

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

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF
ANY PERSON UNDER THE AGE OF 17 YEARS WHO APPEARED AS A
WITNESS PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT
1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA605/2012
[2013] NZCA 297**

BETWEEN	ALEXANDER BRUCE CLAUDE DEMPSEY Appellant
AND	THE QUEEN Respondent

Hearing:	23 May 2013
Court:	O'Regan P, Goddard and Dobson JJ
Counsel:	A J S Snell for Appellant M J Inwood for Respondent
Judgment:	11 July 2013 at 10 am

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B The appeal against sentence is allowed to the extent that the minimum term of imprisonment is quashed. The term of 10 years imprisonment is confirmed.**
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REASONS OF THE COURT

(Given by Goddard J)

[1] The appellant was tried before a Judge and jury on an indictment containing two counts: unlawful detention of a young woman without her consent with intent to have sexual connection with her; and sexual violation of the same young woman by rape.

[2] The appellant was found guilty of rape but acquitted on the charge of unlawful detention.

[3] He was sentenced by the trial judge, Judge Adeane, to a term of imprisonment of 10 years, with a minimum period of imprisonment of five years.¹

[4] He now appeals against both conviction and sentence. His appeal against conviction is on the ground that the verdict of guilty on the count of rape is inconsistent with his acquittal on the count of unlawful detention with intent to have sexual connection.

[5] His appeal against sentence is against the length of the sentence imposed and the imposition of a minimum term of imprisonment.

Background facts

[6] The complainant, a young woman aged 18 years, was walking home through the Hastings central business district between midnight and 1 am. She had been out for the evening with friends and they had accompanied her for a while but had parted company with her on a street corner. She continued on her way alone. She was moderately intoxicated although in command of her faculties.

[7] The appellant was cruising around the area in his utility vehicle. A series of security camera views recorded his vehicle circling and recircling in what the trial Judge described as “an apparently aimless fashion”.²

[8] The appellant drove up beside the young woman and stopped and offered her a lift home. She declined and the appellant repeated his offer several times. His

¹ *R v Dempsey* DC Napier CRI-2011-020-3194, 29 August 2012.

² At [2]

presence and persistence clearly became distressing to the young woman because she surreptitiously sent a text message to her friends saying “Huri a manz tryna take me”.

[9] On receiving the text, the complainant’s friends turned around and ran back towards her. They saw she was standing near a white utility vehicle. As they got within 50 metres of her, the vehicle departed.

[10] The friends said in evidence that the complainant was upset and crying and they offered to walk with her to her home. They all set off together. However the friends did not accompany the complainant the whole way. At some point they turned back, believing that she would be all right.

[11] Shortly afterwards the appellant appeared again in his utility vehicle and stopped beside the complainant and once again asked her if she wanted a ride to her home. He also told her he had some puppies in his vehicle and asked if she would like to look at the puppies. The complainant again declined but the appellant persisted with his invitation. The complainant began to walk away down the street. She said the appellant then came up behind her on foot and grabbed her by her jersey and started pulling her back towards his vehicle. She said she tried to stop him by taking his hand off her jersey but he got more violent and started pulling her by her hair as well. She said he told her to “shut up and hurry up” and then pushed her into the passenger side of his utility in a forceful manner. He then got into the driver’s seat and drove to a secluded area, the journey taking less than three minutes. On the way he threatened the complainant with a spanner and told her that if she wanted to get home she had to “sit there and shut up”.

[12] When they got to the secluded area the complainant said the appellant got out of the vehicle and came around to the passenger door. He then ordered her to remove her pants and underwear, which she did because she was extremely frightened. She told him that she had her period and had a tampon inserted. He removed this and she has no idea what he did with it. Unprotected sexual intercourse then took place. Afterwards the appellant told her to get dressed and said she could go home. She got dressed and ran to her home.

[13] On arrival she awoke her siblings, who then woke their mother. The police were called.

[14] The appellant was apprehended six days later and volunteered a brief statement about a possible sexual encounter, stating “I was with a chick the other night, she told me she was 19 though”. His utility vehicle was forensically examined and blood stains on the passenger’s seat and passenger door sill with a flow pattern were found. Chemical testing indicated semen was present in the blood stained area of the seat. Results of a medical examination carried out on the complainant established that semen was also present in her vagina, indicating recent sexual intercourse had taken place. The medical evidence also confirmed that she was menstruating on the night of the rape.

