IN THE COURT OF APPEAL OF NEW ZEALAND CA494/97

Publication of name or identifying particulars of complainant prohibited by s139 Criminal Justice Act 1985.

Order forbidding publication in news media until completion of re-trial.

THE QUEEN

v

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Coram: Eichelbaum CJ
Blanchard J
Heron J

Hearing: 26 May 1998

Counsel: J M Ablett Kerr QC and S K Barr for Appellant
J C Pike and W J Wright for Crown

Judgment: 8 June 1998

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

The appellant was convicted after a trial in the District Court at Dunedin on four representative charges of sexual violation by rape and one representative charge of sexual violation by unlawful sexual connection. He had pleaded guilty on arraignment to representative charges of indecent assault on a girl over the age of 12 years and under the age of 16 and of having sexual intercourse with a girl not being his wife and being under the age of 20 years who was at the time living with him as a member of his family. He was acquitted by the jury on another representative charge of indecent assault.

All charges related to P who was the daughter of the appellant's de facto wife. The appellant, P's mother and P had lived in the same household since P was 6. Also living there were P's younger sister and the appellant's four sons. The appellant admitted indecent touching of P when she was 14. The jury found that before her 15th birthday the offending had progressed to digital penetration. Full sexual intercourse on a regular basis began shortly after P turned 15 and continued when she was 16. The appellant said that she not only consented but encouraged his approaches and became his sexual partner, replacing her mother. The jury obviously rejected the appellant's evidence on this question. There was no evidence from anyone in the household other than P of her resistance or protests. The sexual activity between P and the appellant continued after P's mother became aware of it and, indeed, after she had been replaced by P in the appellant's bed and was sleeping in the lounge or in a sleep-out.

The Crown case was that the appellant had achieved domination over P, her mother and the other members of the family by bullying and aggressive behaviour including frequent resort to the threatened and actual use of violence. The Crown called evidence from Dr Gail Ratcliffe, a registered psychologist, who described to the jury Post-traumatic Stress Disorder (PSD) and expressed her expert opinion that P was suffering from it. In a pre-trial ruling the Judge had refused to allow the Crown to call evidence from Dr Ratcliffe that P's mother had been a battered woman and also suffered from the disorder.

In her comprehensive written submissions Mrs Ablett Kerr QC put forward ten grounds of appeal:

1. That P, who was 17 at the time of the trial but under that age when the proceeding commenced, had been allowed to give her evidence by way of closed circuit television (ss23D and 23E Evidence Act 1908) and that her mother and one of the appellant's sons (aged 16) had given evidence behind screens.

2. That the Judge failed properly to warn the jury in relation to the use of the screens and closed circuit television.

3. That evidence had been wrongly admitted from witnesses apart from P of the appellant's violence and intimidation of the family.

4. That the evidence of Dr Ratcliffe was "flawed" because it was dependant upon that evidence of violence and intimidation.

5. That the Judge misdirected the jury on the use which it could make of Dr Ratcliffe's evidence.

6. That the Judge failed to tell the jury that before it could use Dr Ratcliffe's evidence, it must have found to be proved the facts upon which her opinion was based.

7. That the Judge misdirected the jury on the burden of proof.

8. That the Judge misdirected the jury concerning the reasonableness of the appellant's belief in P's consent.

9. That the verdicts were unreasonable and could not be supported having regard to the evidence.

10. That the Judge's directions failed to put P's evidence in proper context.

It is convenient to begin, as counsel did in her oral argument, with the last of these grounds. Mrs Ablett Kerr submitted that in reaching its guilty verdicts the jury must have accepted a Crown case put forward in closing which ignored what the complainant actually said in her evidence and proceeded upon a different theory about what had occurred between the defendant and P; and that the trial Judge failed to point this discrepancy out to the jury and to properly put the defence case.

