IN THE COURT OF APPEAL OF NEW ZEALAND CA 440/96

THE QUEEN

V

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Coram: Eichelbaum CJ
Blanchard J
Heron J

Hearing: 23 April 1997

Counsel: S L O'Neill for Appellant
S P France for Crown

Judgment: 24 April 1997

REASONS FOR JUDGMENT OF THE COURT DELIVERED BY HERON J

This was an appeal against conviction on one charge of sexual violation by rape. The appellant stood trial in the Christchurch High Court and was found guilty by a jury on 22 October 1996. He was sentenced to 6½ years imprisonment. He appealed on the grounds that the verdict of the jury was unreasonable and could not be supported having regard to the evidence.

At the conclusion of the hearing we allowed the appeal, quashed the conviction for sexual violation by rape and substituted one in the following terms:

> Between 11 May 1990 and 3 November 1990 at Christchurch indecently assaulted [the complainant] a girl under the age of 12. (Crimes Act 1961, Section 133).

After hearing submissions, pursuant to Section 386(2) we passed a sentence of 2½ years imprisonment in substitution for the sentence imposed in the High Court. The reasons now follow.

The appellant who was commonly known as Tip, lived at an address at 37 River Road, Christchurch with Sharlene Nathan. At that address the appellant was visited from time to time by the complainant, then a girl of 4 years of age, in the company of her mother and stayed over night at that address. The appellant, the complainant's mother and Sharlene Nathan were good friends. The complainant's mother described Tip as like family, and treated like a brother.

In December 1994 the complainant was taken by her mother to Dr Sheldon following her mother noticing symptoms of thrush infection and then apparently referred to Dr Exton.

The circumstances must have given rise to concern and on 6 December 1994 an evidential interview was undertaken of the complainant. In summary the complainant said that during one of the visits in 1990 Tip had told her to get on to his bed. She said that she tried to scream but he covered her mouth, that he was on top of her and she described an act of intercourse. At the time of her interview the complainant was aged eight years and was describing events that had occurred four years earlier. Following that interview the appellant was examined by Dr Exton. She described the condition of the complainant's vagina as being typical of a thrush infection. That doctor held a post-graduate diploma in obstetrics, was a member of the Royal College of General Practice, and since 1991 had been a member of Sexual Abuse Care, a national organisation made up of gynaecologists, paediatricians and sexually transmitted disease experts.

On examination the doctor also discovered that the child had a loss of normal hymenal tissue in the posterior part of the hymen. The doctor considered

that in her experience the loss of tissue in that area was symptomatic of sexual abuse, but she was unable to date when that might have occurred. She could not exclude recent sexual abuse.

The appellant was interviewed on 15 February 1996. He acknowledged that during 1990 he had lived at River Road with Sharlene Nathan and that the complainant had from time to time visited at that address. He acknowledged that there had been one occasion when the complainant and himself were on the bed together. Asked if anything had happened then, he described having a doze, waking up from sleep and finding the complainant sitting on top of him. He pushed her off and walked out of the room. The appellant said that no one had seen him push the complainant away but that Sharlene had then come into the room. He admitted that he had an erection whilst lying on the bed. He said he could not explain why he had an erection but that he had just woken up.

The principal issue arising in this appeal is the state of the evidence which goes to demonstrate that penetration of the complainant's vagina occurred. Throughout her video interview she maintained that her clothing remained the same and that contact with the appellant's penis was on top of her clothing. Various passages in the interview on this subject were as follows:

PG So um where, where, what happened to your clothes. Did they stay the same or did they change

SS They stayed the same

...

PG And what about your clothes
SS They stayed the same. I wasn't wearing a skirt.

PG What, what were you wearing
SS I was wearing pants

PG So where, where exactly was his, what did you call it a lu, lulu
SS Yeah

PG Was it. What where exactly was his lulu
SS Over there (indicates)

PG Was that on top of your clothes

SS Yes
...

