IN THE COURT OF APPEAL OF NEW ZEALAND CA283/01

THE QUEEN

V

DAVID IAN BACH

Hearing:	30 May 2002
Coram:	McGrath J Hammond J Panckhurst J
Appearances:	A C Balme for the Appellant J M Jelaś for the Crown
Judgment:	10 June 2002

JUDGMENT OF THE COURT DELIVERED BY McGRATH J

Introduction

[1] The appellant was convicted by a jury in the High Court at Rotorua on 14 May 2001 of 11 charges of sexual offending against 3 girls under the age of 12 years. On the first day of his trial he had pleaded guilty to a charge of indecent assault of a fourth complainant also under 12 years of age. The appellant was sentenced to preventive detention. He appeals against his convictions in relation to 5 counts concerning offending against one of the complainants. He also appeals against his sentence.

Charges and Verdicts

[2] Two of the complainants, whom we will call W and R, were sisters aged 7 and 5 years respectively. The appellant was convicted by the jury in relation to four counts arising from W's complaints that he had done an indecent act on her, indecently assaulted her, induced her to do an indecent act on the appellant, and sexually violated W by digital penetration of her vagina. In relation to R the appellant was convicted on two counts of indecent exposure and of doing an indecent act on her. The appellant was convicted of all charges that he faced concerning these complainants. As indicated he does not appeal against those verdicts.

[3] The plea of guilty related to a charge of indecent assault of J, another complainant, aged 8 years. That was the only charge which the appellant faced in respect of J.

[4] The fourth complainant was T who was aged 7 and 8 years during the period of the alleged offending. Her complaints gave rise to 10 charges at the appellant's trial. He was convicted of 5 and acquitted of 5 by the jury. The charges concerned and their outcomes are set out below.

Count No.	**Charge**	**Location**	**Verdict**
7	Indecent Assault	Rugby ground	Guilty
8	Sexual violation (digital penetration)	Rugby ground	Guilty
9	Induced indecent act	On way to beach	Not Guilty
10	Sexual violation (digital penetration)	On way to beach	Not Guilty
11	Induced indecent act	On way back from beach	Guilty
12	Induced indecent act	Bedroom, appellant's house	Guilty
13	Indecent act in public	Park	Guilty
14	Sexual violation digital penetration	Bedroom, appellant's house	Not Guilty
15	Sexual violation, digital penetration	Bedroom, appellant's house	Not Guilty
16	Rape	Bedroom, appellant's house	Not Guilty

Conviction appeal: the evidence at the trial

[5] The appeal against the jury's convictions of the appellant is based on the contention that they are inconsistent with the jury's 5 verdicts of acquittal on charges concerning T.

[6] The principal evidence supporting the counts concerning T comprised two video interviews of T in which she described the alleged abuse. The mother of T gave evidence of meeting the appellant through a mutual friend with whom the appellant was having a relationship and of resulting contacts between T and the appellant between March and August 2000 when the offending allegedly took place. The mother gave evidence of occasions when the appellant had taken T in his utility to the shops and on trips to the Domain. On two such occasions T was away much longer than her mother had expected. Over the next few months the appellant also took T on other trips. These included a trip to the beach in which T went with the appellant in his vehicle separately from the mother. The mother said in evidence he had taken much longer than normal to drive home. The friend also gave evidence concerning the trips and of an incident at the appellant's house on an occasion when T was staying the night. The friend got up in the night to go to the toilet and when she returned found T in bed with the appellant who was wearing nothing. Eventually the mother and friend both became suspicious about the appellant's behaviour and contacted the police. The appellant denied any offending when interviewed.

[7] At his trial the appellant's counsel put it to T that her allegations were made up, and that T's mother wished her friend and the appellant to break up. Questions in cross-examination also attempted to draw out inconsistencies in T's evidence of abuse. She was also closely questioned on a particular aspect of her evidence namely the alleged use of sellotape during the offending.

[8] In relation to counts 9, 10, and 11 T said in her video interview that while she and the appellant were on their way to the beach in his vehicle the appellant had touched "inside her personal part" and that she had "touched his diddle". In response to the question about what happened on the way home from the beach she said:

"He tried to touch my personal part cause he took off his pants.
When did he take off his pants?
He stopped somewhere and took off his pants."

Later she added that when he took off his pants she could see his "diddle". The jury acquitted the appellant in relation to the two charges concerning the trip to the beach but convicted him on that in relation to what happened during the return trip. On appeal these differing verdicts were said to be inconsistent.