The Crown painted a picture of an atmosphere of violence and threats from Mr Colquhoun to all members of an isolated rural household. He was portrayed as a selfish tyrant and a strict disciplinarian who used his great physical size (22 stone) and overbearing personality along with the actual striking of blows or the threat of them to intimidate the complainant's mother and the children. He was able to do so because of the contrastingly weak and submissive character of the mother who was entirely under his domination. The children were beaten with a belt and a stick even for minor infractions.

But when P was 13, although the appellant's general behaviour did not change, he began to exempt her. She became his favourite with whom he spent long periods alone (for example, they went rabbit shooting together in the evenings) and to whom he gave presents. His sexual approaches to her began. Against the background of continuing violence to other family members, carrying with it the possibility that it would again apply to her if she did not do what he wanted, and using a combination of the use of his parental position and physical presence and the granting of favours or "grooming", he obtained P's unwilling acquiescence to sexual intercourse. As Mr Pike put it, the underlying violence still flickered.

Mrs Ablett Kerr contrasted this view of events with what P actually told the Court. P said that the appellant forced her to have sex with him by using actual violence against her and by threats. On the first occasion when intercourse occurred he had taken her to his bedroom. She was "climbing up the wall" in trying to escape from him and protesting but he pinned her to the bed and raped her. He was afterwards in the habit of hitting her including slapping her face ("I just about got a broken jaw") and sometimes (but "not often") she tried to fight him off. It was submitted that the Judge in his summing up failed to remind the jury of this evidence from P. He is also said to have failed adequately to address the defence case, which was that there was no violence to P but, rather, she consented to a sexual relationship with the appellant because it made her life considerably better than that of her mother and the other children. The defence submission was that P lied to the Court about the true nature of her relationship with Mr Colquhoun because she is ashamed of it and embarrassed to admit that it was consensual.

Because Mr Colquhoun admitted the sexual relationship, quibbling only about when it commenced (he initially said 16, later accepting 15), the real issues were whether P consented and, if not, whether he had a reasonable belief that she was doing so.

Having considered the summing up as a whole we find ourselves persuaded by counsel's arguments. The Judge did not point out to the jury the contradiction between P's evidence of violence and of resistance on her part and the Crown's theory which the Judge described as one of "a grooming, or seductive process." We are also unable to find in the summing up any reference to the defence contention that P is now embarrassed to admit that she was willing to have a sexual relationship with a man who was not only unattractive and much older than herself, but was also her mother's partner.

Modes of evidence

We now move to the first of a series of objections to particular rulings and directions. In a pre-trial ruling the Judge made an order under s23D of the Evidence Act 1908 that the evidence of P should be given by way of closed circuit television. Applications had also been made in reliance on the inherent jurisdiction of the Court in relation to P's mother and younger sister and the appellant's son. It was ordered that their evidence should be given behind a screen.

Because the younger sister was aged 14 and, as counsel said, was of obviously nervous disposition, no objection was taken in her case. The defence was also willing to consent to the use of a screen for P. It raised objection to the use of television. In argument before us Mrs Ablett Kerr suggested that this made it difficult for the jury to assess P's size, but of course if knowledge of that was really going to assist the defence case P could have been asked about her height and weight.

The main thrust of counsel's argument was that the use of television combined with the screening of all the other family members who gave evidence must have created great prejudice against the appellant in the minds of the jury, notwithstanding that the Judge gave them the usual direction that such modes are commonplace and that no adverse inference was to be drawn against the

appellant from their use. He did this before each of the four witnesses gave evidence and again in his summing up.

