

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF
COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA360/2009
[2011] NZCA 141**

BETWEEN	TIMOTHY PAUL WEBSTER Appellant
AND	THE QUEEN Respondent

Hearing: 30 March 2011

Court: Glazebrook, Chambers and Lang JJ

Counsel: C B Wilkinson-Smith for Appellant
K A L Bicknell for Respondent

Judgment: 8 April 2011 at 2:00 PM

JUDGMENT OF THE COURT

- A The appellant's application for an adjournment is declined.**
- B The appeal is dismissed.**
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REASONS OF THE COURT

(Given by Chambers J)

Appeal relating to alleged sexual offending

[1] Following a trial at which Timothy Webster, the appellant, had the benefit of very experienced defence counsel, a jury found Mr Webster guilty of a series of sexual crimes against a young girl. The offending occurred over a six year period:

the complainant was about nine when the offending was said to have started and 15 when it came to an end.

[2] The Crown case was that Mr Webster committed many of the crimes in a rather sinister way: it said that on many occasions he rendered the girl unconscious using chloroform so that she would not remember what he had done to her. Sometimes he put chloroform on a cloth which he placed over the complainant's mouth. Other times he administered the chloroform using a funnel device. On a small number of occasions, however, the complainant was conscious during the acts of rape. When the police executed a search warrant at Mr Webster's home, they found the chloroform device in the kitchen rubbish tin. The complainant's DNA was found on it. The police also found a bottle containing chloroform and unused condoms in a bag in Mr Webster's bedroom.

[3] The police discovered a used condom in Mr Webster's bedroom. Evidence was given at trial that Mr Webster's DNA was detected in semen inside the condom. There was also evidence that the girl's DNA was detected on both the inside and the outside of the condom.

[4] Mr Webster's defence was that none of the alleged offending occurred.

[5] Judge Joyce QC sentenced Mr Webster to 16 years' imprisonment and ordered that he serve a minimum period of imprisonment of ten years.¹

[6] Mr Webster appealed against his convictions and against the length of the minimum period of imprisonment (MPI).

Issues for our consideration

[7] At the hearing on 30 March, Mr Webster sought an adjournment of at least six months. The first issue we therefore had to determine was whether we should grant that adjournment. We refused it. The principal reason for refusing it was that we were satisfied there are presently no sustainable grounds of appeal against

¹ *R v Webster* DC Auckland CRI-2007-004-24327, 27 May 2009.

conviction. We explained to Mr Webster, who took part in the hearing by video link, that we would deliver a formal judgment, with reasons, later, setting out why we declined his application for adjournment and why his appeal against conviction should be dismissed.

[8] We then turned to consider his appeal against sentence. Mr Wilkinson-Smith, Mr Webster's counsel, addressed us on that topic.

Should there be a further adjournment?

[9] Mr Webster was convicted on 30 March 2009, two years to the day before the hearing before us. He appealed in a timely way. His grounds of appeal at that stage were as follows:²

- (a) The crucial scientific evidence of ESR at trial was presented in an incomplete and unfair way.
- (b) I hope to have fresh scientific evidence about the DNA on the condom available for appeal.
- (c) The sentence was manifestly excessive.

[10] Subsequently Mr Webster changed counsel. His new counsel was Warren Pyke. Mr Pyke abandoned the grounds of appeal against conviction as set out in the notice of appeal and instead asserted a new ground. That was that the trial judge, Judge Joyce QC, had erred in failing to leave consent to the jury. The appeal against sentence was maintained but only with respect to the MPI.

[11] Later still Mr Webster changed counsel again, this time retaining Mr Wilkinson-Smith. Mr Wilkinson-Smith found it difficult to obtain instructions from Mr Webster. Mr Webster was not interested in pursuing Mr Pyke's point of appeal. He wanted to raise other matters, none of which Mr Wilkinson-Smith considered even arguable grounds of appeal. Mr Wilkinson-Smith sought to

² We have taken these from the notice of appeal Mr Webster signed on 18 June 2009.

withdraw. We asked that he attend the hearing, which he did. We heard from him and also from Mr Webster.

