NZLR

IN THE COURT OF APPEAL OF NEW ZEALAND CA 81/98

THE QUEEN

v

CHARLES HERBERT

Coram: Blanchard J
Heron J
Anderson J

Hearing: 4 August 1998 (at Auckland)

Counsel: W C Pyke for Appellant
M J Thomas for Crown

Judgment: 13 August 1998

JUDGMENT OF THE COURT DELIVERED BY ANDERSON J

The appellant was tried before a Judge and jury in the District Court at Hamilton on an indictment alleging six counts of rape and four counts of indecent assault in respect of a 14 year old girl. At the end of the Crown case the appellant pleaded guilty to the counts of indecent assault and the Crown sought and obtained leave to amend the indictment to include alternative counts of unlawful sexual intercourse contrary to s 134(1) of the Crimes Act 1961. This application to add alternative counts was obviously in response to the complainant's evidence on the matter of consent to sexual intercourse with the appellant. The jury found the appellant guilty in respect of four counts of rape and he was sentenced to 9½ years imprisonment on each, concurrently. He was also sentenced to 5 years imprisonment

on each of the four counts of indecent assault to which he had pleaded guilty, such sentences to be served concurrently with the rape sentences. He has appealed against conviction and sentence, although the sentence appeal was not pursued.

Facts

The appellant who was aged 36 at the time of the conduct in question lived as a boarder at a residence occupied by the complainant's mother, three year old brother, and two sisters aged nine and five. One night in December 1996 the appellant, who was known to the complainant as "Uncle Charlie" but was not in fact a relative, went into the complainant's room and discussed sex in terms appearing in the testimony of the complainant as follows:-

> What happened at night time with Uncle Charlie that first time? He asked me to have sex with him.
> What happened after he asked you to have sex with him? I said yes.
> So what did he do? Took my clothes off.

The complainant said that she did not want him to do what he did but she did not let him know that because she was scared. She then testified to a number of other occasions involving sexual intercourse and sexual activity, such as touching of the complainant's breasts and other intimacies. She said that she never told her mother about what the appellant was doing because she felt scared. Defence counsel's cross-examination was succinct and acute. The whole of the cross-examination appears below:-

> Ms Edmonds, you told us that the first time you say this happened with Uncle Charlie he asked you to have sex with him? Yes.
> Is that correct? And you were asked by my learned friend what happened after he asked you to have sex with him and it's recorded you said 'I said yes', is that correct? Yes.
> Were you agreeing to have sex with him? Yes.
> Well on the other occasions you've told us about did you tell him on any of those occasions that you didn't want to have sex with him? No.
> Were you agreeing to have sex with him? Yes.

In re-examination the complainant said that she never told him she didn't want to have sex because she was scared, and when asked what she was scared of she said "might do it to my sister or something". There is no suggestion by her or in the evidence at all that the appellant threatened her or anyone else, in any context. She also said that the appellant asked so she let him, she didn't know why; she didn't want him to do it; he always asked for sex and she would always say yes.

Grounds of Appeal

The fact of sexual intercourse with the complainant was not challenged at trial, the emphasis then, as on this appeal, being on the issue of consent. The grounds of appeal against conviction are summarised as follows:-

1. The trial Judge misdirected the jury on the issue of consent in wrongly referring to the complainant's age as a factor to be taken into account when determining whether consent was in fact given.

2. The trial Judge did not adequately direct the jury in relation to s 128A of the Crimes Act 1961, which section elucidates the concept of consent by reference, amongst other things, to acquiescence induced by actual or threatened force, or the fear of it.

3. The trial Judge misdirected the jury on the use of inferences in relation to the question whether the Crown had proved absence of belief on reasonable grounds that the complainant was consenting.

4. That the verdicts are unreasonable and cannot be supported having regard to the evidence, in particular the complainant's evidence of her conduct.

Summing-up

In summing-up to the jury on the issues of consent the trial Judge correctly directed that consent meant a true consent, that a true consent may be given reluctantly or hesitantly and might be regretted afterwards, but if consent is given even in such a manner, provided it is without fear of the application of force or the result of actual or threatened force, then the act of sexual connection would not be rape. He referred to s 128A(2). He directed that the Crown must prove not only that the act was without the complainant's consent but also that the accused did not

believe on reasonable grounds that she consented, there being no burden of proof on the accused to prove that he did believe. He expatiated upon the concept of consent, stating that it must be a full, voluntary, free and informed consent, and directed the jury that they must ask themselves:-

> Whether this girl, at the age that she was, when intercourse took place, understood the significance of the act and therefore rationally and on an informed basis gave consent.

