PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA247/2010
[2010] NZCA 561

BETWEEN	W (CA247/2010) Appellant
AND	QUEEN Respondent

Hearing: 15 November 2010

Court: Glazebrook, Chisholm and Miller JJ

Counsel: W M Johnson for Appellant
K A L Bicknell for Respondent

Judgment: 29 November 2010 at 9.30am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed in part. The sentences of 18 years imprisonment on the two charges of rape (counts one and five) are set aside and sentences of 17 and ten years imprisonment substituted on counts one and five respectively. The minimum period of imprisonment of ten years is set aside and a minimum period of nine years substituted on count one.

REASONS OF THE COURT

(Given by Miller J)

[1] W appeals against his eight convictions for sexual violation and injury of his stepdaughter, A, and indecency against his daughter, B, and his sentence of 18 years imprisonment with a minimum period of imprisonment of ten years.

The narrative

[2] A, born on 12 May 1992, was placed in 1998 in the foster care of the appellant and his wife. There were several other children of the family, including R, an older son, and two teenage daughters, B and S, who were respectively 15 and 18 at the time of trial.

[3] For present purposes the offending against A began in November 2005, when the family moved to a rental property in Hamilton, and ended on 19 April 2008. The appellant faced four representative counts of unlawful sexual connection covering that entire period; rape, connection between her mouth and his genitalia and vice versa, and digital penetration. The Crown's case was that the offences occurred on many occasions, usually when he came late at night to the bedroom that she shared variously with B and S.

[4] There were two specific counts alleging that he raped A at Matakohe between November 2007 and January 2008, and that he committed an indecency upon A between 4 and 6 January 2008 at Opononi.

[5] In December 2007 the appellant is said to have committed an indecent act on his daughter, B. The Crown's case was that A and B had swapped beds that evening. When the appellant entered the room late at night he indecently assaulted B, mistaking her for A.

[6] In February 2008 the appellant separated from his wife and moved to another address. With his active encouragement, A went to live with him there. During this period he attacked A for being truant from school, punching her repeatedly in the face. That led to a charge of injuring her with intent to injure.

[7] On 19 April 2008 the appellant's wife, from whom he was by now separated, entered his home. A was not around and the appellant's bedroom door was closed. It had been jammed shut using a kitchen knife. She forced the door open and found the appellant and A in bed together. That led to the police becoming involved.

The trial

[8] The Crown led the evidence of the two complainants A and B, their sister S, R, the appellant's ex-wife, and a witness who corroborated A's account of having stayed at Opononi.

[9] R gave evidence that he had observed the appellant kneeling by A's bed late at night. He heard the appellant shushing A and telling her it was "all right". He confronted the appellant who apologised and said he was going to go. He said that when he threatened to tell his mother on one occasion the appellant slammed him against a van and threatened to smash him. R also said he heard the appellant saying to A "come on" when he entered the room in which the young people were sleeping at Opononi.

[10] The appellant's ex-wife gave evidence that she had observed suspicious behaviour on several occasions when she found him in the girls' bedroom at night. On one of these occasions she saw his hand under the blanket on A's bed and he claimed that he was praying for A. She deposed to entering his bedroom on 19 April 2008 and finding the appellant and A in bed, both naked from the waist down. There was evidence from a police officer tending to show that the doorframe had been repaired with putty not long before he inspected it later on 19 April.

[11] S gave evidence that she had read intimate texts on A's phone from "Dad", and said that she had once seen him kneeling by A's bed with his hands under the blanket.

[12] Lastly, as noted above, the Crown's case was that the appellant offended against B in error, not knowing that she and A had swapped beds that night. Accordingly, B's evidence tended to corroborate A's.

[13] The appellant's defence was that the incidents did not happen. He maintained that the family relationships were such that not only A and B but also others had an incentive to lie. He focused particularly on the positions of, R, aged 19 at trial, who had also had sexual relations with A, and his ex-wife.

[14] Before the trial the appellant sought leave under s 44 of the Evidence Act 2006 to cross-examine R and A about A's sexual experience with R. Leave was refused by Judge Treston, whose decision was upheld on appeal to this Court. The appellant argued that sexual conduct between R and A gave R a motive to lie to corroborate A's untruthful account, maintaining that it was necessary to challenge R's veracity because he corroborated important aspects of A's account.

