IN THE COURT OF APPEAL OF NEW ZEALAND **CA 315/96**

THE QUEEN

v.

PHILLIP JOHN SMITH

Coram: Thomas J
Keith J
Barker J

Judgment: 19 December 1996
(ex parte)

JUDGMENT OF THE COURT DELIVERED BY THOMAS J

The appellant was convicted in the High Court at Wellington of one count of murder, one count of aggravated burglary, two counts of sexual violation, two counts of indecent assault on a boy, two counts of doing an indecent act on a boy, and two counts of kidnapping. He was sentenced to life imprisonment with a minimum 13 year non-parole period for the murder, five years imprisonment for the aggravated burglary, four years and eight years for the sexual violation charges, five years imprisonment for each of the indecent assault and indecent act charges, and three years imprisonment for each of the kidnapping charges. The burglary and kidnapping sentences were concurrent with each other but cumulative on the sexual abuse charges.

The appellant has appealed against the convictions in respect of the murder and the sexual offences. He has also appealed against his sentence.

The appellant applied to this Court for legal aid. After three Judges of this Court had considered his application, it was declined. The appeal has been now determined on the basis of written submissions received from the appellant.

There are four victims. The first was a 35 year old father who was killed. The other victims are his wife and his two sons who are now aged 13 and six respectively. The father died from stab wounds inflicted by the appellant. The 13 year old son had been sexually abused by the appellant and was then stabbed during the incident in which the father was killed. The wife and the youngest son have lost a husband and a father and were terrorised by the appellant's actions.

The appellant was known to the family. Over a period of months the appellant became friendly with the eldest son and, after a period of time, he began a sexual relationship with him. At this stage the son was approximately 12 years of age and the appellant was about 21. The sexual relationship involved indecent touching, masturbation, oral sex and attempted anal intercourse. Throughout this period the appellant threatened the son. He told him that if he told anyone about the sexual abuse something bad would happen to his family. Eventually, the young boy did tell his family and soon after that the appellant was arrested.

Because of fears for the family's safety, the family were relocated by government agencies. Efforts to keep the family's address confidential were unsuccessful, however, and after a short time the appellant ascertained the families whereabouts. In the early hours of the morning in question he broke into their house armed with a hunting knife and, after checking to see that the parents were asleep, he cut the telephone lines. The appellant then went to the room where both sons were sleeping.

The eldest son awoke to find the appellant standing over him holding a knife. He screamed out to his parents. The appellant then attempted to stab the boy who was able to deflect the knife. The boy's father entered the room and tackled the appellant. He was savagely stabbed. The eldest boy attempted to run from the room. As he did so he was stabbed three times in the back before fleeing the house and running to the local Police station.

In the meantime, the mother had locked herself and her youngest son in the master bedroom. The appellant, who was still armed with the hunting knife, gained entry to the room. The mother constantly pleaded to be able to call an ambulance for her husband whom she could hear moaning in the other room. But the appellant would not allow her to do so. Instead, the mother and her son were forced to accompany the appellant to the section of a vacant house nearby. There the appellant retrieved a .22 rifle which he had earlier hidden in a hedge. He loaded the gun and forced the pair to walk back towards the house. But, hearing sirens, he ran away.

By the time the ambulance arrived the father was already dead. He had 19 stab wounds in his back and a severe chest wound.

The first ground of appeal is directed to the conviction for murder. The appellant submitted that the trial Judge made an error of law in failing to adequately put the defence of self-defence to the jury. In our opinion there is no merit in this ground of appeal. The trial Judge, no doubt following the ruling in ***R v Tavete*** [1988] 1 NZLR 428, put self-defence to the jury and, in his direction, covered all of the major elements required to establish the defence of self-defence. This direction was given even though the appellant's counsel (as had the counsel in ***R v Tavete***) sought a verdict only for manslaughter through lack of murderous intent. During the summing up the trial Judge expressed some reservations about the defence of self-defence in the circumstances of this case. Taking into account the facts of the case, we consider

that the Judge was entitled to express some scepticism. We are satisfied that he gave an adequate direction.

The second ground of appeal relates to the sexual violation and indecency charges. The appellant contends that the trial Judge wrongly restricted the cross-examination of the eldest son on the question whether the son had the appellant's telephone number. Again, there is no merit in this ground of appeal. In cross-examination the son denied having the appellant's telephone number. In any event, we are of the view that whether or not the son had the appellant's telephone number was irrelevant. Even if the son had acknowledged that he had the appellant's telephone number, the Crown case would not have been damaged.

The third ground of appeal relates to allegedly fresh evidence being available. The appellant has produced to the Court a detailed document giving his version of the events which took place. The evidence relates to both the murder and sexual offence charges. In essence, he alleges that much of the evidence given at the trial, and especially the evidence given by the wife, is untrue. He contends that there was no sexual abuse of the son and that the father's death was either a result of self-defence or occurred without murderous intent. This Court has re-iterated on numerous occasions that evidence will only be allowed after the conclusion of a trial if it is fresh and cogent. This evidence is clearly neither. Indeed, it could have been given at the trial. The appellant chose not to give evidence. This ground of appeal is also without merit.

The appellant also appeals against the sentences he received in respect of his murder and the sexual offence convictions.

In our view, the sentences for the sexual offending are appropriate for a long course of sexual abuse of a young victim, more particularly as threats were made to keep the

abuse secret. We do not consider that the sentencing Judge could have fixed a lesser sentence in the circumstances of this case.

In respect of the sentence for murder, the appellant submitted that the murder was not "exceptional" and therefore did not warrant a non-parole period of thirteen years. We disagree. This was a particularly nasty murder involving breaking into a household in the early hours of the morning, cutting the telephone lines, savagely attacking the father, stabbing the eldest son, and intimidating the family. We are of the opinion that the sentence was well within the discretion of the sentencing Judge.

For the above reasons, the appeals against both the convictions and sentences are dismissed.