IN THE COURT OF APPEAL OF NEW ZEALAND

C.A.113/83

THE QUEEN -v- PETER DANIEL HARRISON

CORAM: Woodhouse P
Cooke J
Bisson J

Hearing: 21 September 1983

Judgment: 26 October 1983

Counsel: D J Taffs for appellant
C A McVeigh for respondent

JUDGMENT OF THE COURT DELIVERED BY BISSON J.

In a District Court jury trial at Christchurch on the 26th and 27th May 1983, the applicant was found guilty on both counts in the indictment, first, that on the 25th day of January 1982 at Christchurch, being a male over the age of 21 years, he did indecently assault James Patterson Price a boy then aged 15 years; and secondly, that at the same time and place, being a male over the age of 21 years, he did an indecent act upon the same boy. He was sentenced to 2 years imprisonment, and has applied for leave to appeal against both conviction and sentence.

The boy alleged that after meeting the applicant at a go-cart centre about 4:00 p.m., he had gone

to the applicant's house where he was offered $5.00 if he would like to have his photograph taken, the applicant saying that he liked taking photographs of the human body of young children. The applicant then took a series of photographs of the boy, in some of which he was completely naked and his genitals were clearly shown. Following that, the boy alleged he was shown a photostat photograph on the applicant's bedroom wall of a boy with an erect penis, and the applicant told him that that is how he wanted the boy's penis to look. The applicant then started sucking the boy's penis. Next day the Police executed a search warrant at the applicant's house and recovered a camera containing a film and various magazines and photographs. When, later that day, they apprehended the applicant in the street, he denied that the boy had been to his house the previous night. At the Police Station he was shown the photographs, which had been developed from the film in the camera, by Detective Barnett, who said the applicant passed the comment that he did not consider them indecent. The applicant made a written statement in which he said :

> "An allegation of indecent assault has been put to me, among a lot of other details, but I strenuously deny the allegation of indecent assault. A lot of detail in relation to my personal alleged way of life has been put to me by these detectives as having some bearing on these allegations. But whatever may or may not be true, my associations are with the adult community. That is all I wish to say, on the advice of my solicitor."

At an early stage of the trial counsel for the defence raised an objection to the admission in

evidence of various items which had been recovered by the Police from the house of the applicant. They included photographs on the bedroom wall, Paedophile Information Exchange material, and assorted photographs of young boys. During the course of argument counsel for the defence made certain admissions for the purposes of the trial - namely, that it was admitted by him on behalf of the accused that the boy was in the house, that he was naked, that it was the applicant who took the photographs of him, and the production of those photographs of the boy would not be objected to. The Judge inspected the material to which objection had been taken and, in giving his reasons for the admission of the evidence, said :

> "It seemed clear therefore that the fundamental issue in the case which the jury ultimately will be required to determine is whether the events which occurred were merely an innocent association, for artistic purposes or whether, on the other hand, as the Crown contends, the dominant purpose of the exchange was sexual and that in the course of it there took place the assault and the indecent act which are the subject of the two specific counts."

And in order to consider the relevance, probative force, and prejudicial effect of the evidence in question, the Judge had regard to the principles set out in the judgment of this Court in Te One (1976) 2 NZLR 510. His conclusion was that the material which the Crown wished to tender in evidence was relevant, and ought not to be excluded in the exercise of his discretion.

On opening the case for the applicant in this Court, Mr Taffs announced that he did not advance his case on the photographs on the bedroom wall, which

the boy had seen while in the applicant's bedroom, but directed his submissions to the other material which the boy had not seen but which was found by the Police when searching the premises. Mr Taffs submitted that the material he challenged was either inadmissible as not relevant to any issue before the Court or, if admissible, should have been excluded by the Judge in exercise of his discretion on the grounds that its prejudicial effect was out of all proportion to any probative value.

This is not a case where similar fact evidence is involved, where the Crown seeks to adduce evidence which tends to show that the applicant has committed an act or acts similar to those with which he is charged but on another occasion. It is a case in which publications and photographs found in the possession of the applicant are sought to be produced in evidence, to rebut a defence of innocent association. Such evidence would not be admissible, of course, if it merely went to show that the applicant is a person likely, because of sexual propensity, to have committed the offences for which he is being tried - nor in circumstances where its prejudicial effect would require its exclusion in accordance with well-established principles. So that it was important for the Judge, in considering the admissibility of the evidence, to identify the issue to which the evidence might be considered relevant. On the one hand the prosecution case was that the applicant's photographic approach to the boy was but the prelude to

indecent sexual acts by him upon the boy. On the other hand, taking into account the admissions that had been made, there was an affirmative defence that the applicant had a genuine photographic interest of an artistic nature, that he committed no indecent acts upon the boy, and that his associations - that is, sexual associations - were with the adult community. That is to say, the issue was one of intent. Just what was the relationship between this man and this boy on that occasion? Were his intentions and actions innocent and limited to photography, or were his intentions and actions of an indecent sexual nature? As indicated, the applicant's defence is commonly referred to as one of "innocent association" but, put another way, the issue was whether the boy was lying.

