NZLR

IN THE COURT OF APPEAL OF NEW ZEALAND 17/12 CA 240/93

ORDER PROHIBITING PUBLICATION OF NAME OR PARTICULARS IDENTIFYING APPELLANT UNTIL TRIAL THEREAFTER PUBLICATION OF NAME IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985

2300

THE QUEEN

v

L

Coram: Gault J.
Holland J.
Henry J.

Hearing: 23 November 1993

Counsel: M J Levett for Appellant
Miss Gordon for Crown

Judgment: 15 December 1993

JUDGMENT OF THE COURT DELIVERED BY HOLLAND J.

The appellant appeals against his conviction on a charge of indecent assault on the nine year old daughter of his step-daughter. He faced two charges of indecent assault but was acquitted on one.

His appeal is focused on the trial Judge's ruling allowing evidence to be given of a complaint to the complainant's school teacher more than two months after the offending, and her direction that defence counsel should not be permitted to refer to the sexuality of the complainant's mother of whom it was suggested that she was gay and had a friend who was weird.

The complainant's evidence in chief was given principally by way of a videotape of an interview pursuant to s.23D of the Evidence Act 1908. She was examined and cross-examined at the hearing by means of closed circuit television.

The videotape was viewed by the Judge in the presence of counsel and the appellant after the appellant had been arraigned. No objection was taken to the admissibility of the tape which included specific allegations of indecent assault by the appellant on the complainant on two occasions as charged in the indictment. The Crown sought to have excised from the tape to be shown to the jury a passage where the complainant, after stating that she had informed two school friends of the incidents, said:-

> "And she kept it to ourself, herself. And then um one day when I was walking home from school um, this friend of mine she um was walking home and she said cause everybody's saying that my Mum's gay, and she said is your Mum gay and I said yes and then the next day I told her about it, her and her friend".

The Judge heard argument from counsel. It was submitted for the Crown that the mother's sexuality was irrelevant and her right to privacy should be given some recognition. Defence counsel submitted that the mother's sexuality was a possible explanation for the complainant's complaint to the teacher. The Judge also heard some argument as to the admissibility of the complaint but directed that she would conduct a voir dire on that issue.

There is no record of any reasons for her decision excluding reference to the mother's sexuality but her notes, which have been produced, show:-

> "All ref. to mother's sexuality not admissible. Xcise video. Child not to appear in Ct".

Following the hearing of evidence on the voir dire the Judge allowed the evidence of the complainant to be given by way of videotape subject to the portion just referred to being excised.

The first count related to an offence alleged to have occurred on or about 22 April 1992. The date of the occasion giving rise to the second count (on which the

appellant was acquitted) was said in the indictment to be between 22 April 1992 and 26 June 1992. The date on which the complaint was made to the school teacher was 26 June 1992.

In her evidence on the voir dire the complainant confirmed that a period of some three months had transpired between the first touching and the complaint to the teacher. She said that she had been encouraged to tell the teacher by all her friends.

In the videotape the complainant said the first incident occurred when the appellant was babysitting and her mother had gone out to a club with her best friend. She said it was on a Wednesday in late April although she had earlier said it was on a Thursday. She said that the second occasion was when she and a friend wanted to go for a swim and the appellant put his hands down inside her bathing suit. She said that this incident occurred about a month after the earlier incident.

The complainant in the videotape said that she first told a friend, N, of both of the incidents and that another friend, A, was present on each occasion. She said that A had told two other friends and that she, the complainant, had told them of the incidents as well as a boy who, she said, had told half the class. The complaint to N in A's presence was said to be a few days after it happened. She was asked how she came to tell the teacher and replied that her friends forced her into it. She confirmed that the first person she told was N and the first adult was the teacher.

The complainant was asked in her viva voce evidence why she waited several months before she told the teacher and replied:-

"So I would make sure that she was the right person to tell".

She had earlier agreed that she was living at home with her mother and when asked why she told the teacher rather than someone in her family had said that it was because she felt more secure with her teacher. In cross-examination when pressed as to why she had not told her mother she replied that she didn't think that her mother would believe her. There was no further cross-examination of the

complainant. We were told by counsel that this was because of the Judge's ruling that no reference was to be made to the mother's sexuality.

After finding the facts as earlier stated the Judge in her ruling on the voir dire said:-

> "Having seen and observed the complainant, I have no doubt that she is someone who is sincere in her evidence, that she did feel more comfortable telling this complaint to her teacher, and that she had difficulty telling her mother. That has not been explained and no-one makes conjectures.
>
> I find on the balance of probabilities that evidence of recent complaint was made at the earliest opportunity, that the evidence was not unacceptable, and that the evidence will be admitted".