He then dealt with the ingredient of absence of belief on reasonable grounds required by s 128(2)(b) in the following way:-

> In respect of the question of reasonable grounds, I just want to summarise this way. Besides the question of consent, the Crown must prove that the accused did not believe on reasonable grounds that the complainant was consenting. Now I spoke to you about inferences. You have a right to come to conclusions from facts that you find proved. The process of inferences is simply a commonsense way that we all adopt to try to ascertain what someone did, or what happened, or what someone was thinking at a particular time. No difference here. I raise this with you so that you take particular note that it is not just what is said that is important. Life is seldom black and white especially when dealing with the affairs of men and women. The surrounding circumstances may well be significant and usually are when an examination is made of what is said or done and particularly why it was said or done. It is, of course, a matter for you.

The Judge then went on directly to consider the alternative charges of sexual intercourse with a girl aged between 12 and 16 years proscribed by s 134(1) of the Crimes Act 1961. He then dealt with the negation of consent as a defence in the particular case, as mandated by s 134(5), in the following way:-

> A person between the age of 12 and 16 years is deemed or regarded by Parliament as being unable to appreciate the significance or quality of such acts as are contained in these charges. She cannot consent to anything, and any consent or acquiescence or even positive encouragement, if there was any by the complainant, is no defence to the charge.

Inadequacies in the Directions

The Crown case as examined by the Judge in summing-up was that the complainant did not consent to sexual intercourse and if the jury found that she was not a willing participant then it was rape. There is no reference in the summing-up to the Crown referring to any evidential basis for the complainant to be fearful in relation to her sister so as to acquiesce in sexual activity. Nor is there any reference at all to the requirements of s 128(2)(b). In dealing with the defence case the Judge referred to the necessity for the Crown to prove beyond reasonable doubt that the accused did not believe on reasonable grounds that consent was not being given.

The grounds of appeal previously summarised resolve into concerns about the Judge's directions on the issues relevant to consent and the adequacy of an evidential basis for the jury to find such elements proven. This is an unusual case involving repeated expressions by the complainant of willingness to participate in sexual intercourse, with the Crown asserting that despite the express indications of consent the complainant was beyond any reasonable doubt not consenting and the offender beyond any reasonable doubt either knew she was not consenting or had no reasonable grounds for believing she was. Whilst as a matter of common sense cases will occur where a young person appears to consent but by reason of all the circumstances, including tender years, cannot be taken in fact to have consented, nevertheless in this case the complainant was of a sufficient age for consent to have been reasonably possible. That reasonable possibility is bolstered by the absence of any indication of actual or threatened force to the complainant or anyone else in any context. We think the trial Judge should have drawn specific attention to the fact that absence of consent was being postulated in the face of expressions of consent with no evidence of coercion by the alleged offender or otherwise. The indications for such examination by the Judge were more compelling when, as appears from the summing-up, the Crown did not focus on an essential ingredient relating to consent. Counsel referred to the issue of consent as the nub of the case and the Judge reiterated that view, but consent was properly concerned not just with s 128(2)(a) but also (b).

There is also a real risk that the issue was confused by the Judge's direction about consent in relation to the alternative counts pursuant to s 134(1) shortly after dealing with consent issues in relation to rape. We think, with respect, it was incorrect and confusing to direct the jury that "a person between the age of 12 and 16 years is deemed or regarded by parliament as being unable to appreciate the significance or quality of such acts as are contained in these charges. She cannot consent to anything ..." The rationale of the removal of consent as a defence to a charge under s 134 in circumstances such as the present is to protect consenting girls from exploitation rather than declaring that girls of the relevant age are unable to appreciate the significance or quality of sexual acts. In a case so acutely requiring an explanation why a repeated expression of consent and acceptance of agreement was in fact an absence of consent, a direction to the jury in relation to the sexual acts in issue that parliament regarded people the age of the complainant to be incapable of appreciating the significance or quality of the acts creates an unacceptable risk of injustice.

