NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE VICTIM AND HER MOTHER REMAINS EXTANT

IN THE COURT OF APPEAL OF NEW ZEALAND

CA525/2012
[2012] NZCA 518

BETWEEN	THE QUEEN Appellant
AND	JAMES ROBERT HALL Respondent

Hearing: 30 October 2012

Court: White, Allan and Lang JJ

Counsel: A Markham and Z Hamill for Appellant
S Jefferson for Respondent

Judgment: 8 November 2012 at 10.00 am

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The appeal is allowed.

C The sentence of 12 months' home detention is quashed.

D A sentence of two years five months' imprisonment is substituted.

E Mr Hall is directed to surrender himself to the Hastings Central Police Station on Eastern Railway Road on or before 10 am on Monday 12 November 2012.

REASONS OF THE COURT

(Given by White J)

Introduction

[1] Following pleas of guilty by the respondent, Mr Hall, to one count of causing grievous bodily harm with intent to injure and one representative count of causing grievous bodily harm with reckless disregard to his baby daughter, S, he was sentenced by Peters J to 12 months' home detention with conditions.[1]

[2] The Solicitor-General seeks leave to appeal against the sentence on the grounds that it was manifestly inadequate and wrong in principle and that a term of imprisonment was required.[2]

The facts

[3] At the time of the offending Mr Hall, who was then aged 19, was living with S's mother, R. R was aged 17. Their daughter, S, was born in late November 2010.

[4] R took the baby to her doctor on 22 and 24 February 2011 and 3 March 2011, twice with concern about her left leg and once about bruising on her chest. The doctor initially suggested an insect bite and bruising from a car seat. Mr Hall "played down" the baby's injuries and allowed R to believe the innocent explanations suggested by the doctor.

[5] R then took the baby to her doctor again on 22 March 2011 because she was concerned about problems with swelling of S's left leg. The baby was referred to hospital. Examination there showed a range of injuries, a number of which were older and healing. The injuries included:

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1 *R v Hall* [2012] NZHC 2070.

2 *R v Wihapi* [1976] 1 NZLR 422 (CA) at 424; and *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 549.

(a) a possible old corner fracture to S's right upper arm;

(b) three separate older fractures to the femur (thigh bone) of her right leg;

(c) a fracture of her upper left femur (and corner fractures of the lower left femur on both sides);

(d) an older fracture of her left shin bone (tibia); and

(e) bruising to the left leg and upper pelvic areas.

[6] To reflect the diagnosis of non-accidental trauma at varying times, the indictment spans the four-month period from S's birth to discovery of these injuries. The incident on 20 March 2011 gave rise to a single charge. The other offending gave rise to the representative charge.

[7] Mr Hall was interviewed on the evening of 22 March 2011. He admitted causing harm and injury to S. He said that on 20 March 2011, home alone with S, he grabbed her left foot and pushed it back up and behind her body. He said this caused her left thigh to swell up. He also stated that once or twice he had meant to hurt her by bending her leg back in "blind anger". Mr Hall could not explain her other fractures except he knew he was rough and careless. On three or four occasions he had held the baby against his chest and pulled her quite firmly, enough to give her a fright and make her cry. He would then comfort S to calm her down.

[8] Mr Hall attributed his actions to unresolved anger and his difficulty in bonding with his daughter. He told the probation officer that he felt guilt and anger resulting from childhood events and that he felt disempowered as a father as a result of R and her mother and sister "monopolising" time with his daughter.

[9] The baby must have spent the first few weeks of her life in significant pain, spending extended periods of time in hospital with her mother. The baby had

difficulty learning to walk, although fortunately her long-term physical prognosis is good.

[10] The relationship between Mr Hall and R has ended. The father/daughter relationship has also ended and R is concerned about what she will tell S when she starts asking questions about her father.

The approach taken to sentencing

[11] After reviewing a number of authorities, Peters J said the offending that led to the hospital visit on 22 March 2011 would attract a starting point of around two years nine months' imprisonment. To reflect the second, representative, charge the Judge increased the starting point by six months to three years three months' imprisonment. In reaching that view, Peters J took into account that the injuries were to limbs, not the head, and were not expected to have long-lasting physical effects.

[12] Peters J said there were no aggravating features personal to Mr Hall. A number of mitigating factors were identified. The first of these was youth. For this factor, the starting point was reduced by 20 per cent. In addition, a 25 per cent discount was afforded for the guilty plea. Those factors took the starting point to just below two years' imprisonment.

[13] The Judge saw a sentence of home detention in such a case as rare. The factors favouring home detention were the respondent's youth and his willingness to "front up" to the offending and take responsibility for it. In light of these factors and the availability of a suitable home detention address, a term of home detention of 12 months was imposed.

The appeal

[14] The Crown's submissions in support of the appeal are that the sentence was manifestly inadequate and wrong in principle because:

(a) the starting point of three years three months was manifestly inadequate to reflect the totality of the offending and its aggravating features;

(b) the discount for youth of 20 per cent was overly generous in the circumstances;

(c) in combination, these features suggested an artificial "tailoring" of the sentence to result in a notional end sentence of two years or less; and

(b) even if a sentence of two years or less was available, home detention was clearly inappropriate in this case.

[15] We address these submissions in turn.

The starting point

[16] For the following reasons, we accept the submissions for the Crown that a starting point of three years three months' imprisonment for these offences was too low.