[12] Before determining the application for adjournment, we asked Mr Webster what points he wished to pursue on appeal. There were five, only one of which had previously been signalled.

[13] The first was that he hoped in due course to get further scientific evidence from a laboratory in Tasmania. (This was point (b) in the notice of appeal.)

[14] His second point was that his trial counsel, Peter Kaye, had been incompetent because he had not sought independent scientific evidence to counter the ESR's evidence.

[15] The third point was some unspecified concern about the complainant's evidence.

[16] The fourth point was that Mr Webster hoped to obtain some expert evidence with respect to chloroform.

[17] The final point was that he hoped to get some further evidence with respect to timing of the alleged offending.

[18] He confirmed to us that he did not wish to pursue Mr Pyke's "consent" argument. He also confirmed to us that all five grounds of appeal he now wanted to pursue would require further evidence, which he did not currently have. He said that it would take him at least six months to get all the new evidence together.

[19] We decided we should not determine the application for adjournment until we had considered the merits of the appeal. Were any of the points fairly arguable? In determining the application, we could not ignore, of course, the wider interests of justice, including the interests of the complainant. The long delay in hearing this appeal has not been in any way the fault of the Crown or this Court. Mr Webster has sought a number of adjournments on a variety of grounds.

[20] We therefore considered all the proposed grounds of appeal, whether abandoned or not. There is nothing to support the contention that “the crucial scientific evidence of ESR at trial was presented in an incomplete and unfair way”. Neither Mr Pyke nor Mr Wilkinson-Smith has been able to sustain that assertion. Nor does Mr Webster pursue it; of course, he hopes that he will be able to obtain evidence which may counter ESR’s or some of it.

[21] His original ground (b)³ is now the first point he still wishes to pursue.⁴ The problem is that it is common ground that the principal test Mr Webster wants done is a test which is not yet scientifically available. Mr Wilkinson-Smith confirmed that he had been in touch with the Tasmanian laboratory to see whether the testing Mr Webster wants done could be done and was told that it could not be. Mr Webster accepts that is currently the case. Apparently, however, there is an expectation that this kind of testing may become scientifically possible later this year. This is the principal reason why Mr Webster says he needs at least six months to get his fresh evidence together.

[22] This is a case therefore where there is not yet available any fresh evidence. At best there is hope that fresh evidence might become available. Even if it does, whether that evidence will advance Mr Webster’s cause is completely unknown. An appeal cannot be adjourned on the basis that some fresh evidence might become available and might be helpful to an appellant.

[23] Mr Webster’s complaint against Mr Kaye is based on Mr Kaye’s alleged failure to seek scientific evidence to counter the ESR’s evidence. We have no affidavit evidence in support of this assertion. Mr Webster has not given a waiver of privilege. But the point clearly has no legs. Mr Kaye did retain an expert. The expert did not give evidence, but that was presumably because he could not say anything useful to Mr Webster’s cause. Mr Kaye can hardly be blamed for not getting evidence which is still not obtainable in 2011, more than two years after the trial.

³ See at [9] above.

⁴ See at [13] above.

[24] We are unable to evaluate Mr Webster's third, fourth and fifth points, as they all lack evidence. They had never been raised in any shape or form prior to the oral hearing before us. Nor were these matters mentioned in the letters Mr Webster sent to the Court when seeking the adjournment.

[25] Finally, although Mr Webster did not wish to pursue Mr Pyke's "consent" point, we have considered it. There is nothing in it. Mr Kaye made it clear throughout the trial that this was a single issue case: did Mr Webster do the acts alleged? There was no suggestion that the young girl had consented or that Mr Webster believed she was consenting. The Judge presented the case to the jury in accordance with the issues agreed by counsel and the evidence. Even now Mr Webster does not assert Mr Kaye acted contrary to instructions in conceding lack of consent in the event the jury were sure that the acts in question had taken place.

[26] Having concluded the appeal against conviction had no merit, we advised Mr Webster that his application for adjournment was declined. There was nothing else he or Mr Wilkinson-Smith wished to say or could say with respect to the appeal against conviction. Accordingly, it too is dismissed.

