IN THE COURT OF APPEAL OF NEW ZEALAND CA No. 252/96

WILLIAMS

v

NOT RECOMMENDED

THE QUEEN

Coram: Richardson P
Gault J
Neazor J

Hearing: 5 September 1996

Counsel: M.J. Behrens for Appellant
D.J. Boldt, with him A.N. Bajwa for Respondent

Judgment: 5 September 1996

JUDGMENT OF THE COURT DELIVERED BY NEAZOR J

The appellant was tried on an indictment containing six counts of indecent assault and one of common assault. The indecent assaults were alleged to have occurred in a Palmerston North gymnasium, at a motel unit in Hamilton and the appellant's house over a period of 13 days in January and February 1988. The common assault is alleged to have occurred about a year later. The appellant was a swimming coach and the complainant one of those whom he trained.

At trial the appellant was acquitted of the first four indecent assaults and the common assault. He now appeals against his conviction on the two remaining indecent assaults and the sentence of six months' imprisonment imposed in respect of them.

Four of the indecent assaults were said to have involved indecent handling of the complainant's breasts. It was on two of those that the appellant was convicted. The fifth involved causing the complainant to penetrate digitally her own vagina and the last involved kissing the appellant.

In 1988 the complainant was aged 14; the appellant 29. Complaint was made to the Police in November 1994 when the complainant, now aged 21, read diaries she had kept in 1988 and 1989. Her evidence was that she had made entries about the appellant's actions, that she had forgotten about the incidents until she read the entries, and that the entries had reminded her of events. Her view was, after speaking to her partner, that she should complain about the appellant's acts and she did.

The diary featured in the trial, the complainant being asked about her diary entries relating to the events complained of to provide a contrast with her evidence in Court. In respect of the first incident in chronological order the complainant agreed that she had noted the circumstances in the course of which she said the handling of her breast occurred but had not noted anything about that handling. She had mentioned for the first time when giving evidence at the trial what was a central part of the circumstances, the use of a heat lamp on her shoulder. There was a difference between her evidence and the diary entry about what underclothing she had been wearing.

There had been no diary reference to the events of the second charge. The third charge related to the digital penetration incident and the fourth to the kiss. There was no cross-examination or reference to the diary about those last two charges. The appellant was acquitted on all four.

In respect of the fifth incident there was a reference in the diary to the appellant touching and fondling the complainant, but cross-examination demonstrated variations

between the complainant's evidence, what she had written in the diary and what she had said to the Police. The differences related to what the complainant had been wearing and whether or not she had taken any clothing off.

As to the fifth incident there was a diary entry about the handling and its circumstances which accorded substantially with the complainant's evidence. These two were the charges on which the appellant was convicted.

Mr Behrens acknowledging what was said in *R v Irvine* [1976] 1 NZLR 96, 99 and *R v Ramage* [1985] 1 NZLR 392, 393 about the question the Court is faced with when the challenge on appeal is based on different verdicts being reached on different counts, submitted that since the jury acquitted on counts 1 to 4 it must have entertained a reasonable doubt in respect of the other two counts.

Mr Boldt referred to *R v Irvine* [1976] 1 NZLR 96, 99, *R v K* (CA 49/96, 13 August 1996) and *R v Jack-Kino* (CA 440/95, 22 May 1996) where this Court pointed out the difficulties which face an appellant who mounts a challenge on the basis of inconsistency between verdicts. In that respect it suffices to refer to the passage in *R v K*:

> "The first ground of appeal is that the verdict on the first count is unsafe because of inconsistency with the verdicts on the other two counts. This is a ground of appeal that has been raised with increasing frequency in recent times, generally without success because of misapprehension of what must be shown before verdicts will be set aside. If there is a reasonable explanation to be found in the evidence such that the jury could have differentiated between the charges there is no inconsistency. It is only when no reasonable jury applying their minds properly to the facts could have arrived at the conclusion that the verdicts cannot stand together: *R v Irvine* [1976] 1 NZLR 96, 99."

Mr Behrens submitted that the jury must have disbelieved the complainant at least in respect of the first three counts, possibly considering kiss alleged in the fourth not to have amounted to an indecent assault.

It was submitted further that the course of cross-examination showed that the complainant was prepared when necessary to embellish her evidence as to how much she remembered and that there were other aspects of the evidence which raised doubts about the complainant's credibility.

Mr Behrens accepted however that when looked at alone the evidence in respect of counts 5 and 6 was sufficient to convict, but he argued that there was a clear inference to be drawn on looking at all of the verdicts and the evidence in support of them together, that the jury convicted only when there was some written record which might be regarded as supportive of the complainant's evidence that the assaults happened, and that it could be said to be probable that the guilty verdicts were reached on the basis of those entries rather than the complainant's evidence in Court.

