IN THE COURT OF APPEAL OF NEW ZEALAND

CA.212/87

THE QUEEN

v

DAVID FRANCIS WHITE

Coram McMullin J (presiding)
Casey J
Bisson J

Hearing 26 April 1988

Counsel B.A. Scott for appellant
R.B. Squire for Crown

Judgment 26 May 1988

JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

This application for leave to appeal by David Francis White is made in respect of a sentence of preventive detention imposed on him in the High Court on 3 August 1987 on one charge of indecently assaulting a girl aged 9 years [s.133(1)(a) Crimes Act 1961], one charge of permitting the same girl to do an indecent act on him [s.133(1)(c)] and one charge that being a male over the age of 21 years, he permitted a boy aged 8 years to do an indecent act on him [s.140(1)(c)]. To these charges White pleaded guilty. It is common ground that all three offences are "specified offences" within s.75 Criminal Justice Act 1985.

According to a summary of facts White aged 50 years

obtained employment in March 1987 as a housekeeper. In this employment he was required to live in and to look after three children aged between 15 months and 8 years as well as preparing meals and doing general housekeeping. He taught the 8 year old boy in the household and one of the boy's friends, a girl aged 9 years, a game in which either of the children or White himself sat in a chair with eyes closed while one of the other two touched the person seated in the chair. That person then had to guess who had touched him. While the girl was in the chair, White rubbed her briefly between her legs on her private parts. When it was his turn to sit in the chair he allowed the children to touch him on his private parts through his clothing. On occasions the children partially removed his track suit pants and touched his private parts. After school the same two children sometimes played with White and partially removed his track suit pants exposing his private parts. Although initially discouraging the children from doing this, White allowed them to continue. On one occasion he permitted the girl to sit on his knees facing him and simulated intercourse.

When spoken to by the police White admitted the facts as outlined and by way of explanation stated that, although he initially tried to resist, he weakened and allowed the children to do what they did. He stated that he was lonely and depressed and it made him feel good when the children touched him. White accepted this summary as a correct account of what occurred except for the reference to the

girl sitting on his knees simulating sexual intercourse. This, he said, was incorrect. He said that the girl had done no more than briefly jump up on his knee facing away from him and that she then jumped up again briefly facing towards him before getting down.

White has previous convictions for sexual offences on children. On 3 June 1960 he was sentenced to one years imprisonment on two charges of having sexual intercourse with a girl between 12 and 16, one years imprisonment for attempted sexual intercourse with a girl between 12 and 16 and six months imprisonment on each of two charges of indecently assaulting a female over 16 years. Then on 2 November 1978 he was sentenced to periodic detention and probation for an indecent assault on a girl under 12 years; on 12 April 1979 to imprisonment for one year on two charges of indecently assaulting a girl between 12 and 16; on 27 November 1980 to imprisonment for 18 months for an assault on a child and to 6 months imprisonment on two charges of obscene exposure; on 18 March 1983 to 15 months imprisonment for indecently assaulting a girl under 12 and to 15 months imprisonment for permitting a girl under 12 to do an indecent act; and on 22 June 1984 to 3½ years imprisonment for an indecent assault on a girl aged 12. All of the offences on which he was convicted from 2 November 1978 onwards are specified offences under s.75(4) Criminal Justice Act 1985.

