NOT
RECOMMENDED

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 428/91

PUBLICATION OF NAMES OR PARTICULARS OF IDENTITY PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985

THE QUEEN

v.

CRIME APPEAL 428/91

Coram: Cooke P
Casey J
Anderson J

Hearing: 27 April 1992

Counsel: J C Pike for Crown
S J Clews for Appellant

Judgment: 20 May 1992

JUDGMENT OF THE COURT DELIVERED BY CASEY J

The appellant faced two counts of sexual violation by rape of his stepdaughter, aged 8 at the date of trial on 23 October 1991, the first relating to the period between 6 October and 16 December 1988 (when she was five) and the second between 6 October 1990 and 25 February 1991, when she was seven. He was found not guilty on the first count but convicted on the second and sentenced to 10 years' imprisonment. He appeals against conviction and sentence.

The girl's evidence was given by way of a video-tape interview pursuant to an order made by the Judge under s23D of the Evidence Act and she was further examined and cross-examined through closed-circuit television. In the notice of appeal against conviction the grounds were stated as error by the Judge in admitting her evidence and that in any event the verdict was unreasonable or against the weight of admissible evidence. At the hearing Mr Clews also advanced a further ground of miscarriage of justice due to counsel's oversight at the trial in not cross-examining the complainant about evidence she had given at an earlier trial, which had to be aborted before she had finished her evidence. The sentence of 10 years is claimed to be manifestly excessive.

The girl was living with her mother and she and her husband (the girl's natural father) had separated towards the end of 1986. He gave evidence and said that he had not seen his daughter since Easter 1988 (when he was with her for about 30 minutes) because her mother refused him access. She had lived in a de facto relationship with the appellant for some two years before marrying him in August 1991, according to the information in the Victim Impact Report. Neither she nor the appellant gave evidence.

The girl came to the notice of the police towards the end of February 1991, and after an interview with a social worker she was taken from the home on 26 February under a "place of safety warrant" and put under the care of Social Welfare with a foster-parent, Mrs B , where she remained until 21 June 1991, then going to live with her paternal grandmother as a result of decisions taken at a family conference.

The social worker concerned (Catharina Mandemaker) worked with the child sexual abuse team and gave evidence that the girl's behaviour, coupled with her knowledge of sexual matters, were strong indications of a child who has been sexually abused. On 28 February she conducted a video-tape interview with her, intended for evidential purposes. Due to a failure to comply with the certification procedures of Regulation 8 of the Evidence (Video-taping of Child Complainants) Regulations 1990, it was accepted that this tape could not be admitted as evidence.

There was a further video-recorded interview held on 7 May and that tape was played to the Court. In it the girl gave an account of the appellant having sexual intercourse with her at home on several occasions when her mother was out, and she demonstrated with anatomical dolls. She said it happened on a couch in the sitting-room, in the bath and in her bedroom, and that it hurt. She was vague about

when and where the abuse had first started. In the earlier interview recorded on 28 February she had described similar acts but named her natural father (Daddy G) as the offender. Towards the close of the second interview she was asked about this and acknowledged that on the very first occasion she had spoken to the social worker she had named the appellant (Daddy L), but that when she went home that night she told her mother who did not believe her and said she was lying. She changed the name to 'Daddy G ' at the first video interview because she was afraid that somebody might growl at her if she named the appellant.

During examination-in-chief following the showing of the second video she still maintained that the appellant was the offender, but in response to a series of leading questions in cross-examination she agreed that it was Daddy G ; and that he, his mother, Mrs B , and other relations had told her what to say in order to implicate the appellant; and that she also knew that the social worker wanted him in jail, and said things to please her. It is difficult to avoid the conclusion that this cross-examination became counter-productive in the light of the girl's willingness to agree with virtually every proposition defence counsel put to her.

In re-examination and in response to questions which were clearly not leading, she re-affirmed that it was Daddy L and not Daddy G who had done those things to her. The Crown called the latter as well as his mother, the social worker and Mrs B , all of whom denied coaching or telling the girl to give evidence implicating the appellant. It was put to G in cross-examination that he had sexually abused her, and to his mother that they had an interest in obtaining custody. Mrs B was asked about previous sexual abuse she had suffered and about her association with Rape Crisis and Womens Refuge, the suggestion being that she was biassed against men. We would not have been surprised if the Judge had commented adversely on the appellant's willingness to have these attacks on Crown witnesses made by his counsel, without being prepared to go into the witness box himself.

He made a statement to the police in which he denied the girl's allegations, but he described naked contact between them in the bed and on other occasions, falling short of intentional indecency, but giving rise to serious reservations about his perception of proper conduct with the child. He also said she had seen him masturbating, and having sexual intercourse with his wife. That statement was produced at the trial. There was medical evidence that the appearance of the girl's vaginal entrance was in keeping with sexual intercourse. The doctor thought it would be highly unlikely that the damage to the hymen opening would have been

caused by the child forcibly pushing a crayon into herself (she had acknowledged doing this once), or by inserting her own finger.

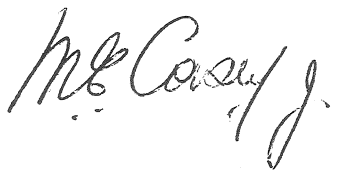
Mr Clews submitted that having regard to the discrepancies between the first and second interviews over who was responsible, and her naming of G throughout the cross-examination, the evidence was so unsatisfactory that no reasonable jury would convict; and that this conclusion would have been reinforced if he had cross-examined the girl about her evidence to the same effect given in the earlier aborted trial.

While there are undoubtedly problems with the girl's accounts, we are satisfied that they were fully understood by the jury, and that further questioning about what she may have said at the earlier trial would have added nothing of significance to their appreciation of the discrepancies. They heard her explanation for naming Daddy G The girl's mother was not called to comment on her daughter's statement that she was afraid to name the appellant for fear of being growled at.

We are satisfied that the girl's evidence was properly admitted and its assessment, along with that of the witnesses who denied influencing her, was clearly a matter for the jury. There was independent testimony from the doctor and the social worker suggesting that the complainant had been the subject of sexual abuse consistent with what she reported. Daddy G was the only other possible offender, but he had no opportunity as, over the period covered by the charges, the girl's mother had refused him access and he said he never saw her. The acquittal on the first charge demonstrated that the jury gave responsible attention to the evidence. As already noted, the girl was uncertain about when and where the conduct had started, but Mr Clews rightly conceded that there was sufficient evidence to convict on the second charge. Taking into account the criticisms and shortcomings so thoroughly canvassed by him, we are satisfied the jury reached the correct decision and that there was no miscarriage of justice. Accordingly the appeal against conviction must be dismissed.

Little need be said about the sentence appeal. In imposing a term of 10 years' imprisonment, the Judge referred to the community's abhorrence over such conduct by an adult male in having intercourse several times with a little girl of seven. He pointed out that the serious effects described in the Victim Impact Report could not have resulted from one isolated incident. Furthermore, the

appellant had been convicted in October 1986 of two charges of indecently assaulting other stepdaughters in a different association, when he was sentenced to imprisonment for one year. Accordingly the Judge regarded him as a danger to society, which he thought might have justified a sentence of preventive detention, and he observed that there was nothing to be said in mitigation, especially as the appellant still denied his guilt. We think the sentence of 10 years' imprisonment was entirely appropriate, and that appeal is also dismissed.



Solicitors: Crown Solicitor, Rotorua