

- a) One count of doing an indecent act on a young person, contrary to s 134(3) of the Crimes Act 1961, for which the maximum penalty is seven years imprisonment (count 1);
- b) One count of sexual connection with a young person, contrary to s 134(1) of the Crimes Act, for which the maximum penalty is ten years imprisonment (count 3);
- c) One count of indecent assault, contrary to s 135 of the Crimes Act, for which the maximum penalty is seven years imprisonment (count 4); and
- d) One count of doing an indecent act on a child under 12, contrary to s 132(3) of the Crimes Act, for which the maximum penalty is ten years imprisonment (count 6).

[2] Mr Pene was sentenced by Judge Spear on 26 November 2009 to six years three months imprisonment, with a minimum term of imprisonment of three years six months.

[3] He appeals against sentence on the basis that the starting point was too high for the lead offence (which was count 3¹), that the discount for his guilty pleas was inadequate and that a minimum term of imprisonment should not have been imposed.

[4] The Crown submits that the sentence imposed was within the range available and that the discount and minimum term of imprisonment were appropriate.

Background

[5] This background is taken from the Crown submissions. We understand from both counsel that this is based on the Crown (as against the police) summary of facts and was the agreed basis of Mr Pene's guilty pleas.

¹ Set out at [1]b) above.

Count 1

[6] Mr Pene was employed as a truancy officer at a North Island High School. Between January 2005 and December 2005 the first complainant became known to Mr Pene through his work at school. She was 15 years old at the time. Mr Pene purchased new trousers, food and cigarettes for the complainant.

[7] On the pretence of an overnight stay related to participation in a new truancy programme, Mr Pene took the first complainant to his home sometime between 1 January 2005 and 31 December 2005. Mr Pene had previously spoken to the girl's mother about the programme and the need for an overnight stay.

[8] At the house, Mr Pene questioned the complainant in relation to the programme and got her to complete some paperwork. He had a bed consisting of a double mattress made up on the lounge floor. Later that evening, the complainant got into bed and Mr Pene got into bed shortly afterwards. He placed his arm around the complainant hugging her and then felt one of her breasts with his hand.

[9] The complainant then left the bed. Mr Pene approached her and apologised, telling her it was something he had to do as it was part of the course. He had to see where her boundaries were and she had to know when to stay safe. The next day the complainant left the address without further incident.

Count 3

[10] The next incident, which forms the basis of count 3, involved another 15 year old complainant and occurred between 1 June 2005 and 31 December 2005. Again Mr Pene knew this complainant from his work. He called her into a Dean's office and told her that girls could earn \$500 per week doing naked pictures. He arranged to pick her up from just outside the school grounds and wore a jersey over his uniform. He took the girl to his home and into his son's room, where he told her to take off her clothes and get on the bed. She did so and lay naked on her back on the bed.

[11] Mr Pene removed his own clothing and stood in the room naked with an erection. The girl followed Mr Pene's instructions which included masturbating herself, playing with her body and spreading her legs while Mr Pene took photographs with a digital camera. Mr Pene told the girl to open her legs wider and instructed her on how to position her body for specific poses. At one stage he applied lubricant to the girl's genitals and inserted his fingers into her vagina for approximately 15 minutes.

[12] Mr Pene also instructed the girl to get into a "69" position on top of him. He repeatedly requested her to put his penis into her mouth. The girl told Mr Pene that she did not want to continue anymore and they left the address a short time later. Mr Pene returned the girl to school and wrote a letter excusing her absence. He also purchased food and cigarettes for her at various times.

Count 4

[13] The next victim was a 17 year old student attending the High School where Mr Pene worked. She told Mr Pene some of her personal problems and he gave her his phone number and said she could call him if she ever needed to talk. At approximately 9.00 pm on 26 November 2007, the victim telephoned Mr Pene seeking support as she was depressed. Mr Pene offered to pick her up, but, after having received directions from Mr Pene, she drove to his address.

[14] Later that evening, when the other occupants of the house had gone to bed, Mr Pene told the complainant that she was in no condition to drive. He asked her to sit next to him on the couch in the lounge. Mr Pene wrapped himself in a blanket and slowly edged himself closer to her. He then lay on the couch with his head on the complainant's lap. The complainant attempted to stand up, but Mr Pene pushed her down forcefully and whispered to her to relax. He undid the button and fly of her jeans and slid his hand inside her underwear and touched her genitals. The girl got away from Mr Pene and ran away from the property.

Count 6

[15] The last victim was 11 years old at the time of the offending, which occurred between 31 May 2008 and 2 June 2008. Mr Pene sat on a couch next to the complainant and placed a finger through her fly that was open and stimulated her genital region by wriggling his finger on top of her underwear.

The sentencing remarks

[16] The Judge noted that he based his sentence of the Crown summary of facts and no issue was taken by Mr Pene in respect of that summary. The Judge considered that the summary of facts showed, particularly in relation to the older three girls against whom Mr Pene offended, that he had put in place a scheme of deception that was clearly designed to enable him to get these young girls alone and to offend sexually against them. The Judge considered it was brazen offending on Mr Pene's part because he had approached their parents in some cases and convinced them of his sincerity and the integrity of his intentions to help these young girls address certain difficulties in their lives.

