IN THE COURT OF APPEAL OF NEW ZEALAND CA 206/98

PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S139 OF CRIMINAL JUSTICE ACT 1985

THE QUEEN

v

JAN MAARTEN DE VOS

Coram: Keith J
Heron J
Elias J

Hearing: 25 August 1998

Counsel: P L Borich for Appellant
A K Mobberley for Crown

Judgment: 26 August 1998

JUDGMENT OF THE COURT DELIVERED BY ELIAS J

The appellant pleaded guilty in the District Court to two charges of indecent assault against different complainants, A (then aged 14) and B (then aged 13 years). The offence in relation to A was committed in 1993. That relating to B was committed in 1996. The appellant was sentenced to one years imprisonment on the 1993 charge and six months imprisonment on the 1996 charge, the sentences being concurrent. He appeals on the grounds that the sentence was wrong in principle and manifestly excessive. The error in principle relied upon concerns the approach adopted by the Judge in declining to suspend the sentence under s 21A of the Criminal Justice Act 1985. The sentence is said to be manifestly excessive when compared with those imposed for similar offending and because the Judge failed to give proper weight to significantly mitigating factors.

The appellant is aged 35 years. The offending in relation to the complainant A, which took place in 1993 was the more serious, as the Judge recognised. At the time of the offence the appellant was separated from his wife, with whom he has since been reconciled. It was a time of some stress for the appellant. He was living in a de facto relationship with A's mother. One night while her mother was out, and the appellant and A were watching television, the appellant put his hand down A's pyjama pants, touching her skin near her vagina. He also kissed A on the mouth, lifted up her top and kissed her breast. Notwithstanding the submission made on behalf of the Crown in this Court that the offending on this occasion is to be seen as an episode which progressed over some time and from which the appellant had opportunity to withdraw, the offence is one-off in that it occurred on one occasion only and was not repeated.

The complainant B was a neighbour of the appellant. She used to visit the appellant's home to play with his children. One evening when the complainant was at the appellant's house babysitting the appellant sat beside her while she was watching television, stroked her hair and said "You have long beautiful hair, it would be nice to wrap it around my cock". Mr Borich for the appellant submits the fact that another person (the complainant in respect of charges which were subsequently dismissed) was in the room at the same time, suggests that the offence, in context, was not serious. But indeed, the Judge did not suggest otherwise. The offence was also a one-off one in that inappropriate conduct by the appellant was not repeated.

The appellant pleaded guilty to the two charges of indecent assault on 24 June 1998 on the basis of a summary of facts from which the outline already given is taken. In addition, the Judge had the advantage of having heard the complainants give evidence on a similar fact basis in relation to three charges in respect of a third complainant. In respect of those defended charges, the appellant was acquitted. During the course of the evidence given by the complainants, complainant A acknowledged that the appellant stopped the indecent touching immediately when asked to do so by her and had apologised to her and her mother straight away.

After the offending, the appellant sought professional assistance apparently after a suicide attempt. As appears by the pre-sentence report, the appellant was subsequently admitted to Kingseat Psychiatric house and to Kahunui Treatment Centre where he stayed for two months before being discharged. The treatment he received was directed at substance abuse as well as the sexual offending which had apparently been the trigger for the suicide attempt. He was not charged with an offence arising out of the indecent assault until 1996 when incidents in relation to the third complainant came to light. At that stage the appellant and his wife inquired about the SAFE Programme. In the end, he did not undertake the programme because it would have pre-empted his unsupervised contact with his son. Since the appellant's son has behavioural and learning difficulties and requires intensive attention for home schooling purposes from the appellant, the requirement by SAFE that the appellant should not be alone with children was considered unworkable.

The sentencing Judge had available to him a victim impact statement relating to the complainant B. Complainant A did not keep an appointment for the preparation of a victim impact statement, apparently on the basis that she did not wish to experience further trauma. The Judge also had a full and sympathetic pre-sentence report which rehearsed the background to the offending and the appellant's efforts to obtain professional assistance, his acceptance of responsibility, his family obligations (particularly in relation to his son), and his motivation to address the problems in his own background which the offending has highlighted. The report noted that after a flurry of burglary offences in 1980 when the appellant was 17 (for which he received a sentence of detention centre training), the appellant has only a 1985 conviction for driving while disqualified. The pre-sentence report recommended a suspended sentence of imprisonment, together with periodic detention.

The Judge's sentencing remarks are brief. A fuller explanation of his reasoning would have been of assistance. He identified the more serious offence as being that concerning the complainant A. That he considered to be "moderately serious". In his sentencing remarks the Judge noted that sentencing in cases such as these is always a matter of balance. He identified as mitigating features the favourable probation report, early pleas of guilty, remorse and family circumstances of the appellant, and his lack of

convictions over recent years. These mitigating features were contrasted with the identified aggravating features, which included the position of trust occupied by the appellant in relation to the complainants and their age. The Judge said that he found it difficult to decide whether the sentence should be suspended or not, but that in his view the balance came down in favour of not suspending the sentence.

