

275
IN THE COURT OF APPEAL OF NEW ZEALAND

25/3
C.A. 513/93

THE QUEEN

PUBLICATION OF NAMES
OR PARTICULARS OF
IDENTITY PROHIBITED
BY S.139, CRIMINAL
JUSTICE ACT 1985

v.

A

Coram: Cooke P.
Richardson J.
Casey J.
Hardie Boys J.
Gault J.

Hearing: 1 March 1994

Counsel: R.G. Glover and Rachel Morgan for Appellant
J.R. Eichelbaum for Crown

Judgment: 18 March 1994

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

The Crimes Act 1961, s.128, defines the crime of sexual violation. By subs.(1)(a) sexual violation is the act of a male who rapes a female. By subs.(1)(b) sexual violation extends to the act of a person having unlawful sexual connection with another person. Subsections (3), (4) and (5) elaborate on those provisions. Section 128A enacts that certain matters do not constitute consent to sexual connection.

Section 128B formerly prescribed a maximum term of imprisonment for 14 years for sexual violation. By the Crimes Amendment Act (No. 2) 1993, s.2,

which came into force on 1 September 1993, the maximum penalty for rape was increased to 20 years; 14 years remained the maximum for unlawful sexual connection. By the Crimes Amendment Act (No. 3) 1993, s.2, which also came into force on 1 September 1993, s.2 of the 1993 (No. 2) Act was repealed and replaced by the more comprehensive provision that everyone who commits sexual violation is liable to imprisonment for a term not exceeding 20 years.

In the present case the defendant pleaded guilty in a District Court to three charges arising out of an episode on 17 September 1993. They were sexual violation of a woman; threatening to kill her, which by the Crimes Act, s.306, carries a maximum penalty of seven years imprisonment; and assaulting a child aged eight years, which by s.194 carries a maximum term of two years. Having been committed to the High Court for sentence, the defendant was sentenced by Fraser J. on 19 November 1993 to a total effective term of imprisonment for nine years. The Judge warned him that he was liable to be sentenced to preventive detention, that is to say indefinite detention, should he ever appear before the Court again for sentence on a similar charge; but the Crown did not submit nor did the Judge order that on this occasion he should receive such a sentence (which is permissible, even for a first sexual violation offender, under the Criminal Justice Act 1985, s.75 as amended, if he is not less than 21 years of age and if there is a substantial risk that he will commit a specified offence upon release).

The defendant appeals against the nine-year sentence, putting forward two grounds, namely that the sentence was manifestly excessive in all the circumstances, especially having regard to the appellant's psychiatric state, and that the Judge erred in setting the starting point for rape under the amended legislation at eight years.

In giving his reasons for sentence the Judge did mention that, as the increase in the maximum term was very recent, there was as yet no guidance from the Court of Appeal as to the approach. He took the view that in this case the appropriate starting point was eight years, arriving at the nine-year sentence by adding aggravating factors and deducting two years for the early guilty plea which had spared the complainant the ordeal of giving evidence in court. The aggravating factors referred to by the Judge were a knife, a threat to kill, physical violence in addition to that involved in the rape itself, the presence of the child and violent conduct towards her.

As this Court is asked to give general guidance on the approach to the new sentencing regime, a court of five was constituted to hear the present appeal and it is desirable to deal with the general question first.

For the approach to rape sentencing in New Zealand before the recent statutory amendments, the case most commonly cited is *R. v. Clark* [1987] 1 N.Z.L.R. 380. There, while pointing out that New Zealand has its own penal and sentencing policy and that overseas levels are not automatically applicable, this Court considered that the general level of sexual violation sentencing in New Zealand was broadly similar to that in England. Particular reference was made to *R. v. Billam* (1986) 8 Cr.App.R.(S) 48. In that case Lord Lane C.J. giving the judgment of the Court of Appeal, Criminal Division, said that for rape committed by an adult without any aggravating or mitigating features, five years should be taken as a starting point in a contested case. Aggravating features could include additional violence or indignities, acting in concert with other offenders, the youth or age of the victim, intrusion into a home, kidnapping, the use of weapons, prolonged abuse. Mitigating features could include a guilty plea, especially if early,

and in some circumstances the youth of the offender. These factors are not of course exhaustive.

