NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA347/2014
[2015] NZCA 191

BETWEEN	VERNON HONGI TEATAWHAI POMARE Appellant
AND	THE QUEEN Respondent

Hearing: 11 May 2015

Court: Randerson, Courtney and Kós JJ

Counsel: L O Smith for Appellant
J C Pike QC for Respondent

Judgment: 22 May 2015 at 11:30 am

JUDGMENT OF THE COURT

A An extension of time to file the appeal against sentence is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] The appellant, Vernon Pomare, was found guilty following a jury trial on nine charges of sexual offending against a female relative, namely two of unlawful sexual connection, one of inducing the complainant to do an indecent act on him, two of

indecent assault and four of rape. Judge Gibson imposed an effective sentence of 11 years with a minimum period of imprisonment of six and a half years (60 per cent).[1]

[2] Mr Pomare appeals the sentence on the ground that the minimum period of imprisonment is manifestly excessive as a result of the Judge wrongly taking Mr Pomare's lack of remorse into account and that it is inconsistent with minimum periods of imprisonment imposed in other similar cases.

Minimum period of imprisonment

[3] Notwithstanding the Parole Act 2002, which provides for eligibility for parole after serving one third of the sentence imposed, s 86 of the Sentencing Act 2002 permits a sentencing judge to impose a minimum period of imprisonment:

> **86 Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment**
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> (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.
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> (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:
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> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
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> (b) denouncing the conduct in which the offender was involved:
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> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.

[4] Under s 86(4) a minimum period of imprisonment must not exceed the lesser of two-thirds of the full term of the sentence or ten years.

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[1] *R v Pomare* DC Auckland CRI-2012-092-6249, 28 May 2014.

[5] In *R v Gordon* this Court described the purpose of s 86 as being to confer a degree of reality on the sentence and the outcome where the offending is so serious that release after one-third of the sentence will plainly constitute an insufficient response in the eyes of the community.[2] The discretion to impose a minimum period of imprisonment is not limited to particular kinds of cases; unusual features or exceptional offending are not necessary.[3] However, a judge imposing a minimum term of imprisonment must take into account the general desirability of consistency with appropriate sentencing levels provided for by s 8(e) of the Sentencing Act.[4]

Sentencing in the District Court

[6] The offences occurred over a period of 14 years when the complainant was aged between six and 20 years old and the appellant aged between 12 and 27 years old. The early offending involved digital penetration. The offending grew more serious until there were instances of rape from the time the complainant was about 16. A feature of the case that greatly concerned the Judge was that for a good part of the relevant period the wider family was aware that the appellant was engaged in inappropriate sexual contact with the complainant. Adequate steps were not taken to protect the girl so that the appellant continued to offend with impunity. Ultimately, the complainant left New Zealand to escape from the offending.

[7] At a relatively early stage in the sentencing the Judge noted that:

> [7] There is no expression of remorse from you. The pre-sentence report notes that you continue to maintain your innocence and that is a fantasy because you were very clearly properly convicted by the jury and that, in my view, is a matter that does you absolutely no credit whatsoever.

[8] However, the Judge made no further mention of a lack of remorse when he proceeded to fix the starting point and address the aggravating factors. The Judge took a starting point of ten years' imprisonment that he uplifted to 13 years to reflect the totality of the offending, which he considered fell into the higher end of band 2 of *R v AM*.[5] He reduced the provisional starting point by two years to take account

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2 *R v Gordon* [2009] NZCA 145 at [15].
3 *R v Wirangi* [2007] NZCA 25 at [17].
4 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [155].
5 *R v AM,* above n 4, at [98].

of the appellant's youth at the time of the earlier offences. There is no challenge to these aspects of the sentencing.

[9] The Judge then turned to the question of a minimum period of imprisonment, specifically referring to the purposes identified in s 86 of holding an offender accountable for the harm done to the victim and the community, the need to denounce the conduct and the need to deter the offender from committing some similar offence. He said:

> [15] In my view, those three factors are uppermost in considering the need to impose a minimum non-parole period. Inter-family sexual abuse is, of course, rife and the scale of your offending is, quite frankly, appalling and I believe that you must serve more than a third before you can be considered for release on parole to meet the purposes of the Sentencing Act that I have just mentioned.
>
> [16] I must take into account your personal circumstances and do so and note that you are 30 years of age; have a limited number of previous convictions; you have been in employment and were in employment until you were found guilty of these offences; you have a number of children, five in total and are a separated man. There is nothing remarkable in your background or about you personally. *You pleaded not guilty and continue to deny the offending and maintain your innocence and that is a matter that I do take into account as a personal circumstance in assessing the length of the minimum non-parole period. That in the face of clear and compelling evidence and I do not believe that you are every likely to accept your role in this offending.* Overall I am satisfied that you ought to serve at least six and a half years before being considered for release on parole.
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> (emphasis added)

Appeal

Did the Judge wrongly take lack of remorse into account?

[10] Mrs Smith, for Mr Pomare, submitted that the Judge's reference to Mr Pomare's not guilty plea and continued denial of the offending as a personal circumstance relevant to the assessment of the minimum non-parole period was a reference to lack of remorse. She argued that the Judge had wrongly treated lack of remorse as an aggravating factor in determining the minimum period of imprisonment and pointed out that under s 9(1) of the Sentencing Act, lack of remorse does not constitute an aggravating factor (compared to s 9(2) under which remorse may be accepted as a mitigating factor).

