IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CRI 2009-454-49

ANDREW JONATHAN EXCELL

v

NEW ZEALAND POLICE

Hearing: 17 February 2010

Counsel: O S Winter for Appellant
S Johnston for Respondent

Judgment: 17 February 2010

JUDGMENT OF RONALD YOUNG J
(Appeal against sentence)

---

[1] This appeal poses the difficult question of the effect of the appellant's Asperger's Syndrome and Kallmann Syndrome on the proper sentence after his conviction (following his guilty plea) on thirty-one charges of possession of objectionable material under the Films Videos and Publications Classification Act 1993.

[2] The appellant's case is that the Judge, in imposing a seven month prison sentence, focussed too much on deterrence and not enough on the appellant's disabilities resulting in a manifestly excessive sentence.

[3] Firstly, the facts. The Police executed a search warrant on the defendant's home address on 7 January 2009. They seized a computer and on examination found it contained thousands of images and hundreds of movies, some of them depicting naked children or children engaged in sexual acts with other children and adults. The ages of the children depicted ranged from babies to adolescence.

[4] The Police concluded that at least thirty images and seven movies were objectionable and therefore prosecuted. The images involved, at their least offensive, simple nudity. There was then sexual activity between children, none of which was penetrative sexual activity, between adults and children, and penetrative sexual activity between children and adults.

[5] In sentencing the Judge adopted the approach approved first by the Court of Appeal in *R v Zhu* [2007] NZCA 470 for offending of this type. That decision adopted as a useful guide the Sentencing Advisory Panel's assessment of appropriate sentencing levels in the United Kingdom. Five levels of seriousness of the images, the subject of the prosecution, were identified in that Sentencing Advisory Report. Here, the first four levels were present without the fifth and most serious level. The guidelines distinguish offending not only on the basis of the level of seriousness of the sexual abuse, but also whether the material was only found in the offender's possession (the less serious category) through to showing or distribution of the material. The highest level cases were reserved for those where the offender had been actively involved in the production of the images.

[6] The Judge in his sentencing remarks considered that this offending brought the appellant's actions within the twelve month imprisonment starting point range. The Judge considered that although there were some special circumstances relating to the offender issues of deterrence and condemnation were so vital that any rehabilitation would have to be achieved after serving a sentence of imprisonment.

[7] The Judge accepted that the maximum deduction for an early guilty plea was available. He also identified the appellant's disabilities as relevant. He deducted five months from the original twelve months starting point and imposed a sentence of seven months' imprisonment. This was a forty-two percent reduction in the

original starting sentence beyond the 33% maximum that could have been allowed for the early guilty plea.

[8] The Judge observed that because no suitable home detention address was available no such sentence could be imposed but considered that such a sentence might have been inappropriate in any event unless strict conditions concerning access to computers could have been imposed.

[9] The thrust of the appellant's argument is that the two syndromes from which the appellant suffers significantly reduce his culpability or responsibility for his offending. Further, counsel emphasises his vulnerability if imprisoned. He calls for a rehabilitative sentence rather than a punitive sentence despite this serious offending.

[10] The appellant in his submissions does not argue with the correctness of the twelve month starting point. He accepts that such a starting point was open to the Judge. I turn, therefore, to the appellant's disability.

[11] The sentencing court had before it several reports relating to the appellant's circumstances. The pre-sentence report identified his psychological vulnerability and the fact that he had in recent years made two attempts on his own life, one recently. The report said that the appellant was motivated to address the danger he himself identified toward children. Despite his motivation for treatment the probation officer understandably thought that the appellant was at high risk of re-offending given his lack of friends, his lack of empathy for the victims, whom he seemed to think would be likely to be consenting to the sexual activity in the videos and other material, and the fact that he acknowledged in the right situation he would be likely to sexually offend against a child.

[12] There were further reports by Dr Rupert Bird, Consultant Psychiatrist, from Kerry Blenman, a Registered Psychologist and an earlier report in December 2000 from a Paediatrician. All reports acknowledge that the appellant had been diagnosed as having Asperger's Syndrome which "has affected his capacity to develop special

relationships, to perceive feelings in others and with a tendency to fixate on certain subject matters".

[13] Kallmann Syndrome is an inherited pathology of the hypothalamus. It prevents production of testosterone effecting puberty and masculinisation. For the latter, the appellant was prescribed testosterone supplements. He was also prescribed an anti-depressant.

[14] Since this offending has come to light the appellant's medical practitioners have substantially reduced the level of his testosterone supplements. This may in turn assist him in controlling his sexual drive and impulses. While cause and effect in this area are difficult to ascertain there remains the distinct possibility that the initial level of testosterone supplement given to the appellant did over-compensate and over stimulate his sexual drive and impulses.

[15] All reports emphasise the very difficult childhood and adulthood of the appellant. They emphasise his motivation for treatment. In the circumstances, however, they accept that he remains at moderate to high risk of sexual re-offending without this treatment.

[16] The reports say that the appellant's Asperger's has contributed to his lack of understanding of appropriate sexual behaviour resulting in his social isolation and in turn contributing to his attachment to children. I note that after the offending Mr Excell took himself to the WELLSTOP programme in Palmerston North for individual treatment sessions.

