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IN THE COURT OF APPEAL OF NEW ZEALAND C.A.150/94

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

THE QUEEN

v

ALAN ROBERT DECKE

Coram: Eichelbaum CJ
Gault J
Holland J

Hearing: 8 August 1994 at Auckland

Counsel: M J Levett for Appellant
M A Woolford for Crown

Judgment: 9 August 1994

JUDGMENT OF THE COURT DELIVERED BY GAULT J

The appellant was convicted after trial in the District Court at Whangarei on five charges of indecent assault on two complainants. He was acquitted on a further charge of rape of one of them. He was sentenced to imprisonment for two years nine months for the four offences against the first complainant and to a cumulative term of one year on the offence against the second complainant. He appeals against both conviction and sentence.

The first complainant was his stepdaughter who gave evidence of continuing sexual abuse over a period of about three and a half years. She described specific incidents corresponding to the charges which may be seen as representative of the whole course of conduct. This began in early 1980 when the complainant was about 12 years old. When she was accompanying the appellant, to whom she was

very close, in his van he pulled off the road, explained to her the facts of life and then had her lie on the seat while he lay on top of her and rubbed his erect penis against her. Both were fully clothed though he fondled her breasts under her jumper. There were other instances described of intimate cuddling and kissing, of touching the complainant's breasts and vagina and having her touch his penis. The incidents were with clothes on though she also described his entering the shower when she was in there.

The second complainant was a friend of the first and aged 11 at the time of the matter of which she complained. She gave evidence of one incident in 1980 or 1981 when she said she was on a large bed with her friend and with the appellant between them. She said the appellant played with her private parts and when he inserted his finger in her vagina she ran out of the room. The first complainant had not given evidence of this incident. The second complainant was not able to recall the incident described by the first complainant and giving rise to the rape charge although she was said to have been there. So neither gave evidence corroborating that of the other.

The appellant gave evidence and denied all indecencies. He sought to explain the stepdaughter's complaint as motivated by disapproval of his intended remarriage soon after his wife's death. She rejected that when put to her and claims to have sought counselling assistance before she had any indication of the likely remarriage.

The first ground of appeal against conviction was that s 12C of the Evidence Act 1908 applied and the Judge should have considered whether to instruct the jury in terms of that section.

The section does not make such a direction mandatory. It merely requires the trial Judge to consider whether it would be appropriate to give the direction. To succeed on appeal it would be necessary to show more than that the jury were not instructed in accordance with the section. It must be shown that the failure so to instruct the jury gave rise to a miscarriage of justice or that such a direction was necessary to ensure a fair trial.

In this case the real issue presented to the jury in respect of the allegations of the first complainant was whether they should accept her evidence. The defence case was that the evidence of the appellant denying the offending should be preferred. As part of that the jury was pressed to reject the complainant's evidence as unreliable, being motivated by the collateral purpose. After hearing the evidence the jury could have been in no doubt that this was what the defence contended. That is obvious from the Judge's summing-up. When summarising the matters addressed by Crown counsel he mentioned the question posed for the jury as:

> He spoke of the motive, that suggested to you by the accused, for the concoction as he termed it, her unhappiness; was that the motive for the concoction of the evidence that has been placed before you?

In the circumstances of this case we think the point to which s 12(c) relates was clearly placed before the jury and there was no disadvantage to the appellant in the absence of specific instruction in terms of the section.

The second ground of appeal involves what is said to be inconsistency in the evidence of the two complainants. It rests on the premise that each gave evidence of events that occurred on the same occasion - that is that the incident on the bed described by the second complainant was part of the same incident described by the first complainant when she spoke of being in bed with the appellant and his alleged rape of her - on which the jury acquitted the appellant.

It was submitted that the Judge should have directed the jury that if the two complainants were referring to the same occasion their failure each to corroborate the evidence of the other should be taken into account in assessing their reliability.

We were referred to the relevant passages in the notes of evidence. They do not establish whether or not the two witnesses were describing the same occasion. However, for present purposes we proceed on the same assumption as counsel that they probably were. Even then we are not convinced that the Judge was obliged to give the direction contended for. The assessment of the complainant's evidence is for the jury. It is apparent from the summing-up that counsel for the appellant had raised the likelihood that both complainants had been referring to the same occasion. The jury would have assessed the evidence in light of that.

