO in this case, Judges should no longer apply an uplift for the purpose of public protection.

Analysis

[17] The starting point, set at the cusp between bands one and two of *R v AM* was within range in this case. The Judge correctly identified aggravating features of the lead unlawful sexual connection charge — the careful planning required to find himself alone in an isolated and private spot (the playhouse) with a four-year-old girl; the gross breach of trust that the offence represented both with respect to the victim herself, her father who was a good friend, and the wider family; the

¹³ *R v Leitch* [1998] 1 NZLR 420 (CA).

associated vulnerability of the victim; and the significant harm the offending caused as reflected in the victim's poignant victim impact statement.

[18] As to protection as a sentencing factor, Collins J relied on the following passage from *Leitch*:¹⁴

[W]here the sentencing Court considers that a finite sentence arrived at in accordance with normal principles would not be adequate for the protection of the public, it is permissible to consider a finite term which would be less severe in its effect on the offender than preventive detention but which at the same time would be of greater severity than a sentence related only to the usual balancing of the desirability of prevention against the gravity of offending. In short, there is some room for public protection purposes to go beyond what would otherwise be the upper level of a sentence. That room must be limited in order to maintain the integrity of general sentencing principles.

[19] The protection principle in *Leitch* is not rendered obsolete by the creation in the intervening period of other protective techniques against child sex offending. Indeed, it has recently been cited with approval by this Court in *D (CA197/2014) v R*.¹⁵ It is true that there is now a suite of protection options available in relation to offending of this nature including automatic offender registration (discussed below) and ESOs. Nonetheless, the ability of sentencing Judges to uplift sentences where that is warranted for truly exceptional cases must remain as one of the options. It is not at all surprising that Collins J considered this was such a case. Mr Bell presented with a 22 year history of consistent child sex offending with multiple victims, and he will still be relatively young (in his early to mid forties) upon release whether at the end of the MPI or the whole sentence.

[20] Finally, although the availability of ESOs might tip the scales against a sentence of preventive detention in a case such as this, it is most unlikely to justify a reduction in the finite sentence imposed in its place.

¹⁴ *R v Leitch*, above n 13, at 430.

¹⁵ *D (CA197/2014) v R* [2014] NZCA 373 at [19]–[21].

Totality

Submissions

[21] Mr Tennet submitted that because Mr Bell was charged while already serving a sentence, Collins J was bound to consider the overall totality effect of any subsequent sentence he imposed. He submitted that Mr Bell has an effective sentence of 10 years with an effective increase in the MPI.

Analysis

[22] It is true as Mr Tennet submitted that, although Collins J was plainly aware of the 2013 offending,¹⁶ he did not undertake the sort of totality assessment suggested in *Opetaiia v R*, where a serving prisoner is to be sentenced for further offences.¹⁷ It is now for this Court to do so — standing back and considering the appropriate sentence for the whole of the offending.

[23] As we have said, the effect of the prior sentence (for later offending in time) was that Mr Bell’s effective term was nine years’ imprisonment with a six year MPI. We deal separately below with the MPI, but as the Crown submitted, a nine year sentence for consistent offending over the 18 year period in relation to eight victims, cannot be considered excessive on a totality basis. Again, all offending involved careful planning, gross breach of trust in relation to vulnerable victims and families into whose lives Mr Bell inveigled himself, and very significant emotional harm both directly to victims and to their families.

[24] Though the Judge elected “by a fine margin” not to impose preventive detention, that sentence was plainly available on the facts and Mr Bell ought to consider himself fortunate that it was not imposed.

¹⁶ *R v Bell*, above n 1, at [38].

¹⁷ *Opetaiia v R* [2013] NZCA 434.

Child sex offender registration

Submissions

[25] Mr Tennet submitted that the sentence imposed failed appropriately to recognise the provisions of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016. The Act was passed after Mr Bell was sentenced but has retrospective effect. It will, Mr Tennet submitted, subject Mr Bell to very restrictive requirements for the rest of his life. This meant, he submitted further, that Mr Bell was subject to a more punitive regime than had been contemplated or was available when he was sentenced. In a sense this is a variant of Mr Tennet's argument with respect to *Leitch*; mandatory post-release restrictions now undermined the prior decision to uplift the sentence for the same community protection reasons that are the focus of the Act.

Analysis

[26] The Act came into force after Mr Bell's sentencing. We accept that its effect is punitive,¹⁸ even if its primary purpose is the protection of further potential victims from harm. It will undoubtedly restrict in significant ways the freedom of offenders who have served their sentences. And, for community protection reasons, it was expressly intended to apply to offenders who had been sentenced prior to its enactment.¹⁹ It is entirely unlikely that Parliament, in legislating retrospectively in this fashion, intended that its effect should be to discount sentences already imposed or to be imposed in the future. That would, we venture, be contrary to the underlying purpose of the measure.

[27] We do not consider that a discount ought to be given to take account of this new legislation.

¹⁸ A point the Crown conceded in the light of the Attorney-General's s 7 New Zealand Bill of Rights Act 1990 report to the House. *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Child Protection (Child Sex Offender Register) Bill* (6 May 2015) at [11].

¹⁹ Child Protection (Child Sex Offender Government Agency Registration) Act 2016, sch 1 cl 1.

Minimum period of imprisonment excessive

Submissions

[28] Mr Tennet submitted that Collins J was wrong in fact to suggest that the MPI would assist Mr Bell in undertaking an appropriate sex offender programme. In reality, Mr Tennet submitted, such programmes are never made available to prisoners until they are due for parole consideration largely, he submitted, as a result of resourcing constraints. In any event, with or without an MPI, Mr Tennet submitted, the Parole Board would never release him until he had completed such a programme.

[29] Finally, Mr Tennet submitted that in cases of this nature an MPI of 50 per cent is the appropriate norm, and there were no factors warranting a higher MPI in this case.

Analysis

[30] At effectively six years, the MPI in this case was the maximum available.²⁰ We are satisfied nonetheless that it was appropriate.

[31] A MPI may be imposed in accordance with s 86(2) of the Sentencing Act 2002 if eligibility for parole after one-third of the sentence is considered too early having regard to the requirements of accountability, denunciation, deterrence and protection. All four factors are engaged in this case.

[32] The period of the offending, the number of victims, and the harm wrought on them and their families all suggest that a longer MPI than the standard statutory minimum is necessary. The same factors suggest that this period should be as long as possible.

[33] Sentencing courts have taken a similar approach in cases less obviously deserving of the maximum MPI. An example is found in the carefully constructed sentencing notes of Woolford J in *R v Thorpe* where an MPI of 65 per cent was imposed alongside a sentence of six years and two months' imprisonment for similar

²⁰ Sentencing Act 2002, s 86.

multi-victim, long-term child sex offending.²¹ The offending in *Thorpe* occurred over a shorter period with fewer victims and without the aggravating element of an unlawful sexual connection charge. The additional elements present in this case demonstrate why the maximum is appropriate here.

[34] We acknowledge Mr Tennet's point that in reality the longer the MPI, the greater the delay in availability of therapeutic programmes for the offender. Nonetheless, the nature and consistency of the offending, and Mr Bell's relatively young age on standard eligibility for release bring the s 86(2) factors into sharp focus. The most important of them in the context of this offending is community protection. The maximum MPI is both consistent with and necessary for the achievement of that purpose.

Disposition

[35] The appeal against sentence is dismissed.

Solicitors:
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²¹ *R v Thorpe* [2012] NZHC 229.