NZLR 13/4

IN THE HIGH COURT OF NEW ZEALAND M. 443/85
AUCKLAND REGISTRY

BETWEEN EASTWOOD

485 Appellant

AND POLICE

Respondent

Hearing: 4 June 1985

Counsel: J.M.T. Wells for Appellant
D. Neutze for Respondent

Judgment: 4 June 1985

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ORAL JUDGMENT OF CASEY J.

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Mr Eastwood faces a charge of wilfully doing an indecent act in a public place between 29 February and 1 March 1984. The two incidents are alleged to have taken place at a swimming pool on the Kauaeranga River known as the Booms which is obviously frequented by numbers of young children. The prosecution case was that over this period the appellant had made himself known to these young people, had engaged in talk with a number involving obvious sexual overtones and on one occasion after a swim he had taken down his underpants and masturbated himself in front of 2 girls between 10 and 13, after asking one of them to remove her swimming costume. On another occasion he exposed his anus to a group of young children in a gesture known as a "brown eye". He was not represented at the hearing but conducted his own defence and did not give evidence.

The learned Judge found that both

episodes had been satisfactorily proved and convicted the appellant and placed him on probation for two years, with special conditions about work and associations and control of finances, and the undergoing of appropriate psychiatric treatment as might be directed. He was also ordered to pay $400 towards the costs of prosecution and $285.40 witnesses expenses. In addition, because the Judge considered the motor vehicle he was using played a very large part in the offence, he disqualified him from holding or obtaining a motor driver's licence for a period of 12 months. As well as the appeal against conviction, Mr Eastwood appeals against this latter part of the order on the grounds that he is a motor mechanic and that the vehicle was essential but during the course of his argument Mr Wells submitted that there was no jurisdiction to make such an order under section 44(A) of the Criminal Justice Act.

Turning to the appeal against conviction first, it seems reasonably clear that a number of these young people, most of whom were around 10 to 12 years of age, didn't come up to brief in their evidence. That in relation to the masturbation depended almost entirely on a girl, , who was 12. She described the episode in which the appellant had gone swimming, came out and stood over a fire complaining of the cold and rubbing himself. She said he asked her friend, to take her togs off which she did and then after describing some other matter she came back to the original topic and described him as rubbing his penis adding that they saw it alright and that it wasn't covered and that he was standing in front of them over the fire. Mr Wells made the point that the statement it was not covered was the result of a leading question from the prosecution, followed by a further leading question about him standing in front of them over the fire, to which she answered "yes", so that the evidence of this depended on or consisted materially of those two

questions.

There might well be considerable merit in his objection; however, read in conjunction with the other evidence from the girl about this episode, it is clear that the answers to these 2 questions really did not add very much of significance. I agree with the learned Judge's conclusion that it would be flying in the face of reality if one did otherwise than accept that he was masturbating in front of these girls. He clearly accepted as a reliable and truthful witness.

The other criticism was of his finding that the "brown eye" had in fact taken place as described by a boy, , who was aged 10. I agree that there is some ambiguity in the earlier questions he was asked about this episode. Firstly, in respect to whether he saw it, he replied, and I quote:

> "No he sort of went half way around the bend"

and when he was asked what he did then, he replied:

> "He done it.
>
> Did you actually see him do it?...Oh well yes sort of."

However, further down in his evidence, he describes in detail him pulling down his pants facing towards the river where people were swimming and the response of those people to him. Read as a whole, I think it is reasonable to accept this passage as a statement by this young boy that while he may not have seen him directly on from the back, he saw enough of the episode to enable the Judge to conclude that what was alleged against the appellant actually took place, especially as this follows from his earlier evidence that the appellant said it was time to go

and do a "brown eye". The Judge saw and heard give the evidence and, accepting the confusion that can exist in the minds of young children, he has obviously come to the conclusion that he could rely on him as a witness. I can see no grounds for interfering with the conviction and that part of the appeal must be dismissed.

I turn now to the order in relation to the drivers licence. It is accepted that the appropriate provision is section 44(A)(2)(b) of the Act, involving the use of a motor vehicle to facilitate the offence, from the various passages in the evidence showing that the appellant used a small reddish car to get to the area. But one or two of the children suggested he might actually be staying in the car and not using it to drive up and down there each day involved in the period to which the charges relate. Mr Wells makes the point that it is not enough to show that he travelled there in a car; there must be some nexus between the use of that vehicle and the offence in order to conclude that it had been used to facilitate its commission. I agree it would not be enough that he had simply driven up to the locality and then, while swimming had been overcome by sudden temptation and committed the offences of which he has been convicted.

When I read the evidence as a whole I think that it is impossible to escape the conclusion that he used the car either to get to or to stay up at this area so that he could position himself among these young people, thereby enabling the offences to be committed. There is evidence from a number of children indicating suggestive conversations with sexual overtones over the period, quite apart from two episodes forming the basis of the conviction. The only reasonable inference that can be drawn is that he wanted to be there for purposes connected with sexual gratification among these children, that he used the car to travel there or to remain there to achieve his object. The commission of these two offences along

with all the other evidence points to this fact that he had an earlier desire to get himself into this situation. In these circumstances I think the matter comes fairly within the provisions of the section, and that he used the car to facilitate these offences. The learned Judge was entitled to exercise his discretion in dealing with the licence in this way, and I certainly do not feel justified in interfering with it.

Mr Wells suggested he had not taken proper account of the hardship in his employment as a motor mechanic. Somebody in his situation would clearly require a licence. However, at the end of his remarks on sentencing, the Judge clearly indicated he would consider a limited work licence to enable the appellant to keep his employment and recommended he see his solicitor about an application. I cannot say for a moment, having regard to the very lenient way he was treated for these very serious offences, that on the principle of totality or otherwise, the order about the licence was inappropriate or manifestly excessive. Mr Wells said the appellant simply does not have the means to make an application for a limited licence, particularly in view of the fact that his previous application for legal aid was declined by the District Court. As to that I make no comment, but having regard to the very clear indication given by the Judge on sentencing I should imagine that Mr Eastwood would not find the absence of a solicitor on his application of any great hindrance. And from the way he handled himself in the District Court in cross-examining witnesses I think he has demonstrated a degree of competence which leads me to believe that he would be quite capable of making the application himself. In those circumstances I cannot interfere with the learned Judge's order and the appeal against sentence must also be dismissed.

M.E. Casey J.

Solicitors: Newfield, Callaghan & Partners for Appellant
Crown Solicitor for Respondent