IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-092-005593
[2020] NZHC 1662

THE QUEEN

v

JAMES MORRIS (aka IAN CHARLES PHIPPS)

Hearing:	10 July 2020
Counsel:	T Cooper and A Al-Janabi for Crown JM Hudson and DGA Reece for Defendant
Judgment:	10 July 2020

SENTENCING REMARKS OF DOWNS J

Solicitors/Counsel:
Crown Solicitor, Manukau.
JM Hudson, Auckland.
DGA Reece, Auckland.

Introduction

[1] Mr Morris, you were found guilty by a jury in the District Court of sexual offending against five victims. It is common ground I must impose a substantial term of imprisonment. In issue is preventive detention. Preventive detention is an indefinite sentence. Your case was transferred from the District Court as the Crown contends preventive detention should be imposed. Your lawyers, Mr Hudson and Mr Reece, argue a long, finite prison sentence is adequate to protect the public.

[2] You have been here before. In 1997, Speight J sentenced you to preventive detention. The Court of Appeal quashed the sentence and substituted a six-year term of imprisonment. More about this soon.

The charges

[3] You were found guilty of 14 charges:

(a) Six of indecency between a man and boy.[1]

(b) Six charges of indecency with a boy aged between 12 and 16 years.[2]

(c) Two charges of indecent assault on a child.[3]

The facts

[4] You committed these offences between 1977 and 2017. Most of your offending is historical, but not all.

[5] Between 1977 and 1979 you were employed as a projectionist at a cinema. You were an assistant scout leader of Mt Albert St Jude's Scout Group. You were also involved with the Northcross Scout Movement. Your victims in this period I call L and T to protect their identity. These remarks will be transcribed and available to the public.

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1 Crimes Act 1961, s 140(1)(a) and (c). The maximum penalty is 10 years' imprisonment.
2 Crimes Act, s 140A(1)(a). The maximum penalty is seven years' imprisonment.
3 Crimes Act, s 132(2). The maximum penalty is seven years' imprisonment.

[6] L attended the first scout group. You befriended him. You drove him home some evenings. When L was 11 or 12, you took him to the cinema. You unzipped L's shorts and removed his penis. You masturbated L until he ejaculated. You then drove him home. You did this to L on another evening, again at the cinema.

[7] You met T through the second scout group. You drove him home after scouts one evening when he was 11, 12 or perhaps 13. You stopped on the way. You kissed T. You fondled his genitals and allowed him to do the same to you. You then placed T's penis in your mouth. You encouraged or permitted T to perform oral sex on you.

[8] You committed other sexual offences against T, all at the cinema. You caressed him, fondled his penis, and performed oral sex on him. You encouraged or permitted T to perform oral sex on you. Again, T was 11, 12 or 13.

[9] Between 1991 and 1994, you were employed as a projectionist at a different cinema. You there befriended the victim I call D. You took him to restaurants and gave him money. He was then 13 or 14. On 27 April 1992, you took D to Denny's. You rubbed the inside of D's thigh and put your hand through his hair. Other diners saw this and were worried. They confronted you. Police were involved. But, D said nothing to the Police. He was then 14.

[10] D went to your home when he was 14 or 15. You put your hand under his clothing. D tried to push you away. You persisted. You groped D's genitals.

[11] You repeatedly groped D's genitals on other occasions too. You also repeatedly touched and stroked his penis.

[12] Between 1993 and 1997, you were a projectionist at a third cinema. You met M at a public toilet. M was then 14 or 15 but gave you an age of 16. You developed a close relationship with M, despite being told by M's mother of M's real age.

[13] You repeatedly told M to perform oral sex on you. M did so at both the cinema and your home. You also repeatedly performed oral sex on M at your home.

[14] I move forward to your recent offending. X, a 10-year-old boy, lived nearby. X would often visit and stay with you until his mother got home from work. You developed a close relationship with X. You bought him gifts, including a teddy bear, confectionery and radio.

[15] Sometime between January and August 2017, you invited X to watch a cartoon in your bedroom. You and X were lying on your bed. You placed your hand into X's shorts and attempted to open his underwear. X moved away. He asked if he might urgently go to the toilet. X climbed out a window and ran home. He was 10.

[16] You engaged in similar conduct on other occasions by putting your hand down the back of X's pants on top of his underwear. On one occasion, X ran downstairs. On another, X said he had forgotten to give someone a message and he ran away.

Starting point

[17] Your offending has aggravating features, meaning things that make it more serious. It spans 40 years, albeit with a long hiatus between 1997 and 2017. You were, of course, in prison for some of this time. Much if not all your offending involved a breach of trust. There are five victims. All were vulnerable. You cultivated relationships with the victims to facilitate the offending. It was thus premeditated and cynical. Unsurprisingly, the victims have suffered harm. I pause to observe some victims read their victim impact statements this morning. I commend them for their courage.

