EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT MANUKAU

CRI-2016-092-008218
[2018] NZDC 3332

THE QUEEN

v

TREVOR IAN GIBBS

Hearing: 23 February 2018

Appearances: J Rhodes for the Crown
A Maxwell-Scott for the Defendant

Judgment: 1 March 2018

NOTES OF JUDGE R J McILRAITH ON SENTENCING

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[1] Mr Gibbs, on 8 December you were convicted of the following representative charges after being found guilty by a jury of your peers: charge 1, a charge of indecency between man and boy; charge 2, a charge of indecency between man and boy; charge 3, a charge of indecency between man and boy; charge 4, an indecency between man and boy; charge 5, sodomy, and charge 6, indecency between man and boy.

[2] At this point I do not propose to summarise in any great detail the facts, but I do wish to briefly note them. In my view, they are summarised very carefully and objectively in the Crown submissions.

[3] You were a music teacher at [school details deleted] . The victim was a boarder at that school and was aged [under 13] when he first began attending the school. He [details deleted], and it was within that context that you began offending against him.

The offending started by you placing your hands on his abdomen in the guise of improving his singing technique. This progressed gradually over time to you touching the victim's genitals on top of his clothing, and then touching the victim's penis with your hand. The victim clearly described a progression of offending that could broadly be put in the category of grooming.

[4] The victim was welcomed into your family and home, including subsequently becoming [relationship details deleted], which created the opportune environment for further offending. You would frequently, to the extent of multiple times per week over a number of years and in multiple locations, do the following things: put your hand on the victim's penis, induce the victim to masturbate you, place the victim's penis in your mouth and perform oral sex on him, induce the victim to give you oral sex, including ejaculating, place your penis in the victim's anus and sodomise him, and induce the victim to put his penis in your anus, although typically that did not happen.

[5] In terms of your personal circumstances, you have two previous convictions for indecent assault on a boy aged 12 to 16. That offending took place in [date deleted], prior to this offending.

[6] I have received a pre-sentence report from Community Corrections dated 16 February 2018 that I requested in advance of this sentencing. In it, it is reported to me that you continue to deny your offending in its entirety. You are stated to show no insight into your offending and to demonstrate no responsibility or remorse. You are assessed, despite your age and the historic nature of this offending, as being of high risk of re-offending and harm. A sentence of imprisonment is therefore recommended.

[7] I have been provided in advance of today with a statement from your wife and a letter to you from your daughter. Your wife describes the distress and effect of these charges upon you and your family. She expresses her concern regarding the effect of a term of imprisonment upon you. Your daughter writes very fondly of her father.

[8] I have today been provided with additional references and letters. [Referee names deleted]. All of those people speak very highly of you and speak very highly of your contribution to society and education.

[9] I have received a victim impact statement, and it has been read to the Court today. I do not propose to go into any detail about what he has said, we have all heard it. All I will say is the effect of your offending has been predictable. It has been significant, and it has been profound.

[10] When sentencing, I am of course guided by the purposes and principles of sentencing set out in the Sentencing Act 2002. I accept the Crown's submissions, and I do not understand Ms Maxwell-Scott to disagree in any respect, that the relevant purposes of sentencing here include holding you accountable for the harm you have done both to your victim and to our community, promoting a sense of responsibility in you for what you have done, and denouncing what you have done and deterring not necessarily you, but more generally deterring others from committing such offences.

[11] In terms of the relevant principles of sentencing, they include taking into account the gravity of your offending and your culpability, the seriousness of your offending, the desirability of there being consistency in sentencing, the impact upon your victim, and the need to impose the least restrictive outcome that is appropriate in the circumstances.