Having settled the principal issue before the Court, the next question was whether the challenged evidence is relevant to that issue. The relevance of incriminating articles found in the possession of the accused has been considered in many cases. In Te One (supra), this Court considered the question in the context of charges of supplying heroin and cannabis. The defence alleged the prosecution evidence was untrue. In delivering the judgment of this Court, Cooke J. said, at p.513 :

> "Evidence must be excluded if it can do no more than show that because of his previous criminal conduct or his character the defendant is likely to have committed the crime charged; but, notwithstanding that it shows such things, it will be admissible if

> "in some other way it has a sufficiently material and logical bearing on the charge. It is enough to refer to R v Boardman (1975) AC 421; (1974) 3 All ER 887, the latest examination at high level of authority of the subject of similar fact evidence. ... ... And specifically as to the results of a search at the time of arrest, Lord Sumner in Thompson v. The King (1918) AC 221 :
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> > '... the fact that evidence of articles found on the premises of accused persons is constantly given without much question, though I doubt not in the vast majority of cases quite rightly, is really only misleading, unless at the same time we ask the question what exactly does this purport to prove and by what probative nexus does it seek to prove it.' (ibid, 236).
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> It may be as well to state explicitly what is implicit in Lord Sumner's words - that the mere fact that certain things have been found in the possession of a defendant at the time of his arrest does not automatically make evidence of that finding admissible against him."

In Te One, this Court held the evidence to be admissible as confirmatory or corroborative of the evidence of the main Crown witnesses as to their negotiations with the defendant. In the present case, we take the same view that the exhibits were both confirmatory or corroborative of the evidence of the complainant and relevant in themselves to rebut the affirmative defence that they merely reflected an artistic feeling of the accused for such material and that he had no sexual interest in boys.

We should add that this is not a case in which the exhibits point to the applicant having committed indecent acts of a similar kind with others. And, in terms of prejudice, in the end it is for the Judge to make a commonsense decision in the circumstances of the particular case before him.

As Lord Morris said in Boardman (supra) :

> "... at whatever stage a judge gives a ruling he must exercise his judgment and his discretion having in mind both the requirements of fairness and also the requirements of justice." (ibid, 439; 893).

We have no doubt that in the circumstances of this particular case the Judge made the right decision. The photograph of the boy with the erect penis had been removed from the bedroom wall prior to the Police search and was in a suitcase with some of the other exhibits. Taken as a whole, they strongly supported the boy's allegations and rebutted the applicant's defence that his interests were confined to artistic photography and sexual relations with adults. The evidence has positive probative value, and its cogency was such that we see no occasion to consider the exercise of the Judge's discretion not to exclude it as other than reasonable.

Leave to appeal against conviction is accordingly refused, and we turn to the application for leave to appeal against the sentence of 2 years imprisonment.

Mr Taffs pointed to several factors in support of a shorter term of imprisonment - that Harrison has no previous record of offending; the lack of any physical violence or threats by the applicant; the age of the complainant (15 years) and the fact that he went voluntarily and uninvited to the home of the applicant;

the applicant's otherwise good character and positive attributes; the applicant's willingness to accept counselling and help for a difficult sexual deviation. Mr McVeigh, in reply, submitted that the applicant was completely unrepentant; and the Judge himself had thought the boy very unsophisticated for his age. He said :

> "The sexual views which you apparently hold are your own business and concern. When you inflict them on a 15 year old boy, leading him on with talk of a job and then committing these indecencies on the pretext of photographing him for artistic purposes, they become the concern of the community. This is a serious case of its kind."

However, taking into account sentences in comparable cases, we are satisfied that in the particular circumstances of this case, and for a first offence, the sentence of 2 years imprisonment was excessive. Accordingly, the application for leave to appeal against sentence is granted, the appeal itself is allowed, and the sentence is reduced to imprisonment for 1 year.

McBrien J.

Solicitors for appellant: D J Taffs Esq, Christchurch.

Solicitors for respondent: Crown Law Office, Wellington