NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

T 78/93

BETWEEN THE CROWN

Applicant

A N D H

Respondent

Hearing: 23,24 November 1993

Counsel: W P Cathcart for Applicant
A J Fitzgerald and M McKenzie for Accused

Judgment: 24 November 1993

ORAL JUDGMENT OF ROBERTSON J

Neville Francis Hargreaves is to stand trial today on four charges :

"1. THE CROWN SOLICITOR AT ROTORUA charges that H between the 1st day of January 1967 and the 31st day of December 1969 at Christchurch indecently assaulted N a girl then under the age of 12 years.

2. THE SAID CROWN SOLICITOR FURTHER CHARGES that H between the 1st day of January 1970 and the 31st day of December 1975 being over the age of 16 years at Porirua had sexual intercourse with N known to him to be his daughter and thereby committed incest.

3. THE SAID CROWN SOLICITOR FURTHER CHARGES that H between the 1st day of January 1976 and the 24th day of December 1990 being over the age of 16 years at Opotiki had sexual intercourse with N known to him to be his daughter and thereby committed incest.

4. THE SAID CROWN SOLICITOR FURTHER CHARGES that H on the 25th day of December 1990 at Opotiki sexually violated N by raping her."

The Crown made an application under s 344A of the Crimes Act with regard to the admissibility of three proposed witnesses none of whom gave evidence at depositions.

There was a Clinical Psychologist, Christopher R Marsh who has worked closely with the victim who is the accused's daughter. When the matter was called, Mr Cathcart for the Crown indicated that this part of the application would not be pursued. He is to be congratulated on his judgment for it is clearly inadmissible evidence.

The second witness is D G Lewell who is the Engineering Manager for Bay of Plenty Electricity in Whakatane. His proposed evidence relates to Mr Hargreaves' employment. It is tendered by the Crown on the basis that it is of relevance to a comment which Mr Hargreaves made to the Police

about his own situation during the 1980's. Mr Fitzgerald argued that it was irrelevant and of course that is the first question that arises in respect of admissibility. I accept Mr Cathcart's submission that his evidence may be probative of a fact in issue. Its weight is a totally different matter. Its eventual importance may be tenuous indeed, but I can see no basis for excluding it as material which could have no bearing on an issue in this case.

The third issue relates to the evidence of Dr G J Simblett, a Consultant Psychiatrist who has had some involvement with the victim at Tokanui Hospital. The brief in the form that it was given was clearly beyond anything which could be given. The matter was adjourned last evening to enable Mr Cathcart to obtain further and better instructions with regard to the evidence which this witness could properly give.

The complainant is over the age of 17 years and therefore s 23G of the Evidence Act does not apply. Accordingly one returns to the common law. That was reviewed by the Court of Appeal in ***R v B*** (an accused) [1987] 1 NZLR 362 and revisited in ***R v Accused*** (CA 174/88) [1989] 1 NZLR 714. Each of those cases dealt with child sex complaints, but in as much as there was no statutory basis to deal with the matters at that time the expressions of opinion relate to the general common law. It was noted by McMullin J in the later case at 720 :

> *"Two features which are common to all the judgments in **R v B** (an accused) are that (1) as a precondition of admissibility the subject-matter upon which the expert expression of opinion is given must be a sufficiently recognised branch of science at the time that evidence is given; (2) that an expert cannot give evidence*

which is effectively a judgment on the complainant's credibility. That is a matter for the jury alone."

The learned Judge then dealt with what might have appeared to be a variance in opinion and then said :

*"The common theme which runs through these dicta, although they are expressed with varying emphasis, is that before a psychologist or other similarly qualified person can be allowed to give evidence that a particular child has exhibited traits displayed by sexually abused children generally, it must be demonstrated in an unmistakable and compelling way and by reference to scientific material that the relevant characteristics are signs of child abuse. Always assuming that the psychologist in the present case was properly qualified to give evidence in this field (as to which we heard no argument) it was not properly established in the evidence that, in terms of the above dicta, children subject to sexual abuse demonstrate certain characteristics or act in peculiar ways which are so clear and unmistakable that they can be said to be concomitants of sexual abuse (**R v B** (an accused) at p 368); or that expert evidence in this field was able to indicate with a sufficient degree of compulsion, features which establish that the evidence of the complainant was indeed truthful (p 370); nor did the psychologist describe the tests she undertook and the reactions of other children from her own experience, or have recourse to specialist literature to confirm her opinion (p 373)."*

Mr Cathcart now tells me that Dr Simblett would give evidence that symptoms which he has observed are indicative of sexual abuse in childhood over a prolonged period. Mr Fitzgerald argues that in the brief which has been tendered there is no proper basis to establish that this is an opinion which he can give based on a sufficiently recognised professional view and that it may be merely his personal conjecture. Counsel is also

concerned that the effect of his evidence however it is expressed, is merely to bolster the credibility of the complainant and that is clearly prohibited.

