

SET 2GGH CC

IN THE COURT OF APPEAL OF NEW ZEALAND

CA 265/88

Publication of name,  
address or other  
identifying information  
of applicant suppressed  
as in the High Court

CRIME APPEAL 265/88

Coram: Cooke P  
Richardson J  
Somers J  
Bisson J  
Barker J

Hearing: 4 November 1988

Counsel: S J O'Driscoll for appellant  
D P Neazor QC and J C Pike for Crown

Judgment: 2 December 1988

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JUDGMENT OF OF THE COURT DELIVERED BY BISSON J

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This is an application for leave to appeal against a sentence of 2 years 9 months imprisonment imposed in the High Court at Dunedin on 13 September 1988 following a plea of guilty by the applicant to a charge that at Dunedin between the 1st day of April 1987 and the 21st day of December 1987 he did sexually violate (the complainant).

In the notice of application for leave to appeal the grounds for the application are that there is now available

significant research that should be put before the Court, particularly in relation to youthful sex offenders, to justify a non-custodial sentence.

Mr O'Driscoll for the applicant said at the outset of his submissions that the application was not against the length of the sentence of imprisonment imposed, but that a sentence of imprisonment was inappropriate and that the sentence which should have been imposed was either one of community care or a lengthy term of periodic detention together with a sentence of supervision. His basic submission was that in respect of young sex offenders as opposed to adult sex offenders, a non-custodial sentence should be a viable alternative to imprisonment provided the offender met a number of conditions and provided that a programme for suitable treatment were available and that the offender was considered to be suitable for such treatment.

Turning first to the facts of the offence itself. The complainant was aged 10 years when the offending commenced. The applicant was then 18 years, turning 19 last January. In July 1988 the complainant told one of her school teachers that on several occasions during 1987 she had been sexually abused by the applicant. She stated that while the applicant was baby-sitting he would follow her into the toilet where he would touch her on the vagina with his hand and would also force her to perform oral sex on him. She

said that oral sex took place on at least 25 occasions and on many occasions went to the point of ejaculation. She also alleged that the defendant would make her touch his penis and that he would also rub his penis between her legs.

The applicant, when interviewed by the Police on 8 August 1988, admitted the allegations as outlined by the complainant but disagreed with the number of times that oral sex had occurred, stating that it happened five or six times. He agreed that he had ejaculated during oral sex but said this happened outside the complainant's mouth. He agreed that he had rubbed her on the vagina and had got her to touch his penis.

The instances of five or six acts of oral sex admitted by the applicant are each acts of sexual violation over the period in the charge laid against the applicant. The Judge quite properly sentenced the applicant on the basis that there was not a single isolated incident but a repeated activity of sexual violation.

A victim impact statement was conveyed to the sentencing Judge in accordance with s.8 of the Victims of Offences Act 1987. This report was provided by a psychotherapist. A further report, an emotional harm report, was provided by a probation officer in terms of ss.22(3) and 23 of the Criminal Justice Act 1987 as introduced in the Criminal Justice Amendment (No.3) Act 1987 s.4. Under those sections

such a report may be sought by the court before imposing sentence in cases where a reparation order may be appropriate in respect of any emotional harm or any loss of or damage to property. The report in this case concluded,

"The question of financial compensation was not addressed due to the sensitive nature of the situation but should the Court wish this issue raised a further remand for a Reparation Report would be necessary."

As the question of a reparation order was not mentioned by the Judge nor raised in this Court we refer only to the Victim Impact Report which dealt with the emotional harm to the complainant in greater depth as one would expect from a psychotherapist. This report is dated 7 September 1988. It was compiled following an interview of the complainant with both her parents and an aunt. We cite the following passages from this report.

"(Her) distress is most overwhelming at night when she lies awake in bed and worries. Often several hours pass before she is able to go to sleep. During the day she is able to put it out of her mind some of the time but it can suddenly impinge when she is not expecting it...

...Both parents report marked behavioural changes in (her) at the time of the onset of the alleged abuse... Since disclosure these characteristics have not been noted and her performance at school has markedly improved...

