

**MEDIUM
PRIORITY**THE QUEEN

v.

325

STEVEN JOHN MORRIS

Coram: Casey J (presiding)
Thorp J
Sir Gordon Bisson

Hearing: 26 February 1991

Counsel: Lowell Goddard QC for Crown
Sheila E McCabe for Appellant

Judgment: 19 March 1991

JUDGMENT OF THE COURT DELIVERED BY CASEY J

The applicant was found guilty in the High Court at Auckland on two counts of rape and two of unlawful sexual connection (anal and oral penetration by the penis) all involving the same complainant and occurring over a period of about one and a half to two hours in the early hours of the morning of 17 December 1989. He was sentenced to 10 years' imprisonment (having spent 7 months in remand custody), and applies for leave to appeal against conviction and sentence. The conviction appeal was abandoned and is dismissed. It is claimed that the sentence is manifestly excessive or inappropriate in the circumstances.

The complainant was a university student aged 24 and attended a party at Devonport, leaving some time close to midnight. She lived at Ponsonby but intended to stay the night at a friend's place a short distance away, and set out to walk there by herself. On the way she was spoken to by the applicant. She did not know him and they got into a conversation and she agreed with his suggestion that they could hitch-hike into Auckland city together. Shortly afterwards they received a ride to Esmonde Road and were walking along it towards the Harbour Bridge seeking another lift. He grabbed her and threw her into some bushes at the side and told her he was going to make love to her.

She said she was shocked and scared while he took off her trousers and pants as she lay on her back and after kissing her around her vagina he raped her. This lasted a few minutes. She let him know how upset she was, and then tried talking to him while he sat next to her. He allowed her to put her jeans back on and they had a cigarette while they talked, but when he finished smoking, she said he went for her a second time; she started crying and tried to move but he grabbed her and pulled off her jeans, holding her tightly and having vaginal intercourse with her while she was still on the ground. He ejaculated inside her and then she said he forced her to have anal intercourse. She screamed because it hurt and he hit her around the head several times. This lasted a few minutes and she said the

more she struggled the more violent he became. Then he made her take his penis in her mouth for a short time by forcing her head down and holding her neck.

These events apparently formed the basis of the four counts, but her ordeal did not end there. She described another act of intercourse, and felt threatened by a piece of wood he had in his hand, and by his statement that he meant to keep her there all night. She then became really frightened for her life and made up her mind that she had to escape. Eventually she succeeded in running half-naked on to the road screaming for help; she was tackled by the applicant but a passing motorist took her to the Takapuna Police Station where she arrived about 4.10am crying and distressed, and naked from the waist down.

When interviewed by the police the applicant at first denied any knowledge of the episode, but in evidence he said intercourse took place but he believed she was consenting. His counsel said at the trial that it was accepted the complainant did not in fact consent.

The Judge had before him a Victim Impact Report from a police constable with annexed reports from an Auckland Help Foundation counsellor and a report for the Accident Compensation Commission from a psychological consultant. They make distressing reading. She experienced what the latter described as "the ultimate indignity and degradation"

of realising she was pregnant as the result of the rapes and had to endure the trauma of an abortion. She felt incapable of continuing her university studies the following year, while the counsellor said she had been thrown into confusion about her future plans. The psychological report described her as an intelligent young woman who has considerable fortitude, but that her life has been irrevocably altered and her well-being probably permanently compromised by the awfulness of the events that beset her. It is said she has used counselling well and constructively, but the events of the rape have been a constant focus in her life and have severely incapacitated her ordinary sense of enjoyment of living and well-being. The psychotherapist thinks she will never be able to erase the memories or be free from their impact upon her, and her inability to have trusting and relaxed relationships with males is likely to be considerably affected.

Physically she had bruising around her face and marks on her body from being held down. The Judge rightly emphasised the dastardly nature of this attack in which the accused took advantage of a situation for his own lust, and subjected the complainant not only to the indignity of rape but also of sodomy and oral intercourse. He referred to the conclusions in the reports about the permanent effects of the incident, and to the indignity and trauma of the pregnancy and abortion.

