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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA458/2011
[2011] NZCA 569

BETWEEN	MARK WILLIAM KENNEDY Appellant
AND	THE QUEEN Respondent

Hearing: 31 October 2011

Court: Harrison, Miller and Asher JJ

Counsel: J F Mather for Appellant
K A L Bicknell for Respondent

Judgment: 9 November 2011 at 2:15 PM

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] Mr Kennedy was convicted of indecently assaulting a child under 12 and sentenced to 12 months' imprisonment. He appeals that sentence and also the decision to refuse him name suppression. His counsel, Mr Mather, advised us that Mr Kennedy did not intend to pursue his conviction appeal.

[2] On Sunday, 18 July 2010 Mr Kennedy, with the complainant's mother's consent, uplifted the complainant from her home address and took her to his home for the afternoon to care for her. While the complainant was sitting on the bed in his bedroom and playing Mr Kennedy pushed her down on the bed and lay down next to her. He gave her a hug and told her that when she gave him a hug his "sausage grows". He then grabbed her hand and pushed it forcefully down the front of his trousers into his groin area. The complainant felt skin and hair and pulled her hand back. She said that she was scared. Mr Kennedy told her not to tell anyone. Some hours later, after she had been returned to her mother, she told her of the offending.

[3] Mr Kennedy was convicted after a jury trial. He was sentenced by Judge Wilson QC who fixed 15 months as the starting point, but taking into account factors personal to Mr Kennedy reduced the sentence to 12 months' imprisonment.

[4] Mr Mather for Mr Kennedy does not dispute the starting point or the discount for mitigating factors. However, he submits that the Judge erred in fixing on a sentence of imprisonment rather than home detention. He submits that in all the circumstances the sentence should have been home detention.

The decision

[5] The Judge noted the submission that home detention was available and would be an appropriate sentence if coupled with release and post-detention conditions. He also noted the submission that there was no need for particular deterrence in Mr Kennedy's case because of his low risk of recidivism and the need to reach the least restrictive outcome. He observed that despite the indications of remorse the charge had been contested and stated:[1]

> In my view, the aggravating circumstances here, particularly in relation to the serious breach of trust, the skin on skin touching involved as in combination are that there are no exceptional circumstances in this case which would justify a sentence of anything less than a full custodial sentence. The principles of sentencing simply would not be met in relation to the need to protect this child by adopting an approach of that kind.

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1 *R v Kennedy* DC Auckland CRI-2010-044-5295, 22 July 2011 at [8].

[6] He went on to set out the post-release conditions recommended in the pre-sentence report, which required Mr Kennedy to attend a SAFE programme and any other programme directed by the probation officer, together with certain protective conditions.

The sentence

[7] The maximum term of imprisonment available was 10 years' imprisonment. The end sentence of 12 months' imprisonment was not challenged and was entirely within the range. Home detention is a sentence in its own right,[2] and had to be considered as an option.[3] It was considered by the learned Judge, but rejected.

[8] The Judge referred to the absence of "exceptional circumstances" in declining to order a sentence that was less than a full custodial sentence. It is not necessary to adopt an "only in exceptional circumstances" approach to home detention in relation to sexual offending against children. All sentences that are potentially in the range should be considered on their merits, although it will be recognised that the likely sentencing outcome for sexual offending against children is imprisonment.[4]

[9] Here the Judge considered the particular aggravating circumstances. He noted the serious breach of trust that was involved in this offending. He also referred to the skin on skin touching. He took these factors into account in assessing whether there should be a sentence of imprisonment. He could have also referred to the tender age of the complainant as a further aggravating factor, given that she was only nine years old. There was no error in his assessment of culpability.

[10] In relation to matters in mitigation relating to Mr Kennedy personally, Mr Mather emphasised that Mr Kennedy had been assessed in the pre-sentence report as having a low general recidivism classification. However, while Mr Kennedy had no record of previous similar offending, he could not call in aid good character. He had previous convictions, although not for sex offending. His

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2 Sentencing Act 2002, s 10A.
3 Sentencing Act 2002, s 15A(1)(b).
4 *R v S* (CA465/05) CA465/05, 11 April 2006 at [12].

ability to rely on remorse was limited by the fact that he had defended the charge and put the complainant through the ordeal of giving evidence. His expression of distress at the harm he had caused, given to the probation officer after the trial, had to be seen in this light.

[11] Mr Mather also referred to Mr Kennedy's range of medical issues. He does have medical problems but they are not so out of the ordinary as to warrant any particular recognition in the sentencing process.

[12] In the end the Judge gave a three month discount for all personal mitigating factors, and that was fair. There was no outstanding rehabilitative history of the type that was established in *R v Hill*[5] to support a sentence of home detention.

[13] Taking into account culpability and those personal factors, it was open to the Judge to conclude that the principles of sentencing would not be met by adopting a sentence of less than imprisonment. We are not satisfied that the Judge erred in this respect. The serious breach of trust, the age of the victim and the extent of the indecency inflicted on her required denunciation and deterrence.

[14] The appeal against sentence is dismissed.

Name suppression

[15] Judge Wilson declined an application for a continuation of interim suppression. He referred to the primary principle of open justice and declined to make an order. Ms Bicknell submitted that there was no jurisdiction to consider suppression in this appeal.

[16] It is not necessary to determine the jurisdiction question as it is clear that any challenge to the refusal to grant name suppression cannot succeed. There is nothing to indicate any error in the Judge's reasoning in refusing to grant final suppression. Indeed, we could not discern any reason for suppression to be granted. The concerns that led to this Court granting interim suppression at an earlier time are no longer

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5 *R v Hill* [2008] NZCA 41, [2008] 2 NZLR 381.

relevant.[6] It is not open to Mr Kennedy to say that the publication of his name should be permanently suppressed to protect the complainant, when the Crown is not pursuing such a submission. We agree with Ms Bicknell that there is no factor of significance put forward to displace the presumption of open justice.

Result

[17] Mr Kennedy's appeals against conviction, sentence and the refusal to grant name suppression are dismissed.

Solicitors:
Crown Law, Wellington for Respondent.

6 *K (CA101/2011) v R* [2011] NZCA 76.