...For months (she) felt it was her fault, a major inhibiting factor in not telling, and is still struggling with feelings of self depreciation and self doubt. She indicated this was aggravated by both the defendant and her sister who gave her clear messages that it was her fault...

...(She) became convulsed with sobs talking about her fear of the defendant... She returned to it several times during the session and at the end expressed concern that he might find her and harm her.

Fear was also a major factor in stopping (her) from telling about the alleged abuse. She said she had thought of doing so numerous times but felt she couldn't because (the defendant) would say she was telling lies and because she was fearful he might hurt her mother. It seemed she was prepared to endure the ongoing pain rather than risk the possibility of her mother being hurt...

...(She) too, is clearly enraged, but had difficulty expressing this as directly as her father...

...(Her) fear of having to talk about what happened and a major concern with people knowing, suggested really uncomfortable feelings of shame...

...The defendant and his family had initially been regarded as friends by (her family). (She) both feel(s) betrayed and really shattered at their trust being abused...

...these feelings (of low self worth) are clearly present now but are likely to be greatly ameliorated by the support her family are able to offer. Access to therapy both family and individual, may also be an important factor in enabling (her) to deal with the difficult feelings she is struggling with. It is clear from my one session with the family that they were able to use this time constructively.

It is also possible that (she) may need further therapy at critical times in her growing up, for example during adolescence and at the time of marrying.

### Conclusion

In my professional opinion I have no doubt that the alleged abuse has had a profound emotional effect on both (the complainant) and her family. Whilst it is impossible to predict how lasting these effects will be it is likely there will be an aftermath for some time, probably aggravated at specific developmental stages."

The Probation Officer in her pre-sentence report gave an account of the family background of the applicant. His father died when the applicant was five years of age and when he was seven his mother remarried a violent epileptic

with a psychiatric history who beat his wife and children. The applicant's mother also had a psychiatric history. At the age of 9 and again at 13 the applicant was sodomised. In neither case was there a prosecution or any professional help but the family twice underwent counselling for the problems of the applicant's brother and step-father. Although he worked hard, school was a struggle for the applicant but he excelled at soccer. He has represented his province twice in soccer in the under 13 and 15 teams and attended the National Interschool Tournament in Auckland in 1986 playing for his highschool.

Since leaving school he has worked hard and to his credit has savings of some \$7,600.00 and assets including television and video to a total value of approximately \$2,500.00. He was flatting from January to April this year and has had a series of girlfriends, the most recent of whom broke off the relationship in July as she is having counselling for childhood incest. After flatting he returned to reside at home with his mother and an elder and three younger sisters.

He fully acknowledged his offending to the Probation Officer saying he knew it was wrong but not that it was against the law. He concluded the offending when he became interested in a young woman his own age. Although the offending ceased in December last year it only came to light

in June this year when a vigilant school teacher overheard it being discussed by the complainant and a group of girls at school. Since then the friendly relationship between the family of the complainant and the family of the applicant as neighbours has declined and the complainant's family has moved to another address.

The report states that it is of some concern to the complainant that her mother used to invite the applicant to watch blue movies at her house. The report concludes that the applicant impressed as a sensitive young man with little assertiveness being easily dominated by his mother who does not keep good mental health. Despite sexual and physical abuse as a child and the loss of his father at an early age and finding school difficult, the applicant has worked hard, saved well and achieved distinction in his sport.

He is now co-operating with counselling and is keen to get his life back to normal. The report concludes,

"although the Court will be considering a custodial sentence, it is considered that a term of community care would ensure ongoing counselling and support to assist the applicant overcome some of the unresolved childhood traumas he has suffered and assist him develop into a more socially and psychologically competent young man. Accordingly community care is recommended."

The community care contract produced to the Court was signed by the applicant and the community care sponsor, Dr Ian Goodwin of the Department of Psychological Medicine, Dunedin Public Hospital, Dunedin. The contract reads as follows,

"Objectives of Proposed Programme To help (the defendant):

- (1) develop more self-confidence and self-understanding.
- (2) become more independent and have more control over his life, particularly in gaining greater independence from his family.
- (3) resolve his relationship with his girlfriend.

