PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA563/2008
[2009] NZCA 145

THE QUEEN

v

WAYNE ALEXANDER GORDON

Hearing: 24 February 2009

Court: Chambers, Gendall and Allan JJ

Counsel: J R F Anderson for Appellant
A R Burns for Crown

Judgment: 24 April 2009 at 9 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The minimum period of imprisonment of eight years imposed in the District Court is quashed.

C A minimum period of imprisonment of six years is substituted.

REASONS OF THE COURT

(Given by Allan J)

[1] Having pleaded guilty to 14 charges of sexual offending against two complainants, the appellant was sentenced in the Waitakere District Court on 11 April 2008 to 12 years imprisonment, with a minimum non-parole period of eight years. He now appeals against the length of that minimum period of imprisonment.

Background

[2] The appellant offended against T between 1998 and 2000 while babysitting her. T was at the time aged between eight and ten.

[3] Judge Taumaunu summarised this offending by saying:

> You raped the named victim on two distinct occasions. You sexually violated that victim by the touching of your mouth to her genitalia, by inserting your penis into her mouth and by inserting your fingers and tongue into her genitalia. Also, between that time period you indecently assaulted her when she was under the age of 12 by placing your groin against her genital area and by rubbing her genital area up and down with your penis, and that you also did an indecent act by exposing your penis to her when she was under the age of 12. Those charges form one set of offending.

[4] These events gave rise to two charges of sexual violation by rape, three of sexual violation by unlawful sexual connection, and one each of indecent assault on a girl under 12 and indecency with a girl under 12.

[5] The second victim, S, was at the time of the offending against her aged eight and nine. Again, the appellant was trusted by S's parents to babysit S and her brothers while the parents were absent.

[6] The Judge summarised this offending in the following way:

> In respect of a different victim, between 1 September 2006 and 31 August 2007 you are for sentence in respect of two charges of sexual violation by inserting your penis into her anus when she was aged under 12 years. You are also for sentence in respect of sexually violating her while she was under the age of 12 by licking her vagina. Also, by inducing her to perform oral sex by sucking your penis. There are two charges before the Court which allege that particular offence. You are also for sentence in respect of a charge of indecent assault upon the same complainant when she was under

> the age of 12 years by inducing her to masturbate your penis and a further charge of indecent assault in respect of the same victim when she was under the age of 12 by touching her chest area.

[7] That offending gave rise to two charges of sexual violation by rape (involving anal penetration), three of sexual violation by unlawful sexual connection (involving oral sexual activity), and two of sexual conduct with a person under 12 years.

The lead sentence

[8] After referring to a number of relevant sentencing principles and objectives, identifying several aggravating features, and discussing a number of authorities (mostly decisions of this Court), the Judge selected a starting point of 16 years imprisonment. From that figure he deducted 25% in order to recognise a very early guilty plea, the appellant's remorse and his previous good character, so producing a lead sentence of 12 years imprisonment on the sexual violation charges.

[9] There is no appeal against that sentence, which was the product of a carefully crafted, and indeed impeccable, analysis.

The minimum non-parole period

[10] Judge Taumaunu considered that a minimum period of imprisonment was required. He did so by reference to the judgment of this Court in *R v Brown* [2002] 3 NZLR 670, deciding that factors such as the existence of multiple victims, their vulnerability and the actual and potential consequences of the offending for the victims, justified the imposition of a minimum term. Having reached that conclusion, to which there is no challenge by the appellant, the Judge simply said:

> I an satisfied that a minimum non-parole period of two thirds of the term of the sentence that I have imposed is appropriate and justified in this sentencing exercise for you today Mr Gordon, and that is what I intend to impose.

[11] Accordingly, the appellant was sentenced to 12 years imprisonment, with a minimum period of imprisonment of eight years.

Counsel's submissions

[12] Mr Anderson submits that by imposing a minimum non-parole period of eight years, Judge Taumaunu effectively erased the credit to which the appellant was entitled by reason of his very early guilty plea, his remorse, and his good previous record. He submits that the non-parole period imposed, being the maximum available, was excessive when compared with the terms imposed in similar cases. He argues that the minimum term of imprisonment imposed ought not to have exceeded six years, or 50% of the length of the lead sentence.