[9] Counts 12, 14 and 15 and 16 related to three separate incidents which T said took place in bedroom at the appellant's house. Her evidence in relation to count 12 described an occasion when the appellant had taken off his clothes and got into bed with her. He had got her to touch "his personal part" and she described an ejaculation by the appellant. He was convicted on that count. Conversely, he was acquitted on counts 15 and 16. T there had referred to the appellant, while she was in his bedroom, pulling down her pants and putting his hands into her personal part. Later, she said, he raped her.

[10] Count 14 concerned the alleged incident of abuse in the bedroom of the appellant and his partner on the occasion when T stayed overnight at the appellant's house. T's evidence was that the appellant had touched her, after pulling down her pants, while Moana was in the room. She also referred to threats being made by the appellant against her mother. The jury found the appellant not guilty on this count.

[11] A common element in T's video statement concerning counts 12, 15 and 16 was that, in the course of the appellant's offending, parts of her body had been affixed by coloured sellotape in particular to the end of the bed. She was closely cross-examined on alleged involvement with sellotape by defence counsel. In this Court Mr Balme argued that the verdicts of acquittal on counts 15 and 16 plainly reflected the jury's appreciation there was a gross and fanciful element in what she had said which went to her credibility in describing the abuse. The verdict of conviction on count 12 in particular was inconsistent with that lack of credibility which ultimately infected all verdicts of conviction.

[12] Counts 7 and 8 concerned alleged abuse while T was in the appellant's vehicle when it was parked at what T said was a "games site where they play rugby". We were told the location concerned was identifiable from this description. She said that on this occasion he had first put his hand against her personal part and later into her personal part. Her "personal part" was what she used for going to the toilet. On this occasion also she referred to being sellotaped. The jury convicted the appellant on these charges.

[13] Finally count 13 concerned an incident in a park where she went with the appellant in his car. She said that while she was on a swing the appellant had pulled his shorts across so she could see his "diddle". He was convicted on this charge.

[14] In the second interview she was questioned extensively about the use of sellotape. She said the appellant had used it on her wrist and feet and that was all. Earlier she had said sellotape had been put over her mouth while they were in the car at the park.

Submissions on appeal

[15] In this Court counsel for the appellant, Mr Balme, submitted that the verdict of guilty on counts 7, 8, 11, 12 and 13 were inconsistent with those of acquittal on counts 9, 10, 14, 15 and 16. The guilty verdicts, he said, in each case turned entirely on the jury's view of the credibility of T. The acquittals reflected a view that she lacked credibility which Mr Balme particularly linked to what he said were the fanciful elements in her narrative. The evidence of the mother and friend added no more than to indicate the appellant had opportunities to commit the offences. He submitted the verdicts of guilty founded on T's evidence were unsafe.

[16] The written submissions of Ms Jelaś for the Crown argued that the differing verdicts were capable of reasonable explanation having regard to the evidence and in particular the different degree of specificity of T's evidence concerning offences on which the appellant was convicted. She argued there was also corroborative evidence supporting the convictions in respect of T.

Verdict inconsistency: the legal test

[17] A submission that a verdict of conviction is unsafe, because it is inconsistent with another verdict of acquittal, seeks to invoke this Court's statutory duty to allow a criminal appeal if satisfied that a verdict should be set aside on the ground that it is unreasonable (s385(1)(a) Crimes Act 1961). To succeed an appellant advancing the submission must show that the two verdicts cannot stand together in the sense that the different findings were not reasonably open to a jury: *R v Irvine* [1976] 1 NZLR 96, 99. As the language of s385(1) makes plain this is a different question from whether the guilty verdicts cannot be supported having regard to the evidence: *R v H* (2000) 18 CRNZ 432.

[18] If the different verdicts can reasonably be explained on a view of the evidence concerning the respective charges which was properly open to the jury, the submission that verdicts are unreasonable for inconsistency is not made out. The crucial issue in this case accordingly comes down to whether any or all of the verdicts of conviction on counts 7, 8, 11, 12 and 13 are unreasonable due to inconsistencies given the view of T's evidence the jury is to be seen as having taken in acquitting the appellant of counts 9, 10, 14, 15 and 16.

[19] In all criminal trials involving multiple allegations of sex abuse, especially where they concern more than one complainant, the jury is directed to consider the evidence in relation to the individual counts separately in order to decide if an accused is proved guilty of that count. On each count the responsibility of the jurors is to decide if the evidence persuades them beyond reasonable doubt of the guilt of the accused on that count. In doing so a jury is entitled to rely on elements of the evidence of a witness in relation to a particular count that make the witness more convincing on that count than on others. The evidence of an individual complainant, particularly a child complainant, can often differ qualitatively in its persuasiveness as to what took place in relation to different alleged incidents and on different occasions.

