N2LR

IN THE COURT OF APPEAL OF NEW ZEALAND CA191/98

PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S139 OF CRIMINAL JUSTICE ACT 1985

THE QUEEN

v

ANDREW TURI PUE

Coram: Eichelbaum CJ
Anderson J
Elias J

Hearing: 29 September 1998 at Auckland

Counsel: S MacBeth for Appellant
A.R. Burns for the Crown

Judgment: 30 September 1998

JUDGMENT OF THE COURT DELIVERED BY ELIAS J

The appellant was convicted of three counts of sexual violation by unlawful sexual connection and one of indecent assault following a jury trial in the District Court at Rotorua. Although issue is taken with an aspect of the Judge's summing up, the principal ground of appeal is that the verdicts are unreasonable.

Background

All charges were in respect of the same complainant. The offences were alleged to have occurred in April 1992, when she was six years old. By counts 1, 2 and 3 of the indictment the appellant was charged with two offences of sexual violation by oral sexual connection and one of indecent assault by genital touching "on or about the 2nd day of April 1992". These offences were alleged to have been committed at the complainant's home. By the fourth count of the indictment the appellant was charged with sexual

violation by oral sexual connection "on or about the 4th day of April 1992". This offence was alleged to have been committed at the appellant's home.

At trial, it was not contended by the defence that the events described by the complainant did not occur. Rather, the case for the appellant was that he was not the perpetrator. Since the families of the complainant and appellant were acknowledged to have been friends who had frequently visited each other over a period of years, the complainant's identification of the appellant was not in issue. Instead, the defence challenged her attribution of the offending to the appellant, claiming that her evidence was inconsistent and contained material discrepancies. There were also some suggestions that the likely perpetrator was her mother's boyfriend, Mr Wilson.

In addition, in relation to the first three counts, a defence of alibi was raised. Because of it and because the evidence of the complainant was specific as to the occasion of the abuse, the Judge ruled that the dates of the offending contained in Counts 1, 2 and 3 of the indictment were essential to the charges and that the date in Count 4, which was identified by the complainant with less precision, required proof of the offence during April 1992. A Crown application for amendment to the dates at the conclusion of the evidence was declined. The jury was instructed by the Judge in his summing up that it could only convict in relation to Counts 1, 2 and 3 if satisfied that the offence was committed on 2 April 1992. It was also directed that it could only convict in relation to Count 4 if satisfied that the offence was committed some time in April 1992.

The offences did not come to light until 1995, when the complainant was nine years old. At that time she was interviewed by a police Child Abuse Team following the procedure provided for in the Evidence (Videotaping of Child Complainants) Regulations 1990. The videotape of the interview formed the greater part of the complainant's evidence in chief at the trial in April 1998. At the time of the trial she was within a few days of her 12th birthday.

In her evidentiary video interview, the complainant was not able to recall the dates upon which the offending had taken place. That is not surprising, given her age at the time and the years which have passed since. She remembered where she was living (which would place the incident between January 1992 and August 1993) and she recalled that she was a junior at school and her teacher's name. She remembered the day as being "the day just before my birthday". When asked what birthday it was, she was not able to remember by her age but remembered that it was the birthday when her father had given her "a bag, a lunch box and a drink bottle". It was accepted at the trial that the reference was to the complainant's sixth birthday, on 3 April 1992.

In the interview, the complainant was asked why the appellant, whom she named as "Andy", was at her house on the night of the offending in Counts 1, 2, and 3:

> Okay, and so what was he doing at the house? Did he live there or was he just visiting? ..
> He was visiting and it happened at night time.
> In the night time. So was he supposed to be staying the night or was he just there? ... He was just there for um, a welcome um, a welcome birthday back for Willie [Mr Wilson, her mother's boyfriend] 'cos he went away.
> Okay.... Then he came back.
> Okay. So he had been there for a welcome birthday. ...Yes.
> Okay.... Him, his wife and his three children.
> Okay... And his dog.

The sexual violation alleged in count 4 was said by the complainant to have occurred at night, at the appellant's house, "[w]hen I went to his house to see the new baby." It was, she said, "a couple of days after" the incidents in counts 1, 2 and 3.