Counsel's concern particularly related to the screening of the mother. We agree with the submission that it is a question in each case of whether the protection of the witness is reasonably necessary (***R v Accused (T4/88)*** [1989] 1 NZLR 660, 668) and that the use of screens for mature *non-complainant* witnesses is a rare occurrence. Indeed, because of the importance of confrontation it is far from common for mature complainants (***R v Daniels*** (1993) 10 CRNZ 165, 168). Accepting that, and further accepting that the Court should be particularly cautious when considering a mode of evidence application in respect of multiple witnesses, especially where they include an adult witness, we think that in this case there were very special circumstances which justified the orders made by the Judge. He had the benefit of extensive psychological reports on the complainant and the witnesses. We will refer later to the evidence about the mental condition of the complainant. The diagnosis of the mother was that she had suffered from battered woman syndrome and, now that the abuse was over, continued to suffer from PSD, a recognised mental disorder. In Dr Ratcliffe's report, which we understand she confirmed when giving evidence at the pre-trial hearing, she described this disorder as "the residual effects of being in a situation of profound and uncontrolled fear for a prolonged period and being unable to remove oneself from this situation." The disorder is said to be characterised by an increased susceptibility to stress, feelings of low self-esteem and worthlessness and difficulties trusting others. It is also characterised by obsessive thoughts about the trauma and by attempts to avoid these and an avoidance of any situation which reminds the victim of the original trauma.

The mother had described to the psychologist her inability to make decisions ("unable to stick to anything and no longer knowing who she is"), being frightened to go outside and often sitting inside with the curtains drawn. She described problems with breathing and episodes of hyperventilation. She had made two recent attempts at suicide. She had nightmares of the appellant

chasing her and yelling. She had expressed to Dr Ratcliffe an attitude of being prepared to give evidence against Mr Colquhoun face to face but was scared by the thought of confronting him without a screen. She described harassment by him after the charges were laid, saying that he had telephoned her while in prison on remand and later had driven up and down the road outside her house and had written a letter to her which she said brought home to her that "he could still get hold of her." She was unable to read the letter, started to shake and came out in a cold sweat when attempting to do so. Dr Ratcliffe's conclusion was that the mother displayed 20 out of the 21 symptoms necessary for a diagnosis of PSD, the threshold being 10. In other words, there was a high level of PSD which was believed to be at least in part related to prior abuse by the appellant.

Mr Colquhoun's son had reported his father's physical and emotional violence towards him. He had expressed reluctance to give face to face evidence against his father because he felt that his father would use "emotional blackmail" against him. He had visited his father in prison and believed that his father was attempting to influence the evidence which he would give in Court. Dr Ratcliffe's conclusion was that the son was still at a very high level of stress related to his father, though he did not quite meet the criteria for PSD.

In our view the Judge was plainly right in the decisions which he made on modes of evidence for P and her mother. The use of the screen for Mr Colquhoun's son was a borderline decision but, on balance, we would not differ from the view taken by the Judge. However, in this unusual situation a strong direction from the Judge was required about the modes of evidence both at the appropriate points during the trial and again in the summing up. We do not have a transcript of what was said prior to each witness's evidence and have to assume that it paralleled the relevant passage in the summing up. What was said there was in our view adequate and of course was being said for the fourth time, but it would have been better for the Judge to expand further. He could have made mention that Parliament has given a lead to the Courts in the case of young witnesses by prescribing the ways in which their evidence can be given and

that, although it is done to assist them, by enabling them to be more comfortable in the unfamiliar surroundings of a courtroom, it is not to be taken as an indication of any view about the worth of their evidence. The Judge could have added that the Courts adopt the same policy in respect of some adult witnesses who may have particular difficulty in a courtroom environment but again the use of a screen should not lead the jury to treat the evidence of such a witness any differently from that of any other witness.

Evidence of violence and threats

The next matter is the appellant's submission that evidence should not have been admitted concerning violence and threats on his part other than incidents observed or experienced by P. It is said that there was obvious prejudice from such evidence and that it was irrelevant to the question of whether she consented or appeared to consent to the sexual relationship because, unless it was something that happened to her or was seen by her, she cannot have been influenced by it. Mrs Ablett Kerr described such incidents as "extraneous violence". There was evidence of this kind from the family members who gave evidence and from neighbours of the family.