[15] A spanner was found in the cab of the utility vehicle. There were also two puppies in a crate on the open tray of the vehicle.

[16] The appellant gave evidence at his trial 11 months later. His version of events was that on the first occasion he had stopped beside the complainant she was very friendly towards him but declined a ride home. On the second occasion, he said he stopped because she had waved him down and asked him for a lift. He said she introduced herself and within two minutes of entering the vehicle he got the feeling she was eyeing him. He said she was cuddling one of two puppies he had in the cab, and then she reached over and rubbed his crotch. The appellant said he felt it was all a bit strange but he was not going to say “no”. He said the complainant told him she had turned 19 and asked if he had any drugs and then suggested a venue where they could have sex. He said consensual sexual intercourse then took place. He said he never threatened her with a spanner, or at all. He said she offered to give him her phone numbers and said she would like to meet up with him in a week’s time and kissed him on the cheek before she got out of his vehicle.

Applicable legal principles

[17] The general principle in appeals based on inconsistent verdicts is that a conviction is unsafe if no reasonable jury, properly instructed, could have arrived at the conclusion that was reached. An appellate court can only intervene if the

appellant has discharged the burden of demonstrating that the only explanation for the inconsistency is that either the jury was confused, or it adopted the wrong approach.³ The Court generally ought to be reluctant to interfere with a jury verdict given the respect for the functions which the law assigns to juries, and the general satisfaction with their performance.⁴

[18] The appellant must show a prima facie inconsistency.⁵ A verdict cannot truly be said to be inconsistent unless it can be seen that a common ingredient of the crimes in issue must have been differently found by the jury.⁶ If a prima facie inconsistency is established, the Court must then inquire whether there is any rational or logical explanation for the inconsistent verdict. It is only when no reasonable jury applying their minds properly to the evidence could have arrived at the conclusion that it reached, that the verdicts cannot stand together.⁷

Conviction appeal

[19] Four arguments were advanced in support of a finding of inconsistent verdicts. These were that:

- (a) the allegations of abduction and rape in the indictment were closely interwoven;
- (b) proof of both charges beyond reasonable doubt rested on the jury's acceptance of the complainant's narrative of events;
- (c) the acquittal on the abduction charge cannot be logically reconciled with the conviction on the rape charge – such that no reasonable jury applying their minds properly to the evidence could have arrived at the conclusion that was reached in this case; and
- (d) in all the circumstances of the case the conviction should be quashed.

³ *R v Shipton* [2007] 2 NZLR 218 (CA) at [75].

⁴ *R v H* [2000] 2 NZLR 581 (CA) [28]–[30].

⁵ *R v Shipton*, above n 3, at [76].

⁶ *B (CA862/2011) v R* [2012] NZCA 602 at [10](a) citing *R v Irving* CA234/87, 4 March 1988.

⁷ At [10](c).

[20] Expanding on these grounds, Mr Snell emphasised that in a case where the coercive nature of the appellant's conduct was alleged to have resulted in the complainant ending up in his vehicle and being induced to submit to sexual intercourse with him within a very short timeframe, there could be no logical reason for differing verdicts about such closely related events. He said the dragging of the complainant by her jersey and hair to the vehicle was a key part of the narrative and the acquittal on the charge of unlawful detention could not therefore logically be reconciled with the conviction on the rape charge. He said no reasonable jury, applying their minds properly to the evidence, could have arrived at such a conclusion. If the jury were not satisfied the complainant had been forced unwillingly into the appellant's vehicle, it was difficult to understand how the same jury could have been satisfied that non-consensual sex had occurred only three minutes later. Mr Snell said such a premeditated and deliberate continuing course of conduct by the appellant, as alleged, over a very short period of time from first encounter to non-consensual intercourse, made the allegations of unlawful detention and rape so closely interwoven that it was artificial to separate them and to attempt to rationalise the apparent inconsistency.

[21] Of greatest significance to a finding of irreconcilable inconsistency, Mr Snell submitted, was the common element of consent (or lack thereof) in both charges.