Particular attention was directed in submissions to the evidence in respect of the fifth count in relation to which it could be said that there were noticeable differences between details of the circumstances of the incident given on three occasions. Mr Behrens submitted that the three versions of events could not all be true, and that if the complainant had at various times given one or more descriptions of the circumstances the jury ought acting reasonably to have rejected her as a credible witness in respect of this matter entirely instead of possibly or probably accepting the diary entry as a sufficient basis for believing that what was charged had happened.

The short answer to this analysis is that it was common to all three accounts that on the date charged the appellant had indecently handled the complainant. What was different was detail as to clothing the complainant was wearing or took off. Even if the jury regarded the complainant as unclear as to the details of the events it was open to them to accept that she was credible in respect of the central issue of whether the accused did handle her indecently.

Mr Behrens accepted that such an argument could not be advanced with the same force in respect of count 6 where there was a substantial coincidence of detail between the diary entry and the oral evidence.

It is plain that the jury did place reliance on the diary entries. During their deliberations they had the passages of evidence relating to those entries read to them again.

Mr Behrens' submission presents one way in which the jury might have reached its verdicts. However, the evidence and the verdicts are equally consistent with the view that the complainant was regarded as a credible witness but that the jury elected to be cautious in respect of complaints made 6½ years after the events on the basis of recollections said to have been triggered by diary entries, and elected not to convict in respect of any charge where no such entry was referred to in evidence. If that was the approach it would have to be regarded as both reasonable and careful. Whichever of these possibilities is right we cannot say that the circumstances are such that a reasonable jury or this jury if it was consistent must have rejected the complainant as a witness wholly unworthy of belief and thus could not have accepted her evidence in respect of the two counts on which the appellant was convicted. Accordingly the appeal must be dismissed.

As to sentence:

The appellant has two previous convictions: one for offensive behaviour and one for disorderly behaviour both incurred when he was 20. He was fined for those. He has been a swimming supervisor and coach for many years after being a successful competitive young swimmer himself. He was highly regarded by people whose children he coached who said that they had had no concerns about his dealings with their daughters and they were referring to the period after the offending charged.

If a community sentence was considered the probation officer suggested a sentence of periodic detention.

The Judge accepted that the actions were completely out of character for the appellant; he took into account that there was a breach of trust associated with the offending and imposed a sentence of 6 months' imprisonment primarily for the purpose of general deterrence.

It is material to note that since sentencing the appellant has spent 16 days in custody. Mr Behrens submitted that that has been sufficient to provide any personal deterrent that might be necessary.

We do not minimise the seriousness of the element of breach of trust when any offence of indecency is committed by a person who is dealing with children and temporarily or permanently has charge and care of them. Nor do we depart from the view that imprisonment will usually be seen as the appropriate penalty in such cases. Nevertheless there are several factors which have a bearing on the sentencing response in this case:

- the two offences were committed on consecutive days 6½ years before any complaint was made. During that period of 6½ years the appellant has continued his coaching activity. Not only has there been no other complaint suggested, the probation officer had positive comments about his attitude to children from parents whose children he has trained during that time. The offences can be accepted as a one-off aberration;

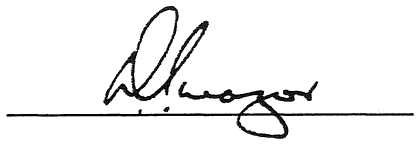
- the assaults themselves were towards the lower end rather than the higher end of the scale of seriousness;

- no determination was made by the trial Judge in respect of the circumstances about count 5 which would warrant those circumstances being seen in the light least favourable to the appellant. All that we can take from the material available is that the jury accepted that indecent handling occurred;

- there has been no suggestion that the assaults were of such seriousness as to produce any profound effect on the complainant at the time the events happened, although we accept that there must have been some then when she was a teenager. The more profound effects were described as arising when she was older.

When these considerations are weighed we consider that the case is one which could properly have been met by a sentence of periodic detention rather than a fully custodial sentence. Periodic detention is in itself not a minor or insignificant sentence.

Accordingly the sentence of imprisonment is quashed. In lieu of it the appellant is sentenced to 6 months' periodic detention. He will be required to report to the detention centre at 9 David Street, Palmerston North on Saturday 14 September and thereafter on such occasions as may be directed by the warden. The statutory maxima as to the length and number of attendances will apply.



D.P. Neazor J

Solicitors: M.J. Behrens, Palmerston North for Appellant
Crown Law Office, Wellington for Respondent