IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2007-004-25057

THE QUEEN

v

RICARDO ARYAN

Hearing: 29 September 2009

Appearances: S Mandeno for Crown
B Hart for accused

Judgment: 29 September 2009

SENTENCING REMARKS OF ALLAN J

Solicitors:
Crown Solicitor Auckland
B Hart, Auckland barry.hart@best.net.nz

[1] Mr Aryan, you appear for sentence this morning having been found guilty by a jury on six counts involving sexual offending against your stepdaughter. There were three counts of sexual violation by rape, including one representative count. The maximum penalty for each of those offences is 20 years imprisonment. There were two counts of indecency with a girl under 12, for which the maximum penalty is ten years imprisonment, and one count of sexual conduct with a dependent family member for which the maximum penalty is seven years imprisonment.

Facts

[2] In or about 1998, you married a Tongan woman and moved into her household in Auckland. She had four children including the victim, but none of them were living with her at the time. The victim returned from Tonga to live with her mother, and with you, in about 2001. In 2002, when she was 11 years old, your offending began. It commenced with an incident in which, while sitting next to her in her bedroom on her bed, you kissed her and stroked her body. The following day when you came home from work, you told the victim's brother to go to the shops. That left you alone with her. Again you kissed and touched her but her brother came home and nothing more transpired.

[3] A week later you offended again. As was the case with all of these offences, your wife was at work at the time. You and the victim were alone in her room. You directed her to remove her clothes, did the same yourself, and then had sexual intercourse with her. When you had finished you simply dressed and left the room. Little was said between you.

[4] On numerous occasions over succeeding months you offended in a similar fashion. Sometimes it happened two or three times a week, but other weeks not at all. The timing of the offending appeared to depend on the emergence of opportunities, and in particular, upon your wife's absence at work. On each occasion you would lock the bedroom door, require the victim to remove her clothes, do the same yourself, and then have sexual intercourse with her in her bedroom.

Sometimes you used a condom, sometimes not. On some occasions you told your victim that you loved her, on other occasions little was said. You told her not to tell her mother.

[5] This course of offending came to an end in January 2003 when the victim and her siblings went to live in Tonga with their grandparents. They were absent until December 2006, when they returned to New Zealand. In January 2007, the victim returned to her mother's household at a new address. There, she joined you, her mother and her siblings. She had been back at home for only a week or two when you abused her again. By this time she was 16 years old.

[6] The first incident occurred when she was alone in the living room when you came into the room and kissed her on the mouth. The following day you instructed her to follow you into your bedroom where you told her to remove her clothing. When she refused you partially undressed her and then had sexual intercourse with her. She did not violently resist, but neither did she offer you any encouragement. She certainly gave you no indication that she was consenting to what occurred. Afterwards you got dressed and returned to the living room.

[7] A few days later this incident was repeated, but with one difference. On this occasion, your victim conceded that although she did not want to have sexual intercourse with you, she did in fact consent to what occurred. It is this incident that supports the charge of sexual conduct with a dependent family member. Shortly afterwards the victim's brother became aware that there was a sexual relationship between you when he came upon you kissing the victim in the kitchen. There was no further offending.

[8] The victim later complained to an uncle and the matter was reported to the police. You denied any of the offending that is alleged to have occurred when the victim was 11 years old, but accepted that you had sexual intercourse with her when she returned from Tonga at the age of 16 years. However, you claimed that the victim consented to sexual intercourse on both occasions, and not merely on the second of them.

[9] The jury took a different view. You were found guilty on all of the charges in the indictment, save for one charge which I withdrew from the jury.

Victim impact report

[10] As is so often the case, the victim impact report makes harrowing reading, although it is to some extent couched in the same restrained language which the victim used in giving her evidence. She says she was so young when the offending began that she simply did not know what to do. She knew that her mother loved you and that you were there to look after her, but she also knew that what was happening was wrong. She was terrified, confused, and powerless. She felt unable to tell her mother because she thought she would be blamed for allowing the offending to continue.

[11] When the victim returned from Tonga, she did not know how to cope with your renewed advances. She half believed your protestations of love, and on one occasion voluntarily succumbed.

[12] The family is now riven. Your victim has no relationship with her mother, who blames her for what occurred. She still struggles with the notion that the offending was her fault, rather than yours. She says she effectively lost her childhood.

[13] All of this is depressingly familiar. It is the result of offending by someone who was there to protect and nurture a stepdaughter, but instead abused that trust.

Pre-sentence report

[14] You are 36 years old and of Iranian birth. You are one of seven children who attended school until the age of 17 and thereafter worked and undertook compulsory military service in Iran. A little later you spent some time travelling. You came to New Zealand in 1998 with refugee status. You became a citizen of this country at the end of 1999.

[15] You have been gainfully employed in restaurant work and more recently as a seafood retailer. For a time you worked in Japan. You have virtually no previous convictions and I will treat you as a first offender. You have made a significant contribution to the sport of wrestling in this country, having won two gold medals in Oceania tournaments, and reached the semi-finals at the Commonwealth Games in Manchester. It is a matter of profound regret that someone with your ability, who has something to offer the community, should have offended so seriously.

