IN THE COURT OF APPEAL OF NEW ZEALAND CA173/98

PUBLICATION OF NAMES AND IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S139, CRIMINAL JUSTICE ACT 1985

THE QUEEN

v

S (CA173/98)

Coram: Gault J
Robertson J
Laurenson J

Hearing: 30 November 1998 (at Auckland)

Counsel: D J McNaughton for Appellant
A J F Perkins for Crown

Judgment: 30 November 1998

JUDGMENT OF THE COURT DELIVERED BY GAULT J

This appeal is against conviction of the appellant for sexual violation of two adopted daughters in accordance with verdicts of a jury in the High Court at Auckland.

The complainants were two of four children the appellant and his wife adopted in Colombia and brought to New Zealand in June 1990.

The younger complainant A, who was 15 at the time of the trial, said in her evidence that her father started touching her when she was in form one (11 years old). She described touching of her breasts and vagina and penetration of her vagina by the appellant's finger at various locations over a period of time. She said she understood what was happening "a little bit". That she did not want him to do it and that when she was 13 she told him to stop because she did not like it and that it did not happen again. It was put to her in cross-examination that in fact the sexual conduct between

her and her father occurred over a shorter period (just a few months) and that she initiated it. She denied both propositions.

The older complainant B, who was 18 at the time of the trial, gave evidence that the appellant had started sexual conduct with her before they left Colombia and that it continued until she was 15 years old. She described sexual intercourse on a weekly basis. Her evidence was that she did not want him to do it.

In the course of cross-examination B agreed she had been sexually abused by an uncle when she was a little girl and that at the time she was adopted by the appellant she thought it was normal to have sex with him as well. She too denied that she had initiated the sexual conduct with the appellant.

The appellant gave evidence. He said there had been sexual activity between himself and A but that it did not begin until early 1995 (when she would have been 14 years old), that it went on for between four to six months. He described the first occasion as occurring during play wrestling on a bed. He said:

> A. We ended up with me touching her and her touching me and it progressed from that. We ended up both of us, I would have only had a pair of shorts on so we ended up both of us naked.
>
> Q. Where did you touch her.
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> A. I touched her on the breasts and the vagina.
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> Q. Did you put your fingers inside her vagina.
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> A. I could not swear to it.

He said that on no occasion did they have sexual intercourse.

In relation to B the appellant agreed they had had sexual intercourse approximately once a week from the time B was 11 until she was 15. The Judge's notes of evidence record the following cross-examination:

> Q. And do I understand your evidence, you concede you yourself didn't think she was consenting.

A. No I don't.

Q. Is that what you're telling us or what.

A. That I didn't think she was consenting?

Q. Yes.

A. I did think she was consenting.

Q. Given she was your adopted daughter and you were 35 years older than her, I suggest you never ever believed that she was consenting.

A. That's not true.

Q. And even if you did think that, don't you think those factors make it pretty damn strange for you to think she was consenting.

A. No.

Q. I also suggest that being such a young girl she wasn't sufficiently old and mature enough to give genuine consent when you put your penis in her vagina.

A. I don't know.

He maintained that it was B who would start the sexual activity on each occasion, but he admitted he knew at the time they should not be doing it.

Although there were some differences between the evidence of each of the complainants and the appellant the central issues at the trial were whether the Crown could establish that each of the complainants did not consent to the activity and that the appellant did not believe on reasonable grounds that they were consenting.

In his summing-up to the jury the Judge said:

> Consent as a matter of law means a consent which is freely and voluntarily given and it must be given by a person who is in a position to form a rational and sensible judgment on an informed basis. With young children, such as an 11 year old child, it will only be in rare and exceptional cases that a child of that age, around 11 or 10, will be able to give a full voluntary free and informed consent to sexual intercourse

> or some other sexual connection. Although a child of that age may indicate agreement to some sexual contact, it will only be a rare case where she understands the significance of what is involved. However, the possibility that a child of that age will be able to give her consent on a fully informed and voluntary basis cannot be excluded, and it is a matter for you to decide whether in this case there was such a free informed and genuine consent as far as [A] was concerned. This is a very important issue in the trial for you to consider because the Crown and defence take opposite positions on that issue and you must be satisfied that the Crown has proved its case beyond reasonable doubt on this issue of consent and, of course, all other issues.
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> ...
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> The Crown must also prove, and the Crown has to prove all of these three things. The third matter is that accused did not believe on reasonable grounds that [A] consented and the Crown must prove that matter beyond reasonable doubt as well. That involves two parts. First of all, did the accused believe she consented and, secondly, did he have reasonable grounds to believe that? And again, it will only be in rare circumstances that a mature man could have reasonable grounds for believing that an 11 year old child is consenting to sexual intercourse or other sexual connection. As I said to you in relation to issue two, that possibility can't be excluded and at the end of the day it's a matter for you to decide whether the Crown has proved that the accused did not believe on reasonable grounds that she consented. And on this issue again, the Crown and the defence take opposite positions. The Crown say that he could not have believed she consented because she was too young, she was his adopted daughter, and he was so much older than her. The Crown say he did not have reasonable grounds for believing she consented for the same reason because when viewed objectively, she was so young that the accused could not reasonably have believed she was consenting. On the other hand, the defence say that the accused did believe she consented and that the accused had reasonable grounds for believing that.