The appeal

Four issues are raised by the appellant on appeal. First it is claimed that no reasonable jury could have convicted the appellant of count 4 since there was no new born baby in the appellant's house during 1992. The uncontroverted evidence of Mrs Pue was that in April 1992 her youngest child was nearly three. A further child was born in December 1994, but that was outside the time specified in the indictment, the Judge having declined the Crown application at the conclusion of the evidence to amend the count to extent the time to December 1994. The second issue raised on the appeal is that the wrong approach by the jury to the fourth count may have led to a miscarriage of justice in its consideration of the first three counts, notwithstanding that it may have been open to the

jury to reject the alibi defence. The third issue identified on behalf on the appellant is that the direction given by the Judge in his summing up to the jury as to alibi was erroneous because it suggested that the appellant had the onus of proving the alibi. Finally, it is claimed generally that the verdicts in relation to all four counts were unsafe and contrary to the evidence.

In development of these contentions in oral argument, Mr MacBeth for the appellant accepted that the appeal against the convictions in respect of counts 1, 2 and 3 was contingent upon the success of the appeal in relation to count 4. He conceded that it was open to the jury, and therefore could not be said to be unreasonable, to reject the evidence of alibi in relation to the events of April 2, 1992. Nor did he argue that the rejection of the alibi, if taken together with the discrepancies or inconsistencies identified in the evidence of the complainant, was sufficient to enable the verdicts in relation to counts 1, 2 and 3 to be characterised as unreasonable. He submitted, however, that if the verdict on count 4 was unreasonable, the matters of criticism identified in relation to counts 1, 2 and 3 (including the Judge's direction on alibi, the deficiencies in the complainant's evidence, and the jury's rejection of the evidence of alibi), together with the unreasonableness of the verdict on count 4, would "taint" the convictions on counts 1, 2 and 3 so that, notwithstanding the fact that the jury was properly instructed to treat each charge separately, there may have been a miscarriage of justice.

On this approach, dismissal of the appeal in relation to count 4 would be determinative. Without accepting that allowing the appeal against the conviction on count 4 would undermine the convictions on the remaining counts (a proposition that is not evident to us), it is convenient to begin, as counsel for the appellant suggests, with count 4.

Was the conviction in relation to count 4 unreasonable?

On appeal the verdict of a jury will be set aside under s 285 of the Crimes Act 1961 if it is unreasonable or cannot be supported, having regard to the evidence. The Court must be of the opinion that the jury, if acting reasonably, must have had a reasonable doubt as to guilt: ***R v Ramage*** [1985] 1 NZLR 392, 393 (CA); ***M v R*** (1994) 181 CLR 487. After making full allowance for the advantage enjoyed by the jury in hearing the

witnesses, the Court must conclude that the evidence so lacks probative force that it was not open to the jury to be satisfied beyond reasonable doubt of the accused's guilt.

The complainant described going to the appellant's house a couple of days after the first incident, which she fixed by reference to her birthday in April 1992. She said that she went to the house with "Willie" (Mr Wilson), her mother's boy friend, "to see the new baby". The appellant met her at the door and asked her whether she was going to come in "to see our baby". Mr Wilson went into the bedroom to see Mrs Pue and the baby, leaving the complainant and the appellant together in what she described as "the great, big, fat hall". There, she said, the appellant caused her to "suck his private", at one stage pulling her back with a stick which had something like a "hook" on it. She described the appellant's dwelling as "sort of like . . . a house, but it's not. Its just a bach . . ." It was night time, but as to the precise time the complainant was not sure: "around 11, 12, 1 in the morning, I don't know". The sexual connection stopped when Willie came out of the bedroom. The complainant did not see the baby. She said it was not in the bedroom "because it was in its, in a place where it had to be asleep". She went in to see Mrs Pue but found that she was asleep and so went out of the bedroom and stayed with the appellant's daughters until she and Mr Wilson left.

William Wilson gave evidence. He recalled going to visit the appellant with the complainant one night when "Andy's wife just had a new baby. Just got home". He went in to see Mrs Pue and the baby, leaving the appellant and the complainant outside by the fire. He stayed in the room about five or 10 minutes or so. Mr Wilson was not asked when the visit occurred.

There was no challenge to the evidence of Mrs Pue that in April 1992 there was no new baby in her home and that her next baby was not born until December 1994. On that basis, Mr MacBeth submits that the jury's verdict on count 4 is unreasonable because there is "no evidence to support the jury's findings as to the date [in the indictment]".

This argument depends upon an acceptance that the incident described by the complainant can be dated only by the birth of Mrs Pue's youngest child. Mr MacBeth

submits that is the only correct interpretation of the complainant's evidence, because in her mind the visit was tied to the arrival of the new baby.

