GGN SET 3

IN THE COURT OF APPEAL OF NEW ZEALAND

CA.221/89
CA.229/89

ORDER PROHIBITING PUBLICATION OF NAMES OR ANY IDENTIFYING MATERIAL

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CRIME APPEALS 221/89 AND 229/89

Coram — Richardson J (presiding)
Casey J
Doogue J

Hearing — 7 November 1989

Counsel — M.A. Bungay QC for L
Lowell P. Goddard QC and N. McAteer for Solicitor-General

Judgment — 7 November 1989

ORAL JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

L was found guilty by a jury in the High Court at Palmerston North on three counts of sexual violation by rape, and following conviction was sentenced to 3½ years imprisonment. He now applies for leave to appeal against conviction and the Solicitor-General applies for leave to appeal against sentence.

The complainant is the granddaughter of the applicant. She was 13½ years old at the time. Her evidence was that on two evenings a night or two apart in the first week of the August 1987 school holidays, which began on Friday 21 August, her grandfather came into her bedroom at the grandparents'

rest home at Bulls where she helped out from time to time, told her to be quiet, kissed and fondled her, and had intercourse with her against her wishes. She said that her grandmother was at the rest home when she arrived on the Friday, but went away to the grandparents' cottage at Picton and returned after the second incident. The third charge related to her evidence that on about 13 November 1987 when she was again staying overnight at the rest home in the absence of her grandmother, her grandfather came into her room about 11 o'clock or midnight, rubbed baby oil on her and on himself and again had intercourse with her against her wishes. She also spoke of a conversation she had had with her grandfather some weeks after the August incidents when she was hanging out the washing. Part of that conversation was, her mother said, heard by her. In that conversation the complainant said her grandfather asked her whether she had told anyone about the incidents, to which she said no. He told her he did not have enough sex with his wife and she said he was married and should stick with that. The complainant's mother said she heard her father say had she said anything to anyone, and also heard her daughter say she did not want to break you, that is the grandfather, and nana, that is the grandmother, up.

But it was not until August 1988 that the complainant complained to her mother about her grandfather's conduct. The matter was reported to the police and he was formally interviewed on 10 November 1988. On the advice of his lawyer who was present he declined to answer a number of

specific questions put to him, and made no reply when the police officer initially said he wanted to put an allegation of a sexual nature by his granddaughter, and again at the end of the interview when he was told he would be arrested and asked whether he wished to say anything in relation to the charges.

At the trial in the High Court neither the applicant nor his wife gave evidence, but other evidence was called in support of the claim of alibi designed to establish that both grandparents were at the rest home in the early part of the first week of the August holidays, and that he then went with others to their cottage at Picton and remained there. In short, that at the crucial time he was not at the rest home without his wife as the complainant had claimed in evidence, and it was suggested that she had made up the allegations against her grandfather in response to questioning about her own conduct with a boy. Apparently it was also suggested as an alternative defence to rape that she had consented to any proved act of intercourse.

The sole ground advanced in support of the conviction application was that the verdicts on the first and second counts were unreasonable and unsafe having regard to the independent alibi evidence, and if the complainant's evidence in respect of those counts could not stand in the light of that alibi evidence, then it would be unsafe to accept it on the third count. The alibi evidence relied on was that of a Mr Little and a Doctor Munro. Mr Little's

evidence was that he celebrated his birthday at his parents home in Feilding on 24 August 1987; that on Tuesday 25 August he travelled with the applicant to Wellington where they stayed the night; that with him he took the ferry to Picton the following morning, that is Wednesday 26 August; and that they remained together in Picton until Sunday 30 August. His evidence was unchallenged by cross examination and it seems that counsel for the Crown at trial accepted from that that the applicant left Bulls on Tuesday 25 August.

Dr Munro's evidence was that he had returned from overseas on 17 August and that on Monday 24 August the applicant and his wife visited them for dinner and to see photographs he had taken. Mr Bungay's submission was that having regard to the evidence that the grandmother was at the rest home for some time after the complainant arrived there on Friday 21 August, and that she was at Dr Munro's on the Monday, and that the applicant left for Picton the next day, the verdicts in respect of those two counts based as they were on the complainant's evidence, must be regarded as unsafe.

