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

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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA647/2014
[2016] NZCA 268

BETWEEN	A (CA647/2014) Appellant
AND	THE QUEEN Respondent

Hearing:	30 May 2016
Court:	Randerson, Woodhouse and Wylie JJ
Counsel:	P T Eastwood for Appellant M A Corlett for Respondent
Judgment:	17 June 2016 at 3 pm

JUDGMENT OF THE COURT

A An extension of time to appeal is granted.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Woodhouse J)

[1] After pleading guilty to charges of sexual offending against three young girls, the appellant was sentenced in December 2012 to 15 years imprisonment with a

minimum period of imprisonment of eight years by Judge Thomas in the Hamilton District Court.[1]

[2] In November 2014, and therefore well out of time, the appellant filed a notice of appeal against conviction and sentence. The appeal against conviction has since been abandoned. The appellant seeks an extension of time to appeal against sentence. No issue was raised by the Crown in that regard and we accordingly grant leave.

[3] The only contention advanced in respect of the sentence is that the minimum period of imprisonment was too high, and that it should be reduced to six years.

The offences

[4] The appellant was indicted twice for sexual offences against his daughter and two nieces.

[5] On 1 February 2012 he pleaded guilty to eight counts in the first indictment dated 9 August 2011. The offences against his daughter occurred when she was aged between 14 and 15 years old – incest, and two counts of indecent assault. In respect of one niece there were two offences of indecent assault when she was aged between eight and nine years old. In respect of the other niece there were three offences of indecent assault, one of which was representative, when that niece was aged between 15 to 16 years old.

[6] The second indictment is dated 6 July 2012, some five months after the guilty pleas on the first indictment. The appellant pleaded guilty to three charges on 12 July 2012. The offences were against his daughter. He pleaded guilty to raping his daughter in 2003 or 2004 when she was around ten years old and to raping her on at least eight occasions between 2004 and 2008. He also pleaded guilty to a charge of sexual violation of his daughter by unlawful sexual connection in October 2011; that is, *after* he was charged with the offences in the first indictment.

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1 *R v [A]* CRI-2010-019-6315, 19 December 2012.

[7] The offences covered by the first indictment occurred between 2008 and 2010. The appellant's daughter did not initially speak to police about the offending against her that had occurred between 2003 and 2008. Some of the reasons for this were referred to by Judge Thomas on sentencing. These bear on the appeal against the length of the minimum period of imprisonment. The Judge said:

> [9] Your family environment enabled you to offend against those who you were supposed to love and protect. Your offending in that way was the ultimate betrayal. But the family environment was so septic that it forced a second and just as powerful betrayal on your victims, [JL, his daughter] in particular. When the family became aware of your offending she was pressured into minimising her complaints. No one stood by her, not even her own mother. The situation was so appalling that you were allowed to breach non-association conditions and you offended grossly against [JL] again, while you were on bail and having already pleaded guilty to some of the sexual offending against her. It was only after her mother died and you were remanded in custody that [JL] was finally able to report what you had really done. She did that on the very day you were safely behind bars. No doubt, for similar reasons, [J] and [N] were not able to report your offending against them for some time. In [N's] case it took her five years to do so.

Minimum period of imprisonment: the statutory provision

[8] The relevant provision is s 86(2) of the Sentencing Act 2002, as follows:

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

The sentence

[9] The Judge took the offences of rape against the appellant's daughter as the lead offences and fixed a starting point of 16 years imprisonment. He did not increase that for the other offences against the daughter except for one offence of sexual violation while the appellant was on bail. The Judge increased the starting point to 20 years imprisonment to reflect the totality of the offences including the offences against the nieces. That was reduced by 25 per cent because of the guilty pleas, resulting in the end sentence for the lead offences of 15 years imprisonment.

[10] In fixing the minimum term of imprisonment of eight years the Judge said he was "satisfied that release after a third of a 15 year sentence would be insufficient to achieve the aims of s 7(1)(a), (e), (f) or (g)" of the Sentencing Act. He continued:

> [17] … The various reports that were ordered and undertaken when the Crown was considering a sentence of preventative detention do not necessarily put you at a high risk of re-offending. As I have said, they demonstrate a lack of insight on your part. That is concerning, given the gravity of your offending. Also, as I have already referred to, despite pleading guilty to some charges, you immediately sexually violated the very same complainant. I am satisfied that release after a third of your sentence will not achieve the relevant purposes of s 7, especially s 7(1)(g).[2] …
>
> (Footnote added)

Submissions

[11] Mr Eastwood made three main submissions. The principal argument was that the minimum period of imprisonment of eight years "is 'crushing' and does not encourage the Appellant to address rehabilitation and [obtain] treatment to address his sexual offending". He referred to the fact that rehabilitation or treatment programmes available in prison for sexual offending cannot be embarked upon until an appropriate time close to the first parole eligibility date. The minimum period of imprisonment will therefore defer the commencement of treatment.

[12] The second submission was that the Judge focused on protection of the community. Implicit in that submission was that there was undue focus on

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[2] Section 7(1)(g) records the same purpose as s 86(2)(d): protecting the community from the offender.

protection of the community. In substantial measure this submission supported the principal argument about deferral of treatment.

[13] The third submission was that the Judge was in error by referring to s 7(1)(g) and there was no reference to all of the provisions of s 86(2).

Evaluation

[14] In order to succeed in the contention that the minimum period of imprisonment should have been six years rather than eight years, the appellant has to demonstrate that there was a material error by the Judge in what was an exercise of a discretion. The matters referred to do not demonstrate any error. A minimum period of imprisonment of eight years was amply justified in all the circumstances of this case.

[15] In respect of the principal argument, relating to deferral of treatment, it is reasonably likely that the minimum period of imprisonment will mean that, if there is to be treatment, it will commence later than it would have if there had been no minimum period of imprisonment. It does not appear that this point was made to the Judge at sentencing. In any event, there was no error in this regard by imposing a minimum period of imprisonment of eight years. Rehabilitation, through treatment or by other means, is an important objective in sentencing, but its relative weight is a matter of judgment. We are satisfied that the possibility of effective treatment – and it cannot be seen as any more than that – does not come close to outweighing the Judge's assessment, the subject of Mr Eastwood's second submission to which we now turn.

[16] The Judge did place some emphasis on protecting the community from the offender. It was submitted that the Judge's emphasis on the need to protect the community was misplaced because the appellant was not "involved in grooming young people on the internet or a predator who loiters around schoolyards with the hope of forming liaisons with young people for sexual purposes". That is not a persuasive argument. "The community" is not an expression directed only to the wider public. It includes family members. One of the reports obtained for assessment of preventive detention referred to the risk in this case of further

offending against family members. The need for protection in this regard was fully borne out by the circumstances of this case. It was given further emphasis by a submission that presumably reflected the appellant's own attitude, as follows:

> This was a hard working man who when his wife developed cancer in 2004 sought another outlet for his sexual needs and fuelled by alcohol targeted the young female members of his family.

[17] In respect of the third submission, the fact that the Judge referred to paragraphs in s 7(1) of the Sentencing Act, rather than the paragraphs in s 86(2) is of no moment. The paragraphs in s 86(2) are all included in s 7(1).

Result

[18] An extension of time to appeal is granted.

[19] The appeal against sentence is dismissed.

Solicitors:
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