Tasks Involved in Achieving Objectives:

- (1) To attend counselling sessions with Dr Goodwin until December 1988 and thereafter with his replacement, Mr Jim Muir.
- (2) To move into a flat.
- (3) To find a job that is more satisfying and challenging.

Proposed Term of Community Care Placement

12 months.

"A report will be supplied to the Probation Service on completion or breakdown of programme."

As pointed out by the Solicitor-General, this report gives no detail of the frequency or duration of the counselling sessions. The programme is extremely vague rendering enforcement difficult.

The applicant was seen by Dr James B. Hannah, a Consultant Psychiatrist, under s.121(2a) of the Criminal Justice Act 1985 after he had been charged with sexual violation. Dr Hannah's report dated 17 August 1988 is somewhat limited in that he did not have available to him the police summary giving the nature of the sexual violation as already stated in this judgment. His report refers to an



admission by the applicant that he had "interfered" with the 11 year old complainant with his fingers saying that he did not hurt her and that she did not protest. The nature of the sexual violation was therefore much more serious than made known to Dr Hannah. He found no evidence of any mental disease or disorder but referred to the applicant having been treated for personality and sexual difficulties at the Department of Psychological Medicine in 1986. The nature of these difficulties is not stated. This report refers to the applicant having been sexually provoked and enticed by the mother of the complainant several times which may have encouraged him to believe that sexual behaviour in the complainant's home was not regulated by restraint or privacy and he may have considered this as a licence for his own immature and confused sexuality. But Dr Hannah states that he had no doubt that he knew what he was doing and knew it was wrong and in his opinion whatever sentence the Court may pass, the applicant was in need of further psychological help and felt sure he would comply with any conditions which would make this possible.

Dr Ian Goodwin, Registrar Psychological Medicine at the Dunedin Hospital, the sponsor under the community care programme, saw the applicant on five occasions since 19 August 1988. Having obtained a full life and sexual history from him, Dr Goodwin in his report dated 13 September 1988 refers to the applicant having experienced

"an extremely chaotic childhood and adolescence". He refers to the applicant and his brother both being placed in a foster home after the death of their father when their mother had one of her several episodes of psychiatric disturbance. He refers to the instances of the applicant being sexually abused and to the physical violence of his step-father for whom the applicant had absolutely no respect. The report states,

"Other than the two episodes of homosexual abuse (his) sexual history up until the time of this offence has been remarkably normal. He has been able to initiate and sustain several relationships with females of his own age and in fact if anything, becomes slightly over-involved in these relationships. He has no previous criminal history or specifically history of sexual offending. I feel that the circumstances of this offence were somewhat unusual and that (he) was having an affair with the girl's mother and in fact by his description appears to have been seduced by her. (He) does not admit to any paedophilliac tendencies or to any paedophilliac fantasies. He tells me that this offence was totally out of character and in retrospect is not able to give any reasons why he may have done it. From (his) account of his upbringing and episodes of sexual abuse that he has suffered it would seem that (he) has had little or no opportunity to learn any code of moral or sexual behaviour. In light of this grossly abnormal development and the fact that (he) has had no previous criminal history I feel that a custodial sentence would be quite detrimental in this case. The Community Care Programme as outlined is designed to give (him) some added structure to his life as well as setting some specific goals that (he) must attain. I feel confident that the probability of any recurrence of this type of offending with (him) is low."

It is to be noted that there is no reference in this report to the nature of the offending conduct in respect of which sentence must be passed.

At sentencing counsel for the Crown advised the Court that the relationship which has been referred to between the applicant and the complainant's mother has been denied. The Judge did not regard that relationship, whether it existed or not, as material so far as the offences against this 11 year old child were concerned, a child who at the time of the offences was in the care and protection of the applicant as her baby-sitter. The Judge referred to sexual offending or the reporting of it increasing so that there has been a need seen to deter persons from such conduct. He referred to the Parliament in 1985 passing s.128B of the Crimes Act which applies to offences of sexual violation obliging the courts to sentence offenders to imprisonment unless there are particular circumstances of the offence or of the offender including the nature of the conduct constituting the offence that the court is of the opinion that the offender should not be sentenced to imprisonment. The Judge referred to the particular circumstances of this offence and the nature of the conduct involved, that is the performing of oral sex, as not being unusual for such offences but did not refer to the serious nature of such acts of sexual violation.