Discussion

[22] While it is not possible to divine exactly why the jury decided on a verdict of acquittal in relation to the first count, there are a number of reasonable possibilities as to why they may have reached different verdicts on the two counts, notwithstanding the close relationship in time and in kind, and the critical shared elements of consent or reasonable belief in consent.

[23] The first reasonable possibility is that there was no evidence of any physical injury or damage to the complainant's clothing as a result of any violent struggle to get her into the appellant's vehicle. Nor was there any ostensible reason as to why the complainant had not got out of the vehicle immediately after being pushed into it, as there was no evidence of the passenger door being locked. It appears the jury

were somewhat exercised about this latter aspect, because during their deliberations they asked the following question:

In the initial address by the prosecutor she mentioned kiddie locks on the ute – it was never mentioned again – any way of finding out if there were kiddie locks?

[24] That question by the jury seems to have been prompted by a passage in the prosecutor's opening address, which was as follows:

What [the complainant] says happened next is that he grabbed her forcefully by her hair and dragged her to his vehicle. He put her inside the passenger seat and then put the kiddie lock on in the car and shut the door.

[25] The Judge's response to the jury's question was apparently to simply direct them that the matter had never been addressed in evidence. What the question does indicate however is that the jury had been listening carefully to the evidence from the outset and were clearly alive to material issues. It cannot therefore be contended that they were confused or were taking a wrong approach.

[26] On the above scenario, the jury may have regarded it as a reasonable possibility that the appellant believed the complainant was reluctantly consenting to get into his vehicle because it had not been too physically difficult for him to get her into the cab and she had not immediately got out.

[27] Alternatively, the jury may have found it a reasonable possibility that the complainant was persuaded to get into the vehicle, albeit reluctantly, but was not consenting to any sexual intimacy with the appellant by doing so. Even if she had entered the vehicle without being forced to do so, there was no logical inconsistency in finding that she did not thereafter consent to the sexual activity that followed.

[28] Another possibility is that the jury may not have been satisfied that at the point of detaining the complainant, the appellant's purpose was to have sexual connection with her. In that regard the trial Judge in summing up gave the jury a specific direction that:

[18] ... If, for example, you are sure that this young lady was detained against her will and forced into the motor vehicle you are going to have to go on to decide whether that was done with the accused having intent to have

sexual connection with her. You know what the end result was. The issue, of course, is what was his intent at the time she was detained and you might well be prepared from all the surrounding circumstances to draw an inference, a fair and reasonable deduction about what were his intentions according to what you decide to be his proved actions. You are entitled to draw inferences from proved facts.

[29] The jury may have been prepared to give the benefit of the doubt about the Crown's case on any one of these possibilities.

[30] By contrast, when it came to the allegation of non-consensual sexual intercourse having occurred within about three minutes of the appellant driving off with the complainant, it was clearly open to the jury to accept her evidence in its entirety and to reject as a reasonable possibility that she was consenting to sexual intercourse with the appellant or that he could have had any reasonable belief in her consent. Given the facts, it is inherently implausible that an 18 year old girl, who had texted her friends for help only minutes before because she was frightened by the approaches of a mature male stranger, could have undergone such a rapid reversal of feelings. Adding to that inherent implausibility, is the fact that she was menstruating at the time of this incident. As she said in her evidence before the jury, when the appellant removed her tampon it made her feel "disgusting".

[31] The complainant was extensively cross-examined by Mr Snell at the trial. The jury also had the benefit of hearing the appellant give viva voce evidence. Counsel for the Crown and the defence both made detailed closing addresses, in which they traversed the evidence thoroughly. Both counsel pointed out that there were some inconsistencies in the complainant's evidence. The trial Judge directed the jury in his summing up that different witnesses see events from different perspectives and will recall them differently. The jury was therefore in a well-informed position to make careful assessments and to reach each separate verdict on the totality of the evidence.

[32] The only live issue for the jury on the sexual violation count was consent. While the only direct evidence on this issue was the complainant's account, there was no doubt that sexual intercourse had taken place, as that was independently confirmed by the forensic analysis of blood found on the passenger seat of the

appellant's vehicle which could be reasonably inferred to be the complainant's; and the medical evidence that she was menstruating on the night of the rape. There was also the evidence of threatening behaviour by the appellant with a spanner and of a spanner being found in the cab of his utility when it was searched.

