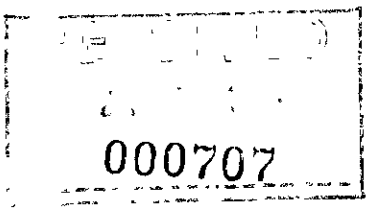
IN THE COURT OF APPEAL OF NEW ZEALAND CA 245/95



THE QUEEN

v

IAN MEREDITH-BLYDE

Coram Hardie Boys J
McKay J
Penlington J

Hearing 19 July 1995

Counsel I M Antunovic for Appellant
R B Squire QC for Crown

Judgment 19 July 1995

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J

This appeal was initially against both conviction and sentence but has proceeded as an appeal against sentence only. A formal notice of abandonment of the appeal against conviction has been filed and that appeal is therefore deemed to have been dismissed.

The appellant was found guilty by a jury in the Wellington District Court on two counts of indecent assault. The complainants are sisters. The count in respect of the elder of them was a representative count covering the period from 1 February 1994 to 6 August 1994. During that time the child turned 10. The allegation on

which sentencing was based was that on a number of occasions, ten at the most, perhaps fewer, the appellant placed her hand on the outside of his clothing over his penis with sufficient pressure for her to feel the penis. The child's evidence went somewhat further, for she said that he also put her hand down inside his trousers although on top of his underpants. But there is some difficulty with that evidence, and we gather from what the Judge said on sentencing that it was only to the other incidents that he had regard. The count in respect of the younger child referred to a single incident, similar to those first mentioned, said to have occurred between 1 June 1994 and 6 August 1994 when she was 8 years old. The sentence on each charge, expressly designed to bring into play the parole eligibility under s 89(3) of the Criminal Justice Act 1985 was 53 weeks imprisonment. An application for permanent name suppression was refused. That refusal is also the subject of this appeal

In this case, as not infrequently happens, the sentencing Judge had before him a man who continued to protest his innocence, and whose family, friends and associates firmly believe in his innocence. The jury heard the evidence of the two girls, and of the circumstances in which their complaint came to light. They heard the evidence of the appellant and of many people testifying to his character. They concluded that the charges - we should say two of them, for there was a third on which they were unable to agree - had been proved beyond reasonable doubt. Thus they largely accepted the evidence of the two girls. Human judgment is not infallible. Jury verdicts represent the unanimous judgment of 12 ordinary people but still cannot claim infallibility. Yet no more acceptable means of arriving at the truth is available to us. Hence the law requires a sentencing Judge to deal with a case on the basis that the verdict is right And this Court on appeal must do the same.

The appellant, his wife and their two young sons live across the road from the complainants' family. The families were friends and the complainants spent much

time in the appellant's home. They would frequently stay the night. The appellant was usually back from work earlier than his wife, or would stay at home while his wife went out in the evening. The four children would often sit with him watching television. It was mainly while they were doing that and one of the girls was sitting next to him, and holding his hand, as often they did in an innocently affectionate way, that the offences were said to have occurred.

We accept that they were not serious offences of their kind. The appellant did not indecently touch the body of either girl. There was no skin to skin contact. There were no lewd or suggestive comments, no extraction of promises not to tell or threats in the event that the girls did so. There was no attempt at masturbation. Indeed the evidence is that the appellant was not physically aroused. It may be added that the appellant did not take advantage of the many other opportunities he had, had he chosen to do so. As the Judge observed:

> The reason for your offending remains unexplained. It is not patently a motive of sexual gratification; possibly you have suffered from an abnormal psycho-sexual response when in the relaxed and intimate company of young children. It is not within the ability of the Court to speculate.

The Judge noted that the girls did not appreciate the significance of what happened. They told their mother about it only after the younger child had participated in a "keeping ourselves safe" programme at her school and had been set some homework tasks in connection with it.

As must almost always be the case, the effects on the children of the offending itself are compounded by and intermingled with the effects of disclosure, interview and giving evidence at trial. There were comprehensive victim impact reports prepared by a police constable in the Child Abuse Unit with the assistance of the children's counsellor and parents. Understandably the reports did not attempt to

disentangle the effects of the incidents from the effects of the trial. Suffice it to say that the counsellor is reported to believe that both children are clearly affected by the offences and will require further counselling now and as they mature Obviously this kind of experience has on any child long term effects of the nature described in the statements. However it must be added that the Judge very fairly had regard to the opinion of the psychologist who gave evidence at the trial that the children did not lack confidence or suffer from any emotional disorder, and that their emotional development had not been noticeably affected.