After referring to the various reports before the Court the Judge felt constrained to sentence the applicant in accordance with the law as laid down by Parliament. He also had regard to recent decisions of this Court in such cases.

The Judge also referred to the very detailed submissions of Mr O'Driscoll who put before the Court a number of matters including some recent social research about young sexual offenders and in particular the 1985 American report from Minnesota called "The Youthful Sex Offender". The Judge considered the applicant did not exhibit any of the indicators of a high risk of further offending referred to in that report and having read that research material carefully he said,

"I regret the necessity to sentence you to imprisonment but I must. I am concerned that there may be a community type of hysteria developing about sexual offending which demands from the Courts a shutting of prison doors on young people, such as yourself, after deviant behaviour has been allowed or encouraged by the community's so-called free attitudes; particularly attitudes as to blue movies and explicit films and to a lack of any real moral or religious education.

For the reasons which I have tried to indicate more fully than normal, there is no value in my exploring in detail sentences of community care or periodic detention. I have considered the possibility of those sentences carefully. In my judgment periodic detention, with special provisions and conditions of supervision accompanying it, would have been appropriate but I must apply the combined wisdom of the law in New Zealand and clearly that indicates imprisonment. The length of the term is as short as I am able to give in line with those other authorities which I have consulted.

You are therefore sentenced to two years nine months' imprisonment."

The research material Mr O'Driscoll supplied to the Judge on sentencing was a document published by the Safer Society Press of the New York State Council of Churches. It

is entitled, "The Youthful Sex Offender: The Rationale & Goals of Early Intervention & Treatment". In a Foreward written on 1 May 1985 by Presiding Judge Allen Oleisky, Juvenile Division of the District Court of the State of Minnesota, he says,

"In sentencing juvenile sex offenders, the primary issue is community safety. The secondary issue is to decide treatment and punishment issues. Pure punishment without treatment is a real mistake. In prison, sex offenders are the lowest of the social scale. If treatment happens to be available, it is usually optional. Since there is a great deal of victimization of prisoners by other prisoners, I can see sex offenders coming back to society a lot harder and a lot more bitter.

We have also learned that most of the offenders were themselves victims of sexual abuse and that their patterns are similar to those of alcoholics. Unless there is some treatment, they are going to go back to the behavior as they would with any addiction, and they are likely to recidivate. Thus, the earlier the treatment the better."

This statement expresses the same concerns of New Zealand judges on sentencing juvenile sexual offenders, namely, the primary issue of community safety and the sentencing principles of punishment for wrongdoing and reformation in the interests not only of the wrongdoer but also of the public. In some cases punishment will teach the offender a lesson and the offending behaviour stops but in most cases treatment or counselling are necessary as well. Treatment and counselling can be combined with punishment whether of a custodial or non-custodial nature and (except as later

mentioned) can be continued as a condition of parole. The Introduction to this publication submits that the optimum judicial response to the youthful sex offender's behaviour is:

- "1) To pay attention to the behavior and demand accountability from the young person
- 2) To provide specialized sex-offender assessment, evaluation, and treatment in order to interrupt the behavior therapeutically as early as possible
- 3) To select the proper placement from a range of treatment settings, including community-based nonresidential through secure residential, followed by post treatment services."

The publication then includes guidelines for determining whether the young person's behaviour is "normal" or an indication of a pattern of sexually aggressive behaviour, criteria for assessing risk, an overview of the goals and methods of treatment for these behaviours, and 10 recommendations for comprehensive state planning to control sexual assaults by youth.

The Judge on sentencing the applicant in this case said,

"I have read all that research carefully but I am not able to say on the basis of that one report from Minnesota that there is significant social research that should alter the pattern provided. It may well be that that report and others like it should be placed before our Court of Appeal at the appropriate time."

Mr O'Driscoll has taken this opportunity to place before this Court a considerable amount of other similar material.