Mr Scott submitted, and Mr Squire accepted, that the

offences for which White was sentenced on 3 June 1960 were not previous "sexual offences" within s.75(4) and that they did not qualify as such for the purposes of the imposition of a sentence of preventive detention. We agree that this is so. Section 75(4) of the Criminal Justice Act 1985 refers only to crimes against children under the Crimes Act 1961. It does not refer to offences committed against a child under the Crimes Act 1908. This is in contrast to s.24(6) of the Criminal Justice Act 1954, the original provision relating to preventive detention, which referred to offences committed under both the 1908 and 1961 enactments. In enacting s.75(4) of the 1985 Act the Legislature almost certainly took the view that crimes committed against children under 16 before the coming into operation of the Crimes Act 1961 (1 January 1962), that is over twenty years before, were so stale as to be excluded from consideration. For these reasons we agree with Mr Scott that the first specified offences for the purposes of s.75(4) occurred in 1978. In the result only four of White's previous sexual offences are "specified" offences for purposes of s.75(4). However, Mr Scott agreed that if an offender qualified for preventive detention because of his conviction for specified offences under the Crimes Act 1961, sexual convictions committed against the Crimes Act 1908 might, when considered with similar types of offending since the passing of the 1961 Act, be relevant to the exercise of the discretion as to whether a sentence of preventive detention should be imposed. We note, too, that on 22 June 1984 the Judge

sentencing White warned him that if a recurrence of his offending occurred then a sentence of preventive detention was likely to be imposed.

Mr Scott referred to the circumstances in which White committed the present offences. He said that at the time he had been drinking a low strength beer and taking anti-depressant pills; that the summary of facts indicated that there was no violence involved and the children had not been detained in any way and that they had not been forced to participate. He also referred to a psychiatric report on White furnished on 21 May 1987. In this the psychiatrist said that White needed a period of treatment for his depression and alcoholism and that this would best be accomplished in a psychiatric unit to which he could be sent. It is noteworthy that White spent several months of the sentence imposed on 22 June 1984 in Lake Alice Hospital. He was paroled on that sentence on 22 October 1986. According to the probation report, on the very next day, 23 October 1986, White advertised for a solo mother to share his flat. He also had plans to open a hostel for discharged female prisoners. In view of his history of sexual offending he was issued with a written instruction not to associate with any female person under the age of 16 but he declined to acknowledge receipt of the instruction. He failed to report to the probation officer on two occasions and thereby broke the conditions of his parole. He claimed that his reason for not reporting was possible intimidation by gang members whom he had met when he was in prison.

Mr Scott made several submissions. His main submission was directed to the wording of s.75(2) of the Act. Section 75(2) provides:

> Subject to the provisions of this section, the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention.

Mr Scott submitted that before a Judge can pass a sentence of preventive detention he must be satisfied beyond reasonable doubt that such a sentence is expedient for the protection of the public. However, the phrase "is satisfied" relates to the expediency for the protection of the public that an offender be detained in custody for a substantial period. It is that on which the Court is to be satisfied; not the imposition of a sentence of preventive detention. That point, however, does not affect the essence of Mr Scott's argument which relates to the standard of proof as to the matter on which the Court must be satisfied. In support of his contention that the phrase "is satisfied" means satisfied beyond reasonable doubt, Mr Scott referred to R v. Carleton [1983] 69 CCR (2d) 1; [1983] 36 CR (3d), a case in which the Alberta Court of Appeal had to interpret a provision of the Canadian Criminal Code which is somewhat similar to s.75(2). Section 688(b) of the Canadian Criminal Code provides:

> If it is established to the satisfaction of the Court ... (b) that the offence for which the offender has been convicted is a serious personal injury offence ... and the offender by his conduct in any sexual matter

> including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses ..., the Court may find the offender to be a dangerous offender and may thereupon impose a sentence of detention in a penitentiary for an indeterminate period ....

It was held by a majority of the Alberta Court of Appeal that the phrase "established to the satisfaction of the Court" imposed the ordinary criminal burden of proof on the Crown of establishing beyond a reasonable doubt the matters of which the Court was required to be satisfied before passing an indeterminate sentence.