[12] I want to say a bit about the sentencing approach in relation to historic offending, because that is important in any case of that nature. Rather than attempting to reinvent the wheel, the approach was very well summarised by Woolford J in the case of *R v Megchelse*,[1] which was referred to me by Ms Maxwell-Scott. What Woolford J says in that case is as follows:

> In relation to historic offending, it is fundamental that an offender can only be charged with offences as they were at the time of the offending, and only if the act constituted an offence at the time of the offending. Furthermore, an offender should not be subjected to punishment more severe than that which applied at the time the offending occurred. Accordingly, the Court of Appeal has repeatedly held that a sentencing Judge confronted with a case of historical sexual abuse should fix the starting point sentence based upon the sentencing levels at the relevant time.
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> In that respect, in both *R v R*[2] and *R v KJB*[3] the Court of Appeal recognised the difficulty of comparing starting points for sentencing purposes by

[1] *R v Megchelse* [2013] NZHC 251.
[2] *R v R* CA244/04, 2 November 2004.
[3] *R v KJB* [2007] NZCA 292.

> reference to historical cases. Starting points, if identified, were generally reflective of all aggravating factors, whether related to the offending or the offender. Accordingly, a sentencing Court should fix the starting point based upon the sentencing regime that applied in the late 1960s to late 1970s, which recognises the aggravating features of the case. It is then appropriate to consider whether any reduction should be made from the starting point in order to take account of any mitigating features.
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> This process does not involve attempting to reconstruct the sentencing mores of an earlier time. Rather, it is about looking at the sentencing regime of that era and trying to achieve consistency with it.

[13] Of course, Mr Gibbs the upshot of that is that the offending with which you are charged at the time had lower maximum sentences than equivalent offending today.

[14] In sentencing you Mr Gibbs, what a Judge is required to do is to set a start point for the offending. From that point, one looks at that start point and uplifts it for any aggravating or mitigating factors, and then one looks at the individual. So, when I am talking about start points, that is what I mean.

[15] Both counsel agree that the lead charge is the charge of sodomy. I have reviewed the written submissions and cases referred to by both counsel. Woolford J's review in *Megchelse* of a number of historical cases was of considerable assistance.

[16] The case of *R v Buchanan*[4] referred to by the Crown, however, was, to the extent it related to the offending in that case against the older of the two victims, the one that I found of most direct assistance. In that case, victim J was aged between seven and 12 in the period of offending. The age is therefore different, but there are a number of significant similarities, albeit that the offending in that case was in a home environment whilst this was in a boarding school. In that case, the aggravating features of the defendant's offending were identified by Toogood J. He identified the following aggravating features:

(a) The vulnerability of the victim by virtue of relationship to the defendant.

(b) The gross abuse of trust.

[4] *R v Buchanan* [2016] NZHC 632.

(c) The regular and repeated use of actual violence.

(d) The scale of the repetitive and regular offending over a seven-and-a-half-year period.

(e) The premeditated and manipulative nature of the offending.

(f) The serious physical and emotional harm inflicted.

[17] In this case, I accept entirely that there is no suggestion of any violence. I accept, however, the Crown's submissions that the aggravating features present here do have considerable similarity, other than that factor.

[18] Looking at them, the first is that of vulnerability. The victim here was a young man at boarding school, away from home and away from the supportive environments that may otherwise have been expected. There was a significant breach of trust. You were a teacher, a confidant. He was a young pupil. The scale of the repetitive and regular offending over several years, as was detailed by the victim, is a significant aggravating factor, as also was the premeditated and manipulative nature of that offending, also as detailed by the victim. Finally, of course, there is the serious emotional harm that has been caused to the victim.

[19] The start point set for Mr Buchanan in relation to victim J was seven years' imprisonment. That was then uplifted for other offending.

[20] Ms Maxwell-Scott submits on her review of the cases that a start point of six years is appropriate for the sodomy charge. The Crown submitted six to seven years. Taking into account my review of the cases referred to and the aggravating features in your offending, I set the start point at six and a half years' imprisonment.

[21] There must be an uplift to that start point for your other offending. There were, as I have noted earlier, five representative charges of indecency. They were each in and of themselves significant offending involving many of the same aggravating features. The Crown has submitted that an appropriate uplift would be between one

to two years' imprisonment. Ms Maxwell-Scott submits one year. I agree with her. The start point will be uplifted by one year to reflect the other offending, the charges of indecency. Each will carry a concurrent one year period of imprisonment. That takes us to a total period of imprisonment of seven and a half years.

