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IN THE COURT OF APPEAL OF NEW ZEALAND CA295/97

PUBLICATION OF NAME AND IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY s139 CRIMINAL JUSTICE ACT 1985

R THE QUEEN

v

EDWARD JOHN EWART

Coram: Gault J
Keith J
Blanchard J

Hearing: 3 March 1998

Counsel: J K W Blathwayt for Appellant
M J Bodie for Crown

Judgment: 3 March 1998

JUDGMENT OF THE COURT DELIVERED BY GAULT J

The appellant was convicted after trial in the District Court at Wellington of sexual violation by rape. The indictment charged that the offence occurred between 1 January 1978 and 28 October 1978 at Blenheim. Prior to trial the appellant applied for a stay of the matter because of the lapse of time since the alleged offence said to have given rise to prejudice. In his ruling the District Court Judge who heard the application dealt fully with the relevant legal principles and the arguments advanced. He dismissed the application. There has been no criticism of that ruling.

This appeal, after trial and conviction, was advanced on two grounds, the first is that the verdict is unreasonable and is not supported by the evidence; the second is that there has been a miscarriage of justice in that as matters eventuated at trial the

appellant was prejudiced by the lapse of time since the events complained of. An appeal against sentence was also notified but was not pursued and is dismissed.

The complainant who was about nine years old at the time, gave evidence that the appellant, who was then about 18 years old, persuaded her to go to the bedroom he was occupying at his mother's house where the complainant also was staying. He told her he wanted her help with an experiment involving a chemistry set he had. He removed her pants, opened his jeans and inserted his penis into her vagina. Her evidence was that it hurt her and that the incident came to an abrupt end when the appellant's mother returned. The complainant said she saw him wipe a glass microscope slide on his penis and put that on the microscope. She also said he warned her not to tell anybody what had happened.

The complainant's evidence as to the time of the incident was that it occurred a month or a month and a half before the appellant was married and on a day she recalled vividly because she did not have her raincoat and was sent to school wearing a rubbish bag over her clothes to keep them dry.

In the course of cross-examination the complainant acknowledged that when she first complained to the police she made a statement which differed considerably from what she said in her evidence as to the time of the offence. She had told the police it was before she started school and that the appellant was 15 years old. Her explanation was that after speaking to the police initially she thought more about the matter and subsequently made a second statement correcting various matters.

The appellant did not give evidence. There were two witnesses for the defence, both dealing primarily with the appellant's living arrangements up to the time of his wedding and going to the accuracy of the evidence of the complainant as to the circumstances of the household at the time.

There were then the acknowledged inaccuracies by the complainant in her original complaint to the police. In addition there were inconsistencies in peripheral

issues between her evidence and that given by the defence witnesses. All of these matters were before the jury. Mr Blathwayt submitted that they gave rise to such concern for her reliability that the verdict must be seen as unsafe. We do not agree. There was evidence of the essential elements of the offence on which there was no uncertainty. The description of the sexual violation was clear and graphic. The evidence was unshaken and was available to the jury on which to rest the verdict. It was entirely open to the jury to accept that evidence notwithstanding the prior inconsistent statement and the conflicting evidence as to peripheral matters. The first ground of appeal fails.

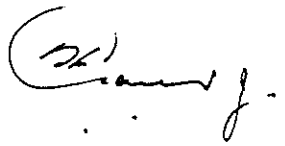
The second ground was advanced by Mr Blathwayt in this way. He submitted that the appellant has been plainly prejudiced by the delay in the sense that the jury were able because of the lapse of time to overlook the discrepancies which otherwise must have resulted in a reasonable doubt. Had the trial occurred within say two years of the alleged offence counsel would not expect the jury to accept the complainant's evidence when the facts establish that the appellant was in fact living elsewhere at the critical time and that her evidence simply was not true. Counsel's submission was that the appellant was clearly prejudiced in the sense referred to in ***R v Accused*** [1991]3 NZLR 405.

Of course, if the trial had taken place within a year or two of the events and the evidence had been exactly the same, the jury might well have entertained concern as to the ability of the complainant to recollect. But it is unrealistic to consider that as a possibility. It is unproductive to speculate on what might have been the evidence then.

The issue now is whether the appellant's right to a fair trial was prejudiced by the lapse of time to such extent as to give rise to a miscarriage of justice. He has pointed to no prejudice other than that the delay must be the explanation for the jury accepting the complainant as a credible witness when there was evidence of inaccuracies and inconsistencies. But there were no demonstrated inaccuracies or inconsistencies in her evidence on the essential issues. Her credibility on those was for the jury to assess. That she had accepted she originally had some matters wrong and

was contradicted by defence witnesses on others would not have bolstered her credibility in the minds of the jury on the essential issues. Yet her evidence on those was accepted.

Therefore we do not agree that the lapse of time prejudiced the accused. This was very much a case for the jury. All matters advanced before us were similarly pressed upon the jury. We see no reason to interfere with the verdict. The appeal is dismissed.



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