R. *v.* **WARREN,** *ex parte* **ATTORNEY-GENERAL**
[C.A. 230/1978]

Court of Criminal Appeal (Wanstall C.J., Lucas J., Hoare J.)
1, 2, 23 February, 1979.

Criminal law – Indecent dealing with female under age of fourteen years – Sentence – Factors relevant – Relevance of order permitting publication of proceedings – The Criminal Code, s. 216 *– Children's Services Act* 1965–1973, *s.* 139.

Factors relevant to be taken into account on the imposition of a sentence for the offence of unlawfully and indecently dealing with a female under the age of fourteen years, with reference to the exercise of the discretion to permit publication of the proceedings conferred by s. 138 of the *Children's Services Act* 1965–1973, *considered*.

CRIMINAL APPEAL

The facts relevant to this report sufficiently appear in the judgments of Wanstall C.J. and Hoare J. reported below.

A. Vasta, for the appellant.

L. F. Wyvill, for the respondent.

Curia advisari vult

WANSTALL C.J.: This appeal against sentence has been brought by The Honourable The Minister for Justice and Attorney-General.

The respondent pleaded guilty to a charge of unlawfully and indecently dealing with a girl under the age of fourteen years. The learned judge of District Courts made an order for probation for two years, in which he included a special condition that the offender was not to return to the caravan park in which he and the complainant child were residing when he committed the offence.

The offender was 54 years old, whilst the victim was a child of eleven years, as was known to him. On his own admission this was his third similar offence committed on her in a course of conduct which had been going on for three months. The offence was committed on a bed in a caravan occupied by the offender and his wife, but during her temporary absence.

The child lived with her parents in the same park and had been known to the offender over two years. There also lived there his daughter and son-in-law, and his two grand-daughters aged 11 and 8 years. The three little girls, who were playmates and schoolmates, used to spend a lot of time visiting his caravan. The compainant used to address him as "Poppy," as no doubt did his grandchildren. His counsel told the trial judge that the child was considered to be a member of the family. He admitted that on some of her visits he had shown her five magazines which, in her word, were dirty, and in his word, crude.

On Fridays, when it was customary for his wife and daughter to go shopping, the grandchildren used to come from school to his caravan to be minded by him until he took them to Surfers Paradise to meet their mother. On the Friday of this offence they brought the complainant with them so that she could join in the trip to Surfers. He was taking a shower at this time and told the three to wait in the caravan. He came in wearing only a pair of shorts, put on a singlet and shirt and removed his shorts, in the presence of the three girls. He then told the complainant to lie on the bed, where he removed her slacks and underpants, and lay with her, both partly naked. His grand-daughters were still in the caravan.

I refrain from detailing the acts which constituted the offence. It suffices to say that they were indecent to the extent of being nauseous, and in some respects, they were more animalish than human.

The learned trial judge said in his sentencing remarks that there were "certain aggravating factors in this matter to which the prosecutor had referred." He did not re-capitulate them, but I will summarise what I consider to be the aggravating circumstances:

1. The extreme discrepancy in age between offender (54) and victim (11);

2. The position of trust and responsibility occupied by the offender in relation to a playmate of his grandchildren, who treated him as her "Poppy," and who was then in his care;

3. The course of indecent conduct running over three months, accompanied by the displaying to her of "crude" magazines, which suggests to my mind that he was pursuing a scheme of pre-meditated perversion of the child;

4. In those three respects his conduct towards the child can rightly be characterised as predatory;

5. The commission of the indecent acts constituting the offence in the presence of his two grand-daughters.

I recognise in these factors a pattern of behaviour which categorises this offence as one of the worst of its type.

The learned judge recited the mitigating circumstances as follows:

> "There is also the fact that you got to the age of 54 without being in trouble. You apparently have a good War Service record; you have got good character references. The psychiatric report indicates there is little probability of this offence being repeated. I think you should be given credit for the fact that you have never been in trouble; that you have worked steadily; that you have been a good family man."

He could have added the fact that the child was not physically harmed in the commission of the offence. His Honour was entitled to take all these matters into consideration.

