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

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2008-404-309

BETWEEN	WARREN STUART GEORGE Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 3 February 2009

Appearances: Stuart Grieve QC and Andrew Speed for Appellant
James Carruthers for Respondent

Judgment: 3 February 2009

JUDGMENT OF HARRISON J

SOLICITORS
Meredith Connell (Auckland) for Respondent

COUNSEL
Stuart Grieve QC; Andrew Speed

Introduction

[1] Mr Warren George appeals against a sentence of three years imprisonment imposed upon him in the District Court at Auckland on 16 June 2008 following his pleas of guilty to one charge of sexual violation by unlawful sexual connection, three charges of assault with intent to commit sexual violation, doing an indecent act with a girl under 12 years of age, and sexual conduct with a child. The latter two charges were of a representative nature.

[2] Mr George, through his counsel, Messrs Stuart Grieve QC and Andrew Speed, submits that the length of the sentence of imprisonment was manifestly excessive. His challenge on appeal is mounted on the principal ground that Judge Roderick Joyce QC erred in adopting a starting point of four-and-a-half years imprisonment. While submitting that something greater might have been appropriate, Mr Grieve accepts this morning that Mr George cannot challenge the Judge's allowance of a discount of one-and-a-half years or 33% against the actual starting point to allow for Mr George's pleas of guilty and his full admissions (which disclosed a wider level of indecency than the complainant alleged in her evidential interview).

Facts

[3] As in all cases of this type, as Mr Grieve properly acknowledges, the facts are decisive.

[4] Mr George pleaded guilty on an agreed summary of facts prepared following a preliminary hearing at which Judge Joyce presided. He had the benefit of access to all the primary materials, particularly the complainant's evidential interview and Mr George's full admission.

[5] Mr George met the complainant's mother in 1998. He was then aged 38 years. The complainant was six years of age. Mr George and the complainant's mother formed a relationship. They married in January 1999. Thereafter they lived together with the complainant as a family unit in three residential addresses in

Auckland. The relationship came to an end when the complainant disclosed Mr George's offending in 2007.

[6] Mr George is a guitar technician. He worked from home. His wife, the complainant's mother, worked in paid employment elsewhere. As a result she was frequently absent from the house while Mr George and the complainant were there together.

[7] One of the perhaps unusual aspects of the family relationship was that Mr George and the complainant would shower together, apparently with her mother's knowledge. The child would also join him in bed before school. They indulged from time to time in play fighting. There was a degree of close physical contact, described as being of a rolling, chasing and wrestling type. Mr Grieve emphasises the originally innocent nature of this association. He may be correct. But the duration of the offending leads to the inference that at a reasonably early stage this pattern of behaviour assumed a more sinister aspect and could be characterised as grooming for prospective sexual activity.

[8] Mr George was able with time to modify his behaviour from that of normal parental contact to touching of a type that enabled sexual gratification during physical contact. He admitted, for example, fondling the complainant's breast and vagina while in the shower with her under the guise of washing. Mr George also admitted to directing the complainant to remove her clothes before school for a similar purpose. He admitted to masturbating himself under the bed covers while alone with her there. This conduct was the subject of the indecency charges.

[9] The most serious offence in terms of sentencing occurred when the complainant was only six years old. Mr George and the child were both naked following showers except for towels. He arranged a play fight. Both towels fell off. He placed the child on the bed. He spread her legs. He performed oral sexual intercourse with her. He also directed the complainant not to tell her mother. This incident was the subject of the charge of sexual violation by unlawful sexual connection.

[10] Mr George attempted the same manoeuvre on three subsequent occasions when the complainant was aged between eight and 11 years of age. Each time the complainant was able to escape, anticipating Mr George's intentions.

[11] The offending was discovered in November 2007. The complainant wrote a school essay about the worst experience of her life. Mr George's explanation to the police was that he was highly sexualised and that his way of dealing with stress was through sexual activity.

