

**ORDER PROHIBITING PUBLICATION OF NAME OF PRISONER AND  
VICTIM AND ANY DETAILS THAT MAY LEAD TO THEIR  
IDENTIFICATION.**

**IN THE HIGH COURT OF NEW ZEALAND  
HAMILTON REGISTRY**

**CRI 2008-090-010290**

**THE QUEEN**

v

**'W'**

Hearing: 12 May 2009

Appearances: R Guthrie for Crown  
M Robb for Prisoner

Judgment: 12 May 2009

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**SENTENCING REMARKS OF ANDREWS J**

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Solicitors: Crown Solicitor, Hamilton  
M. Robb, Box 58, Hamilton

[1] “W”, I am not going to ask you to stand. I understand that it is difficult for you, so I am going to permit you to remain seated while I impose sentence.

### **Charges**

[2] You appear for sentencing today having pleaded guilty to one representative charge of sexual violation by unlawful sexual connection with a male aged between 12 and 16, and three charges of indecent assault on a male aged between 12 and 16. One of those three charges is a representative charge.

[3] On the sexual violation charge, if a person is convicted on that charge the maximum available penalty is imprisonment for 20 years. On the sexual assault charges, the maximum available penalty is seven years imprisonment.

### **Relevant facts**

[4] The victim of your offending was your grandson. From 2006 onwards you looked after your grandchildren each afternoon. During the period from September to November 2008 they went to your house for two hours from 3.30pm each week day after school. Your grandson was aged twelve during the offending.

[5] You regularly asked your grandson to do household chores, to isolate him from other family members. These tasks included things like collecting fruit in the backyard and tidying books and magazines in your bedroom.

[6] With respect to the charge of sexual violation, as I noted that is a representative charge, which means that it is a single charge of events that happened several times. On one occasion, while your grandson was doing something for you in your bedroom, you took your penis from your pants and displayed it to him and told him to suck it. He refused. You became agitated and directed him to suck your penis. You told him that if he loved his granddad he would do it. Your grandson feared that you would get angry, and knelt in front of you. You placed your penis in his mouth and moved it in and out. He kept his mouth open to avoid touching you with his tongue. You then masturbated in front of your grandson.

[7] Another time in your bedroom you asked your grandson to pull down his pants to expose his genitals. You placed his penis in your mouth and sucked his penis. You then made him lie on his back on your bed and continued to suck his penis. Your teeth hurt him. After that you again removed your penis from your trousers while you and your grandson were in your bedroom, and told him to suck it. He hesitated, but agreed, again because he was afraid of your anger. You then masturbated until ejaculation.

[8] There was a further occasion when your grandson was again in your bedroom, assisting with various jobs, and you asked him to pull down his pants and lie on the bed. He complied and you began to suck his penis. This again caused him pain. You then placed a condom on your penis and masturbated in front of him.

[9] The indecent assault charges are representative charges. Between 1 September and 27 November 2008 you indecently assaulted your grandson numerous times. The assaults included touching his genitals over his clothing, and with his pants removed. The incidents occurred at least two or three times each week.

[10] The offending occurred in and around your home address, in your backyard, bedroom, bathroom, dining room and lounge. In the bathroom, while he washed his hands, you approached him from behind and fondled his genitals for a short period before walking off. In the lounge, you sat beside him and fondled his genital area over his clothing.

[11] One of the specific charges relates to an incident when you were in the bedroom with your grandson. You told him to pull down his pants. You then stroked his penis for a short time.

[12] The other specific charge of indecent assault relates to an incident on 27 November 2008 when you and your grandson were in your bedroom sorting out magazines. You again made him pull down his pants. You then stood close behind him and touched his penis. You touched and rubbed his penis for 5-10 minutes, then bent him over his bed and placed your penis between his buttock and legs. You

squeezed his legs and buttocks together and moved your penis back and forth, simulating intercourse. You stopped when your wife entered the room.

[13] When spoken to by police, you admitted to touching your grandson's penis on two separate occasions, but denied all other allegations put to you.

### **Victim Impact Statement**

[14] I have received a victim impact statement prepared by your daughter, your grandson's mother. As she says, the impact your offending has had on her, her son and your wife is simply not measurable. You will be sentenced for what you have done, but they will have to live with what happened for the rest of their lives. It is something they will find difficult to forget or get over. Your daughter said she feels devastated and guilty that she did not protect her son from you. She never dreamed that you would offend against him.

[15] Your grandson is small and somewhat naïve for his age, but since your offending he has been involved in some aggressive incidents at school. Your daughter believes your offending had a lot to do with that.

[16] Your family feels hurt, angry and confused that you have been, in her words, "sneaky and malicious" to get around the supervision they thought would protect the children. Your daughter ended the victim impact statement by saying that there is no place in the community that can support you and provide the constant supervision you need to prevent you from doing this to anyone else.