He expressed doubts about the applicant's remorse as recorded in a probation report and thought that his feelings were more of self- pity. In his view there were no mitigating circumstances, only aggravating features - "such as the manner in which the victim was lulled into a false sense of security, the wantonness of the attack upon her, the subsequent rape and degradation of her, and the beating to which she was subjected to the point where she was fearful of her life". He concluded that retribution and deterrence must play a part in the sentencing process. Acknowledging that the applicant had already spent some months in prison, he treated that as one year and sentenced him to concurrent terms of 10 years' imprisonment on each count. In fact, the applicant had spent only 7 months in remand custody so the sentence is effectively one of 10 years 7 months' imprisonment. But it indicates that the Judge took the view that the offending warranted an 11-year term.

Ms McCabe submitted that this was not only manifestly excessive but was longer than terms imposed for similar offences in which the circumstances were far worse. She complained that the Judge had overstated the aggravating factors. The lulling of the victim into a sense of false security was based on the complainant's evidence that when they were discussing the matter of hitch-hiking, the applicant said he would make sure that he would look after

her, or would make sure the people that gave her a lift were nice and that they looked nice. Clearly he did try to reassure her that he was a safe person to be with, although we agree with Ms McCabe's submission that this does not put the case into that category in which a trusted friend or relative has taken advantage of his special position.

The Judge also said that about the time of the anal intercourse the complainant began screaming, being fearful for her own life. In fact she said that she screamed from pain when she was subjected to that offence, and that the applicant then struck her about the head; and that she began to fear for her life later when she realised he would not willingly let her go. In spite of counsel's criticism we do not think the Judge overstated the general effect of this evidence. Ms McCabe also referred to his apparent misunderstanding about the degree of violence, reflected in the comment quoted above about "the beating to which she was subjected to the point she was fearful for her life". It must be said there is nothing in her evidence to suggest that kind of beating. She was struck about the face and forcibly held down, but the medical evidence and photographs disclose only minor bruising and marks about an eye and on her arm and side. On her account, the fear for her life which she ultimately experienced was instilled more by the applicant's general attitude and refusal to let her go, rather than from any direct physical assault, although the

blows he struck at the time of the anal intercourse and the force he used in holding her must have contributed to it. We cannot accept Ms McCabe's submission that he did not deliberately instil that fear; he must have been well aware of the effect he was having upon his victim.

As noted, the Judge was not impressed with the belated expression of remorse recorded in the final pre-sentence report, and his assessment of the accused throughout the trial made him well qualified to reach that conclusion, which is also supported by the immediate appeal against conviction. Ms McCabe submitted that in one passage of his sentencing remarks the Judge misunderstood the applicant's concession at trial that the complainant did not consent. He said :

"At your trial while on the face of it and through your counsel you said you were involved and accepted that the complainant did not consent, yet some of your evidence in reality suggested she was consenting. But putting that to one side, your substantial defence was that you believed on reasonable grounds she was consenting."

Counsel made the point that in putting forward a plea of reasonable belief, an accused might well have to give evidence about the complainant's conduct tantamount to consent. But the Judge expressly put that to one side, and then went on to describe as fanciful the applicant's claim that he believed she was consenting.

He can get no credit for his attitude. He made a step-by-step retreat from a total denial, putting the Crown to the expense and trouble of having to obtain full forensic and identification evidence, and then waiting until the trial itself to acknowledge lack of consent. Nevertheless, the complainant was subjected to a cross-examination designed to support his fanciful claim of reasonable belief, and then he sought to appeal against his conviction.

Subject to the qualification about the beating mentioned above, we are satisfied that the Judge did not overstate or misrepresent the seriousness of the applicant's attack on this young woman and its consequences.

