

**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

**CA307/2010
[2010] NZCA 426**

BETWEEN	TRAVIS EUGENE BURRELL Appellant
AND	THE QUEEN Respondent

Hearing: 1 September 2010

Court: Arnold, Keane and MacKenzie JJ

Counsel: T Sutcliffe for Appellant
H A Wrigley for Respondent

Judgment: 20 September 2010 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by MacKenzie J)

[1] The appellant was found guilty by a jury on one count of sexual violation by rape, one count of sexual violation by unlawful sexual connection, involving the digital penetration of the anus of the complainant, and one count of attempted sexual violation by unlawful sexual connection from an attempt to penetrate the anus of the complainant with his penis. He was sentenced by the trial Judge, Judge Connell, to a

term of nine years' imprisonment.¹ He appeals against sentence on the grounds that the sentence was manifestly excessive.

[2] The appellant and the complainant had become acquainted on an internet dating site in the latter part of 2008. A relationship built up over a period of time to the extent that they were conversing in what the Judge described as “a cordial and sometimes flirtatious way”² over the internet and by text message. They arranged to meet for the first time in the evening of 27 February 2009. The complainant forgot about the arrangement and there was subsequent communication between them in which she invited him to her house to stay the night. The complainant was looking after her disabled son and there was a caregiver staying for the night. The complainant made it plain that she was not interested in sexual contact on that night, and the appellant acknowledged in his evidence that he knew that. The complainant had taken a sleeping pill, as the appellant knew. They went to bed together, the complainant fully clothed and the appellant partially clothed. She fell asleep as a result of taking the sleeping pill. She woke to find the appellant having sexual intercourse with her in what she described as a rough way. The digital penetration and attempted penile penetration of her anus then occurred, and there was coarse and abusive language from the appellant. The complainant managed to get away and went into the bathroom. The appellant expressed concern about her. He left the property shortly afterwards, once the complainant asked him to do so. The complainant required surgery to treat an injury to her anal region.

[3] The appellant contended that the complainant consented to sexual intercourse and that he had briefly digitally penetrated her anus, but stopped when requested to do so and that any contact between his penis and her anus was simply an accident during the act of sexual intercourse which the appellant claimed was consensual.

[4] In sentencing, the Judge noted that the jury must have rejected the appellant's version of events, although the appellant continued to maintain, at sentencing, that there was, on his part, a mistaken belief that she was consenting to this activity. The Judge, in considering whether that submission was relevant to an assessment of the

¹ *R v Burrell* DC Hamilton CRI-2009-019-1950, 3 May 2010.

² At [3].

total culpability of the offending, expressed some difficulty in accepting that view of the matter because the appellant was aware that sexual intercourse was not an activity the complainant wished to engage in that evening, and that she gave no consent. The appellant was aware that she had taken the sleeping pill, he knew that she was asleep and took advantage of that. The Judge considered that, as a result of the relationship that “developed electronically so to speak”,³ the complainant had come to trust the appellant with the expectation that he would treat her decently and that she could rely on him not to take advantage of her. The Judge considered that it was that trust that led to her letting him stay the night. The Judge noted from the complainant impact statement that the complainant had been left with considerable trauma over the event which will continue to have an impact on her life for some time, and she suffered injuries to her anus which required surgery.⁴

[5] As to the appellant’s personal circumstances, the Judge noted that there was nothing in the list of previous convictions relevant to the offending at all. The appellant had a relatively limited prior history commencing in the Youth Court at age 16 and with a most recent offence of shoplifting in 1993.

[6] The Judge referred to the aggravating features of the offending relied upon by the Crown as being the vulnerability of the complainant because of her drugged state and the fact that the appellant knew that, that the offending involved three different sexual acts, including acts involving anal intercourse, and the effect on the complainant, both emotionally and physically. The Judge referred to the guideline judgment in *R v AM*.⁵ He noted the Crown submission that the offending should be placed in band 2 of the rape bands.

[7] As to the submissions of the appellant’s counsel at sentencing, the Judge noted the submission that there had been a mistaken belief in consent. The Judge did not accept that view of the matter, in light of the complainant having made clear that there was not to be any sexual contact on that night. The Judge did accept that the appellant and the complainant had formed something of a relationship but said that the appellant “had expectations of this complainant which went way beyond what

³ At [10].