[20] In this case T's evidence on the counts concerning the trip to and from the beach provide material which the jury may well have considered to indicate

differences in evidential quality. As the Crown's submissions pointed out T's description of what happened on the way to the beach is much less detailed than as to what happened on the way back. At two points in her video interview she implied she might have been sleeping when she was abused on the way to the beach. She was also ambivalent over whether what had happened to her on the way to the beach may have in fact occurred on the way back. In relation to her description of what happened during the trip back, however, T is more specific (as indicated in para [8] of this judgment). Furthermore her statement that the appellant took off his pants at this time is corroborated by the evidence of the mother's friend (who lived with the appellant) that the appellant was dressed "in a towel" when he arrived back from the beach. In our view it was certainly open to the jury on this basis to conclude that T's articulation of the abuse was sufficiently convincing without more on count 11, but not so on counts 9 and 10, to convict the appellant.

[21] Similarly, concern by the jury in relation to T's references, when interviewed, to use of sellotape to restrain her while she was being abused may well be reflected in the acquittals on counts 15 and 16. In this regard it is significant that a search under warrant of the appellant's home address failed to locate tape of the kind described and nor did an inspection of the appellant's bed lend support to the description of events given by T. It does not follow, however, that it was unreasonable to convict on counts 7, 8, 12 and 13. On count 12 for example, as Mr Balme accepted, T's evidence of touching and also of the appellant's ejaculation was detailed. We are satisfied that there was a basis to differentiate between different aspects of T's evidence. Indeed the clear impression we have formed is that the jury worked out carefully which parts of the evidence on these counts should be accepted.

[22] Similar points can be made concerning the other counts on which the appellant was convicted. Overall we are of the view that there were differences in the nature and quality of T's evidence which provided a reasonable and indeed entirely sound basis for the different verdicts of the jury in relation to the counts concerning her complaints. There is nothing in the circumstances in which the jury deliberated, nor in its responses to enquiries as to the progress it was making, to indicate that it reached its verdicts other than after a conscientious evaluation of all the evidence in relation to each individual charge. We are satisfied that in terms of

the tests outlined above the different findings on the various counts were reasonably open to the jury and that the appeal against conviction must fail.

Sentence appeal: the other convictions

[23] As indicated the appellant was sentenced in relation to offending against three other complainants as well as T. The offending against W and R, who were sisters, arose when the appellant befriended their family while working next door. He would take W and R on outings and on occasions they stayed at his home when no adults were present. The offending took place on these occasions. The offending consisted of the appellant exposing himself to W and R, while walking naked through the house, masturbating in front of them and ejaculating while he did so. The appellant also simulated intercourse with W while the two girls were with him in a double bed. W said the appellant was on top of her. while she had her legs apart, hugging her around the waist with his face beside her head. She could not push him off. On one occasion he got W to touch his penis. He also touched her indecently himself and this touching included digital penetration of her vagina. As we have said the appellant denied all these allegations. He was convicted of each of the following charges:

Count No.	Complainant
1 Indecent act	W
2 Indecent assault	W
3 Induced indecent act	W
4 Sexual violation (digital penetration)	W
5 Indecent exposure	R
6 Indecent act	R

[24] The offending against J followed the appellant forming a relationship with her mother. On his return home from work he would sit next to J on the couch, slip his hand beneath her buttocks and squeeze them.

Remarks on sentencing

[25] In her very comprehensive remarks when sentencing the appellant the High Court Judge referred to the deeply adverse effects of his offending on the complainants and traumatic consequences for their families. She said their whole

lives and futures had been placed at risk by the offending and it was impossible to predict the long term consequences of it for them.

[26] The report of the probation service recorded the appellant's continuing denial of his offending and his unwillingness to address the factors promoting it. It also recorded that following earlier offending the appellant had, between July and December 1996, completed 21 of 24 sessions of the Steps to Safety rehabilitative programme for sex offenders. This preceded the imposition of a term of imprisonment of eighteen months imposed in January 1997 in the District Court, following conviction of the appellant for indecent assault on and inducing an indecent act by a girl under 12 years of age and for indecent exposure.

[27] The report to the High Court of a forensic psychiatrist reiterated the appellant's denials since his conviction by the jury of sexual abuse or of having any sexual interest in children. The psychiatrist considered his attitude to be one of minimalising the seriousness of his situation and his offending. He diagnosed the appellant as having female specific paedophilia. He saw the prognosis for improvement as being very poor. There was a significant risk of similar offending in the future.

