

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: THERE IS AN EXTANT ORDER SUPPRESSING THE NAMES AND IDENTIFYING PARTICULARS OF THE APPLICANT.

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2009-044-002759
[2018] NZDC 13993**

[MOSS AVERY]
Applicant

v

ATTORNEY-GENERAL OF NEW ZEALAND
Respondent

Hearing: 10 July 2018
Appearances: S Mitchell for the Applicant
J Herring for the Crown
Judgment: 10 July 2018

ORAL JUDGMENT OF JUDGE P A CUNNINGHAM

[1] This is an application under the Criminal Records (Clean Slate) Act 2004 that Ms [Avery]'s conviction for conspiracy to commit incest be disregarded. That is the case because, for the purposes of the Clean Slate Act as set out in the Interpretation section, incest and any conspiracy charges are specified offences.

[2] The effect of an order under s 10(4) means that Ms [Avery]'s application will be disregarded. However, there are certain situations when that order will be ineffectual, and that is if she applies to act in a role predominantly involving the care and protection of children or there is safety checking under the Vulnerable Children's Act 2014.

[3] Essentially, the facts are as follows. Ms [Avery], who is currently [age deleted], was born in [country 1 deleted] to two teenager parents. They separated

when she was just a baby. Her father remarried and eventually came to live in New Zealand. She did not see her father from since about age four until she reconnected with him through an Internet site [about a decade ago]. By that time she had married and was living in [country 2 deleted] with her husband and her own [children].

[4] She came to New Zealand in [date deleted] to meet her father, then returned to [country 2]. There was a plan for her and her family to come out and live in New Zealand. Ms [Avery] obtained work with [employer deleted]. She has gradually been educating herself as an adult and supporting the family.

[5] She has [multiple qualifications] and many, many other certificates relating to [various achievements]. She has mainly worked in the [area deleted] in [country 2], and worked in [field deleted] after coming to New Zealand.

[6] Before Ms [Avery]'s family came to New Zealand her husband, now former husband, discovered communications that she had been having with her father that were of a sexual nature. That was reported to [Police in country 2] and eventually reported to the New Zealand Police and both Ms [Avery] and her father were charged with a number of charges. The Crown charging document was resolved by them both pleading guilty to conspiracy to commit incest. The accepted position being that despite the talk about a sexual relationship and what that would entail, it was never consummated.

[7] She was sentenced in the District Court by Judge L Moore on [date deleted], at which time Judge Moore declined an application for a discharge without conviction. Nothing other than entering a conviction was imposed. The discharge without conviction application having been declined, Ms [Avery] had carried out some voluntary community work, and so [the Judge] saw no need for any punitive element.

[8] From there, there have been appeals to the Court of Appeal, who upheld the sentence, and then an application for leave to the Supreme Court, which was declined and an application to recall that decision, which was also declined.

[9] The reason that Ms [Avery] fought so hard to have the conviction removed is that since her job with [employer deleted] terminated in [year deleted] she has been unable to work. That job terminated essentially because the organisation that employed her became aware of the Court proceedings and were concerned about the effect that employing someone with such a conviction might have on funding applications.

[10] Ms [Avery] makes the application under the Clean Slate legislation essentially because she has found herself unable to get work. I know through various affidavits, including one prepared on 2 July this year, that every time she applies for a job and discloses her conviction, the application process comes to a screaming halt. I can understand that because it is natural to think of incest as being something an adult might do to a small child. Of course, the facts of this case are very different.

[11] She has applied to [a number of roles suited to her qualifications], and naturally all of those roles require police vetting or a declaration that you do not have any criminal convictions. Even jobs such as library assistant, working on reception, becoming a train driver, serving at a McDonald's yoghurt store and cleaning have similarly resulted in a halt in the application process as soon as she has disclosed that she has this conviction.

[12] During her life she has undertaken voluntary work for [organisation deleted], she was a youth leader for [details deleted] in [country 2] and those options are not available to her now either because of the conviction and she says that she was not able to go on a school camp [details deleted] because of her conviction.

[13] Both Ms [Avery] and her father were suffering from a condition known as genetic sexual attraction. It is a known phenomena where a father and daughter are separated at an early stage of the child's life and then reunite many years later. I was interested to learn that it is a medical or psychological condition of a compulsive nature.

