PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINTS PROHIBITED BY s31, CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND CA 322/00

THE QUEEN

V

DONNY IKAPOSI MOKALEI

Hearing:	30 November 2000
Coram:	Thomas J Keith J Anderson J
Appearances:	V C Nisbet for Appellant J M Jelas for Crown
Judgment:	30 November 2000

JUDGMENT OF THE COURT DELIVERED BY THOMAS J

The sentence

[1] Following a plea of guilty, Mr Mokalei, the appellant, was sentenced at the Wellington High Court on 4 August 2000 to three years imprisonment on six charges of indecent assault. The charges were in respect of three different complainants and spanned the period from 1983 to 1984. Mr Mokalei has now appealed against his sentence on the ground that it is manifestly excessive.

The facts

[2] Mr Mokalei is a native of Niue who came to New Zealand with his family in 1974 when aged 13. He served in the New Zealand Army from 1983 to 1985, the period during which the offending occurred. At this time he was also living in a de facto relationship in Wellington. In a pre-sentence interview Mr Mokalei stated that this relationship was abusive on both sides and that he regularly drank alcohol to excess.

[3] The first complainant, E, was the sister of Mr Mokalei's de facto partner. In January 1983, when E was aged 13 years, Mr Mokalei and his partner visited E's family. They stayed for some nights. On the last evening of their visit, after E had gone to bed in her own bedroom, she was awakened by a hand being placed on top of her vagina. Mr Mokalei was standing next to her bed. He told E to "shush" and placed E's hand on his penis. He then inserted his finger into E's vagina. E finally told him to get out of the room, which he did.

[4] In May 1984, E, then aged 15, visited Mr Mokalei's house to care for her one year-old niece while her sister was in the maternity hospital. One night she was awakened by Mr Mokalei. He was naked, and rubbed his erect penis against her. He asked her if she knew what sex was. She told him to go away. He did so. Mr Mokalei was charged with three counts of indecent assault in relation to E.

[5] The second complainant, L, was a family friend of Mr Mokalei's partner. L went to live with the couple between May and November 1983, after Mr Mokalei's partner had just had her first child. L was then aged between 13 and 14 years. While she lived with the couple she slept in the spare room. One night she awoke to find Mr Mokalei leaning over her. He placed his hand inside her panties and moved it up and down on her vagina. When she realised what was happening she immediately rolled away. Mr Mokalei then left the room. He was charged with one count of indecent assault in relation to L.

[6] The third complainant, B, was also a family friend. The offending in relation to her took place on Boxing Day 1983 in a motor camp in Wanganui. Mr Mokalei and his partner's family were holidaying there with a number of friends and

relatives. That evening B, who was 13 years old, went to sleep in a bunk of a cabin at the motor camp. She woke up to find Mr Mokalei holding her wrists tightly with one hand and pulling up her nightie with the other. He placed his hand between her legs and rubbed the top of her vagina. He then pulled her panties to one side and digitally penetrated her. After some time Mr Mokalei desisted and returned to his own bunk. Mr Mokalei was charged with two counts of indecent assault in relation to B.

[7] Mr Mokalei belatedly pleaded guilty to all counts on the day of the trial. Despite this plea, he continued to insist that he had not committed the offences and that the complainants were lying. He explained his guilty plea by expressing doubts that he would have been believed at trial. He also claimed that he was influenced by an offer made by the Police to drop less serious charges if he pleaded guilty. Consequently, the sentencing judge was not able to give Mr Mokalei any credit for being remorseful. He sentenced Mr Mokalei to three years imprisonment on all six charges, the sentences to be concurrent.

The submissions

[8] Mr Nisbet, counsel for Mr Mokalei, relied on the historical character of the offending and the marked changes that have occurred in Mr Mokalei's life. He pointed out that, since ending the relationship during which the offending occurred in 1992, Mr Mokalei has turned his life around. In a letter to this Court, dated 20 August 2000, Mr Mokalei characterised this relationship as emotionally and physically abusive. He said it had affected his self esteem. It is clear that it was a tempestuous relationship marked by severe alcohol abuse. Mr Nisbet submitted that in contrast, until being imprisoned, Mr Mokalei was in a healthy new relationship, in regular work as a car groomer, attending church regularly and taking responsibility not only for his own child but also for his new partner's children. In testimony of this change, a number of positive references of Mr Mokalei's character were produced to the High Court.

[9] We note that in his letter to the Court Mr Mokalei now acknowledges responsibility for his offending and expresses remorse for the hurt he has caused to the complainants. He states:

> I am truly very sorry and shameful of what I did and done in my past to these girls, and I am truly very very sorry in the bottom of my heart. For their sake and for my sake, and…my greatest apologies and I feel deeply remorse…

Mr Nisbet submitted that Mr Mokalei's earlier difficulty in accepting responsibility was due to his acute shame and reluctance to being exposed to the judgment of his peers.

