IN THE COURT OF APPEAL OF NEW ZEALAND CA 217/90

ORDER FOR SUPRESSION OF NAME
AND IDENTIFYING MATERIAL OF
RESPONDENT AND COMPLAINANTS

CRIME APPEAL CA 217/90

Coram: Bisson J
Hardie Boys J
Williamson J

Hearing: 7 September 1990

Counsel: G A Rea and N McAteer for Crown
D H Quilliam for Respondent

Judgment: 7 September 1990

ORAL JUDGMENT OF THE COURT DELIVERED BY BISSON J

The respondent stood trial on 9 and 10 July 1990 in the High Court in Napier on an indictment containing four counts:

"1. On the 10th day of January 1990 at Napier did wilfully and without lawful justification or excuse stupefy (his de facto wife).

2. On the 10th day of January 1990 at Napier did wilfully and without lawful justification or excuse stupefy (his de facto wife's daughter).

3. On or about the 10th day of January 1990 at Napier did indecently assault (the daughter) a girl then aged 15 years.

4. On or about the 10th day of January 1990 at Napier did sexually violate (the daughter) by having unlawful sexual connection with her occasioned by the penetration of her vagina by his finger or fingers."

The jury returned a verdict of guilty on all counts. He was sentenced on 27 July 1990 to four months imprisonment concurrently on being convicted on counts 1, 2 and 4 and on count 3 he was convicted and discharged. A reparation order was made in these terms,

> "I also direct that you make reparation in the sum of 2,000 dollars and that is to be paid when you are in a position to commence payments as proposed by the Probation Officer. I understand that there could be some concern about the particular form of trust which is proposed and I direct that any trust which is set up in respect of this is as to be directed by the Probation Officer."

This is an application by the Solicitor-General for leave to appeal against the sentences.

The facts can be stated quite briefly. The respondent lived with the complainant for 2½ years as her de facto husband together with her two daughters, the 15 year old complainant and another daughter. At the time of the offences the mother was aged 36, the daughters 18 and 15 respectively and the respondent was 20. Approximately two weeks prior to 10 January 1990 the respondent had found a plastic container containing several blue pills and their

name which was on the label started with "Hal". The container held four or five tablets.

On the day of the offences the respondent had, after finishing work at 2.30 pm, gone to a hotel. In his evidence before the Court he said,

> "I started drinking that day at 3 o'clock I think. I was drinking at the Union Hotel. I met somebody there, that was arranged. That was While at the hotel I drank maybe five bottles, four or five bottles, that is each. They were big bottles. I couldn't tell you if drank a similar amount, I presume he would have. We left the hotel and went to a friend's place at Shakespeare Road. As we were leaving the hotel we bought a crate of big bottles and we drank some of that at our friend's place. I went home eventually and I drank more at home, same size bottles.
> Were you affected by the alcohol you had taken? Pretty much so, yeah. When I got home (the de facto wife's) mood was not very good. She was angry with me. She made that clear to me. was still with me. I decided to do something about that. I sort of went in and sat down and had a drink and she was sitting on the couch and she was quite ratty, then I came across the idea if they were on a bit of a high she would be right so that's what I intended to do but it didn't go the way I had planned, it didn't quite go the way it was supposed to. What did you decide to do in order to give (the de facto wife) a bit of a high? Put something in her coffee, some tablets that I found, I had in my possession.
> ...
> In your statement to Detective Sergeant it says, 'I hope they would quieten them down and put them to sleep', remember saying that to Detective Sergeant? I do not. Does that correctly state what you believed at the time? Don't understand.
> Those words, are they correct, are they true 'I hoped they would quieten them down and put them to sleep' - are they true, is that what you intended? No I did not."

The respondent said in his statement that he had put one and a half tablets in his de facto wife's cup and about the same in her daughter's. The older daughter was not at home,

having gone out for the evening. The respondent's de facto wife drank three-quarters of her cup and very shortly after drinking the coffee she became disorientated and very sleepy. The daughter, after drinking less than half a cup of coffee, started to fell a bit dizzy. The respondent admitted that he had put some crumbled bits of the tablets in his own coffee but had had only two sips of it as he preferred beer. The respondent said in his statement,

> "She (the mother) walked up to our bedroom and crashed on the bed. She was asleep, out of it, so I threw a bedcover over her and (the daughter) came into the bedroom."

