

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

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA190/2012  
[2013] NZCA 316**

BETWEEN                      W (CA190/2012)  
   Appellant

AND                              THE QUEEN  
   Respondent

Hearing:                      9 July 2013

Court:                         Stevens, Heath and Cooper JJ

Counsel:                      L L Heah for Appellant  
   J M Jelas for Respondent

Judgment:                    23 July 2013 at 2.45 pm

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**JUDGMENT OF THE COURT**

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**The appeals against both conviction and sentence are dismissed.**

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**REASONS OF THE COURT**

(Given by Cooper J)

[1]      Following his trial by jury, the appellant, Mr W, was convicted on two counts of blackmail, one count of threatening to kill and one count of sexual violation by rape.

[2] He was sentenced to an effective term of imprisonment of nine years and six months. He appeals against both his conviction and sentence, but the conviction appeal is advanced only in relation to the sexual violation count.

### **Background**

[3] The appellant and the complainant had been in a relationship for about 12 months when it came to an end in September 2010 and the complainant left the home they had shared. For about a month after their separation there was no contact between them. However, one night the complainant went to a Girl Guides meeting that she regularly attended and when she left the meeting, the appellant was waiting outside for her. Following that, the complainant began to visit the appellant at his home “on a friends basis”. He had retained possession of the dogs they had jointly owned, and her evidence was that she visited him about three or four times a week so she could see the dogs, walk them, or drop off some dog food.

[4] For a couple of weeks this arrangement appeared to work, but it was her evidence that the appellant then intimated that he wished to resume a sexual relationship. She did not want that, but said in evidence that the appellant started “almost trying to threaten or bribe me to give in to his ... demands”. He told her that he would tell her parents they were seeing each other again – something which her parents would not be happy about because they had helped her end the relationship.

[5] The Crown alleged that the appellant’s conduct escalated to blackmail. It was alleged that between 18 December 2010 and 5 January 2011 the appellant threatened to send naked photographs of the complainant to her family and employer.<sup>1</sup> As these threats continued to be made the complainant went to the police. In her evidence she said that she was “going to the police station almost daily, trying to find out what I could do...but I couldn’t see... an out”. She had the impression that the police were not taking any action in relation to her predicament.

[6] The complainant acknowledged that up until mid-December she had in fact had intercourse with the appellant “between two and four times” to try to “placate

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<sup>1</sup> The complainant acknowledged that during the course of their earlier relationship photographs of her naked had been taken with her consent.

him”. She regarded this as the only option available to her and said she made it perfectly clear to the appellant that she did not want to do so and was only doing it because she considered there was no alternative. In her evidence she said:

[S]o I did end up, end up sleeping with him a couple of times just to see if it would shut him up and, um, keep him, keep him happy but it didn’t.

...

[O]ther times he, he seemed quite aggressive towards me when, whenever I’d try and leave and it seemed to be the only way that I could ensure that, from, I could persuade him for another night to make sure no texts messages were sent out to people I didn’t want them going to.

...

That’s, that was what he wanted, he wanted sex, um, and if I didn’t give it to him then that’s when he would start texting and phoning up people and causing trouble so if I didn’t do that, there was nothing else you could try and do for him that would be an alternative, it had to be sex.

[7] She described the appellant as having “bombarded [her] with text messages”. He adopted an aggressive attitude towards her which was intimidating, but fell short of actual physical violence.

[8] As Christmas 2010 approached, the appellant’s demands for sexual favours from the complainant increased and he began to make explicit reference to the way in which their sexual relations should occur. Examples included statements that he wanted a “blow job like you used to”, “decent fucking”, “not a quickie”, and the use of sex toys.

[9] He also threatened to sell property that she had left behind when the relationship had ended, and he continued his threats to contact her family and distribute naked images of her. On 18 December 2010, he sent a text to the complainant stating:

I am sure your family will like the pics im goin to send them and put on line for every one to see.

[10] A further text on that day read:

You not fuckin me ova for xmas and new year [complainant] it only takes one fone call to make your world crumble an not to leave the country.

That message was sent again on the same day, 50 minutes later.

[11] The nature of the appellant's conduct was also apparent from another text message of 18 December in which he said:

You owe me 3 nights an other shit till i leave you alone and if you want my money then you will get ova your self an we carry on fuckin couple times

And:

... the ball in your court an I will be doin some thing thru your work just to teach you a lesson.

