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S 139 OF THE CRIMINAL JUSTICE ACT 1985**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA95/2013
[2013] NZCA 340**

BETWEEN	JODIE HERBERT FAIRBROTHER Appellant
AND	THE QUEEN Respondent

Hearing: 16 July 2013

Court: Wild J, Heath and Keane JJ

Counsel: C J Muston for Appellant
B D Tantrum for Respondent

Judgment: 31 July 2013 at 1 pm

JUDGMENT OF THE COURT

A The appeal is granted.

**B The sentence of two years imprisonment is quashed and in its place there
will be a sentence of imprisonment of one year, 10 months.**

REASONS OF THE COURT

(Given by Keane J)

[1] On 23 January 2013 the appellant, now aged 21 years, was sentenced by Judge Harvey in the District Court, Kaikohe, to imprisonment for two years for sexual connection with a girl aged less than 16 years, then aged 12 in fact, by having sexual intercourse with her.¹ He appeals his sentence as manifestly excessive.

[2] The appellant accepts the Judge was entitled to take a starting point of three years imprisonment. He contends the Judge miscalculated his sentence, after reducing it by six months for his youth, lack of previous convictions and “to a very modest extent ... mental impairment”, when setting out to give him “full credit” for his plea. The appellant submits that full credit must mean 25 per cent and that the sentence the Judge must have intended was imprisonment for one year, 10 months.

[3] The appellant’s sentence will need, we accept, to be reduced by two months to take account of that miscalculation. The larger question is whether, as he also contends, the Judge erred in deciding that only imprisonment would serve the purpose of general deterrence. The appellant contends that his young age, his lack of previous convictions and most especially his mental impairment made home detention the least restrictive appropriate sentence.

Offence, charge and plea

[4] Between 27 and 29 December 2011 the appellant, then aged 19, who had lived throughout his life in Christchurch with his mother, went with his brother’s family to a gathering on a Northland marae at which the complainant, a 12 year old girl, was also present.

[5] On the night of 28 December 2011, when everyone was asleep, the appellant lay next to her, pulled her hand to his penis and asked her to hold it. She first refused, then held it for about 30 seconds. On 29 December 2011 he took her to some trees near the marae and told her to take her pants off and bend over. She did so and he engaged in intercourse with her for a few minutes.

¹ *R v Fairbrother* DC Kaikohe CRI-2012-027-101, 23 January 2013.

[6] When the complainant told the appellant it was hurting her, he replied, she said, “I don’t care”; a reply he denies. He then withdrew his penis and the complainant told him that her grandfather was looking for her. She immediately disclosed to her family what the appellant had done and, that day, a detective spoke to him and he admitted having had intercourse with her.

[7] On 30 December 2011 the appellant appeared in the District Court, Kaikohe, facing preliminary charges, and was assessed by a forensic nurse. The day following he was charged with sexual violation by rape of a child between 12 and 16 years. On 4 January 2012 the forensic nurse reported that he was fit to plead and counsel was assigned to him.

[8] On 15 March 2012, after a plea inquiry hearing and a post committal conference, the police wrote to the appellant’s then counsel and said that, after reviewing the complainant’s interview, they intended to withdraw the rape charge. On 20 April 2012 the Crown filed in the High Court, Whangarei, an indictment alleging the offence which the appellant admitted and three indecent assaults.

[9] On 10 August 2012 in the District Court, Christchurch, by arrangement, the appellant pleaded to the offence he admitted. He entered no plea to the indecent assaults and, when he was sentenced in the District Court, Kaikohe, on 23 January 2013, he was discharged on those counts.

[10] On sentence the Judge had, as is usual, a pre-sentence report to which we will refer next, and a psychiatric report to which we will refer when we come to consider whether the Judge made any error ascribing little, if any, weight to the appellant’s mental impairment.

Pre-sentence report

[11] The appellant, his assessor said, had suffered from an early age from “extensive mental health difficulties”, compounded by substance abuse and isolation. He had first come under psychiatric care at age 11 and, by the time he was 15, he had been diagnosed to suffer from paranoid schizophrenia; a mental illness since well controlled by daily medication.

[12] The appellant, the assessor said, had never been diagnosed formally as intellectually disabled and denied ever being attracted to younger children, though he did say he had been attracted to younger but developed girls. The appellant's social worker, his assessor said, had reported that the appellant had suffered psychotic episodes with a sexual content. But the appellant himself denied that to have been so on the day of his offence.

[13] Further, his assessor said, the appellant had disclosed that family members had told him that the victim appeared attracted to him and warned him to keep away from her. He denied knowing she was 12. He said he found "nice girls that talk to you" attractive, was flattered by her attention and wanted to return it. He expressed remorse but said that it was "both our faults".