Insufficiency of Evidence

In addition we think that there was simply an insufficient evidential basis for the jury to be satisfied beyond reasonable doubt that the appellant did not believe on reasonable grounds that the complainant was consenting. Of course we understand the arguments advanced on behalf of the Crown on this appeal that the appellant was a man of 36 and the complainant only 14½ years old, giving rise to a question whether on the one hand the complainant would be sexually compliant and on the other hand whether the man might reasonably think she was. We consider, however, that the crucial issues in relation to consent cannot be dealt with merely in terms of age difference when the complainant is of an age when consent to sexual activity could be possible and where the appellant is of mature years but younger than early middle aged.

The substantive evidence available for the jury's consideration was:-

- The complainant was 14½ and the appellant was 36 years of age.

- In relation to the acts of sexual intercourse the appellant asked the complainant whether she wanted sex on the first occasion and she said yes. She accepted the proposition in cross-examination that she was agreeing to have sex with him and that she never told him that she didn't want to.

- She said she never told him she didn't want to because she was scared that he might do it to her sister or something, but there was no evidence of any threat or conduct on the part of the appellant, except of course the actual sexual activity with the complainant herself, that could cause such fear.

- There was no evidence that the appellant was aware of such fear or any manifestation of it.

- Evidence of a younger sister was consistent with the likelihood that the complainant's conduct with the appellant was indicative of consent.

- Although there was evidence that after being almost caught by the mother in activity with the appellant in the garage the complainant ran outside and cried, there is no evidence of the appellant seeing the complainant crying on that or any other occasion.

- On one occasion when the appellant tried to get into the complainant's bed she pushed him away and ran downstairs. The timing of this incident was not established.

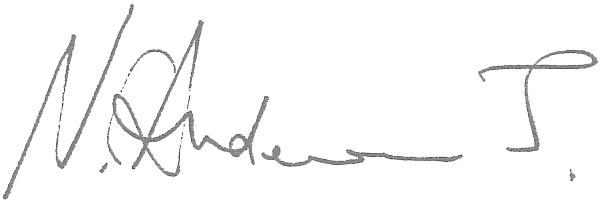
Whilst the evidence clearly supported convictions for offences against s 134, and the appellant's offences in that respect were disgraceful and serious, we consider that in the exceptional circumstances of this case the evidence fell short of sufficiency to support convictions for rape.

Substitution of Convictions

We are satisfied that the appeals against conviction should be allowed because those aspects of the summing-up about which we have expressed concern have led to a miscarriage of justice. If that were the only ground for allowing the appeal we would order a new trial. However, we are also satisfied that the verdicts of the jury should be set aside on the grounds that they are unreasonable and cannot be supported having regard to the evidence. We are led to the view that the convictions for rape should be quashed and that convictions on the alternative counts of unlawful

sexual intercourse contrary to s 134(1) of the Crimes Act 1961 should be substituted. The appellant through his counsel has acknowledged to this Court his liability to be convicted on those counts, and the evidence clearly establishes guilt in respect of them. In our opinion the evidential inadequacies of the Crown case are unlikely to be capable of satisfactory rectification and we are concerned to save the young complainant from the ordeal of another trial which in all probability should achieve the same result as the course we are now taking.

The maximum penalty in respect of each of the substituted offences is seven years imprisonment. The overall sentence should reflect a continuing exploitation of a 14½ year old complainant by an older man in a position of trust in the household. We have already indicated our recognition of this case as a serious one of its kind. However, the sentence of five years imprisonment in respect of each of the charges of indecent assault, which carried the same maximum penalty as the substituted offences, is severe if considered in isolation. We think that a similar concurrent sentence for each of the substituted offences is sufficient to reflect the total seriousness of the offending in this case. The appeals against conviction are allowed and those convictions are quashed. Pursuant to the provisions of s 385(2) of the Crimes Act 1961, convictions are entered in respect of each of the four alternative counts pursuant to s 134(1) of the Crimes Act 1961 and on each such count the appellant is sentenced to five years imprisonment, to be served concurrently with each other and with the sentences imposed in the District Court for indecent assault.



Solicitors:
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CRN2

NO INFORMATION IS TO BE PUBLISHED LEADING TO THE IDENTIFICATION OF THE COMPLAINANTS

IN THE COURT OF APPEAL OF NEW ZEALAND CA168/99

THE QUEEN

V

AFELE SIO

Hearing:	29 July 1999
Coram:	Tipping J Doogue J Goddard J
Appearances:	J W K Blathwayt for the Appellant K G Stone for the Crown
Judgment:	29 July 1999

JUDGMENT OF THE COURT DELIVERED BY GODDARD J

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[1] The appellant was convicted by a jury on seven counts: six counts of indecent assault on three young female members of his family and one count of male assaults female in respect of one complainant. He was sentenced to 18 months imprisonment on each charge (concurrently) and now appeals against that sentence.