[27] We did point out to Mr Webster that, if at some time in the future, fresh evidence helpful to him did become available, there might be remedies available to him. One possible remedy would be an application for leave to appeal to the Supreme Court, obviously out of time. Another remedy might be an application "for the exercise of the mercy of the Crown" under s 406 of the Crimes Act 1961. Obviously we express no views as to whether either remedy would be available. That would clearly depend on the cogency of any fresh evidence obtained.

Was the MPI too high?

[28] As we have said, Mr Webster did not pursue his appeal against the nominal sentence of 16 years' imprisonment. But Mr Wilkinson-Smith did submit that the MPI, at 60 per cent of the nominal sentence, was too high. The MPI should have been, he submitted, 50 per cent of the nominal sentence – that is, eight years.

[29] The Judge gave careful consideration to the question of an MPI order. He was faced with a situation of prolonged sexual offending against a young girl who was entitled to have trust in the appellant, a trust which had been callously abused. The extreme seriousness of the sexual offending is demonstrated by the length of the nominal sentence, against which Mr Webster has not appealed. There can be no doubt in terms of s 86 of the Sentencing Act 2002 that this case demanded an MPI; the only question was its length.

[30] In the end, the Judge concluded that ten years was the appropriate length. He noted that Mr Webster had not been prepared to confront what he had done, which made him “a person of risk when in the community”.⁵ He had “conditioned” and “groomed” the girl.⁶ The Judge found the use of the chloroform particularly aggravating.

[31] Mr Wilkinson-Smith submitted ten years was too long. He referred to the cases analysed in *R v Gordon*⁷, which suggested, he submitted, the MPI range was 46 to 58 per cent. Mr Wilkinson-Smith also noted that in the leading case of *R v AM*⁸, the offender’s MPI was fixed at 50 per cent.⁹

[32] We do not accept Mr Wilkinson-Smith’s submission. The point of *Gordon* was not to fix a range: the legislature has done that, and it is a range of one-third to two-thirds. What this Court was stressing in *Gordon* was the need for consistency when imposing MPI’s, as required by one of the important principles of sentencing set out in s 8(e) of the Sentencing Act. MPI’s in the 60 to 66 per cent range have been fixed in cases involving prolonged sexual offending: see, for example, *R v V (CA57/04)*¹⁰ (effectively 60 per cent) and *R v T (CA674/07)*¹¹ (both referred to in *Gordon*) and *R v M (CA477/07)*¹² and *R v I (CA70/2008)*.¹³

⁵ At [46].

⁶ At [47].

⁷ *R v Gordon* [2009] NZCA 145.

⁸ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

⁹ At [159].

¹⁰ *R v V (CA57/04)* CA57/04, 14 July 2004.

¹¹ *R v T (CA674/07)* [2008] NZCA 157.

¹² *R v M (CA477/07)* [2008] NZCA 168 at [10].

¹³ *R v I (CA70/08)* [2009] NZCA 101 at [15]. The offending in this case was very similar to Mr Webster’s.

[33] We also consider Judge Joyce's 60 per cent figure is very consistent with this Court's decision in *R v AM*, even though Judge Joyce did not have the benefit of that case, it not having been decided when he was sentencing. AM's offending was rather similar to Mr Webster's, but the overall circumstances justified a shorter MPI (even though the notional sentences imposed were identical):

- (a) AM had pleaded guilty to significant sexual offending, whereas Mr Webster continues to deny any sexual offending at all.
- (b) AM was 60 and in indifferent health. By the time he was eligible for parole, he would be 68 and therefore, on account of age, less likely to be a danger to young girls than a younger man would be. Mr Webster on the other hand was only 47 at the time of sentencing and in excellent health.
- (c) The trial Judge in *AM* had not imposed an MPI order at all. The matter came before this Court therefore on a Solicitor-General's appeal. In accordance with our normal practice on such appeals, the Court imposed the least restrictive penalty consistent with the directions contained in s 86. This is not a Solicitor-General's appeal.

[34] We are satisfied that the MPI fixed by Judge Joyce was justified. He made no error of principle. The sentence was consistent with relevant appellate authority. We dismiss the appeal against sentence.

Solicitors:
Crown Law Office, Wellington for Respondent