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IN THE COURT OF APPEAL OF NEW ZEALAND

CA609/2011
[2012] NZCA 180

BETWEEN	GREGORY MARK BRAY Appellant
AND	THE QUEEN Respondent

Hearing: 27 February 2012

Court: Hammond, Priestley and Allan JJ

Counsel: V L Pomeroy for Appellant
D J Boldt for Respondent

Judgment: 10 May 2012 at 10 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Hammond J)

Introduction

[1] The appellant, Gregory Mark Bray, was convicted by a jury, presided over by Judge Ingram on six counts of sexually abusing two young boys.

[2] The appellant had befriended the mother of the two boys (X and Y) who were aged six and seven respectively. He offered to have the two boys stay with him in a one bedroom flat he occupied. This was so that their mother, who was burdened

with the care of four small children, could have a break from time to time. The boys would stay with the appellant for a weekend at a time.

[3] The Crown case was that the offending was accompanied both by grooming and threats. It alleged that Mr Bray supplied toys and games, and fed the boys well. He made it clear that he was in charge, and if they disobeyed him they would be smacked.

[4] The Crown alleged regular assaults on the boys in the guise of physical discipline. The offending against the two boys was similar. In the case of Y the sexual offending gave rise to three representative counts of sexual violation (two alleging oral sex, one alleging anal intercourse). With respect to X there was one representative count of sexual violation (consisting of oral sex) and one of indecent assault. The offending continued over a three and a half month period. Each of them witnessed the appellant sexually abusing the other.

[5] The appellant gave evidence at trial. He denied any sexual contact between himself and the boys, although he admitted that he smacked them. Two character witnesses were called on his behalf. One, A, had worked with the appellant for 10 years, and gave evidence that he was loyal, honest and trustworthy. Another, B, had also known the appellant for over 10 years. The appellant had lived in a house bus on her property for between two and three years, leaving around 2005. B said she could depend and rely on the appellant.

[6] The defence wished to lead some further evidence from B. She is the mother of two boys who are aged 10 and 16. From time to time she would leave them in the appellant's care. The appellant wished to lead evidence from B that she had no concerns about leaving her sons in his company.

[7] The trial Judge ruled that this aspect was not something B could give evidence about. He noted that both boys would be distinctly older than any of the complainants in the present case. There was a significant difference between the two sets of circumstances. He concluded that there was little comparison between a situation where the appellant was effectively living in the boys' home with their

mother and the complainants' situation, where they would regularly be sent to stay overnight at his flat. In the Judge's view the proposed propensity evidence was not sufficiently proximate, in terms of the circumstances, to be relevant in this case.

[8] The jury could not agree on certain other counts, including alleged offending against a five year old half brother of one of the victims.

Grounds of appeal

[9] Ms Pomeroy did not appear at the trial. She was instructed very late on the appeal. The originating Notice of Appeal had been prepared by other counsel.

[10] In the circumstances, we allowed her to advance submissions with respect to the appeal against conviction on four grounds:

(a) the Judge's refusal to permit defence propensity evidence;

(b) that there were further propensity witnesses who were not called;

(c) errors in directions to the jury and summing up; and

(d) evidence prejudicial to the defence which should have been excluded.

[11] We take each of these grounds in turn.

Refusal to permit defence propensity evidence

[12] The character of this evidence has already been outlined at [7] above. In our view the Judge was correct to exclude this evidence. First, the witness was unable to give evidence that the appellant had always behaved appropriately when alone with her sons. She was not always present. She could only make the obvious point that nothing she had observed, or that her sons had said, had given her any cause for concern. Her evidence was patently hearsay. And with respect the Judge was right to conclude that the probative value of the proposed evidence was low.

[13] As this Court observed in *Gharbal v R*[1] it can be assumed that many persons subsequently found guilty of rape will have had appropriate dealings with members of the opposite sex on occasions. We agree with Mr Boldt that the possibilities from this line of evidence are almost endless, in describing occasions on which a defendant has behaved lawfully, and of little, if any, assistance. Even hardened criminals do not offend constantly.

[14] That said, it is possible to conceive cases where a defendant's failure to take advantage of a particular kind of opportunity might distinctly impact upon or undermine a Crown case. Such situations will be rare.

Other propensity evidence

[15] Apparently the appellant wished to give evidence about children in his care in similar positions to the complainants. But even now the appellant has not provided any detail as to those witnesses, or what they might have to say.

[16] This Court can have no regard to this point without a fresh evidence application, cast in the usual way; or a submission of counsel incompetence, again cast in usual terms. Simply throwing an appeal point in the air in this manner is not appropriate.

Errors in directions for jury and summing up

[17] The general submission here is that the Judge's directions to the jury were unbalanced in that they failed to draw attention to what is said to be an inconsistency between the complainants accounts. Then it is said that he did not put the defence case adequately, and did not properly direct the jury in some respects.

[18] These concerns are not made out. If there were inconsistencies between the complainants accounts – which appears to us to be a distinctly problematic assertion – it was certainly raised by defence counsel in closing. The Judge himself reminded the jury of the defence's submissions regarding X's initial denial that anything had

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1 *Gharbal v R* [2010] NZCA 45.

happened to him; and further, of the possibility of contamination as between the complainants.

[19] The Judge's summary of the defence case was extensive. It took up several pages in the written record and reviewed a number of matters in substantial detail. The jury would have been in no doubt as to the key contentions advanced by each side or of the detail of the criticism which was levelled against the complainants' evidence.

Prejudice or passages in the police interview

[20] The concern under this head is that the appellant asserts that two passages in his video interview should have been excised. First an acknowledgement that he had himself been sexually abused, and second, his statement that he had stolen food to feed the complainants.

[21] No objection was taken to either passage at trial; there has been no formal criticism of the conduct of trial counsel; nor has there been any waiver of privilege.

[22] On the merits of this point, far from being prejudicial these passages in the evidence could have provided a distinct reason why the appellant would not engage in any inappropriate conduct with the two complainants. Indeed, it is a fair supposition that is why it was led. There is nothing in this point.

Burden and standard of proof

[23] Although it is not a distinct ground of appeal in Ms Pomeroy's principal submissions, there was some criticism in the supplementary and oral submissions that the Judge's directions regarding these important topics were not adequate. There is nothing in this point. These matters were distinctly and repeatedly emphasised throughout the summing up. They were reiterated in the question trail the jury was required to work through when addressing the charges. For instance, each set of questions was prefaced with a reminder that "on all issues, the burden of

proof beyond reasonable doubt lies on the Crown", and every individual question began with a question: "are you sure ... ?".

Conclusion

[24] The appeal against conviction is dismissed.

Solicitors:
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