

**PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF  
COMPLAINANT PROHIBITED BY SECTION 139 CRIMINAL JUSTICE  
ACT 1985**

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

**CRI 2007-004-009065**

**THE QUEEN**

v

**ALLAN JONATHAN DRAIN**

Hearing: 18 November 2009

Appearances: P K Hamlin and SP Singh for the Crown  
D P H Jones QC and A M Barrowclough for Mr Drain

Sentence imposed: Rape (x1)  
**5 years imprisonment**  
Indecent assault on a girl under 12 years (x1)  
**3 years imprisonment**  
Indecent assault on a girl aged between 12-16 years (x1)  
**3 years imprisonment**

Judgment: 18 November 2009

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**SENTENCING NOTES OF HEATH J**

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Solicitors:  
Crown Solicitor, Auckland  
D P H Jones QC, Auckland

## **Introduction**

[1] Please stand Mr Drain.

[2] Allan Jonathan Drain, you appear for sentence today having pleaded guilty to one representative charge of indecent assault on a girl under the age of 12 years, one representative charge of indecent assault on a girl aged between 12 and 16 years, and one representative charge of rape.

[3] The victim was your younger sister. The offending occurred between 1969 and 1972. The pleas of guilty were entered on the Friday before your trial was due to begin. The pleas did save the complainant from the ordeal of having to give evidence of what occurred to her in the witness box. Nevertheless, there was a prior occasion on which she was required to give evidence in Court, namely on your application to stay the proceedings.

[4] You are currently aged 54 years. The offending occurred when you were between 14 and 17 years old. The complainant, during that period, was between 9 and 13 years old.

[5] In sentencing you, I am required to apply the applicable levels in force between 1969 and 1972. As you have heard, those levels are much lower than those presently in force.

[6] First, I shall summarise the facts to which you have pleaded guilty. Then, I will outline the submissions made to me by the Crown and your counsel. In doing that I shall touch upon the content of the victim impact statements and the corroborating material. Finally, I shall determine the appropriate sentence to impose.

## **Facts**

[7] The majority of the offending occurred in your family home.

[8] Your parents were members of a sect. Every Sunday morning and evening the family were required to go to religious service. A large emphasis was placed on the importance of children obeying their parents, without question. Women were instructed to obey men and men were seen as superior to women. There were strict regulations governing the behaviour of women and girls. Women were regarded as the tempters or seducers of men.

[9] There was an emphasis on the importance of women being virgins when they married. Girls were not allowed to look at or talk to boys at any of the meetings. The family discouraged any form of social interaction with members of the opposite sex. It was a rule in the home that boys were not allowed into the girls' bedrooms and, likewise, the girls were not allowed to go into the boys' rooms.

[10] Notwithstanding those rules and the strict disciplinary practices in your home, much of the offending, as I have said, took place in the home contrary to rules you knew were there to be obeyed and put in place by your parents.

[11] Between 27 February 1969 and 25 November 1971 the complainant was attending primary school. The first indecent touching occurred when she was 9 years old. It occurred on the floor, in an alcove in the house or on a floor in the bedroom. You have accepted by your plea that you would rub your hands over her body, touch her vagina with your fingers and, on a number of occasions, penetrate her vagina with your fingers.

[12] On one occasion, when your sister was 10 years old, your parents were out and you were being looked after by your eldest sister. The complainant was sitting next to her sister in a room because she was scared of you. You opened the door to that room, beckoning the complainant who eventually went to you. You took her into the boys' bedroom and got her to lie on the floor. You pulled her pants down. You then pulled your own pants down and began prodding with your penis in her vaginal area.

[13] When the complainant was between 11 and 12 years old, on one day after school you persuaded her to lie on the floor in your sister's bedroom. You pulled her

pants down and touched her genital area including the vagina. You also touched her stomach. You lay on top of her, after pulling your own underpants and trousers down, moving your body backwards and forwards stimulating yourself. You accept that you kept saying: "It feels good doesn't it".

[14] There were times, during this behaviour, that the complainant's own behaviour at school began to deteriorate. It is clear that she became fearful of what was happening. On one occasion you told her not to tell anyone or she would get into trouble. She felt unable to disclose the abuse to her parents. She was afraid of being blamed by them.