At the end of the trial the appellant was found guilty on two representative counts of sexual violation by unlawful sexual connection in respect of A and two representative counts of sexual violation by rape in respect of B.

The appeal is advanced on the ground of a miscarriage of justice flowing from an expectation of the appellant and his counsel that it was sufficient to show consent or belief in consent - or a reasonable possibility of one or the other. It seems the defence

was, in relation to B, that her acknowledgment of a belief arising out of the prior abuse by an uncle in Colombia, (that it was normal to have sex with her adopted father), taken together with his evidence that she initiated the activity, established consent or grounds for belief in consent and, in relation to A, that his evidence that she initiated sexual activity was enough.

We were told that after counsel had addressed the jury, but before the Judge commenced summing-up Crown counsel referred the Judge to the decision of this court in *R v Cox* CA213/96, judgment 7 November 1996. This was said to have taken defence counsel by surprise and to have led the Judge to sum up to the jury in the terms he did effectively negating the appellant's defences.

That what was said in *Cox* should come as a surprise to defence counsel is itself surprising. As was recorded in Garrow and Turkington, ***Criminal Law*** paragraph S129A.1 under the heading "Consent"

> At common law consent means "a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents": ***Stephen's Digest of Criminal Law*** 9th, ed, 257.

Later in the same paragraph the following passage appears under the heading "Children".

> It is clear from pre-amendment cases such as *Cook* (above), a consent must be real and genuine and one would hardly think that possible with a child of tender years. In *B* (CA17/94, 7 July 1994) the Court of Appeal did not dissent from a trial Judge's direction in respect of a 17 year old who had a mental age of about 12 as a result of epilepsy that "[c]onsent here means a true consent, given by a person who is in a position to make a rational decision. A young child, for instance, cannot give consent because that child most likely would not understand the significance of what is about to occur.

In *Adams on Criminal Law* CA128.04(2) there is a review under the heading "Genuine consent" with reference to the relevant cases including a quotation from *Cox*. The relevant pages are dated 1 April 1998.

In any event the defence must have contemplated at least the standard jury direction on consent with reference to a true consent, freely and voluntarily given by a person in a position to make a rational choice. Further, the question to the appellant in the course of cross-examination already quoted clearly flagged the issue of the genuineness of any consent apparently given by B. The appellant's answer that he did not know perhaps reflected the lack of insight pervading the whole defence.

It was contended that, had the true nature of the issue been realised, the defence would have investigated the capacity of the complainants to give meaningful consent. It was said:

> The defence could have addressed the complainants' fluency in English, their understanding of matters relating to sexuality generally, their understanding of the appropriateness of sexual relations with adults, their general level of education, their ability to relate to their peers and other adults and their assertiveness or lack of it.

Those are matters which were open for investigation in any event on the immediate enquiry of whether the complainant should be believed when they denied having consented. We are not convinced the defence was denied the opportunity to investigate them.

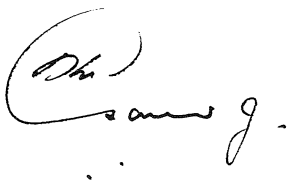
The issue of consent was at the centre of the trial. That the appellant and his counsel did not give sufficient thought to the essential character of consent - agreement with full understanding of the significance - is no ground for asserting a miscarriage of justice.

The appellant also complained that in the course of the summing-up the Judge so emphasised the rare and exceptional case that is needed before children of 10 or 11 years of age will be accepted as sufficiently mature to consent to adult sexual conduct that he really invited the jury to convict. We have carefully reviewed the whole of the summing-up. We think the directions given were entirely appropriate in light of the judgment in *Cox* and simply reflected the reality of the situation in which the accused was placed. He had brought these two young children from another culture in another

country assuming the responsibilities of their parent. It was entirely open to the jury to adopt the view, even if his own evidence was accepted, and each child, because of her unfortunate background, had initiated inappropriate behaviour, that no reasonable adult in the position of the appellant would have taken it as genuine consent to continuing sexual activity with a man approaching fifty years of age.

We were asked for time to allow for the appellant to pursue the prospect of further evidence from the complainants in light of a suggestion apparently said to have been made that one of them might have agreed after the trial that she initiated the sexual contact. We have not been satisfied either that there has been shown sufficient basis to allow time nor that such evidence, even if obtained, would make any difference. The issue plainly was not of apparent consent but of capability of consenting and of reasonable grounds for believing any consent was truly given with the necessary mature consideration. That 11 year olds may have initiated such activity would be rather a reflection of their lack of understanding of the true nature of their acts.

For the reasons given the appeal is dismissed.



Solicitors
Crown Solicitor, Auckland, for Crown.