⁴ At [11].

⁵ *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750.

she herself viewed the relationship was all about”.⁶ The Judge found that any remorse was of a fairly minor nature for which he could not give the credit that he might for anyone who fully acknowledged offending and is remorseful for it. The Judge noted counsel’s submission that the sentencing should be at the lower end of band 1 of the rape bands. The Judge noted that that would require an acceptance, as a mitigating factor, of the submission that the appellant was under some form of mistaken belief, which the Judge had rejected. The Judge held that the circumstances of the offending, based on the consequences to the complainant, and considering that there was violence because of the injuries inflicted for which surgery was required, that this was a case at the upper end of band 1. He took an eight year starting point for the sexual violation by rape. He added a further year in respect of the other two offences to consider the totality of the offending, leading to a nine year term. The Judge rejected a Crown submission that a minimum period of imprisonment should be imposed.

[8] Counsel for the appellant submits that the Judge erred in assessing the starting point for the offending. He submits that the Judge was correct in assessing the case as falling within band 1, but submits that it should have been assessed at the lower end of band 1. He submits that the starting point for the lead charge of rape should have been six years, that there was nothing personal to the appellant that should have increased that starting point, and that the eight year starting point for the rape was excessive. Counsel accepts that it was open to the Judge to add 12 months to reflect the totality of the offending.

[9] Counsel for the Crown submits that the adjusted starting point of nine years’ imprisonment, which falls at the lower end of band 2, was open to the trial Judge because of the vulnerability of the complainant arising from her drug-induced sleeping state which was known to the appellant. Counsel submits that a number of the culpability assessment factors identified in *AM* are present here, particularly harm to the complainant, vulnerability of the complainant and the scale of offending in the three separate counts. Counsel submits that the limited extent of the consensual activity that occurred did not decrease the seriousness of the offending. Counsel for the Crown submits that the appellant’s offending can be characterised as

⁶ At [18].

involving him deliberately taking advantage of the medicated sleeping complainant, involving a range of sexual activity that caused the complainant both pain and injury and resulted in significant psychological harm. Counsel submits that when the scale of the present offending is considered, together with the complainant's vulnerability and the harm caused to her, the offending falls within the lower end of band 2. Counsel submits that the adjusted starting point of nine years cannot be said to be manifestly excessive in light of the complainant's vulnerability, the nature of the assault and the physical and psychological harm she suffered.

[10] In assessing the offending, the Judge adopted the approach of fixing a starting point for the lead offence, the rape, and making an uplift to reflect the other counts. That was a proper and available approach. Another approach would be to assess the totality of the offending in fixing the appropriate band, and placement within that band, for the offending as a whole. Either approach is available to a sentencing Judge. This Court, in discussing the approach to reflect the scale of offending, said in *AM*:

[48] Offending against multiple victims is another aspect which increases the culpability of the offender. The Crown submits that if there are multiple victims this should lead to a departure from the guidelines. We agree with the Crown submission that there is a risk that including such offending within the guidelines may not give adequate recognition to the harm caused to each victim. However, this aspect can be addressed in two ways. First, by the recognition that prolonged offending involving multiple victims, particularly in the familial context, warrants higher starting points in rape band four. Secondly, by application of the provisions in the Sentencing Act relating to cumulative and concurrent sentences and the totality principle. In that context we note that where there are multiple victims of offending (particularly in cases where there have been offences over a number of years against multiple victims), the 20-year maximum for one offence is not the maximum available sentence able to be imposed for the series of offending.

[49] On the other hand, a realistic view is to be taken where a number of offences are committed as part and parcel of what is, in substance, a single incident. Offending in one case involving indecent assaults followed by sexual violation by rape may be no more serious than offending in another case in which the only offence committed is sexual violation by rape. What is required is a common sense approach to overall culpability.

[11] Whichever approach is adopted, the outcome should be the same. In this case, we prefer the first approach, namely to assess culpability in relation to the offending as a whole, when fixing the banding, and placement within the band, for

the lead offence. We adopt this approach because the offending here all occurred within a single incident. Also, adopting this approach provides something of a cross-check to the method adopted by the sentencing Judge.

[12] This Court in *AM* discussed a number of culpability assessment factors.⁷ That is not an exhaustive list. It is convenient to begin our assessment by enumerating the factors which we consider to be of particular significance in this case.