I am of the view that the proper course of action is to permit the Crown to have Dr Simblett present in Court while the complainant gives evidence. This is a case where the Crown accepts that there is no evidence which under the old requirements would have amounted to corroboration. Therefore the material available upon which a professional opinion can be based will be the testimony of the complainant alone. Having heard that evidence I will then conduct a voir dire in the absence of the jury. Counsel can explore with the Doctor the various issues about which there is a degree of uncertainty to see whether he is able to bring himself within the requirements which would enable him to proffer a professional opinion on relevant matters.

The other outstanding issue in this case is an application under s 23A of the Evidence Act to permit counsel for the accused to question the complainant with regard to her sexual experience with another person. The application is advanced on the basis that such evidence is of direct relevance to a fact in issue and to exclude it would be contrary to the interests of justice.

I had occasion to consider this section here in Rotorua last week where I reviewed some of its history in ***R v Taylor*** (T 82/93, 17.11.93). The facts of that case bore no relationship to the facts here but I recognised and adopted the standards laid down by the Court of Appeal in ***R v McClintock*** [1986] 2 NZLR 99, ***R v Duncan*** [1992] 1 NZLR 528 and most recently in ***R v Accused*** (CA 92/92) 1 NZLR 553.

The complainant in the present case is now just over 30. She alleges that from the time that she was 3 she has been subjected to sexual abuse by her father. It appears that the matter first came to light in the latter part of the 80's by which time she was seriously psychiatrically disturbed and receiving ongoing psychiatric treatment.

In a statement which she made to the Police on 4 May 1993 and which has come into the defence's hands under the provisions of an Official Informations Act disclosure, the complainant said :

> *"After I came back from Christchurch I was living in Opotiki with M . It was at that time that Chris Cussack raped. It happened down by the Whakatane Heads."*

The defence in the present case is that there was never any improper sexual behaviour by this man towards his daughter. As noted above it is a case in which there is a one on one conflict with no independent supporting evidence in respect of the allegations made. The defence recognises that inevitably the Crown will raise the issue which is invariably raised in cases such as this, why would a person make these allegations if they had no basis in fact and persist through with them in the torture of a Court process? It is the contention of the defence in as much as this woman was the subject of a rape in the early 1980's which was never reported or dealt with. The defence argues that was the commencement of a total breakdown in her mental health. It is argued that as a result of those unresolved difficulties she has now fantasised and attributed to her father a series of sexual attacks and abuse throughout her life.

Mr Cathcart has vigorously argued that in ***R v Accused*** [1993] 1 NZLR 553 the Court of Appeal dealing with what they considered was a borderline case, were impressed with the similarity between the circumstances of the alleged offence and the circumstances of the earlier sexual activity which the defence wished to investigate before the jury. He argues that because there is absolutely no similarity between the allegations made against the accused in this case and a one-off incident of rape with another man then there is no basis for the Court permitting the matter to be investigated.

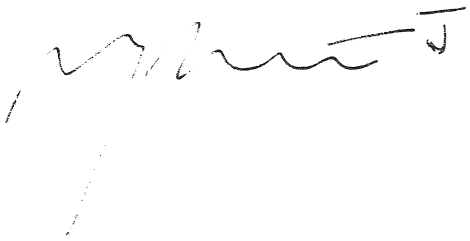
I do not accept Mr Cathcart's reasoning. In my judgment it is misconceived to focus on the particular facts of any case rather than the principle which emerges. This is a situation where Parliament has for good reason excluded what would otherwise have been admissible evidence but has left to the Courts a discretion to deal with unique factors which arise in each particular case. This is not a case where there is any suggestion that the activity between this accused and his daughter was consensual and that there is some endeavour to establish that she was generally promiscuous. This is the situation where a man has been confronted with allegations of misconduct (some of which happened 28 years ago) and is now faced with having to answer allegations made by someone who sadly is mentally impaired, if not disabled. In my view it would be contrary to the interests of justice to deny the defence the opportunity to place before the jury this material which could go to a fact in issue.

Mr Cathcart labelled the application as a fishing expedition. With respect I cannot accept that either. The evidential base is present in this woman's statement made only six months' ago. I am of the clear view that it is necessary for the defence to have the ability to enquire whether this

occurred. If so, on how many occasions and what steps (if any) the complainant took to gain or receive assistance with regard to the trauma which arose. There may not be any questioning about the detail or circumstances of the previous sexual conduct.

The application referred to other questions about the timing of the breakdown in her mental health. Those are matters which are outside the purview of the section and can be asked in any event. Probably they will form the basis of submission rather than any particular questioning of the complainant.

I have been very mindful overnight of the high standard which is required before the Court exercises this discretion. Coincidentally, this is again a case in which the mischief which the legislative enactment was directed against is not the point which is before the Court. I am satisfied that to grant the application in these circumstances is not lessening the integrity of the provision. It is a necessary response to a very unusual fact situation which will be before this Court and clearly within the discretion.



Solicitors

Crown Solicitor, Rotorua
Hamertons, Whakatane for Respondent

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