The psychiatric report to which the learned judge referred had been furnished to the Public Defender by the Psychiatrist-in-Charge of the Psychiatric Clinic in Brisbane, and was tendered in evidence by the Public Defender with the comment that it revealed "a catalogue of features which go to mitigation." Such comment fairly described it, as can be seen from the extract which Hoare J. has included in his reasons herein. His Honour was entitled to accept the opinion of the psychiatrist that he was genuinely remorseful, that no psychiatric treatment was indicated, and that "it is unlikely that he would re-offend … in a similar manner."

The principles to be applied in considering this appeal were recently re-stated by the Court of Criminal Appeal in *R. v. Liekefett* [1973] Qd.R. 355, and brought into line with those formulated by the High Court in respect of appeals from the exercise of a discretion, in *House v. The King* (1936) 55 C.L.R. 499, at pp. 504–5; and in *Whittaker v. The King* (1928) 41 C.L.R. 230, *per* Isaacs J. at pp. 244–250; and by the Court of Criminal Appeal of New South Wales, in *Reg. v. Cuthbert* (1967) 86 W.N. (Pt. 1) (N.S.W.) 272. I have not overlooked the fact that since *Liekefett* the word "unfettered" has been inserted before "discretion" in s. 669A, but the Court has not on that account regarded itself as free to exercise the discretion without regard to the rules of reason and justice. These principles need not be recapitulated here, however I think it would be useful to include an extract from another case argued before and decided by the same bench contemporaneously with *House v. The King (supra)* and reported immediately after that case at 55 C.L.R. 509 – it is *Cranssen v. The King*. I think its phraseology is more appropriate than that of *House* when applied to a Ministerial appeal against sentence, although I do not suggest that it brings in any different principle. In *Cranssen* the appeal was from a sentence imposed for a crime by the Supreme Court of the Territory of New Guinea. At p. 519–520 Dixon J., Evatt J. and McTiernan J. said:

> "This court is … given a jurisdiction to hear appeals from sentences of the Supreme Court of the territory. But, although this consideration may distinguish the power it is called upon to exercise from the general appellate power invoked in *House v. The King*, it remains true that the appeal is from a discretionary act of the court responsible for the sentence. The jurisdiction to revise such a discretion must be exercised in accordance with recognised principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court

A may have mistaken or been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion B has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority."

In my opinion the application of those criteria in this appeal should C lead to its being allowed, because –

"the nature of the sentence itself, when considered in relation to the offence and the circumstances of the case affords convincing evidence that in some way the exercise of the discretion has been unsound."

As to that principle, consideration of the revolting nature of the D respondent's acts, in respect of the five features I have described, should lead to the conclusion that a sentence of imprisonment not probation, was required in this case.

Moreover, with respect to His Honour, I can see no indication in the record that he has given any consideration to the need to punish the offender and to deter others from committing like offences. His Honour has referred to the unlikelihood of recidivism by this respondent, but in E my view the deterrent effect upon others is always particularly relevant in cases of this kind.

Again, with respect to His Honour, I find difficulty in understanding what the learned judge thought was to be achieved by putting this offender on probation, since he accepted the psychiatric report as indicating that there is little probability of this offence being repeated by this offender. F In my view a correct assessment of the psychiatric report negatives any necessity for probation in order to rehabilitate this offender or to protect the public.

I appreciate the complicating effect of s. 138 of the *Children's Services Act* in giving effect to the denunciatory and deterrent aspects of punishment in cases of this kind which invariably involve children.

G The correct approach for a judge who is sentencing in circumstances in which s. 138 is applicable is, in my opinion, to determine objectively according to the recognised principles an appropriate punishment. If the offence in itself, and in the circumstances, is such as to deserve a term of imprisonment which would act as a deterrent to others then such a sentence should be imposed. Only then should the judge turn to s. 138 and consider the exercise of the discretion it gives him, remembering that

he must exercise it upon judicial considerations. In order that the deterrent punishment he has imposed may have effect he ought then to allow publication of an appropriately limited report which is capable of giving it the desired operation. To my mind it would be a wrong approach to preclude himself, by declining to order publication, from imposing the objectively-proper sentence. Unless the course I have proposed is followed the operation of s. 138 could result in a situation in which the most atrocious acts of indecency committed on children would go free of such punishment as is calculated to deter other like-minded potential offenders.