[13] The first is the vulnerability of the complainant. While not otherwise vulnerable, we regard the fact that the complainant had, to the knowledge of the appellant, taken a sleeping pill, the effect of which was to place her in a deep sleep and unable to resist the appellant's advances, as constituting a significant level of vulnerability.

[14] Next is the harm to the complainant. Here, there is significant harm to the complainant, beyond that inherent in the offending. There was significant laceration to the anus, causing severe pain and requiring surgery. The complainant was left with considerable psychological trauma.

[15] The breach of trust is also a factor which increases culpability. The appellant here was not in a relationship of trust in the ordinary sense with the complainant. However, a level of trust had developed from the online relationship, and was inherent in the complainant's actions in allowing the appellant to share her bed while she was affected by the sleeping pill. The appellant took advantage of that trust.

[16] A mistaken belief in consent may reduce culpability. On the view the Judge took of the facts, having heard the evidence at trial, he rejected the proposition that the appellant's culpability should be diminished on this ground. We agree with that assessment. Consensual sexual activity immediately before the offending may in some circumstances be a factor diminishing culpability.⁸ The circumstances here as we have described them do not lead to any diminution of culpability on that account.

⁷ At [34]-[64].

⁸ See *R v AM* at [54]-[60].

[17] The degree of violation is a relevant factor in the assessment. Here, there was penetrative intercourse interrupted only by the waking of the complainant, plus digital penetration of the anus and attempted penile penetration of the anus. The degree of violation is serious and extensive.

[18] We come to the placing of the offending within the appropriate band. Because of the rape, the appropriate category is the rape bands. Rape band 1 is appropriate for offending at the lower end of the spectrum where the aggravating features are not present, or are present only to a limited extent.⁹ Where none of the factors referred to as aggravating factors are present, a starting point at the bottom end of band 1 would be appropriate. Where one or more of the factors is present to a low or a moderate degree, a higher starting point within the band would be required. Band 2 is appropriate for a scale of offending and levels of violence and pre-meditation which are, in relative terms, moderate.¹⁰ The band covers offending involving a vulnerable victim. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.

[19] Assistance with placement within the bands may be derived from the examples given in *AM*. Mr Sutcliffe relies particularly on the example of *R v Pehi*¹¹ as an example of cases with starting points at the lower end of band 1. We regard the offending in that case as significantly less serious than in this. The parties had been in a relationship. There had been some kissing in the early hours of the morning in the complainant's bedroom, followed by non-consensual activity culminating in rape. That case does not have the features of vulnerability and breach of trust present here, and the harm to the complainant appears to have been significantly less. Those factors also serve to distinguish this case from the other two examples given of cases with starting points at the lower end of rape band 1. *R v Wirangi*,¹² a case at the higher end of rape band 1, has an element of vulnerability (by age) and breach of trust, albeit of a different sort from that involved here. Of the cases at the lower end of rape band 2, counsel for the Crown relies

⁹ *R v AM* at [93].

¹⁰ At [98].

¹¹ *R v Pehi* CA86/06, 31 October 2006.

¹² *R v Wirangi* [2007] NZCA 25.

particularly on *R v Dunick*.¹³ The facts of that case have some similarity with the present case. There is one significant difference. In that case, the victim was awake and alert and her rejection of the offender's advances was met with a degree of violence. The complainant in this case was insensible and no violence was involved. We see the greater degree of violence involved in *Dunick* as being broadly comparable with the increased vulnerability of the complainant in this case, so far as our assessment of culpability is concerned. The degree of violation in this case is higher in that it involves penetration of the anus as well as of the vagina. *Dunick* was on the cusp of bands 1 and 2, taken into band 2 by the increased level of violence, the range of sexual activity and associated degradation. This case is taken into band 2 principally by the breach of trust, the range of sexual activity, and the harm to the complainant.

[20] We consider that an assessment of the total offending at the lower end of band 2 is appropriate here, having regard to the number of aggravating culpability assessment factors which are present. Accordingly, we consider that a starting point of nine years for the totality of the offending was within the range available to the sentencing Judge, and the sentence was not manifestly excessive.

[21] The appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

¹³ *R v Dunick* [2008] NZCA 482.