Discussion

[10] The main point advanced by Mr Nisbet, and reiterated by him in oral argument with admirable skill, was that the sentencing Judge had failed to give sufficient weight to the fact Mr Mokalei has dramatically changed his way of living since he ended his earlier relationship. We consider, however, that the sentencing Judge was fully alert to this change in Mr Mokalei's approach and the fact he has turned his life around. He had to have regard, as do we, to the fact that Mr Mokalei has continued to be convicted of various offences up until 1997/1998. We are not prepared to accept that the fact Mr Mokalei may be able to claim that he has mended his ways warrants this Court intervening. In our view, the main mitigating factor, as recognised by the sentencing Judge, remains Mr Mokalei's plea of guilty.

[11] In a persuasive submission, Ms Jelas, for the Crown, endorsed the view that Mr Mokalei's guilty plea is the principal mitigating factor. She submitted, however, that the plea must be considered in the context of a number of aggravating factors, including the number of complainants and their young age, the breach of trust involved, the period of the offending and the effect it has had on the complainants' lives. We at once pause to note that we have read the victim impact statements and agree that in this case, as in many others, the effects of the sexual abuse have proven to be lasting and destructive.

[12] We are indebted to Ms Jelas for drawing the Court's attention to the case of *R v K*, 6 August 1992, CA 166/92. In that case, decided in 1992, this Court reduced

a three year sentence in respect of three counts of indecent assault to two years imprisonment. The case illustrates the much repeated difficulty of comparing one case with another when the facts and circumstances will inevitably differ. Certainly, in *R v K* the offending was historical. It involved a single complainant to whom the offender was in the role of a "father-figure". On three occasions when the complainant was aged between 13 and 14 years the offender fondled her breasts, and during the last occasion he digitally penetrated her vagina. In a brief judgment, the Court noted that the offender was a "responsible and valued" member of the community and, the offending apart, a "responsible and caring" parent. The Court concluded that, in all the circumstances, three years imprisonment was a manifestly excessive sentence and reduced it to two years.

[13] But one swallow does not make a summer, and we would suggest that, while responsibly made, it was not necessary for Ms Jelas to seek to reconcile the present sentence with that imposed in *R v K* in 1992. This led her to submit that, while the sentence imposed on Mr Mokalei was on the high side, it is still in line with *R v K*.

[14] With respect, we do not consider the sentence in this case to be on the high side. *R v K* was decided on its facts. Unlike that case, there are three complainants in the present case and the offending is more serious. Moreover, the appellant in *R v K* was significantly older than Mr Mokalei with a different background, including, it would seem, extensive community service. Other differences might well emerge if this Court were to obtain a closer knowledge of the facts of that case. It would look for some exceptional factor which led the Court in a case in which the appellant did not have the advantage of a plea of guilty, and where one of the offences would today be classified as "sexual violation" attracting a maximum sentence of 20 years imprisonment, to reduce an apparently moderate sentence of three years imprisonment to two years.

Conclusion

[15] It is well-established that, because of the diverse variety of factual situations which arise, there is a wide sentencing range in historical cases of indecent assault. That range, we believe, was correctly identified by the sentencing Judge as being in

the range of 12 months to five years. The offending in this case cannot be placed at the lower end of that range.

[16] In our view, therefore, in the circumstances of this case three years imprisonment was an appropriate sentence. Three particular factors may be mentioned. First, we would refer to the nature of the guilty plea. It was made on the day of trial and was accompanied by an "adamant" assertion of total innocence from which Mr Mokalei did not resile until after he had been sentenced. His present remorse is a matter for the District Prisons Board, not this Court. Because of his late plea Mr Mokalei did not spare the complainants the trauma of waiting for trial. He continued to insist they were lying. We do not consider that, in these circumstances, the plea can carry much mitigating weight. Secondly, we are influenced by the serious nature of the offending. We disagree with Mr Nisbet's description of the offending as "one-off". Mr Mokalei was in a position of trust and he abused three separate young complainants over a prolonged period. His actions were totally unacceptable in a caring community. Thirdly, we have regard to the victim impact statements. The lives of all three victims were irreparably damaged. Two of the victim impact statements, in particular, make sad and tragic reading. Mr Mokalei must accept responsibility for the enduring harm which he has caused. The offending may be "historical" to him; its impact is not historical to his victims.

[17] For these reasons the sentence of three years' imprisonment will stand. The appeal is dismissed.

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