IN THE COURT OF APPEAL OF NEW ZEALAND

CA413/2010
[2010] NZCA 606

BETWEEN	EUGENE HAPI MCCORD Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 23 November 2010

Court: Harrison, Ronald Young and Keane JJ

Counsel: M R Bott for Appellant
M E Ball for Respondent

Judgment: 10 December 2010 at 10 am

JUDGMENT OF THE COURT

Appeal against extended supervision order dismissed.

REASONS OF THE COURT

(Given by Keane J)

[1] On 7 September 2006 Eugene McCord, then aged 24, was sentenced to imprisonment for three and a half years, effectively, for a series of offences which took place from May to August 2005 against a 15 year old girl, with whom he had been in a relationship.

[2] The three and a half year sentence was imposed for the last of Mr McCord's offences, where he had kidnapped the victim on 14 August 2005. He was also sentenced concurrently to imprisonment for two years for earlier wounding her with intent to injure her and one year for assaulting her. Most materially, he was sentenced concurrently to imprisonment for one year for sexual intercourse with her, when she was aged under 16, between 20 May and 14 August 2005.

[3] That last offence, a 'relevant offence' under s 107B of the Parole Act 2002, made Mr McCord eligible for supervision under an extended supervision order to take effect once his release conditions ceased; and the Chief Executive applied for such an order. Apart from that index offence, Mr McCord had convictions for two others also considered predictive, an indecent assault on an adult woman in December 2003 and, in 1999, an obscene exposure.

[4] On 23 June 2010 Mr McCord became subject to an extended supervision order for two years, to commence once his release conditions ceased.[1] Relying on reports from two health assessors, Judge M E Sharp held that there was a real and ongoing risk that Mr McCord might sexually reoffend against children or young persons under 16. The two year term she imposed, Judge Sharp held, was the minimum term required to safeguard the vulnerable young.

[5] In decisions given on 17 November 2009 and 28 January 2010 Judge E M Aitken had earlier held that the first two health assessments made, which were then contested, were admissible. Those issues did not recur on this appeal. Nor was there any issue as to jurisdiction or as to Judge Sharp's identification of the issue she had to resolve; whether the risk Mr McCord presented was "both real, ongoing and one that cannot sensibly be ignored having regard to the nature and gravity of the likely re-offending".[2]

[6] Rather, on this appeal, Mr McCord contends that the Judge made three errors, the first two of which were related:

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1 *Chief Executive of the Department of Corrections v McCord* DC Auckland CRI-2008-085-6675, 23 June 2010.

2 *R v Peta* [2007] 2 NZLR 627 (CA) at [8].

a) she treated his index offence as a sexual offence against a young person under 16 years, when it was consensual and he believed, reasonably, that she was over 16 years;

b) she did this having rightly excluded as irrelevant to risk the obscene exposure and she compounded her error by treating the offence against the adult woman as equally relevant; and

c) she treated his intellectual disability as aggravating when, because an order is penal, she ought to have treated it as mitigating.

Decision under appeal

[7] The Judge began her analysis of the risk that Mr McCord continued to present once his release conditions ceased by relying, in the first instance, on the report of the first health assessor, Dr Jane Freeman, dated 21 July 2008, whose assessment rested, as the Judge said, entirely on departmental records. Mr McCord refused to be interviewed by her.

[8] If Mr McCord remained untreated, Dr Freeman said, he was highly likely to commit further sexual offences against girls under 16. He had little insight into situations of high risk, or strategies to avoid offending. He saw such sexual relationships as normal and expressed no remorse. He remained dysfunctional and antisocial. Absent treatment, Dr Freeman said, that risk could remain constant for years. She recommended an order for the maximum term, ten years.

[9] Dr Freeman's opinion, the Judge said, rested also on two actuarial measures under each of which the risk Mr McCord presented was assessed to be high; the Automated Sexual Recidivism Scale (ASRS), and STABLE 2007. The Judge was explicit that for this purpose Dr Freeman had treated the 1999 obscene exposure offence, the 2004 indecent assault offence on an adult woman and Mr McCord's index offence, as all relevant; an issue to which we will return.

[10] Finally, the Judge said, Dr Freeman did not consider Mr McCord to be a paedophile. He presented a high risk to girls under 16, because he was of borderline intelligence, generally dysfunctional and antisocial, and just as likely to offend against young as well as adult women.

[11] Mr Kriek, the second psychological assessor, who interviewed Mr McCord twice, once for two hours and then for one and a half hours, and also assessed him by a third actuarial measure, RoC*RoI, the Judge said, agreed with Dr Freeman. By that third actuarial measure Mr McCord was at very high risk within the next five years of being reconvicted of and imprisoned for general, as opposed to sexual, offending.

