PUBLICATION OF NAME(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CRI-2008-016-002529

M
Plaintiff

v

THE QUEEN
Respondent

Hearing: 26 February 2009

Appearances: R J Collins for Crown
D J Sharp for Accused

Judgment: 8 May 2009 at 10:00 am

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 8 May 2009 at 10:00 am
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date……………………….

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Fax: (06) 868-5024 – D J Sharp

[1] M has pleaded guilty to 21 historical sexual offences against his daughters. They include ten charges of rape, two of assault with intent to commit rape, six of indecent assault on a girl under 12 and one of indecent assault on a girl between 12 and 16. In addition, M has pleaded guilty to a charge of sexual violation by rape and one of sexual conduct with a girl under 12. These charges relate to M's great-niece, R, who was aged eight at the time of the offending. M has not yet been sentenced and he seeks to vacate the guilty pleas entered in respect of the charges relating to R.

[2] Section 169 Summary Proceedings Act 1957 precludes the withdrawal of a guilty plea except with the leave of a High Court Judge. The principles that apply to such an application appear from the Court of Appeal's decisions in *R v Turrall,*[1] *R v Ripia*[2] and *R v Kihi*.[3] Whilst there are a number of well established grounds that are recognised as generally justifying leave,[4] the touchstone for granting leave is whether the interests of justice require that to be done. This, of course, requires an assessment of both the interests of the accused and the interests of the victim. However, the onus of making out the grounds to justify granting leave rests on the accused and mere repenting of the plea, without more, will not suffice. Although the discretion is unfettered it is not to be lightly exercised, particularly where the accused was legally represented when the plea was made.

[3] M raised four grounds in support of his application. The first is that the admissions he made regarding offending against R were improperly obtained. Secondly, he maintains that he has a defence to the charge of sexual violation by rape. Thirdly, the guilty pleas were the result of pressure, shame following the admitted offending against his daughters, communication difficulties and a desire to get things over with. Finally, M felt that for the benefit of his family he should accept all of the allegations being made against him and it was only after he had explained to family members that he had not offended against R that he realised they did not want him to accept guilt for things he had not done.

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[1] [1968] NZLR 312, 313
[2] (1984) 1 CRNZ 145, 150 and [1985] 1 NZLR 122, 126-127
[3] CA395/03 Chambers, Laurenson and Randerson JJ 19 April 2004
[4] see for example *R v Le Comte* [1952] NZLR 564

Circumstances surrounding the guilty pleas and application to withdraw them

[4] In about July 2008 R's mother, Mrs C, began noticing changes in R's behaviour. Around that time, as a result of complaints by R about a rash on her bottom Mrs C consulted a doctor. The doctor diagnosed warts, which could only have been contracted either through sexual touching or through R touching someone with warts and then touching her bottom. On 19 August 2008 R told her mother that M had "tried to have sex with me". The next day Mrs C contacted the Police.

[5] Shortly after midday on 20 August 2008 Constable Hemmingway interviewed R and her parents at the offices of Child Youth and Family Services in Gisborne. R made disclosures that would support a charge of indecent assault but did not allege sexual intercourse and was consistent that at all the relevant times she had kept her underwear on. In a subsequent interview with a psychologist R said that she had not told the police everything that had happened because she was shy.

[6] Later on 20 August 2008 Detective Park interviewed M at the Police Station in Ruatoria. It appears that he did not have the transcript from R's interview when he conducted the interview. Detective Park told M that R had complained of M touching her in way that he should not have. He did not say that R had not actually alleged that sexual intercourse had occurred. During the interview, however, M, disclosed that he had had sexual intercourse with R and was charged accordingly.

[7] Following R's disclosures four of M's adult daughters came forward and made statements regarding historical sexual abuse by him against them and M was interviewed in respect of those allegations. By 10 September 2008 M's counsel had received Police disclosure and been advised that charges were to be laid relating to M's daughters as well as in relation to R. By 19 September 2008 M's counsel had discussed the charges with him and received instructions to apply pursuant to s 153A Summary Proceedings Act 1957. M subsequently signed that application and on 19 September 2008 he appeared and pleaded guilty to all of the charges against him including those relating to R.