If the timing of the visit had been fixed by the complainant only by a visit at which she had seen a new baby, the argument may have had more force. But that was not the case. The complainant fixed the time of the visit when the sexual violation occurred as being a couple of days after the incidents which were the subject of the first three counts in the indictment. They are fixed by reference to her birthday in April 1992. The jury were left in no doubt by the Judge in his summing up that if the visit described had occurred in December 1994, when Mrs Pue's youngest child was born, it was outside the time frame of the indictment, which the Judge had restricted to April 1992. The Judge emphasised that the timing was important and that it had to be proved beyond reasonable doubt that the incident described in count 4 happened some time in April 1992.

The verdict shows that the jury accepted the evidence of the complainant which fixed the date by reference to her birthday and the earlier incidents. That was open to them, acting reasonably. It was open to the jury to regard any mistake as to the purpose of the visit as collateral and immaterial to proof of the essential elements of the charge, including its date. The jury was well able to conclude on the evidence that the complainant was correct in her placement of the event in time, while perhaps being confused about the occasion of the visit or having been mistaken in her understanding of it purpose. In circumstances where the complainant did not in fact say that she had seen the baby and where the evidence, confirmed by the appellant's statements to the police, was that the complainant had visited the appellant's family many times, such mistake could not be said necessarily to undermine her credibility either generally or on the critical issue of the fixing of the date by reference to the birthday.

It follows that we do not agree with the principal submission advanced on behalf of the appellant. The complainant's reference to the new born baby did not mean that a jury acting reasonably must have had a reasonable doubt as to the appellant's guilt in relation to count 4 of the indictment, as limited to the events of April 1992.

Criticism of the complainant's evidence

In addition to the complainant's association of the incident which was the subject of count 4 with the visit to see the new baby, counsel for the appellant points to other features which, he submits, make the complainant's evidence unreliable. These matters are put forward as additional points acknowledged to be insufficient in themselves to support the contention that the verdicts are unreasonable.

Because we are of the view that the reference to the new baby does not undermine the verdict in count 4, the points raised can be dealt with shortly. First it is said that the complainant failed to identify the appellant by his single most distinguishing feature, his artificial leg. She also acknowledged that the appearance of the appellant at the trial was very different from his appearance in 1992. Criticism is also made of her evidence that she knew the appellant's children well when in the video interview she misnamed them. There is also criticism of the complainant's evidence that the offences described as occurring on 2 April 1992, ended when a police car drew up outside her home and her mother and Mr Wilson woke. It is suggested that the position of the complainant's room at the rear of the property would have prevented her seeing such vehicle. In addition, counsel for the appellant points to the complainant's acknowledgment that Mr Wilson had been violent to her, was habitually "stoned or drunk", and called her "Missie" and would threaten her in much the same way as she described the appellant calling her "Miss" and threatening her to be quiet during the incidents on 2 April. These matters were relevant to the suggestion made at the trial that it was Mr Wilson and not the appellant who had committed the offences.

All of these matters of criticism or suggestion were put to the jury by defence counsel. In our view it was open to the jury, notwithstanding the criticisms that were made, to accept the complainant's evidence in essential particulars.

There was ample evidence, including in the statements made by the appellant in his interviews with the police, that the complainant knew the appellant and his family well. They visited each other's houses frequently over a period of approximately three years, although from 1993 there had been a cooling off and the complainant's mother no longer

visited the appellant's family. In those circumstances, errors in the names of the appellant's children by the complainant and her omission of a description of the appellant's disability are not material. There is no issue as to identity. The complainant identified the appellant's house from photographs produced to the Court.

The complainant's descriptions in the video interview of the appellant's house coincide with the photographs. The complainant's description of being hooked by a stick with a type of hook on it may be thought to be substantiated by the appellant's acknowledgment that he had crutches in the house which could correspondence to that description. .

The suggestion that the complainant was describing incidents for which Mr Wilson, and not the appellant, was responsible, was directly put to her in cross-examination. It was suggested to the complainant that she was blaming the appellant for the actions of Mr Wilson. She denied that was so. Indeed, as the complainant made a complaint of indecency against Mr Wilson during her video interview, the suggestion that she was blaming the appellant to protect her mother's boyfriend may be thought to be unconvincing.