[14] If home detention were considered at the appellant's Christchurch home, his assessor said, the police had two concerns. One was his mother's safety. The other was that there were primary and high schools nearby. As against that, it had always been the appellant's home and for the 13 months before sentence he had been bailed to live there. There he was "stable and supervised". It was far from where he had offended. He could undergo a STOP program in Christchurch.

[15] The appellant's assessor recognised that he could be facing a sentence of imprisonment, and, if he were, pointed out that to complete a Kia Marama Sexual Offenders' Programme his sentence would need to be not less than two and a half years in length. He recommended intensive supervision and community detention.

Sentence under appeal

[16] On sentence, and after describing the appellant's offending, the Judge began by outlining neutrally and accurately the purposes and principles of sentencing in the course of which he said this:²

There is clearly a need for me to tell you in no uncertain terms that this type of behaviour simply cannot be tolerated. There is a need for me to deter not just you but also other people from offending in this way. I accept, of

² At [6].

course, that any sentence I impose must, where possible, be designed to assist your rehabilitation.

[17] At that point the Judge remarked the appellant's offence was "very serious offending" and called for a sentence consistent with those imposed in like cases.³ Later he identified the cases to which he had been referred, *Johnson*, *Faapuea* and *Misileki*.⁴ He found *Misileki* most helpful but said that there was no tariff.

[18] The Judge held that the appellant's offence was not aggravated by an abuse of trust, but that it was premeditated. As he said: "You knew that there was some interest expressed by this little girl towards you. You had been warned by older members of your whānau to stay away."⁵ Despite that, the appellant offended on the evening of the first day and then more seriously on the second.

[19] As to that the Judge also said that he was especially concerned by the qualified way in which the appellant had expressed remorse:⁶

You indicated that you agreed that you needed to be punished for what you did but you then added, "It is both our faults". I want you to understand very, very clearly that it is not 'both your faults', it is your fault. She was a child and you must have known that she was very much younger than you.

[20] The Judge accepted the assessment in the pre-sentence report that the appellant was "at medium risk of harm to others". If he again became intoxicated, and had the opportunity, the Judge said, he might re-offend. The Judge said he had given "very anxious consideration" to whether the appellant had been mentally impaired when he offended.⁷ He was satisfied that he had not been acutely unwell.

[21] Relying on the cases to which he had referred, the Judge took a starting point for sentence of three years imprisonment, taking into account that the appellant was seven years older than the complainant, that there had been "some targeting", and the effect on the complainant.⁸

³ At [6].

⁴ *R v Johnson* [2010] NZCA 168, *Faapuea v R* [2010] NZCA 20 and *R v Misileki* [2008] NZCA 513.

⁵ At [15].

⁶ At [10].

⁷ At [19]–[20].

⁸ At [24].

[22] Taking into account the appellant's age and lack of previous convictions and "to a very modest extent ... mental impairment", the Judge deducted six months from his three year starting point.⁹ He then set out to allow a "full credit" for plea resulting, as he considered, in a sentence of two years imprisonment, the sentence he imposed. When imposing that sentence the Judge made clear that he had considered home detention but decided that it could not suffice:

[29] Ultimately there is a need for the Courts generally to pass sentences that are truly deterrent. There is a need for this Court to protect children. That is the purpose of the legislation and that is why the Court of Appeal has said that in most cases serious offending against children will result in a term of imprisonment.

[30] Giving the matter the careful thought that I have I am simply unable to reach the conclusion that home detention here would be appropriate. It would send the wrong message and would not properly mark the seriousness of your offending.

A considered and principled choice

[23] Imprisonment is the most restrictive sentence in the hierarchy of sentences and orders prescribed in the Sentencing Act 2002.¹⁰ It is, as the Court of Appeal said in *R v Rawiri*, "a measure of last resort",¹¹ more especially since the passing of the 2007 amending Act, which introduced the home detention sentence. The 2007 amendments, the Court said, demonstrated a "discernible legislative policy of keeping offenders within the community wherever appropriate".¹²

[24] Before the 2007 amendments that policy was already inherent in the hierarchy of sentences the Sentencing Act 2002 created; and in the priority the Act gave to the s 8(g) principle, requiring that any sentence imposed be "the least restrictive outcome that is appropriate in the circumstances", by making that a precondition to any sentence above a discharge, fine or reparation order.¹³

[25] Section 16(1) says that when deciding whether to imprison, and to what extent, the sentencing judge "must have regard to the desirability of keeping

⁹ At [26].

¹⁰ Sentencing Act 2002, s 10A.

