IN THE COURT OF APPEAL OF NEW ZEALAND CA.330/87

THE QUEEN

V

COLIN NEVIS GLEN-CAMPBELL

Coram McMullin J (presiding)
Casey J
Gallen J

Hearing 17 March 1988

Counsel D.S. Hislop for appellant
W.R. Flaus for Crown

Judgment 24 March 1988

JUDGMENT OF McMULLIN J

Colin Nevis Glen-Campbell, aged 58, pleaded guilty in the District Court to crimes of indecency committed by him between June and August 1987 on a girl then aged 10 years. There was one charge of doing an indecent act with or upon the victim (s.133 Crimes Act 1961) and two of attempting to sexually violate her (s.129). He was later sentenced in the High Court to preventive detention on each of these charges. He now applies for leave to appeal against that sentence.

According to a summary of the relevant facts the applicant first met the victim when he married her aunt in

1982. Since that time she has visited his home along with her brother and sister. She became something of a family favourite of his, he paid her special attention, and he was insistent that the children visit him at a caravan where he lived. During these visits he made an excuse to take the victim to a nearby portable home and while there endeavoured to have intercourse with the girl. The girl underwent a personality change which was noted at school, discussed by the school authorities and finally reported to the local District Health Nurse. As a result arrangements were made for the girl to leave the area during the August school holidays. Once away from the immediate influence of the applicant, an elder brother of the victim told his parents that the applicant had been behaving in an indecent manner with the victim, and with the assistance of the welfare agencies the matter was reported to the police. Subsequent investigations revealed that over a period of time, the date of which could not be clearly established, the applicant had endeavoured to have intercourse with the girl aged 10 years and encouraged her brother to have intercourse with her in his presence. The activity became a regular occurrence and there was evidence from the victim that on one occasion the applicant inserted a tampon into her.

When the applicant was interviewed by the police he denied that he had committed any form of indecencies upon the victim and blamed her 12 year old brother for any sexual activity that had taken place. It was not until 21 October

1987, at the deposition hearing that the applicant admitted any offences against the girl.

According to a victim impact report the teachers responsible for the schooling of the victim during the period she was being offended against noted a personality change in the girl to the stage where she was withdrawn, lacked communication with other members of the class and did not appear to be accepted by her class members. The situation improved considerably after the arrest of the applicant. The girl is now considered to be back to the bright, helpful and pleasant child that she had previously been. She has not herself expressed any lasting emotional problem. However, contact and counselling has and will be maintained through the child health authorities.

It is not in dispute that the applicant has qualified for a sentence of preventive detention. He has since he attained the age of 17 years been previously convicted of an offence "specified" in s.75(4). He was convicted on 17 August 1962, then aged 32 years, on three offences of indecent assault on a girl of the age of 10 to 11 years (s.133). He was placed on probation for three years on that occasion. On 6 September 1968, then aged 38 years, he was convicted on four charges of sexual intercourse with two girls, sisters aged 13 and 14 years (s.134). On that occasion he was sentenced to cumulative sentences totalling 15 months imprisonment.

In sentencing the applicant to preventive detention the Judge noted that the girl was only 10 years of age at the relevant time and that the applicant had involved her brother in his sexual activities. He then made reference to R v. Bidwell (CA.249/85, judgment 20 December 1985) in which this Court allowed an appeal against a sentence of preventive detention imposed for rape. Instead it sentenced Bidwell to nine years imprisonment on that charge. In doing so the Court referred to what it had earlier said in the case of R v. Brown (CA.181/82, judgment 16 December 1982) that "where possible an indeterminate sentence should be avoided in favour of a sentence which will eventually come to an end". To the same effect is R v. Tipene (CA.312/86, judgment 21 May 1987). The Judge noted that R v. Bidwell had been decided under the provisions of the Criminal Justice Act 1985, since when the legislation had been amended to take account of what he called "changed social attitudes in the community".