[8] On 27 October 2008 members of M's family contacted his counsel to advise that M denied offending against R and wished to defend those charges. Counsel saw M a few days later and was instructed that he wished to withdraw the guilty pleas in respect of the charges relating to R. He subsequently sought to withdraw the guilty pleas in respect of the offending against his daughters as well. That led to his then counsel withdrawing. A psychiatric report was obtained which confirmed his fitness to plead. New counsel was engaged and instructed to advance an application for leave to vacate the two pleas relating to R.

Was the police interview unfair?

[9] The evidence against M on the sexual violation by rape charge came almost entirely from the admissions M made during his police interview (there was also the circumstantial evidence of R having contracted genital warts). Mr Sharp, however, argued that the police interview was conducted unfairly and was therefore improperly obtained for the purposes of s 30 Evidence Act 2006. He said that if M were permitted to vacate his guilty plea the admissibility of that interview would be challenged.

[10] Section 30 Evidence Act 2006 applies to evidence offered by the prosecution that was improperly obtained. Section 30(5) identifies the circumstances that would result in evidence being improperly obtained. One of those circumstances is where evidence has been obtained "unfairly". Section 30(6) requires a Judge, in deciding whether a statement obtained by the police was obtained unfairly, to take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

[11] Relevant to this case is the practice note issued by the Chief Justice on 16 July 2007 which provides, amongst other things, that:

> 4. Whenever a person is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence must be fairly explained.

[12] Section 30(2) requires the Judge first to decide whether, on the balance of probabilities, the evidence was improperly obtained and, if it was, to determine whether exclusion of the evidence is proportionate to the impropriety by the means of a balancing exercise that gives appropriate weight to the impropriety bit also takes proper account of the need for an effective and credible system of justice. Section 30(3) provides various matters that Court may have regard to in making a determination under s 30(2). These include the nature of the impropriety (in particular whether it was deliberate, reckless or done in good faith) and the nature and quality of the improperly obtained evidence.

[13] Mr Sharp submitted that the substance of R's statement was not fairly explained in that it was not made clear that she had not made an allegation that sexual intercourse had occurred. This, he said, was a breach of the Practice Note on police questioning issued 16 July 2007. Mr Sharp submitted that although M was found to be fit to stand trial and understood the significance of guilty pleas, it was apparent from Dr Barry-Walsh's report 7 January 2009 that he had some cognitive decline consistent with his age (81) and needed a careful explanation of legal processes because of that fact. Mr Sharp submitted that M was, as a result, more susceptible to feeling the pressure to answer the police officer's questions. In his affidavit in support of the application M said:

> I told the detective that I had sex with the complainant, as he kept asking if anything else had happened and asking me to detail having sex with the complainant. I thought I must have had sex with her for him to ask so many questions, so I told him I had and how it happened.

[14] I accept that M would have needed careful explanation of the legal process. However, the transcript records the detective taking considerable care to explain the purpose of the interview and the nature of R's complaint. There is nothing whatsoever to suggest that at the start of the interview M was under any misapprehension as to the purpose of the interview or the nature of R's complaint, namely that he had touched her in a sexual way that he should not have. I therefore find that there was no unfairness in terms of the explanations given to M at the outset of the interview.

[15] The real issue is whether Detective Park's failure to make it clear that there had not been any allegation of sexual intercourse meant that the substance of R's complaint was not fairly explained. Although it is apparent that Detective Park did not commence the interview with the intention of discussing an allegation of sexual intercourse it was made clear to M that he was facing an allegation of sexual misconduct by inappropriate touching. At the outset of the interview Detective Park advised M of his rights and summarised the discussion that they had had prior to arriving at the police station:

> SP: And I told you that [R] was currently at the Gisborne Police Station and she was making a complaint about you saying that, she was saying that you had been touching her in a way that, that you shouldn't. Do you remember me telling you that?
>
> FM: Yeah.
>
> …..
>
> SP: Um, and at that time I started to give you your rights and I told you that you, that, that because I was speaking to you about the offence, I needed to give you your rights and that I told, the first thing I said to you was you have the right to consult and instruct a lawyer, and then you kind of interrupted me and said "I don't need a lawyer, if she's made a complaint, she's told you everything, she's right. Do you remember that?
>
> FM: Yeah.

After reiterating M's rights, the officer continued:

> SP: Ah, then I said, "what can you tell me about what happened with [R]?" and you said "I've got nothing to say, she's told you everything and she's right." Do you remember saying that?
>
> FM: Yeah.