He said that the daughter had staggered up to her mother's bedroom and he said to her to go to bed and go to sleep. Again quoting from the statement he said,

> "Both (the mother) and (the daughter) were clearly affected by what I had given to them."

He went on to say,

> " was asleep on the couch so I took him home. He was drunk.
>
> When I got back it was about 9.15 pm. I first went to our bedroom to check on (the mother). I actually got into bed. I was in bed about 5 minutes at the most, I was guilt ridden. I asked her if she was alright, she groaned, sort of muttered something and then went to sleep. I bent down and gave her a kiss.
>
> I got up and went into (the daughter's) bedroom. I was just in my underpants. She was wearing a button up nightshirt and a pair of knickers. She was under the blankets. I kissed her, she responded to me, I put my arms around her, at first I lay on top of the bed but as it got a bit heavier I got into the bed. I pulled the blankets down so they were down to her thigh area.
>
> Her eyes were open, but she was effected by what I had earlier put in her coffee. She was just lying there. I presume she would have been pretty sleepy. I kissed

her, I kissed her on the lips and neck, I touched her breasts with my hands and I placed my fingers in her vagina. I was able to put 2 fingers inside her, one finger then both fingers inside her vagina.

I played with her vagina for about 7 or 8 minutes, I kissed and played with her breasts and laid close to her. I was in the bedroom with her for about 20 minutes.

She was responding to what I was doing. She felt wet between her legs, I was half hard.

She was staring at me, just lying there.

I went back into our bedroom and went to sleep."

Medical evidence revealed an injury to within the vagina causing bleeding and scientific evidence showed the presence of seminal emission on the girl's panties. The blood sample taken from the mother revealed the presence of Triazolam, which is described as the hypno-sedative (sleeping pill) halcion, in quantities to suggest that she had ingested a very large dose of the drug. No Triazolam was detected in the blood or urine of either the respondent or the girl complainant. This, however, was not conclusive because of the time lapse since the samples had been taken approximately 16 or 17 hours after the incident.

The learned trial Judge put the matter to the jury on the basis that they could not find the respondent guilty of the two charges of stupefying unless they were satisfied that the respondent knew what he was doing and intended the results which were achieved. Further, he put it to the jury that they could not convict on the sexual violation count

unless they were satisfied that, again, the respondent knew what he was doing and intended the results he achieved and that he acted not believing that the daughter consented to the actions which took place. The Crown did not set out to prove the respondent stupefied the complainant in order to sexually violate her but that after he had deliberately stupefied her he took gross sexual advantage of her.

The respondent said in his statement that when the older daughter came home she could not wake up her mother or her sister and became concerned. She got the neighbours in and eventually next morning the two complainants and the respondent went to the hospital. The doctor in the Accident and Emergency Department described their condition as follows,

> "1. (The Mother). On arrival she was very drowsy although she woke to questions asked at normal voice volume, and answered sensibly, with slightly slurred speech. By 11.30 hours she was much more alert, being able to sit and to stay awake. In my opinion her condition was consistent with having taken a substantial quantity of a sedative drug.
>
> 2. (The daughter). Was alert and appeared reasonably well. She complained of a slight headache. Further examination was, I understand, to have been done by a Police Doctor.
>
> 3. (The respondent). Was quiet and tense, sometimes shakey. He initially complained of chest discomfort but later said that this had gone."

It is noted that the respondent did not inform the doctor of the tablets he had used. That was not revealed by him until interviewed by the Police later that day.

As to the respondent's knowledge of the actual nature of the tablets he used, he was cross-examined and I quote the following passage from the notes of evidence,

> "As far as you were concerned anything could have been in those tablets, you had no idea? As I said before, I administered myself the same sort of things and I have never had a result like that.
> Have you administered to yourself tablets or tablets exactly the same as these ones? Not that I believe no, I have given myself tablets of various shapes and form.
> You were telling us you had no idea what the tablets were other than they started with "HAL"? Yes.
> As far as you were concerned they could have been some form of poison? No.
> How did you know they weren't poison? Well I didn't know for sure if you put it like that."

On sentencing the Judge said,

> "The Court of Appeal and indeed the legislation has made it quite clear that for such offences imprisonment must be imposed and for a lengthy term."

He then referred to the unhappy background and good work record of the respondent and then he said,

> "I think it is important that your partner and the two daughters of the relationship speak well of you and are prepared when it is possible, to have you back with them."