[2] The single issue on appeal is whether the sentence should have been suspended.

Facts

[3] As noted, there were three complainants. Two are the appellant's step-daughters from his wife's previous marriage: one is the daughter of the appellant's cousin. All three complainants were living in the appellant's household under his care at the time of the offending.

[4] The first complainant was aged 15 years at the time. The appellant indecently assaulted her by touching her on the breasts and vagina. She had been previously abused by her own father and felt compelled to leave the appellant's home when she suffered the same type of abuse from the appellant.

[5] The second complainant was indecently assaulted by the appellant on a regular basis whilst aged between 12 and 15 years. Again, the assaults involved touching her on her breasts and vagina. The appellant was also physically violent towards this complainant on at least one occasion. As a result of the appellant's abuse the second complainant also left home at aged 15 years.

[6] The third complainant is a child of the appellant's cousin. She had been in the care of the appellant and his wife since an early age. The appellant indecently assaulted her over a four year period whilst she was aged between 12 and 16 years. Again the indecencies involved touching her on the breasts and vagina.

[7] In total the appellant faced nine charges. He was convicted on six counts of indecently assaulting girls aged between 12 and 16 years (s.134(2)(a) Crimes Act 1961 – maximum penalty seven years imprisonment); and one charge of male assaults female (s.194(b) Crimes Act 1961 – maximum penalty two years imprisonment). Three of the indecent assault charges involving two of the complainants were representatively laid. The appellant was acquitted on the remaining two counts of indecent assault. The trial Judge commented, on sentence, that the acquittals on those two counts could fairly be interpreted as arising from difficulty or confusion in relation to the dates alleged.

The Ground of Appeal

[8] The sole issue on appeal is whether the sentence of imprisonment imposed should be suspended. This was also the central issue pleaded before the trial Judge at sentence.

[9] The appellant and his wife have one child of their union: a 23 year old son who is severely intellectually and physically disabled and requires 24 hour care. Because his condition is deteriorating the couple, who were formerly separated, had resumed co-habitation in order to provide adequate care for the son, who is completely bedridden, although still able to live at home. This home care is achieved with the assistance of a home-aid who assists with the son's management from Monday to Friday.

[10] A number of letters written by family members and friends were before the sentencing Court. An updated medical report was placed before this Court, confirming that advice together with affidavits from the appellant's wife and the home-aid. The family's general practitioner also provided the Court with advice as to the degree of care needed for the son, who he says can only really cope if being looked after by both parents upon whom he is utterly reliant. A particular feature is the son's close relationship with the appellant. Medical opinion indicates that the son will not live for very long.

[11] On behalf of the appellant, the submission is made to this Court that the sentence of imprisonment ought to be suspended - not for the appellant's sake, but in the interests of his severely disabled son and his wife.

The Sentencing Judgment

[12] The Judge referred to the difficult nature of the sentencing decision he had to make and the impossible situation the appellant's wife had been placed in. He remarked upon the loyalty of the appellant's family, particularly his wife. He referred to the medical report before the Court and to the hardship that would result

to the son if deprived of the appellant's presence and assistance through incarceration.

[13] Against those difficult hardship issues, the Judge balanced the serious aggravating features, including the appellant's lack of remorse and the destructive outcome of his offending on the lives of the three complainants. In the end, the Judge determined that, notwithstanding the sadness and difficulty caused to the appellant's wife and son by his incarceration, a suspended sentence could not be justified on the basis of the principles set out in *R v Petersen* [1994] 2 NZLR 533. However the Judge gave all consideration he could to the length of the sentence of imprisonment to be imposed and determined that it should be shorter than usual to allow for the appellant's relatively early release on conditions.

The Victims

[14] As frequently happens in such cases, a range of people are adversely affected by the appellant's offending.

