SET 2 GGH

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.346/88

THE QUEEN

v.

DENIS NORMAN COLE

Coram: McMullin J (presiding)
Somers J
Barker J

Hearing: 7 December 1988

Counsel: B Wilson for Appellant
G A Rea for Crown

Judgment: 7 December 1988

JUDGMENT OF THE COURT DELIVERED BY BARKER J

Denis Norman Cole seeks leave to appeal against a sentence of 6 months' imprisonment imposed on him in the High Court at Auckland on 23 November 1988. Cole had earlier pleaded guilty on arraignment to one charge of sexual violation by unlawful sexual connection.

On 21 May 1988 the complainant, a 14-year old boy, and the applicant were amongst those present at a party in a flat in Papatoetoe. During the course of the evening, the boy became intoxicated and he went to sleep in a bedroom. Cole entered the bedroom; he undressed the sleeping complainant, until he was naked. He then sucked the complainant's penis several times before leaving the room. The complainant, whilst aware of what had happened, offered no resistance

because of his intoxicated state. There was no suggestion that he had consented. When interviewed by the police the following morning, Cole admitted the facts. He asserted that he had stripped the complainant and committed the sexual acts out of a warped sense of humour and as a party trick.

Cole is aged 26. He is in stable employment as a hairdresser. He had previously been before a Court in 1983 on dishonesty charges when he was ordered to come up for sentence if called upon. He claims to be bisexual. He had an unfortunate sexual experience in the past when he was assaulted by an older man when he was aged 15. He is living currently in a de facto relationship with a 32 year old woman; they plan to marry. According to an affidavit filed by this lady (which was not before the sentencing Judge) she has endeavoured to provide the appellant with some emotional stabiity. Cole has demonstrated to her that he is capable of entering into a heterosexual relationship.

In a pre-sentence report, the probation officer summed up Cole in these words :

> "Offender appears to have been raised in an effeminate, socially isolated manner, in which he also gained both positive and negative attention for somewhat flamboyant exhibitionistic behaviour. Consequently he appears to have some ambivalence both as regards his sexuality and his social relationships. If the Court were prepared to consider a lenient approach, supervision and possibly a fine payable to the complainant might be considered."

In his sentencing remarks, the Judge noted - "There is no doubt the victim was grossly outraged and humiliated."

Even before the change to the legislation imposing a presumption of imprisonment for sexual violation, this behaviour would have called for a prison term in the Judge's view. The Judge made adverse comments on Coles' assertion that he thought that the complainant was older than 14. The Judge noted that the issue must be faced by Cole that non-consensual sex is illegal. Because of Cole's good record, a sentence of 6 months' imprisonment was imposed.

Cole was released on bail by the sentencing Judge after his appeal to this Court had been filed. His counsel has provided us with a report from a consultant psychiatrist, Dr Culpan. This report was not before the sentencing Judge. Cole told the doctor that on the night of the offence, he had drunk a lot more liquor than he had previously admitted to the police officer. He claimed that his ation was not premeditated and that the complainant was not an invited guest at the party. He told the doctor that he was petrified by the prospect of imprisonment.

The psychiatrist comments that Cole appears to have had no realistic perception of the enormity of his offence, even though he knew that his action was criminal. He considers Cole's fear of imprisonment genuine and that, apart from the effects of imprisonment on Cole's nervous wellbeing, the doctor opines that the experience of confinement in a male inmate population would have the likely outcome of provoking and entrenching Cole's already existing homosexual

tendencies. Such a development would be likely to lead to a future pattern of fleeting homosexual relationships, with concurrent emotional upheaval, rather than to a more enduring heterosexual attachment.

On the information available to the sentencing Judge, it is difficult to hold that the sentence of 6 months' imprisonment was manifestly excessive or inappropriate, particularly in view of the requirements of s.128B(2) of the Crimes Act 1961. This provision requires imprisonment for sexual violation unless, having regard to the circumstances of the offence and the offender, including the nature of the conduct constituting the offence, the Court is of the opinion that the offender should not be so sentenced.

We think that the material available to us but not to the sentencing Judge takes this case out of the category where imprisonment must be imposed. The reasons can be summarised as follows :

(a) The likelihood of lasting damage to Cole if incarcerated. In this regard, we note that the doctor considers likely the provocation and entrenchment of his homosexual tendencies, particularly in a place when for a person of Cole's vulnerabiity, sexual attacks or approaches cannot be ruled out. Cole's phobic disorders must also be considered.