In support of the ground of appeal that the sentence is manifestly excessive, Mr Borich for the appellant suggests that, to arrive at a sentence of one year, the Judge "must have had a starting point in the vicinity of at least 18 months." He refers to a number of authorities which illustrate the range of sentences imposed for comparable offending. In our view, however, they indicate that the sentences imposed were within the range available to the Judge. In general, as was indicated in ***R v Frost*** (CA 242/89, 27 October 1989), sexual offending against children, particularly where breach of trust is entailed, will result in a sentence of imprisonment. Nor is the 12 months here imposed in respect of the more serious offence, which included touching on the skin in the genital area, out of line with the sentences reviewed by this Court in ***R v Meredith-Blyde*** (CA 245/95, 19 July 1995).

It is submitted on behalf of the appellant that, in balancing the aggravating and mitigating factors identified, the Judge gave insufficient weight to the appellant's remorse, lack of significant previous convictions, personal attributes, efforts towards rehabilitation, motivation to reform and the effect upon his family of a full time custodial sentence. All these factors were however identified by the Judge and were taken into account by him. The Judge did not overlook the appellant's acceptance of responsibility, his family circumstances and the efforts he has taken voluntarily to address the problems which lie behind his offending. But the complainants were young and the appellant took advantage of a position of trust in relation to each. The offending in relation to E, entailing skin contact in the genital area, was rightly described by the Judge as being a moderately serious indecency. The offences were separated by some years, despite the insight which should have been obtained by the appellant at the time of the earlier offending, when he sought professional assistance. The impact upon complainant B has been on-going, as was described in the victim impact statement. Her mother reports behavioural disruption which has caused family

stress and dislocation. The complainant A preferred not to be interviewed, apparently because of the trauma already suffered, which she did not wish to relive. It is submitted by Mr Borich that the emotional harm reports are not as serious as some the Court sees. While that is the case, we are not prepared to infer - and it is not suggested by Mr Borich - that the effect on the particular complainants here has not been significant. Balancing these identified features, as the Judge did, it cannot be said that the sentences imposed were manifestly excessive.

The sentence imposed was within the scope of s 21A of the Criminal Justice Act 1985. It was submitted by Mr Borich that the Judge failed properly to consider the exercise of his discretion whether or not to suspend the sentence. The Judge is said to have erred in giving insufficient weight to the outlook for the appellant's successful reform. His potential is said to be shown by his early acknowledgment of offending and assumption of responsibility, his continuing remorse and steps to obtain professional assistance both at the time of the 1993 episode, and following the 1996 incident in his approach to the SAFE programme. Ms Mobberley for the Crown says that the SAFE programme was not undertaken by the appellant because of his subjective assessment of family convenience. The reasons referred to by Mr Borich appear more than matters of convenience. We do not draw any inference adverse to the appellant from the fact that he did not feel able to persevere with the SAFE programme. It is to his credit that he approached the programme and we accept that it indicates his motivation to address his problems.

Mr Borich emphasised that the offending in 1993 was at a time when the appellant was under considerable personal stress and was separated from his wife. In addition to the steps taken to obtain professional assistance, the appellant has been open about his offending with others in the neighbourhood in an effort to provide a safe environment for his further rehabilitation. As is made clear by the pre-sentence report, the appellant has the personal attributes and the motivation to avoid further offending. The pre-sentence report writer assessed the appellant as being an intelligent man, a factor considered to bode well for his successful rehabilitation. In addition Mr Borich submits the Judge failed to give adequate weight to the hardship which would be caused to the appellant's family from a refusal to suspend the sentence.

The Judge acknowledged that the question of whether to suspend the sentence was a matter that he found difficult. He correctly identified the factors in favour of suspension. In the end, however, he was of the view that, despite the prospects for rehabilitation of the appellant, suspension was not appropriate.

There is no settled principle which makes suspension inappropriate in cases of sexual offending against children: ***R v Meredith-Blyde***. The Judge did not fall into error in his approach however. He considered suspension but rejected it. Although he does not explicitly refer to the reasons why he found the balance to come down in favour of not suspending the sentence of imprisonment, it is to be inferred from his sentencing notes read as a whole that suspension was rejected because of the aggravating features of the case, identified by the Judge in arriving at the sentence of 12 months imprisonment.

The matter, as the Judge recognised, was not free of difficulty. Given the exploitation of a position of trust, the repetition of indecencies in respect of two different complainants separated by an interval of some years and the relatively serious indecency entailed in the touching of complainant E, we are not persuaded that his assessment was wrong. Indeed, it is a matter of some concern in relation to the prospect for the appellant's successful rehabilitation that, despite the motivation indicated by his attempts to obtain professional assistance in 1993, he should have offended again in 1996. Although motivated to address his problems, the appellant's insight does not go so far as to permit him to recognise the reasons for his offending, which he has been unable to explain. His wife has acknowledged to the pre-sentence report writer that she considers the appellant still has underlying problems associated with his own upbringing and past which still need to be addressed.

For these reasons, the appeal against sentenced is dismissed.

Solicitors:

Rice Craig, Auckland for appellant
Crown Law Office for respondent