In this case, both before the trial judge and in this court, the opinions and recommendations contained in the psychiatrist's report were relied upon heavily. In that respect I think it would be useful to call attention to recent judicial pronouncements directed to putting such reports in proper perspective. In *R. v. Schloss* (13 November 1974 – unreported) Hanger C.J. with the concurrence of Lucas J. and myself said:

> "These reports are of course concerned only with the interests of Schloss. We have also to think of the interest of the community at large regarded separately, and of those persons in the community who are potential offenders of the same kind."

In *R. v. Starr & Kiriazis ex parte Attorney-General* [1973] Qd.R. 472, Stable J. (as he then was) at p. 481, with my concurrence, made the same point. The most useful statement of the principle, I think, is to be found in *R. v. Lindeman* [1973] 1 N.Z.L.R. 97, in which the Court of Appeal said, at p 98:

> "This is a case in which we all feel that the psychiatric evidence was worthy of the most careful consideration. We were impressed not only with the authority of the … reports, but also with their studied moderation and their objectivity…. We have given careful consideration also to the plea … that a short sentence followed by probation, in which psychiatric and medical treatment could be available, would probably or possibly result in the cure of the appellant, so that he might be saved from any chance of further offences. This may well be so; but we remind ourselves that the reports of psychiatrists must be read by judges subject to the realisation that they are primarily directed … to the cure of the patient. The lawyer and the judge, on the other hand, must have regard principally, though not necessarily exclusively, to the public interest. They are concerned with placing the responsibility of crime upon him who committed it, and with the imposition of an appropriate penalty."

Whilst in my opinion the learned trial judge appears to have been favourably impressed by the psychiatrist's report in favour of the respondent, he should have had regard principally, though not necessarily exclusively, to the public interest.

A The maximum sentence for this offence was increased in 1945 from three years hard labour, with or without a whipping, to five years, and again in 1975 to seven years, and significantly the provision for whipping was retained on both occasions. It is essential, I think, when determining a sentence for this offence to keep very firmly in mind the virtual defencelessness of the little girls who are the victims, and the denunciatory and deterrent aspects of punishment. Few offences are more emphatically B denounced by the community than those in which children of tender years are the victims of sexual molestation. The principles for punishing such offences stated by Webb C.J. and Macrossan S.P.J., in *R. v. Beevers* (1942) St.R.Qd. 230, are in my respectful opinion still valid and applicable.

For these reasons I would allow the appeal, set aside the probation order, and impose a sentence of imprisonment with hard labour for two C years.

The views which I have expressed in these reasons also lead me to the conclusion that the making of an order pursuant to s. 138 of the *Children's Services Act* permitting a report of proceedings of this kind can be justified only as a means of giving effect to the denunciatory or the deterrent effect of a sentence imposed either at first instance or on D appeal. Consequently, when, as here by the majority judgments, such an effect is not intended, it is not appropriate in my opinion to permit publication of such a report.

I am authorised by my brother **LUCAS** to say that in his opinion the appeal should be dismissed and that he agrees with the reasons of Hoare J.

E **HOARE J.:** On October 27, 1978 the respondent Cyril Leslie Warren was charged before the District Court that on or about June 23, 1978 at Nerang he unlawfully and indecently dealt with a girl under the age of fourteen years. The girl in fact was born on January 13, 1967 and was therefore eleven years of age on the date of the offence. The accused pleaded guilty. He was aged 54 years at the time of the offence. He was residing at the Nerang Caravan Park. The girl was residing in the F same caravan park with her parents by adoption. I do not think it necessary to refer to the details of the offence which can fairly be described as disgusting. However no physical harm was caused to the child.

Loewenthal D.C.J. heard somewhat detailed submissions both from the Crown Prosecutor and counsel for the offender. A psychiatric report G by the Director of the Psychiatry Clinic was tendered in evidence and is of course before us. This report contained a number of observations including –

> "He is a person of average intelligence. He was anxious and mildly depressed when interviewed. This would seem to be a reaction to the situation in which he finds himself. He has never suffered from any significant psychiatric illness during his life.

His account to me of this offence was substantially the same as that contained in the depositions. He seemed to be genuinely ashamed and remorseful regarding his behaviour.