[11] It would be an error to treat lack of remorse as an aggravating factor.[6] However we do not consider that the Judge was referring to a lack of remorse when he fixed the minimum period of imprisonment. The only reference to lack of remorse occurred much earlier in the sentencing and was no more than a general observation. The Judge's reference to Mr Pomare's plea of not guilty and his continued denial of offending was not a reference to lack of remorse; these factors are recognised as distinct from lack of remorse and as highly relevant in assessing the extent to which the offender poses a risk to the public in the future. In *R v Wellm* this Court observed that:[7]

> All other things being equal, a defendant who has pleaded guilty poses less risk to the public than a defendant who, while guilty, steadfastly refuses to acknowledge it.

[12] These factors are also relevant to the application of s 7(1)(a), (f) and (g) of the Sentencing Act. Mrs Smith did not accept that, arguing that it was within a prisoner's right to maintain his or her innocence. But a prisoner's right to maintain his or her innocence does not preclude a sentencing judge treating that as a factor in assessing the risk the offender poses to the community in the future. The sentencing judge is not seeking to punish the prisoner for exercising his or her right to maintain his or her innocence but simply to make the assessment of future risk. In this case the Judge also had before him the pre-sentence report which assessed the risk of Mr Pomare reoffending as being moderate to high on the basis of the serious sexual nature of the offending and his continued denial of the offending.

[13] This ground of appeal therefore fails.

Was the minimum period of imprisonment excessive having regard to other similar cases?

[14] Mrs Smith submitted that the minimum period of imprisonment of 60 per cent was inconsistent with other similar cases of sexual offending within the family circle and that consistency required it to be closer to or at 50 per cent.

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6 *R v Rameka* [2011] NZCA 75, (2011) 26 CRNZ 1 at [163].
7 *R v Wellm* [2009] NZCA 175 at [18].

[15] A survey of cases involving sexual offending with similar features to the present discloses minimum periods of imprisonment between 50 and 64 per cent. In *R v I(CA70/2008)* this Court upheld a minimum period of imprisonment of 63 per cent of the sentence for repeated sexual offending against a stepdaughter, including frequent rapes, saying:[8]

> The ten year period fixed represents 63% of the total and might thus be thought to be at the high end of the available range (which is limited by statute to two thirds of the nominal sentence). But that range is necessarily compressed by the statutory maximum at one end and, at the other, by the reality that there is not much point in imposing minimum periods representing much less than 50 per cent of the nominal sentence. As a matter of common sense the sort of offender whose offending engages s 86 is unlikely to be released at or soon after the relevant parole eligibility date. Minimum periods imposed in like cases tend, as Mr Mount indicated, to be in the range of 50% – 60% of the nominal sentence. But there could be no legitimate basis for restricting the maximum minimum sentence to 60 per cent of the nominal sentence (given that the statute provides for a two thirds maximum). In those circumstances we can see no basis for interfering with the minimum period imposed by the Judge.

[16] In *R v AM*, serious sexual offending against three complainants over several years resulted in a 50 per cent minimum period of imprisonment being imposed by the Court of Appeal on a successful Solicitor-General appeal.[9] We note, however, that the factors relevant to the fixing of the minimum period of imprisonment in *R v AM* included AM's age and ill health. This Court also noted that previous similar cases suggested that a minimum period of imprisonment of at least half the nominal sentences was "very routine" in cases involving multiple counts of sexual offending against children.

[17] In *Z(CA586/2012) v R* this Court dismissed an appeal against a minimum period of imprisonment of 64 per cent.[10] We note that the offending was significantly worse than the present case in terms of its frequency and the fact that the victim became pregnant to the offender.

[18] In *R v Te Au*, which involved five victims and one rape charge, the minimum term of imprisonment imposed was 50 per cent. However, the Judge noted that the

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8 *R v I*(*CA70/2008)* [2009] NZCA 101.
9 *R v AM* [2010] NZCA 114.
10 *Z(CA586/2012) v R* [2012] NZCA 607.

offender's poor health was a factor mitigating against a lengthier minimum term and noting that the risk of ongoing offending had been assessed at moderate to low which would make a lengthy minimum period unduly punitive.[11]

[19] In *R v Petera* a minimum period of imprisonment of 50 per cent was imposed in relation to offending against three complainants over a long period.[12]

[20] The present case involves sustained serious sexual offending against a relative over a very long period, beginning when the complainant was just six years old. The risk of reoffending has been assessed as moderate to high. There are no issues regarding Mr Pomare's age or health that require particular consideration. The offending is comparable to that in *R v I(CA70/2008)*, though slightly less serious because some of the offending occurred when Mr Pomare was much younger. In these circumstances, we consider a minimum period of imprisonment of 60 per cent, whilst at the higher end of the available range, is generally consistent with other similar cases.

[21] This ground of appeal fails also.

Result

[22] We grant an extension of time to file the appeal.

[23] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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11 *R v Te Au* [2012] NZHC 2705 at [50].
12 *R v Petera* [2013] NZHC 2170.