[33] We are not troubled by the possibility that the verdicts returned by the jury in this case were inconsistent or that the acquittal on the unlawful detention charge is unable to be logically reconciled with the conviction on the rape charge. Whilst proof of both charges beyond reasonable doubt rested on the jury's acceptance of the complainant's narrative of events, there is nothing to indicate that the jury must have believed certain evidence in relation to the sexual violation count but rejected that same evidence in relation to the unlawful detention. As Ms Inwood submitted, there is a rational basis for the jury's view that the evidence was stronger and more plausible on the sexual violation count than it was on the unlawful detention count.

[34] The ground of appeal based on inconsistent verdicts fails. The appeal against conviction is therefore dismissed.

Appeal against sentence

[35] The trial Judge adopted a starting point of 10 years imprisonment by reference to the guideline decision of this Court in *R v AM (CA27/2009)*.⁸ After taking into account factors personal to the appellant, no uplift or discount was applied and the end sentence remained at 10 years imprisonment. The aggravating features that led to identification of that starting point were the degree of premeditation, the vulnerability of the complainant, the fact that she was carried off to "facilitate a pre-informed criminal design" and the emotional harm that she has suffered. In terms of vulnerability, the Judge referred to the complainant's age, the fact that she was affected by liquor and had become separated from her friends and was alone on the street late at night.

[36] The Judge's finding that the appellant had carried the complainant off to facilitate his criminal intent was referred to by Mr Snell as a double counting of

⁸ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

premeditation. While, on a reading of the sentencing notes, this might be construed as a double counting of this factor, there is an element of abduction in the appellant's driving of the complainant to a secluded place whilst threatening her with a spanner. That would be so, whether she entered the vehicle voluntarily or not.

[37] Mr Snell realistically accepted that the appellant's offending came within Band 2 of *R v AM* but submitted that it fell towards the lower end of that band and that a starting point of no more than eight years imprisonment was appropriate. He argued that the starting point of 10 years imprisonment was outside the range on the facts of the case and the imposition of a minimum period of imprisonment was also inappropriate. He pointed out that the offending was an isolated incident of reasonably short duration, and had not involved the use of violence beyond that inherent in the offending itself, and suggested the appellant's history and personal attributes do not give rise to concerns about the need to protect the public in the future.

[38] The start and end point of the sentence was set at the midway point in Band 2. This could be regarded as at the very top end of the available range for the appellant's offending but it is not outside that range and thus not manifestly excessive. An overall assessment of the appellant's culpability, as *R v AM* requires, suggests this case is one of relatively moderate seriousness.

[39] We accept there was no gratuitous violence other than that inherent in the crime itself although there was the additional overlay of threatening behaviour with the spanner. It is the appellant's predatory and persistent behaviour towards a young woman who he callously violated and for whose dignity he showed a complete lack of respect that requires condemnation. The victim impact statement makes clear how traumatised she was by his offending and how unfortunately retraumatised she has been by the ordeal of the trial.

[40] By way of cross-check on the starting point, we conducted a comparative analysis of the sample cases provided at the lower end of rape Band 2 and also at the higher end of that band. In addition, we conducted a cross-check with the more recent decision of this Court in *Pakau v R* and the collection of cases discussed

therein.⁹ On a comparative basis we conclude that the start and end point identified by the Judge in the present case was within his discretion.

[41] In relation to the imposition of a minimum term of imprisonment of five years, Mr Snell suggested there had been no careful consideration of whether the usual one-third parole eligibility were sufficient to punish, deter and denounce the appellant's offending and to protect the community from him. We accept the validity of that submission. We consider that the usual one-third parole eligibility will be sufficient in the appellant's case to punish, deter and denounce his offending. The pre-sentence report was positive in respect of the appellant's willingness to engage in programmes within the Prison service and the assessment of him is as a low risk of reoffending, notwithstanding his denial of the subject offence. His actual release date will depend on whether he can demonstrate to the Parole Board that he is no longer a risk to the public.

Result

[42] The appeal against conviction is dismissed.

[43] The appeal against sentence is allowed to the extent that the minimum term of imprisonment is quashed but the term of 10 years imprisonment is confirmed.

Solicitors:
Crown Law Office, Wellington, for Respondent

⁹ *Pakau v R* [2012] NZCA 522.