Although there was undoubtedly prejudice from it, we consider that the evidence was properly admitted and, indeed, can be seen as essential to the Crown's case, which was that Mr Colquhoun's violence and threats had enabled him to obtain domination over the family and, in particular, his de facto wife. The Crown faced the difficulty that the jury might not accept its version of events because it would seem so unlikely that even a submissive woman like the mother would be prepared to tolerate what had occurred between Mr Colquhoun and her daughter. The explanation of her compliance was that she too had suffered and was continuing to suffer physical and emotional violence from him. Thus her evidence and supporting testimony from the other witnesses on the question of his disposition towards family members and of how they were scared of him was

of considerable relevance. Its probative value outweighed its prejudice and it was rightly admitted.

It follows that the next ground of appeal, namely that Dr Ratcliffe's evidence was dependant upon it - that she expressed an opinion partially based on such evidence - also fails.

Misdirections?

Four grounds of appeal related to alleged misdirections by the Judge in his summing up. The first two of them related to his directions on the ingredients of the sexual violation offences. It is first said that the issues of consent and reasonable belief in consent in relation to the charge of digital penetration when P was 14 were effectively taken away from the jury when the Judge made the following comment:

> In this case it appears the accused knew that sexual intercourse was illegal before the age of 16 years of age. One has to apply, I suggest, commonsense to this as to whether or not he would know that this type of activity, of inserting fingers into a girl's vagina when aged 14, was also unlawful. If he did appreciate that it was, then you may wonder how he could claim on an objective test that true consent was being given by a 14 year old.

The Judge clearly appreciated that, although consent to an indecent assault cannot be given by a girl under the age of 16, consent is an ingredient for any charge of sexual violation. Shortly afterwards he made the point that "the fact that the act may be unlawful does not necessarily mean that the act can be without consent." It may be appropriate, save possibly in exceptional circumstances, for a Judge to dismiss entirely or downplay the possibility of consent or reasonable belief in consent in a case in which the complainant is a mere child (*R v Cox* (7 November 1996, CA213/96), where the Court was speaking of a 10 or 11 year old). But consenting sexual activity by females of 14 or even slightly younger with an understanding of the significance of what they

are doing occurs despite the law's proscription and it will therefore be only in a case of obvious violence or deception that a Judge will be justified in suggesting to a jury that there is really no need to consider consent on the part of a girl of that age. We think that the Judge's comment could have led to the jury failing to consider it on the digital penetration count, when plainly that was necessary.

That matter related to one count only. The second objection taken by Mrs Ablett Kerr related to all the sexual violation charges. The Judge contrasted the absence of any consent ingredient in indecent assault where the female is under 16 with its presence as an ingredient in sexual violation. He said:

> Our law, of course, as provided in respect of the indecent assault charge specifically says consent is not a defence. The law does not say that with rape and you need to be satisfied that the consent was given, was a true consent, and the accused believed on reasonable grounds that consent was not being given.

Counsel points out that in this passage the Judge has effectively reversed the onus of proof. What he should have said was that the jury needed to be satisfied by the Crown that the consent was not given or was not a true consent. Furthermore, by linking the reference to consent conjunctively ("and") with the accused's belief on reasonable grounds, the Judge has also misstated the legal position. This was of particular importance in the present case because the appellant's defence included the assertion that, even if there had actually been no consent, he had reasonable grounds to believe there was. In support of this view the appellant was able to point, *inter alia*, to evidence of statements by P that she loved him, her taking his side in family arguments, teaching him to play the clarinet, her disinclination to go with her mother when the mother separated from Mr Colquhoun and discussions P had with him about their possibly going overseas together.