[15] The Court reasoned that:

> [18] The appellant must then show that it would be contrary to the interests of justice to exclude the evidence. But the appellant has not been able to explain how the fact of this sexual activity between R and A provides R with a motive to lie. Although R has been candid with both his family and the police as to the events in which he was involved, he has not been charged with criminal offending in relation to the conduct. There is no suggestion in any of the material placed before us that R can hope to gain an advantage by giving evidence that corroborates A's account. When pressed on this point the appellant's counsel submitted that the defence should be able to place before the jury the true family dynamics, and see what the jury makes of it, that is, to use his phrase, "put everything into the wash and see what comes out".
>
> [19] Evidence of family dynamics of this nature cannot be said to be of such direct relevance to facts in issue that it would be contrary to the interests of justice to exclude it. But allowing such evidence to be offered is likely, if not calculated, to divert the jury from the issues they have to decide. Whilst having no probative value in relation to the facts truly at issue in the proceeding, the evidence will also no doubt embarrass and distress A, which is the very mischief s 44 (and its predecessor, s 23A of the Evidence Act 1908) was enacted to avoid.

[16] The application for leave to cross-examine R and A about their sexual relationship was renewed at trial, when Mr Johnson further sought to cross-examine her about the fact that after the present offending came to light she left her address where she had been placed by the Department of Social Welfare to be with her boyfriend. The application was refused, Judge Wolff finding that as it occurred after the date of the offending it was not relevant in any way that was of benefit to the

appellant. On the contrary, the jury might interpret it as evidence tending to support A's account of the appellant's conduct.

[17] The appellant did not give evidence, but his denials of any form of sexual contact with either complainant were before the jury in the form of police interviews. He contended not only that the family witnesses were lying but also that he lacked opportunity to offend given the communal sleeping arrangements, and that insignificant events had been blown out of proportion.

[18] The appellant was convicted on all eight counts.

The appeal

[19] On appeal, the appellant maintains that his counsel ought to have been allowed to cross-examine R and A about their sexual relationship, to suggest that R had reason to lie and to corroborate A's false account. R was an important witness and at trial his evidence proved potent. He added to what he had previously said in a depositions statement, claiming that the appellant had used violence against him on one occasion to stop him disclosing what he had seen. The issue was not collateral. On the contrary, the way in which R gave evidence and the nature of his evidence emphasised the direct link between the facts in issue and the allegations against R. The jury should also have had the opportunity to assess A's demeanour at trial knowing of her relationship with R.

[20] Counsel conceded that complainant B is in a different category. The defence case at trial was that she sought to support A because of the relationship between them and the upheavals in the family caused by the marriage breakup.

[21] Secondary grounds of appeal were that the trial Judge erred in his directions to the jury about the use that could be made of previous statements, and that the summing up as a whole was not fair and balanced. In his written submissions Mr Johnson raised other points that are of a strictly peripheral nature; we do not address them as they can have no bearing on the result.

Cross-examination on sexual experience

[22] Mr Johnson acknowledged that he must point to something in the evidence that might lead this Court to depart from its earlier decision. He pointed only to R's effectiveness as a witness and the fact that R raised a new claim in cross-examination, namely that he had been threatened with violence. Mr Johnson pointed out that in summing up the Judge himself spoke of the "family dynamics" when he addressed the question why A and B might not have complained earlier, and argued that all he wanted to do in cross-examination was to put the family dynamics before the jury.

[23] None of this warranted cross-examination of A and R about their sexual relationship. For the reasons given in the earlier judgment of this Court, the proposed cross-examination went to veracity but something more was needed to show that the relationship was so directly relevant to facts in issue that the interests of justice required that leave to cross-examine be given. Mr Johnson was unable to point to any reason why their relationship would lead A to lie about what the appellant did to her, and R to lie in turn to support A. Nor is there any logical reason why R might think that his account of his father's activities would divert attention from R himself, in circumstances where R had been frank with his family about his relationship with A.

[24] There is also no substance in Mr Johnson's complaint that he ought to have been allowed to cross-examine A about her decision to leave a home (where she had been placed after removal from the appellant's home) to be with her boyfriend. The most that he could say is that it showed she did not care very much about the trial. The argument seemed to rest on unexamined premises that if her complaints were true she would have been an enthusiastic witness and that her decision to leave that home at that time in some way indicated that she was not enthusiastic. This defies experience. As the Judge observed, the jury might well interpret her behaviour as consistent with sexual abuse.

[25] Even if we were wrong in this conclusion, it could not be said that any miscarriage of justice had resulted. As the Judge observed, this was an exceptionally

strong case, with a great deal of circumstantial evidence and corroborating evidence from B, S and the appellant's ex-wife, whose evidence was in turn supported by that of the police officer who inspected the bedroom door.