[16] There are one or two disturbing aspects in the pre-sentence report. You acknowledge your culpability to a limited extent, in that you accept you improperly engaged in sexual activity with the victim, but you admit only the incidents that occurred when she was 16, and maintain that everything that happened was consensual. You acknowledge therefore that you are responsible for offending against a young woman who was in your care, but you do not accept that what you did amounted to rape; neither do you accept any of the earlier offending against her when she was just 11. Regrettably you display little insight into her plight, and seem to be rather more concerned with your own situation.

Sentencing principles

[17] Section 7 of the Sentencing Act sets out certain sentencing purposes. The Court is reminded that it is obliged to hold you accountable for the harm done to your victim and to the community by your offending. I am obliged to promote in you a sense of responsibility for, and an acknowledgement of the harm you have done. I must denounce the conduct in which you have been involved. Any sentence imposed must be sufficient to deter you and others from committing the same, or similar, offences. And there is a need to build into any sentence imposed a degree of protection for the community.

[18] Under s 8 the Court is required to take into account the gravity of your offending, the seriousness of the offences, the need for consistency in sentencing, and the effect of your behaviour on the victim.

[19] Having said all of that, the Court is required to impose the least restrictive outcome appropriate in the circumstances, and to do what it can to assist in your rehabilitation.

[20] I turn to consider the aggravating factors that arise here. There are several. First, your abuse has caused your stepdaughter very serious on-going emotional harm. I have already dealt with the detail of that. She will suffer for some time yet, if not permanently. She was entitled to look to you for love, care and protection. What she got instead was sexual abuse of the most serious kind. What you did amounted to the gravest abuse of your position of trust and authority.

[21] Then there is her age at the time of the offending. She was just 11 when you started on this course of conduct. It is perhaps fortunate that she went away to Tonga for several years and so, in all likelihood, thereby limited the extent of your offending. It is a proper inference that your offending would simply have continued had she remained. That much is plain from the fact that you raped her again within days of her return to Auckland when she was 16. Obviously the intervening years taught you nothing.

[22] There is also the fact that this offending must inevitably have been the result of premeditation in each case. The evidence is that you offended when your wife was out of the house. There must have been an element of pre-planning every time you offended. I take into account also of the length of time over which this offending occurred. You raped your stepdaughter on many occasions over a period of months when she was 11, and resumed your offending as soon as she became available to you again at 16. You simply treated her as your sexual plaything.

[23] I am unable to discern any relevant mitigating factor associated with the offending itself. Your limited acceptance of responsibility, for what you say was consensual sexual activity with her when she was 16, involves little overt remorse. You pleaded not guilty to the charge of sexual conduct with a dependent family member, when the evidence you yourself gave to this Court established your guilt on that charge.

Counsels' submissions

[24] Ms Mandeno for the Crown submits that an appropriate starting point is 14-15 years imprisonment. She also seeks the imposition of a minimum period of imprisonment.

[25] On your behalf Mr Hart submits that the starting point ought to be no more than 13 years reduced perhaps to 12 ½ and that there is no basis on which it would be proper to impose a minimum period of imprisonment.

Discussion

[26] The starting point for an offender found guilty of sexual violation by rape is eight years, but seriously aggravating features may require a higher starting point: *R v A* [1994] 2 NZLR 129 at 132. The repeated rape of a child over a significant period, with its inevitable destructive impact, calls for the strongest denunciation and a much higher starting point: *R v T* (2002) 20 CRNZ 51.

[27] The focus in such circumstances must be on the offender's overall culpability. *R v T* is often cited in cases such as this. That was a case in which the appellant was found guilty at trial on six counts of rape and three counts of unlawful sexual connection, having pleaded guilty to two counts of indecent assault. The victim was the daughter of the appellant's partner; although she was not his biological daughter. The offending took place over a period of 6-7 years and commenced when the victim was aged seven. Sexual kissing progressed to oral sex, and eventually to full intercourse. From the age of about nine the victim was regularly raped for a period of about four years. There were other indecencies. The Court of Appeal upheld a sentence of 15 years with a minimum term of nine years imprisonment.

[28] More recently in *R v C* CA245/05 23 November 2005, the Court of Appeal upheld a sentence of 10 years six months with a minimum term of six years. In that case the prisoner pleaded guilty to representative charges of rape and unlawful sexual connection (both digital and oral). He offended against his natural daughter

from 1999 to 2005. She was six when the offending began and 11 when it escalated to rape. It is to be observed that was a case in which the prisoner had pleaded guilty.

[29] In *R v M* CA3/04 23 August 2004, a guilty plea was entered to six charges of sexual offending against the plaintiff's daughter. They included two charges of rape, one of which was representative, and two representative charges of sexual violation by unlawful sexual connection. The offending commenced when the victim was eight years old and continued for a period of three years, increasing in seriousness. A starting point of 15 years imprisonment was adopted, and a final sentence of 11 years imprisonment imposed, allowing a discount for the early guilty plea. That sentence was upheld on appeal.