[28] A report obtained on the appellant's behalf from a neuropsychiatrist recorded that the appellant accepted the events leading to his conviction were sexualised incidents and inappropriate. It referred to the appellant having symptoms of a major depressive disorder and to issues in relation to the death of his adoptive father. The Judge observed however that there was no analysis of the relationship between the major depressive disorder and the paedophilia diagnosed by the forensic psychiatrist, who, having read his colleague's report, reiterated his view of the poor prognosis in terms of future offending by the appellant.

[29] The Judge referred to the deliberate planning involved in the offending and the multiple violations suffered by several victims. It had been directed at a vulnerable section of the population with devastating effects. The appellant's earlier response to rehabilitative measures had been unsatisfactory.

[30] Her Honour accepted the risk assessments and view of the prognosis for reoffending in the reports of the probation service and forensic psychiatrist. They were that the appellant was a serious danger to public safety and there was a significant risk of his reoffending. She concluded that for the protection of the public who might become victims of future serious sexual offending by the appellant a sentence of preventive detention was inescapable. She was in no doubt the statutory parameters for it had been met. Her Honour sentenced the appellant to preventive detention accordingly.

[31] In his submission to us on the sentence appeal Mr Balme invited us to impose a lengthy finite term of imprisonment, in the region of 8 to 10 years, in place of preventive detention. He submitted a copy of the letter of instructions to him from the appellant in which the appellant acknowledged he had a serious problem with sexual offending. Mr Balme accepted that the present offending met the statutory qualification for the indefinite term sentence but argued as the appellant was no longer in denial, and had also agreed to complete a substantial rehabilitation programme while in prison, there was every prospect a finite sentence would work for him. The appellant should be treated as a second time defendant rather than a recidivist. He argued the overall nature of the appellant's offending was not so serious as to require preventive detention.

[32] Ms Jelaś for the Crown submitted that the offending was extremely serious. The appellant, in the course of a round of offending, had committed two offences of sexual violation on different occasions against different complainants. His conduct had been predatory throughout and the suffering of his victims was ongoing. She argued the appellant's prospects of rehabilitation were very much at the lower end. It also appeared that the seriousness of his offending had increased over time.

Decision on sentence appeal

[33] The appellant's convictions met the statutory prerequisites for a sentence of preventive detention under both s75(1)(a) and (b). It is appropriate to consider his appeal in terms of the latter subparagraph and thus in light of the offending in 1996. To impose a sentence of preventive detention under s75(2) the High Court Judge was

required to be satisfied that detention of the appellant in custody for a substantial period was "expedient for the protection of the public", meaning that the sentence was appropriate for the protection of the public and suitable to the circumstances of the case: *R v Leitch* [1998] 1 NZLR 420 (CA).

[34] The remarks of the Judge on sentencing, as summarised in this judgment, covered the range of factors which required consideration in applying the expediency test. Of particular relevance were failure of rehabilitative treatment, following earlier offending, to effect a change in the appellant's behaviour and the extent, multiple nature and prevalence of the current offending. The Judge, as previously indicated, also accepted the view of the forensic psychiatrist that there was a significant risk of reoffending and that the appellant was a danger to public safety. Such factors in combination led the Judge to the conclusion that the statutory parameters under s75 had been met.

[35] Those parameters include of course the residual discretion, identified in *Leitch*, not to impose a sentence of preventive detention if the Court considers an available finite sentence would meet the underlying purpose of protection of the public which is central to s75. It is this aspect of the test that requires particular consideration in this appeal in view of Mr Balme's submission that the overall offending history of the appellant is not such as to require preventive detention to protect the public.

[36] In one sense it is true that the appellant's overall criminal record is not as extensive as that of many others sentenced to preventive detention. The seriousness of the impact on the victims of the current offending should not, however, be underestimated. It is also true that the appellant has not undergone previously intensive rehabilitative treatment which he has now, through counsel, signified his intention to do. Nevertheless it is in our view highly uncertain whether this somewhat belated acknowledgement offers any reliable indication of remorse or a commitment to do what is necessary to arrest a pattern of offending that has increased in its intensity and seriousness to the point where over a six month period there has been multiple offending involving four victims and including two incidents of sexual violation. The psychiatric reports that influenced the sentencing Judge

cannot in our view be dismissed as mere unfortunate professional assessments that might have been avoided had the appellant conducted himself differently prior to being sentenced.

[37] In the end we are driven to the view that a finite sentence within the scope available for offending of this kind is inappropriate because the Court cannot have any confidence that it would be accompanied by the successful rehabilitative treatment that is necessary if young girls are not to be subjected to future offending by the appellant. For these reasons we consider the sentence of preventive detention imposed by the Judge was both in accordance with the statutory requirements and an appropriate sentencing response to all the circumstances of the case.

[38] The appeal against conviction and sentence is accordingly dismissed.

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