[22] The next question is whether there should be an uplift for your previous convictions. Ms Maxwell-Scott has submitted there should not be. The Crown in its written submissions submitted that there should be an uplift of between six months to one year. Mr Rhodes stepped back slightly from that written submission today, and I agree with him doing so. I accept Ms Maxwell-Scott's submissions. I will not uplift for your prior convictions.

[23] So, we are at the point of seven and a half years' imprisonment. At that point for the purpose of mathematics I find it easiest to convert that to a period of months, and that is a period of 90 months.

[24] I now turn to the question of discounts from that period of imprisonment. As you will have heard me discuss during counsels' submissions, there is no dispute that you are not entitled to any discount for a guilty plea, of course, because you denied your offending and continue to do so. There is also no dispute that you are not entitled to any discount for remorse, willingness to take rehabilitative steps, or anything of that type. There is also no dispute that you are not entitled to any discount for prior good character.

[25] The Crown says that there ought to be no discounts from that starting point, or certainly that was the position taken in its written submissions. Mr Rhodes concedes today that there is an ability for me to consider your age and ill health, and he accepts that contribution to the community can be considered, although he takes a very different view than Ms Maxwell-Scott in terms of quantum.

[26] So, the first discount that Ms Maxwell-Scott seeks on your behalf is a discount for your age and your ill health. You will have heard her refer to case law. *R v Megchelse* and *R v Pennington*[5] are two examples of the cases to which she has

[5] *R v Pennington* [2017] NZDC 11030.

referred. On the basis of those cases, she seeks a discount of up to 25 percent from that start point. I have reviewed those cases, and as you will have heard me say to her, I do not consider that your circumstances are anything like those contemplated in the cases in which discounts of 25 percent have been provided.

[27] I have been provided with a letter from [a Doctor] of [name deleted] Medical Centre from 17 January this year. He does provide some detail of your health. He has been acting as your general practitioner since 1997. He refers to you having ongoing pains in your lumbar spine. You have not had surgery but have ongoing pain, and you have treatment with analgesics. He says that you also suffer from osteoarthritis of both knees, for which you have had bilateral knee replacements. Again, analgesia is required for ongoing management. You were diagnosed with diabetes in 2009. To date that has been managed with diet alone, but your sugar control has deteriorated recently and you may require medication. You are also on medication for high blood pressure and have been diagnosed with a disease of the colon. You are compliant with medication but you need regular monitoring for your diabetes, and you are currently awaiting excision of skin cancers from your neck.

[28] Ms Maxwell-Scott also referred to mental health and depression, and that was a matter that was raised with me during the trial, as I recall.

[29] While I am not satisfied that the amount of discount that ought to be provided under the case law to you is in the amount that Ms Maxwell-Scott has submitted, I do accept that there should be a discount to reflect both your age and your medical condition, given that I accept a period of imprisonment will be considerably harsher for you given those factors. The amount of discount I am willing to provide is 10 percent.

[30] The second discount sought by Ms Maxwell-Scott is in relation to your contribution to society and the damage to your family. There is not a lot of authority in that regard, but I accept that there are some cases that indicate a discount is available for such matters. What Ms Maxwell-Scott is really asking me to do is to be merciful in the circumstances. I have read the references that I referred to earlier. There is no doubt that you have made a significant contribution to society, both in the way

mentioned by Ms Maxwell-Scott and in the way covered by the references. It is a matter of real difficulty because, as the victim said in his victim impact statement, of course that type of reality is sometimes simply in the nature of this type of offending. But, I accept fully that what those people have to say must be taken into account, and I do not doubt for one second the genuineness of what they say. I am prepared to deduct 10 percent for those factors.

[31] The total discount, therefore, is 20 percent. That takes the sentence from 90 months' imprisonment to 72 months' imprisonment. That is a six-year term of imprisonment. I stand back at that stage, thinking from the totality perspective, is that an appropriate outcome? I am satisfied that it is. A period of six years' imprisonment is the appropriate outcome.

[32] Finally, I note that given the historic nature of your offending, the issue of a minimum period of imprisonment does not arise.

[33] The other practical matter I need to address is registration under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016. Given that I am sentencing you to a period of imprisonment, your registration on that register is automatic.

[34] That concludes the sentencing, Mr Gibbs.

R J McIlraith
District Court Judge