

THE QUEEN

v

PETER MELVIN BRYANT

Hearing: 19 November 2003

Coram: Elias CJ
Blanchard J
Panckhurst J

Appearances: P J Kaye for Appellant
B R Northwood for Crown

Judgment: 16 December 2003

JUDGMENT OF THE COURT DELIVERED BY PANCKHURST J

[1] The appellant was sentenced at the High Court at Auckland on 19 February 2003 to preventive detention, with a minimum period of imprisonment of seven years to be served, in relation to multiple sexual offences. He appeals against that sentence essentially upon the basis that the case was one which warranted a substantial finite sentence of imprisonment, rather than preventive detention.

The background

[2] The charges were defended. They concerned two complainant boys both aged nine years at the relevant time. We shall refer to them as Donald and David.

The appellant had been a friend of Donald's family for several years. Between October 2001 and February 2002 he offended against Donald typically in the child's own home on occasions when the two were alone together. The jury found the appellant guilty upon nine counts, being four of sexual violation by unlawful sexual connection, four of indecent assault and one of inducing an indecent act. The underlying conduct comprised fellatio committed upon Donald, licking his anus, indecently touching him (including by masturbation) and requiring Donald to masturbate him. The abusive conduct occurred repetitively, between twenty to thirty times. Three of the counts, therefore, were representative in nature.

[3] David was a friend of Donald. He met the appellant through that association. In January-February 2002 the relevant abuse occurred in a public swimming pool, in a shed at Donald's home and in David's bedroom. The appellant was found guilty upon five charges of sexual violation by unlawful sexual connection and four charges of indecent assault. The violations included fellatio and digital penetration of the anus. The indecent assaults comprised fondling and masturbating the complainant.

[4] The offending against Donald came to light when his sister interrupted an act of masturbation. Later that same day David's mother interrupted activity in her son's bedroom at a point when the appellant and the complainant were in a state of undress and the appellant was in possession of, and had used upon himself, a dildo. The police were contacted a short time later and the charges resulted.

The sentence

[5] The verdicts were returned in early November 2002. On 5 December the Judge adjourned the sentencing at the request of the Crown to obtain expert reports relevant to preventive detention. In these circumstances the sentence was not imposed until 19 February 2003.

[6] Because the offending occurred before the Sentencing Act 2002 (the Act) came into force but the sentencing itself post-dated its enactment, s153 applied. Thereby an offender who is convicted of a specified offence as defined in s75(4) of

the Criminal Justice Act 1985 and who would have been sentenced to preventive detention in terms of that section, is to be dealt with under s.s. 87 to 90 of the new Act. This meant that the Judge, who had presided at the trial, was first required to consider the threshold question whether preventive detention would have been the sentencing response under the previous regime and, if so, the new sections governing preventive detention were to be applied in relation to the imposition of that sentence.

[7] Early in his sentencing remarks the Judge noted that the appellant had previous convictions for possession of objectionable material and copying such material. These were in 1999 and late 2002. In relation to the earlier conviction a sentence of supervision was imposed with a special condition that the appellant undertake counselling as directed by his probation officer. The Judge noted with concern that in a report dated January 2000 its writer said that psychological treatment had been discontinued on account of the appellant's "lack of motivation to address treatment issues and non attendance at treatment sessions ...". The November 2002 conviction was met with a discharge since, by then, the appellant had been convicted of the present offences. The objectionable material was found on the appellant's computer when the police investigated the current matters. It was of close relevance, since it comprised tens of thousands of images, and films, which depicted the abuse of children and bestiality.

[8] With reference to the offending itself the Judge noted with concern a number of aggravating features. These were the extreme youth of the complainants, the use of threats to coerce the boys into non disclosure of the offending, the number and persistence of the offences, the use of a dildo and the prisoner's lack of insight and remorse.

[9] Victim impact statements confirmed the inevitable, namely that the complainants were psychologically scarred on account of the offending. Indeed the Judge expressed the opinion that it was "not putting the matter too highly to say that you (the prisoner) have ruined the lives of two families". He noted also that Donald's sister, who had interrupted an act of abuse upon her brother, was traumatised by this and had left home as a consequence.

[10] A substantial part of the sentencing notes was devoted to a consideration of reports from Dr Moskowitz, a forensic psychologist, and from Dr Goodwin, a consultant psychiatrist. These contained guarded opinions concerning whether the prisoner was susceptible to treatment and as to the risk of further offending in the future. It will be necessary to return to these reports later, since an assessment of them was at the forefront of Mr Kaye's submissions in support of the appeal. At this stage it is sufficient to note that the Judge was pessimistic as to the likelihood of the prisoner accepting treatment. It followed, in his assessment, that the prisoner would represent an unacceptable risk to young boys upon his return to the community after serving a finite term. The Judge was therefore satisfied that preventive detention would have been the appropriate sentencing response under the Criminal Justice Act 1985, and that it remained so under the new Act. Hence he imposed preventive detention and ordered that the appellant serve a minimum term of imprisonment of seven years. Whether this term was imposed on account of the gravity of the offending or because it was required to promote the safety of the community was not stated : s89(2) of the Act.