¹¹ *R v Rawiri* [2011] NZCA 244, (2011) 25 CRNZ 254 at [18].

¹² At [17].

¹³ Sentencing Act 2002, s 15(1)(a).

offenders in the community as far as that is practicable and consonant with the safety of the community.” Where imprisonment is the presumptive or mandatory sentence, the judge must sentence accordingly. Where that is not so, s 16(2) then provides, the judge is prohibited from imprisoning unless satisfied as to three things.

[26] First, the purpose for which imprisonment is to be imposed must be to hold the offender accountable, or to induce in him or her a sense of responsibility, or to serve the interests of any victim, or to denounce the offending, or to deter, or protect the community.¹⁴ Secondly, any such purpose must not be able to be achieved by any lesser sentence.¹⁵ Thirdly, there must be no other sentence that would be consistent with such of the 10 s 8 principles of sentencing as apply.¹⁶

[27] Where a sentence of imprisonment is presumptive or mandatory, or where the term required plainly exceeds a short-term period of imprisonment, 24 months or less, that is the sentence that must be imposed. But where the sentence proper is a short-term period of imprisonment, the judge must decide whether to commute that sentence to a sentence of home detention.¹⁷

[28] Home detention is a significant sentence in its own right. When it was introduced in 2007, it was deemed to be the second most restrictive sentence able to be imposed;¹⁸ and it may only be imposed when a judge is “satisfied that the purpose or purposes for which the sentence is being imposed cannot be achieved by any less restrictive sentence or combination of sentences”.¹⁹

[29] Sentences of imprisonment have been quashed and home detention substituted for two errors of law. One is where the sentencing judge has assumed that the offence category lies beyond a sentence of home detention.²⁰ The other is where the purpose of deterrence has been given complete priority without regard to any of the countervailing purposes of sentence.²¹

¹⁴ Section 16(2)(a).

¹⁵ Section 16(2)(b).

¹⁶ Section 16(2)(c).

¹⁷ Section 15A(1)(b); *R v Vhavha* [2009] NZCA 588 at [29].

¹⁸ Section 10A.

¹⁹ Section 15A(1)(a).

²⁰ *R v Ondra* [2009] NZCA 489; *Osman v R* [2010] NZCA 199; *Heta v R* [2012] NZCA 267.

²¹ *Manikpersadh v R* [2011] NZCA 452 at [17].

[30] That does not mean that a short-term period of imprisonment must always be commuted to a sentence of home detention. That equally would be an error of law. What it does mean is that the judge must make a considered and principled choice between the two forms of sentence, recognising that both serve the principles of denunciation and deterrence, and identifying which of them better qualifies as the least restrictive sentence to impose taking into account all the purposes of sentencing.

[31] Sometimes, as this Court said in *R v D (CA253/2008)*, that can prove a very difficult exercise of judgment; and “the closer one gets to the dividing line, the more difficult it becomes to articulate reasons for preferring one approach to the other”.²² Even in those cases, however, the choice must be intelligible. The factors that really count must be identified and weighed.

[32] As this case involved sexual abuse of a child the Judge was obliged to consider carefully the appropriateness of a sentence of home detention.²³ Because, as this Court said in *Kennedy v R*:²⁴

All sentences that are potentially in the range should be considered on their merits, although it will be recognised that the likely sentencing outcome for sexual offending against children is imprisonment.

(Footnote omitted.)

Mental impairment

[33] The question on this appeal is, therefore, whether the Judge made any error in ascribing little or no weight to the appellant’s mental impairment. For, as this Court stated in *E (CA689/10) v R*, mental impairment can be a mitigating factor on sentence, and sometimes a considerable factor:²⁵

[68] A mental disorder falling short of exculpating insanity may be capable of mitigating a sentence either because: if causative of the offending, it moderates the culpability; it renders less appropriate or more subjectively punitive a sentence of imprisonment; or because of a combination of those

²² *R v D (CA253/2008)* [2008] NZCA 254 at [66].

²³ *R v M (CA197/00)* CA197/00, 19 July 2000 at [14]; *R v S (CA465/05)* CA465/05, 11 April 2006 at [12].

²⁴ *Kennedy v R* [2011] NZCA 569 at [8].

²⁵ *E (CA689/10) v R* [2010] NZCA 13, (2011) 25 CRNZ 411.

reasons. The moderation of culpability follows from the principle that any general criminal liability is founded on conduct performed rationally by one who exercises a willed choice to offend.

(Footnotes omitted.)

[34] In that decision the Court took into account two decisions of the Court of Appeal, Victoria, both of which state that mental impairment can moderate or even eliminate general and specific deterrence as sentencing considerations.²⁶ In each instance, whether deterrence should be moderated or eliminated as a sentencing consideration depends on:²⁷

the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.