It is now well settled that in sentencing for rape committed by an adult without any aggravating or mitigating factors, a figure of 5 years should be taken as a starting point in a contested case - see for example, R v Clark [1987] 1 NZLR 380. There are no mitigating circumstances. The aggravating features comprise a repeated rape, with the victim being subjected to further acts of sexual violation, each offence compounding the others; she was hit around the head several times and suffered serious psychological damage as a result of an episode which lasted between one and a half to two hours, and she became pregnant and underwent an abortion.

In that last regard, as this Court did in R v Clark, we cite a passage from the English Criminal Law Revision Committee's 1984 Report on Sexual Offences (Cmd. 9213, para. 2.2) quoted by the Lord Chief Justice in R v Billam (1986) 8 Cr App R (S) 48 :

"Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse, associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be underestimated because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any."

Miss Goddard accepted that the sentence was very much at the high end but was still within the range of the Judge's discretion. Certainly the case called for a substantial prison term. Contrary to Ms McCabe's submission, the applicant must accept responsibility for the consequences outlined in the Victim Report. They were all foreseeable and he cannot wipe his hands of them and plead that he is to be punished only for the criminality of the acts themselves, without regard to their results. This is brought home by s 8 of the Victims of Offences Act 1987, providing for the sentencing Judge to be informed about any physical or emotional harm suffered by the victim; its purpose must surely be to acquaint him or her with the consequences to be

expected of the offending in order to make a proper assessment of its gravity.

However, the Court must also be concerned to ensure the maintenance of a due proportion between sentences. Any marked departure from accepted levels for offences of similar gravity without adequate reason can result in injustice to an accused person and may raise doubts about the even-handed administration of justice. It is also important to bear in mind what this Court has said on a number of occasions, that sentences going well beyond an adequate level of punishment achieve nothing positive and may well be counter-productive by stifling any incentive to rehabilitation. They may also result in diverting resources from other areas of social need in order to maintain a prison service capable of meeting the demands of long sentences.

In support of her submission that the sentence here was out of proportion, Ms McCabe referred us to a number of decisions of this Court. In the first group were those which she said involved circumstances of about the same seriousness, in which the sentences ranged from 5 to 8½ years. In R v Durno (CA 133/87; 4 December 1987) we reduced a sentence of preventive detention to one of 8 years imprisonment in respect of sexual indignities committed on two girls, including the rape of one of them, in an episode which lasted about one and a half hours during which the offender frightened them into submission, striking them and

causing some minor bruising. The case was described as a bad one with no mitigating factors.

An 8-year sentence was imposed in R v Wynyard (CA 285/87; 3 March 1988) where the accused entered a house through a window at 3am, and after robbing a 19-year old girl in her bedroom at knife-point, tore off her clothing and forced her to have oral sex, and then raped her on the floor and again on the bed. After that he committed various indecencies. She suffered superficial physical injury and it was said that the long term effect of the assaults on her could not be estimated. However, he expressed immediate remorse and apparently underwent a change of heart in prison. The Court said it was a bad case and but for the mitigating factors would have merited a more severe sentence and the application was dismissed.

In R v Waretini (CA 364/87; 24 May 1988) a 7-year sentence for raping a female taxi driver and robbing her of a small sum of money was reduced to 6 years. This Court took the view that the mitigating factors including a guilty plea warranted a reduction of 2 years as allowed by the sentencing Judge. However, it considered his starting point of 9 years to be too high, having regard to cases with more serious aggravating circumstances in which sentences of 8 and 9 years were thought to be justified. Waretini looped the cord of the complainant's radio telephone around her neck and threatened to kill her and then punched her in the

face and forced her to lie across the front seat where the offence was committed. He admitted the offence when confronted by the police and pleaded guilty. It must be accepted that the circumstances of a violent assault and rape of a taxi driver late at night in a lonely area constitute serious matters of aggravation.