Starting Point

[12] The charge of sexual violation by unlawful sexual connection carries a maximum term of imprisonment of 20 years. The maximum term on the other charges is 10 years imprisonment. These maxima together and in isolation reflect Parliament's views about the severity of this type of offending by adults against young children.

[13] There were a number of aggravating features in this case. All were recognised with varying emphasis by Judge Joyce and are depressingly common in this area. They included a pattern of grooming by Mr George for the purpose of gaining the complainant's trust and confidence; opportunism and exploitation; abuse of trust and confidence; and, perhaps most significantly, the effect of the offending both immediate and permanent on the complainant. She was sexualised or robbed of her innocence. Other aggravating factors which Mr James Carruthers emphasises for the Crown are the multiplicity of the offending, its totality, and its duration. In combination, without considering authority, these factors would appear to amply justify a starting point of four-and-a-half years or more.

[14] Nevertheless, Mr Grieve submits that the starting point was too high. He has carefully analysed the facts. He places them in three categories consistent with the summary above. He is correct that in each, viewed in isolation, Mr George's offending was at the lower end of the scale of severity. But once the offending is combined and its totality and effect are taken into account, the severity is of a different and much more culpable scale.

[15] In support Mr Grieve cites *R v B* (1986) 2 CRNZ 528 (CA). In that case a man committed a range of sexual offences against two de facto stepdaughters. In each case he was living with the mother of the child. Mr Grieve points out that the most serious offences in *R v B* were partial sexual intercourse with the younger child and full sexual intercourse with the older 12 year old. The trial Judge imposed a sentence of 18 months imprisonment following pleas of guilty. The Crown appealed. The Court of Appeal increased the sentence to three years imprisonment. While acknowledging that there is no tariff in this area, Mr Grieve submits that the end result in a case which involved more serious offending was a starting point comparable to this case.

[16] However, the decision in *B* is distinguishable. Sentencing levels in this area have altered considerably since 1986. The Court of Appeal was influenced in *B* by the comparative rarity of this type of offending. The maximum sentence for sexual violation by unlawful sexual connection was then 14 years. The legislature saw fit to increase that maximum to 20 years in 1993. Consequently sentencing levels for sexual offending against children have undergone a significant upward shift.

[17] The Court in *B* was concerned to preserve a sentencing Judge's right to impose a humane sentence taking account of the stepfather's psychiatric problems and his pleas of guilty. Had it not been for those factors, the Court recognised that a sentence of five years may have been appropriate. It also acknowledged that the long term effects of this type of offending on the victims 'are incalculable'.

[18] Mr Grieve also sought some support from *R v M* [2000] 2 NZLR 60 (CA). That was also an appeal by the Solicitor-General. Other than to state by way of summary that sentences in this area show starting points ranging from two to five years, the Court of Appeal's decision is of no direct assistance. And, as Mr Carruthers submits, the Court of Appeal has since expressed the opinion that the starting points at both ends of the spectrum identified in *R v M* may be considered conservative: *R v Tranter* CA486/03 14 June 2004. Significantly in *R v M* the Court of Appeal increased a sentence from a suspended term to one of three years imprisonment following findings of guilty after trial of single charges of unlawful sexual connection by digital penetration and indecent assault on a 15 year old girl.

As I have already noted, the duration and multiplicity of Mr George's offending places it in a different category of severity.

[19] I am in no doubt that the starting point of four-and-a-half years imprisonment was within the range available to Judge Joyce. Indeed, Mr George may count himself fortunate that a higher figure was not adopted; I would not have interfered if the Judge had used a starting point of five to six years imprisonment. I am not satisfied that the end sentence of three years imprisonment is excessive. Accordingly, Mr George's appeal is dismissed.

[20] I wish to express my appreciation to counsel, both Mr Grieve for his oral argument and Mr Speed for his written submissions, and Mr Carruthers for the Crown.

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Rhys Harrison J