IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 247/85

THE QUEEN

v.

K

Coram: Cooke J. (presiding)
McMullin J.
Tompkins J.

Hearing: 10 December 1985

Counsel: Miss Shirley Smith for Appellant
K.G. Stone for Crown

Judgment: 10 December 1985

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LAW LIB

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

H K applies for leave to appeal against a sentence of imprisonment for seven years imposed on him in the Wellington High Court on 7 June 1985 following pleas of guilty to the crimes of incest and rape. These were manifestations of a course of conduct by him with his 13 year old daughter, conduct which occurred during a period of about 18 months.

The rape may be described as one of the most serious incidents in the course of that conduct, in that it involved some degree of physical force, but the conduct as a whole was essentially in the nature of incest rather than the more ordinary type of rape. We say that not in any way to palliate the crimes but to put them into their proper perspective. As the Court has had occasion to mention more

than once, incest cases are coming increasingly to notice, whether because the incidence of the crime is on the increase or because it is reported more often is not clear.

Some review of existing sentencing levels was undertaken in R. v. B. [1984] 1 N.Z.L.R. 261. We should mention that counsel for the appellant referred us to R. v. K. [1984] 1 N.Z.L.R. 264, but it is to be noted that, as pointed out in that judgment at 271, there was no application for leave to appeal against sentence there. These incest cases are a grave problem and no doubt there are different opinions responsibly held as to how they should be approached from the point of view of sentence or penalty. In the absence, however, of any change in the relevant legislation and any significant social research leading to such a change, this Court has litle choice but to continue to approach the subject, in cases where there are no special circumstances, on the more or less conventional lines indicated in R. v. B.

The present case is one which is fairly typical, in the sense that it is incest between a father and a teenage daughter continuing over a considerable period. It is not unusual either in that, since the offences and now that the father is in prison, the family - including his wife and the girl in question - have been supportive of him. There is ground in the information before us for accepting that the wife is willing to reconcile with him. There are tragic features in his background. His youth was one of poverty

and deprivation. While the psychiatric report available to the Court is necessarily largely based on information supplied by the appellant himself, there is no reason to doubt the general tenor of the report and the indications both there and in the probation report of conduct on the part of the boy's father which appears to have had a lasting and unfortunate effect on his personality.

Now, though, he is 33 years of age and it cannot be suggested that he was ignorant that what he was doing was wrong, although it can be said that he had little insight into the possible serious and permanent psychological effects on the daughter. We have no specific information about those. What has just been said is merely a general comment as to the risk which is ever-present in these cases.

Another feature regrettably not uncommon is the predominance of alcohol in this man's way of life. He is not an alcoholic but it is evident that under the influence of alcohol he does descend to conduct that does not otherwise come naturally to him. There are some things on the credit side; particularly his relationship and help with his haemophiliac son and his own school record as a boy.

While the effects on the family as a whole are not to be overlooked, the fact remains that crimes such as these are very serious and, as already mentioned, in the present circumstances the Court can only continue to impose substantial penalties. The term decided on by the High

Court Judge is a long one but we do not say that it would necessarily be wrong, except for one feature. As Miss Smith has pointed out, the Judge made no express reference in his sentencing remarks to the accused's pleas of guilty to both charges. It may be that the Judge had these in mind, but counsel frankly accepts that if she mentioned them at all to him on the occasion of sentencing, she did not press submissions based on them.

They are, however, a particularly significant feature in this case because the accused pleaded guilty at the earliest possible stage, at the beginning of the lower Court hearing, with the result that there was no need for any evidence at all from the girl. She and the rest of the family were spared any ordeal of that kind. This Court has emphasised, in recent times particularly, that the sparing of a girl and her family of ordeal in such cases is a matter for which credit can appropriately be given in sentencing.

We are satisfied that this is such a case and for that reason, having regard to the general features of the case, we propose to grant the application for leave to appeal and the sentence will be reduced to five years' imprisonment.

RB Cooke J.

Solicitors:
Miss Shirley Smith, Wellington, for Appellant
Crown Solicitor, Wellington, for Crown