[13] Mr Burns argues that all four sentencing purposes identified in s 86(2) of the Sentencing Act 2002 are engaged, that the mitigating factors identified by Mr Anderson are largely overwhelmed by the seriousness of the offending, and that it was open to Judge Taumaunu to decide that the appellant must serve at least two-thirds of the lead sentence.

Discussion

[14] Section 86 of the Sentencing Act 2002 in its current form provides:

> 86. **Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment**
>
> (1) If a court sentences an offender to a determinate sentence of imprisonment of more than 2 years for a particular offence, it may, at the same time as it sentences the offender, order that the offender serve a minimum period of imprisonment in relation to that particular sentence.
>
> (2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:—
>
> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
>
> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.

(3) Repealed.

(4) A minimum period of imprisonment imposed under this section must not exceed the lesser of—

(a) two-thirds of the full term of the sentence; or

(b) 10 years.

(5) For the purposes of Part 4 of the Summary Proceedings Act 1957 and Part 13 of the Crimes Act 1961, an order under this section is a sentence.

[15] The legislative purpose underpinning s 86 was extensively discussed by this Court in *Brown*. The effect of the section is to enable sentencing Judges to over-ride those provisions in the Parole Act 2002 requiring that all offenders be eligible for parole after serving one-third of the sentence imposed; where the offending is so serious that release after one-third of the sentence would plainly constitute an insufficient response in the eyes of the community, the Court may confer a degree of reality on the sentence and the overall outcome by imposing a minimum period of imprisonment.

[16] As originally enacted, s 86 permitted the imposition of a minimum term where the offence was "sufficiently serious", that is, where the circumstances of the offending took the case out of the ordinary range of offending of the particular kind. But under s 86 as it now stands, a minimum period of imprisonment may be imposed even where the case does not disclose any unusual or abnormal features for offending of the kind in question, although such features may well remain relevant to the overall assessment required under s 86(2): *R v Wirangi* [2007] NZCA 25.

[17] A sentencing Judge has a discretion as to whether or not to impose a minimum period of imprisonment, and as to the assessment of an appropriate minimum period if imposed. But in doing so, he or she must have regard to s 8(e) of the Sentencing Act 2002, which requires the Court to take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances.

[18] The selection of an appropriate minimum period of imprisonment is of obvious and direct importance to the prisoner concerned. It is desirable that the approach of sentencing Judges be discernible from their sentencing remarks.

[19] In the present case, Mr Anderson submits that the Judge's decision to impose the highest available minimum period of imprisonment was not in line with recent comparable cases. We therefore turn to a brief consideration of some recent authorities.

[20] In *R v K* (2003) 20 CRNZ 799, the appellant was convicted following a District Court trial on two counts of rape and six counts of indecent assault. The offences were committed against two girls aged between seven and 11 years. The offender was aged 69 years when sentenced and was a friend of, or distantly related to, the complainants' families. The first complainant described several indecent assaults by reference to identified events. The offending progressed to rapes, which took place on several occasions at the appellant's house when he was alone with the complainant. Likewise, the second complainant gave evidence of indecent assaults and of repeated rape at the appellant's house, where she was permitted by her parents to stay overnight for a period of some weeks. The appellant was sentenced to 13 years imprisonment on the rape charges and four years imprisonment on the indecent assaults. He was ordered to serve a minimum period of imprisonment of six years, somewhat less than 50% of the lead sentence. The Court dismissed an appeal against that sentence, indicating that at most it could be regarded as a "firm response". The Court also noted that the Judge had imposed a minimum period of six years when the upper end of the available range was eight years eight months. The appeal was dismissed.