Since 'mitigating' features do not necessarily diminish the traumatic effect of the crime on the victim, it is perhaps preferable to speak of them as special features justifying a lower sentence, but this is only a verbal point.

Billam appears still to be treated as the leading guideline case in England: see *Attorney-General's Reference No. 16 of 1992* (Andrew David Yandell) 14 Cr.App.R.(S) 319. We were not referred to and are not aware of any case in England in which ss.1 and 2 of the Criminal Justice Act 1991 have been specifically considered in relation to rape. Those provisions, which have been in force since 1 October 1992, lay down as the sentencing criteria the seriousness of the offence and in violent or sexual offences the need to protect the public from serious harm from the particular offender (which may justify a sentence longer than the seriousness of the offence). Denunciation and the deterrence of others are not specifically mentioned, but presumably fall for consideration under the seriousness of the offence. No matter whether or not the new English legislation affects rape sentencing there, the New Zealand approach must be significantly influenced by the decision of our Parliament to raise the maximum sentence for sexual violation to 20 years. Sentencing is a field in which there is genuine room for differences of informed opinion, but it is well established that the Courts should have regard to a policy of our Parliament evinced by an increase in the maximum penalty for particular offences: *R. v. Spatalis* [1979] 2 N.Z.L.R. 265. This is now called for in the field of sentencing for sexual violation.

On the argument of the present case counsel for the Crown informed us that the average New Zealand sentence for rape, disregarding preventive detention

cases and without allowing deduction for pre-sentence custody, is now five years seven months. If the time spent in custody before sentence is taken into account, the average may well be more than six years. Thus the starting point stated in *Clark* for contested cases has apparently come to be lower than the average for all rape sentences, whether the plea has been guilty or not guilty. We think that a major reason is that, as any Judge with significant experience in the field will confirm, additional indignities and the force accompanying them have become a very marked feature of evidence relating to rape. Whether in the main this represents a change in the pattern of the conduct of offenders, or only in the willingness of victims to speak out in a franker world, is a question which we cannot answer. But a further contributing reason may have been a sense in the judiciary that the five-year starting point should now be seen as itself rather on the low side.

It is reasonable to assume that both the five-year starting point and the approximate sentence prevailing in practice could have been known to Parliament and its advisers when the maximum sentence was increased to 20 years. On a purely arithmetical basis, looking only at *Clark*, counsel for the appellant is no doubt right in saying that the new starting point would be seven years, one month and three weeks, on which footing Mr Glover would also be justified in his submission that, sentencing not being a purely mathematical exercise, the practical starting point should be seven years. We consider, however, that this suggestion would not allow adequately for the spirit of the recent legislative changes or the previously existing general level of rape sentencing in fact.

In his reference to an eight-year starting point, the Judge did not expressly distinguish between guilty and not guilty pleas. His observations about eight years was addressed to this particular case. We think, however, that in the light of the judicial experience since *R. v. Clark* and the knowledge of what has

transpired that is to be attributed to Parliament, it should now be said that eight years is the starting point in a contested rape case.

While eight years should be the starting point, it is not necessarily the norm. Regrettably there may be seriously aggravating features, as in the present case. The cases of *Clark* and *Billam* illustrate, non-exhaustively, what some of these may be. See also, for instance, gang rape cases and what was said and done about one of them in *R. v. Misitea* [1987] 2 N.Z.L.R. 257. There, in a case of very bad gang rape, it was said by this Court at 266 that, if persons shown to have been ringleaders had been convicted, sentences at or close to the then maximum of 14 years imprisonment might very well have been appropriate. Under the new regime the maximum of 20 years would have to be considered.

On the other hand there may be features in a particular case justifying going below, possibly even well below, the eight-year starting point. Some such cases are listed in *Billam* and *Clark*. Another illustration, depending always on the particular circumstances, may sometimes occur when consent to intercourse is refused after a degree of consensual sexual stimulation. An extreme example is *R. v. Brookes* (1992) 14 Cr.App.R.(S) 496, where a sentence of three years for rape was upheld on the basis that the accused was not aware of the refusal of consent until the act of intercourse had begun. The man's persistence in such a case is criminal but some allowance for the special facts may be made in sentencing.