In some instances only extracts from reports or abbreviated computer printouts have been supplied. Mr O'Driscoll in his written submissions drew heavily on this material in support of his principal submission that youthful sex offenders should be treated on sentencing differently from adult sex offenders. But Mr O'Driscoll did not submit that all youthful sex offenders should not receive a custodial sentence. He accepted that the protection of the community must be of paramount importance when sentencing any sex offender and that any offender, including a youthful sex offender, who commits either a particularly serious sexual offence or who has previous convictions for sexual offending should be sentenced to a full custodial sentence in accordance with normal sentencing policy. If Mr O'Driscoll is suggesting that five or six acts of oral intercourse in the course of other sexual abuse by the offender of this child is not particularly serious, we are bound to differ.

He concluded his submissions that where youthful sex offenders meet a number of criteria a non-custodial sentence should be considered a viable alternative to a term of imprisonment. These criteria can include,

- "(a) the offender is before the Court on a sexual offence for the first time
- (b) the offender has been assessed as being at 'low risk' of re-offending
- (c) the offence is not a particularly grave or serious offence

- (d) the offender is willing to undergo treatment
- (e) a suitable programme or appropriate treatment is available to the offender."

The rationale for early therapeutic intervention in juvenile and adolescent sexually aggressive behaviour is stated in "The Youthful Sex Offender" as follows,

"1) deviant patterns are less deeply ingrained and are therefore easier to disrupt; 2) youth are still experimenting with a variety of patterns of sexual satisfaction which offer alternatives to consistent deviant patterns; 3) distorted thinking patterns are less deeply entrenched and can be redirected; 4) youth are good candidates for learning new and acceptable social skills; 5) public safety is improved by preventing further victimization; and 6) fiscal economy is enhanced."

The basis for the concern expressed in these reports of research into juvenile sex offences is that there is some evidence of progression from non-violent sex crimes during adolescence to more serious sexual assaults as adults. It is therefore important that there be an assessment of the offender by qualified experts to establish the risk to the safety of the community if the youth is to be treated in a non-residential programme. An individualized assessment and treatment plan is required.

We have read all the material submitted by Mr O'Driscoll but refrain from extensive quotations. The research writers have a common theme, which can readily be accepted, that adolescents who engage in deviant or aggressive sexual



behaviour need treatment in an endeavour to prevent them developing repetitive or additional deviant sexual-interest patterns. Without treatment there is an increased risk for sexually abusive behaviours to escalate in number and seriousness as the offender reaches adulthood. Early intervention may help the adolescent learn to control his deviant sexual behaviour. Incarceration alone is seen as not only unproductive but as increasing the sex offender's pathology. On the other hand it is not contended that treatment programmes will end the problem for the sex offender but it is contended that those who go through the programmes will be less of a threat to the public than when they came into the system. In his book, "The Adolescent Molester" (1987) W. Breer writes in his Preface,

"Most professionals despair of successfully treating the adult sex offender. Prognosis is poor, the work long, slow, and arduous. All of us working in the field hope that by beginning treatment in adolescence it will be more effective. As yet this is largely an act of faith. It is such an act because serious disciplined treatment of the adolescent sex offender is so new that no meaningful follow up studies of treatment are yet available. We just don't know if what we are doing is going to work.

What we do know is that the number of referrals is growing at an astounding pace. Probation officers, judges, and family agencies are all urging, if not demanding, the treatment of the young offender. As little as three years ago such cases were often simply brushed under the rug. They were dismissed as 'adolescent experimentation' and settled out of court if they came to the attention of law enforcement at all. Now such cases are routinely referred for treatment."

Since the hearing of this application the Report of the Advisory Committee on the Investigation, Detection and

Prosecution of Offences Against Children, dated October 1988, has been released to the public. This Report (the chairman was Dr D C Geddis) which is mainly concerned with the interests of the children who are victims of sexual abuse, reproduces in Appendix One five Papers prepared by the National Advisory Committee on the Prevention of Child Abuse (October 1986). Paper III deals with the assessment of and therapy for the offender including acolescent offenders. As with the material provided by Mr O'Driscoll this Paper stresses the need for therapy for the offender and in the case of adolescent offenders, as with adults, it considers therapy should be court-ordered, not voluntary. A detailed psychiatric/psychological evaluation of the offender has particular relevance to sentencing, guidelines for which are contained in para. 4.0 of Paper V. We set out the following extracts,