[17] First, when a court is sentencing an offender in a case involving violence against a child under the age of 14 years, it must take into account the aggravating factors prescribed by Parliament in s 9A(2) of the Sentencing Act 2002 as inserted by s 4 of the Sentencing (Offences Against Children) Amendment Act 2008, namely:

(a) the defencelessness of the victim:

(b) in relation to any harm resulting from the offence, any serious or long term physical or psychological effect on the victim:

(c) the magnitude of the breach of any relationship of trust between the victim and the offender:

(d) threats by the offender to prevent the victim reporting the offending:

(e) deliberate concealment of the offending from authorities.

[18] As this Court pointed out in *R v Pene*,[3] the enactment of s 9A reflected Parliamentary concern about violence against and neglect of children and signalled that tougher sentences might be required for such offending. The enactment of s 9A meant that some earlier sentencing decisions for offending of this nature needed to be approached with caution. In relying on pre-2008 decisions,[4] the Judge in the present case does not appear to have taken into account the significance of the enactment of s 9A.

[19] Second, in the present case, the following factors were clearly relevant:

(a) the defencelessness of the baby, who was injured by her father during the first four months of her life;

(b) the serious nature of the injuries caused over the four month period and ultimately the inevitable psychological effect on the child;

(c) the irreparable breach of trust in the relationship between Mr Hall and his baby daughter; and

(d) Mr Hall's failure to correct the doctor's initial innocent conclusion regarding the cause of the baby's injuries which meant she did not receive appropriate medical treatment at an earlier stage.

[20] Taking these factors into account and recognising that the second representative count involved serial violence, we consider that a starting point of at least four years' imprisonment was required. In adopting this starting point, we note that this Court has previously considered that a starting point of three and a half years' imprisonment would be appropriate for a single episode of violence against a young child.[5] Serial violence as in the present case clearly warranted a significantly greater starting point,[6] but in the context of this appeal we are constrained by the four years suggested as appropriate by the Crown in the High Court.

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3 *R v Pene* [2010] NZCA 387 at [12]–[13].
4 *R v Gatland* CA330/98, 26 November 1998; and *R v Filo* [2007] NZCA 20.
5 *R v Wilson* [2004] 3 NZLR 606 at [58]; and *R v Brown* [2009] NZCA 288 at [22].
6 *R v Wilson* at [50]–[51].

[21] Third, on this basis it is apparent that the Judge erred in adopting a starting point of two years nine months' imprisonment for the first count, the single episode, and then in increasing it by only six months for the second representative count, which reflected Mr Hall's serial violence towards his baby daughter during the first four months of her life.

[22] For these reasons we therefore do not accept the submission for Mr Hall that the Judge's starting point was "wholly within the range available."

Discount for youth

[23] The Crown accepted that Mr Hall was entitled to some discount for his age at the time of the offending (19), but submitted that the appropriate discount should have been no more than 10 per cent and not the 20 per cent given by the Judge.

[24] There is no doubt that the age of an offender is a relevant mitigating factor.[7] At the same time the Court's discretion to reduce a sentence based on an offender's age will depend on a range of factors, including the nature and circumstances of the particular offending and the actual age and circumstances of the particular offender.[8]

[25] We accept the Crown submissions that the offending here was serious and involved an acceptance by Mr Hall of "reckless disregard" for his baby daughter. We also accept that at the age of 19 Mr Hall was at the upper end of what might be considered youthful.

[26] We also accept, however, the submissions for Mr Hall that his youth was a contributing factor in his inability to resolve his family issues and to cope as a teenage father. In particular, his reference to his inability to bond with his baby daughter demonstrated a concerning immaturity.

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7 Sentencing Act, s 9(2)(a).

8 *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [83] and [96]; and *Churchwood v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].

[27] As the Crown submitted, this Court has endorsed discounts for offenders of a comparable age to Mr Hall of around 10 to 15 per cent.[9] While we might have adopted a discount of 15 per cent in the present case, we are not prepared to conclude that the Judge's discount of 20 per cent, while generous, was so out of line as to be wrong.

[28] Applying a 20 per cent discount to the correct starting point of four years' imprisonment gives a sentence of three years three months' imprisonment. Then, making a further deduction of 25 per cent for Mr Hall's guilty pleas, a final sentence of two years five months' imprisonment is reached.

Home detention

[29] In view of our conclusion that the appropriate sentence is two years five months' imprisonment, it is unnecessary for us to consider the Crown's third and fourth submissions.

Substitution of a custodial sentence

[30] We recognise that before increasing the sentence imposed on Mr Hall and substituting a custodial sentence, we must be satisfied that the considerations justifying an increase are sufficiently compelling and that any injustice to the offender is avoided.[10] For the reasons we have given, however, we are satisfied that the sentence imposed by the Judge was manifestly inadequate, and that it would not be appropriate to reduce the sentence further to two years' imprisonment, so enabling a sentence of home detention to be considered. This case involved two serious counts with aggravating features that required the imposition of a term of imprisonment. Apart from the discounts for youth and the guilty pleas, there were, as the Judge recognised, no relevant mitigating factors justifying a further reduction in the sentence.

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9 *R v Jamieson* [2009] NZCA 555; *Brook v R* [2010] NZCA 13; and *Day v R* [2010] NZCA 172.

10 *R v Donaldson*, above n 2, at 549–550.

Result

[31] The Solicitor-General's application for leave to appeal is granted and the appeal is allowed. The sentence of 12 months' home detention is quashed.

[32] A sentence of two years five months' imprisonment is substituted. While Mr Hall did, we understand, serve some ten days of his home detention sentence, we do not consider in the circumstances of his case that he should receive any reduction in the sentence we have imposed.

[33] Mr Hall is directed to surrender himself to the Hastings Central Police Station on Eastern Railway Road on or before 10 am on Monday 12 November 2012.

Solicitors:
Crown Law Office, Wellington for Appellant