The appellant is 37 years of age. He is described in the pre-sentence report in this way:

> Ian Meredith-Blyde is a hard working resourceful man who has always enjoyed a good reputation among his family members and friends. He continues to have the support of his wife, wider family and friends. He is considered to be a good father and provider.
>
> All my inquiries have drawn only positive responses with regard to Ian Meredith-Blyde. The overall impression I have been given is that of a dedicated family man hard working and of hitherto excellent reputation.

This assessment is born out by the character witnesses at trial and by an impressive number of additional references and letters of support from family, friends and business associates, all of whom express profound disbelief that the appellant could have committed these offences. He is obviously an exceptionally conscientious caring family man, who has a good rapport with children. He has not previously offended. Offending of the kind found to have occurred here appears quite out of character. Yet, as the Judge observed, one must be very concerned that apparently it took place; and without obvious reasons.

The Judge had regard to all these matters but did not consider that they justified a departure from what he described as the usual outcome in cases of this kind

where there is repetitive offending and abuse of a position of trust. He thought the starting point for the general gravity of the offending would be about 18 months imprisonment, but reduced it because of the appellant's otherwise exemplary character.

The Judge's reference to usual outcome may well have been a reference to this Court's decision in *R v Frost* (CA 242/89, 27 October 1989) where it was said that the ordinary principle is that unless exceptional circumstances exist a sentence of imprisonment should be imposed in respect of sexual offending against children, particularly where a serious breach of trust is involved. That was a Solicitor-General appeal in a case not significantly dissimilar from the present. The Court accepted a sentence of 12 months to be the minimum while a substantially higher sentence could have been justified. A sentence of 12 months was also upheld in *R v Moran* (CA 105/90, 19 July 1990) where the assaults were somewhat more serious but there were only three of them and only one victim. The judgment endorsed the comments made in *Frost*, already mentioned.

While Mr Antunovic quite rightly pointed out that in this difficult area where there can be such factual variations there is no inflexible sentencing regime, it is highly desirable that there be a degree of consistency between broadly comparable cases. Having regard to that desirability, we are unable to say that the sentence imposed in this case was manifestly excessive. As we have said, the offences were by no means the most serious of their kind, but three aggravating features stand out. One is that two children were involved. Another is that several offences were committed against the older girl over a six month period. And the third is that this really was a serious breach of trust, for it seems that the appellant's was virtually a second home to these girls.

Having determined that imprisonment is appropriate, we must address the submission that the sentence should be suspended under s 21A of the Criminal Justice Act. We do not accept Mr Squire's argument that the existence of a settled sentencing principle prevents suspension. This Court's decision in *R v Petersen* [1994] 2 NZLR 533 is authority to the contrary. In the present case, the Judge considered the possibility of suspension but rejected it because of the aggravating factors he had already identified. Had he suspended it, we doubt that this Court would have interfered; but he did not do so. We are not persuaded that we should take a different view. The Judge had presided over the trial, and had all the relevant information before him. His sentencing remarks show that he gave the case the most careful thought. We are not satisfied that he was wrong.

In reaching this conclusion we have not overlooked Mr Antunovic's submission as to the desirability of enabling the family to move from the neighbourhood as quickly as possible. The evidence at trial shows that the girls' complaints have brought about an emotional and abusive reaction from their parents and we were told from the Bar that a further incident is alleged to have occurred since sentencing. Whatever may be the reaction to what the appellant has been found to have done, it is plain that his wife and children carry no responsibility at all; indeed they are victims too. It is reprehensible in the extreme that they should be the target of retribution, if that is indeed what has happened. Moreover any kind of over-reaction can only be to the detriment of the girls themselves. Any repetition of what is alleged to have occurred will we have no doubt be suitably dealt with by the police.

We appreciate that if the appellant were released from custody at once he would be able to soon complete the necessary building work so that his present house may be sold and the family could move to another they own some distance away. That they should do so is in the interests of both families. But we do not think that is

a consideration that can properly influence the appropriate sentence for the offences which of course brought about this very situation.

Mr Antunovic emphasised that the application for name suppression is brought for the sake of the appellant's two sons. It is unfortunately the fact that the penalty for offending impacts on the offender's family perhaps as much as, sometimes more than, on him or her. And name publication is part of the penalty. That the discretion to order name suppression is to be exercised with caution was emphasised by this Court in the recent case of *R v Liddell* [1995] 1 NZLR 538. The starting point in considering an application for suppression is the importance of openness in the conduct of judicial proceedings. The sentencing Judge considered the competing interests in this case and in the exercise of his discretion declined to prohibit publication. We do not think he erred in the exercise of that discretion.

Mr Antunovic has most ably presented the appellant's case but for the reasons given we are satisfied that the appeal against sentence cannot succeed. It is therefore dismissed, as is the appeal against the refusal to prohibit publication of the appellant's name.

Solicitors

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