IN THE HIGH COURT OF NEW ZEALAND 19/8
MASTERTON REGISTRY

M 2/94

1235

BETWEEN CHASE

Appellant

A N D NEW ZEALAND POLICE

Respondent

Hearing: 10 August 1994 (at Wellington)

Counsel: J.K.W. Blathwayt for appellant
M.T. Lennard for respondent

Judgment: 10 August 1994

JUDGMENT OF DOOGUE J

This is an appeal against summary conviction in respect of one offence of indecently assaulting a boy then aged nine years and two offences of doing an indecent act upon the same boy. All three offences were alleged to have occurred between 1 February 1989 and 31 May 1990 during a period when the boy lived with the appellant, the boy's mother and his two younger half sisters and the appellant's father in the same home. As the District Court judge noted, the prosecution case was based primarily upon the evidence of the boy, who was almost 12 years of age at the time of hearing in October 1993.

Some evidence in support was given by the sister of a cousin of simulated sexual-type activity by the

complainant with that cousin. The District Court judge found that evidence established. The District Court judge was also influenced by a measure of consistency between the complainant's present de facto mother as to complaint evidence and the complainant's evidence combined with evidence as to behavioural changes. He was also influenced by the evidence of a psychologist. He did not accept evidence of the complainant in toto that during the period of time involved the appellant was not fully employed as he accepted that, at least in part, the appellant had some employment in the period in question.

Notwithstanding that he did not accept the evidence of the complainant in full, he did accept the complainant's evidence that there had been a number of sexual abuse incidents at the instigation of the appellant. He rejected the appellant's firm denial of both the incidents involved and his opportunity to have participated in the incidents.

The District Court judge put some emphasis upon the evidence of the child psychologist as he referred to strong supporting evidence for the prosecution from that witness, who the District Court judge said was an impressive witness. In referring to the psychologist's evidence, he commented in passing:

> "His conclusions were that overall the complainant's behaviour seemed strongly consistent with those behaviours of a child his age who had been sexually abused. Significantly he referred to 'when' questions and he was not surprised that the complainant could be inaccurate as to times and places. Overall his acceptance from the evidence of the complainant is that there were a number of abuse

> incidents at the instigation of this defendant." (p 5)

The District Court judge found three separate acts in particular proven to the requisite standard of proof. He appreciated that the time lapses between the alleged offences and the hearing affected both the complainant and the appellant.

The onus is on the appellant to satisfy the Court that in all the circumstances the District Court judge was not warranted in entering a conviction or at least that his mind should have been left in a state of reasonable doubt. Thus the onus is upon the appellant to show effectively that the decision was wrong. The advantages the District Court judge may have had in seeing and hearing the witnesses have to be borne in mind in this Court upon an appeal.

Effectively six points are taken for the appellant. Some of those points can be dealt with shortly, and I therefore deal with them immediately.

It is first submitted for the appellant that the provisions of s. 23G of the Evidence Act 1908 do not apply to summary trials. It is submitted that ss 23C to 23I inclusive of the Evidence Act 1908 as inserted by s. 3 of the Evidence Amendment Act 1989 represent a code for the taking of the evidence of a complainant in sexual cases who is under 17 years of age. It is further submitted that when certain of those sections, ss 23D and 23E, apply, it is said, only to trials by jury, that

logically there is no reason to think that any of the other sections should apply to summary trials.

I find no substance in that submission.

Section 23C of the Evidence Act 1908 specifies the circumstances in which ss 23D to 23I of that Act apply. They are specific. They do not relate to whether the trial is a jury trial or a summary trial. If Parliament had intended that the provisions should apply only to jury trials, Parliament would have said so. It is apparent from the language in the sections, in particular ss 23D and 23H where there is reference to committal for trial or trial before a jury, that Parliament has clearly differentiated where it thought appropriate in respect of jury trials from summary trials. The sections as a whole, unless the Legislature has so differentiated, clearly apply to both summary and jury trials.

A further point taken by the appellant relates to acceptance by the District Court judge of evidence of the child's present de facto mother of recent complaint I do not intend to traverse the full extent of the evidence and the points taken in the attack upon the acceptance of the evidence of recent complaint. It is accepted that the complainant came into the care of the particular witness as to complaint in May 1990 and first made complaint in November 1990. It is suggested that there would have been earlier opportunities for that to have occurred. It is said that the disclosure came about because of the complainant being questioned from time to time by the de facto mother. It is said that there were

certain inconsistencies between the complaint and the evidence of the complainant.