[17] The Judge said that he was in no doubt that Mr Pene's behaviour in respect of all four girls was predatory and carefully planned. The schemes were carefully constructed and the conduct was callous and deplorable, requiring the firmest of responses from the Court. In the Judge's view, the offending involved a degree of sexual grooming to a point where Mr Pene was able to obtain the trust of these troubled young girls and, using the influence that he had gained over them, require them to subject themselves to sexual acts with him. In the Judge's view, the abuse of trust that was involved here was extreme. It was also serious offending of its various types.

[18] The Judge accepted, in relation to count 3, that there should be a distinction drawn between the cases that deal with full sexual intercourse with a girl under 16 and those where the offending stops short of full sexual intercourse. However, this

was with some hesitation because he considered that the harm done to the complainants would be almost as much as if there had been full sexual intercourse.

[19] The Crown had suggested a starting point of between six and seven years in relation to count 3 before the other offending was taken into account. The Judge considered that was too high. He therefore took a starting point for count 3 of five years imprisonment. The Judge agreed, however, with the Crown submission that there should be an uplift of a further two years in respect of the offending against the other three complainants in order to take the totality of offending into account.

[20] In the Judge's view, the aggravating features of the offending were that: there were four separate victims; there was a substantial age difference between the victims and Mr Pene, given that Mr Pene was in his early 50s at the time of the offending; and the behaviour was predatory behaviour that was carefully constructed and undertaken. He also took into account that the offending occurred over a three year period.

[21] The Judge then turned to personal factors. He considered that the guilty pleas, having been entered at only 11 days prior to the trial when there was plenty of opportunity to enter those pleas earlier, merited a discount of no more than ten per cent. The Judge noted that Mr Pene had expressed remorse for his offending but considered that was easy to say at sentencing and it would be quite another thing to see whether Mr Pene remained remorseful with due empathy for his victims upon his release from prison.

[22] The Judge noted that the pre-sentence report identified that Mr Pene was considered at a high risk of re-offending but recognised that this assessment was made with a rather blunt tool and based upon the police summary of facts rather than the Crown summary of facts. That notwithstanding, the Judge considered that Mr Pene must present a real risk of re-offending unless there is a substantial change in his attitude.

[23] Taking all these factors into account, the Judge considered the appropriate sentence on count 3 was one of six years and three months imprisonment. For the

other offending on counts 1, 4 and 6 the Judge imposed a sentence of two years imprisonment to be served concurrently.

[24] The Judge considered that the one third of the lead sentence provided by s 84(1) of the Parole Act 2002 would be insufficient for the purposes of accountability, denunciation and deterrence. This was because there were four victims and the offending occurred over a three year period. The Judge therefore imposed a minimum period of imprisonment of three and a half years.

Was the starting point too high?

[25] Mr Bean's first submission on behalf of Mr Pene is that the starting point taken by the Judge was too high. As to this he refers to a number of decisions, including, in particular, *R v Burdett*² where a starting point of three and a half years imprisonment was adopted and upheld on appeal.

[26] In our view, the starting point was one well available to the Judge given the aggravating features of the offending. The uplift was also appropriate under the totality principle. We accept the Crown's submission that the offending involved a high level of premeditation. Indeed, the victims were vulnerable not just because of their age but because of specific problems that they appear to have been having.

[27] In our view, the Judge was correct to characterise this as predatory offending that involved the grooming of the victims. The harm to the victims was consequently high. We note that the offending involved four different victims and spanned a three year period. We also accept the Crown submission that Mr Pene's actions in photographing the victim in count 3 should be considered to be an added aggravating (and degrading) factor.

[28] We consider that the Judge was correct in considering this to be very serious offending which merited a stern response from the Court. This ground of appeal fails.

² *R v Burdett* [2009] NZCA 366..

Was an adequate discount given for the guilty pleas?

[29] It is submitted on behalf of Mr Pene that it had been communicated and noted at each callover from 10 June 2009 that resolution of the matter was possible. That resolution was achieved through Mr Pene entering guilty pleas and thus the four complainants avoided the stress of giving evidence at trial. Further, Mr Pene shows remorse and empathy for his victims. In these circumstances it is submitted that a larger discount for the guilty pleas should have been afforded.

[30] The Crown submits, and we accept, that the fact that a possible resolution may have been indicated at an earlier stage is not a factor meriting a greater discount. The fact remains that the guilty pleas were not entered until 11 days before trial and the complainants had no certainty they would not be required to testify until that time. It is clear too that the Judge was sceptical of Mr Pene's claims to be remorseful and empathetic towards his victims. In these circumstances, a ten per cent discount was the maximum that could be expected.

Should a minimum term of imprisonment been imposed?

[31] It is submitted on behalf of Mr Pene that, given the largely optimistic pre-sentence report, a minimum term of imprisonment was not appropriate. It is noted that the overall assessment in the pre-sentence report of Mr Pene's risk as being high was coloured by the fact that he had not yet been able to engage in any programmes. This is a matter that the Parole Board will take into account on any application for parole.

[32] The Crown submits that, while the Parole Board will be able to monitor Mr Pene's progress, that is insufficient to answer the need to address the issues of accountability, denunciation and deterrence in relation to this particular pattern of offending. It was this that led the Judge to impose the minimum term of imprisonment.

[33] We accept the Crown submissions. Given the seriousness of the offending, we would in fact have likely held there to have been an error of principle if a minimum term had not been imposed.

Result

[34] The appeal against sentence is dismissed.

Solicitors:
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