NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA69/2008
[2008] NZCA 357

THE QUEEN

v

LAURIE GOODWIN

Hearing: 31 July 2008

Court: Chambers, Chisholm and Cooper JJ

Counsel: A M M Schulze and S A Oudyn for Appellant
M D Downs for Crown

Judgment: 9 September 2008 at 4 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentences imposed in the District Court are quashed and sentences of two years' imprisonment are imposed on each count, the sentences to be served concurrently.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] The appellant stood trial on an indictment containing nine counts. It was alleged that at various dates between 1967 and 1973 he indecently assaulted the complainant A (aged under 12 years) in various ways, and induced her to do indecent acts on him. He was also charged with one count of indecent assault against another complainant B, and one count that he induced her to do an indecent act on him. These offences were allegedly committed between November 1971 and September 1975 when B also was under 12 years of age.

[2] The appellant was acquitted on five of the counts that concerned offending against complainant A. He was found guilty on the other four counts.

[3] Judge Moore, who had presided at the trial, sentenced the appellant to two years nine months' imprisonment on each count. The sentences were to be served concurrently.

[4] The appellant now appeals against the sentences imposed.

The offending

[5] The appellant was born on 22 September 1953. At the time of the offending against complainant A he was aged between 14 and 20 years. His offending against complainant B occurred when he was between 18 and 22 years.

[6] All of the charges that were laid were representative counts. During the trial however, because some of the allegations appeared clearly to relate to specific occasions, the indictment was appropriately amended to allege offending on those specific occasions. The appellant was in fact acquitted on all of the amended counts. The guilty verdicts related to counts that remained as representative charges throughout.

[7] The offending occurred when he was babysitting the complainants and began when he was in his early teenage years. He was convicted of indecently assaulting

complainant A by touching her genitalia and of inducing her to do an indecent act upon him by touching his penis.

[8] The charges involving complainant B were indecent assault by touching her genitalia with his tongue and inducing her to do an indecent act upon him by touching his penis. The conduct took place over a period of a little under four years.

[9] At the time of the offending complainant A was aged between four and ten and complainant B between eight and 12 years.

The sentence

[10] Having referred to the jury's verdicts, the Judge said at [5] and [6]:

> [5] I have got no doubt what these verdicts mean. What they mean is this: that from a time which started before you were old enough to have what I think can best be called the criminal responsibility of an adult for your actions, you were sexually abusing [the complainants], particularly the older one – it is really her who features initially – in ways which, if they had stopped before you were out of your mid teens, might now be able to be seen as some sort of teenage experimentation which reflected the fact that you had been entrusted to look after these youngsters from time to time at a stage when you were not sufficiently mature to appreciate the responsibility entailed and the need to keep your hands to yourself.
>
> [6] That aspect of these matters I put to one side because, as I have said, the approach of the law recognises that there is a point in a person's development prior to which they should not be seen as criminally responsible in the adult sense. That background no doubt added to the impact of your conduct on the complainants, but you persisted in this conduct well after you were mature enough to appreciate how terribly wrong what you were doing was. It was not just a case of indecently touching these youngsters. You were also getting them in day to day terms, to play with you sexually.

[11] The Judge referred to the enduring emotional harm caused to both victims and said that the appellant's conduct had played a very significant part in their subsequent lives. He acknowledged that at the time of the offending the appellant had been very troubled but noted that the offending had occurred when he was in a position of trust and authority. That might not have been something that the appellant had understood in the early stages, but the offending had continued even after he had reached an age of maturity.

[12] The victims had of course been vulnerable because of their ages and noting that the offending had occurred on a substantial number of occasions, the Judge held that imprisonment was the only option. The conduct was too serious for a sentence of home detention or community detention to be an appropriate response, having regard to the period over which the offending had continued, the need to hold the appellant accountable, uphold community standards and deter others.

[13] At [23] the Judge said:

> Grappling with the matter as best I can, and that includes an allowance for your age – time becomes more precious as we grow older – and allowing too for some recognition of the fact that there has been no further sexual offending and that the secondary impact on you of the sentence I have to impose – through its effects on those who are now close to you and in many cases have written to the Court about that – it is something that I have tried to take into account to a modest extent although frankly the law makes it plain that people who commit serious offences impact on the lives of those who love them in all sorts of ways that the Court can do nothing about – I have come to the conclusion that the appropriate sentence here is one of two years and nine months imprisonment. That must be the sentence on each of these four charges.