[15] The three complainants have all suffered long term emotional and psychological damage. His two step-daughters were forced to leave home at the age of 15 in order to escape from his abuse. That abuse was not only sexual but also verbal and on some occasions physical. All three victims have spoken eloquently of their ruined childhoods and their impaired relationships with their step-mother, their mother and other family members. The appellant has not apologised to any of these victims, nor expressed regret, and has belatedly purported to shield behind lapse of memory in mitigation of his offending. The fact that he was not the only abuser of all of the three victims is of no consequence to the sentencing exercise.

[16] Other victims of the offending are the appellant's wife. She is the mother of two of the complainants. She has also suffered greatly as a result of the appellant's earlier years of drunkenness and violence towards her, and now from the fall-out of his sexual offending against the three complainants. Her relationship with her daughters is impaired and it is she who has been left with the sole day-to-day care of and responsibility for their physically and intellectually disabled son. Similarly, the

son is a victim of the appellant's offending, as he now misses the appellant's day-to-day presence and must forego the care he gave to him.

[17] Likewise, the appellant's elderly parents and other family members have also been adversely affected by the appellant's offending and can correctly also be regarded as victims.

Reports and Testimonials Before the Court

[18] The Probation Officer who wrote the pre-sentence report referred to the unusual situation arising as the result of the need for day-to-day care of the appellant's son. He outlined the hardships that would arise from a sentence of imprisonment; these relating mainly to difficulties for the appellant's wife and for his disabled son, but also to financial difficulties. After considering possible alternatives to imprisonment, the Probation Officer was nevertheless compelled to recommend a sentence of imprisonment. His recommendation in this regard was based on the aggravating features of the offending, the appellant's continuing denial of responsibility for his offending, coupled with his view that there was no need for him to change his attitude or behaviour in the future. The Probation Officer was forced to conclude from the appellant's attitude that only imprisonment could ensure, albeit temporarily, the safety of other young women whom the appellant may know.

[19] On the basis of information gleaned from the appellant's wife, both the Probation Officer and the sentencing Judge concluded that it was likely only her vigilance which had contained the scope of the appellant's offending. Therefore, whilst not liable to any sanction for that aspect, it does underline the predatory nature of his approach to young women in his care and under his control.

Previous Convictions

[20] The appellant, who is aged 49, has some previous convictions although only one is particularly relevant. That is a conviction for assaulting his wife in 1991, for which he received a sentence of periodic detention.

Discussion

[21] The principles in relation to this type of offending are well established. In cases of sexual offending, unless there are exceptional circumstances, the Court will impose a custodial sentence. Therefore, the ordinary course is that a sentence of imprisonment will be imposed in cases of sexual offending against children, particularly where a serious breach of trust is involved: *R v Meredith-Blyde* (CA 245/95, 19 July 1995); *R v F (*CA 242/89, 27 October 1989); *R v Fuller* (CA 189/98, 12 August 1998). The possibility of suspension will arise only in extreme cases and sexual offending against children rarely fits within the parameters set out in *Petersen*.

[22] Dependent children, whether disabled or otherwise, do not of themselves automatically constitute a sufficiently compelling competing factor to rebut the presumption of imprisonment in cases of serious offending and are rarely likely to justify the imposition of a suspended sentence. The principle stated in *R v Brand* (CA 8/97, 15 September 1987), a case involving drug dealing is of general application:

> ...the duty of the Court is to see that major criminality is properly punished, against its obligation to endeavour to avoid injury to innocent third parties and the special weight a sentence of imprisonment would have on [the offender].

See also *R v Panoa-Masina* (CA 309/91, 7 October 1991).

[23] In the appellant's case the aggravating features are the age and number of children offended against, the breach of trust and the length of time over which the offending occurred. The sentencing Judge found that a further aggravating factor was the fact the appellant had persisted with offending after it had been drawn to his attention.

[24] The competing factors which require to be given weight are, of course, the considerable additional stress caused to the appellant's wife by his incarceration and

the impact on his disabled son. Also, exacerbation of the family's financial difficulties.

[25] All of these matters were, however, properly taken into account by the trial Judge at sentencing.

[26] Weighing all factors in this case we are satisfied that the extent and seriousness of the appellant's offending and the long-term effect on the victims cannot be outweighed by the sad fall-out for the appellant's family. In the circumstances the sentencing Judge has extended as much mercy as possible by the imposition of a relatively short sentence, for the sake of the family. No further clemency can be appropriately extended.

[27] In conclusion, there are no special circumstances which bring the appellant's case within the provisions of s.21A Criminal Justice Act 1996.

Judgment

[28] The appeal is dismissed.