Previous consistent statements

[26] Mr Johnson complained that the Judge instructed the jury that the statements made by A to the police in interview were consistent and therefore true. There is nothing in this point. The Judge correctly directed the jury about the use that could be made of such statements, saying:

> You have heard what A had to say to her mother, to the police officer in the brief interview on 19 April, and you have heard part of what she said in the video interview that took place at Manuwai. When you heard the first of those statements you will recall that I told you that when someone repeats something it does not make it true, and I emphasised that the reason that you were hearing about that in this case was because there was a suggestion here that the complainant had amplified the story, made it up ... you need to consider whether what the complainant said immediately after the event and repeated was consistent, and what is more, now that you have heard that evidence you can weight that into account and you can take as true, if you believe it to be so, what she said on those previous occasions, but its real importance in the present case is for consistency because the Crown says that her account is consistent with what she said to you on oath from the room in which she gave her video evidence to you.

[27] Mr Johnson further argued that during interview with the police suggestions were made to A that rendered her statement unreliable, and that the statement was so general that it was not really a prior consistent statement. He submitted that the Judge did not advert to this in his summing up.

[28] Again, there is nothing in the point. It is not in dispute that the interview was consistent with A's evidence at trial in that it alleged sexual contact. The trial issue was whether there was any such contact. The Judge instructed the jury that they had to consider whether the previous statements were consistent, and made it clear that A's reliability and credibility were very much in issue.

Balance in summing up

[29] Mr Johnson criticised the Judge for lack of balance in the summing up, focusing on his statement, when dealing with the question why A and B might delay in making complaints, that A had said she had nowhere else to go. This statement was said to have been made forcibly. Mr Johnson argued that A did have other places to go, but this was not pointed out. He added that in his closing address he argued that the initial complaints were not spontaneous but had been led from the complainants then added to over time in a way that rendered them unreliable. He invited the Judge to get the jury back in to emphasise these points, but the Judge refused, ruling that if anything it would harm the defence case to highlight damaging material.

[30] We do not accept that there was any lack of balance. The Judge mentioned the evidence that A had nowhere else to go just after detailing the defence position that if the allegations were true, then as a matter of common sense they would have been made earlier. Nor did the Judge fail, when summarising the cases, to recount the main elements of the defence case. He emphasised the lack of opportunity to offend when the sleeping arrangements were communal, that A would not have gone to live with the appellant had her allegations been true, the dysfunctional nature of the family, that the complainants had trouble describing what was said to have been done to them, and that there were inconsistencies in the witnesses' accounts. In doing so he adequately drew to the jury's attention the defence argument that the complainants' accounts were unreliable.

Sentence

[31] At sentencing Judge Wolff characterised the Crown's case as extraordinarily strong and the verdicts as unequivocally correct. He noted that R had been a compelling witness despite the love he obviously still felt for his father.

[32] It is not in dispute that the decision of the Court of Appeal in *R v AM (CA27/2009)* took effect on 1 April, the day on which the appellant was

sentenced.[1] His attention having been drawn to it at the commencement of sentencing, the Judge adjourned for a time to review the judgment. He then placed the case in the middle of band four in *R v AM* (16-20 years).

[33] The Judge reviewed the evidence, noting the extensive nature of the violations over a period of years. He pointed to the assault on A as evidence of an inherent threat of violence in the relationship, stating that the severe beating was probably attributable to the fact that A had truanted to be with a boyfriend. A was isolated and vulnerable, with no relatives to escape to. The Judge accordingly accepted that there was an element of detention. There was also planning and premeditation so that he could get to A late at night, and an element of grooming A so she would move in with him after he separated from his wife. There was no victim impact statement from A, but there was an affidavit from a police officer, Detective Cassidy, who explained that he monitored A's video interview and found her extremely distressed. She did not find it easier to discuss the offending as time passed. She appeared still to be highly traumatised, and she was unable to discuss the matter when interviewed for a victim impact statement. The Judge observed that Mr Johnson criticised those observations as subjective, but they came from an officer who had worked in the field and his observations were consistent with the known effects of sexual abuse. The family as a whole had been harmed by his conduct, particularly given his continued denials.

[34] There were no mitigating factors, so the sentence on the rape charges was 18 years imprisonment. The sentence on the other sexual violations was 10 years imprisonment. The injury with intent to injure earned two years imprisonment, as did the charge involving B, who had expressed the wish that he not go to prison for long. Lastly, the Judge imposed a minimum non-parole period of ten years to mark the seriousness of the offending.

