IN THE COURT OF APPEAL OF NEW ZEALAND 13/8 C.A. 172/92

1345

THE QUEEN

PUBLICATION OF NAMES OR PARTICULARS OF IDENTITY PROHIBITED BY ORDER UNDER S.140, CRIMINAL JUSTICE ACT 1985

v.

M

Coram: Cooke P.
Richardson J.
Robertson J.

Hearing: 3 August 1993

Counsel: T.C. Brewer and D.J. Boldt for Crown
C.P. Brosnahan for Respondent

Judgment: 3 August 1993

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

The Solicitor-General applies for leave to appeal against an effective sentence of four years imprisonment imposed on M in the High Court at Wanganui on 5 June 1992. She is a woman now aged 47, who was found guilty on trial before a Judge and jury of three crimes: attempting during the period from May 1990 to December 1990 to procure a man named Brown to murder her husband; agreeing during the period September 1990 to 17 June 1991 with Roberts to murder her husband; on 17 June 1991 at Waverley with Roberts attempting to murder her husband. Obviously those are very serious crimes and the circumstances would have to be extraordinary to justify

as short a sentence as the trial Judge selected. In fact they are extraordinary, as we now explain.

The victim, who is a little younger, is the respondent's second husband. Before marrying him she had undergone deprivation as a child and an unhappy first marriage; we need not detail the history. The second marriage occurred when she was approaching 30 years of age. There is one child of it, a daughter now aged 15. The husband was a heavy drinker and there is evidence that he was violent to her from time to time to the extent that she consulted the police. He has also long been handicapped by a major eyesight problem and has difficulties of physical balance. Evidently the frustrations of living with him drove her to the point of planning his death and to offering a reward for this, said to be $5000, although there is no evidence that she had the means to make such a payment. She tried to persuade Brown to carry out the killing and paid some fines of his, for non-payment of which he had been imprisoned. He refused to take part in the proposed killling. Through his introduction she met her co-accused, Roberts, who is now aged 23. Roberts came to board with the M in their house at Waverley.

At the trial the Crown case was that Roberts and Mrs M agreed to murder Mr M ; that in the early hours of the morning of Monday 17 June 1991 Mrs M woke her husband and told him that she could hear prowlers outside; that Mr M went out to investigate but was followed by Roberts, armed with a tomahawk; and that Roberts struck M between four and six times with the tomahawk on the back of the head, causing very severe injuries from which he was fortunate to survive. They left the victim as they thought dead or dying, but heard him groaning. Nevertheless they went ahead with their plan to ring the police and to represent that Mr M had been attacked by some unknown intruder. The police arrived to find Roberts waiting at the front gate with

a baseball bat, the back door locked and M still lying severely injured, behind the house at the back.

A series of interviews took place between the police and the two accused over some ten days. There was evidence from neighbours of seeing the accused outside the house at a material time and other relevant evidence, including the finding of a tomahawk with blood on it in a drying cupboard in the house and a rugby league jersey belonging to Roberts stained by blood which could have come from M but not from Roberts. Mrs M was charged with three crimes and Roberts with two, as already indicated.

At the trial while Mrs M was found guilty - and she does not appeal against her conviction - Roberts pleaded guilty after the Judge had ruled admissible incriminating answers given by him to police questions on a day when he had reported for periodic detention. That ruling has led to an appeal by Roberts against his conviction, which we are determining today also. For the reasons to be given by my brother Richardson, the Court has concluded that there was a failure to comply with s.23(1)(b) of the New Zealand Bill of Rights Act 1990 and that Roberts must have a new trial. His present sentence, imprisonment for seven years, will necessarily be quashed also, so that we need not consider the Crown's application for leave to appeal against it; but we are not to be taken as indicating that, if the conviction had stood, the sentence would have been inappropriate in the particular circumstances, including especially its relationship to the sentence imposed on Mrs M .

We are directly concerned with her sentence only. The extraordinary circumstances are that the victim is totally dependent on her, unless the young daughter sacrifices her life to him, and that he wants her back as soon as possible.

Before the trial they had effected a reconciliation and she was looking after him in their home. As a result of the attack Mr M , already partly blind, lost the sight of one eye almost completely and suffered a deterioration in the sight of the other. He has the difficulty in walking already mentioned and his memory has been affected. There is no victim impact report but the facts that we have recounted have not been questioned by the Crown, nor does the Crown question that he is adamant that his attitude is that the sooner she is home the better and that he wants her back.

The trial Judge described this sentencing case as perhaps the most difficult exercise of its kind that had fallen to him as a Judge. We share his view that it is extremely difficult. The almost inexplicable cold-blooded planning (an expression that we use despite such provocation and frustration as there was) would normally require a very long sentence indeed. To what extent do the plight and wishes of the victim, and the opportunity of easing his lot for the future, justify a reduced sentence? Clearly some substantial weight ought to be given to those very special factors. How much is a question on which opinions could easily differ. It is a problem of justice and humanity as much as sentencing law.

In the end we think that the answer lies in the very difficulty of the case. This Court does not interfere with a sentence on appeal unless satisfied that it was wrong. On Crown appeals the Court in practice requires to be particularly clearly so satisfied before differing from a sentencing Judge. In this case the Judge, having presided at the trial, had significant advantages; he saw it as 'bizarre' and we agree. We are not able to say that his sentence was wrong. Accordingly the application for leave to appeal is dismissed.

Perhaps it is unnecessary to add, but to avoid the slightest doubt we do add, that this sentence can be no precedent for any other cases where the

circumstances are not truly extraordinary. No impact on general sentencing levels will follow from it.

Pursuant to s.140 of the Criminal Justice Act 1985, there will be an order prohibiting the publication in any report or account relating to any proceedings in respect of the offences referred to in this judgment of the name, address or occupation of any person accused or convicted of the offences or of any other person connected with the proceedings or any particulars likely to lead to any such person's identification. Such order is to have effect permanently.

RB Cooke P.

Solicitors:
Crown Solicitor, New Plymouth, for Crown