(b) The very real chance to Cole of a permanent relationship offered by his proposed marriage.

We are therefore prepared to quash the term of imprisonment and to grant leave to appeal. As to a

substitute sentence, there must be an element of punishment to reflect society's distaste of this type of behaviour. The offending had the aggravating features of being carried out on a complete stranger aged only 14 and of advantage being taken of his condition and youth. Serious as the offending was, the conduct had nothing like the aggravating features found in the majority of sexual violation cases of a homosexual nature to come before the Courts.

The appeal is allowed; in place of the sentence of imprisonment is substituted a sentence of 6 months' periodic detention. The applicant is to report to the Periodic Detention Centre at Otahuhu at 6 pm on Friday, 9 December 1988. He is to attend at such times as directed by the Warden or as directed by the Registrar of the High Court. No one period is to exceed 9 hours.

In addition the applicant is placed on supervision for a term of 12 months. We make the supervision order on condition that the appellant undergo such counselling as may be specified from time to time by the probation officer. This condition is imposed with the consent of the appellant.

The appeal is accordingly allowed.

R. J. Barker J.

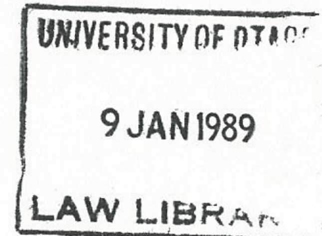
Solicitors: Crown Solicitor, Auckland, for Crown

IN THE COURT OF APPEAL OF NEW ZEALAND SET 2 GGH CA.94/88

THE QUEEN

v

CHRISTOPHER RODNEY COOK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Coram McMullin J (presiding)
Somers J
Hardie Boys J

Hearing 5 July 1988

Counsel Rennie Gould for appellant
R.B. Squire for Crown

Judgment 8 November 1988

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J

Christopher Rodney Cook applies for leave to appeal against a sentence of two years imprisonment imposed on each of eight charges of using documents with intent to defraud and one of attempting to manufacture morphine. Decision has been delayed pending completion of inquiries undertaken in the case of R v. Taylor, in which also judgment is delivered today. Those inquiries were as to the current level of homebaking, the deterrent effect of the sentencing guidelines indicated by this Court in R v. Latta [1985] 2 NZLR 504, and the significance of homebaking in the overall drug problem in New Zealand. It is unnecessary to repeat what was said in the judgment in that case. In view of the conclusion reached in it, it has only marginal relevance to the present case.

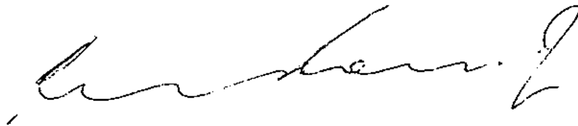
of cannabis for supply. In 1981 he was imprisoned on two charges of possession, one of cocaine, one of methadone. In 1983 he was sentenced to periodic detention for the possession and sale of cannabis, and again in 1985 for the cultivation of cannabis. In addition, in the period of 11 years from 1974 he was sentenced on 20 charges of dishonesty, including two of armed robbery (in Australia) and five of burglary.

Cook is a man of some considerable ability, who in 1984 and 1985 made quite a determined effort to improve himself. Temporarily free from drugs, he achieved some success in his life. But despite his efforts and no doubt his good intentions, he drifted back into drug abuse. This most recent offending caused his wife to leave him, and brought all his efforts to nought. He is now adamant that he will not repeat his past mistakes. The Probation Officer realistically commented that his resolution will not be easy to maintain, and that he will require close supervision and support to succeed. The sentencing Judge, who quite properly considered a sentence of imprisonment was required, thought that the sentence he imposed would ensure a parole period that was adequate for this purpose.

The sentence of two years imprisonment is severe for a first offence of homebaking taken on its own. But it cannot be said to be excessive for a man who has shown such a propensity for drug related offending as Cook has. Moreover, the penalty must reflect the other charges for which he was

The disparity issue was comprehensively discussed in R v. Lawson [1982] 2 NZLR 219, where it was made clear that before the Court will reduce an otherwise proper sentence on account of disparity it must be satisfied that "a reasonably minded independent observer aware of all the circumstances of the offence and of the offenders would think that something had gone wrong with the administration of justice." (p.223). We do not think that is the case here.

For these reasons the application for leave to appeal is dismissed.



Solicitors

Crown Law Office, Wellington for Crown