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

ORDER CONTINUES PROHIBITING PUBLICATION OF NAME, ADDRESS OR PARTICULARS IDENTIFYING APPELLANT.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA674/07
[2008] NZCA 157

THE QUEEN

v

T (CA674/07)

Hearing: 19 May 2008

Court: Robertson, Wild and Cooper JJ

Counsel: H T Young for Appellant
B J Horsley for Crown

Judgment: 9 June 2008 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of nine years' imprisonment imposed on the representative count of indecent assault of the appellant's partner's daughter A is quashed, and a sentence of four years' imprisonment substituted.

C **The sentences of 18 months' imprisonment on the four counts arising out of the events at the holiday camp are confirmed, but it is ordered that those sentences be served concurrently with the other sentences imposed.**

D **The nine year term imposed on the two representative counts of sexual violation are confirmed so the effective sentence is nine years' imprisonment.**

E **It is ordered that the appellant serve a minimum period of imprisonment of six years on the count alleging sexual violation by rape.**

REASONS OF THE COURT

(Given by Cooper J)

[1] The appellant pleaded guilty to:

(a) two representative counts of sexual violation, alleging respectively rape and digital penetration; and

(b) one representative count of indecent assault.

[2] On each of these counts, Judge Phillips in the District Court imposed nine years' imprisonment. The Judge also ordered that the appellant serve a minimum term of six and a half years.

[3] In addition, the appellant pleaded guilty to four further counts of indecent assault. On these counts, the Judge sentenced him to 18 months' imprisonment. Those were concurrent terms, but to be served cumulatively on the nine year term imposed for the sexual violation. The total effective sentence was therefore ten and a half years.

[4] The appellant now appeals against the sentence, alleging it was plainly excessive.

Facts

[5] The victim ("A") of the counts alleging sexual violation was the daughter of the appellant's partner. They lived together as a family unit, which included A's younger brother. When the appellant's offending began, A was nine years old.

[6] The offending started with inappropriate touching of A's breasts, genital area and anus. On a number of occasions the appellant attempted to masturbate her. He inserted his finger into her vagina at least twice. A recounted other occasions when he attempted to insert his penis into her vagina. He admitted doing so on four to five occasions. A claimed that "on one or two occasions" the appellant succeeded in inserting the head of his penis, leaving her with a stinging pain. He admitted to the police that there were two occasions when he really tried to insert his penis, but said that A did not like it, and he desisted. He also admitted to police that he was aware that A was distressed by his actions, but said he was driven to continue because of a high sexual drive.

[7] This conduct led to the representative counts of sexual violation and indecent assault against A. A and three young friends were the victims of the four additional indecent assaults charged against the appellant. The latter charges arose from the following events.

[8] A was to have her tenth birthday on Monday 17 September. A celebration was planned for the preceding weekend at a YMCA camp. A invited three friends aged between ten and eleven years. At about 4.00 a.m. on the Sunday morning, the appellant went to the room where the girls were sleeping. He touched the vagina of one of the girls through her underpants, although she pushed his hand away three times. He asked her to follow him. She was scared but felt she had to, although she asked one of her friends to accompany her. The appellant led them to the shower block where the appellant fondled their genital areas outside their pants and kissed

them on the cheek. He told the second of the girls that he intended to take their virginity from them.

[9] The appellant told A, who had also come to the shower block to remove her clothes and enter the shower. He then removed his own clothes, telling the other girls to leave if they were uncomfortable. In the shower he held his stepdaughter around her waist and stomach from behind and rubbed his penis up and down against her buttocks.

[10] The appellant later approached the fourth victim as she lay in bed. He put his arm down her sleeping bag and touched her genital area through her clothing.

The sentence

[11] The Judge emphasised the harm done to the victims by the offending, and the gross abuse of trust that characterised his actions against A and the other victims, and their vulnerability. He considered that all of the appellant's actions had been pre-meditated. He noted that the appellant would be entitled to credit for his guilty pleas, which had been immediate. He referred also to the appellant's remorse.