[12] On 22 December further text messages were sent in which he appeared to offer her the prospect that he would abandon his threats provided she complied with certain specific demands:

Well, wat we going to do about this [complainant] you can give me two days then. Then that's it.

Followed by, in the next text:

This going to cost an as you said you can't afford it so your choice [complainant]. Only other way is one hole night an you buy me a dvd cam corder.

[13] On 23 December the appellant sent a text to the complainant as follows:

Im bout to text your family if you don't ring an talk ...

[14] Later the same day a further text read:

We need to meet up and talk 2nite [complainant] b4 the real truth comes out to your parents ok.

[15] Counsel for the Crown, Ms Jelas, submitted, by reference to the booklet of the text messages sent which was produced at the trial, that during the month of December 2010 the appellant's texts were numerous, threatening, abusive, demanding and apparently made continuously throughout the day and well into the night, every night. We agree with that summary.

[16] On Christmas Eve, the appellant sent the complainant 200 texts and on Christmas Day a further 102 texts. We accept the Crown's submission that those texts show that he repeatedly demanded sexual favours from the complainant in exchange for the return of her property and the cessation of contact with her and her family. He also made very explicit and demeaning suggestions as to what their sexual encounters should entail. Throughout this period, the complainant's replies included:

What choice do i have.

That's wot I mean u are forcing me into it and i don't have a choice.

You like blackmail don't you.

I can't fuk u or meet u u know that. I wanna be left alone and all my family.  
Don't do this please. Get into your head that this won't and can't ha.

I said i didn't have a choice but that doesen't mean yes.

I don't have a choice.

[17] Also in this period were texts from the appellant asking the complainant if she had been speaking to the police, threatening to take police action himself against her, and threatening self harm. In one text, he acknowledged that the complainant had never liked him "sexually", that she hated him "to death" for which he did not blame her.

[18] The allegation of sexual violation by rape was based on events on Christmas Day 2010. It was the complainant's evidence that on that day the appellant had sent some text messages to members of her family, and she hoped that if she submitted to sexual intercourse with the appellant one further time "he might end it". She said that she told the appellant she thought she had no option and was only doing it because he was making her. She went to the appellant's home during the evening of Christmas Day, went straight to the bedroom and removed her clothes. Over a period of about two hours she had sexual intercourse with the appellant twice and performed oral sex upon him once. Following that, she ran to the bathroom because she was feeling sick and disgusted. She said that she felt dirty and that it was horrible doing something that she should not have had to do.

[19] In cross-examination it was put to her that she had not been forced in any way to engage in sexual activity on that occasion. The following evidence ensued:

A. I was forced in the fact that if I didn't do it then, um, trouble was going to be caused, that my family stuff but not in the sense that I wasn't being forced onto the bed and forced upon. It was more emotionally forced through the blackmailing of the text messages I was receiving.

Q. So that was what was going on in your head, is that what you're saying to him?

A. Yeah, if I hadn't have gone and done that then he would've started carrying out some of the threats he'd already sent texts about.

[20] Subsequently, it was put to her that she had willingly had sex with the appellant on that occasion. She responded as follows:

It wasn't willingly, um, it was in response to the text messages and the threats that, that were being put out there about texting my family, sending pictures, um, which was the main reason for going and doing it and he'd said if I went and had sex with him then he'd bring an end to all of this.

[21] Later she was asked why she had gone around to the appellant's address on the evening of 25 December. She replied:

A. I felt I had no other option, um, it was, it seemed, um, in my head the only thing that could maybe stop this as I didn't feel I was able to get any help from anywhere else or anything was being done to go round and sleep with him. It seemed to be the only bargaining tool I had with him and it was the only thing that, in his mind, would help fix all this.

[22] The text messaging continued after the events of Christmas Day and there was a separate count of blackmail based on ongoing threats made between 6 and 10 January 2011. There was also a count that on 9 January 2011, the appellant threatened to kill the complainant. The text message that was the basis of the charge read simply, "Im going to kill you". Two other texts that he sent on 9 January exemplify the nature of his discourse:

Ya both better watch ya backs il go for your family then you then [the complainant's new boyfriend] haha not sure wat il do with dogs yet

Im so going to enjoy raping you bitch

[23] The appellant did not give evidence. However, a video tape of an interview that he gave on 11 January 2011 (the police having executed a search warrant earlier that day) was played to the jury. The focus of this interview was on the numbers of the cell phones from which the threatening and abusive texts had been sent to the complainant. The police had not at that stage decided what charges to bring against him.

