28/7

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

M19/89

8/2

BETWEEN MELVYN JAMES JACOBS

Appellant

A N D THE POLICE

Respondent

Hearing: 21 July 1989

Counsel: S.F. Gaines for Appellant
A.J. Naysmith for Respondent

Judgment: 26.7.89

JUDGMENT OF ELLIS J

This is an appeal against sentence of 18 months imprisonment on two charges of indecently assaulting a boy under 12 years.

The Appellant is aged 49. Over a number of years he was a friend of the complainants' family and stayed with them. For several months during the middle of 1988 he stayed with their grandparents and lived in a caravan, and the older boy aged 8 used to take him his breakfast in bed. The boy then climbed into bed with the Appellant and he fondled the boy's penis. On two occasions when he was staying with other family members he did the same thing to the younger boy aged 5. It was stated in the summary of facts that this conduct had continued over six months.

This was denied by Appellant to the Probation Officer, but conduct over a 2½ month period was admitted. The prosecution has not elected to contest this, as it would involve calling the children as witnesses. Apart from this, Appellant freely admitted the episodes at the first opportunity.

Appellant is a first offender, and his health has deteriorated over the past six years and his offending seems directly related to this. He has been divorced for some time and does not see his own children. He is a sickness beneficiary.

Emotional harm reports indicate that the younger boy may be less affected than the older. Nevertheless there will no doubt be ongoing problems of adjustment as a result. The parents and families of the boys are upset and disgusted by what has happened.

Probation and medical reports confirm that these are the first offences committed by the Appellant. They also confirm the Appellant is in poor health, is a lonely man who was unable to control his feelings and emotions. He has the support of a community officer in Picton with who he stayed prior to sentence. The Probation Officer offered to explore and finalise details of a Community Care programme if the Court wished it.

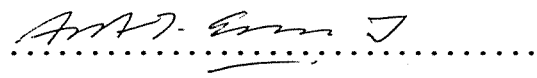
The sentencing Judge described Appellant's conduct as a gross breach of trust, calling for a sentence which would reflect the community's denunciation of such. The Judge rejected the suggestion of a community based sentence.

Mr Gaines submitted that a prison sentence while appropriate, should be no longer than was necessary to punish the Appellant and reflect the community's rejection of his conduct. He pointed to Appellant's sorry state of health, early guilty plea, and previous clean record. He also submitted that although there was a breach of trust involved, the Appellant was also motivated by affection and was not a predator.

Both Mr Gaines and Mr Naysmith referred me to some sentencing cases, and because I wished to obtain the transcript of one in particular, I reserved my decision. I have now had the advantage of reading the decision of the Court of Appeal in Crime Appeal C.A. 298/88 delivered 9 May 1989, and Douglas (unreported Henry J, Whangarei App 4/87, 20 February 1987). The latter was a prosecution appeal against a sentence of periodic detention and supervision for indecent assaults on a 13 year old girl, and an 8 year old boy. Henry J reviewed the factual situation and increased the sentence to 1 year's imprisonment. The Court of Appeal decision dealt with charges of indecencies with a girl under 12, and upheld a sentence of 18 months.

Close factual comparisons are largely unhelpful, but I can conclude that Appellant's conduct was if anything less serious than in the other cases. The matters of principle that can be observed from these and other cases is that indecencies with young children involving breach of trust by a friend or relation shall except in quite exceptional circumstances be visited with a sentence of imprisonment. The personal circumstances of the offender are of little consequence, but allowance will be made for early plea, and

compassion is not inappropriately reflected in the length of the sentence. To this extent the rigours of a prison sentence will be felt more acutely by this Appellant than most because of his very poor state of health. If it were not for that, I would have no hesitation in dismissing the appeal. However, in all the circumstances I consider punishment and condemnation will be adequately expressed by a sentence of 12 month's imprisonment. The sentence is accordingly varied by reducing the term of 18 months to 12.



Solicitors:

Lundon Radich Dew, P O Box 646, Blenheim
Wain & Naysmith, P O Box 11, Blenheim