### **Pre-sentence report**

[17] I have also read the pre-sentence report prepared by the Probation Officer. You are 80 years old, you are in your second marriage and have two adult children from it. You also have two children from your previous marriage. You are presently on remand in the Rata Unit, which caters for inmates who lack mobility. The Probation Officer says that your wife will not allow you back into your home, believing you to be a significant predator.

[18] As I said in relation to the victim impact report, your family considers that you pose a risk and will not allow you into a house with your grandchildren again.

[19] The Probation Officer outlines your health concerns. You had a heart bypass in the 1980s and have since suffered erectile dysfunction. More recently, you were diagnosed with Parkinson's disease. You have arthritis, suffer from fluid retention and hearing difficulties. You use a hearing aid and walking frame, and you are on medication which is currently overseen by prison nursing staff. The Probation Officer noted that you have been losing weight in custody and are on a food supplement. As I said earlier, your family believe that you require full time care.

[20] When discussing your offending with the Probation Officer, you said that you had the "urge", for the first time in 44 years. You expressed concern about the effect of your offending on your grandson, but said you did not think of that at the time. You displayed some remorse to the Probation Officer.

[21] You have relevant prior convictions, albeit from over forty years ago. In 1960 you were convicted on eight counts of indecent assault on a male. In 1967 you were convicted on two counts of indecent assault on a boy and imprisoned for three years.

### **Sentencing process**

[22] I come now to the sentencing process. First, I am going to talk to you about the general law relating to sentencing. I will be talking about the principles and purposes of sentencing that are set out in the law that I have to apply. Then I have to decide what sentence is appropriate, taking those principles into account. That will be a two-step process.

[23] The first step is to establish what we refer to as the starting point. The starting point is what would be the sentence imposed for conviction on the most serious of the charges on which you have been convicted, if that conviction had come after a trial in Court. In your case, that is the sexual violation charge.

[24] The second step is to take that starting point and decide what is the appropriate sentence for you and your offending. I do this by considering whether there is anything about your offending that makes it more or less serious. We refer to those as aggravating or mitigating factors and they would lead me to impose a sentence that is greater or less than the starting point.

[25] I also consider matters that relate to you personally, because these may also lead me to adjust your final sentence either up or down.

[26] In sentencing you I have to take into account what the law has set out as the purposes of sentencing. In particular I have to hold you accountable, to make you responsible for what you have done. I have to consider deterrence and protecting the community from you. I also have to denounce your offending; this means to tell you in the plainest of terms that your offending is not acceptable in New Zealand society. At the same time, the purpose of sentence is to help you with rehabilitation.

[27] There are also some general principles of sentencing that must be considered. In your case I consider the gravity of your offending, including your culpability, the seriousness of your offending in comparison with other types of offences, and the general desirability of keeping consistency in sentencing levels. Also, I must take into account any information provided about the effect of your offending on your victim. I am required to take into account any particular circumstances relating to you that mean that any particular sentence would be disproportionately severe.

[28] I am directed to impose the least restrictive outcome that is appropriate in the circumstances. It is desirable to keep offenders in the community as far as that is practicable with regard to the safety of the community. However, the Court can impose a sentence of imprisonment in order to achieve the purposes of sentencing that are relevant to your case. For an offence of sexual violation by unlawful sexual connection, the law is that there is a presumption that a sentence of imprisonment will be imposed.

## Starting point

[29] Now I come to the starting point. As I said earlier, I set the starting point by reference to the most serious offence, the sexual violation charge. I must also, then, take into account the other charges because I have to take into account the totality of your offending.

## Comparable cases

[30] The appropriate starting point will depend on the circumstances of your offending. I have considered the sentences imposed in four cases where the circumstances were in some way similar to yours. Of course, no two cases are ever exactly the same.

[31] In the case of *Gamble v Police*<sup>1</sup> Mr Gamble was convicted on two counts of sexual violation by unlawful sexual connection and two of indecent assault. The victims were his son and step-daughter. On at least two occasions when the step-daughter was aged eight or nine, Mr Gamble gave her an ice-cream in exchange for allowing him to lick her genitalia. On at least five occasions he made his son place his mouth over his penis, for which he gave his son a chocolate bar. On at least five occasions Mr Gamble touched his son's penis under his clothing. On at least three occasions he touched his step-daughter's genitalia under her clothing. In that case the Judge took a starting point of six years imprisonment.

[32] In the case of *R v T*<sup>2</sup> the offender, 'T', was found guilty of all representative charges of indecent assault of a child under 12, indecent assault on a child 12 – 16 years, sexual violation by digital penetration, and sexual violation by forcing the victim to perform oral sex on him. In all cases the victim was his daughter. The Court of Appeal upheld a sentence of 7½ years imprisonment.