In R v Retimina (CA 121/88; 5 October 1988) the Solicitor-General appealed against an effective sentence of 5 years for a rape which involved ambushing the victim, dragging her across to some bushes while she struggled, and then hitting her over the head several times with a beer bottle to stop her screaming, inflicting severe bruises and cuts which required stitching and medical treatment. She was rendered semi-conscious and he then removed her clothing and had intercourse. The accused had an almost psychopathic personality which this Court considered warranted a sentence adequate to protect the community. While observing that with his plea of guilty he could have expected 7 years, a longer than normal sentence would be imposed in the public interest and the term was increased to 9 years. Importantly the Court emphasised its wish to make it clear that the decision was not meant to signal or encourage any further or general increase in rape sentencing levels.

Sentences of 7 years were upheld in R v Morrell and Draper (CA 332-3/89; 6 April 1990) where the complainant was detained and assaulted in a gang headquarters and then raped

by the two men described by the Judge as "taking advantage of a sick and beaten young woman and acting together".

In R v Tumai (CA 403/89; 28 June 1990) a 29-year old woman with a young child was stopped at traffic lights at 10pm when the accused entered by the front passenger door, struck her on the face and threatened to kill her if she did not drive off with him, and in a lonely road he made her remove her undergarments and penetrated her vagina with his finger; then he drove her back to his motel with her eyes covered and raped her twice. The whole episode lasted about one and a half hours and the Victim Impact Report stated that the ordeal had changed her life. The applicant was sentenced to 9½ years' imprisonment. This Court said that it must be recognised "that in comparison with patterns of sentencing in appeals in this class of case an effective total sentence of 10 years 2 months (he served 8 months in remand custody) would have to be regarded as exceeding the previously accepted range for offending of this nature and gravity". It was felt proper to reduce the sentence by one year to a level having appropriate regard to general patterns of sentencing as reviewed on appeal in this Court.

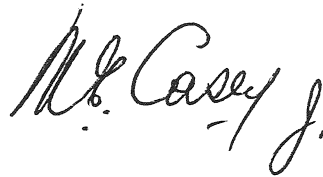
Finally in this group there was the recent decision of R v Cordeaux and Tito (CA 192/90 and 205/90; 5 December 1990) where a sentence of 10 years for rape of a complainant at a party by two men, not involving any added violence but without any mitigating factors, was regarded as too high on present sentencing patterns and was reduced to 8 years.

It is plain that in some of these cases the gravity of the accused's conduct and the consequences could be regarded as comparable to the situation in this case, bearing in mind of course that every case has its own special features. But the overall impression is that the effective sentence of 10 years 7 months imposed in this case is significantly above the general level thought appropriate over a broadly similar spectrum of cases.

Ms McCabe pointed to another group of cases which she said could be described as very severe and exceptional. They include R v Hovell [1987] 1 NZLR 610, where a sentence of 10 years was imposed for rapes and assaults on an 82-year old woman in her own home lasting over six hours; R v Misitea [1987] 2 NZLR 257, 8 - 10 years for the participants (though not the principals) in the appalling Ambury Park gang rape; and R v Hiha [1987] 2 NZLR 119 where 10 - 12 year sentences were imposed on youths guilty of major collective violence of an extreme kind and rape and other sexual aggression on young people on a Napier beach. It can hardly be said, with all its aggravating features, that this case bears any resemblance to the seriousness of those, but the sentence was within the same bracket.

In the light of this exercise we have reached the conclusion that this sentence is sufficiently above the general level accepted as appropriate for offending of this gravity to be regarded as beyond the range of a properly

exercised discretion. Allowing for the 7 months spent in custody and the aggravating factors discussed earlier in this judgment, we think the proper sentence should have been one of $8\frac{1}{2}$ years' imprisonment - i.e. an effective sentence of just over 9 years. The application for leave to appeal against sentence is granted and the appeal is allowed by reducing the term of 10 years' imprisonment to one of $8\frac{1}{2}$ years.

A handwritten signature in black ink, appearing to read "M. J. Casey J.", is written in a cursive style.

Solicitors: Crown Solicitor, Auckland