IN THE COURT OF APPEAL OF NEW ZEALAND CA 420/95 & CA 434/95

LOW PRIORITY

THE QUEEN

V

QUENTIN JAMES VINCENT COUGHLAN
&
CRAIG ANTHONY HEWITT

Coram: Eichelbaum CJ
Thomas
Heron J

Hearing: 29 April 1996 (at Wellington)

Counsel: Mr R G R Eagles for Appellants
Mr S P France for Crown

Judgment: 29 April 1996

JUDGMENT OF THE COURT DELIVERED BY HERON J

These two appeals are against sentences of three years and two years imprisonment respectively on two men found guilty by a Dunedin jury of assault with intent to commit sexual violation. Hewitt aged 28 years received the longer sentence. Coughlan was aged 21 at the time of sentencing. Both men lived together with Hewitt's brother at a Dunedin address and had been joined there some weeks before the offence by the complainant The complainant who was 16 years of age, was after he had been drinking with the two appellants, asked to engage in oral sex. He declined. It was suggested by that he was bisexual and should therefore co-operate, this being a reference to some earlier

association, the details of which were not given. It appears that the two appellants then engaged in threats over a period of time, 1½ hours or possibly more, directed to the complainant himself and his property saying that if he did not agree to oral sex they would "hit me, bang me over" and damage his possessions. The two men then performed oral sex in front of the complainant, in it would seem, an effort to persuade him to agree to engage in sexual activity with them.

This was a sustained piece of intimidating behaviour clearly designed to persuade a 16 year old to engage in sexual conduct which he continuously resisted. Despite attempts to confine him within his house he escaped and telephoned a friend who described his distraught state. Hewitt who had made the particular threats to the property, chased the complainant but did not catch up with him. He later carried out his earlier threats by damaging the property.

The different from usual feature of the case is that neither man directed physical force of any kind to the complainant, the assault element of the offence being satisfied by the threatening behaviour described.

Hewitt has convictions for sexual offending but those are now some 8 or more years ago. Since then there has been a regular pattern of appearances before the Court by him for a variety of offending including assaults. The Probation Service record that he has received most of the sentencing options and has generally performed poorly in response to community based sentences. He has limited intellectual capacity and been assessed in the range of mild mental retardation. Despite efforts to help him to be able to be able to cope in the community he has failed to attend a number of courses and to keep appointments, and has now run out of persons willing to assist him. The Probation Officer considered that there was a high risk of reoffending.

We are of the view and Mr Eagles accepts that a sentence of imprisonment was the only option available to the sentencing Judge. We think this appellant needed a sharp reminder of the way in which he had allowed his life to deteriorate evidenced by his rejection of those persons who could assist him, acknowledging the difficulties that he probably has in coping.

Coughlan, although younger, has a deplorable history including previous convictions for threatening behaviour and assault and a number of charges of breaches of periodic detention. He was plainly unsuitable for a community based sentence but has no previous sexual offending. He was at the time of his trial or

shortly before, serving a sentence of nine months imprisonment for dishonesty offences. He too seems to have rejected the various opportunities that he has had offered to him in an attempt to turn his life around. These include treatments at various stages directed to his serious alcohol problem. Again a Probation Officer considered there was a risk of further offending and a prison sentence Mr Eagles accepts was the only option.

Counsel were unable to refer to any case where the assault ingredient of the offence was confined to threatening behaviour alone but referred to *R v Vowell* CA 264/89 where a sentence of 2½ years was reduced to 18 months when more than threats but actual physical assaults accompanied the intention to have unlawful sexual connection. Whilst the facts of that case are very different we note the Court said:

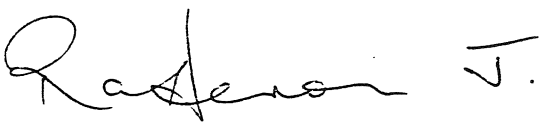
> "The offence of assault with intent to commit sexual violation is a serious one. It carries a maximum sentence of 10 years imprisonment. The sentence to be imposed will reflect the length and gravity of the assault, the seriousness with which the purpose is pressured, the indignities suffered by the victim and all the other circumstances."

Whilst there were undoubtedly aggravating features of his detention, including being subjected to witness the sexual actions of the two appellants, the intrinsically more serious physical violence element was absent.

We are of the view that a sentence of three years and two years respectively was more than was necessary to punish these two men in the somewhat unusual circumstances of the case and the sentence on both men is quashed.

It was accepted by the appellants that the differential between them was appropriate. We agree. In lieu a sentence of two years (Hewitt) and 16 months (Coughlan) respectively is imposed.

Appeals against conviction were not pursued and are dismissed.



Solicitors:

Eagles & Eagles, Invercargill for Appellants
Crown Solicitors Office, Wellington for Crown