(a) L says he lived with "these terrible memories for all his life". L says the offending has made him "homophobic" and "hypervigilant". L says he always sees the bad in everything.

(b) T says he feels guilty he did not disclose everything to the Police during initial investigation many years ago. T feels responsible you committed offences against others. T believes you stole his childhood and have contributed to his problems with alcohol and marijuana.

(c) D says he remembers the offending "like it happened yesterday". D feels angry about what you did, which he believes contributed to his involvement with crime and gangs. D believes you took his innocence.

(d) X says it was scary having you live so close. X says the offending caused him to "lose trust in a lot of people". X says he often feels uncomfortable because of what you did. X describes nightmares and feeling scared. X's mother says he would awake in the night and sound as though he were in excruciating pain.

(e) This leaves M. M's short statement records an absence of resentment and animosity. M implies the offending has not caused great harm. M's mother offers a different perspective of a profound abuse of trust.

[18] You have committed sexual offences before. In 1979, you were convicted of indecent assault of a boy aged under 16. You were fined. In 1980, you were convicted of two offences of doing an indecent act on a boy under 16. You were given six months' imprisonment. In 1982, you were convicted of indecently assaulting a boy under 16. You were given probation and fined. In 1987, you were convicted of doing an indecent act. You were given supervision and ordered to attend counselling. In 1990, you were convicted of 15 charges of doing or inducing an indecent act with a boy between 12 and 16, and one charge of anal intercourse with a person under 16. You were given a year's imprisonment.

[19] In 1997, you were convicted of a single but representative charge of indecent assault on a boy between 12 and 16. You were then known as Ian Phipps. The High Court imposed preventive detention. Speight J said you wished to reform, but you had said that before. The Judge said your record displayed "a consistent course of conduct".[4] The Judge believed you posed "a high risk of re-offending".[5] He said he would fail to protect the public "and other susceptible youths" if he did not impose preventive detention.[6]

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4 *R v Phipps* HC Auckland S30/97, 21 May 1997 at p 3.
5 At p 3.
6 At p 3.

[20] The Court of Appeal quashed that sentence later the same year. It considered a finite sentence adequate to protect the public. It substituted a term of six years' imprisonment.[7]

[21] The parties are not far apart in relation to the length of a determinate sentence. The Crown argues the starting point should be seven and a half years' imprisonment with a year added for your record. Mr Hudson contends the starting point should be five years, nine months' imprisonment. Mr Hudson acknowledges your record requires another year of imprisonment be added.

[22] The parties disagree about underlying methodology. The Crown contends I should apply contemporary sentencing standards, albeit with reference to the maximum penalties then available.[8] Mr Hudson says I should ask what the Court of Appeal would have added to the six-year term it imposed in 1997 had it known of all your offending to that point.[9]

[23] Mr Hudson's submission presupposes the Court of Appeal would have quashed preventive detention had it known of all your offending to then. Another difficulty is that not all your offending is historical. You committed sexual offences in 2017 too. To make matters more difficult, the Court of Appeal imposed the six-year term to deter further offending. For these reasons, its judgment is not a suitable vehicle on which to construct an additional determinate sentence. To do so would also be artificial as you have been out of prison for a long time. Today's exercise is far from some sentencing mop-up.

[24] Having read the cases provided,[10] I consider a seven-year starting point captures the totality of your offending and its aggravating features, bar one. For your record, I would add a year. So, if I were to impose a determinate sentence I would begin with the figure of eight years' imprisonment.

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7 *R v Phipps* CA196/97, 19 August 1997.
8 *R v Accused* (1998) 15 CRNZ 602 (CA) at 609. See also *R v W* (2006) 23 CRNZ 531 (CA).
9 By analogy to *Wilson v R* [2019] NZCA 584.
10 *R v Milligan* [2013] NZHC 118; *Pauling v R* [2019] NZHC 1929; *R v Kihi* HC Auckland CRI-2008-044-7949, 7 April 2009; *R v Parker* [2007] NZCA 534 at [44]; and *Camden v Police* HC Christchurch AP 2/90, 10 May 1990.

Mitigating features

[25] You are 67. You report sexual abuse by your father when you were seven or eight. You have no partner or children. You have experienced seizures since 1997 following an assault in prison. You have been prescribed anti-convulsant medicines. You have a history of self-harm traceable to at least 2002, and a related history of attendances on mental health services. A picture emerges of a lonely, inadequate man with a difficult upbringing. I would deduct six months for this constellation.

[26] I would make no allowance for remorse. You protested your innocence to Ms Pula, who wrote your pre-sentence report. You told her you did not commit these crimes. You told Dr Jacques, a consultant forensic psychiatrist, none of the victims had refused you and you had not threatened or physically hurt any. However, you also described shame. You told Dr Pillai, the Director of Area Mental Health Services, you could not recall the older offences. You implied some of your offending was the product of depression. You also said one of the victims fabricated the allegations because you confronted him about theft.