[15] Between 26 November 1971 and 31 December 1972, when the complainant was between 12 and 13 years, the activities to which I have referred continued.

[16] The representative count of rape covers the period from 27 February 1969 until 31 December 1972. The first rape occurred when your sister was between 9 and 10 years old. She was lying on the floor of the boys' bedroom. You were on top of her. You pulled down her panties; your pants were down. You had your hand on your penis. You were holding the end of your penis trying to put it into her vagina. Penile penetration occurred. Subsequently, on various occasions, rapes occurred in a similar manner. These occurred inside the bedrooms of the house and in the alcove.

[17] Complaints were made by the complainant in or before 1993. When you were spoken to by the Police, you accepted that there had been mutual showing of private parts when you were children and cuddling. You alleged that your sister's allegations were motivated by financial concerns. In other words, you suggested that she was making this up to obtain ACC compensation.

[18] The Police did not lay charges in 1993. However, subsequently, the investigation was revived. You were spoken to again in 2007. You denied the offending. You did not accept responsibility for what occurred until three days before your trial.

## **Submissions**

[19] Mr Hamlin, for the Crown, submits that an end sentence of something in the range of 5 to 6 years imprisonment is required to mark your offending. He bases that submission on the duration and seriousness of the offending as well as its repetitive nature over the period in question.

[20] Mr Hamlin has referred me to other cases involving sibling sexual abuse and submits this case is worse than many contemporary comparators. He emphasises the effect on the victim your offending has had. He submits it has impacted adversely on the quality of her life, for some 40 years.

[21] As aggravating factors relating to the offence, Mr Hamlin relies on the seriousness of the offending, the extent of the harm done to the victim, the abuse of trust expected by a younger sibling of an elder brother, and her vulnerability. Mr Hamlin also suggests that at least towards the end of the offending it was plainly premeditated.

[22] As to mitigating factors, Mr Hamlin accepts that you should receive some credit for youth at the time of the offending and the entry of guilty pleas. Nevertheless he submits that any credit for guilty pleas should be diminished to take account of the late entry of those pleas and the need for the complainant to give evidence at the stay hearing.

[23] The Crown's position is that you have sought to minimise your conduct in statements made to the probation officer who completed the pre-sentence report.

[24] On your behalf, Mr Jones QC has said everything that he could responsibly say on your behalf. He submits that an appropriate end sentence should not exceed 3 to 3½ years imprisonment. But, because your offending took place before 1 October 2007, he asks me to take account of the eligibility for the sentence of home detention. Mr Jones submits that such a sentence is appropriate to mark your offending.

[25] Mr Jones has referred to what he termed “school boy” offending, noting that the cessation of offending coincided with your sixth form year. He also refers to your late development as an adult, in a physical sense. That seems plain enough from photographs produced by your father. He also asks me to sentence in accordance with principles applicable at the time of offending.

[26] Mr Jones submitted that mitigating factors go beyond those identified by Mr Hamlin. In addition to your age at the time of the offending and the guilty pleas, Mr Jones suggests I should take into account a diminished understanding of the offending on your part, remorse, previous good character, and personal preparedness to engage in restorative justice processes and counselling. He also refers to your otherwise unblemished character since these offences occurred nearly four decades ago.

[27] Your sister has read significant parts of her victim impact statement to the Court today. I acknowledge her presence and that of her husband who supported her.

[28] The effect that the offending has had on her is apparent from the written words and the way in which she addressed the Court today. The extent of the impact of the offending is confirmed by the complainant’s husband and by counsellors who have provided statements about their observations over a period of many years.

[29] I accept that the offending has resulted in the complainant feeling unwarranted shame, terror and self-loathing. She has suffered intense emotional pain and grief. She has a difficulty in dealing with men in normal everyday situations. Undoubtedly, the crimes you committed have demonstrably affected adversely any career ambitions the complainant may otherwise have held. In addition, I think it can be safely said that the quality of the complainant’s sexual relationship with her husband has been compromised.

[30] It is clear that your family has been torn in two directions by what has happened. Some have sided with you, others with the complainant. That is sad and distressing but I need to leave to one side the rights and wrongs of the views held by

the family members. My task is to sentence you in accordance with law as dispassionately as possible.