[21] In *R v M* (*CA3/04)* 23 August 2004, the appellant pleaded guilty to six charges involving sexual offences against his daughter. The offending spanned three years at a time when the complainant was aged between eight and 11 years. There were two charges of rape (one representative), two representative charges of sexual violation by unlawful sexual connection (involving oral sex), one representative charge of indecent assault on a girl aged under 12 years, and one representative charge of indecent assault on a girl aged 12 years. The appellant was sentenced to a

term of imprisonment of 11 years, with a minimum non-parole period of six years. In that case the evidence indicated that the appellant had first had sexual intercourse with the complainant when she was nine years of age, and continued to do so for about two years. Acts of intercourse occurred two to four times a week. Oral sex began in 2003 and was regular after that. The appellant and his wife had separated in March 2001, soon after the offending commenced, but the victim continued to live with him.

[22] This Court rejected the submission that the starting point of 15 years imprisonment chosen by the sentencing Judge was too high. It said that the sentencing Judge was entitled to adopt a starting point near the top of the available range, given the very serious and repetitive nature of the offending involving the appellant's biological daughter. Neither were there grounds for criticism of the discount of four years for co-operation and an early guilty plea.

[23] The Court also rejected the contention that the offending was not sufficiently serious to justify the imposition of a non-parole period and upheld the Judge's assessment, which amounted to approximately 55% of the finite sentence.

[24] In *R v V* (*CA57/04*) 14 July 2004, the appellant had pleaded guilty in the District Court to three charges of sexual violation by rape, four charges of sexual violation by unlawful sexual connection, three representative charges of indecent assault, and four representative charges of sexual intercourse with a girl under care. All of the charges arose from offending against the appellant's stepdaughter who was aged between 11 and 17 years during the period of offending, which spanned some six years. The complainant would go to her stepfather's workplace, where he showed her pornographic magazines after other workers had left the premises. The appellant's offending initially took the form of indecent assaults involving, first, fondling outside the complainant's clothing, but later progressing to skin to skin contact. Those assaults continued on a regular basis over the following years.

[25] When the complainant was 14 the abuse progressed to digital penetration and to regular sexual intercourse, which took place on an average of two to three times per week until she was 17 years of age. On one particular occasion when she was 16

and at home from school suffering from glandular fever, the appellant forced sexual intercourse upon her despite her pleas for him to leave her alone.

[26] The appellant was 57 years of age and effectively a first offender. Although he did not deny the facts set out in the summary, he denied rape, telling the probation officer that he and the victim had been drawn together because they did not receive any affection from the complainant's mother, and that they had found consolation in one another. The appellant told the probation officer that during the sexual acts "he didn't think the victim was his stepdaughter". Like the sentencing Judge, this Court regarded these latter comments as exacerbating a plain breach of trust over a very long period.

[27] The sentencing Judge took a starting point of 16 years imprisonment, allowed a discount of two years (12.5%) for an early guilty plea and remorse, and imposed a lead sentence of 14 years imprisonment with a minimum period of nine years imprisonment.

[28] This Court regarded the discount as inadequate to reflect the mitigating factors, including the guilty plea expressly taken into account by the Judge, and increased it to 25%. That reduced the lead sentence to 12 years imprisonment and entailed a need to revisit the minimum non-parole period. The Court said that the relationship between the lead sentence and the minimum term of imprisonment arrived at by the Judge was appropriate, and replaced the nine year minimum non-parole period with a seven year period.

[29] In *R v F (CA206/05)* 22 November 2005, this Court dismissed an appeal against a sentence of ten years six months imprisonment, with a minimum term of five years three months imprisonment. The appellant had pleaded guilty on arraignment in the High Court to seven counts of sexual offending against two young girls. The younger complainant was aged between seven and nine years when the offending took place; she was the appellant's niece and stayed with the appellant and his wife from time to time. Over a period of more than two years the appellant raped her on multiple occasions and sodomised her once. There were also instances of oral sexual connection and of forced masturbation. The other complainant was

aged 12 and 13 at the time of the offending. She also stayed with the appellant and his wife, she and her siblings having been removed from the custody of their natural mother by reason of serious physical abuse. There were several attempts by the appellant to rape this complainant, two of which were accompanied by violence; one incident was witnessed by the complainant's infant sister. There were also instances of digital penetration and of indecent assault.

[30] On the day on which he was to be sentenced the appellant intimated that he wished to withdraw his plea of guilty. After hearing evidence the sentencing Judge declined the application. This Court upheld that decision, and the sentence imposed upon the appellant.