Preventive detention

[27] This brings me to preventive detention. It is common ground this sentence is *not* available for your offending in relation to L and T. Your offending against them was committed when preventive detention was a different beast; it required *previous* sexual offending. Your offending against L and T occurred before you were convicted of any sexual offence. However, it is also common ground your offending against the other victims—D, M and X—qualifies for preventive detention.

[28] Preventive detention may be imposed when a person is convicted of a qualifying offence, was 18 years or over at the time that offence was committed, and the Court is satisfied the offender is likely to commit a qualifying offence after serving a finite term.

[29] There is no dispute the first of these two conditions are met. The question is whether you are likely to commit a qualifying sexual offence on release. Even then a discretion remains. Preventive detention is not a sentence of last resort, but it is

exceptional. A long but determinate sentence is preferable when that would adequately protect the community.

Risk of commission of a qualifying offence?

[30] Ms Pula considers you pose a high risk of further sexual offending. Her assessment is based on the number of victims and your criminal history. Dr Pillai considers you pose an above average risk for similar re-offending compared to other sexual offenders. Dr Pillai says this reflects your chronically unstable psychological state, your lack of capacity for stable relationships, a persistent deviant sexual interest, your pattern of offending, and your lack of social support. Dr Jacques considers you pose a high risk of committing similar qualifying sexual offences absent "adequate interventions, monitoring and supervision".

[31] I am satisfied you are likely to commit another qualifying sexual offence on release from a finite sentence. You have been committing sexual offences against children and young people for much of your adult life. I do not overlook the experts' opinion that risk of sexual re-offending typically reduces as one gets older. You were 64 when you repeatedly abused X. Nor do I overlook the experts' observation you may benefit from psychological interventions, counselling and programmes, including a sexual offenders programme. You completed the Te Piriti Sexual Offender Programme more than 20 years ago. I have been given a prison record confirming this. That programme might have helped you remain offence-free for many years. However, it did not prevent your repeated 2017 offending against X.

[32] My discussion thus far has captured the pattern of your offending, the harm you have caused the community, your risk of re-offending, and your efforts to address its causes. This brings me to the very important principle a long finite sentence is preferable when it would provide adequate community protection.[11]

[33] Mr Hudson stresses this principle. He submits a long finite sentence would be adequate to protect the public, especially as an extended supervision order may be imposed on you, and you also will be subject to the Child Sex Offender Register.

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[11] Sentencing Act 2002, s 87(4)(e).

Mr Hudson reminds me of your age, that you were offence-free for many years, and most of your offending is historical. Mr Hudson observes Dr Jacques appears to favour a finite sentence. I acknowledge that opinion. I acknowledge too Dr Jacques' associated expertise.

[34] I consider preventive detention necessary. I consider no other sentence adequate. First, you continue to pose a risk of re-offending despite your age. You are the exception.

[35] Second, when it quashed preventive detention, the Court of Appeal gave you a final warning. It said this was your "last chance".[12] I believe that Court would not have quashed preventive detention had it known of all your offending to that point.

[36] Third, your engagement with treatment did not prevent the 2017 offending against X. I do not overlook this offending involved lesser indecencies. That said, it was repeated, premeditated and cynical. You groomed X. You cultivated a relationship with him to indulge your desires. Fortunately, X tended to resist by running away.

[37] Fourth, you are at best ambivalent about what you have done. You describe shame, yet you did not plead guilty. You appear to have acknowledged aspects of your offending to Drs Jacques and Pillai, but you accuse one victim of fabrication. You also emphasised apparent consent and a lack of coercion. You told Ms Pula you did not commit these crimes. You protest your innocence. The mix is unsettling especially as meaningful prospect of reform begins with an acknowledgement of responsibility.

[38] Fifth, unlike preventive detention, a finite term offers limited incentive for reform.

[39] I must impose a minimum period that reflects the gravity of your offending, or protects the public, whichever is longer.[13] The period must be at least five years.[14] A finite sentence of seven and a half years' imprisonment could have attracted a

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12 *R v Phipps*, above n 7, at p 7.
13 Sentencing Act, s 89(2).
14 Section 89(1).

minimum period of four years and 11 months, so just under five years. That would have been the longest available minimum.

[40] I fix your minimum period at five years. This figure is very close to—but just above—what I could have been imposed had I made your sentence finite. It recognises your age.

Sentence

[41] Mr Morris please stand. On every charge in relation to D, M and X, I sentence you to preventive detention. You must serve a minimum period of five years.

[42] On the remaining charges in relation to L and T, I sentence you to three and a half years' imprisonment. All sentences are concurrent, meaning they run at the same time. The effective sentence—as you know—is preventive detention.

[43] Stand down.

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Downs J