- "4.1 serious cases of sexual abuse of children should result in imprisonment in the general range of six months to two years. Such cases might include re-offending, offences where violence has been involved, where there has been intimidation or coercion in the commission of the offence or in maintaining the secret or in the course of investigation and/or prosecution.
- 4.2 Punishment and custodial sentences alone are not always effective in preventing re-occurrence of sexual abuse. For this reason, every support needs to be given to enable suitable prisoners to participate in family orientated therapeutic programmes when these are available in the community. For those who are not suitable, counselling (including individual and group counselling) and behavioural methods of treatment should be offered within the justice institution. (See also: Paper III - 11.0.) For persistent

re-offenders, it may be necessary to consider physical methods of treatment.

- 4.3 A sentence of community care with conditions as to counselling and treatment or a sentence of periodic detention, followed by a period of supervision up to two years and conditions as to treatment might be an appropriate option if there is a suitable treatment programme available, adequate supervision and appropriate motivation on the part of the abuser and his family."

It is normal practice in New Zealand for Judges to consider a psychiatric or psychological report in respect of a sex offender so that the risk of re-offending and the need for treatment or counselling is made known. Judges also consider a pre-sentence report from a probation officer which includes information on the personal history and characteristics of the offender and advise whether in the opinion of the probation officer the offender is likely to respond satisfactorily to a non-custodial sentence. The Criminal Justice Act makes provision for these reports and other types of report where appropriate to be called for by the court and the court may from time to time adjourn the sentencing for the purpose of enabling enquiries to be made or of determining the most suitable method of dealing with the case (s.14). When the court is fully apprised of the circumstances of the offence and the offender and the condition of the complainant the court must then impose a sentence within the parameters prescribed by statute having regard to sentencing principles and the facilities available for treatment or counselling of the offender if appropriate.

The Solicitor-General was able to supply to this Court information given to him by the Director of Psychological Services in the Department of Justice. This information revealed that there are 33 psychologists under the control of the Director in the Forensic Psychological Services throughout New Zealand and in addition the sum of \$400,000 was available in the annual budget to employ psychologists from the private sector on contract. Currently 30 psychologists are so engaged. There are also two full-time psychiatrists in Auckland who see sexual cases and part-time psychiatrists elsewhere who may deal with such cases. Psychological services have been offered in New Zealand since 1955 and as well as psychologists there are social work counsellors and education officers who may be engaged in dealing with sexual offenders. All prisons except Ohura can offer psychological treatment and counselling programmes for sex offenders.

The Solicitor-General advised the Court that a 60 bed self contained sex offenders wing at Rolleston Prison will be commissioned in mid-1989. This unit will employ an additional four full-time psychologists and will have a fully equipped therapeutic block. He said that there is no waiting list of those seeking psychological services either in or outside custody and treatment that is begun in custody may be continued if necessary on the release of the offender. Treatment is based on a case-load approach and

involves a wide range of procedures together with psychological measuring equipment and includes active methods to modify thought patterns, anger management and sex response measurement and modification.

Regarding the articles supplied by Mr O'Driscoll from various journals and reports mainly published in North America, the Solicitor-General has made the broad submission that this material now placed before the Court does not provide on its own a sound basis for changing this Court's approach in the sentencing of sex offenders. In support of this submission the Crown questions whether the overseas material placed before the Court can be translated into New Zealand circumstances in the absence of any results being available from the application of those works into the New Zealand legal and social setting. Furthermore, whether the material is relevant to the case of an offender of 18 years of age and where the sexual misconduct is grave in itself and aggravated by having occurred in a situation of authority and trust, is to be considered.

In R v B (1986) 2 CRNZ 528 this Court had occasion to rule on the approach to sentencing in cases concerning the sexual abuse of children, in particular within families, there having been a considerable number of such complaints partly prompted by the showing on television of a production "Amelia" about incest. As in the case now before this Court

the Judge on sentencing had before him reports from a psychiatrist and the probation officer which favoured a merciful course. On increasing an effective sentence of 18 months imprisonment to three years on an appeal by the Solicitor-General this Court said,

"Yet uppermost in the approach must be recognition that, in the expression adopted by counsel for the Solicitor-General in his argument in this Court, this kind of conduct can be said to rob children of their childhood. Moreover its long-term effects on the victims are incalculable.