[35] The appellant maintains that the sentence was manifestly excessive. The appellant argues that the application of *R v AM* resulted in a substantially higher starting point than would previously have been the case. In any event, the Judge was

---

[1] *R v AM (CA27/2009)* [2010] 2 NZLR 750, [2010] NZCA 114.

wrong to place the offending in the middle of band four. The Judge further erred by attaching weight to the affidavit of Detective Wharton.

[36] In *R v AM* the Court identified a number of aggravating factors. Those that are said to apply here are breach of trust, scale of offending, vulnerability of the victim, harm to the victim, and an element of threatened violence. With respect to band four, the Court held:

> [108] The same sorts of factors that place offending towards the higher end of rape band three will apply here but it is likely that the offending in rape band four will involve multiple offending over considerable periods of time rather than single instances of rape.
>
> [109] Perhaps the paradigm case of offending within this band is that of repeated rapes of one or more family members over a period of years as is illustrated by the present case. Offending of this nature, especially that involving children and teenagers will attract starting points at the higher end of this band as indicated by the authorities discussed in *R v S* (CA64/06)100 and *R v Proctor*. Gang or pack rape is another situation which is likely to fall within this band.

[37] With respect to band three, the Court held:

> [105] This band will encompass offending accompanied by aggravating features at a, relatively speaking, serious level. Rape band three is appropriate for offending which involves two or more of the factors increasing culpability to a high degree, such as a particularly vulnerable victim and serious additional violence, or more than three of those factors to a moderate degree. Particularly cruel, callous or violent single episodes of offending involving rape will fall into this band. ...

[38] Ms Bicknell pointed out that this case might seem to be the paradigm example of a band four offence of which the Court spoke.[2] However, it is important not only to identify the aggravating factors but also to assess their gravity in the particular case. Here the sexual offending was extensive in scale and serious in nature, but it did not involve actual violence additional to that inherent in the act, nor additional degradation. Contrary to the Judge's view, we do not think that there was detention, although the victim was vulnerable by reason of age and dependency. There was one principal victim, the other having been involved on one occasion and then by mistake. The offending endured for a period of a little less than two and a half years. The harm done to A, it can properly be inferred, was serious, but not

---

2 At [109].

exceptionally so. In reaching that conclusion we take into account Detective Cassidy's affidavit, as information obtained from the victim, insofar as it states that she was unable to complete a victim impact statement.[3] The affidavit is not admissible for sentencing purposes, Mr Johnson having taken exception to it, insofar as the officer expressed an opinion about the significance of her behaviour.[4]

[39] The aggravating factors that are present in high degree are breach of trust, vulnerability, premeditation, and scale. Accordingly, we would place this case within the bottom half of band four. It is similar to *R v N (CA88/05)*,[5] one of the examples given in *R v AM* of a case at the lower end of band four.

[40] We conclude that the appropriate starting point in this case was 17 years. There being no mitigating factors, that was also the appropriate sentence on the lead offence (count one, the representative rape count). We do not think that an adjustment of that extent can be described as minor. We adjust the sentence on the other rape charge (count five) to ten years imprisonment as it was a single offence, not more serious than the offences on which the Judge imposed a ten-year sentence. We make no adjustment to the remaining sentences.

[41] In *R v AM*, the Court observed that a minimum period of imprisonment is routinely fixed in very serious cases of serious sexual offending.[6] The statutory criteria of accountability for harm done, denunciation, deterrence and community protection are frequently satisfied in such cases. But it is always necessary to examine whether a minimum period is warranted in the particular case and if so, of what length. In this case the need for accountability and denunciation was high. Because of his denials the appellant is also said to present a high risk of reoffending. In the circumstances, we agree that a minimum period was necessary. However, he has no relevant previous convictions and he has not previously served a sentence of imprisonment, while he also expressed willingness to attend programmes within the prison. Having regard to the adjustment that we have made to the sentence, we consider that a minimum period of nine years imprisonment suffices.

---

3 Victims Rights Act 2002, ss 17, 19 and 21.
4 Sentencing Act 2002, s 24.
5 *R v N (CA88/05)* CA88/05, 23 November 2005.
6 At [156].

Result

[42] The appeal against conviction is dismissed.

[43] The appeal against sentence is allowed in part. The sentences of 18 years imprisonment on the two charges of rape (counts one and five) are set aside and sentences of 17 and ten years imprisonment substituted on counts one and five respectively. The other sentences are unchanged. The minimum period of imprisonment of ten years is set aside and a minimum period of nine years substituted on count one.

Solicitors:
Crown Law Office, Wellington for Respondent