With all respect to those submissions, given the age of the complainant it was entirely open to the District Court judge to accept the evidence of recent complaint, having regard to common trial experience cases of this Court, and the trial judge was an extremely experienced District Court judge; and, having regard to the evidence before the Court in this particular case, there was no reason for the District Court judge to do other than accept, as he did, that the particular complaint could be treated as a recent complaint. Indeed, to the extent that there was a difference between the particular complaint evidence and the evidence of the complainant, the complaint evidence to some extent assisted the appellant. Whilst it was submitted that the District Court judge paid no attention to that, it was apparent that the District Court judge did accept, at least to some extent, that the complainant was not altogether correct in his evidence but also made allowance for the delays that had occurred between the alleged offences, the complaints, and trial.

The further point is taken on behalf of the appellant that if one took out of the case the evidence of the psychologist and the complaint evidence the District Court judge was basically left with simply the evidence of the complainant. It is submitted that, given certain inconsistencies in the evidence of the complainant, there was sufficient for the District Court

judge to have at least had a reasonable doubt as to the reliability of the complainant's evidence.

It is apparent, however, in his assessment of the evidence of the complainant that the District Court judge weighed those inconsistencies in the context of the evidence as a whole and yet nevertheless had no doubt as to the reliability of the complainant's evidence in respect of the integral elements of the offences with which the appellant had been charged. There is no basis for me to disturb those findings unless the District Court judge's determination was so affected by his assessment of the evidence of the psychologist that it would be difficult to leave his decision in place. I will return to that point a little later.

The next point taken on behalf of the appellant is that the District Court judge has not clearly adumbrated his reasons for rejecting the appellant's denial of the incidents and his acceptance of the complainant's evidence as truthful and accurate so that it is difficult to know how the District Court judge came to the conclusion that he did.

With all respect to that submission, the District Court judge's findings are perfectly clear and are perfectly clearly expressed. He may not have gone into the detail in the expression of his findings that the appellant's counsel may have preferred to see him do, but there can be no question at all about his findings and why he has in general terms reached them.

The next point taken on behalf of the appellant has no substance whatever, notwithstanding that there can be certain sympathy with the appellant in respect of the particular point. During the course of the trial it emerged that the psychologist in question had made a report which had not been disclosed to the appellant. The appellant, however, then, having had a short adjournment to consider the report, made a conscious decision not to seek any further adjournment and to continue with the trial. In those circumstances the point is not now open to the appellant to take. It was a point open to the appellant at the time and a point waived by the appellant in permitting the trial to proceed after the adjournment granted by the District Court judge without seeking any further adjournment or a mistrial.

The major point taken for the appellant and the only one worthy of detailed consideration in this case is the evidence of the child psychologist and the weight given to it by the District Court judge. The child psychologist had previously seen the complainant and had made enquiries of various sources prior to the trial. It is accepted for the Crown that the evidence which was admissible from the child psychologist was that coming within s. 23G of the Evidence Act 1908. The only part of that section relevant to the present case is s. 23G(2)(c):

> "23G(2) In any case to which this section applies, an expert witness may give evidence on the following matters:

> (a) ...
>
> (b) ...
>
> (c) The question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is, from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant."

It is not disputed that the child psychologist's evidence had to be limited in accord with the provisions of that section unless his evidence could be otherwise justified, which was not suggested. What is in dispute first in this case is whether the child psychologist's evidence was in fact confined to the information which was properly available to him in accordance with the provisions of the subsection. For the appellant it is said that it was not. For the respondent it is said that it was.

The submissions for the appellant rely heavily upon a particular passage in the psychologist's evidence at page 53 of the notes of evidence, where, after referring to various aspects of the appellant's evidence and other matters, he said:

> "Now you've got to judge that though against the child himself and from my observations of in the box and what I heard from other people in the witness stand and what I heard other people saying it was very obvious that has, I would say, a relative inability to open up on anything."

For the respondent there is an endeavour to put a gloss upon the words "and what I heard other people saying", regardless of whether the particular gloss could be put on the words as explaining them away. The position, however, remains that the witness's observation was indeed justified by other evidence before the court. Whilst the witness clearly had difficulty in distinguishing between the material upon which he was entitled to rely in accordance with the provisions of the subsection and other information within his possession, it was apparent from his evidence in chief as a whole, as clarified in cross-examination, that he did endeavour to rely upon the matters contained within the subsection.