The officer covered some background issues before returning to the complaint:

> SP: And I, and, when I've been, when we've been talking um, you've pretty much said to me the whole way through if, if she's made a, if she's made a complaint, if she's saying that you've done stuff to her, then she's right, and you've kind a said that, and, and I've, I've said to you at one point I said to you um, so if she's said that you've pulled down your pants and, and laid on top of her on, on the couch and that you've tried to get her to sit on top of you on the couch, then she's, then she's right.
>
> FM: Yeah.

…

SP: And I said um, "so what you're saying is that you, that if she's saying that you pulled your pants down and got her or laid on top of her on a couch so then tired to get her to sit on top of you when your pants were down, then, then you actually did that, and you went "yes".

FM: Yeah.

[16] Two things are clear from the early part of the interview. The first is that M was facing a complaint by R of sexual misconduct. The second was that M accepted whatever allegations R had made. At some stage during the interview M formed the belief that R had alleged sexual intercourse. However, the topic of sexual intercourse arose simply from the officer's suggestion that touching of the kind already referred to (M taking off his pants and lying on top of R) had happened more than once. M rejected that suggestion but then went on to refer to another occasion and the officer sought to clarify what he was referring to:

SP: Okay. Alright, so that, that time that it happened, tell me what happened?

FM: Well I, I, if she says oh yeah we had intercourse, well we must have.

SP: Well, when, when you say, because I need you to explain to me things like that, what, what do you mean. So, if she's saying "intercourse" what do you mean? Oh no, sorry, if you're telling me she says "intercourse" what do you mean by that?

FM: That's it. That's it. Well intercourse means only one thing

SP: Yeah. So you're.

FM: If, if she said we had it, that's it.

SP: So what you're saying, we're talking about sexual intercourse.

FM: Yeah

SP: With a man's penis and a woman's vagina?

FM: Yeah.

SP: So if, what you're saying to me is that if she says that, that you've had sexual intercourse,

FM: Yeah.

SP: You, we are talking about

FM: Yeah.

SP: Sexual intercourse as in a man's penis and a female's vagina and the penis goes into the vagina.

FM: Yeah.

SP: Is that what you're talking about?

FM: Yeah.

SP: So you're telling me if she says that is what's happened, that you have had sexual intercourse with her?

FM: Yeah.

SP: So you, you have had sexual intercourse with [R]?

FM: There it is.

SP: Why? Have you or haven't you? Yes or no.

FM: I, I'll say yes because she said so. I'm not calling her a liar. I'll never call her a liar because I love my grandchild.

SP: Mm

FM: But there you are, to do a thing like that, well, I would a paid for it.

[17] In these circumstances, it was not unfair for Detective Park not to have said that R had not actually alleged sexual intercourse. First, the officer could only explain the allegations as he understood them and it is apparent that he did not have the details of R's interview. It is obvious from the transcript that Detective Park was caught off-guard by M's admission and I find that he was not actually in a position to confirm then that R had not alleged sexual intercourse. The officer cannot be criticised for attempting to clarify the position.

[18] I consider that the allegations that M ultimately pleaded guilty to were sufficiently similar to those that were explained to him for him to understand what he was facing in the sense that he knew that he was facing allegations of sexual misconduct against an eight year old. The nature of both the charges were similar and, given R's age, both serious. Finally, M himself raised the issue of intercourse. He did so without any suggestion that this is what R had alleged. His subsequent qualification that the admission was made on the basis that R had alleged it does not detract from that.

[19] I add, however, that, even if I had found that the interview was unfair I would not have regarded its exclusion as proportionate to the impropriety. It is apparent from what I have already said that I consider that the interviewing officer acted in good faith during the interview. Significantly, when Detective Park asked for details about the incident of sexual intercourse that M had volunteered, the details that M then gave went well beyond merely agreeing that sexual intercourse had occurred if that was what had been alleged:

> SP: Okay. So where, where did it happen?
>
> FM: Oh I'm not saying it happened at the station.
>
> SP: At your house?
>
> FM: Yeah
>
> SP: Do you remember? Do you remember it?
>
> FM: Yeah.
>
> SP: Where were you?
>
> FM: At the station.
>
> SP: Oh, where in the house were you? Was it inside? Was it in the house?
>
> FM: Yeah.
>
> SP: In which room in the house was it?
>
> FM: In the sitting room where I am.
>
> SP: So in the sitting room. Was it on the couch or somewhere else?
>
> FM: Oh well it had to be on the couch, there's nowhere else.
>
> SP: Okay. So it was on, on the couch, where, where you were watching the Olympics today when we came in.
>
> FM: Yeah.
>
> SP: That couch? Okay, and um what do you remember actually happened? How did it get to that point where you had sexual intercourse?
>
> FM: It's one of those things that just happened.
>
> SP: Mm. Like spontaneous?
>
> FM: Yeah.

