

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

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA564/2008
[2008] NZCA 482**

THE QUEEN

v

RHYS NICHOLAS DUNICK

Hearing: 10 November 2008

Court: William Young P, Ronald Young and Fogarty JJ

Counsel: R G R Eagles for Appellant
G H Allan for Crown

Judgment: 14 November 2008 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Ronald Young J)

[1] The appellant and complainant had been friends for about six weeks when she invited him to her house one evening.

[2] Shortly after the appellant arrived he attempted to remove her dressing gown. She resisted. The appellant became violent and, as a jury found, eventually raped and sexually violated her by digital penetration. The appellant says the eventual sentence imposed by Judge Phillips of nine years' imprisonment was manifestly excessive because the starting point of eight years' imprisonment was too high, he erroneously treated some factors as aggravating which were not, and he failed to recognise some mitigating features.

Background facts

[3] The complainant's invitation to the appellant to visit her home had been preceded by an exchange of text messages with some sexual content. However, once the appellant arrived at the complainant's home she rejected his advances. He became violent and starting slapping her breasts. He removed her dressing gown and held her down. She continued to protest. He then digitally penetrated her, which she found painful. He then pushed her to the floor and penetrated her. He then made her kneel on the bed pushing her head into a pillow and again penetrated her while slapping her buttocks. The appellant made a number of derogatory sexual references to the complainant. Eventually the complainant escaped. She ran out into her garden where she stayed until the appellant left.

Submissions and discussion

[4] The appellant submits the Judge's starting point of eight years' before aggravating features relating to the facts were taken into account was too high given the sexual banter preceding the appellant's arrival at the complainant's house.

[5] It is well established that a starting point of eight years imprisonment is appropriate for a contested rape with seriously aggravating features justifying an increase: *R v A* [1994] 2 NZLR 129 (CA). A starting point below eight years' imprisonment can be appropriate where there is consensual sexual conduct immediately before the offending: *R v A* at 132.

[6] However, the brief sexual banter by texting before the appellant arrived at the complainant's house is not in this category. The complainant made it explicitly clear to the appellant when he tried to remove her dressing gown that she did not consent to him doing so. The starting point at eight years' imprisonment was, therefore, appropriate and justified.

[7] The Judge identified the aggravating features as premeditation, that the attack occurred in the complainant's home, their friendship, the violence and the multiple acts of sexual violation.

[8] We do not consider there was any evidence which could have justified the Judge's conclusion that the appellant entered the complainant's house intent on having sexual intercourse whether consensual or not. It is clear when the appellant arrived at the house he expected to have sexual intercourse given the exchange of text messages. There is no evidence at this stage, however, that he had decided he would proceed whether the complainant consented or not.

[9] Nor do we consider in these particular circumstances the fact the rape occurred in the complainant's house and that they were friends required an increase in the starting sentence of eight years. This was not a case of unlawful entry into a house and the friendship was only of a few weeks duration.

[10] However, we are satisfied the violence of the attack, including the pinching of the complainant's breasts, grabbing her hair and pulling her to the ground, pressing her head into the pillow, and especially the slapping of her breasts and buttocks justified an increase beyond the 8 years. In addition we are satisfied the multiple sexual violations would also have justified increase from the starting point of eight years' imprisonment. The Judge's increase from eight years' to nine years' imprisonment was well justified by these aggravating features.

[11] As to the appellant's personal circumstances, the appellant has been previously convicted and imprisoned for violence towards women although in the circumstances we do not think that would have justified an uplift from the starting sentence.

[12] The Judge did not consider there were any mitigating features relevant to the length of sentence. The appellant says the Judge should have reduced the sentence based on his limited intellect, poor work history, dyslexia, substance abuse and supportive family.

[13] Neither a poor work history nor a supportive family in the context of this case are mitigating factors that would justify a reduction of the starting sentence.

[14] Diminished intellectual capacity or understanding can legitimately reduce an otherwise appropriate sentence (s9(2)(e) Sentencing Act 2002). There was no evidence before the sentencing Judge that the appellant came within s 9(2)(e). Ms Ely, a clinical forensic psychologist saw the appellant prior to sentencing and provided a report to the Court. She was asked to assess whether the appellant had “Foetal Alcohol Syndrome, organic brain syndrome, or other neuro- or psychopathology”.

[15] Ms Ely was referred to an incident when the appellant had been hit on the head with a hammer. She concluded that given he had not lost consciousness there would be minimal cognitive deficit or effect. Ms Ely recorded her concern about the appellant’s drug abuse and observed that such drug abuse often causes brain damage. However, there was no evidence of any foetal alcohol syndrome, organic brain damage or other neuro or psychopathology.

[16] Her report, therefore, did not establish diminished intellectual capacity or understanding sufficient to reduce an otherwise appropriate sentence.

[17] We agree with the Judge, therefore, that there were no mitigating circumstances and that the sentence of nine years’ imprisonment reflecting the facts and the aggravating features was within the range available.

[18] The appeal will be dismissed.

Solicitors:
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