He also took into account the respondent had taken steps to overcome his drink problem and he said,

> "Having said that I must say to you that I cannot avoid imposing a sentence of imprisonment. I propose however to impose a sentence which is as short as I possibly can do bearing in mind that I hope that the sentence will be such as to retain your employment or possibilities of it and to allow you to continue with the course which you have at present adopted of coping with your problem. I also take into account the attitude of the other people who were affected in this situation. I accept that

> while the stupefying was serious, it was not intended to make these people available for sexual purposes."

As to the relationship being one of trust between the respondent and the girl, the Judge said,

> "This is not a case of incest and I particularly say because I would wish it to be recorded that I have formed the view that I have because I see that the relationship between you and the girl who was the subject of this charge as completely unique, that it does not correspond with the situation of trust which has been the concern of the Courts in other cases and indeed because of the age considerations, has a proper bearing on the sentence that can be imposed."

The submissions made by Mr Rea in support of the application were, (1) that the correct approach was for the learned sentencing Judge to assess the overall criminality of the conduct of the respondent and impose a sentence reflecting that overall criminality. While the Crown did not set out to prove that the respondent deliberately stupefied the younger complainant for sexual purposes it was the Crown case that when she was stupefied he very quickly took advantage of that in a gross sexual way. In that sense the stupefying and the indecent assault and sexual violation are linked in the one ongoing series of criminal conduct; (2) that even when the stupefying charges are not taken into account the nature of the sexual violation warranted a sentence significantly greater than that imposed; (3) that a situation of trust clearly existed between the complainant and the respondent. Both the mother and the daughter spoke to the Probation Officer of trust having been lost as

between them and the respondent as a result of the events. Accordingly, Mr Rea submitted that a position of trust existed and that this was a further aggravating feature of the offence not taken into account by His Honour on sentencing.

He also submitted that the family factors have little or no relevance here. He said it is not uncommon for complainants in such cases to express forgiveness of the assailant. It was submitted that the sentence must reflect society's condemnation and denunciation of such offending and that in this case the Judge had given too much weight to the factors favourable to the respondent and not enough to the seriousness of the offending.

Mr Quilliam for the respondent stressed that the complainants had not wished to see the respondent charged but the Police chose to do so and although all crimes are against society as a whole, he said that in the narrow sense, the section of society represented by this family wished to give the respondent their help and support.

This is a case in which the Judge had to weigh up the gravity of the offending itself, which clearly called for denunciation and a deterrent sentence in the public interest, and then he had to take into account the mitigating features of the particular case. He obviously gave his task earnest and anxious consideration but with the greatest of respect

we are satisfied that the Solicitor-General has proved that the sentence is manifestly inadequate having regard to his three principal submissions.

We reach this view approaching the sentencing task in this way. Here was a young man who chose to use tablets, the particular nature of which he was uncertain, but intending them to have the effect of causing a "high". In the terms of s.197 of the Crimes Act 1961, under which he was charged, he wilfully and without lawful justification or excuse stupefied two people, his de facto wife and her 15 year old daughter, without their knowledge. Such conduct must be regarded seriously.

As to the act of sexual violation, again it was not a trivial or momentary penetration. It lasted some time and caused injury. At the time he found the girl in a dazed state. He knew he had caused it; he took advantage of it and satisfied his sexual desires on this 15 year old girl while her mother was also in a drugged state. It is accepted that it was not planned that way but once he took advantage of her and did nothing to protect her in her drugged condition which he had induced, we regard that as a high degree of aggravation. He had caused the state and took advantage of it and it was a breach of trust in the family situation.

This case may well have attracted a substantial term of imprisonment, but this being a Crown appeal and having

regard to the family support which weighed with the Judge and respecting his desire to show leniency, we consider a sentence of 1½ years imprisonment is appropriate on appeal in those circumstances. We grant leave and allow the appeal. The concurrent sentences of 4 months imprisonment are quashed and in lieu a sentence of 1½ years is imposed on each of the convictions under counts 1, 2 and 4. In view of this sentence it is inappropriate that the order for reparation remain. It is quashed. The conviction and discharge on count 3 remains as the conduct under that count was part of the more serious conduct under count 4. The order for suppression of name and identifying material in respect of the respondent and the complainants will continue in force.

G K Binnie J.

Solicitors

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