PG Okay. Did you see his lulu or not
SS No

PG And what did it feel like
SS Rock

PG Did it feel anything else
SS No. I don't think so

PG Okay. So when you say the middle, what do you mean by that
SS It's a lulu, oh what do you mean by that

PG When you felt it in your middle, on the middle. Where, where was that exactly. Can you show me on here
SS There (indicates)

PG Okay, and that was on top of your clothes, is that right
SS Yep
...

PG How did it feel on your body
SS Hard

PG So where did it feel hard
SS In my vagina

PG So what made it feel hard
SS When he was pushing

PG So how was he pushing
SS Um, like that (indicates)
...

PG Okay. So was that kind of um, can you just show me with this doll here, um, if that's you and that's him, could you show me where, where were his clothes, show me where his clothes were
SS They were on him

PG And where were you clothes
SS They were on me as well
...

PG Where, whereabouts were his trackpants
SS They were, on, there, they were on him, he had pulled them down before
...

PG So was that on top of your clothes or underneath
SS Oh um I think they were underneath or, oh I think they were on top

PG Is that something you don't remember or is it something that's too hard to talk about
SS It's when oh what

PG About where your clothes were
SS Something I can't remember

Without objection further evidence in chief was given by the complainant in addition to her evidential video recording in which she spoke of going to the toilet and throwing away her underpants which had stuff in them. She was not asked about the critical question of clothing again.

Whilst from this further evidence an inference of penetration may have been drawn, the overriding impression left by the evidence given by way of the video recording was that the actions of the appellant did not necessarily involve penetration and therefore an essential ingredient of the offence of rape was missing.

The deposition evidence of Sharlene Thomas was read to the jury, she having died before the trial. She confirmed the complainant had been sitting on top of the appellant and he had pushed her off. She observed he had an erection but there is no evidence that it was exposed. The circumstances were unable to be further explored at trial.

In the course of cross-examination Dr Exton was prepared to assert that penetration may have occurred through the complainant's clothing. This however had not been the way the Crown case had been presented. The jury had been invited to infer penetration from other evidence but properly the Crown had laid an alternative charge of indecent assault to reflect the alternative view the jury might take of the incident overall.

In the end we think the evidence does not go sufficiently far to enable the jury to be satisfied beyond reasonable doubt that penetration occurred and the verdict cannot be supported having regard to the evidence. Having regard to the child's age

at the time of the event and the requirement made of her to recall the detail four years later it is no surprise that some of the details were not recalled.

For these reasons we consider the verdict to be unsafe and the conviction on this count required to be set aside and the sentence quashed.

S.386(2) Crimes act 1961 provides as follows:

> Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed as may be warranted in law for that other offence, not being a sentence of greater severity.

The elements of the lesser offence of indecent assault on a girl under 12 are included in the elements of rape. See *R v McCormack* [1969] 2 QB 442, and compare *R v Norris* (1988) 3 CRNZ 527 where the complainant was over the age of consent. Undoubtedly, the lesser offence is made out.

Mr O'Neill raised two other grounds of appeal which need only to be considered briefly. The first was that the complainant's evidence given *viva voce* at the hearing showed signs of coaching or schooling and was inconsistent with the video recording. In the end the evidence so given did not in our view remove the fundamental difficulty relating to proof of penetration. No further comment is required.

When the Judge gave the standard direction as to delay in making complaints pursuant to S.23AC Evidence Act 1908, Mr O'Neill suggested that the Judge ought then to have reminded the jury of the evidence to the effect that hymenal damage could have been recently caused. We consider the Judge made sufficient reference to the point as to recent sexual abuse in his summing up and was not required to do anything more by way of emphasis.

In summary, the appeal against the rape conviction was allowed and a conviction for indecent assault was substituted.

Sentence

Aged 29, the appellant had no previous convictions for sexual offending and his probation officer regarded it as out of character. The victim is said to be coping reasonably well and her age at the time of the offence has meant her recollections are not particularly vivid.

A sentence of 2½ years was appropriate and was imposed.

Ra Jerom J.

Solicitors:

S L O'Neill, Christchurch for Appellant
Crown Law Office, Wellington for Crown