This difficulty has arisen because the Judge has departed from the model direction on sexual violation. Whilst such models are not to be slavishly adhered

to and require adaptation to individual cases, in their description of the basic elements of offences they have been carefully crafted. If a Judge chooses a different way of describing an offence to the jury great care is needed. Certainly at the beginning of the summing up, which in transcript covers about 36 pages, the Judge gave the standard direction on burden of proof. He also gave the standard direction that the burden did not shift to the accused because he elected to give evidence. But we cannot find in the directions on sexual violation anything about the burden of proof which might have counteracted the impression which the jury could have received from the words which have been quoted. As well, there are other passages in which the consent/reasonable grounds ingredients are not set out disjunctively. It is of concern that the jury may have concluded that reasonable belief is coupled with consent rather than being something which has to be considered separately when and if the view is reached that the complainant did not consent.

The two other alleged misdirections related to Dr Ratcliffe's evidence. The first point has no merit. It was submitted that the Judge failed to tell the jury that before they could use the evidence of Dr Ratcliffe they first had to be satisfied that they found proved the facts upon which she based her opinion. The Judge did not directly instruct the jury in that manner. However, it is plain from a reading of the whole of the summing up that the jury would have understood that Dr Ratcliffe's evidence was based upon the other evidence and upon her observation of the complainant. The jury had also been told that the facts were for them alone to determine. They had received an appropriate direction about the way in which expert evidence is to be approached. They were reminded of it at the end of the summing up. We are satisfied that they must have understood the position.

The remaining question concerns the Judge's direction about the use which the jury might make of Dr Ratcliffe's evidence. It had been the subject of a pre-trial ruling to which no objection is taken. Nor is there any criticism of the manner in which Dr Ratcliffe gave her evidence. It had been admitted under

s23G of the Evidence Act (though the Crown could also have relied upon the inherent jurisdiction (*R v Guthrie* (1997) 15 CRNZ 67):

> **23G. Expert witnesses**-(1) For the purposes of this section, a person is an expert witness if that person is -
> (a)A medical practitioner holding vocational registration in the speciality of psychiatry, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or
>
> (b)A psychologist registered under the Psychologists Act 1981, practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children.
>
> (2) In any case to which this section applies, an expert witness may give evidence on the following matters:
>
> (a)The intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on-
>
> (i) Examination of the complainant before the complainant gives evidence; or
> (ii) Observation of the complainant giving evidence, whether directly or on videotape:
>
> (b)The general development level of children of the same age group as the complainant:
>
> (c)The question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is, from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

Dr Ratcliffe testified as to her observations on the intellectual attainment, mental capacity and emotional maturity of P. She then described PSD which she said was "a recognised symptom of sexual abuse." The brief of evidence which by consent she read to the Court contained the following passage:

> What is created is a situation of learned helplessness. Typically the person will accept repeated abuse, which can be by threats

> of physical harm or physical abuse which may be either straight assaults or sexual assaults. The person responsible for the abuse then gains a degree of control over the victim who will comply as directed. This type of apparent compliant behaviour is one of the hallmarks of certain forms of post-traumatic stress disorder. What appears on the face of it to be totally illogical and an irrational response to the situation is in fact a consequence of the condition.

She then expressed the professional opinion that P suffered from PSD.

In the summing up the Judge said:

> ...you have been assisted in this case by the evidence of an expert, somebody who is recognised as having a good deal of experience in their field of dealing with victims of sexual abuse and knowing all about post-traumatic stress disorder. That is so because of course that type of evidence is not generally regarded as being within the knowledge of the average member of the community. In the end, however, it is your decision on whether or not [P] had a post-traumatic stress disorder at the time that these incidents occurred, and whether that has affected her ability to give consent to the sexual activity which we have heard, on the accused's submission started when she was 15...

It is the reference to "ability to give consent" to which objection is taken. The argument is that the expert is permitted only to give an opinion on whether or not the behaviour of the complainant is consistent or inconsistent with sexual abuse. Dr Ratcliffe has opined that P's behaviour was consistent with PSD and that PSD is a symptom of sexual abuse; thus, that P's behaviour was consistent with sexual abuse. But, it is said, if the jury accepted that P was suffering from PSD it was not entitled to rely on Dr Ratcliffe's evidence to decide whether as a consequence of the disorder P's ability to choose whether or not to give consent to sexual activity was affected or impaired.