For several reasons we do not accept Mr Scott's submissions First, the materials upon which a Judge acts in the sentencing process are not all susceptible of proof beyond reasonable doubt. In that process a Judge acts not only on sworn testimony and admitted facts but also on pre-sentence and psychiatric reports, counsels' submissions and, not least of all, his own experience and judgment. Secondly, the phrase "it is satisfied" does not carry with it the implication of proof beyond reasonable doubt and has not been construed to have this meaning in the many cases in which it has been considered. The Canadian case referred to is an exception. We would decline to follow it. The phrase "is satisfied" means simply "makes up its mind" and is indicative of a state where the Court on the evidence comes to a judicial decision. There is no need or justification for adding any adverbial qualification to "is satisfied" - Blyth v. Blyth [1966] AC 643. In that case the House of Lords rejected the view of the Court of

appeal that "it is satisfied" means "satisfaction beyond reasonable doubt". Lord Pearson said:

> The degree or quantum of proof required by the Court before it comes to a conclusion may vary according to the gravity of the subject matter to which the conclusion relates, but in relation to which subject matter the specified conclusion is reached or not reached by the end of the trial: the Court either is or is not satisfied upon each point. (676)

To much the same effect is the dictum of Smith J in Angland v. Payne [1944] NZLR 610 at 626.

> ... the Judge must be 'satisfied'. This implies, I think, the weighing of the opposing contentions and the reaching by the Judge of a clear conclusion that a substantial ground exists. The Judge must pass beyond the stage of saying that there 'seems' to be a substantial ground. He must be 'satisfied' that there is a substantial ground.

And Adams J in Robertson v. Police [1957] NZLR 1193, 1195:

> The mind of the Court must be 'satisfied' - that is to say, it must arrive at the required affirmative conclusion - but the decision may rest on the reasonable probabilities of the case, which may satisfy the Court that the fact was as alleged, even though some reasonable doubt may remain ... the Court is not at liberty to uphold the defence unless the evidence produces in its mind the required acceptance of the truth of the allegation.

Thirdly, to read the phrase 'is satisfied' as requiring proof beyond reasonable doubt would strain the construction of other sections of the Criminal Justice Act where the phrase is also used. It appears in s.5, s.6, s.9 and s.10. There is no logical reason why it should be given a different meaning in these last sections from what it is given in s.75(2). But to read it as meaning 'satisfied

beyond reasonable doubt' in sections 5, 6, 9 and 10, would lead to odd results. One example will suffice. Under s.5 a Court would be precluded from sentencing an offender guilty of serious violence to other than a full time custodial sentence unless it was satisfied beyond reasonable doubt that the special circumstances of the offence or the offender justified otherwise. That, we think, cannot be its true interpretation.

For these reasons we reject Mr Scott's submission as to the construction of the phrase 'is satisfied' in s.75(2). That does not mean that the Court should ever lightly impose such a sentence. To impose such a sentence is a serious matter. R v. Glen-Campbell (CA.330/87, judgment 24 March 1988). It will only do so if it is satisfied that it is expedient for the protection of the public that an offender to whom s.75 applies should be detained in custody for a substantial period. Otherwise, a finite sentence should be imposed - R v. Glenn-Campbell and the cases referred to in that judgment.

In the present case there are four previous qualifying offences committed since 1978. Mr Scott stressed that these showed that White's sexual offending was at the lower end of the scale and that he had never been sentenced to a substantial term of imprisonment. (The sentence of 3 years 6 months imposed on 22 June 1984 is the longest.) Moreover, Mr Scott said that if the sentence of preventive detention were to be

imposed White would not be eligible for parole for ten years and so would lose all hope and motivation to seek help. (We record that in addition to Mr Scott's submissions White himself wrote to this Court a very lengthy submission which we have read.)

It is true that White's offending to date has not been violent, nor did he detain the children concerned. However, he has demonstrated a disturbing persistence in his endeavours to secure access to young females. As mentioned earlier White advertised for a solo mother to share his flat the day after his discharge from prison, and he planned to open an hostel for discharged female prisoners. According to the probation officer White has taken few positive steps since his discharge from prison to reduce the likelihood of further offending. Furthermore that offending has occurred in the face of the specific warning given as to its likely consequences

In the circumstances outlined we have no doubt that the view formed by the Judge was right and that it was appropriate for him to sentence White to preventive detention. For the reasons given the application for leave to appeal against sentence is refused.

Solicitors:

Perry Castle, Wellington for appellant
Crown Law Office, Wellington