PUBLICATION OF NAME(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CRI 2007 076 2064

REGINA

v

GAVIN JAMES BIGGS

Hearing: 6 April 2009

Appearances: A R McRae for Crown
W van Vuuren for Prisoner

Judgment: 6 April 2009

REMARKS ON SENTENCE OF CHISHOLM J

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[1] Gavin James Biggs, you pleaded guilty on arraignment to 14 counts of sexual offending against two young girls. There is one count of rape, one of attempted rape, nine of indecent assault, one of an indecent act and two of inducing an indecent act. Virtually all the charges are representative. Importantly the rape and attempted rape charges are representative.

[2] The circumstances behind the offending were these. [Suppressed]
. You began
offending against D in 1980 and continued to offend against her for approximately three years through to 1983. During that time D was between

10 and 13 years of age and you were between 26 and 29 years of age. Then in 1983 you began to offend against C and that offending spanned roughly one and a half years during which time she was aged between nine and 11 years and you were between 29 and 30 years.

[3] I am not going to go into the offending in great detail. Suffice to say that the offending against D began with fondling of the genitalia and breasts and led to other things including digital penetration of the genitalia of this victim. There was masturbation, shaving of her pubic hair on one occasion, attempted rape on a number of occasions. On at least one occasion that led to injury to D which involved bleeding. Ultimately the offending progressed to full rape against this young victim. As far as C was concerned, again there was fondling of the genitalia and also masturbation.

[4] These days many of the indecent assault charges would have qualified as sexual violation. But that's really beside the point because I have to sentence you on the law as it stood at the time the offending occurred.

[5] Needless to say, Mr Biggs, your offending has had a huge impact on the two victims. I am not sure whether you have seen the victim impact reports. The offending has affected their whole lives: their schooling, it has given rise to depression, it has compromised their ability to trust others and, of course, they have had this awful nightmare of wondering whether they would be believed. From reading the victim impact statements it is clear to me that the effects of the offending will be with them virtually the rest of their lives, as is so common unfortunately in this type of offending.

[6] You, Mr Biggs, are 55 years of age. The tragedy is that. apart from this offending of around four years, you have led an absolutely blameless life. An assessment has been undertaken under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 by Mr Trainor, who is a clinical psychologist. He has provided a very detailed report. Although he accepts that you meet the criteria for intellectual disability under the Act, his conclusion is that the framework under that Act wouldn't provide the appropriate sentencing option in your case, and that

imprisonment would be the more appropriate response. As Mr van Vuuren said, these are difficult cases because there is really no halfway house.

[7] Taking into account the very low risk of re-offending indicated by the probation officer, and the little that could be offered in the way of rehabilitation if there was a compulsory care order, I have decided to adopt Mr Trainor's approach. I will impose a sentence of imprisonment rather than some form of compulsory care order.

[8] I take the rape charge as the lead charge. At the time of the offending, Mr Biggs, the starting point for what we describe as contested rapes was five years. The authority for that is *R v Clark* [1987] 1 NZLR 380 (CA).

[9] The aggravating features of your offending are not greatly in dispute and they have been summarised by Mr McRae. First, there is multiple offending, in other words, numerous incidents of offending over a reasonably lengthy period of around four years. Many of the indecent assaults are at the most serious end of the spectrum and in addition there have been attempted rapes. I also have to take into account the representative nature of the charges. The second aggravating feature is that there are two victims, and the third is the young age of the victims. Fourth, the severe harm that has been, and will continue to be, suffered by both victims. Fifth, there is an element of breach of trust. I agree with counsel that this is not the breach of trust that is often referred to during sentencing. Nevertheless when the offending occurred these young girls were in your care. Finally, I am afraid there was an element of premeditation in the offending.

[10] For the Crown Mr McRae has argued that the starting point ought to be lifted to around nine or 10 years to reflect these aggravating features. Mr van Vuuren for you (and he has spoken very well for you today) has argued that that is too high and that the appropriate starting point would be somewhere around five or six years.

[11] It is always very difficult to arrive at a starting point. In arriving at the starting point in your case I have taken into account all the cases cited by counsel, including *R v IWM* (CA186/06, 1 November 2006). I am going to adopt a starting

point of eight years in relation to the offending. There are no personal aggravating features that would justify an uplift in that starting point.

[12] This brings me to mitigating features, which in the eyes of the law make the offending less serious. Again I don't think there is too much debate about these. First, there is your guilty plea. You are, of course, entitled to credit for that because, amongst other things, it has saved your victims having to go through the ordeal of a trial. But I also note that that guilty plea was at a late stage. Although there was some last minute modification in the charges, the most serious charges had been laid at the outset. To my mind a discount of 25% is appropriate to reflect your guilty plea. Secondly there is, as I have already mentioned, your good record both before and after the offending but, of course, excluding the period of your offending. Third, there are the intellectual limitations described in the report from Mr Trainor. In this regard I apply *R v Satherley* (CA483/06, 31 August 2007) while keeping in mind that those limitations have to be kept in perspective because you have been able to live pretty much an ordinary life within the community. When I take all those factors into account I increase the 25% discount for the guilty plea to 33%.

[13] That means that I arrive at a sentence for rape of five years and 4 months imprisonment. On the attempted rape you are sentenced to two and a half years and on each of the other charges to 18 months imprisonment. All of those charges are concurrent which means that the overall sentence you will have to serve will be five years and 4 months imprisonment I recommend that you be assessed for an appropriate sex offender programme and that you attend such a programme if you are assessed as being suitable.

[14] In terms of suppression orders, the Christian names of the victims that I have mentioned are, of course, suppressed (as are their whole names) and I also suppress any information that might lead to them being identified by way of connection with Mr Biggs.

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