Failing significant social research offering a different solution, or some radical change in accepted standards in the community, or a new legislative policy, the courts would not be justified in any general lowering of sentencing levels. Section 128B of the Crimes Act 1961, inserted by the Crimes Amendment Act (No.3) 1985 and making imprisonment the normal mandatory penalty for sexual violation, was not in force at the time of the present offences or of sentencing; but it certainly points against any relaxation of sentencing policy in this field."

Section 128B which came into force on 1 February 1986 and applies in this case is as follows,

"128B. Penalty for sexual violation - (1) Every one who commits sexual violation is liable to imprisonment for a term not exceeding 14 years.

(2) Every one who is convicted of sexual violation shall be sentenced to imprisonment unless, having regard to the particular circumstances of the offence or of the offender, including the nature of the conduct constituting the offence, the Court is of the opinion that the offender should not be so sentenced."

Sexual violation is defined in s.128 as,

"(a) The act of a male who rapes a female; or

- (b) The act of a person having unlawful sexual connection with another person."

Rape is defined in s.128(2) and unlawful sexual connection is defined in s.128(3) and sexual connection is defined in ss.(5) as meaning,

- "(a) Connection occasioned by the penetration of the vagina or the anus of any person by -
  - (i) Any part of the body of any other person; or
  - (ii) Any object held or manipulated by any other person, -
 otherwise than for bona fide medical purposes:
- (b) Connection between the mouth or tongue of any person and any part of the genitalia of any other person:
- (c) The continuation of sexual connection as described in either paragraph (a) or (b) of this subsection."

Under s.128 sexual violation may be committed in many different ways and vary greatly from a serious rape to an indecent assault of a comparatively minor nature. But in all cases there is an act of violation to the body of another involving at the very least an invasion of privacy and loss of personal dignity. While Parliament by enacting s.128B(2) legislated in 1985 for sterner penalties for offences of sexual violation and in 1987 removed eligibility for parole for offenders convicted of sexual violation and sentenced to more than two years imprisonment, and reflected public opinion by requiring in general the imposition of a

sentence of imprisonment in denunciation of the crime, for the protection of the community, and as a deterrent in the public interest, it has also recognised that there may be circumstances in which the offender should not be so sentenced. To illustrate the application of s.128B(2) in this Court we refer to the following two cases. In R v Ngawhika (1987) 1 CRNZ 433 this Court said that circumstances vary so widely that it would be dangerous to try to force sentencing in all sexual violation cases into one pattern or tariff. In that case on the application of the Solicitor-General a sentence of three years imprisonment was increased to five years in respect of three crimes of sexual violation by acts of sodomy by a 38 year old man with a 15 year old boy. In contrast this Court in R v Adams (CA 132/87 Judgment 8/7/87) quashed a sentence of 18 months imprisonment and imposed a sentence of community care for 12 months in respect of an act of sexual violation against a girl of 12 years by the insertion of a finger in the girl's vagina. This was considered to be, because of the less serious nature of conduct and the particular circumstances of the offender, "one of the rare cases of offending of this nature against young children where effect can be given to the proviso in sub-section (2)" of s.128B.

Accepting that imprisonment is the normal mandatory penalty for sexual violation, there is still ample scope within the prescribed maximum sentence of 14 years



five years his sexual history was "remarkably normal". He has no psychiatric condition which needs treatment. He has worked and saved and been successful in sport. These are factors to be taken into account in his favour and some allowance should be made for his age and the likely influence upon him of blue movies which the complainant confirmed her mother used to invite the applicant to watch at her home. We regard this last factor as quite an important and unusual feature of the case; but it could not rightly be given dominant weight. Furthermore, he had discontinued his offending prior to the offences being made known and has by his plea of guilty saved the complainant further distress. However, we do not consider that these particular circumstances of the offender, which are certainly relevant to the length of any term of imprisonment imposed, outweigh those features of the case which warrant the imposition of imprisonment in keeping with the policy of the legislation for offences of sexual violation. None of the reasons referred to in R v B (supra) have emerged in this case to justify any general lowering of sentencing levels. There is ample scope within the terms of s.128(2)(B) to deal with each case on its own merits without any judge feeling bound by any particular tariff, but at the same time maintaining in comparable cases a reasonable level of parity and having regard where appropriate for the provision of psychiatric treatment or psychological counselling.

