NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA682/2012
[2013] NZCA 495

BETWEEN	FREDERICK BAILEY Appellant
AND	THE QUEEN Respondent

Hearing:	3 October 2013
Court:	O'Regan P, Panckhurst and MacKenzie JJ
Counsel:	V C Nisbet and P A Walker for Appellant S B Edwards and M L Wong for Respondent
Judgment:	17 October 2013 at 11 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by O'Regan P)

Introduction

[1] The appellant, Mr Bailey, appeals against a sentence of preventive detention with a minimum period of imprisonment of eight years imposed by Brewer J on 8 June 2012.[1]

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1 *R v Bailey* [2012] NZHC 1276.

Offences

[2] The appellant pleaded guilty to three counts of exploitative sexual connection with his first victim, whom we will call S. There was one count involving the appellant performing oral sex on S and one count of S performing oral sex on the appellant. Each of these counts related to a single, specified, incident. In addition, there was one representative count of the appellant performing anal intercourse on S. This happened on three occasions.

[3] The appellant also pleaded guilty to four counts of indecent assault and two counts of doing an indecent act with intent to offend in relation to his second victim, whom we will call H. Only the four indecent assault counts were relevant to the preventive detention decision. Those counts involved indecent touching of H.

The victims

[4] Both S and H are intellectually disabled. S has a mild intellectual disability and also has foetal alcohol syndrome. He falls into the bottom 3 per cent of persons for verbal comprehension skills, working memory and processing speed. His communication skills are equivalent to those of a child aged five years and 10 months. H has a moderate intellectual disability. His IQ level indicates that more than 99 per cent of people of his age perform at a higher level.

The High Court sentencing

[5] The Judge described the circumstances leading to the offending and then turned to the impact of the offending on the victims. The impact on S has been severe, causing extreme paranoia and anxiety and a lack of trust in others. It has had a seriously adverse impact on his day-to-day living. The impact on H is of a lesser degree, reflecting the lesser offending.

[6] The Judge determined that, were a finite sentence to be imposed, a sentence of seven and a half years' imprisonment would be appropriate, with a minimum period of imprisonment of five years. This was based on a total starting point of nine and a half years' imprisonment. The Judge calculated this by setting a starting point

for the offending against S of six years' imprisonment and a starting point of 16 months' imprisonment for the offending against H. He rounded this to seven years total (reflecting totality) and added an uplift for the appellant's previous offending of two years and further uplift of six months because the offending occurred in breach of the conditions of an extended supervision order to which the appellant was subject. The proposed end sentence was reached by allowing a reduction of about 20 per cent for the appellant's guilty plea.

[7] The Judge then turned to the question of preventive detention. He noted that the appellant had committed qualifying offences in 1988 (three), 1990, 1993, 1995, 2000 and 2002. All of these were indecent assaults or similar offences. He assessed the factors set out in s 87(4) of the Sentencing Act 2002 as follows:

(a) *Pattern of offending*: The Judge noted that the previous offending was at the lower end of the scale. The appellant had previously been sentenced to a sentence of preventive detention but that had been reversed by this Court on appeal, reflecting the low level of the offending. This Court did, however, issue a final warning.[2]

(b) *Seriousness of harm:* the Judge said the severe impact on the victim S indicated the serious harm caused by the offending.

(c) *Tendency to commit serious offences in the future*: the Judge referred to the report of the two health professionals before him. The first, Dr Green, assessed the appellant as being at a very high risk of reoffending sexually. The second, Dr Ruzibiza, concluded that the appellant was currently at a high risk of committing further sexual offences against prepubescent males or young men of low intellectual ability. The prospects of remedial treatment being successful were regarded as poor.

(d) *Efforts to address the cause of offending*: the Judge referred to the fact that the appellant had had a great deal of rehabilitative assistance in

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2 *R v Bailey* CA102/03, 22 July 2003 at [9].

the past. He had twice exited from the STOP programme due to reoffending and had undertaken the Kia Marama Programme but with little gain being made.

(e) *Lengthy determinate sentence is preferable*: the Judge determined there was nothing in the appellant's record that showed that a lengthy determinate sentence was adequate to protect society.

[8] The Judge noted that the appellant had not taken the chance that had been given to him by this Court when it gave him a final warning in 2003. He had no hesitation in concluding that preventive detention was necessary.

[9] The Judge imposed a minimum period of imprisonment of eight years. This was calculated by taking a starting point of six years to reflect the gravity of the offending and adding an uplift of two years to achieve the objective of safety of the community.

Grounds of appeal

[10] The essential ground of appeal was that the Judge ought to have imposed a lengthy determinate sentence rather than preventive detention. This was advanced on the basis that the appellant's earlier offending was not of a serious kind and his last previous offence was in 2003. It was argued that his advancing age (he is now 63 years old) meant that he would not be likely to be a risk to the public at the end of a lengthy finite sentence. Counsel for the appellant, Mr Nisbet, said that S's intellectual disability was not readily apparent to the appellant.

[11] In the alternative it was argued that, if the sentence of preventive detention is upheld, a lower minimum period of imprisonment should be imposed. This was advanced on the basis that the administration of sentences for those on preventive detention is such that they do not become eligible for treatment programmes until they become eligible for parole. In the appellant's case this will mean he will be in his 70s before he is eligible for any treatment programme.

Decision

[12] We see no error in the Judge's assessment of the factors set out in s 87(4). The present offending against S was serious and has had very serious consequences.

[13] We do not accept Mr Nisbet's argument that the appellant would not have been aware of the extent of S's intellectual disability. We accept Ms Edwards' submission for the Crown that S's responses on the evidential video interview that he underwent when the offending came to light are such that his impairment is readily observable.

[14] The health assessors' reports before the Judge were clear that the risk to the public of further offending by the appellant was significant.

[15] While the appellant will be in his 70s at the end of the minimum period of imprisonment imposed by the Judge, there is nothing to indicate that this will mitigate the risk to such an extent that the Judge could have been confident that the appellant would not constitute a high risk of reoffending on release.

[16] We do not consider that there was any realistic alternative to the imposition of a sentence of preventive detention in the present case and we do not see any basis to interfere with the imposition of a minimum period of imprisonment of eight years.

Result

[17] In the circumstances, the appeal is dismissed.

Solicitors:
Val C Nisbet, Wellington for Appellant
Crown Law Office, Wellington for Respondent