

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

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA772/2008
[2009] NZCA 197**

THE QUEEN

v

MICHAEL TE AOROA STUSKY

Hearing: 13 May 2009

Court: Ellen France, Priestley and Miller JJ

Counsel: J C Down for the Appellant
M E Ball for Crown

Judgment: 22 May 2009 at 10 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Priestley J)

The appeal

[1] The appellant was convicted of sexual violation by rape after a jury trial.

[2] On 20 November 2008 Judge Field sentenced the appellant to a term of nine years imprisonment and imposed a minimum term of imprisonment of four years. This appeal challenges that sentence.

Background

[3] The offending occurred in March 2007. The appellant was then aged 31. His victim was a 16 year old. Both were members of a group who had spent the afternoon drinking alcohol at Bastion Point. They had not previously known each other. They were introduced that afternoon. A member of the group was the victim's elder sister.

[4] Around 7 pm the group decided to leave Bastion Point and travel to central Auckland. The victim stayed behind waiting for her sister. Growing impatient at the delay, the victim walked to Tamaki Drive and hailed the group ahead of her. The appellant turned around and approached the victim. They were effectively alone. The appellant grabbed the victim and pushed her into bushes adjacent to a bus stop. He removed the victim's lower clothing, ignored the victim's efforts to push him away, and raped her.

[5] The victim impact statement makes it clear she had, during the afternoon, displayed no interest in the appellant whatsoever. The report describes the victim's trauma, aggravated by her sexuality, and her heightened distrust of men.

[6] The pre-sentence report detailed the appellant's personal circumstances. He is of Cook Island ethnicity and had been employed in the construction industry until an injury rendered him a sickness beneficiary. He had amassed a large number of convictions over the previous 15 years.

[7] Approximately two months after the offending, in May 2007, the appellant offended again. He assaulted a guest in his home. During the same evening he indecently assaulted and sexually violated (by digital penetration) his 17 year old partner. Having pleaded guilty he was sentenced to two years imprisonment in the District Court on 18 December 2007. Thus, by the time he appeared for sentence before Judge Field, the term of imprisonment imposed for the May 2007 offending was probably no longer operative.

The sentence

[8] The Judge considered there were no mitigating features of the offending. He identified the aggravating features as the victim's vulnerability (she being alone and intoxicated) and her relative youth. The Judge found it difficult to accept the appellant was unaware of his victim's sexual orientation but gave him the benefit of the doubt on that aspect.

[9] Having regard to the identified aggravating features the Judge adopted a starting point of eight years and three months. He referred to the appellant's long list of convictions and the May 2007 offending. He observed that, although occurring after the offending with which he was concerned, the subsequent sexual offending was "relatively close in time and ... demonstrate[d] a worrying propensity for violent sexual offending against women".

[10] The Judge correctly reminded himself that the appellant was not to be punished twice for the offending which had been visited with a two year sentence. Nor was he to be punished again for his previous convictions.

[11] The Judge concluded that the appellant's history demonstrated "an alarming escalation" of sexual offending "from which the community must receive protection". This justified an uplift from the eight years three month start point to an end sentence of nine years to reflect the personal aggravating features to which the Judge had referred.

[12] The Judge then addressed s 86 of the Sentencing Act 2002. He was satisfied the criteria of the discretion to impose a minimum term had been satisfied, particularly in the case before him, for the purposes of denunciation, deterrence, and protecting the community. It was these last two aspects which weighed with the Judge:

... we have two serious sexual offences within a fairly short space of time. You have a long list (as I said) of previous convictions, much of which I suspect is drug related having regard to the kind of offences recorded. I see this as escalating seriousness of the offending and it seems to me that the previous shorter prison terms have not deterred you and personal deterrence is a particular issue here.

[13] On that basis the Judge imposed a minimum term of four years imprisonment.

Discussion

[14] Mr Down's submissions were understandably economical but helpfully focused on two central issues. The first was that the Judge, despite his clear methodology, had insufficient regard to the previously imposed sentence of two years imprisonment. The net result of the sentences imposed was that for the March and May 2007 offending the appellant had effectively been visited with a term of 11 years imprisonment. Such a result violated totality principles.

[15] The second issue was the minimum term which counsel submitted on the authority of *R v Wirangi* [2007] NZCA 25 was unnecessary. At [18] of *Wirangi* this Court observed that the statutory purpose of s 86(2) was to cover situations where the usual minimum period of imprisonment under s 84(1) of the Parole Act 2002 was insufficient for the s 86(2) statutory purposes.

[16] *Wirangi* too was a rape case. This Court said (at [18]):

It is not to be assumed that the appellant will be released immediately upon the expiry of the minimum period of one-third of the full term of the sentence. Indeed, our understanding is that this is unlikely for offending of this type. The statutory purposes of holding the offender accountable for the harm, denouncing his conduct and deterring him or others from committing similar offences will be met sufficiently by the usual minimum period.

There is nothing in the appellant's previous record to suggest he presents a high risk of reoffending

[17] On this basis, submitted Mr Down, there was no justification in imposing a minimum term under any of the four heads of s 86(2).

Decision

[18] Dealing with counsel's first point the Judge was not faced with a situation to which the totality principles embodied in s 85 of the Sentencing Act apply. Had the Judge imposed a sentence cumulative on the term the appellant was already serving (jurisdictionally problematic given the time served), then totality issues under s 85(3) might have applied.

[19] Although counsel argued that the previous sentence might have justified the Judge adopting a lower starting point for rape than the eight year figure which *R v A* [1994] 2 NZLR 129 (CA) suggests, we do not consider there is any feature of the offending or the aggravating factors identified by the Judge which calls his eight year three month start point into question. Nor do we consider that the uplift to nine years was wrong given the aggravating features relevant to the appellant. The Judge was right to identify as an alarming feature the escalation of the appellant's offending, involving as it did sexual offending against relatively young women.

[20] We do not consider the appellant was being re-punished for his May 2007 offending. Rather a significant aggravating feature requiring deterrence and community protection was identified and appropriately weighed.

[21] Nor do we see any error in the imposition of a minimum term under s 86. The issue before the Judge was whether serving a minimum of one third of the nine year sentence was insufficient for some or all of the s 86(2) purposes. Relevant to *Wirangi* is that the offender there had no previous convictions for sexual or violent offending.

[22] In our view the approach taken by the Judge was correct. The proximity of the two episodes of the appellant's sexual offending brought into play the purposes

of deterrence (the offending being a significant change and escalation by the appellant) and community protection.

[23] Imposing a minimum term which exceeds by one year the parole eligibility entitlement was, in the circumstances before the Judge, a proper exercise of his discretion. We see no basis for interfering with it.

Result

[24] For these reasons the appeal against sentence is dismissed.

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