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<sup>1</sup> *Gamble v Police* HC HAM CRI 2008-419-76 4 February 2009, Heath J  
<sup>2</sup> *R v T* CA 139/05 26 July 2005

[33] In the case of *R v B*<sup>3</sup> the prisoner 'B' was convicted on one representative charge of indecent assault of a girl under 12 and one representative charge of sexual violation. On appeal, it was held that the appropriate starting point was six years imprisonment.

[34] Finally, in the case of *R v K*<sup>4</sup> the prisoner pleaded guilty to one representative count of sexual violation by digital penetration and one representative count of indecent assault on a girl aged between 10 and 12 years. The victim was the prisoner's daughter. The offending spanned two to three years and was carried out on almost a daily basis. The prisoner would fondle his daughter under her clothes, and on occasion digitally penetrate her vagina. On appeal, it was held that the appropriate starting point was six years imprisonment.

### **Features of offending**

[35] I turn to your offending. As I said earlier, the law requires me to look at the aggravating and mitigating features of your offending, that is anything that would make it more or less serious. Aggravating features of your offending are the harm that you have caused to your grandson, the gross abuse of the trust placed in you by your family to care for your grandchild, and the vulnerability of your grandson, only 12, and with whom I am told you have a strong bond. Also, your offending was done on many occasions, and in preparation, ensuring that you and he were alone together, and you had tissues and a condom ready.

[36] There are simply no mitigating features of your offending.

### **Counsels' submissions re. starting point**

[37] With respect to the starting point, on behalf of the Crown Ms Guthrie submitted that the starting point should be six years imprisonment, taking the factors I have just mentioned into account. Mr Robb, on your behalf, was in broad agreement with that starting point.

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<sup>3</sup> *R v B* [2007] NZCA 437

<sup>4</sup> *R v K* CA 264/02 26 March 2003



[38] I have concluded that in the circumstances of your offending, the appropriate starting point for the sexual violation charge, and that is before any adjustment for the other offending or any personal factors, is five years imprisonment.

[39] Considering the indecent assault charges on their own, I have concluded that the appropriate starting point on the two specific charges is two years imprisonment, and for the representative charge it is three years imprisonment.

[40] When I factor the two sets of offending together, looking at the totality of your offending and the fact that it all occurred at about the same time, I have concluded that the starting point, adjusted for the totality of your offending, should be six and a half years imprisonment.

### **Personal factors**

[41] I now turn to consider matters that relate to you personally.

[42] I referred to your previous convictions earlier. They were serious and you have served terms of imprisonment. That would normally lead me to adjust the starting point upwards. However, the convictions are some 40 years ago. After considerable thought, I have concluded that in this case no increase should be made for your previous convictions.

[43] I turn then to consider Mr Robb's submission in relation to matters relating to you personally. He has submitted that you are remorseful and he has noted this morning that you are now making a regular payment towards the ongoing counselling required for your grandson. Mr Robb also refers to your ill-health, and as I said earlier the circumstances of that are set out in the pre-sentence report. In his written submissions Mr Robb referred me to cases where the courts have considered a prisoner's ill-health as a factor that may reduce a sentence that would otherwise be imposed.

[44] Ms Guthrie has noted, on behalf of the Crown, that no medical evidence has been provided as to the impact of the sentence on you, but I can accept from the pre-sentence report, the medical conditions outlined and that a sentence of imprisonment will not be easy for you.

[45] I have carefully listened to Mr Robb's submissions. I have concluded that a reduction of a little over 15% should be allowed on the adjusted starting point, to take account of your remorse and your ill-health. I add here that Mr Robb noted in his written submissions, and confirmed today, that the Rata Unit at Waikeria Prison is a unit that is able to cope with medical issues such as yours.

[46] Finally, I also take your guilty plea into account. This was made at an early stage in the prosecution and, significantly, it means that you have spared your family, in particular your grandson, the stress and anguish of going through a trial. For that you are entitled to a further credit of one-third from the adjusted starting point.

[47] In the end result, your final sentence on the charge of sexual violation will be three years and six months imprisonment.

### **Sentence**

[48] Accordingly, on the charge of sexual violation by unlawful sexual connection, you are sentenced to three years and six months imprisonment.

[49] On the two specific charges of indecent assault, you are sentenced to two years' imprisonment.

[50] On the representative charge of indecent assault, you are sentenced to two years and six months' imprisonment.

[51] All sentences are to be served concurrently. Your effective sentence is, therefore, three years and six months imprisonment.

[52] I order that there be suppression of the name of the prisoner and of the victim, and any details that may lead to their identification.