[12] Having summarised the submissions of counsel, and referred to the relevant purposes of sentencing in s 7(1) of the Sentencing Act 2002, the Judge then sentenced the appellant in the following terms:

> [14] When I have regard to this matter I look and see the horrific nature of the destructive type of offending you committed. I therefore intend to impose a stern denunciation of your conduct, given the gross abuse of trust, particularly the vulnerability of your stepdaughter and her ongoing compassing tragedy. In my view, overall the starting point for sentence should be in the vicinity of 13 years, but exacerbated by the prolonged nature of your offending and what happened at [the holiday camp], in my view the Crown is really directly on point with a starting point in the vicinity of some 14 years. I acknowledge your guilty plea. I consider that I must give due credit for that guilty plea. But when I look at all of the various factors in relation to the offending, excluding the offending at [the holiday camp], I consider that from the starting point, taking into account aspects of totality of sentencing, I think that an overall final sentence for all offending when I combine it together, of 10 and a-half years as the end sentence is appropriate. I arrive at that point in the following way.

> [15] In relation to the offending, being the sexual violation of rape of your stepdaughter, the attempts to sexually violate your stepdaughter, the digital penetration sexual violation and indecent assault as a representative charge, on those charges you are sentenced to imprisonment for a period of nine years. I entirely agree and accept that in the terms of s 86 of the Sentencing Act that this is an appropriate case here for a non parole period to be imposed against you. I note here that I must hold you accountable, I denounce your conduct, deter you and others from likeminded [sic] and I protect the community. I impose a non parole period of six and a-half years in relation to that offending.
>
> [16] As I have said I consider (to [sic] the matters at [the holiday camp]) to be aggravating on top of the offending against your stepdaughter. After giving you all due allowances for your acceptance there, I refer back to what I started with (that is, the facts as they relate to it, the little girls in the dark at [the holiday camp]), in relation to that matter, taking into account the questions of totality of sentence, I impose a separate sentence of 18 months imprisonment in relation to those four matters. That sentence to be cumulative on the nine years that I have imposed. Your end sentence is a sentence of 10 and a-half years.

Submissions

[13] It was common ground that the sentence of nine years' imprisonment for the representative count of indecent assault of A could not stand, because the maximum penalty under s 135 of the Crimes Act 1961 is seven years. We substitute a concurrent term of four years on that count.

[14] However, the main thrust of Mr Young's submission was that the starting point of 14 years adopted at [14] of the sentence was too high. He submitted that both the very high starting point and an inadequate discount of only 25 per cent for mitigating factors had resulted in an effective end sentence of ten and a half years, which was manifestly excessive.

[15] He based those submissions on a comparison of the facts of this case with those before the Court in *R v Minnis* CA242/06 23 November 2006, *R v T* (2002) 20 CRNZ 51 and *R v H* CA488/05 4 September 2006. He submitted that although there were two counts alleging sexual violation, on the most favourable interpretation of the summary of facts there had only been one occasion when the appellant had committed sexual violation by rape, the incident had been of short duration and the level of penetration had been minimal. The other charge of sexual

violation involved two incidents of digital penetration, which again had lasted for only a short period. Mr Young submitted that an appropriate starting point of 11-12 years would have been appropriate, but 14 years was too high.

[16] As to the mitigating factors, since the guilty pleas had been entered at the first reasonable opportunity and the pre-sentence report had referred to the appellant's "considerable remorse," a full discount of one third should have been given.

[17] Mr Young also argued that the Judge was wrong to impose a minimum period of imprisonment at close to the maximum two-thirds set out in s 86(4) of the Sentencing Act. He submitted that a minimum non-parole period of about half the total finite sentence imposed would have been adequate to meet those purposes.