[30] *R v Proctor* [2007] NZCA 289, was an unsuccessful appeal against convictions for rape, sexual violation and indecent assault, and against a sentence of ten years imprisonment following a guilty plea. The 14 year old victim was staying with the appellant. Whilst in his care she was raped by him on at least 15 occasions, and was required many times to perform oral sex on him. The offending occurred over a five month period. The trial Judge had taken a starting point of 13 years imprisonment, reduced to ten years to reflect the guilty plea. The Court considered the starting point to have been very much on the generous side, but regarded the discount as somewhat niggardly. These two considerations balanced each other out. Accordingly, the appeal against sentence was dismissed.

[31] In *R v G* [2008] NZCA 452, the victim was the appellant's stepdaughter. When she was around ten years old the appellant came into her bedroom at night and rubbed the victim's genital area underneath her pyjamas, ultimately penetrating her vagina with his fingers. A week or so later he got into the victim's bed and forced her to have sexual intercourse. He continued to rape her regularly over the next two years. On occasion there was physical violence, the offender punching the victim sufficiently hard to cause bruising. By various means the victim attempted to prevent the abuse occurring, but without success. The Court of Appeal upheld a starting point of 15 years imprisonment, reduced to 14½ years in the final sentence.

[32] The leading recent cases on sentencing for repeated sexual violations are collected in *R v S* (CA64/06) [2007] NZCA 243 at [76]-[91]. They established that the starting point for repeated sexual violations against children and young persons, especially those entitled to the offender's care and protection, is 13-19 years imprisonment.

[33] A feature of the present offending is that it involved no physical violence at all other than was inherent in the offences themselves. That distinguishes it perhaps from one or two of the cases to which I have referred. Moreover, the period of time during which the offending continued was perhaps a little shorter than in one or two of the other cases, but nevertheless it took place over a period of many months and was resumed at the first opportunity when your stepdaughter returned from Tonga at the age of 16, a factor that clearly aggravates the totality of your culpability.

[34] Mr Hart has referred to several factors which perhaps distinguish this case in your favour from some of those to which I have referred. There was only one victim as against one or two of the cases in which there were multiple victims. The offending started when your victim was aged 11, which is a little older than in some other instances. The case does not possession some of the worst features, such as particularly degrading behaviour found in certain cases. The victim did not become pregnant, although that might have been largely a matter of luck.

[35] Finally Mr Hart refers to the victim impact report which tends to suggest that the victim may perhaps be capable of putting this offending behind her to a greater degree than some victims in other cases. That may well be so. At trial she impressed me as being a young woman of some quality, and that is reflected in the way in which she has expressed herself in the victim impact report. But the effects of offending like this do not easily dissipate, and it cannot be said with confidence it will not continue to have some effect on her for some time yet.

[36] However, I collect up all the points Mr Hart makes and weigh them in the balance along with the aggravating factors to which Ms Mandeno has quite properly pointed.

[37] In all the circumstances, I consider the appropriate starting point to be 14 years imprisonment. I am unable to deduct anything significant for mitigating factors. Although you have effectively no criminal record and you have been a useful member of the community (several references have been tendered to the Court), previous good character is of little relevance in cases of sexual offending as serious as this: *R v H* [2008] NZCA 172. I will allow six months for your previous good record. That results in a final sentence of 13½ years.

Minimum period of imprisonment

[38] Section 86(2) of the Sentencing Act provides that the Court may impose a minimum term of imprisonment if it is satisfied that the period otherwise applicable under s 84(1) of the Parole Act 2002 (one-third of the sentence) would be 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 offender's conduct;

c) deterring the offender or other persons from committing the same or a similar offence;

d) protecting the community.

[39] This offending straddled a law change on 30 June 2002. However, given the nature of the offences charged, s 86 in its current form applies: *R v Te Huia* CA327/06 21 December 2006.

[40] A minimum period of imprisonment must not exceed the lesser of two-thirds of the full term of the sentence, or ten years. It is to be noted that a minimum period of imprisonment may be imposed even where the case does not disclose any unusual or abnormal features for offending of the kind in question: *R v Wirangi* [2007] NZCA 25.

[41] In the present case I am satisfied that, having regard to the s 86 indicia, the imposition of a minimum period of imprisonment is called for. In *R v Taueki* [2005] 3 NZLR 372 at [56], the Court of Appeal noted that in setting the length of any minimum period of imprisonment, the provisions of ss 7-9 of the Sentencing Act must be taken into account. That was recently re-emphasised by the Court of Appeal in *R v Gordon* [2009] NZCA 145. In the light of the aggravating features of this offending, already discussed, I conclude that a minimum period of imprisonment of six years is appropriate and in line with the sentencing authorities to which I have already referred.

Sentence

[42] On each of the three counts of sexual violation by rape you are sentenced to 13½ years imprisonment with a minimum period of imprisonment in each case of six years.

[43] On each count of indecency with a girl under 12 years you are sentenced to three years imprisonment.

[44] On the count of sexual conduct with a dependent family member, you are sentenced to two years imprisonment.

[45] The sentences are to be served concurrently. The overall sentence is therefore 13½ years imprisonment with a minimum period of imprisonment of six years.

C J Allan J