The present judgment therefore signals an increase in the starting point for rape sentencing, and so probably in the average length of rape sentences, but it is not intended to fetter sentencing Judges in assessing the gravity of particular cases. In the end, almost everything turns on the facts of the particular case. It is part of the judicial responsibility to weigh these. Generalisations are not likely to

be of much assistance. Nor of course are expressions of opinion by media or members of the public not fully apprised of all the facts of particular cases and relying only on very brief summaries. In general a more severe sentencing approach for sexual violation other than rape is also called for by the new legislation; but the facts of such cases vary so greatly that it is not easy to provide guidelines, and in any event that should not be attempted in the present case.

Although the Judge in the present case did not express his eight-year starting point as being appropriate for a defended rape case, his decision accords with that approach in substance in that he allowed a deduction of two years for the early guilty plea. Further the Judge looked at the totality of the circumstances, including the prisoner's mental condition, and the various aggravating factors. There was no error of principle in his sentence.

We turn then to the complaint that the sentence is manifestly excessive. This can be dealt with shortly. It is certainly not. The defendant, aged 30, had a *de facto* partner, who is the sister of the rape victim; they have two children aged respectively, in November 1993, two years and seven months. The relationship had lasted nine years but with significant periods of discord. Latterly it had particularly deteriorated because of his addiction to alcohol, an obsession with prostitutes, and his bad temper and proclivity for violence. At one stage he broke his partner's jaw. He has a good report from his employer but because of his spending on marijuana, alcohol and massage parlours, the family had financial problems. There was apparently some resort to welfare fraud. On the night leading to the offending he had been drinking in the city and became increasingly morbid, angry and despondent. A leading psychiatrist reports that he had become seriously suicidal. He planned to end his own life by car exhaust after the planned rape but was dissuaded by his mother when he telephoned her.

Evidently he had long been attracted to the victim although he also blames her for the breakdown of his relationship with her sister. Early in the morning he walked from the central city to Ferrymead, a distance of some miles, premeditating rape and suicide. He went to the house where the victim lived with her husband. He was given coffee. She drove her husband to his work and returned to find the accused still there. After a short conversation he seized her by the hair and pushed her into a bedroom. He forced her against a wall with his knee and produced a knife, which he is said to have obtained from the kitchen, and held it against her throat. The woman managed to indicate to her eight-year-old daughter to ring the police, but the accused threw the daughter on to a couch and pulled the telephone cord from the wall. The complainant was screaming. He held the knife to her throat again and told her that it was either herself or the girl. He dragged the complainant into the bedroom again, ordering the daughter to follow. He forced the complainant to the floor, where he struck her on the back of the head several times with his knee. He also punched her and then forced her on to the bed. He attempted to put her daughter, who was crying, into a wardrobe but ultimately made her lie on the bed, facing the wall. He then raped the woman on the same bed, having held the knife to her throat and forcibly removed her underwear. Victim impact reports demonstrate the traumatic and enduring effect of all this on both mother and daughter.

Later in the day the accused went to the police and made voluntary admissions. The psychiatric and probation reports speak of certain disadvantages and unfortunate sexual experiences in his early life, but the probation report includes the following:

[He] found the victim sexually attractive and he admitted fantasising about her. Although alcohol further depressed an already suicidal mood, [he] admits that the offence was planned and purposefully carried out. His relationship

problems, use of prostitutes, and early sexual experiences form the background to this offence but do little to explain it. His wish to dominate and hurt the victim coupled with his indifference to the consequences and his desire for sexual gratification overcame any reluctance he may have felt. He fully accepts his guilt in the offences.

The report states that he will need treatment for his reliance on drugs and alcohol, and for anger control, and some form of sexual therapy. It expresses the hope that these issues will initially be addressed during his prison sentence.

It is only necessary to outline the facts to bring out the gravity of the combined offending. The psychiatrist accepts that he was under extreme tension, to the point of despair, but that there was no evidence of mental disorder to the extent of inability to form an intention or to distinguish right from wrong.

Manifestly the sentence was fully justified. The appeal is dismissed. It should be recorded that the Crown has not sought a higher sentence and that accordingly we have not been called upon to consider that possibility.

R B Coote P.

Solicitors:

Crown Law Office, Wellington, for Crown