[18] For the Crown, Mr Horsley submitted that a starting point of 14 years was within the range available, and was in fact in accordance with the authorities discussed by Mr Young. As to the discount for the guilty plea, the discount given was exactly 25 per cent, given in similar cases. Mr Horsley referred to observations made by the Court in *R v P* CA176/04 7 October 2004 that a range of discounts between 25 per cent and 33 per cent are commonly applied in cases where the guilty plea has been entered at the first opportunity. In *R v P*, which involved 15 charges of sexual offending against one of the appellant's daughters and an assault against the other, the discount given for guilty pleas entered at the first available opportunity was 25 per cent.

[19] As to the minimum term, Mr Horsley conceded that the Judge had been wrong to impose a minimum term of six and a half years because his power was limited to a maximum minimum term of two-thirds of the nine year sentence imposed on the representative counts of sexual violation against A. He argued, however, that a minimum term of six years would be appropriate. Referring to *R v Brown* [2002] 3 NZLR 670 and again to *R v P* he emphasised that a significant minimum term will usually be appropriate in cases involving sex crimes against young children, particularly when there is more than one victim, such offending being outside the ordinary range of offending.

Discussion

[20] There is no doubt that the conduct for which the appellant was to be sentenced was very serious. Its seriousness cannot be mitigated as Mr Young attempted to do by suggesting that the count of sexual violation by rape was brought in respect of only one incident. That charge was advanced on a representative basis. The appellant accepted, by his guilty plea, that there were at least two occasions on which a rape had occurred. We observe that, in the course of the sentence, Judge Phillips noted a submission by Mr Young in the following terms:

> Mr Young says that the two occasions, as to penis penetration, it was part penetration and not full penetration and that you stopped when she protested.

[21] As to the degree of penetration that occurred, this Court has several times said that the duration and degree of penetration are irrelevant factors especially when the rape is of a young pre-pubescent girl. In *R v H* CA488/05 4 September 2006 it was observed at [17]:

> We would not wish to endorse in the case of sexual offending against young girls any general principle that a lower starting point is justified for minimal or brief penetration compared with full or longer penetration. The law provides that the act of rape is complete even upon a minimal degree of penetration. The statutory policy recognises that an act of sexual violation may well have a similar traumatic effect on the victim whether the act is of short or long duration and regardless of the extent of penetration.

[22] It is plain from the Judge's remarks set out in [12] that the 14 year starting point was for the totality of the appellant's offending. He indicated a starting point "in the vicinity of 13 years" for the offending against A, which he thought was exacerbated by both the prolonged period over which it continued and what happened at the holiday camp.

[23] A starting point of 14 years was high but within the range available to the Judge with respect to the totality of the offending here. Such a starting point is consistent with the Court's decisions in *R v Kolio* CA219/01 1 November 2001; *R v Minnis* CA242/06 23 November 2006 and *R v T* (2002) 20 CRNZ 51.

[24] In the first of those cases, a starting point of 17 years' imprisonment was adopted for offending which lasted for almost a year, against an eleven year old victim, the daughter of the appellant's partner. At least ten rapes were involved.

[25] In *R v Minnis* this Court adopted a starting point of 15 years for the rape of the primary victim, who was aged twelve years, and against whom other sexual violations by the same offender had involved digital penetration and oral sex. In *R v T*, the offending commenced against the victim when she was seven years old and continued for a further six to seven year period. During the last four years the complainant was subjected to regular unwanted sexual intercourse, as well as other indecencies. A 15 year starting point adopted by the sentencing Judge was not regarded by this Court as manifestly excessive.

[26] However, as has been seen, the Judge imposed a cumulative sentence of 18 months in respect of the offending that occurred at the YMCA camp. This involved a double counting. It was that approach that took the Judge to his final effective sentence of ten and a half years, after making an allowance of 25 per cent for the guilty plea.

