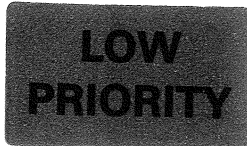


PUBLICATION OF NAME AND
IDENTIFYING PARTICULARS OF
COMPLAINANT PROHIBITED BY S139,
CRIMINAL JUSTICE ACT 1985.



THE QUEEN

v

JACKSON

Coram: Eichelbaum CJ
Keith J
Heron J

Hearing: 20 March 1997

Counsel: J C Pike for the Crown
L H Atkins QC for the Respondent

Judgment: 24 March 1997

JUDGMENT OF THE COURT DELIVERED BY KEITH J

Jackson was convicted, following a five day jury trial in the High Court at Wellington, of unlawful sexual connection by digital penetration in breach of s128(1)(b) of the Crimes Act 1961. He was acquitted on a charge of indecent assault against the same complainant based on facts occurring the day before those constituting the sexual connection charge. On 22 November 1996 he was sentenced to two years imprisonment, suspended for two years, and 200 hours

of community service. The Solicitor-General has applied under s383(2) of the Crimes Act for leave to appeal against the sentence on the grounds that it was manifestly inadequate and wrong in principle.

The facts giving rise to the prosecution occurred in July 1995 when the respondent, a qualified psychiatric nurse, was working at Porirua Hospital. Two weeks earlier he had been involved in the process of admitting the complainant to the hospital as a voluntary patient suffering from severe depression. There is an unresolved issue whether the respondent became aware at that time of important relevant details of the complainant's sexual orientation and history of sexual abuse.

The events relating to the first charge - of which the respondent was acquitted - occurred early on a Monday morning. They began with the complainant coming to the nurses' station and commencing a conversation with the respondent. At that time the complainant told the respondent that she was to be discharged shortly. She had, she said, made a significant recovery. He then visited the complainant in her cubicle, sat on the edge of the complainant's bed and asked if she wanted a cuddle to which she replied "OK". He gave her a hug. He left and, according to the complainant's written account prepared the next morning on the advice of her private psychiatrist, at

About 4.15 he came back, I sat up in bed so I could hear him and we talked about our flats. He asked if I wanted a hug and I said yes so he hugged me while sitting opposite but beside me on the bed. He then told me to lie down in bed and pulled the covers up. He then told me to move over and layed down beside me on top of the bedclothes. He told me this was a 'no-no' and not to say anything. He asked me if I wanted a cuddle and I said yes and we both turned to each other and he held me. He held me tightly and started turning me over and started kissing me. I was on my back and he held me tightly and I held him loosely and we were kissing and he started moving up and down. It seemed to get really intense. He then rolled off me, moved the bedclothes back on me properly, like he was scared of getting caught or something. He then stood up and told me to meet him in the nurses station in five minutes. For some reason I went and just sat there as if nothing had happened watching TV with him and

went back to bed about five minutes later because it was too cold.

The medical notes for the next day record her as being cheerful in mood, bright, with straight posture, pleasant and chatty with an animated facial expression.

The respondent's evidence was that he honestly believed that the kissing and the rubbing of his body against the complainant's on the bed in her cubicle was mutual and consensual and that she was willing. He based that belief on the series of events beginning with her visit to the nurses' station. As we have said, the respondent was acquitted on the charge of indecent assault arising from those events.

The following night the complainant asked if she could sleep in one of the isolation rooms at the far end of the psychiatric ward rather than in the women's dormitory because she found it too noisy to sleep in. In the early hours of the morning she went to the toilets at the opposite end of the ward. She did not want to use the toilets at her end because, she said, they were not in a fit state. Her journey took her past the nurses' station where she again stopped and spoke with the respondent who later visited her in her isolation room on four or five occasions. On several of these visits the respondent asked the complainant if she wanted a hug and on her staying yes the respondent gave her a hug. On the last occasion he pushed her back on to the bed until they were lying down. He then asked her to suck his penis. She said no. She did not know how to. The respondent then asked her to touch his penis and he pushed down his tracksuit pants and boxer shorts. She did not respond. He took her hand and placed it on his penis and touched her on the outside of her underwear and then on the inside. After that he inserted one or two fingers into her vagina. He asked the complainant if he could ejaculate on her. Again she didn't respond. He did ejaculate on her. And shortly afterwards he left.

The respondent's evidence was that the episode was mutual and consensual and that the complainant was willing. Her evidence was that, as with the evening

before, she felt absolutely powerless in the situation and went into automatic mode, unable to respond or protest. She said she felt awful and the event evoked memories of the sexual abuse she had suffered from her father and grandfather as a child. The next morning she complained to the Ward Manager and the matter was swiftly referred to the police.

The respondent initially lied to the police about what had happened but at the trial he admitted that the events alleged by the complainant were true. The only issue at trial on the sexual violation charge was the respondent's belief of consent on reasonable grounds.

The maximum penalty for the offence of sexual violation is 20 years. Parliament has emphasised society's judgment of the seriousness of the offence by giving the sentencing court the following direction in the Crimes Act, s128B(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.

As well, the Solicitor-General argues that s5(1) of the Criminal Justice Act 1985 applies:

(1) Where—

(a) An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and

(b) The court is satisfied that, in the course of committing the offence, the offender used serious violence against, or caused serious danger to the safety of, any other person,--

the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.