[35] There is an obvious correlation between whether, and to what extent, an offender is mentally impaired and whether he or she needs to be specifically deterred. That turns, very concretely, on the offender's mental state at the time of the offence, or sentence, or both. That correlation is not so immediately obvious when the issue is rather whether the sentence to be imposed should be generally deterrent. Then it turns more abstractly on what sentence is justly proportionate.

[36] In a recent decision of the High Court of Australia, *Muldrock v R*, the issue was what sentence was proper for a mentally retarded man, aged 30, for sexual intercourse (in fact oral sex) with a boy aged under 10 years.²⁸ There the Court held that, where an offender suffers mental illness, or more especially is mentally retarded:²⁹

The lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and the needs of the community.

²⁶ *R v Tsiaras* [1996] 1 VR 398 at 400; *R v Verdins* [2007] VSCA CA102, (2007) 16 VR 269 at [32].

²⁷ *R v Verdins* cited in *E (CA689/10) v R*, above n 21 at [70].

²⁸ *Muldrock v R* [2011] HCA 39, (2011) 244 CLR 120.

²⁹ At [54].

[37] Affirming yet another decision of the Victorian Courts,³⁰ the High Court of Australia accepted that general deterrence is a “kindred concept” to retribution or punishment.³¹ Both, the Court accepted, involve “an element of instinctive appreciation of the appropriateness of the sentence to the case”.³² The principle the Court then expressly adopted and affirmed was this:³³

A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community.

[38] Ultimately, as is the case here, the issue whether the offender’s mental illness had any part to play is very much a matter of fact and psychiatric opinion.

Psychiatric assessment

[39] In ascribing little or no weight to the appellant’s mental impairment in the sentence he imposed, the Judge relied, as he was entitled to, on the opinion of the psychiatrist who examined the appellant in September 2012 and concluded that there was “certainly nothing to suggest that his offending was driven by any form of acute mental illness”.

[40] The psychiatrist expressed his clinical opinion in five points, which the Judge evidently found convincing, as we do ourselves:

1. This young man has experienced a Schizophrenic illness which manifested itself at the age of 14 or 15 but has been well controlled on psychotropic medication since that time, to the point that he shows no evidence of any active symptoms of illness.
2. He does, however, show evidence of some negative symptoms related to his Schizophrenia in that his judgment is probably diminished, his emotional state is somewhat impoverished, his energy levels are reduced and his ability to converse completely normally is somewhat subdued and restricted.
3. At the time of the offending there was no evidence that he was acutely unwell but he would have had some diminution of judgment no doubt further impaired by the injudicious use of alcohol. Given

³⁰ *R v Mooney* unreported, Court of Criminal Appeal (Vic), 21 June 1978 at 8, cited in *R v Anderson* [1981] VR 155 at 160–161.

³¹ At [53].

³² At [53].

³³ At [53].

that he told me he drank for three hours before the sexual connection charge it is highly likely that he was indeed quite drunk.

4. While the Defendant in the past has a fairly strong history of illicit drug use this does seem to have been much better controlled in recent years and there is no indication that he was using any illicit drug substances during the perpetration of his crime.
5. From my examination of the Defendant I think he certainly knew that committing himself to a sexual act with a 12 year old was wrong. It would appear that his judgment was impaired both in terms of using too much alcohol and having some negative symptoms of Schizophrenia.

[41] The psychiatrist also concluded, oddly enough, that the appellant did not appear to have a high sexual drive or a strong sexual fantasy life. Indeed, the psychiatrist considered, both would have been “dampened” by the appellant’s illness and treatment. Rather, the psychiatrist said, this offending on the appellant’s part was “an unfortunate lapse in a vulnerable young man rather than ... a longstanding paedophilic interest in children”.

[42] The psychiatrist outlined as options for sentence a Kia Marama program if the appellant were imprisoned, or a STOP program, if he were subject to a non-custodial sentence. He did not, as is clear, rule out the former as inconsistent with the appellant’s state at the time of his offence or on sentence.

Conclusions

[43] The appellant’s two year sentence of imprisonment, which the Judge imposed giving priority to the purposes of general and specific deterrence, is not manifestly excessive. But it is longer than the sentence the Judge intended to impose, and we consider that his intended sentence better accords with the appellant’s offence and circumstances.

[44] For that reason we grant this appeal. We quash the appellant’s sentence of two years imprisonment and in its place sentence him to imprisonment for one year, 10 months.

Solicitors:
Crown Solicitor, Auckland for Respondent