IN THE COURT OF APPEAL OF NEW ZEALAND CA 126/92

ANY INFORMATION LEADING TO IDENTIFICATION OF PARTIES PROHIBITED

QUEEN

v

CRIME APPEAL CA 129/92

Coram: Eichelbaum CJ
Casey J
Jeffries J

Hearing: 17 June 1992

Counsel: R Douch for Crown
G A Anderson for appellant

Judgment: 17 June 1992

JUDGMENT OF THE COURT DELIVERED BY EICHELBAUM CJ

This is another tragic child abuse case, the victims being appellant's daughters, aged 7 and 6 at the time of the events. In respect of each child the appellant pleaded guilty to one charge of incest and one of unlawful sexual connection, while in respect of the elder daughter there was an additional charge of inducing the girl to do an indecent act upon him. On the incest charges he was sentenced to 7½ years imprisonment, in respect of sexual violation 4 years and on the fifth charge he was convicted and discharged. This appeal is against the incest sentences.

The charges are of a representative nature. So far as the incest convictions are concerned the summary

on a number of occasions over a period of a year appellant had intercourse with each daughter, although it is accepted that penetration was brief and minimal. Both victims have said the appellant put a pillow over their face to stop them screaming. One says she could scarcely breathe and both refer to the pain caused by intercourse. In addition the appellant submitted the elder girl to oral intercourse by placing his penis inside her mouth and ejaculating, and admits he attempted the same with the younger child. In addition he admitted licking the complainants' vaginas, digital penetration of the older child and attempted digital penetration of the younger.

Turning to appellant's personal circumstances, little is said about employment and we infer that appellant has mainly been unemployed. As a youth (he is now 27) he accumulated a number of convictions, mainly for burglary and theft but there has been no significant offending since 1983. None of the previous convictions is relevant to the present offending. Appellant married when aged 16 and there are five children altogether. The probation report states that the marriage has suffered through poor parenting skills.

The victim impact reports graphically illustrate the suffering imposed on these unfortunate children by appellant's conduct, and the potential long term effects. In the case of the older child it has to be said that she has also been the subject of sexual abuse by a brother of the appellant. Appellant therefore cannot be regarded as wholly responsible for her present state but there is little doubt that his conduct predisposed his daughters to the risk of further abuse on account

of the confusion of their attitudes towards males brought about by his actions.

It has not been suggested that the Judge's sentencing remarks contained any error of fact or overlooked relevant considerations. He referred to the decision of this Court in *R v B* (an accused) [1984] 1 NZLR 261, in particular to the Court's remarks that in this field deterrent sentences were unlikely to be effective and that very long sentences, crushing for the individual offender, had to be reserved for the worst cases. Whilst taking into account the plea of guilty the Judge did not state the allowance made but in the circumstances it could not have been less than a year. We deduce therefore that the Judge's starting point must have been 8½ or perhaps 9 years.

A number of factors need to be weighed in appellant's favour. He commenced a course of counselling long before there was any complaint to the police, although by then other persons had been told and he may have appreciated the likelihood that eventually charges would be laid. His account of his own childhood, for which there is a degree of confirmation, is an appalling one; clearly sexual and physical abuse was rife in this family. Once charges were laid he was open about his conduct and we accept there was never any question of a contested hearing. Appellant's wife has continued to support him.

In his comprehensive submissions Mr Anderson has referred us to a number of decisions in this Court. Although the incidence of reported cases of sexual abuse has risen dramatically in the 8 years since *R v B* was decided there has been no dissent from the

principles there expressed. It may be that sentencing attitudes have hardened somewhat. The charges in that case were attempted sodomy, attempted incest and indecent acts, mainly the appellant requiring his daughter, aged 10, to perform oral sex on him, which the Court regarded as the worst form of the various offences. In reducing the sentence from an effective 8 years to 5, the Court stated (we think significantly in the present context) that bad and repugnant though the case was it fell a little short, for instance, of repeated incest or sodomy. The present offending, which in its worst form amounts to repeated acts of rape, and on two victims, must necessarily be regarded as in a higher category. In putting the matter that way we do not overlook what has already been recorded as to the minimal degree of penetration. Other cases referred to us which we have considered include *R v Karawana* CA 247/85, 10 December 1985, *R v Matenga* CA 315/84; 3 March 1986; *R v Pyke* CA 274/86, 29 July 1986; *R v Tugaga* CA 40/87; 8 May 1987 and *R v Vunimasi* CA 370/91, 17 February 1992. For purposes of this judgment it is unnecessary to analyse these in detail but we mention *R v Accused* (CA 121/89) [1989] 3 NZLR 555, described in the judgment as probably the worst case to come before the Court since *R v B* was decided. There the offending against the appellant's children, a son and two daughters, was described as prolonged and deeply depraved sexual abuse persisting continuously over a period of 8 years. We will not repeat a full account of the offending, set out in the report itself, but it included various forms of group activity, and inducing the children to perform gross indecencies upon one another. On a Crown appeal the sentence of 6 years imprisonment was increased to 10, this making an allowance of 2 years for a plea of guilty

so that the effective sentence, imposed as noted as a result of a Solicitor-General's appeal, was 12 years. Just as, in our view, the present is a distinctly worse case than *R v B*, on the other hand undoubtedly the level of culpability must be seen as well below that in *R v Accused* (CA 121/89).

The general approach to cases of this kind is well known. The sentence has to express the community's emphatic denunciation of the conduct involved. Such offending is committed against vulnerable and helpless victims by a person they should have been able to trust but who instead has exploited his position within the family against those virtually powerless to resist. The consequences are to rob the victims of the joy and innocence of childhood, and the infliction of harm which may not be fully apparent for years and the full effect of which cannot be calculated. On the other hand *R v B* cautions against allowing one's natural revulsion to overbear more objective considerations. The remarks in that case about the futility of crushing sentences have already been mentioned.

We have assumed the Judge's starting point was 8½ or 9 years. Of course he had to have regard to the totality of the offending but even so, measured against the maximum of 10 years, such a starting point was high. The resulting sentence was severe and we regard it as the maximum which could be justified. However we are not persuaded it was manifestly excessive. Accordingly the appeal is dismissed.

Thomas J

Solicitors:

G A Anderson, Milford for appellant
Crown Solicitor, Auckland for respondent