[31] Counsel for the appellant in that case argued that although the offending would ordinarily have justified the imposition of a minimum term of imprisonment, the certainty that the appellant would be deported to Tonga upon his release rendered a minimum term unnecessary. The Court rejected that argument, on the basis that a minimum term was necessary in order to adequately punish, deter and denounce the offending. It also upheld the minimum term of imprisonment, which was equivalent to 50% of the lead sentence, noting that a longer term could have been imposed and would have been, were it not for the appellant's expressions of contrition and remorse. The Court remarked that the appellant should regard himself as having been leniently treated. That observation was plainly warranted in the light of the appellant's attempt to have his guilty plea vacated, so casting doubt upon the sincerity of his earlier expressions of contrition and remorse.

[32] In *R v T (CA674/07)* [2008] NZCA 157, the appellant pleaded guilty to:

a) two representative counts of sexual violation alleging respectively rape and digital penetration.

b) one representative count of indecent assault;

c) four further counts of indecent assault.

[33] On the sexual violation counts and the representative count of indecent assault, the appellant was sentenced to nine years imprisonment with a minimum term of six and a half years. On the four additional counts of indecent assault, he was sentenced to 18 months imprisonment cumulative on the sentence of nine years imprisonment. The total sentence was ten and a half years imprisonment with a minimum period of six and a half years.

[34] The sexual violation counts related to the appellant's stepdaughter. She was aged between nine and ten years at the time. The offending started with intimate touching, which led to digital penetration and then to several incidents in which the complainant was raped, although it appears that penetration may not have been complete.

[35] The indecent assault charges that attracted the cumulative sentence related to a particular occasion upon which the complainant had her tenth birthday party at a YMCA camp. She invited three friends. In the middle of the night the appellant woke the girls and indecently assaulted all of them. The complainant herself was required to go to the shower block, to remove her clothes, and to permit the appellant to rub himself against her from behind.

[36] The sentence of nine years imprisonment for indecent assault was beyond the sentencing Judge's jurisdiction. This Court made the necessary adjustment for that, and also reduced the starting point because the Judge appeared to have both adopted a starting point of 14 years by reference to the overall offending, and imposed cumulative sentences in respect of what took place at the camp. This Court also considered that a full discount of 33% ought to have been allowed for a prompt guilty plea.

[37] In the result, this Court imposed an effective sentence of nine years imprisonment after appropriate credit for the guilty pleas and remorse and fixed a minimum period of imprisonment of six years, which it considered to be justified in the light of the observations of the Court in *R v T* (2002) 20 CRNZ 51 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.

[38] Finally, we refer to a case in which no minimum period of imprisonment was imposed: *R v Minnis* CA242/06 23 November 2006. In that case there were three complainants. The overall offending involved one count of sexual violation by rape, four of sexual violation by unlawful sexual connection (digital and oral), one of indecent assault on a girl aged between 12 and 16 years, and four specific counts of indecent assault on a girl under 12 years. The appellant was aged 31 years and had no previous convictions. He pleaded guilty on arraignment and was sentenced to 12 years imprisonment.

[39] The first complainant was aged between 12 and 13 years; the offending occurred over a period of 12 months, the appellant having befriended her mother. He assisted the family and gradually gained her trust. When babysitting the children, he offended against the complainant by fondling her, violating her digitally and orally, and on one occasion, having full sexual intercourse with her.

[40] The second complainant was the younger sister of the first. This offending occurred several years later. The appellant fondled the complainant's genitals when she was ten or 11 years of age, just after she had emerged from a bath.

[41] The third victim was the youngest child of a friend. Again the appellant befriended the complainant's mother. The counts of indecent assault against her involved the fondling of her genitals over (and once under) her clothing, and blowing "raspberries" on her stomach.

[42] Aggravating features included the multiplicity of the victims, their ages and vulnerability, the significant psychological damage that had occurred, the duration of the offending, gross breaches of trust, premeditation and grooming, and threats to the complainants if the offending was reported.

