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IN THE COURT OF APPEAL OF NEW ZEALAND

CA57/2016
[2016] NZCA 216

BETWEEN	DOUGLAS HAROLD MCINNES Appellant
AND	THE QUEEN Respondent

Hearing: 11 May 2016

Court: Kós, Courtney and Gilbert JJ

Counsel: M J Phelps for Appellant
S K Barr for Respondent

Judgment: 23 May 2016 at 11.30 am

JUDGMENT OF THE COURT

The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Kós J)

[1] Mr McInnes befriended C, a woman with a low level of intellectual functioning. He had C sign a contract which said she would engage in sexual activities with him. He visited C regularly over the following months. They engaged in sexual acts. Subsequently Mr McInnes was convicted of four representative counts of sexual exploitation of C, a person with a significant

impairment.[1] Given his history of sexual offending against children, he was sentenced to preventive detention.[2] He appeals against his convictions and sentence.

Conviction appeal

[2] Section 138 of the Crimes Act 1961 creates the offence of sexual exploitation of a person with a significant impairment. The following elements must be made out:[3]

(a) The complainant has a significant impairment, which is defined as an intellectual, mental, or physical condition or impairment that affects the complainant's capacity to understand the nature of sexual conduct or decisions about sexual conduct, or to foresee the consequences of decisions about sexual conduct, or to communicate decisions about sexual conduct.

(b) The defendant had a sexual connection or did an indecent act with the complainant.

(c) The defendant knew of the complainant's significant impairment.

(d) The defendant obtained the complainant's acquiescence in, submission to, participation in or undertaking of the sexual connection or indecent act by taking advantage of the impairment.

It is not a defence if the defendant honestly believed the impaired person consented to the sexual connection or indecent act.[4]

[3] The conviction appeal focuses on element (a). It is not suggested Mr McInnes did not know of C's impairment or that he did not have a sexual relationship of sorts with her.

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1 Crimes Act 1961, s 138.
2 *R v McInnes* [2015] NZHC 3279.
3 *R v Tapson* [2008] NZCA 155 at [24].
4 At [25] and [29]

[4] The prosecution case at trial was that Mr McInnes befriended C in 2012. C has an IQ of 63 and a low level of intellectual functioning. Mr McInnes volunteered to drive C's husband to work and would then assist C with errands. Then, in June 2012, Mr McInnes had C sign a contract which set out sexual acts he wanted her to engage in with him and stated that she would keep the arrangement secret. The contract included a points system where C would be awarded points for good sexual behaviour. Over a period of three months, Mr McInnes and C engaged in sexual acts pursuant to that contract.

[5] The defence case at trial was Mr McInnes was not aware of C's impairment and did not act exploitatively. C was able to communicate decisions about sexual conduct — for instance, in refusing to give him oral sex on all occasions, and by refusing to engage when she felt tired or did not have enough time.

Submissions

[6] Mr McInnes raises two grounds of appeal: that the verdicts were unreasonable, and that the Judge's summing-up undermined the defence case. Mr McInnes' counsel, Mr Phelps, accepted that the second ground was dependent on the first, and would fall away if that failed.

[7] On the first ground, Mr Phelps submits C did not have a significant impairment. She had the capacity to foresee the consequences of decisions about sexual conduct and to communicate decisions about sexual conduct. He relies on C's evidence that she would sometimes say she did not wish to engage in sexual activities, refused to perform oral sex, she was fond of Mr McInnes, she enjoyed or gave the impression she enjoyed the sexual activities and that she did not participate simply because of the contract.

[8] On the second ground of appeal, Mr Phelps submits the summing-up undermined his case when the Judge directed the jury to focus on the times when the activity occurred. The Judge said:

> … The fact that, on other occasions she may not have succumbed to that, on other occasions she did not consider things fitted within the contract, *is all*

> *matters you can have a look at* but the focus is, for you, on the times when these events occurred.
>
> (Emphasis added).

Mr Phelps submitted this may have led the jury to err in its assessment of C's level of impairment by ignoring the times she said "no".

Discussion

[9] In our view this is a clear case of offending, and the verdicts are not unreasonable. C had a significant impairment. There was no real response to the expert evidence called by the Crown. That evidence showed C lacked abstract reasoning powers. She lacked the ability to foresee the consequences of sexual conduct. She felt constrained by the contract. She lacked intellectual ability to appreciate the contract was not legally binding. She gave evidence she was scared about what would happen if she did not perform the contract. And that Mr McInnes would remind her they had a contract if she did not want to engage. The instances when C did not engage in sexual activity do not detract from the prosecution case because there is no suggestion C felt she could freely discontinue the sexual relationship.

[10] Furthermore, the fact Mr McInnes made C sign such an instrument and would use that to persuade her into sexual conduct is a strong evidential basis for the inference he knew she was impaired in her ability to make and communicate decisions about sex. The jury was well placed to evaluate whether C was impaired significantly in her capacity to make and communicate decisions.