SP: Spur of the moment?

FM: Yeah. (coughs)

SP: Um, how, how, what were you wearing at the time, your clothes?

FM: Well I mi, might a had this and my outside pants on and I think I still had the others on.

SP: Mm.

FM: My undies, my long johns.

SP: Okay, and um what was she wearing?

FM: Well I dunno whether she was in her pyjamas or whether she still had her college clothes on.

SP: Okay. So for two people to have sexual intercourse you, they both have to have no, really you have to have no clothes on.

FM: Yeah.

SP: Well, at least no, no pants on or pants down.

FM: Yeah.

SP: How did, I take it you both had pants down, would that be, would that be right?

FM: Yeah.

SP: Okay. How did it, how did your pants come off?

FM: I had to take it off, didn't I?

SP: And how did her pants come off?

FM: Oh she took it off herself.

SP: She took her own pants off?

FM: Yeah.

SP: Okay. So once you both had your pants off, what happened?

FM: Yeah, ??? ??? is. We had intercourse.

SP: You had intercourse?

FM: Yeah.

SP: Um, where were you when this intercourse was happening. What, how were you? How were, were you sitting, standing or lying or, or something else?

FM: No, we were both lying there.

SP: Okay. Um, side by side or one on top of the other?

FM: One on top of the other.

SP: Who was on top?

FM: Me.

SP: Okay. So it's the position commonly known as the 'missionary' position?

FM: Yeah.

SP: Okay, and um, so you were lying on top of her. You say that you had intercourse. Did you put your penis into her vagina?

FM: Yeah.

SP: Okay. Um, how long did you have intercourse for?

FM: I dunno. I didn't worry about the time.

SP: Okay. Um, rough, roughly speaking was it um, a minute, less than a minute, five minutes, more than five minutes?

FM: Oh, could have been a couple of minutes I suppose.

SP: Okay, and how did it stop?

FM: It stopped just like that.

SP: So how?

FM: I, I got off here and she put her clothes back on and that was it.

[20] As can be seen, M gave details such as where the incident happened, what clothes he had been wearing, the fact that R took her pants off herself, the position that was adopted and how R reacted. Mr Sharp submitted that the details that M provided were either an obvious choice or promoted by material supplied by the interviewing officer and that the interviewing officer had been at pains to have M acknowledge that he had done certain acts. However, I do not accept this. There were likely to be limited possibilities as to where intercourse had taken place and what clothes M had been wearing. But open-ended questions such as "How did her pants come off?" and how R had reacted provided no indication as to what answer was expected.

[21] For these reasons I do not consider that there was unfairness in the way the statement was obtained and, in any event, do not consider that exclusion would have been a proportionate response had the matter come before me in a pre-trial context. It follows that I do not regard the circumstances in which the statement was made as grounds on which to justify leave to withdraw the guilty plea in relation to the sexual violation charge. I note that since R's allegation undoubtedly supported the indecent assault charge, there was no prospect of leave being permitted to withdraw the plea in relation to that charge.

Would M have a clear defence to the charges against him?

[22] The existence of a clear defence is a recognised ground that would generally justify granting leave to vacate a guilty plea.[5] Whilst an applicant who relies on the existence of a defence to support his application need not prove that the defence would certainly succeed, he must nevertheless establish more than merely the existence of a possible defence. In *Sharp v District Court at Whangarei* Randerson J put the threshold as:

> …a reasonably arguable defence…which could leave a jury in a state of reasonable doubt".[6]

[23] M asserts that he has a defence to the charge of sexual violation by rape, namely that the complainant's statement does not disclose the acts required for the charge to be made out. During her interview R, in describing the events that had occurred on the previous day, said both that M "..had sex with me but I told him to get off me…."[7] and that he had "tried to have sex with me…"[8]. However when asked what she was wearing she said that she had her pyjamas on[9] and reiterated later[10] that she had her pants on and again, slightly later[11], that when he was lying on her she still had her clothes on. The interview then moved to another occasion when her mother was in the kitchen cooking breakfast and she was watching TV. She said

[5] *R v Le Comte* above n 4 at 564
[6] [1999] NZAR 221
[7] p6
[8] p10
[9] p10
[10] p12
[11] p13

that on that occasion M tried to pull her pants down but she held on to them.[12] The interview moved to a third occasion when M pulled his pants off but left R's on.

