IN THE COURT OF APPEAL OF NEW ZEALAND CA 350/94

PUBLICATION of names or identifying particulars of complainant prohibited by s.139 Criminal Justice Act 1985

THE QUEEN

v

94\2224

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Coram	Eichelbaum CJ Hardie Boys J Williamson J
Hearing	22 November 1994
Counsel	Lesley Jane Turner-Geary for appellant R M Lithgow for Crown
Judgment	22 November 1994

JUDGMENT OF THE COURT DELIVERED BY WILLIAMSON J

This appellant, a 51 year old man, was sentenced on 6 September 1994 to 12 months imprisonment together with 12 months supervision in relation to two charges of inducing his daughter to do an indecent act upon him. He now seeks to have those sentences quashed or reduced upon the grounds that the sentences of imprisonment were clearly inappropriate or excessive.

At the time of the relevant offences the appellant's daughter was approximately eight years of age so the offences occurred some twelve to thirteen years ago when the appellant was then aged thirty-eight to thirty-nine. The two

charges formed part of an indictment containing nine counts involving three of the appellant's daughters. The appellant was tried upon this indictment and was acquitted by jury verdict on seven of the counts. The two counts upon which he was convicted relate to incidents which he himself had admitted to the police.

The facts of the two charges, as found by the sentencing Judge, were in relation to the first conviction on count six, that the complainant daughter was staying with the appellant at his house; that the appellant, as was his practice, was sleeping naked; that at some stage of the night the daughter had come to his bed either at his suggestion or with his permission; that the appellant had got into bed with an erection and had then taken her hand and put it on his penis. In relation to the second conviction on count nine, the facts found were that the daughter had been playing draughts at the appellant's home; that he stood behind her clad only in a dressing gown; and that then took her hand and put it on his penis where it remained while the game continued.

The appellant was appearing before the Court for sentence for the first time. He is the father of 11 children. Since 1974 he had been separated from his wife and living in separate accommodation. The offences for which he was convicted occurred when the complainant daughter was staying with him at his home.

The probation officer in his pre-sentence report assessed the appellant as a person who was open and honest and who acknowledged shame for his actions. He went on to say that the appellant seemed genuinely concerned for his offending and had stated that whatever the outcome he wished to seek treatment. The probation officer recommended to the Court two options which might achieve the result of appropriate treatment, being first, a sentence sufficient to enable the appellant to attend the Kia Marama treatment programme for sexual offenders and secondly, a sentence of imprisonment followed by not less than 12 months

supervision to enable the appellant to attend and complete a 52 week community based treatment programme.

In his remarks on sentence the District Court Judge said that in his judgment imprisonment was the only appropriate sentence and he referred to the reasoning contained in this Court's decision in *R v Klarwell* CA 24/87 14 May 1987. He included in his remarks extracts from that decision which emphasise the manner in which family loyalties and family relationships affected such offending.

In this Court counsel for the appellant has argued a number of grounds and in particular the following five:

1. The Judge was in error in concluding that a sentence of imprisonment was the only option available to him.

2. The Judge failed to give proper weight to the following factors:
   (a) that the offences were not of a sexual abuse nature;
   (b) the offences were isolated;
   (c) there was no pattern of indecent conduct over a number of years;
   (d) the offences were historic;
   (e) the offences did not occur whilst the appellant and the victim were living in the same household nor as within a family unit in the same way as in the *Klarwell* case.

3. There were unique and distinguishing features that make imprisonment inappropriate in this case. Counsel particularly relied for that submission on the features that the appellant was a 51 year old man described as quiet living, hard working and with no criminal history.

4. The sentencing Judge had wrongly allowed himself to be influenced by the evidence upon counts upon which the appellant had been acquitted.

5. The Judge's conclusion that the offences were motivated by sexual gratification was inconsistent with the jury's verdict.

We note that the maximum penalty for these offences is one of 10 years imprisonment. Although these offences occurred some 12 to 13 years ago they were and still are ones of a serious nature. The evil involved in such offences is not only the acts themselves but also that the acts involved a young child at a stage of particular innocence and they were committed by a person who the victim was entitled to trust and to look to for protection.

As to the specific grounds of appeal, upon the first ground that the Judge was in error in concluding that a sentence of imprisonment was the only option available to him, we note that in his remarks, on two separate occasions the Judge refers to the fact that in his judgment imprisonment is the only appropriate sentence. He does not suggest that in forming that view in this case he had no other options open to him.

The second ground of appeal namely that the Judge failed to give proper weight to a number of matters is based on a process of negative reasoning referring to matters which were not expressly mentioned in the Judge's remarks. The Judge clearly said what the basis for his sentence was but did not refer to other possible features which had been discounted. He was not obliged to refer to other alternative views which he did not adopt himself. In his remarks, the Judge describes the nature of the acts constituting the offence. He refers to the fact that there were only two offences and to the historical nature of the events. He also made reference to the family relationship between appellant and complainant.

Although it is true to point to the fact that the relationship was not identical with that of the parties in the *Klarwell* case there were clearly elements in this case of an unequal relationship being that between an eight year old girl and her thirty-eight year old father who was in a position of control over her.

The third ground that this case has unique and distinguishing features which make imprisonment inappropriate is not accepted by this Court. The features pointed to, namely the age and hard working and honest nature of the appellant are not unique features in such cases but come within a normal range of circumstances applying to similar cases.

As to the fourth ground that the Judge had wrongly allowed himself to be influenced by evidence upon counts upon which the appellant had been acquitted, this submission is contrary to the expressed basis for the sentences. The Judge said at the commencement of his sentencing -

> "I think it appropriate to sentence you on the basis that you committed criminal acts only to the extent that you admitted them."

And later -

> " ... the criminal acts went no further than I have described though".

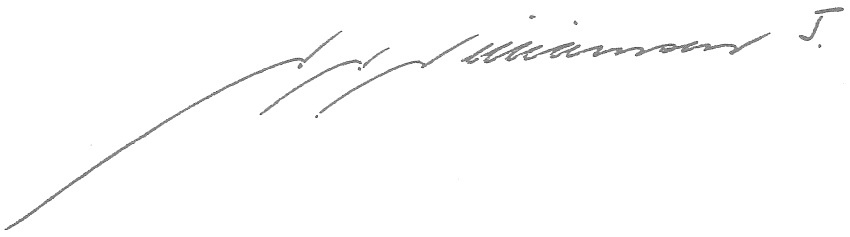
In expressing himself in this way the Judge has specifically restricted the basis of his sentence to those admitted facts.

As to the fifth ground that the Judge's conclusion as to motivation was inconsistent with the jury's verdict it is noted that this ground is based upon the appellant's own evidence that the acts were not committed for sexual gratification but rather were foolish or stupid acts carried out apparently without reason. The Judge's conclusions that the motivation must have been sexual gratification was

one open to him and not inconsistent with the jury's verdict on the elements necessary to establish these charges.

In submitting these grounds of appeal counsel has comprehensively argued the matter. We consider that it is not possible in this case to conclude that imprisonment was an inappropriate sentence. The length of twelve months constitutes a stern sentence but one which is not clearly excessive.

For these reasons the appeal is dismissed.



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