The admissibility of evidence of recent complaints in cases of sexual offending as an exception to the rule against hearsay was discussed by this Court in R v Nazif [1987] 2 NZLR 122 at p.125:-

> "It is a prerequisite of the admission of evidence of a complaint that it is made at the first reasonable opportunity after the commission of the offence. It is for the Judge to determine whether the evidence meets this threshold test, see eg, *R v Cummings* [1948] 1 All ER 551, and for the jury to decide what credence they give to the evidence if admitted. There are no hard and fast rules as to the time within which a complaint must be made in order to be admissible. Matters to be taken to account will include the age, nature, and personality of the prosecutrix, her relations with those to whom she might be expected to complain, the reasons for delay in complaint and all other circumstances the Judge regards as relevant".

It has been recognised that questions of spontaneity in cases of complaints by very young children must be examined with particular consideration as to the age and capacity of the child (R v Duncan [1992] 1 NZLR 528, and R v S [1990] 5 CRNZ 669), and, as is stated in Nazif, the age of the complainant is relevant in determining what is the first reasonable opportunity of complaining. Nevertheless no departure from the fundamental rule that for a complaint to be admissible it must be made at the first reasonable opportunity has been suggested in any of the cases.

Evidence of recent complaints is not allowed for the purpose of proving the contents of the complaint but is to establish that a recent complaint was made if such should be the facts. For this purpose the content of the complaint and

evidence of the circumstances in which it was made, including the condition of the complainant, are allowed to be stated. The evidence of the complaint is admitted to assist the court in determining whether the complainant's account of what occurred as given in evidence in Court is consistent.

The present case is not one of a girl so young as not to appreciate that the conduct is such as should be complained about. She had within one year before the offending attended a school programme including a video and she understood about "naughty touching". It is apparent from the videotape in this case that what she said to N and A within a few days of the offending amounted to a complaint. None of the young girls or the boy to whom the complainant had complained were called to give evidence.

It was submitted before us that it was permissible for the complainant in her evidence to say that she had told those children what the appellant had done to her notwithstanding that they were not called. We do not agree with this submission. Unless the person to whom the complaint was made gives evidence within the scope of the recent complaint exception to the hearsay rule, evidence of the complainant either as to the fact that she complained or as to what she told another person by way of complaint can add nothing to the Crown case. It is quite incapable of serving to bolster the credibility of the complainant (which is the only purpose served by evidence of recent complaint): R v Kincaid [1991] 2 NZLR 1. In the absence of a particular reason (such as a charge of recent invention) the evidence is likely to convey a misleading impression to the jury.

In Crime Appeal CA 273/91 (judgment 20 December 1991) this Court considered the meaning of "first reasonable opportunity" and the possibility of there being more than one admissible complaint. The charge was one of sexual violation by unlawful sexual connection of the appellant's 12 year old step daughter. The incident occurred one night when the appellant and the child were alone in the house. The following morning the child behaved normally although with the appellant's consent she stayed home from school. She provided the appellant with

lunch when he returned home from work for that purpose. Following his return to work she tried to telephone her mother in Auckland without success and then telephoned her sister in Auckland to whom she said what had happened. The sister later telephoned back and advised her to stay away from the appellant. The mother later telephoned but the child was too distraught to tell her anything. In the meantime the child's other sister had come home from school and found the child in a distressed condition and unable to tell her what the matter was. This sister found under her pillow two notes which the child said she had written after speaking to her sister in Auckland and had put there for her other sister to read.

No objection was taken to any of this evidence at trial but on appeal counsel submitted that the first telephone call to the child's sister in Auckland was too late in time because the child could have complained to an aunt who lived nearby during the morning. This submission was rejected. Counsel for the appellant also submitted that the evidence of the notes should be excluded as there could not be more than one complaint made at the first reasonable opportunity. After referring to two Australian decisions and R v Wilbourne [1917] 12 Cr App R280 this Court said:-

> "The purpose of evidence of complaint is of course to demonstrate consistency in the conduct of the complainant; that what she has said in evidence to the jury is consistent with her conduct within a short time after the events to which she has deposed. The reason for insistence upon the complaint being made at the first reasonable opportunity is that it is generally only conduct close to the event that can reliably indicate consistency. The further from the event the greater the possibility that the conduct is influenced by factors other than the event itself. This being the purpose underlying the requirement, there is no cause to apply it with a literal rigidity. The expression "first reasonable opportunity" is to be understood in a broad sense, not as referring to a particular point in time, but as referring more generally to a particular occasion of time, place and circumstances. The events which follow a sexual assault are often of a developing kind with more than one confidence being made within a short period of time. All the confidences can then properly be said to have been made on the same occasion. It is a matter of degree in the individual case. That is so here. The complainant wrote her notes sufficiently soon after her telephone conversation with her sister in Auckland as in our opinion to be properly treated as written on the same occasion as that telephone

> conversation, so that they too are admissible as having been made at the first reasonable opportunity after the commission of the offence".

The learned author of Garrow and Turkington's Criminal Law has cited this case as authority for the statement at p.204 under s.129A.14:-

> "There is no rule which requires that the first complaint is the only complaint that may be admitted. Further complaints relating to the same incident may be admissible".

With respect that brief summary may take the case further than it goes. In both R v Wilbourne and Crime Appeal 273/91 there was sufficient connection between the successive complaints for the Court to say in Crime Appeal 273/91 that it may "be said to have been made on the same occasion".

