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IN THE COURT OF APPEAL OF NEW ZEALAND

PUBLICATION OF NAME, ADDRESS OR OTHER IDENTIFYING INFORMATION PROHIBITED

CRIMINAL APPEAL C.A. 20/88

Coram: McMullin J (presiding)
Somers J
Bisson J

Hearing: 31 May 1988

Counsel: R.J. Johnson for Appellant
Miss Kristy McDonald for Crown

Judgment: 28 June 1988

JUDGMENT OF THE COURT DELIVERED BY SOMERS J

The applicant, to whom we will refer as H. for his name is to be suppressed, applies for leave to appeal against a sentence of seven years imprisonment imposed on him in the High Court at Auckland on a charge under s.131(1)(a) of the Crimes Act of sexual intercourse with his stepdaughter aged 15, who, at the time, was living with him as a member of his family. The term imposed was the maximum for such an offence and his ground of appeal is that the sentence was excessive.

H.'s wife, whom he married in February 1985, has three daughters by a former marriage now aged 16, 14 and 12 years respectively. The complainant was the eldest of those children. H., who is now aged nearly 60 was convicted of the same offence with the same girl in May 1985. He was then sentenced to 9 months imprisonment and the girl was made a state ward and removed from the home. She returned to the house about a week before the offence with which this case is concerned.

H., who worked a night shift, arrived home the day in question at about 8.20 a.m. His wife and her youngest daughter were away and had been for some days. The evidence of the complainant, given at the preliminary hearing, was that on arriving home H. went to bed, that she brought him coffee and a sleeping pill and that he then had intercourse with her. She was wearing her nightie at the time. She said that after getting up for lunch he returned to bed at 8 p.m. asking the complainant to wake him at 11 p.m. She said she went in to see him at 9 p.m. again wearing a nightie and that he again had intercourse with her and that she was too scared to protest.

Two charges were laid against H., one in respect of each act of intercourse. After taking of depositions he was committed for trial in the District Court and pleaded guilty to the second count which related to intercourse in the

evening and not guilty to the first count. After submissions by the Crown he was discharged on the first count pursuant to s.347 of the Crimes Act. Subsequently the District Court Judge declined to sentence H. and committed him to the High Court for sentence because, as a result of his conviction in 1985, he qualified for a sentence of preventive detention.

When it came to sentencing in the High Court other facts about H.'s past were mentioned. The pre-sentence report referred to 'an alleged indecent assault' in June 1986 in which H. had touched the second child's vagina. It also mentioned that a daughter of H.'s by a previous marriage had been subjected to 'indecent assault and attempted intercourse'. This must have been over twenty years before. Neither of these matters was or could be explored, but after H.'s counsel was asked whether this history would be contested, H., through his counsel, indicated that he did not wish to challenge it.

The Judge took these two matters into account in assessing the seriousness of the offending and the likelihood of its happening again. In doing so he relied upon the judgment of this Court in R v Moriarty (unreported C/A 64/85; judgment 14 June 1985). There the earlier offending was evidenced by convictions so that the case does not cover what happened here.

The principle is we think straightforward. A Court, on sentence, is entitled to know the character and antecedents of the person to be sentenced. Previous convictions may be proved. There is no reason why earlier offending, never the subject of prosecution, should not be referred to provided that the facts are clearly admitted. Normally where the prosecution wishes to establish some fact which is not admitted it will have to prove it : see R v Bryant [1980] 1 N.Z.L.R. 264. This is not possible in the case of previous offending which is not the subject of a conviction and is not admitted. To permit the prosecution, on sentencing, to prove unadmitted previous offending would be to admit a new type of trial.

In the instant case H. did not want to challenge the assertions about his earlier conduct. We do not consider this a clear enough admission of criminal conduct over 20 years before which had apparently not been the subject of any prosecution. In the case of the younger daughter however there are other plain admissions sufficient to make it safe to bring to account his conduct towards her.

That conclusion however does little to advance H.'s case. The High Court Judge rightly viewed the offence as grave and rightly emphasised his earlier criminal intercourse with the same girl. He considered H. represented no threat to anyone outside his own household and that it was the duty of the Court to ensure that his two younger stepdaughters had the opportunity of growing up and

achieving maturity and independence without interference by him. The Judge thought that could be achieved by a long finite sentence rather than preventive detention and accordingly imposed a sentence of seven years coupled with an order under s.77A of the Criminal Justice Act that -

> any grant of parole be subject to the conditions that you do not return to a household in which either of your younger step-daughters is a member and that you do not during the period of your parole communicate with either of them directly or indirectly.

H., as mentioned is now aged nearly 60 years. There are indications that he suffers from some minor organic brain disease. He was not charged with rape and the evidence is at least open to the construction that the complainant was not an unwilling party to what occurred. She has now left the household and it seems certain she will not return to it again.

It should be added that H.'s wife has expressed continued loyalty to him and is apparently estranged from the complainant whom she blames for the offence and that both she and the second daughter accept H.'s explanation that his interference with the latter was, as the psychiatrist put it, 'to ensure that she reacted negatively and that the risk of circumstances that have affected the older sister would not occur'.

The gravamen of s.131 is intercourse with a girl under 20 living with the offender as a member of his family and

under his legal or de facto care or protection. Twice in two years H. has breached the trust which the section protects. That itself makes the case a bad one and its seriousness is increased by the age of the girl. It is no defence to a charge under s.131 that the girl consented and we do not think that in the circumstance of this case, involving a repetition of an earlier offence, that her consent or compliance (assuming its existence) can much mitigate its gravity.

Having said that however we do not think the case is one which called for the maximum sentence. Several more serious cases than this were considered in R v Pike and Others (C.A. 48/88, 49/88, 51/88 and 70/88) judgment in which was delivered on 20 June 1988. There most of the children concerned were much younger and in some the charges were merely representative of a sustained course of conduct. The range of sentences imposed in those cases indicate that the present case would be appropriately met by a sentence of 4 years imprisonment.

As mentioned the Judge made an order under s.77A of the Criminal Justice Act. We would not disturb that.

Leave to appeal is given, the appeal is allowed and the sentence of 7 years imprisonment is quashed. In lieu the applicant is sentenced to 4 years imprisonment.

In the interests of the victim and the other children mentioned publication of the applicant's name or any details which might identify him or the victim is prohibited.

M Downs J.

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