[12] Mr Kriek's clinical opinion, which the Judge accepted, was that Mr McCord was likely to re-offend sexually against young persons under 16 as a result of the cluster of factors he and Dr Freeman had identified; and that he lay within a subset of sex offenders who have an extensive criminal history in which there has been some sexual offending, offending that can be anticipated to continue.

[13] As well as this the Judge took into account Mr McCord's 116 previous convictions over an 11 year period since the age of 17 years, his consistent substance abuse and his borderline intelligence and poor compliance with sanctions. She accepted Mr Kriek's opinion that if Mr McCord were to offend sexually again (which was predicted to be against young as well as adult women), it was likely that he would be violent, perhaps seriously.

[14] In imposing extended supervision for two years the Judge recognised the burden that this would impose on Mr McCord, taking into account his intellectual disability. That term, she considered, was the least that was proportionate to the risk he posed.

Three grounds of appeal

[15] The purpose of an extended supervision order is to protect the vulnerable young from a serial sexual offender. It may also, if indirectly, assist offenders by

bringing some discipline to their lives that saves them from further offending and a much more severe sanction. The fact nonetheless remains that, as this Court said in *R v Peta*, it does have "the potential to impose major restrictions on a person's freedom of movement and association".[3] In that sense it can be experienced as penal.

[16] It is against that reality that Mr Bott, in his careful submission, has sought to persuade us that an extended supervision order is, in effect if not purpose, a second sentence and that in making the order the Judge made three errors. We are unable to uphold his submissions and can say quite shortly why.

Index offence error

[17] First, we do not accept that the Judge was wrong to take literally Mr McCord's index offence, sexual connection with a young person, and to treat it as a 'relevant offence' for the purpose of the order; as it plainly was.

[18] The Judge was well aware that Mr McCord contested the relevance of that conviction, as she recorded when recounting Dr Freeman's evidence. Mr McCord's stance, she then said, was that his relationship with the young girl had been consensual and that he assumed on reasonable grounds that she was over 18. She was employed in the sex industry, her parents were aware of their relationship and she was already sexually active.

[19] The Judge was correct, we consider, to set these claims to one side. Mr McCord could, had he wished to, have defended the offence charged on the bases he asserts.[4] By his plea, however, he accepted that he had not taken reasonable steps to find out whether the girl was over 16, or that he believed on reasonable grounds that she was, or that she consented. He remained, when extended supervision became the issue, as much bound by his plea and all that it implied as he had been on sentence.

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3 At [14].

4 See Crimes Act 1961, ss 134, 134A.

[20] Indeed, we consider, the Judge was right instead to set, as she did, Mr McCord's claims against the totality of his offending against the girl, and to conclude that "a disturbing thread of dominance and violence emerges". His index offence extended from 20 May to 14 August 2005 and, between 11 and 14 August, he wounded the girl with intent to injure her, he assaulted her and he kidnapped her.

Predictive offence category error

[21] Secondly, we are unable to accept that the Judge made any categorical error when identifying the sexual offences that were relevant to the future risk Mr McCord presented.

[22] The Judge was well aware that in accepting any actuarial measurement of risk she had to be satisfied that it was founded on truly indicative offending. She was also aware that the number of offences included was reflected in the risk identified. When she abstracted the obscene exposure from her assessment,[5] she noted that Mr McCord's risk fell from high to medium-high and the likelihood that he might be reconvicted of a relevant sexual offence within five years fell from 21 per cent to seven per cent.

[23] Knowing, as she did, that risk assessments had to be based on truly indicative offending, the Judge was right to aggregate Mr McCord's index offence with the indecent offence on the adult woman. In contrast to the obscene exposure offence, both were instances of significant deliberate sexual offending. The ages of Mr McCord's victims were, in the clinical analysis of the two assessors, incidental.

Intellectual disability error

[24] Finally, we are unable to accept that the Judge impermissibly treated Mr McCord's intellectual disability, his borderline intelligence, as an aggravating factor in deciding to impose the order; a sanction, as he sees it, equivalent to a second sentence.

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5 At [23].

[25] The Judge was not, when she made the order, required to assess Mr McCord's moral culpability, as she would have had to do had she sentenced him. Then his disability might have figured as mitigating. Rather, she had to assess the risk, if any, that he continued to pose to children and young persons under 16, once his conditions of release ceased to constrain him. To that analysis his borderline intelligence had to be highly relevant.

[26] The Judge, moreover, set the term of the order at two years precisely to ensure that Mr McCord was subject to the least sanction possible. That term, we consider, could have been considerably longer.

Outcome

[27] The extended supervision order the Judge made, limited as it was to a term of two years, was justified by Mr McCord's unique set of risk factors. The Judge made no error in making that order. Mr McCord's appeal is dismissed. The order will continue according to its terms.

Solicitors:
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