PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA558/2008
[2009] NZCA 107

THE QUEEN

v

K (CA558/2008)

Hearing: 3 February 2009

Court: William Young P, Chambers and Ellen France JJ

Counsel: A Markham for Crown
A M Courtney for Respondent

Judgment: 2 April 2009 at 10 am

JUDGMENT OF THE COURT

A Leave to appeal is granted.

B The appeal is allowed.

C In substitution for the sentences of three years three months' imprisonment on the counts of sexual violation, we pass sentences of five years three months' imprisonment. All sentences remain concurrent.

D In substitution for the order that the respondent serve a minimum period of imprisonment of 19 and a half months, we order him to serve a minimum period of imprisonment of 31 months.

REASONS OF THE COURT

(Given by Chambers J)

Sexual offending on a young girl

[1] The complainant, who was born in 1997, is the respondent's stepdaughter. Her mother began a relationship with the respondent in 2001. They married five years later. In February 2006, some months prior to the wedding, the respondent began going into the complainant's bedroom at night after she was asleep. He would remove her lower clothing and fondle her genitals. He would also wet a finger and insert it into her vagina. On occasions, he would pull the complainant's legs apart and lick her vagina. Afterwards, the respondent would often masturbate.

[2] In October 2007, the respondent's wife spent a week in hospital. While she was there, on two occasions, the respondent got into the complainant's bed, removed his own clothing, and rubbed his erect penis on and around her anus.

[3] The complainant disclosed the abuse to her mother a few weeks later. The mother confronted the respondent, who then made full admissions. He said he had sexually abused the complainant on approximately 50 occasions. An estimated 80 per cent of these occasions involved him touching or penetrating the complainant's genitalia with his fingers, while on 20 per cent of the occasions he had licked her genitalia.

[4] The respondent pleaded guilty prior to depositions on two charges of sexual violation by unlawful sexual connection and two of indecent assault on a child under the age of twelve years. The charges were representative and spanned a two year period, from January 2006 to December 2007.

[5] Miller J sentenced the respondent. The Crown sought preventive detention. The judge refused to make that order. Instead, he imposed a determinate sentence of three years three months' imprisonment for the totality of the offending. He also ordered the respondent to serve a minimum period of imprisonment (MPI) of 50 per cent (ie 19 and a half months).

[6] From that sentence, the Solicitor-General seeks leave to appeal. He argues that the sentence was manifestly inadequate.

Issue on the appeal

[7] The Solicitor-General does not persist with the Crown's submission at sentencing that the respondent was deserving of preventive detention. Rather, what the Crown challenges is the starting point Miller J adopted. His Honour considered that the appropriate starting point was four and a half years. He then applied an uplift of six months to reflect the respondent's previous convictions, which were for indecencies involving children under the age of 12. He then deducted one year nine months (35 per cent) for mitigating factors. Of that, the guilty pleas justified a discrete discount of 30 per cent; the balance represented a special acknowledgement of the respondent's remorse, including the fact he took himself to the police station and made full admissions after he was confronted: HC WN CRI 2007-019-10430 15 August 2008 at [27]. That left an effective end sentence of three years three months' imprisonment.

[8] Ms Markham, for the Crown, did not challenge any aspect of the sentencing or its reasoning other than the starting point. Ms Markham submitted that was manifestly too low; rather than four and a half years (prior to uplifts and discounts), it should have been in the range of eight and a half to ten and a half years. Given this was a Solicitor-General's appeal, where the least available sentence is appropriate, she plumped for a starting point of eight years' imprisonment (prior to uplifts and discounts).

The starting point

[9] The judge, in fixing the starting point, appears to have considered four cases. The first was *R v M* [2000] 2 NZLR 60 (CA), from which he deduced that the starting point for sexual connection by digital penetration was generally in a range of "between two to five years": at [22]. He also considered two cases on which the Crown had relied in which starting points of nine and 13 years had respectively been adopted: *R v Schwartfeger* CA211/05 10 November 2005 and *R v RHA (CA63/07)* [2007] NZCA 301. He distinguished them on the basis that "the conduct and harm [in those cases] were very much more serious than this case": at [23]. Lastly he noted *R v Ali* [2007] NZCA 322, in which this court fixed a starting point of six years' imprisonment. Miller J distinguished that case on the basis that it involved a sexual attack on a stranger, a factor he thought generally deserving of "a higher starting point": at [23].

[10] In fixing his starting point, he took into account the following considerations (at [24]):

> The offending in this case has to take into account the representative nature of the charges, the age of the victim, the abuse of trust, and the indecent assault charges, which add to the starting point because on your own account there were many such incidents. Fortunately, it appears that the victim slept through most of the incidents. Nonetheless, her mother recounts that the girl is now clingy and shy, and prone to tantrums. The offending has also affected her mother, who has lost her relationship and suffered economic hardship.