[43] This Court allowed the appellant's appeal and substituted an effective sentence of ten years imprisonment. The Crown did not seek a minimum period of imprisonment and none was imposed.

[44] We return to this case. In *Brown* at [34] and [39] the Court remarked upon the need to avoid giving any impression, when imposing a minimum period of imprisonment, that the credit for mitigating factors had been erased. That could occur if there were to be a concentration on the seriousness of the offence, to the exclusion of the circumstances of the offender.

[45] Mr Anderson submits that, from the point of view of the appellant, the credit for his guilty plea and remorse appears to have been cancelled out by reason of the length of the minimum term imposed.

[46] Of course, whatever the length of the minimum period of imprisonment, an offender will necessarily derive benefit from a discount given in the course of calculating the lead sentence, because the minimum period cannot exceed two-thirds of that sentence. But sentencing Judges must devote separate attention to the circumstances of the offender at the second stage of the inquiry, when a minimum period of imprisonment is being considered. That is not to double-count mitigating factors. It simply recognises the need to consider the circumstances of the offender as well as the offending itself.

[47] Mr Burns submits that the seriousness of the offending in this case was such that to a large degree it overwhelmed the mitigating factors. We disagree.

[48] At the second stage of the sentencing inquiry, where a minimum period of imprisonment is being considered, it is necessary to reconsider all of the sentencing principles in ss 7, 8 and 9. Judge Taumaunu identified a number of mitigating features, which together justified a discount of 25% from his starting point. Those factors included the appellant's early guilty plea and genuine remorse, previous good character, a period of service in the army, and difficult personal circumstances which it is unnecessary to canvass here. Taken in combination, factors such as those would

ordinarily suggest a minimum period of imprisonment falling short of the maximum two-thirds of the finite sentence, despite the undoubted gravity of the offending.

[49] We accept of course that there may be cases in which the circumstances of the offending are of such gravity as to completely outweigh factors personal to the offender, but the cases to which we have referred suggest that the decision to impose the maximum non-parole period in this case was out of line. The facts in *R v K* bore some similarity to the circumstances existing here, in that there were two young complainants and the offending progressed over time from indecencies to rape. There, the minimum non-parole period was fixed at something less than 50% of the lead sentence.

[50] In *R v M* the complainant, who was the appellant's biological daughter, was raped several times a week over a period of two years. There, a minimum non-parole period equivalent to 55% of the lead sentence was fixed.

[51] In *R v F* the Court upheld a minimum period of imprisonment amounting to 50% of the finite sentence, but remarked that the lead sentence and the minimum period of imprisonment were both lenient, given that a separate allowance had been made for contrition and remorse, despite the fact that the appellant had formally applied to vacate his plea of guilty.

[52] In *R v V*, where a minimum period of imprisonment equivalent to 58% of the lead sentence was imposed, the offending was in our view more serious than in the present case. It continued over a period of some years, and the appellant regarded the teenaged complainant as a surrogate wife, rather than a stepdaughter.

[53] We have considered *Minnis* as an example of the numerous cases in which no minimum period of imprisonment has been imposed at all in circumstances where a minimum period might have been called for. Cases where no minimum period of imprisonment at all has been fixed form part of the spectrum of prior relevant authority.

[54] In *R v T (CA674/07)* this Court fixed the highest possible minimum period of imprisonment when resentencing the appellant. That case was perhaps less serious than the present one. The Court did not cite any authority in doing so, nor did it indicate why it had chosen to impose the highest available minimum period. We think that case is somewhat out of line with the others to which we have referred.

[55] Ultimately, we have reached the conclusion that the minimum period of imprisonment imposed in this case was too high. The Judge, while appropriately recognising the circumstances of the appellant in fixing the lead sentence, may have overlooked factors personal to the appellant that strongly suggested a minimum period of imprisonment falling short of the available maximum. In our opinion, the objectives of s 86 will be achieved by the imposition of a minimum term of imprisonment of six years, which is 50% of the lead sentence.

Result

[56] The appeal against the length of the minimum term of imprisonment imposed upon the appellant is accordingly allowed. The term of eight years imposed in the District Court is quashed. We substitute a minimum period of imprisonment of six years.

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