There remains the question of counselling for the applicant as recommended by Dr Hannah and Dr Goodwin, the importance of which for the juvenile sex offender is stressed in the overseas and New Zealand research and reports to which we have referred. In his Introduction to the "English Sentencing System" (2nd Edn) Sir Rupert Cross writes at p.1,

"It is essential to realise that there are sentencing problems which will probably never be solved by research, that in the case of others the research will be very long term, and that there are matters with regard to which it is difficult even to see how a satisfactory beginning to research can be made."

Nevertheless, the significant research and enquiry into problems of child sexual abuse and the sexual offender are helpful and reinforce the existing practice of judges in New Zealand to avail themselves of psychiatric and psychological reports prior to sentencing. Provision for treatment and counselling is commonly included in the sentence of the Court. This is in keeping with the demonstrated need for treatment and counselling of many offenders, not just sexual offenders, which the Department of Justice has already recognised in its Forensic Psychological Services and which are being extended.

No order or recommendation was made in this case for counselling of the applicant either while in custody or on release. There is a problem in the latter regard. An

offender is not eligible to be released on parole in respect of any sentence of imprisonment for a term of more than two years imposed for the offence of sexual violation (s.93(2A)). As the applicant has been sentenced to imprisonment for over two years he is not eligible for parole and the Court is therefore unable to apply s.77A by imposing a special condition that the applicant receive psychological counselling if released on parole. The Court is unable to impose special conditions on an offender after release on remission of sentence; that is a matter for the Secretary for Justice to determine for a period not exceeding six months under s.107(1)(b).

In conclusion we emphasise these points. Child abuse is a social evil which has been recently discovered to be much more widespread than used to be thought. It is a major problem in many countries. New Zealand is far from alone in having the problem and not having the answer to it. Its causes are beyond the control of the Courts but we must do what we can to tackle the problem as best our sentencing powers allow. Probably sentencing patterns will gradually change as psychiatric and social research and government resources make more options available. Public opinion at any given time is also a factor which the courts must bear in mind.

At the present stage we have to say that in cases of serious child abuse by a young offender, youth alone does

not automatically justify leniency. We cannot overlook that to impose anything less than a substantial term of imprisonment could be misinterpreted. It could look like a licence to indulge in this sort of conduct without fear of really serious punishment. We note the sentencing Judge's comments about what he called community hysteria, but it is the responsibility of this Court to try to balance all the competing considerations.

We think that there are cases where, although the youthful offender knew what he did was wrong, he did not really understand its full gravity. This is probably one. Also the case has some special features, particularly the conduct of the girl's mother, and the fact that if the offender has paedophiliac tendencies there seems to be good reason to think they may be curable. For these reasons we have attempted to solve the balancing problem in this particular case by a combination of a prison term, substantial but not too long to be crushing, and counselling after that. To a degree every case turns on its own facts, but sentencing Judges may find some help in what we have said in using their discretion in other cases. There is justification in this case for the sentence of imprisonment to be reduced to two years so that an order can be made under s.77A for the applicant to receive counselling if released on parole. Accordingly, we grant leave to appeal, allow the appeal and quash the sentence of two years nine months imprisonment. In lieu,

1. the applicant is sentenced to two years imprisonment;
2. it is recommended that the applicant receive while serving his sentence such counselling as may be thought beneficial by the Psychological Services of the Department of Justice;
3. if the applicant is released on parole in respect of the sentence now imposed by this Court, it is ordered pursuant to s.77A of the Criminal Justice Act 1985 that he shall be subject for the period of his parole to the special condition that he shall undergo a programme of psychological counselling on such terms as are specified by the District Prisons Board;
4. it is ordered that a copy of this judgment be forwarded to the Superintendent of the penal institution to which the applicant is sent and to the Director of Psychological Services, Department of Justice.

*G. B. Simon J.*

Solicitors

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