For the appellant there were submissions in respect of some five or six other specific aspects of his evidence. For the most part little or nothing could have turned upon the passages to which attention was drawn. In one instance, however, the submissions related to answers by the psychologist which it was said related to the credibility of the complainant, and it was said that the psychologist was in fact usurping the function of the court in respect of the issue of credibility.

The unfortunate aspect of this part of the case is that the passage already cited from the District Court judge's decision appears to indicate that the District Court judge had placed some reliance upon an assessment by the child psychologist not only of whether abuse had occurred of the complainant but also as to the identity of the abuser. It is apparent that the psychologist's

evidence did not go that far and there was no substance for the District Court judge commenting as he did in that respect.

The child psychologist's evidence upon which emphasis is placed by the appellant does not go as far as the appellant submits or it appears from the District Court judge's judgment that he accepted. All that the child psychologist's evidence does is to substantiate that there could be reasons, because of the nature of the questions being asked, as to why the child complainant may have been mistaken in his answers or found it difficult in giving answers. The exchanges did not extend to the extent of the child psychologist expressing any view in the ultimate as to the truth of the complainant's evidence or otherwise. It has to be recalled at all times that this was not a trial before a jury, where if some of the passages of evidence had arisen there no doubt would have been objection, with the issue being sorted out in the absence of the jury and with appropriate direction being given to a jury. This was a trial before an experienced District Court judge where one would inevitably expect certain evidence which might otherwise be treated as inadmissible in the context of a jury trial to pass without particular objection at the time and without particular comment by the District Court judge simply because both counsel and the District Court judge would know that the evidence was inadmissible.

There is nothing in the judgment of the District Court judge that establishes that the District Court judge clearly relied in any sense upon any inadmissible evidence from the child psychologist. To the extent that he relied upon the evidence of the child psychologist in a general way, it is apparent that he was entitled to do so. The matters of criticism raised on behalf of the appellant in respect of particular aspects of the evidence relating to the application of s. 23G(2)(c) do not by themselves lead to any conclusions by the District Court judge fatal to the appellant in this case. Most of them can indeed be explained in the manner submitted for the respondent as consistent with evidence before the court. However, in most, if not all, instances nothing in particular turned upon the particular passages in respect of which criticism was made.

The more essential issue was whether the child psychologist has usurped the functions of the court. Certainly in the evidence particularly criticised by the appellant that was not the case. The respondent refers to numerous statements by the child psychologist under cross-examination which make it plain that he was not endeavouring to make any conclusions as to the truth or otherwise of the complainant or the other evidence heard by the trial judge. In at least two of the incidents where criticism was made of the evidence of the psychologist the answers arose directly out of cross-examination by the appellant's counsel and nothing could

turn upon the criticism arising in respect of those two exchanges.

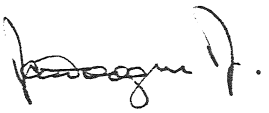
If it were not for the unfortunate sentence in the District Court judge's judgment, "Overall his acceptance from the evidence of the complainant is that there were a number of abuse incidents at the instigation of this defendant", there would be nothing upon which any attack of any substance could be made. In the context of the judgment the sentence is indeed unfortunate. It is, however, followed immediately by the sentence that the District Court judge accepted the evidence of the complainant. The judgment as a whole makes plain that that was not in sole reliance upon the evidence of the psychologist but also in reliance upon the evidence as to the simulated sexual activity and the complaint evidence. Even if the evidence of the psychologist had been shown to be inadmissible in its entirety, there was ample evidence upon which the District Court judge was entitled to convict in this case when it has not been shown that the District Court judge has relied in any way upon any particular inadmissible evidence of the child psychologist and when for the most part that evidence would be admissible in accord with the provisions of s. 23G(2)(c) of the Evidence Act 1908.

The consequence is that there is no substance in this submission on behalf of the appellant.

Certainly the appellant has not satisfied me that in all the circumstances the District Court judge was not warranted in entering a conviction, or at least that his

mind should have been left in a state of reasonable doubt. There is nothing in the submissions made on behalf of the appellant today which indicates that any possible miscarriage of justice has occurred in this case.

The result will be that the appeal must be dismissed and the sentence which followed the conviction must be upheld and must come into force today, the appellant having been granted bail pending the determination of his appeal.



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