The submissions in this Court

[11] In support of the appeal Mr Kaye advanced two interrelated submissions, namely that the Judge erred by placing too much weight upon the appellant's negative response to his previous sentence of supervision and counselling, and, that the Judge reached an unduly pessimistic assessment of the expert reports. On this basis counsel argued that the prospects for treatment and, thereby, for rehabilitation were better than the Judge had allowed. Hence Mr Kaye contended that the case was one for a substantial finite term of imprisonment, say a term of ten years, which would adequately meet the objectives of sentencing relevant in this case.

[12] By contrast Mr Northwood supported the reasoning and conclusion reached by the sentencing Judge. He submitted that the essential conclusions concerning the appellant's willingness to accept treatment (rather the lack of it), and the resultant bleak assessment of future risk, were well based conclusions. It followed that preventive detention with a substantial minimum term was appropriate. In the alternative, should this Court be persuaded to substitute a finite term, counsel

contended that a term of twelve years imprisonment would be required. With regard to the minimum term of seven years imprisonment Mr Northwood responsibly acknowledged that both counsel in the court below, and perhaps as a result the Judge, were under the mistaken impression that the statutory minimum term required pursuant to s89(1) was seven rather than five years.

Discussion

[13] With reference to the appellant's poor response to counselling in 1999-2000, Mr Kaye stressed the differences between the appellant's position then as compared to now. Previously he was not subject to a sentence of imprisonment. Counsel drew attention to Dr Moskowitz's observation that the intensive programmes provided in a prison setting and targeted to the treatment of sexual offending "are quite different than weekly individual therapy on an outpatient basis," which meant it was possible the appellant would respond more positively than he had in the past.

[14] We accept that the appellant's present situation is entirely different to that which prevailed when he was subject to the sentence of supervision. But the fact remains that his response to counselling, imposed it is to be noted as a condition of a court sentence, was poor. What is more it is apparent from the reports from the experts that the appellant gained no insight during counselling into the inappropriateness of the views which he holds in relation to sexual activity with pre-pubescent boys. In the end result we are unpersuaded that the Judge gave undue weight to the fact of the appellant's poor response to the previous sentence.

[15] Mr Kaye's main submission centred upon the Judge's conclusion that he had no confidence that the appellant would take, or respond to, treatment even in a prison setting. Counsel accepted that this issue was at the nub of the appeal. It had to be accepted on the basis of the reports that there was a substantial risk that the appellant would commit a further specified offence upon release (being the relevant test in s75(3A) of the Criminal Justice Act 1985) and, equally, that the appellant was likely to commit a qualifying sexual offence upon his release (in terms of s87(2) of the new Act). Therefore the ultimate question became whether it was likely the appellant would be receptive to treatment and, if so, whether he would cease to pose a

significant and ongoing risk to young boys after receiving it. The answer to that question depended upon an assessment of all relevant circumstances, including in particular the expert assessments contained in the psychiatric and psychological reports.

[16] Counsel drew attention to observations in Dr Goodwin's report concerning the appellant's outlook. The doctor said, in what counsel described as the highpoint, that he thought the appellant

was more than willing to accept treatment for his sexual offending behaviours. Mr Bryant was able to consider with me that his activities were wrong and he did express some remorse when I stated to him that it was possible that the children in this case may have suffered adverse psychological development as a result of this abuse. This seemed to indicate to me a willingness to consider an alternative position to that which he expressed earlier but this would need to be explored further in appropriate treatment.

The position earlier expressed by the appellant was that he considered the conduct in which he had been involved with the complainants was consensual and that he could see nothing wrong with it in any event.

[17] In a similar vein counsel sought comfort from the report of Dr Moskowitz who identified a number of positive prognostic factors. These were that the appellant had no previous convictions for qualifying sexual offences which suggested that the pattern of his actions was not deeply entrenched, that his sexual preference was not focused exclusively upon children and that the appellant appeared interested in treatment, including the need to acknowledge and accept the fact of his offending. We note both reports indicated that Mr Bryant, who is aged 44 years, has been a homosexual since his teenage years, but had been unable to form relationships with adult partners on account of a lack of necessary social skills.

[18] Did the Judge err in reaching an unduly pessimistic assessment about the appellant's likely amenability to treatment? We are unpersuaded that the view reached by the Judge was wrong. Both reports convey that the appellant's thinking in relation to sexual contact with young boys is disordered. He neither appreciates the seriousness and inappropriateness of such conduct, nor the inability of boys as young as these to give meaningful consent. Moreover, the reports read as a whole

convey at best that there is a prospect that the appellant may accept treatment. But the report writers are guarded in their observations of the appellant in relation to this issue. While the door is certainly not closed, there are barriers in the way of a successful treatment process, in particular the appellant's seeming inability to comprehend the criminality of his conduct.