[24] The defence case at trial was that the complainant willingly and knowingly had sex with the appellant, the parties having agreed to have an ongoing sexual relationship. Trial counsel asserted in his closing address that the Crown had not proved beyond reasonable doubt that the complainant was not consenting, nor that the appellant did not believe on reasonable grounds that she was consenting.

### **The summing up**

[25] The appeal against conviction for sexual violation by rape centres on Allan J's summing up, so it is necessary to outline what he said. The Judge acknowledged that it was common ground that sexual intercourse had taken place on 25 December 2010; the real issue was consent. Referring to the texts which had passed between the appellant and the complainant, he noted her evidence that she went to the appellant's house on Christmas Day knowing that sexual intercourse would occur, but did so only in the belief that if she did not submit to his demands he would carry out a threat to disclose naked photographs of her to members of her family and her employer. He continued:

[27] Against that background, it is important for you to understand what the term "consent" means in this context. The law distinguishes between consent that is freely given and submission to what a woman might regard as unwanted but unavoidable. For example, submission by a woman because she is frightened of what might happen if she does not give in, is not actual consent for the purposes of this charge. Equally, submission because she feels powerless, trapped or exhausted, is not true consent. The fact that a woman does not protest or physically resist, or ceases to do so, is not of itself to be taken as consent. But a woman who freely consents to sexual activity, even though she does not want it and would strongly prefer not to be involved in it, will nevertheless amount to a consent.

[28] I will repeat what I said a moment ago about one aspect of consent. Submission to sexual intercourse by a woman because she is frightened of what might happen if she does not give in, is not consent in law for the purposes of a charge of rape.

[26] He next emphasised that the Crown had to establish beyond reasonable doubt that the complainant did not consent to sexual intercourse with the appellant. If absence of consent could be established, then the Crown had also to satisfy the jury that the appellant did not believe on reasonable grounds that the complainant was consenting. His explanation of the ways in which the Crown might establish the absence of such belief proceeded along traditional lines: the Crown needed to either establish as a matter of fact that the appellant did not believe that the complainant was consenting, or prove beyond reasonable doubt that no reasonable person in the appellant's shoes could have thought that she was consenting.

[27] These directions were accompanied by an issues sheet (to which the Judge referred during the summing up) in the following terms:

**Count 4**

[1] This count relates to the alleged sexual violation by rape of [the complainant] on 25 December 2010.

[2] Has the Crown proved beyond reasonable doubt that:

- (a) Mr [W]'s penis penetrated [the complainant's] vagina;
- (b) She did not consent;
- (c) Mr [W] did not believe on reasonable grounds that she was consenting.

[3] If the answer to all three questions is 'yes', convict. If not, acquit.

[28] Later, when summarising the respective cases of the Crown and defence, the Judge noted that the Crown's case was that if the text messages were considered in their entirety they constituted demands:

aimed at getting [the complainant] to act in accordance with his will – in other words, by having sex with him, in circumstances where she did not want to do that, in return for avoiding the threatened consequences of showing the photographs to family members.

[29] He then summarised the defence contentions, referring to what the appellant had considered "an agreed arrangement" and noting that even if the appellant had "got the wrong end of the stick" about the complainant's position, it did not follow that he had been trying to "overbear her will". Later, he referred to a defence



submission noting that any threats must have been operative at the time at which intercourse took place. He then reminded the jury:

[61] .... You have to look at all of the evidence and remember what I told you about what is and is not consent. A reluctant consent is still a consent. Even if she would rather not have been there, and did not appreciate the circumstances that had got her there, if in the end she was consenting, the Crown has not established its case. But if she was acting under duress throughout, to the extent her will was effectively overborne, that would not be a true consent.