[14] This is from a report by Lynn Beresford, who is a registered psychologist, and it is dated [date deleted], I believe in support of an application to re-call a Supreme

Court declining of leave to appeal. This refers to the Westermarck effect, which is the reverse of sexual imprinting, when people live in close proximity during the first few years of their life they become desensitised to sexual attraction, but when children are separated from their parent, research supports that sexual attraction when they meet as adults is likely. There is no risk to anyone in the community. It is an attraction between, on this occasion, the father and his daughter.

[15] Ms [Avery] has given evidence this morning and she has explained to me that it was like a bolt out of the blue for her; something that hit her and she said it did not carry on, "You wake up from your dream," which I took to mean that for a period of time she was not able to rationalise what emotional state she was in or how that was affecting her, her father and other people around her. She described it as not a choice a sane person would make. She says now when she looks back on that period of her life it is like that was somebody else, not her, "But over time you educate yourself about it."

[16] She was assessed by Greg Woodcock, who is a registered psychologist, prior to the sentencing in the High Court in [date deleted] and was assessed as the condition not being an ongoing risk, and that, too, is confirmed by Ms Beresford in her report I have just referred to.

[17] Ms [Avery] has now settled in New Zealand. She is living with her [relatives] in [city 1], her stepmother and father having now separated. She came to be living with her [relatives] for a number of reasons, including that she did not have any financial or other support here, but also because her [relative] had some health issues and needed help because [details deleted].

[18] Her father now lives in [city 2] and he, [personal details deleted]. Ms [Avery] says that she visits him or he visits her and her [relatives] about [regularly] and she now describes him as a good friend. She does not see him as a father-like figure.

[19] She had a stepfather for most of her life. She says that she offers ongoing support to her father, indeed as a daughter might in that situation; helping him with his house and garden, cooking and cleaning for him when she is staying with him and

generally socialising, including with conversation. They both seem interested in [details deleted] and they talk about that.

[20] There has only been a couple of cases under s 10(4) that I have been referred to, and they were both cases where there were low level indecent assaults and a period of no further convictions, the problem in every case has been about employment. Section 10(5) provides that, “In considering an application under this section, a court must balance the interests of individuals in concealing their criminal records against the wider public interest in the safety of the community,” so it is balancing Ms [Avery]’s interests against the wider public interest in terms of safety of the community.

[21] In terms of Ms [Avery]’s interests, they are high. She is unable to support herself financially. She has managed, with the help of her [relatives], not to have to rely on State assistance, and nor does she wish to. This whole experience and ending up with a conviction has come at a very high cost for her, in that her marriage is now at an end. I saw somewhere that that marriage was not in good shape, as far as she was concerned, towards the end of it so that might not be as devastating as it sounds. However, for some period of time she did not have any contact with her children and, although she is now in contact with them, they are on the other side of the world and she is here.

[22] Looking at Ms [Avery]’s life I have a picture of somebody who is an incredibly hard worker, who has educated herself while bringing up a young family and being the family breadwinner for a lot of the time too. To not work and not utilise her impressive array of qualifications must be terribly frustrating. I cannot think of another case where the needs or the interests of the person applying could be as high as this.

[23] I now look at the wider public interest and the safety of the community. The first thing is that there have been two psychologists who have said that Ms [Avery] is no longer a risk. She has given evidence today that that sort of mad, if I can call it that, attraction she had to her father went [about a decade ago] as quickly as it came;

and there was never really a risk to the community in terms of other people being directly affected by her, or potential victims.

[24] There was probably a risk to community standards, but that is not the same, in my view, as the meaning in s 10(5), which is the safety of the community, except to say that it is important that criminal and moral standards of behaviour are maintained in a general sense. What I am trying to say is that Ms [Avery] was never a particular risk to any other person apart from herself and her father. She has no previous convictions and there has been nothing since this conviction was entered [about a decade ago].

[25] Whatever rehabilitation was required back in [year deleted] is long gone and she has effectively been given a clean bill of health by two qualified psychologists. Her risk to the community is, in my view, as low as it can get. This is an overwhelming case for an order that her conviction for conspiracy to commit incest be disregarded and I make the order accordingly.

[26] In doing so, I would like to say something about the possibility that she might work with children. It seems to me that there is no risk to any children that she might work with in terms of care and protection organisations and I would hope that the whole gamut of jobs available to her will be available, notwithstanding the exception in the clean slate legislation. The suppression orders made in the High Court continue to apply.

P A Cunningham
District Court Judge