[19] We are also influenced by the fact that the Judge had the opportunity to assess the appellant in the course of the trial, including when he gave evidence in his own defence. This placed the Judge in an advantaged position in reaching that essential assessment concerning the prospects for successful treatment. Given the, at best, muted optimism expressed in the expert reports and bringing to account the advantage which the trial Judge enjoys by comparison to us, we are not persuaded that he erred in relation to this pivotal issue. It follows that the sentence of preventive detention must stand.

The minimum term of imprisonment

[20] It is apparent from the Judge's sentencing remarks, confirmed by the concession made by Mr Northwood, that limited attention was given to this aspect at the time of sentencing. Counsel at least were focused upon whether a sentence of preventive detention should be imposed, rather than the issue of the appropriate minimum term. It, we think, required greater attention than it received.

[21] Under the Sentencing Act the statutory minimum period of imprisonment is five years. As the Justice and Electoral Committee noted in reporting back on the Sentencing and Parole Reform Bill, at page 20 of its report, the bill was intended to achieve increased flexibility in relation to parole:

Under the existing law, all persons sentenced to preventive detention become eligible for parole after serving ten years or, since 1993, any minimum period of imprisonment of more than ten years imposed by the court. The bill requires the court to impose a minimum term in every case, that must not be less than five years. There is no specified maximum period, so very long minimum periods can be imposed in appropriate cases.

Most of us are satisfied the additional guidance and the reduction in the minimum term that may be imposed provide sufficient flexibility to deal

with the bill's expanded range of cases in which preventive detention is a sentencing option.

[22] The apparent philosophy behind the changes was to make the sentencing option available in relation to both younger offenders (aged 18 as opposed to 21 years) and a greater range of offences, but at the same time to introduce greater flexibility in relation to parole. Provided offending was not of such gravity as to require a minimum term greater than five years imprisonment and provided the offender achieved rehabilitation, a release after five years may ensue. In the result preventive detention is a sentence of greater flexibility than was previously the case.

[23] In the context of his submissions in favour of a finite sentence Mr Kaye realistically accepted that a sentence of about ten years imprisonment would be required in the circumstances of this case. Assuming the imposition of a minimum period of imprisonment to reflect the serious nature of the offences, it is not unrealistic to suppose that the appellant would serve a term of the order of five years. This indicates that the real differences between the available sentencing approaches lie in the discretionary element which attends the sentence of preventive detention and in the circumstance of the eligibility of the offender to be recalled following release. In essence the offender is subject to an indefinite term of imprisonment because there is no sentence expiry date and the prisoner's release, therefore, is entirely at the discretion of the Parole Board : s.s82(3) and 28 of the Parole Act 2002. It may be said the offender controls his own destiny. Successful participation in a course of treatment, such that he will not pose an undue risk to the safety of the community if released, will be determinative of his final release date. The advantage of this incentive by comparison to the situation of a prisoner subject to a finite term is obvious.

[24] Returning to the present case we see a number of factors as of direct relevance in the context of the present issue. These convictions are the first against the appellant for actual sexual offences. He has not previously been sentenced to imprisonment. Nor, therefore, has he been in a situation where an intensive programme of treatment was available to him. Mr Bryant is not unintelligent and the reports confirm that he does not suffer from any medical condition which might pose an impediment to his rehabilitation.

[25] In determining the minimum period of imprisonment in the context of a sentence of preventive detention the first inquiry is as to the minimum period required to reflect the gravity of the offence : s89(2)(a). We are not persuaded that the gravity of the present offending warranted a minimum term in excess of five years imprisonment. While the offending was plainly serious, particularly that which comprised sexual violation rather than indecent assaults, a five year term was sufficient denunciation in relation to an offender who had not previously been imprisoned.

[26] The second inquiry is whether a minimum period greater than five years imprisonment is required for the purposes of the safety of the community in light of the offender's age and the risk posed by him : s89(2)(b). The appellant does represent a serious risk to young boys in particular. However, he will now have for the first time the opportunity to accept intensive treatment. Whether, thereby, Mr Bryant is capable of attaining the necessary insight so that he ceases to pose such a risk to young boys is a vexed question. Nonetheless, since this is the appellant's first sentence of imprisonment and the first opportunity for him to accept intensive treatment, we are satisfied that advantage should be taken of the increased flexibility which is available in terms of the Sentencing Act. It follows that a minimum period of five years imprisonment is appropriate in the particular circumstances of this case.

Result

[27] The appeal against a sentence of preventive detention is dismissed. The minimum term of seven years imprisonment is quashed, and five years is substituted.

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