The sentencing judge does not expressly discuss s5 - she may not have been referred to it - and we cannot find its terms reflected in the sentencing judgment. On the view that we take of the case we do not need to consider the applicability of s5 and the difference, if anything, between “special circumstances” in s5(1) and “particular circumstances” in s128B(2) as the basis for departing from the general principle that a sentence of imprisonment is to be imposed in the cases covered by the two provisions.

We consider the case in terms of s128B. As this Court has said on earlier occasions, a very wide range of offences is covered by the offence of unlawful sexual connection, even if that offence is restricted to digital penetration. On an earlier occasion we said that no clear patterns had yet emerged in respect of that type of case and at that time, at least, we thought there was no value or purpose in attempting to nominate a benchmark. Each case had to be determined on its facts remembering that generally speaking this offence falls somewhere between that of indecent assault on the one hand, and sexual violation by rape on the other, *R v Talatana* (1991) 7 CRNZ 33, 36. In a judgment given last September, this Court said that both parties accepted the proposition that the normal range, subject to the qualifications and limitations already mentioned, of between two to four years imprisonment should now be higher in light of the change in the maximum sentences from 14 years to 20 years, effected by Parliament in September 1993, *R v Edwards* (judgment of 3 September 1996, CA 259/96).

Again, we do not indicate a range for this offence given the great variety of circumstances, but we do consider that the starting point in this case must be a good deal higher than that implied by the sentence imposed and must be substantially affected by two serious aggravating features. The first is the gross breach of trust involved in the actions of the respondent, a psychiatric nurse subject to important professional responsibilities, visited on a vulnerable person who is in his care. The very person the complainant looked to for care, comfort and security committed these serious breaches of professional and criminal standards. This must be a dominant feature in the case.

Closely related to that factor is the impact of the sexual violation on the complainant and particularly on her emotional state. After the incident, she says in her victim impact statement, she was depressed for eight weeks before she was discharged. The matter still wasn't sorted out but she was well enough to go home. She was unsure whether the depression was a continuation of her previous history or as a result of this incident, perhaps a mixture of both. She had definite sleeping problems, especially at the time of the violation and continuing. As the Court case drew nearer her sleep was worse. One of the worst parts was waiting for the trial. Court, too, was an unpleasant experience, having to disclose aspects of her personal life to strangers and also friends who did not know lots of things about her. She really resents the offender for putting her in the situation of having to disclose these things.

He abused his position, she says, and took advantage of her being a patient. She was very angry and confused at the time and is still angry at the time of the statement.

Importantly, she says, "over the years when I have got sick, the hospital has been a safe place for me but now because of what has happened I don't feel safe there any more". This incident, she concludes, has had a huge effect on her life thus far. The respondent, she says, had no right to abuse his position.

The sentencing judge gave four reasons which led her to the conclusion that there were "particular circumstances" justifying "a sentence of no more than two years' imprisonment, which is towards the lower end of the appropriate range". Those circumstances also appeared to be relevant to her decision to suspend the sentence of two years imprisonment under s21A of the Criminal Justice Act.

We are not convinced that those matters, individually or collectively, do amount to particular circumstances calling for a sentence of no more than two

years imprisonment. The first was that the respondent's chosen career, which he had worked hard to achieve and in respect of which he had been described as caring and competent, was now denied to him because of his conduct. That consequence was an entirely predictable and indeed inevitable consequence of the conviction in this case. There is nothing "particular" about it.

Secondly, the fact that this is a first offence and that the respondent has an otherwise exemplary record as a citizen is not, as indeed the Judge acknowledges, a special factor of itself and alone.

The third point is the respondent's age and his ability to make a real contribution to society if given the opportunity to prove himself in the future, coupled with the real risk that his ability in that respect will be destroyed and lost if subjected to a prison term. Again, that is the general consequence of serious offending of the kind in issue in this case. It is not a "particular" consideration. The fourth factor mentioned by the Judge is the fact that the respondent cannot get a credit for a guilty plea. This is of course no more than the absence of possible mitigating consideration.

Mr Atkins urged on us a number of other considerations relating to the immediate circumstances of the days in question which might be seen as contributing to the Judge's characterisation that this was "a rare case", "a very difficult and highly unusual case". They are not, however, factors which the Judge in a long and detailed sentencing judgment adverted to herself and we similarly do not find them persuasive.

A term of imprisonment of four years would not be out of line in this case. We do, however, take account of the fact that it is an appeal by the Solicitor-General and in accordance with established practice in such appeals especially when a custodial sentence replaces a non-custodial one, referred to in the recent judgment of *R v Donaldson* (6 March 1997, CA 426/96, 19-21), a sentence of two and a half years imprisonment would be appropriate. We do however take account

of the fact, as we were informed from the bar, that the respondent has already served 77 hours of the 200 hours of community service. That leads us to the conclusion that an appropriate penalty in this case is two years imprisonment. The considerations which would lead to suspension under s21A of the Criminal Justice Act are not present in the case, especially given the three factors stressed earlier : the gross breach of trust; the serious impact on the complainant's emotional state of the offending; and the absence of "particular" circumstances. The direction given by Parliament in s128B(2) must be followed.

Accordingly, the Solicitor-General's application is granted, the appeal is allowed and a sentence of two years imprisonment is imposed in place of the sentences imposed in the High Court.

The respondent is to present himself to the Registrar of the High Court of Wellington at 10.00 am tomorrow, Tuesday 25 March 1997, to begin his term of imprisonment.

A handwritten signature in black ink, appearing to read "KJ Keir". The signature is fluid and cursive, with a long, sweeping tail on the final letter.