The arguments on appeal

[14] On appeal, Mr Schulze has argued that the sentences were manifestly excessive. He submits that the Judge failed to properly consider relevant authorities and gave insufficient weight to mitigating factors.

[15] Mr Schulze observed that during the period in which the offending occurred, the relevant maximum penalty for the offending was in each case a term of imprisonment not exceeding ten years. He noted that there is no distinct tariff for offending of this nature and that there had been no tariff in the 1960s and 1970s.

[16] Mr Schulze referred to *R v Barnes* CA404/99 14 February 2000 in which the Court confirmed that community based sentences are available for indecent assault offending, observing at [11]:

> Indecent assault is a difficult sentencing area where there may be such factual variations that there is no inflexible sentencing regime and sentences may range from community based sentences to substantial terms of imprisonment.

[17] He also relied on *R v Carruthers* CA401/94 10 April 1995 where Hardie Boys J, speaking for a Court of five said, at 4:

> … where in the years that have intervened the offender has demonstrated that he has overcome his earlier proclivities, and has settled into a normal and law-abiding life, that fact must be recognised.

[18] Mr Schulze noted that in *R v Carruthers*, the appellant had appealed against a sentence of two years' imprisonment imposed for offences of indecency against children committed some 13 years previously. There were two complainants who had been aged eight to ten at the time. The offending involved touching their vaginal area as well as the placing of the appellant's penis between the girls' legs and masturbating until ejaculation. He would also induce the girls to masturbate him. Due to the good character of the appellant since the offending, the Court reduced the sentence to 18 months' imprisonment.

[19] Mr Schulze also referred to *R v Robinson* CA304/95 4 October 1995 in which the appellant had been found guilty at trial of offences against one complainant, a ten year old niece, equivalent to the charges of which the appellant has been convicted in this case. There was also a charge against a second complainant, a niece 13 years of age, who he had indecently assaulted by touching her vagina under her clothing. There was a further charge that on a specific occasion he had digitally penetrated her vagina. An effective sentence of imprisonment for three years was reduced to two years on appeal. The Court was influenced by the length of time that had elapsed since the offending occurred, in 1982.

[20] Another case to which Mr Schulze referred was *R v S* CA538/99 28 March 2000 in which a sentence of 18 months' imprisonment was substituted for a term of two and a half years in respect of sexual offending against the appellant's two younger half-sisters, (respectively 6 and 7 years old when the offending began) when the appellant had been aged between 14 and 16. The offending had included the touching of their genitals as well as inducing the complainants to perform oral sex on the appellant until he ejaculated.

[21] Finally, Mr Schulze relied on *R v H* CA436/02 23 June 2003. In that case, the appellant was found guilty on one count of indecent assault on a girl aged

between 12 and 16 years, one count of indecent assault on a girl under the age of 12 and two counts of inducing a girl under the age of 12 to do an indecent act upon him. He was sentenced to a total of two years and three months' imprisonment. The Court reduced the sentence to 18 months on the most serious of the charges and granted leave to apply for home detention under the sentencing regime that then applied. It is apparent from the Court's decision that in taking that course it was influenced by the fact that the offending had occurred 11 years previously, and that over the period since the appellant had established a successful new life free of offending of this kind.

[22] Mr Schulze relied on these cases to submit that sentences of two years or less could have been imposed in respect of the appellant's offending. He also argued that if he had been sentenced soon after the offending ceased, the Court would have taken into account that he had few criminal convictions none of which were relevant to the conduct in question. Although over the years the appellant has incurred further criminal convictions, none have been in respect of sexual offending. In the last ten years there has only been one conviction, and that relates to driving with excess blood alcohol. Mr Schulze maintained that the appellant's good character and lack of relevant convictions since the offending should have been taken into account.