These matters, even when taken in combination with the new baby argument and the evidence as to alibi, do not persuade us that the verdicts were unreasonable. The alibi witnesses called by the defence gave evidence that the appellant and his family were not at a birthday party held at the complainant's home on the occasion of her birthday. The party was said to be memorable because Mr Wilson and another guest had fought. The appellant's wife gave evidence that the appellant and his whole family had gone to Hastings to visit the appellant's mother in the first week in April. School records were produced showing that the appellant's eldest child, the only one then at school, was absent for the five school days beginning on 2 April 1992 and ending on 8 April 1992. He returned to school on Thursday 9 and Friday 10 April but was away the whole week of 13 April. Mrs Pue's evidence was that the family left for Hastings on Wednesday 1 April. Although she acknowledges she has no independent memory of the exact date, she has worked it out from the school records of her son's absence on 2 April. She gave evidence that the family left on the Wednesday because it was pay day and it was

necessary for them to collect the money before leaving. They left after her son finished school for the day.

As Mr MacBeth acknowledges, it was open to the jury to reject the evidence of alibi. They may have disbelieved the witnesses of alibi or considered that they were mistaken in their recollection of the occasion of the party. They may have accepted the evidence of the complainant's mother that the fight which all witnesses remark upon occurred at a party in May or even August. There was circumstantial evidence relating to the reason for the fight which supports one of the later dates. The complainant does not date the sexual violations contained in the first three counts by reference to a birthday party for her. She says they occurred the day before her birthday. Although she refers to a welcome home birthday party, she mentions no guests other than the appellant's family. The jury may have disbelieved Mrs Pue in her evidence as to when the family travelled to Hastings. It was a reconstruction on her part based on school records and recollections of the fight at the party. The jury may have concluded that she was mistaken in the reconstruction of events. Brian Pue (who had looked after the stock on the appellant's farm in their absence) admitted the possibility that the family had gone to Hastings not in April, but in August, at a time when school records also disclose that the appellant's eldest son was enrolled for a period in a school in Hastings.

Assessment of the evidence of alibi and the complainant's evidence was a matter for the jury. It was open to the jury to reject the alibi and to accept the complainant's evidence both as to the dates of the incidents she described and her identification of the appellant as the offender. It was open to the jury acting reasonably to find the appellant guilty..

The direction on alibi

The Judge directed the jury that when considering the question of alibi:

> If you were to convict the accused, you would have to determine that there was no reasonable possibility that the alibi evidence was true. In other words, you would have to completely reject the alibi evidence either as being false or mistaken before you could convict the accused in this case. So if I can just put it in a step by step way as far as the alibi is concerned, if you thought that there was a reasonable possibility that the accused was elsewhere at the time these offences were alleged to have been committed, you must find him not guilty.

Since the Judge had determined that the date of the offending in counts 1, 2 and 3 was essential to the charges, it was incumbent upon him to direct the jury that they could not convict unless the alibi was rejected by them as being false or mistaken: ***R v Dean*** [1932] NZLR 753. That is exactly what he did in. In application of the onus of proof upon the Crown, the Judge told the jury that they must exclude any reasonable possibility that the alibi evidence was true. That direction was quite correct. Mr MacBeth for the appellant submits that the direction was "circular" and that "the references to reasonable possibility [in] both the positive and negative senses may have led to confusion by the jury as to onus of proof". We do not agree. In order to determine that there was no reasonable possibility that the alibi evidence was true, the jury had to exclude the reasonable possibility that the accused was elsewhere at the time of the offences. If it was unable to exclude such reasonable possibility, the jury was obliged to find the appellant not guilty. The direction is correct in law and helpful in its expression. The jury cannot have been left in any doubt as to the approach required in considering the alibi raised and the onus of proof on the Crown.

Unsafe verdict

There remains the overall submission that a "substantial miscarriage of justice might have occurred in unsafe verdicts in relation to all four counts". This ground was not separately developed by Mr MacBeth in his oral submissions. It was acknowledged to turn upon the determination of the appeal in relation to count 4. As was rightly conceded on behalf of the appellant, it was open to the jury to reject the alibi evidence called on the appellant's behalf. The other matters of criticism of the complainant's evidence have already been dealt with. They were pressed upon the jury. It was entitled to accept the evidence of the complainant in essential respects. The verdicts cannot be said to be unsafe or unreasonable.

Result

For the reasons given, the appeals against the convictions are dismissed.

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