[11] Ms Markham was critical of the judge's reliance on *R v M*. She submitted it had been criticised by this court subsequently in *R v Tranter* CA486/03 14 June 2004 and that it was inconsistent with this court's earlier decision in *R v E* (*CA259/96)* 3 September 1996. This is not the occasion on which to resolve these inconsistencies (if they are truly inconsistencies): the permanent members of this court have decided to release later this year a guideline judgment on sentencing for sexual offending generally. What we do say, however, is that the range in *R v M* assumed a single violation by digital penetration, in the same way as *R v A* [1994] 2 NZLR 129 (CA) fixed an eight year starting point for a single rape of an adult woman. The *R v M* range is of little significance in a case involving persistent

sexual abuse of a child over a two year period, abuse involving not just digital penetration of the complainant's vagina but also repeated oral sex. (This court has made similar observations with respect to the significance of *R v A* in cases involving persistent sexual abuse by rape: see, for example, *R v H (CA789/2008)* [2009] NZCA 77 at [5].)

[12] Secondly, Ms Markham challenged the judge's dismissal of *Schwartfeger* and *RHA*. She accepted that *RHA* involved more serious offending, but not by much. She did not accept that *Schwartfeger* involved "very much more serious" offending. She noted that in *Schwartfeger* the harm to the victim had been extreme, but on the other hand the conduct involved only three discrete incidents in respect of an older complainant. Here, there were dozens of offences. Further, Mr Schwartfeger did not have the appellant's previous convictions or risk profile.

[13] We agree with Ms Markham's submissions concerning those cases. Miller J's starting point seems much too low compared with them.

[14] Ms Markham submitted that the starting point should have been at least eight years' imprisonment. In reaching that figure, she relied not only on *Schwartfeger* and *RHA* but also four other decisions of this court.

[15] The first was *E (CA259/96)*, in which this court appears to have adopted a starting point of about six and a half years. Ms Markham considered the offending in that case to be, overall, less serious, as, although repetitive, it had taken place over only a six month period, not a two year period.

[16] Her second case was *R v Salt* CA353/04 4 May 2005, in which this court upheld a six year starting point. Ms Markham submitted that the offending was overall less serious in *Salt*, because the complainants were not living with Mr Salt. The offending appears to have occurred during occasional sleepovers and visits.

[17] Her third case was *R v Hayward* [2008] NZCA 172, in which this court upheld a starting point of eight and half years, while noting it was stern.

Ms Markham submitted the offending in that case was less serious than here, as the complainant was older.

[18] Finally, she referred to *Ali*, but only because Miller J had. The facts in *Ali* were far removed from the present. Mr Ali was a taxi driver who had sexually assaulted a female passenger after refusing to drop her home. He grabbed her breasts and then forced her down on the seat and digitally penetrated her, before she managed to escape. This court upheld a starting point of six years' imprisonment, although noting it was at the upper end of the scale. Ms Markham submitted that, while the facts of *Ali* are very different, "it is difficult to see how a one-off incident involving an adult victim could possibly be seen as less serious than 50 incidents in respect of an eight year old child". To the contrary, she submitted, the present offending is significantly worse. We agree.

[19] After considering all the cases cited to us, we are satisfied that the judge's starting point was manifestly inadequate. The least available starting point was seven and a half years' imprisonment. To that we add the judge's six month uplift for prior convictions. We allow a two years nine months' discount in respect of the early guilty pleas, remorse, and the full confession. This leads to a total effective sentence of five years three months' imprisonment.

Result

[20] We grant the Solicitor-General leave to appeal. We allow the appeal. In substitution for the sentences of three years three months' imprisonment on the counts of sexual violation, we pass sentences of five years three months' imprisonment. We do not interfere with the sentences of two years' imprisonment imposed with respect to the indecent assault counts. As all sentences remain concurrent, the effective sentence is five years three months' imprisonment.

[21] Ms Markham did not challenge the 50 per cent MPI. Accordingly, we adjust the MPI to 31 months.

[22] We finish by observing that Ms Courtney, for the respondent, said everything that could be said on the respondent's behalf in seeking to uphold the judge's sentence. She accepted the judge's approach had been "merciful", but said it was justified as the respondent was "a rarity". Unfortunately, we cannot agree that his act of going to the police and making a full admission can in any way justify the manifestly inadequate starting point the judge adopted. Although Ms Courtney's submissions have not carried the day, we are grateful for the care she took in preparing and delivering them.

[23] Ms Courtney observed that she hoped, if we did adjust a sentence, that this would not prejudice the respondent's "opportunity of reform via the Kia Marama programme". We understand that it will not.

Solicitors:
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Amanda Courtney, Wellington for Respondent