[17] To return to the appellant's case. He says the Judge failed to adequately recognise that the combination of Asperger's and Kallmann Syndromes significantly reduce his responsibility for this offending. Secondly, he points to his strong motivation for treatment. He recognises the danger he poses and he wants treatment. He emphasises that, unlike so many others, he has not attempted to hide or disguise his offending. Finally, he submits that prison will be especially hard for him given his Asperger's Sydrome.

[18] The Crown accept the essence of these submissions. They submit, however, that the connection between the testosterone supplements and this offending is not clearly established. They say that it is common for men charged with such offending to have personality disorders of one form or another. Their emphasis remains on deterrence and keeping the appellant out of the community. Thus, they say, imprisonment remains the correct sentence and the sentence of imprisonment should remain.

[19] Deterrence and condemnation for such offending as this is an important part of the Court function at sentencing. The Court of Appeal guideline sentences for such offending make it clear that generally anything other than offending in the least serious categories will likely result in imprisonment. Those who access this type of material especially involving the physical and sexual abuse of children must understand that they help provide a market for the material and thus support those who directly abuse children by producing this material.

[20] However, the sentence ranges identified in the Court of Appeal in *Zhu* and other cases are guidelines. Sentences should be tailored to the individual circumstances of each case, both factually and to a greater or lesser degree to the individual circumstances of the offender.

[21] In this case the District Court Judge correctly identified the facts as bringing the case within a starting sentence of twelve months' imprisonment. Based on *R v Hessell* HC Auckland CRI 2007-004-21910, 6 March 2009, which the Judge was obliged to follow, a discount of 33% for the appellant's guilty plea was required. That reduced the sentence to eight months' imprisonment. The Judge was then faced with the proposition of what further reduction should be given for the appellant's personal circumstances. He gave a further one month reduction.

[22] The combination of the three factors identified by counsel for the appellant, culpability, motivation to change and the difficulty of prison service convince me that a sentence other than imprisonment would best meet the individual circumstances of the case, the offender and most importantly best protect the community without detracting from the need for deterrence.

[23] I accept that the combination of the Asperger's Syndrome and Kallmann Syndrome meant that the appellant's culpability for this offending was significantly reduced below that of a "ordinary citizen".

[24] Secondly, a sentence of imprisonment will no doubt be especially difficult for the appellant given his Asperger's Syndrome. These two factors do not mean by themselves, that imprisonment could not be imposed. However a sentence of imprisonment well below eight months taking account of these factors would have been appropriate. If the appellant, with these appropriate deductions, then faced a prison sentence of say four to five months he would have been entitled, by virtue of the Parole Act 2002, to release after one half of the sentence, or eight to ten weeks. The fact that he would not be in the community for that limited period is hardly by itself protective of the public. While the Judge then could, as he did, impose conditions upon release from prison the imposition of such conditions after a sentence of imprisonment have generally had very modest rehabilitative success.

[25] In those circumstances given the appellant's high motivation for treatment now what is more likely to be protective of the public in both the short and long term is a rehabilitative sentence designed to treat the reasons why the appellant offends together with the availability of a punitive aspect.

[26] I am satisfied therefore in the circumstances the Judge's sentence of seven months' imprisonment was manifestly excessive and that it failed to adequately reflect the appellant's limited culpability and the other factors I have identified as relevant. I consider that the sentence best designed to protect the public and reflect the unique circumstances of the appellant is a sentence of intensive supervision together with community work.

[27] The appeal is allowed. The sentence of imprisonment quashed and instead a sentence of intensive supervision for two years imposed together with the following special conditions:

a) firstly, he is not to associate with or contact a person under the age of sixteen years except in the presence of and supervision of an adult who:

i) has been informed about the relevant offending; and

ii) has been approved in writing by a probation officer suitable to undertake the role of supervision;

b) secondly, he is not to own, use or have access to a computer; and

c) thirdly, he is to attend a psychological assessment and complete any treatment of counselling as recommended by that assessment to the satisfaction of a probation officer and treatment provider.

[28] I order the appellant to undertake 300 hours community work.

[29] Mr Excell will understand that if he does not comply with the sentence then there is little left other than a sentence of imprisonment.

[30] Finally, I am aware of the recent publicity in this area regarding sentencing for such offending. The courts are public institutions and they welcome public debate about proper sentencing levels. All they can ask of those who have the responsibility for reporting the court's work is that they do so by fully and fairly informing both themselves and the public of what the Judge has said. If they do so then the debate will be accordingly informed. If they fail to do so then the public may unjustifiably lose confidence in the courts misunderstanding the full import of what they have said.

[31] I note that no application for suppression of Mr Excell's name was made in the District Court or in this Court.

Ronald Young J

Solicitors:
O S Winter, WinterWoods Lawyers, PO Box 12067, Palmerston North
S Johnston, Ben Vanderkolk & Associates, PO Box 31, Palmerston North
email: Shannon@bvalaw.co.nz