Personality-wise he seems to be a rather shy, retiring, introverted man. He appears to be rather conventional in his attitudes. I could find no evidence of any particularly abnormal personality traits. His sexual orientation is basically that of a normal heterosexual individual. Specifically he does not have a sexual preference for prepubertal girls, i.e. he is not, in my opinion, an example of the sexual deviation generally referred to as paedophilia.

I think his behaviour on this occasion (and the two previous occasions) was a function of the situation in which he found himself … His wife apparently had surgery in the bladder region on several occasions some two years ago and as a complication developed what he described as 'ulcers in the bladder and a perforated bladder.' He stated that because of his wife's illness there was no sexual activity for a period of six months and that the sex life in the marriage never got back to what it was prior to his wife's illness …

No psychiatric treatment is indicated.

He is in my opinion the type of person who will learn sufficiently from this experience without a custodial sentence being imposed. I think in the future he would recognise the likelihood of any similar situations developing and would take the appropriate action to ensure that this did not occur …

I think it is unlikely he would re-offend again in a similar manner. He is an unassertive individual and would be most unlikely to ever behave in an aggressive manner towards anyone, including children, and I would not regard him as a danger to the community."

The learned trial judge evidently gave due and proper consideration to all the relevant factors which were addressed to him by the Crown Prosecutor and counsel for the accused. The learned trial judge at the conclusion of the consideration of these matters said:

"Accused, there are certain aggravating factors in this matter to which the prosecutor has referred. There is also the fact that you got to the age of 54 without being in trouble. You apparently have a good War Service record; you have got good character references. The psychiatric report indicates there is little probability of this offence being repeated. I think you should be given credit for the fact that you have never been in trouble; that you have worked steadily; that you have been a good family man, and I do not intend imposing a prison sentence….

His Honour made a probation order for two years subject to the usual terms and with a special condition "that you do not return to the

A caravan park at Nerang where you have been residing and where the complainant child lives."

The respondent was duly admitted to probation.

The Honourable the Minister for Justice and Attorney-General on November 29, 1978 appealed against the sentence pursuant to the provisions of s. 669A of *The Criminal Code*. Due mainly to the intervening summer court vacation, the appeal has not been heard until the current sittings of the Court of Criminal Appeal. It is appropriate to record that the appeal was brought with reasonable promptitude and any delay which has occurred in the hearing of the appeal has not been caused by any dilatoriness on the part of the appellant.

Counsel for the Crown refers to a number of aggravating features including the youthfulness of the complainant, the fact that the offences occurred in the presence of the respondent's granddaughters aged eleven years and eight years respectively, that the offence was not a singly isolated incident and there would appear to have been some degree of pre-meditation on the part of the respondent. These are important matters.

Counsel referred to a number of cases which have been the subject of appeal to this Court as well as to a number of sentences for offences against the same section (s. 216) of *The Criminal Code*. In some cases substantial prison sentences have been imposed. In other cases probation orders have been made.

When referring to the theory of punishments counsel for the appellant referred to the desirability of imposing a sentence that would be a deterrent both to the offender and to others who may be like-minded and also to the undoubtedly important aspect of the desirability of the imposition of a sentence that marks the disapproval of the community (sometimes referred to as the denunciatory aspect of sentencing).

Except in the case of premeditated crimes committed for gain, there is now much less assurance by judges as to the effectiveness of a substantial sentence as a deterrent than was once the case. However it seems to be generally recognised that in the case of some offences, while it is clear that the offender is most unlikely to re-offend and imprisonment will certainly be of no benefit to the offender and no obvious benefit to the community nevertheless it is desirable that a substantial prison sentence be imposed in order to indicate public disapproval for the criminal act which the offender has committed. For example, statistics reveal that there is comparatively little recidivism by convicted murderers after they are released from prison whatever the length of the sentence actually served. In the case of many criminal offences it is reasonably clear for any number of reasons – sometimes public humiliation in the case of a well known person – that the offender is most unlikely to offend again even if he were immediately restored to the community. However it would seem that the desirability of the public having reasonable confidence in the

criminal justice system precludes the unduly early release of such offenders. For similar reasons also, in the case of other serious offences, a judge often feels constrained to sentence an offender to gaol even though he is convinced that the offender would never offend again. Thus, a person who commits armed robbery or burglary will usually be sent to gaol even though he is unlikely to re-offend. (This is not to say that a custodial sentence is required in *every* such case. There are always exceptions to any general rule.)