In Breen v R (1976) 50 ALJR 534, the High Court of Australia in a case heard on written submissions without appearance, dismissed an appeal against a conviction for rape where evidence was given by several witnesses of complaints made to them by the complainant although she testified as to only one complaint. In giving judgment the Court said:-

> "There is no doubt, in the Court's opinion, that each of the complaints by the woman concerned ... satisfied the requirements of the law with respect to the admissibility of complaints in cases of rape and sexual assault."

The report of the case gives no details as to the circumstances of the several complaints to different witnesses. They may well have been so related in time and occasion as to amount to the one complaint made more than once but approximately at the same time and place. On that basis the reasoning of the High Court is in accord with the decision of this Court in Crime Appeal CA273/91. We do not regard the decision as one which should affect our conclusions in this case.

The complaint admitted into evidence in this case was made more than two months after the first incident, more than one month after the second incident, and more than two months after the complainant had complained to A and N. The earlier complaints cannot in any way be said to be directly connected with the later complaint to the school teacher. It follows that this later complaint cannot be said

to have been made at the first reasonable opportunity and should not have been permitted to be introduced by way of evidence.

Miss Gordon submitted that in cases of complaints to young children an exception should be made to the rule that the complaint must be made at the first reasonable opportunity. She submitted that because the Crown would be slow to call evidence of complaint from children of a tender age the first complaint to a responsible adult should be admitted. There may be facts which would support such a submission, as the decision as to what is the first reasonable opportunity is a matter of degree, where the ages of the complainant and those to whom complaints are made are relevant. That is not the present case. The gap between the first complaints and the complaint sought to be admitted is between two to three months. The first complaints were made to a school friend but what was said was intended as a complaint and understood by the friend to be such. If the Crown, in such cases should decide not to call a young child or children to whom complaints were made on the first occasion reference would no doubt be made to s.23AC of the Evidence Act 1908 empowering the Judge to give an appropriate direction to the jury in his summing up.

A further submission was made that we should apply the proviso to s.382(2) of the Crimes Act 1961, and uphold the conviction. We are not persuaded that the admission of the evidence of the complaint could not have resulted in an injustice. We are reinforced in this conclusion by the restrictions placed on counsel for the appellant which prevented cross-examination as to the total content of, and circumstances giving rise to, the complaint. We also note that the evidence of the complainant was not accepted totally in that the appellant was acquitted on the second count. The conviction must be quashed and a new trial ordered if the Crown wishes to adopt that course.

In case there should be a new trial we must refer to the decision of the District Court Judge that no reference should be made to the complainant's mother's sexuality. We have already set out the passage in the videotape of the interview

with the complainant when she referred to her mother being gay. The school teacher in giving evidence of the complaint referred to notes made by her at the time. These notes were not produced in evidence. They include reference to matters other than the indecent assaults which were troubling the complainant at the time. The notes contain the following passage:-

> "Amanda said that mum told her she was gay. Mum is presently seeing someone at the moment. Amanda thinks mum's friend is weird."

Because of the Judge's ruling counsel was unable to cross-examine the teacher or the complainant, or the complainant's mother about this.

We no doubt have had much fuller argument on this topic than was presented to the Judge at the commencement of the trial. The issue is one of relevance. In the event of the mother's credibility not being in issue, it is irrelevant whether the mother was gay or not.

However, counsel for the appellant wished to submit to the jury that the nine year old complainant was being teased by her friends about her mother being gay and having a weird friend and that this teasing might have caused the complainant, in order to draw attention to herself, to make a false complaint of indecent assault by her step-grandfather and might have explained the complainant's upset condition at the time of making the complaint. It was also desired to submit to the jury that the complaint to the teacher was not a genuine complaint but that she had been "forced" to do so because of the teasing of her friends.

The relevance of the circumstances leading to the making of the complaint ceases to exist now that we have ruled that the complaint is not one permitted to be led as a recent complaint. Nevertheless we do not feel able to rule that the possibility of this child, because of the teasing, making a false complaint in order to draw attention to herself or to seek sympathy, can be said to be so fanciful as to justify refusing the appellant the right to put the possibility to the jury. In order to do so counsel must be permitted to lay the foundation notwithstanding the right to privacy which the complainant's mother might otherwise expect.

Counsel also wished to challenge the evidence of the complainant as to the date on which the first offence was alleged to have occurred. He submitted that he should have been allowed to put to the jury that the complainant had deliberately been persuaded to give the wrong date so as to protect her mother from enquiries into possible lesbian activities by the mother on the night that the appellant admitted babysitting. We were not persuaded that this rather far fetched submission would alone have affected the jury's verdict but we are not a jury and it would have been preferable to have allowed defence counsel to put the issue.

The appeal is allowed. The conviction is quashed. A new trial is ordered at which the evidence of the complaint to the school teacher should be excluded and no order should be made excising any part of the videotape or forbidding reference to the complainant's mother's sexuality.

A D Holland J

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