[11] The fact no negative consequences arose from the times C did not want to engage in sexual conduct is not significant. C gave evidence Mr McInnes would not pressure her further if she said she was too tired or did not have time. That does not undermine her evidence that on other occasions he was able to pressure her by referring to the contract, which she felt bound to perform.

[12] Nor is it significant that C refused to perform oral sex on Mr McInnes. C's evidence suggests that was not a requirement of the contract. Her refusal to perform

oral sex shows the significance she attached to the contract. It reinforces her evidence that she felt pressured by the contract to engage in other sexual conduct.

[13] The first ground of the conviction appeal fails.

[14] The second ground Mr Phelps accepted would fall away if the first failed. However we would not have found that the summing-up misdirected the jury in the manner suggested. The Judge did not undermine the defence case. He summed up adequately the defence submission that C was not taken advantage of because she would from time to time say "no", and always said "no" to performing oral sex on Mr McInnes.

[15] For these reasons, the appeal against conviction is dismissed.

Sentence appeal

[16] Mr McInnes was transferred to the High Court for sentencing.

[17] Collins J first considered what finite sentence was available. He took the lead charge as exploitative sexual connection involving Mr McInnes placing his mouth on C's vagina. The aggravating features included premeditation, the secret contract, harm to the complainant, the seriousness of the offending, previous sexual offending against underage girls in 1966, 1969, 1974 and 1998–2000, and the fact the offending against C occurred whilst subject to an extended supervision order (ESO). On that basis, the appropriate finite sentence would have been six years and six months' imprisonment with a minimum period of three years and three months.[5]

[18] The Judge then considered whether preventive detention should be imposed. The key question was whether Mr McInnes was likely to commit another qualifying sexual offence if released at the expiry date of a finite sentence. The Judge considered the following factors:

(a) There was a pattern of sexual offending dating back to 1966 involving exploitation of vulnerable victims and a similar methodology. It was

[5] *R v McInnes*, above n 1, at [23]–[39].

not a significant difference that this offending was against an adult complainant and the previous offending was against children. The Judge said, however, that the pattern of offending was not "serious" because there had been a number of offence-free gaps.[6]

(b) Mr McInnes engendered serious harm to C.[7]

(c) Mr McInnes was at a medium to high risk of reoffending against underage females and vulnerable adult females, according to health assessors' reports.[8]

(d) Mr McInnes had undergone treatment programmes in prison and on release in the past. He behaved poorly and was removed from one such programme.[9]

(e) A three year three month prison sentence would be inadequate time for Mr McInnes to complete rehabilitation programmes in prison.[10]

(f) The offending against C occurred whilst subject to an ESO.[11]

[19] Based on these factors, the Judge sentenced Mr McInnes to preventive detention with a minimum period of five years.

Submissions on appeal

[20] Mr McInnes submits preventive detention should not have been imposed for the following reasons:

(a) The pattern of offending was not serious because the previous offences were not against adult complainants.

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6 At [44]–[50].
7 At [51].
8 At [52].
9 At [53].
10 At [62].
11 At [54].

(b) The offending was not the worst of its kind because C consented to the sexual conduct.

(c) Although there is a moderate to high risk of reoffending, both health assessors considered treatment tailored to the circumstances of this offending was likely to reduce risk.

(d) Earlier efforts to address the causes of offending have been met with some success. While in prison in 2007–2008, Mr McInnes began to recognise why he was at real risk of reoffending. He has not committed any further child sexual offences. Mr McInnes should be given an opportunity to undertake further treatment, which Dr Fisher, a psychologist, said may be of utility. A minimum period of imprisonment of three years three months' will be adequate time to undertake relevant rehabilitative courses.

(e) Mr McInnes is now 64 and the likelihood of sexual recidivism will reduce with advanced age. If there is still a risk of reoffending, he can be subject to an ESO indefinitely.

Discussion

[21] We do not consider Collins J erred in imposing a sentence of preventive detention. We note:

(a) Although the pattern of offending has changed, it remains exploitative sexual predation of vulnerable members of society. What is also remarkable here is the length of time over which Mr McInnes has reoffended. And that he slipped back into a pattern of offending in 1998 after a gap of some 25 years.

(b) Any consent given by C to the sexual conduct is immaterial in terms of the seriousness of the offending because she was intellectually impaired, vulnerable and manipulated.

(c) An ESO is clearly insufficient protection of the community, as this offending occurred whilst Mr McInnes was subject to one. It is concerning that Mr McInnes was able to evade detection for about three months by manipulating C.

(d) There has been some improvement as a result of rehabilitation and treatment, but not to the extent that Mr McInnes was able to restrain himself from taking advantage of C. Further treatment may be helpful, but that is far from certain. As Dr Fisher noted, "any treatment gains should be taken with caution …".

(e) Finally, given the enduring nature of Mr McInnes's sexual offending over a long period, and the fact that he is still in his mid-60s, we are not convinced that increasing age will materially diminish risk. First, the expert evidence in this case does not suggest it. Secondly, considerable care is needed in assessing a submission that age will act as an effective protective factor.[12]

Result

[22] The appeal against conviction and sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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[12] See *Rubick v R* [2016] NZCA 8 at [21]–[26].