So far as concerns the type of offence with which we are now concerned, the circumstances surrounding these offences as well as the circumstances relating to the offender are so varied that it could not be said that a gaol sentence should necessarily be regarded as the norm. For some offences it is often appropriate that there be what is sometimes described as a "tariff" sentence. This may be regarded as meeting the average case so that the "tariff" may be imposed or a greater or lesser sentence imposed depending upon all the circumstances. However the circumstances surrounding the offence of the kind which we are now considering are so varied as well as the circumstances of the individual that any suggestion of a "tariff" for offences of this nature is inappropriate.

So far as concerns the possible deterrence to others and the matter of disapproval by the community, these factors are complicated in Queensland by the operation of s. 138 of the *Children's Services Act* leading to non-publication of any report of the trial. While it is true that the Court can authorise publication of offences affecting children, the operation of the section in practice has the effect in most cases of leading to non-publication of any proceeding "in relation to an indictable offence concerning a child whether the offender, victim or merely a witness." In practice the section has some extraordinary results. An offender who commits a serious offence on an adult may receive wide, adverse publicity in the course of his trial whereas if he selects a child victim the probability is that there will be no publicity whatever. Also the section of course applies to any offence whatever and is not in any way restricted to sexual offences. In all too many instances the public is kept blissfully unaware of serious crimes committed by juveniles.

The broad object of the section, namely to protect the interests of innocent juveniles, is praiseworthy but the actual effects in practice are frequently contrary to the interests of the community as a whole. Many young people who are classified as children for the purposes of the Act are in fact hardened offenders. It seems ludicrous that such young offenders are often treated as merely slightly wayward.

This Court gave leave to the respondent's counsel to call the probation officer to whom the respondent was assigned. His report includes the following –

> "At the present time it is felt that Warren is functioning very well on probation. He is making a genuine effort to stabilise himself

A and to overcome the problems caused for himself and his family by his involvement in the offence. He appears to sincerely regret the behaviour which resulted in his conviction and is determined that it will not occur again."

In determining what is an appropriate sentence it is essential that the sentencing judge bear in mind the interests of the victim, the community and the offender. Usually, the interests of the community outweigh the B interests of the offender. Frequently the interests of the community require the imposition of a substantial sentence even though this course may be clearly contrary to the future prospects of the individual. Of course the future prospects of the individual bear on the question of the interests of the community. A reformed citizen is likely to be a better member of the community than a person soured and possibly corrupted by imprisonment.

C In the present case there have been no newspaper reports on the trial as no authority for publication was given by the trial judge. In so saying I am in no way criticising the trial judge. Thus it can be assumed that at this stage any prison sentence imposed would not operate as a deterrent to the public generally and similarly the ignorance of the public generally as to the offence means that there is no scope for a denunciatory sentence. It is true, as submitted by counsel for the Crown, that this Court could D make an order pursuant to s. 138 of the *Children's Services Act* which would have the effect of making public the offence and any sentence imposed by this Court.

In the ordinary course of events I would not regard it as appropriate in this case to make such an order at this time. However there was considerable discussion at the hearing of the appeal concerning the E operation of the *Children's Services Act* and for this reason I would be prepared to order that a report may be made of the proceedings of this appeal or any part thereof provided that the name of the child, the complainant in this case, or the respondent to this appeal or any other material likely to disclose the identity of the said child shall not appear in any such report.

In imposing sentence in this case the trial judge should have considered F the interests of the victim and the community as well as the interests of the offender. There is nothing to indicate that he did not do so. I can see no reason for concluding that the trial judge's discretion was wrongly exercised. The fact that he appears to have favourably impressed his probation officer in the way I have indicated is an additional reason why in my opinion it would be wrong for this Court to interfere with the sentence. In my opinion the appeal should be dismissed.

G *Appeal dismissed.*

Solicitors: *D. V. Galligan*, Crown Solicitor; *Public Defender's Office*.

I.McG.W.