### **Analysis**

[31] In my view, the primary sentencing goals in any case involving rape must be to denounce the conduct in issue and to hold an offender accountable for his actions. This case is no exception. Those sentencing goals are also relevant to whether imprisonment or home detention ought to be imposed.

[32] I am required to take account of the gravity of the offending and the seriousness of the particular offending in comparison with other offences. At the relevant time, rape carried a maximum penalty of 14 years imprisonment – something that amply demonstrates the seriousness of the crime. I am also required to take account of the general desirability of consistency in sentencing, namely the need for like cases to be treated alike. I am required to take account of the information provided to the Court about the effect on the victim. From your point of view the legislation also requires me to impose the least restrictive outcome appropriate in the circumstances.

[33] I take the rape charge as the lead offence. It is accepted that you raped the complainant repeatedly during the relevant period. I shall bring to account the indecent assaults you perpetrated as one of the aggravating factors affecting my assessment of the totality of the offending. But, it is as well to tell you that digital penetration under our present law is regarded as a form of sexual violation which would carry a maximum penalty of 20 years imprisonment. So, that is how serious the law regards offending of that type also.

[34] Rape is an example of the use of power by a man over a woman. Rape is intrinsically violent. It is not sensual in any way. It involves forced sexual contact between a male and a female. Not only did your acts violate your sister physically, they also violated her dignity as a person. Such offending is very serious.

[35] Aggravating factors are the seriousness and prolonged nature of the overall offending, the pre-mediation involved, the traumatic effect on the victim over many years, your breach of trust as an elder brother to her, and her vulnerability, particular in the peculiar family setting in which you were brought up.

[36] Having regard to those factors and comparable cases to which I have referred, I regard a starting point for sentence of 6 years to be appropriate.

[37] From that starting point, mitigating factors must be deducted. Some credit must be given for the entry of guilty pleas. Some credit I believe should also be given for your age at the time. I see the issue of physical development as something that is allied to the credit you may be given for youth. However, I take the view from the material I have seen that you were plainly physically developed sufficiently to carry out the crimes in issue and appear to have had an intellect sufficient to understand the harm you were causing.

[38] I also accept that there may have been, at least in the early time, some lack of insight for what you were doing. But as you grew older, I cannot accept that that did not become apparent to you.

[39] You are entitled to some credit for attempting to participate in a restorative justice process. That process failed for reasons beyond the control of yourself and your sister. Just as you deserve some credit for embarking on the process, your sister ought not to be blamed for it not taking place.

[40] I allow 6 months for mitigating factors involving age, your attempt to engage in a restorative justice process, and the good character shown since your offending took place. Lack of insight is captured within the credit for youth. The credit is tempered by the fact that you must have realised what was happening to your sister as time went on.

[41] I allow a further credit of 6 months to reflect the entry of guilty pleas. I regard that credit as generous, in the circumstances. It takes into account any remorse that may exist, though I have doubts whether it really does. From what I



can see your only attempts to accept responsibility for what you did occurred immediately before trial, after your sister had been living with the prospect of the Court hearing for some time.

[42] On that basis the starting point is reduced by 1 year, meaning that a sentence of imprisonment of 5 years must be imposed, subject to availability of home detention.

**Home detention [“transitional” offender in terms of *R v Hill* [2008] 2 NZLR 381 (CA)]**

[43] When a sentence of imprisonment of that length is involved and the need to denounce offending of this type is brought to account, it cannot possibly be said that a sentence of home detention would adequately respond to your offending. To impose home detention would not hold you accountable sufficiently for your serious offences. A period of imprisonment is necessary to mark the offending.

[44] Consistency in sentencing also requires a sentence of imprisonment, when dealing with a representative charge involving repeated rape.

**Sentence**

[45] Mr Drain, on the charge of rape, you are sentenced to 5 years imprisonment.

[46] On the charge of indecent assault on a girl under the age of 12 years, you are sentenced to 3 years imprisonment.

[47] On the indecent assault on a girl between the ages of 12 and 16 charge, you are sentenced to 3 years imprisonment.

[48] All of those sentences are to be served concurrently, meaning that the effective sentence is 5 years imprisonment.

[49] Stand down please.

[50] I thank counsel for their assistance.

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P R Heath J