[23] He argued that a sentence of imprisonment of two years or less ought to have been imposed and that in those circumstances home detention would have been warranted having regard to the lapse of time, the lack of similar offending in relation to the conduct in question, a stable employment history, responsibilities to provide for the appellant's current partner and her ongoing support.

[24] Mr Downs, for the Crown, submitted that the sentence of two years and nine months that had been imposed was within the range available to the sentencing Judge. Although the offending was historic, it involved representative sexual offending against two children and had occurred over a substantial period of time. He argued that home detention would not adequately mark society's condemnation of offending of this type.

Discussion

[25] The Judge said that he was in no doubt that the offending for which the appellant was found guilty had occurred on a substantial number of occasions. As has been seen, the representative charges on which the appellant has been convicted spanned time periods of six years in the case of complainant A and four years in the case of the complainant B. Although when the offending began he was a young person himself, there was a significant disparity between the appellant's age and that of the complainants. He was in a position of trust concerning them and he breached it. We think in the circumstances that the Judge was right in his decision that imprisonment was the only appropriate outcome.

[26] In his sentencing remarks the Judge emphasised as well the harm that the appellant's conduct had caused to the victims, and the need to hold the appellant responsible and deter others. This was plainly appropriate.

[27] The Judge stated in [23] that he would make an allowance for the appellant's age. He did not state what the allowance was. The appellant, although young at the time of the offending, was 54 years of age when sentenced. Clearly he was not entitled to any credit on account of his age at that point. The Judge also said that he would give some recognition to the fact that there had been no further sexual offending but did not articulate the extent to which that consideration influenced the final sentence he imposed. The cases upon which Mr Schulze relied, and which we have earlier briefly discussed, show that where an offender has, over a substantial period of time, shown by his conduct that he has turned his back on offending of a kind which he has historically committed, proper recognition should be given to that in the sentencing process. The reason for that approach was explained by Hardie Boys J in *R v Carruthers* when, immediately after the passage already quoted above, he observed (at 4-5):

> For events have shown that one of the objectives of sentencing, deterrence of the specific offender, is unnecessary. The man to be sentenced today is not the same man who committed the offences. Moreover, the interests of a new family unit, of other children, may need to be considered.

[28] This consideration is particularly important where there has been a very lengthy period during which the offender has shown by his conduct that he has put offending of the kind in question behind him. The present charges were laid over 30 years after the offending had ended, a much longer period than in any of the other cases to which Mr Schulze referred. Over the intervening period, the appellant could not be said to have led a blameless life. He has convictions ranging from minor offending involving cannabis under the Misuse of Drugs Act 1975, to offences involving theft and receipt of stolen property as well as drink driving offences. But there is nothing equivalent to the current offending.

[29] We have concluded in the circumstances that the Judge did not make sufficient allowance for the changed circumstances which applied by the time these charges were prosecuted and the appellant was convicted. The facts of each case of course differ and it is not easy to draw an exact parallel between this case and the others to which Mr Schulze referred. In relation to those cases however, we observe that although the offending here seems to have taken place for a longer period, it involved a younger offender (except in the case of *R v S*) and the period that has elapsed since the offending occurred was greater in this case. In the circumstances, we consider that a period of imprisonment of two years would not be out of step with the result that was reached in the other cases we have discussed.

[30] We consider that an effective sentence of two years would be sufficient to hold the appellant accountable, to denounce the conduct involved and be of sufficient deterrent effect for others. The need to deter the appellant has ceased to be a significant consideration for the reasons already discussed. Under s 85(4) of the Sentencing Act 2002, since concurrent sentences were to be imposed, the Judge should have fixed a penalty for the most serious offence that was appropriate for the totality of the offending while ensuring that each lesser offence received the penalty appropriate to that offence. However, no point was made of that on the appeal and the course we take is simply to substitute two years' imprisonment on each of the charges, that being the figure appropriate for the totality of the offending.

[31] We would not however, take the further step of substituting a sentence of home detention. In our view, the offending involved was too serious and prolonged for that to be appropriate.

Result

[32] The appeal is allowed and the sentences imposed in the District Court are quashed. We substitute sentences of two years' imprisonment in respect of each charge and direct that the sentences are to be served concurrently.

Solicitors:
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