There are differences between s.75 as it first appeared in the Criminal Justice Act 1985 (the old s.75) and s.75 as substituted for it by the Criminal Justice Amendment Act (No.2) 1987 (the new s.75). The new section reduces the age at which offenders qualify for preventive detention from 25 years to 21 years and extends the range of offences which qualify for preventive detention. Further amendments were made by the Criminal Justice Amendment Act (No. 3) 1987 in respect to the granting of parole to offenders sentenced to

preventive detention. Section 9(4) of the No. 3 amendment increased the period after the expiry of which an offender subject to a sentence of preventive detention is eligible to parole from seven years to ten years but both s.94(3) which provides that a member of a Parole Board may at any time refer to the Board the case of an offender who is subject to a sentence of preventive detention and s.94(6) which provides for the Parole Board to direct the release of any such offender on parole notwithstanding anything to the contrary in s.93 were left untouched.

The parole provisions of the 1985 Act were further altered by the No. 3 amendment. While s.9 of the No. 3 amendment has no direct application to a sentence of preventive detention it does place further restrictions on the eligibility for parole of persons sentenced to a term of imprisonment of more than two years for various offences some of which qualify an offender for preventive detention. Section 7 of the Criminal Justice Amendment Act (No. 3) 1987 should also be noted. It adds a new section which empowers a Court on the imposition of a sentence of imprisonment or preventive detention to impose such special conditions (if any) as it thinks fit to which the offender shall be subject if he is released on parole. There are consequential amendments to s.99 to add to the standard conditions of release imposed by s.100 and the special conditions able to be imposed by the Parole Board the further conditions which may be imposed by a Court under s.7 of the 1987 amendment.

By these various amendments the Legislature has made changes to the law which may reflect a hardening in attitude to the grant of parole to persons sentenced to preventive detention.

However, while the old s.75 has been repealed in its total substitution by a new s.75, the old s.75(2) has been re-enacted as a new s.75(2) in the substituted provision without amendment. It still provides that a High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom the section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention. Section 75(2) as enacted in 1987 is therefore in the same terms as s.75(2) of the 1985 Act and indeed s.24(2) of the Criminal Justice Act 1954.

The question then is whether the present case was one where a sentence of preventive detention ought to have been imposed for the protection of the public. The applicant had assuredly qualified for such a sentence and his previous history justified his imprisonment for a substantial period. However, the sentencing Judge had to consider whether, as Mr Hislop submitted, a substantial period of imprisonment would have been enough or whether the more drastic sentence of preventive detention was required. What was said in Bidwell, Tipene and again in R v. Visser (CA.29/87, judgment 22 October 1987) - that where possible an indeterminate sentence should be avoided in favour of a finite sentence - is still

the touchstone notwithstanding the various statutory changes to which we have referred.

In this case there was no psychiatric report on the applicant available to the sentencing Judge. There was, however, a long pre-sentence report prepared by a probation officer. Having traced the history of the applicant's life and commented on his reputation as an extremely hard working and diligent man having many good traits, including generosity and diligence, the probation officer said:

> On the other hand, aspects of his character give considerable cause for concern. Chief among these is his willingness to abuse children sexually, individuals who are at a vulnerable age. He himself is a man of mature years, and yet it appears that for a long time children have been at risk in his home.

The probation officer also referred to the circumstances in which the applicant was convicted in 1962 and 1968. As he described them, in 1962 the victim was a 10/11 year old girl on whom the offences were committed over a period of twelve months. The girl was a friend of the applicant's daughter and was interfered with at the applicant's home. At the end of the period of probation imposed upon him it was commented that the applicant had strong sexual desires and that it would only be his fear of humiliation if caught again that would prevent further offending. In 1968 the offences were committed, as already mentioned, on two sisters aged 13 and 14 years. The younger of these was

friendly with the applicant's daughter and often stayed over night at his home. On several occasions he came into the bedroom where his daughter and her friend were sleeping, got into bed with the friend and had intercourse with her. He also had sexual relations with the older girl on several occasions over the same period, generally in his car, and away from his home. As a result the older girl became pregnant to him and bore a child.