[24] Mr Sharp submitted that there was nothing in R's statement to suggest that her underwear had ever been removed and nor was there any reference to being hurt in any way. As a result, there is no evidence on which to conclude that penetration had occurred, as is required to prove a charge of sexual violation by rape. Mr Sharp acknowledged that this point could only amount to a defence to the charge of sexual violation by rape, not the second charge of sexual conduct with a girl under 12, though he said that M now also denies any indecent touching as well.

[25] Mr Sharp is correct that there is nothing said by R to suggest that there was an occasion on which her underwear was removed or that there had been penetration. As against that, however, is the fact that when M was interviewed he had made admissions that would support a finding of sexual violation by rape. The question of whether M has a defence to the charges depends substantially on the status of his statement to the police and I proceed on the basis that, as I have already concluded, the interview was conducted fairly.

[26] I accept Mr Collins' submission that there could be absolutely no doubt that M was describing an occasion on which sexual intercourse occurred between him and R. Whilst R did not allege that sexual intercourse had taken place, that fact is explicable by her age and the circumstances in which she was making the statement. However, M's statement provides strong evidence that he had had intercourse with R. Given the detailed description that he gave of the event, the admission is not explicable merely by the fact that he simply accepted that he had done whatever was alleged by R. I also note the circumstantial evidence of R having contracted genital warts. Given my conclusion regarding the status of the statement it cannot be said that M has a clear defence to the charge.

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[12] p14-15

Did M act out of feelings of shame and obligation to his family?

[27] The last two grounds advanced for M's application is that he made admissions in relation to R out of feelings of pressure, shame (in relation to offending against his daughters), communication difficulties and a desire to get things over with. Mr Sharp submitted that M felt that for the benefit of his family he should accept everything that was alleged against him and take the resultant punishment. It was only after he had spoken with family members and made them aware that he had not offended against R that he realised they did not want him to accept guilt for things he had not done.

[28] It is very likely that M was feeling under some pressure. He had previously served a sentence in the 1960s for incest and, of course, would have been conscious of the other offences against his daughters to which he was pleading guilty. The victim impact reports, which can reasonably be expected to reflect the attitude of those relatives affected by the offending, show particular anger and distress at the fact of his having offended against R, who was only aged eight years.

[29] However, it is important to view this ground against the circumstances in which the pleas were made. M had counsel advising him and she had had disclosure of all the police statements, which would have included the transcript of both R's interview and M's interview in relation to R's complaint. The difference between R's statement and M's admissions would have been apparent to counsel and it was not asserted on behalf of M that there was any failing on the part of counsel in her assessment of the evidence or her advice to M.

[30] If there had been something to indicate a clear defence to the charges involving R then M's assertion that he pleaded guilty out of a sense of pressure or obligation to his family may have been more compelling. But given my earlier conclusions it cannot be said that M had a tenable defence to either of the charges. In those circumstances, the understandable feelings of shame and family obligation do not justify permitting the guilty pleas to be vacated.

Conclusion

[31] I find that M does not have a clear defence to the charges relating to R because of the admissions he made that would have proven those offences. Those admissions were made during a police interview that was conducted fairly. I have no doubt that M felt under some pressure or obligation to his family but I do not accept, given the circumstances of his admissions, that this fact would, in itself, justify allowing the application. I also take into account the fact that, to allow M to vacate his pleas, would impose on R and her family the distressing prospect of her having to give evidence. Taking all these factors into account I conclude that it is not in the interests of justice to allow M to vacate his guilty pleas. The application is accordingly dismissed.

[32] I note that M is currently remanded in custody until 18 May 2009. A change in the High Court sitting times in Gisborne has necessitated a change of the next available date to 20 May 2009 and I accordingly remand M to the callover date 20 May 2009.

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P Courtney J