The third ground of appeal rested in part on the same assumption and was of inconsistent verdicts. It was submitted that the verdicts on the first four counts in respect of the first complainant are unsafe as inconsistent with the acquittal on the fifth (rape) count. It was further submitted that the verdict on count six in respect of the second complainant is unsafe as inconsistent with the acquittal on count five which arose out of the same incident.

It was argued that the acquittal on count five can have no other rational explanation than rejection of the first complainant's credibility and there is no basis for distinguishing between the evidence she gave of that incident and the evidence she gave on the others. Further, rejection of her evidence of the alleged rape, it was said, leaves the conviction on count six for indecent assault on the second complainant unsupportable because that occurred on the same occasion.

We consider the acquittal on count five can be explained consistently with the convictions on the other counts. In her evidence directed to count five the first complainant said:

> ... and shortly after that he lay on top of me and started forcing his penis into my vagina and it really really hurt and he wouldn't stop until I yelled at him and told him it was hurting so he got off me.

And shortly after that he said:

> ... he only tried to have intercourse that way once that I remember.

It may be that the jury simply gave the appellant the benefit of the doubt on that evidence and found that penetration had not been proved. Alternatively, the jury may have been prepared to accept the complainant's evidence in other respects but, in view of the appellants denials and the absence of any supporting evidence from the second complainant, were not satisfied beyond reasonable doubt as to the alleged rape. The acquittal on that count does not make the convictions on the other counts irrational and this ground of appeal must fail also. The appeal against conviction therefore is dismissed.

In his remarks on sentencing the Judge referred to ***R v B*** CA 74/89, judgment 24 November 1989, as indicating a level of sentencing in the order of three to five years. He referred to the representative nature of the indecent assault charges in respect of the first complainant, the breach of trust by the appellant and the totality of offending. He imposed sentences of two years nine months in respect of each of the four offences. He then imposed the cumulative sentence of 12 months imprisonment in respect of the offence against the second complainant. He added a recommendation that the appellant receive counselling during his imprisonment.

It was submitted that the overall sentence of three years nine months is excessive in the light of:

(a) The remorse expressed, albeit belatedly, by the Appellant.

(b) The absence of risk of reoffending. It was over a limited period many years ago and the victims are now adults.

(c) The extensive character references.

(d) The need, expressed by the victims and the Community Corrections service, for counselling and treatment.

(e) The circumstances of Count 6 which did not warrant a cumulative sentence.

As to the appellant's remorse, he does appear to have been troubled by the offending for some time but that is of limited weight because he has lacked insight into the effects of the abuse on his stepdaughter. Some realisation of this seems to have emerged after the trial. The Judge commented on sentencing as follows:

> Even at the trial [the stepdaughter] expressed her love and affection for you and as I understood her evidence was pleading with you to accept your responsibility and to accept her expression of love for her father. You chose to proceed to give evidence, to deny the allegations, putting in issue the credibility of that witness and yourself.

The evidence disclosed also that the appellant had been confronted about the abuse of his stepdaughter prior to any complaint to the police but would not accept responsibility and can be said to have brought the processes of the law upon himself.

It can be accepted that there may be no risk of re-offending against the same complainants who are now adults but there can be no assurance that in the absence of treatment, if opportunity should arise, other young children might not be at risk.

The character references supporting the appellant from members of his community are impressive. He is entitled to credit for his good character although the courts encounter all too often serious child sexual abuse by persons living otherwise blameless lives. That can be a factor in the abuse remaining unexposed for so long.

We agree that treatment is desirable and accept that it should commence at the earliest possible date consistent with the appropriate sentence for the offending. We note however that the appellant has rejected previous opportunities to seek assistance by counselling.

On appeal the principal focus must be on the overall sentence imposed. It is of less importance how the total sentence is composed. There can be no criticism of the approach adopted by the Judge of imposing a cumulative sentence in respect of the separate offending against the separate complainant. Similarly there could have been no criticism of the imposition of concurrent sentences reflecting the total offending. The issue remains whether the total sentence of three years nine months imprisonment is excessive. We are satisfied it is not. The abuse of the first complainant extended over a period of three and a half years commencing when she was twelve years old. It was frequent and persistent. Although not involving intercourse it was degrading, caused long term damage and involved a serious breach of the position of trust in which the appellant stood towards his stepdaughter. The single offence against the second complainant also was serious involving digital penetration again when the appellant was in a position of responsibility towards the child.

The sentence was within the range open to the Judge and cannot be interfered with.

The appeal against sentence also is dismissed.

Solicitors
Crown Solicitor, Auckland, for Crown