We are unable to agree. Perhaps not surprisingly there were some variances and uncertainties in the evidence of the complainant as to dates and some other details, but she was very clear in her crucial evidence that on two nights during that August period her grandfather had come to her room at the rest home and had raped her, and that he had done so again on about 13 November. By their verdicts the jury must

be taken to have accepted that evidence of those sexual incidents, and importantly there was opportunity for the commission of those offences between Friday 21 August and Tuesday 25 August. The jury may have considered that Dr Munro, who it would seem cannot have been asked to cast his mind back until at least 15 or 18 months after Monday 25 August, was an honest but mistaken witness as to the actual date of that dinner visit. They may have considered on the evidence that the grandmother was or might have been away for some days between 21 and 25 August and both the applicant and his wife failed to give evidence to support the alibi defence. At the same time the alternative defence advanced at the trial was that the complainant had consented to any act of intercourse found proved against the accused. In any event we are satisfied that there being no dispute that the complainant and the applicant were at the rest home between 21 August and 25 August, the jury were entitled to accept her evidence that she had been raped by him in her bedroom on two nights during that period. The application for leave to appeal against conviction is accordingly dismissed.

We turn to consider the Solicitor-General's application for leave to appeal against sentence. The respondent was 59 years old when the offences occurred. Until recent times his health had been good, but he had been told he had problems with blood pressure and with his heart which would require medical attention. He and his wife had raised six children. He came before the Court as a first offender and the many references tendered on sentencing demonstrated that

he was well respected within the community. The Judge noted his personal record, his high standing in the eyes of the community, and that he was entitled at his time of life to substantial credit for that record. He also took account of his age and the health problems referred to.

Turning to the offending itself, the Judge accepted that on the evidence there was no violence associated with the offending other than that involved in intercourse, but rightly went on to emphasise that there is necessarily an element of violence in any sexual intercourse with a girl of 13. He added that there were three such occasions and that they involved a substantial breach of trust.

It was clear from the trial itself and from the reports furnished on sentencing that the offending had obviously caused distress and disturbance within the family, and distress and suffering to the complainant. Included in that material were individual reports signed by the complainant and her mother but because of some of the content and tone the Judge, rightly in our view, put those to one side, preferring to focus on the victim impact report prepared by a counsellor. The counsellor reported that she had found the complainant to be confused, very angry and extremely fearful, and concluded that she had experienced extreme emotional trauma as a result of the incidents. She continued that the incidents occurred at a crucial stage in the complainant's development as a young woman and in her understanding of her sexuality, and concluded that she would

continue to battle with the emotional trauma for many years, and would need to continue to address the consequences of that abuse in particular with respect to developing close intimate relationships in later life.

It is well settled in the judgments of this Court that for rape committed by an adult without any special aggravating or mitigating features a figure of five years imprisonment should be taken as a starting point in contested cases. Some consideration by way of mitigation was appropriately given to the respondent's age and health problems, and to his previously clear record and standing in the community. But, as the sentencing Judge noted, in some ways that high standing must have made it more difficult for the complainant to resist the actions and to complain about them. Further, as Ms Goddard submitted, the respondent is an intelligent man who does not and cannot claim childhood hardship and abuse or lack of insight as contributing to his offending. In short there is no possible excuse or explanation for what he has done other than pure self gratification.

Giving such weight as we properly can to mitigating features, we are satisfied that the sentence does not adequately recognise four serious aggravating features and must be held to be manifestly inadequate. The first is the age of the complainant. She was only 13 years old at the time of the offending, and was at a crucial stage in her development into a young woman. The second is the substantial breach of trust involved. The complainant was a granddaughter

and was staying with her grandfather in his care and control. She was entitled to have full trust in him. The third is the repeated nature of the offending; she was raped three times in separate incidents. The fourth is the effect of the rapes on the complainant and the family to which we have already referred. A sentence of six years imprisonment would have been well justified for this offending by this offender, but giving such weight as we can to the Judge's conclusion, and recognising that the sentence imposed on a successful Crown appeal against inadequacy should properly be fixed at the minimum in the appropriate range, we consider that the interests of justice will be met by a sentence of five years imprisonment.

The application for leave to appeal against sentence is accordingly allowed. The appeal itself is allowed and in lieu of the sentence of 3½ years imprisonment imposed in the High Court a sentence of five years imprisonment is substituted. There will be an order for prohibition of any publication of the name or other particulars of the offender or any other material that may identify him or the complainant.

Solicitors

Crown Law Office, Wellington.