[27] Section 84(1) of the Sentencing Act 2002 provides that cumulative sentences of imprisonment are generally appropriate if the offences for which an offender is being sentenced are separated in time, whether or not they are a connected series of events. Section 84(2) then provides that concurrent sentences are generally appropriate if the offences for which an offender is being sentenced are of a similar kind and are a connected series of offences. Although the offending at the holiday camp was different in the sense that it was at that point that the appellant's conduct affected victims in addition to A, it remains the case that the offending at the holiday camp was "of a similar kind" and these were also a connected series of offences. That does not mean that the imposition of cumulative sentences was wrong in principle; the Judge could legitimately have taken the view that the nature of the offending at the holiday camp justified a cumulative approach. Nevertheless, in a circumstance where concurrent sentences could have been imposed, we consider that it was wrong for the Judge both to adopt a 14 year starting point by reference to the overall offending and then to impose cumulative sentences in respect of what took

place at the camp. The error has contributed to a sentence which in the end is plainly excessive.

[28] The other contributing factor is the allowance of 25 per cent in respect of the guilty plea and remorse. Charges arising from the incidents at the holiday camp were laid on 17 September 2007, the day after the events occurred. The appellant was remanded without plea in custody to the following day, when he was then further remanded in custody. The further charges, including those alleging sexual violation of A were laid on 12 October 2007. On 16 October, the appellant pleaded guilty to all of the charges. In the circumstances, the appellant should have been sentenced on the basis that he had made the earliest possible pleas of guilty. There was the added factor of remorse, which appears not to have been taken into account at all by the sentencing Judge. The pre-sentence report had mentioned that the appellant was distraught when interviewed, recognised that his behaviour was illegal, foolish and reckless and that he was trying to understand why he had behaved as he did. Remorse cannot count for much in a case where the offending is as serious as this, but it does go some distance towards lessening the need for personal deterrence to be emphasised in the sentence.

[29] Given that the prompt guilty pleas relieved the four young victims of the need for further participation in the judicial process, we consider that this was a case where the full discount of 33 per cent, (recognised by the Court in cases such as *R v P* CA176/04 7 October 2004 and *R v Hannagan* CA396/04 9 June 2005, should have been given.

[30] That leaves for consideration the minimum term of imprisonment. While accepting that a minimum period of imprisonment was appropriately imposed here, Mr Young submitted that a period of about half the total finite sentence imposed would have been adequate to meet the purposes of s 86 of the Sentencing Act. He contended that the Judge had imposed a minimum period of imprisonment "at close to the maximum two-thirds of the full term sentence" (clearly a reference to the effective sentence of ten and a half years). As earlier noted, Mr Horsley accepted that the minimum term of six and a half years imposed by the Judge could not stand because it exceeded the maximum which he could impose as a minimum term.

[31] We cannot accept Mr Young's contention which was, in effect, that a minimum term of four and a half years would be a sufficient response to the statutory considerations set out in s 86(2) of the Sentencing Act.

[32] In *R v T* (2002) 20 CRNZ 51, this Court observed at [20]:

> With multiple offending as is involved here, the application of the totality principle in sentencing gives some proportionality and realism to sentences where full cumulative sentences for all separate offences would be pointless. But a consequence is that eligibility for parole after one-third of the sentence imposed often will be quite inadequate to reflect the appropriate level of punishment, deterrence and denunciation for that total offending.

[33] As in that case, having regard to the various factors to be weighed in accordance with ss 7, 8 and 9 of the Act applicable to this offending, we are satisfied that a minimum term of six years should be imposed.

Result

[34] The appeal is allowed.

[35] The sentence of nine years' imprisonment imposed on the representative count of indecent assault of A is quashed. We substitute a concurrent term of four years' imprisonment on that count.

[36] The sentences of 18 months' imprisonment on the four counts arising out of events at the holiday camp are confirmed, but those sentences are to be served concurrently with the other sentences imposed.

[37] The nine year terms imposed on the two representative counts of sexual violation of A are confirmed. The result is an effective sentence of nine years' imprisonment after appropriate credit is given for the guilty pleas and remorse.

[38] We order pursuant to s 86 of the Sentencing Act that the appellant serve a minimum period of imprisonment of six years.

[39] Publication of the name or identifying particulars of the complainants is prohibited by s 139 of the Criminal Justice Act 1985. An order prohibiting publication of the appellant's name, address or identifying particulars was made in the District Court and continues.

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