IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY T.198/94

THE QUEEN

v

CHARLES ROBERT AFEAKI

Offence: Indecent Assault (7)
Sodomy (1)
Attempted sodomy (1)

Re-sentenced: 20 December 1994

Counsel: Mr Woolford for Crown
Mr H Fulton for Prisoner

RE-SENTENCE OF THOMAS J

I have had Mr Afeaki re-called in order to correct the sentence which I imposed yesterday.

In respect of the charge of sodomy I sentenced Mr Afeaki to eight years imprisonment. On my return to my chambers, my attention was drawn to s 4 of the Criminal Justice Act 1985. That section provides, amongst other things, that where the maximum term of imprisonment for a particular offence is reduced between the time

when the offender committed the offence and the time when sentence is to be passed, the maximum term of imprisonment which may be imposed on the offender is the maximum term which could be imposed on the day of sentencing.

At the time of the commission of the sodomy in question, the relevant section was s 142 of the Crimes Act. It provided that everyone who committed sodomy on a male under the age of 16, and where the offender was of or over the age of 21 years, was liable to a term of imprisonment not exceeding 14 years. This provision remained in force until 1986 when the Homosexual Law Reform Act was passed. In that Act, s 142 was repealed and a new s 142 substituted for it. It provided that "everyone commits an offence who commits an act of anal intercourse on any person who is under the age of 16 years". An offender is liable for a maximum term of imprisonment of seven years.

I acknowledge that yesterday Mr Fulton referred to the principle that, where the maximum penalty for offence has been reduced, an offender should not be liable to a greater sentence than the reduced penalty. He referred to the Bill of Rights Act. But he did not refer to s 4 of the Criminal Justice Act. Mr Woolford responsibly admitted that the Crown had been taken by surprise and argued then, as he has today, that the offence before 1986 was of a different kind. Through no fault of counsel or the Court, no adjournment was possible. The sentencing had already been adjourned, I think twice, at great inconvenience to a number of people. In the result, I proceeded to sentence Mr Afeaki to eight years imprisonment in respect of the sodomy charge and to make the sentences which I imposed in respect of the other offences concurrent with that sentence. I may, where the

circumstances and justice so require, disregard a principle. But I cannot, of course, disregard a statute.

I have examined the original s 142 and the amended s 142 closely. I believe that, in respect of the act of sodomy or anal intercourse upon a person under the age of 16 years, they provide substantially the same offence. Even if that is not so, the spirit of the section is clear. Noone is now liable for a custodial sentence of more than seven years for anal intercourse on a person under the age of 16 years.

But I confess to being disturbed at the outcome. Mr Afeaki yesterday faced sentencing in respect of seven charges of indecent assault for which the maximum penalty is seven years and the present charge of sodomy where the maximum penalty is also only seven years. Mr Afeaki is liable for up to seven years imprisonment for kissing a 14 year old youth once and yet only liable, it appears, for up to seven years imprisonment in respect of a representative charge of sodomizing a youth of the same age twice a week for a year.

Nevertheless, as I accept that I do not have jurisdiction to impose a custodial sentence of eight years in respect of the charge of sodomy, that sentence is set aside. I also set aside the sentence of six years imprisonment in respect of the sixth count for attempted sodomy.

I also, in the circumstances, however, set aside my direction that these sentences be served concurrently. I propose to recognise the criminality involved in the totality of Mr Afeaki's offending by imposing a cumulative sentence of eight years imprisonment. This will be made up of the six years imprisonment imposed in respect of

the sodomy, and the two year sentence of imprisonment imposed in respect of count 1. Count 1 relates to a different complainant and the offending occurred at a different school.

I appreciate that it will appear that, having found that I lacked jurisdiction to sentence Mr Afeaki to eight years imprisonment for sodomy, I am now seeking to achieve the same result by adopting a different route. That is not the case. The sentence of eight years was intended to reflect the totality of the offending. I do not think that the maximum sentence of seven years is adequate to reflect that totality or the criminality which I described in some detail yesterday.

The fact of the matter is that Mr Afeaki's sexual abuse of the four complainants was so serious that the one charge of sodomy cannot encompass the full extend of his criminality.

To make some allowance for Mr Afeaki's good record and the other factors advanced in mitigation I am, I consider, obliged to reduce the sentence for sodomy from the maximum of seven years to six years, and I therefore sentence Mr Afeaki to six years imprisonment in respect of count 14. In respect of count 6, the charge of attempted sodomy, I sentence Mr Afeaki to four years imprisonment. All other sentences imposed yesterday are to stand.

The sentence of six years in respect of count 14 and the sentence of two years in respect of count 1 are to be served cumulatively. All other sentences are to be served concurrently with the sentence on count 14.