Although, as the appellant's counsel said, questions about consent were the very issues for the determination of the jury and such matters were for it alone, as the Judge had made clear, Dr Ratcliffe's evidence was plainly going to be of

some assistance. The jury had been told about how PSD may lead a victim of assaults (either sexual or non-sexual) to comply with the abuser's directives because of an inability to do otherwise, a learned helplessness. P was in the witness's view suffering from PSD. If the jury accepted that assessment, rather than the defence view that she had chosen to sleep with her mother's partner, the existence of the disorder might explain her conduct. It might cast light on whether she was truly consenting or merely acquiescing because of violence or threats. It might help the jury in their overall assessment of the evidence bearing upon this question. It seems to us that the jury would naturally take some account of Dr Ratcliffe's evidence when considering the credibility of P's claim that she did not consent. They were entitled to do so. The Judge's direction merely recognised and approved that course. The jury would doubtless have thought it very odd if directed to disregard that evidence when considering whether P had consented or might have appeared to a reasonable man in the position of the appellant to have done so.

Unreasonable verdicts?

It was submitted that the verdicts were unreasonable or cannot be supported having regard to the evidence. Mrs Ablett Kerr argued that it was not open to the jury to accept the complainant's evidence of actual and threatened violence towards her by the appellant. Counsel drew attention to certain inconsistencies in her testimony and, with some justification, suggested that the complainant had not been truthful in parts of her evidence. In particular, she had dramatically changed her account of the occasion on which sexual intercourse first took place when reminded in cross-examination of an interruption caused by a neighbour's visit to the house. She then said that intercourse had not occurred until later the same day, again maintaining that it was forcible. However, she admitted that at one point the appellant had asked her if she was sure she wanted "this" to happen.

Another example given by counsel related to nightmares which P said she experienced during the period when she was having intercourse with the appellant. She said she dreamed about a frightening creature for whom she had invented the name of "the shrike". She persisted in this story even after it was demonstrated in cross-examination that the description and name of the creature appeared in a work of fiction which was in her possession at that time.

Mrs Ablett Kerr drew attention to the absence of any confirmation from other witnesses of violence or protests accompanying the sexual activity, notwithstanding that the house had walls that were far from soundproof. P had said that on occasions she screamed at the appellant. Nobody appeared to have heard that.

There had also been numerous instances during the cross-examination when the complainant said that she could not remember some matter that was being put to her or simply answered that she did not know.

Although the aspects of the complainant's evidence to which counsel has referred are likely to have been of some concern to the jury and certainly cause us to say that this is not a case for the application of the proviso to s385 of the Crimes Act 1961, we have not been satisfied that the verdicts can be said to have been unreasonable or insupportable having regard to the evidence. As counsel herself pointed out, the Crown put its case on a basis which did not depend upon acceptance by the jury of the complainant's evidence about violence and threats directly inducing submission to sexual activity. It was open to the jury to conclude, notwithstanding the discrepancies in P's evidence, that the Crown's case had been established beyond reasonable doubt. We think that is the probable explanation for the verdicts.

Appeal allowed

Because of the Judge's failure adequately to put the defence before the jury and to draw attention to contradictions between the Crown case and the evidence of the complainant, the misdirections on the burden of proof and ingredients of sexual violation and the fact that (on the digital penetration count) the Judge virtually took the defence of reasonable belief away from the jury, we have reached the view that the convictions are unsafe. We allow the appeal, quash the convictions and order a new trial.

In the meantime the appellant will continue to serve the sentence imposed on the indecent assault charge to which he pleaded guilty. We understand that convictions have not yet been entered in respect of his pleas of guilty to the charges of sexual intercourse with a member of his family under the age of 20 which the Crown laid in the alternative to the sexual violation by rape counts.

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