In the course of his submissions Mr Hislop said that the the applicant now admitted that he had a psychiatric problem and that he intended to have that problem cured. When it was pointed out to Mr Hislop that there was no psychiatric report available from which an assessment of applicant's condition could be made, Mr Hislop said that he had such a report but that he would have to obtain instructions from the applicant before he produced it. In an adjournment given for that purpose he obtained instructions from the applicant to do so. The report is from Dr James E. Woolridge, a consultant psychiatrist. It is dated 3 March 1988 and was made by Dr Woolridge after he had interviewed the applicant on two occasions in prison while serving his present sentence. Dr Woolridge is of the opinion that while the applicant is not suffering from any formal psychiatric disorder, there is no doubt that he is sexually deviant, that his attraction towards juvenile females is virtually life long and that his deviant behaviour has persisted in spite of periods of probation and imprisonment. The

applicant told Dr Woolridge that he wants help with the problem he now recognises he has, that he would like to see a psychologist or psychiatrist while he is in prison, that he would take any medication which was prescribed and that he would even undergo physical castration or neuro-surgery if it would help him. There is a passage in the psychiatric report which suggests that there has been no break in the applicant's sexual activity with pre-adolescent and adolescent females over the years. The applicant denies this and, as the report was not before the sentencing Judge, we do not propose to take the disputed passage into account. Dr Woolridge has expressed an opinion on the likelihood of the applicant re-offending. That opinion is as follows:

> His long history of deviance, his re-offending after imprisonment and his continuing to shift at least part of the responsibility for his offending onto his victims, all suggest that re-offending is not unlikely. If, as is quite likely, he were to lose his marriage relationship the inevitable social isolation which would follow could increase the possibility of him seeking solace in illicit relationships.
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> However, his avowed attitudinal changes both as regards the effect of his behaviour on others and his accepting more of the responsibility himself, must be optimistic signs. He would appear to have participated actively and effectively in therapeutic sessions within the prison and this is encouraging.
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> His attitudinal changes have still got a considerable way to go and if these are to be consolidated, it is my opinion that he will have to be offered individual psychological assistance in addition to the group exposure he is presently receiving. If such can be offered and if, after his release, he can be closely and regularly supervised, his indefinite incarceration may not be necessary.
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> Should he be subject to interpersonal or psychosocial stress or should there be any deterioration of his faculties through organic causes, this could well increase the possibility of re-offending.

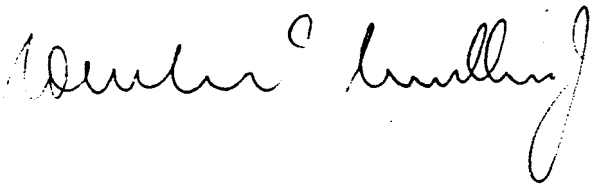
Mr Hislop accepted that a substantial sentence of imprisonment was justified; he suggested that one of six to eight years might have been in order having regard to the applicant's history of offending (R v. Ward [1976] 1 NZLR 588) but he submitted that preventive detention was not called for, particularly having regard to the period of nineteen years during which the applicant had been free of convictions for this class of offence.

Mr Flaus said that there were some disturbing features about the offending. He pointed to the involvement of his victim's twelve year old brother, the sustained period over which the offences had been committed, the abuse of the trust which had been placed in the applicant and the fact that this was the third time he had been before the Courts for this type of offence.

It is a very serious matter to impose or sustain a sentence of preventive detention carrying with it, as it does, the imprisonment of the offender for ten years without any prior right to parole. We have weighed the relevant matters, but in the end we are of the view, having regard to the applicant's predilection for offending, his inability to control his behaviour, an established social deviancy for at least 30 years and what we think is a real risk that he will offend in a similar manner, that this is a case where a sentence of preventive detention is expedient for the protection of the public. In our view the Judge was right to impose such a sentence.

However, the Parole Board should know of Dr Woolridge's prognosis and for that purpose we direct that a copy of his report be sent to the Secretary for Justice for transmission to the Parole Board. It contains material which may have a bearing on any conditions to be imposed on the grant of parole should the Board consider the applicant's release.

The application for leave to appeal is refused.



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