[62] You will need to consider the whole of the relationship between these two when you come to consider the difficult question of consent. As [then counsel for the appellant] pointed out, this is not the case of a young teenage girl engaging in her first sexual experience. She and Mr [W] had been in a sexual relationship for some months. On her evidence it seems that for some of the time it had been a loving relationship; I think she used the phrase “in love” at one stage, so there was a background of consensual caring and affection, which unfortunately did not endure. You need to take that into account, and also the trend of the text messages down to Christmas Day, and work through that and determine, in the light of the instructions I gave you about what constitutes a consent, whether the Crown has established there was not a proper consent by reason of the duress under which [the complainant] was acting.

## **The conviction appeal**

### *Submissions*

[30] Ms Heah acknowledged that the fundamental issue at the trial was the question of the complainant’s consent and accepted that, to be effective, consent must be “true, real or genuine consent” and “full, voluntary, free and informed”.<sup>2</sup> She referred to the Court of Appeal decision in *R v Brewer*<sup>3</sup> in which a 16 year old complainant had been out of work for some time and attended a job interview during which the appellant offered her the job in return for oral sex. She accepted the proposal and the appellant was subsequently convicted of sexual violation by unlawful sexual connection. In the course of its judgment the Court rejected a suggestion that desperation for work could have induced her to behave as she had, noting that she would still have had a choice whether to consent or not.

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<sup>2</sup> Her quotations were from Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA.128A.03] and [CA.128A.07].

<sup>3</sup> *R v Brewer* CA516/93, 26 May 1994.

[31] Ms Heah submitted that on the present facts, the complainant had acted voluntarily in the sense that she had had a number of options available to her and had chosen “of her own free will” to have sexual intercourse. It was a calculated decision made in the hope that if she had sex with the appellant one more time, he might end his campaign. As she put it, the issue relevant to consent was whether the circumstances effectively removed the complainant’s ability to freely choose between the options that confronted her. Ms Heah submitted the sexual intercourse followed a decision made of her own free will.

[32] These submissions reached their zenith when counsel submitted that the fact that the complainant had given a statement to the police on 28 December 2010, without mentioning being forced to have sexual intercourse with the appellant on Christmas Day, was evidence that she “willingly *albeit* most unwillingly gave the appellant sex on Christmas Day because she believed at the time that ‘this would be the end of it’”.

[33] Ms Heah submitted that the Judge misdirected the jury when he said:<sup>4</sup>

Submission to sexual intercourse by a woman because she is frightened of what might happen if she does not give in, is not consent for the purposes of a charge of rape.

[34] She argued that the jury could well have taken from that direction that it would be sufficient to negate consent if the complainant had been frightened of having sexual images of herself sent to her family.

[35] Ms Heah also advanced an argument based on the contrast between ss 128A and 129A of the Crimes Act 1961. The former provides:

**128A Allowing sexual activity does not amount to consent in some circumstances**

- (1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.
- (2) A person does not consent to sexual activity if he or she allows the activity because of—
  - (a) force applied to him or her or some other person; or

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<sup>4</sup> At [28] of summing up, reproduced at [25] above.

- (b) the threat (express or implied) of the application of force to him or her or some other person; or
  - (c) the fear of the application of force to him or her or some other person.
- (3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.
  - (4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.
  - (5) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.
  - (6) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.
  - (7) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.
  - (8) This section does not limit the circumstances in which a person does not consent to sexual activity.
  - (9) For the purposes of this section,—
 

**allows** includes acquiesces in, submits to, participates in, and undertakes

**sexual activity**, in relation to a person, means—

    - (a) sexual connection with the person; or
    - (b) the doing on the person of an indecent act that, without the person's consent, would be an indecent assault of the person.

[36] Section 129A provides:

**129A Sexual conduct with consent induced by certain threats**

- (1) Every one who has sexual connection with another person knowing that the other person has been induced to consent to the connection by threat is liable to imprisonment for a term not exceeding 14 years.
- (2) Every one who does an indecent act on another person knowing that the other person has been induced to consent to the act by threat is liable to imprisonment for a term not exceeding 5 years.

- (3) For the purposes of subsection (1), a person who has sexual connection with another person knows that the other person has been induced to consent to the sexual connection by threat if (and only if) he or she knows that the other person has been induced to consent to the sexual connection by an express or implied threat of a kind described in subsection (5).
- (4) For the purposes of subsection (2),—
  - (a) a person who does an indecent act on another person knows that the other person has been induced to consent to the act by threat if (and only if) he or she knows that the other person has been induced to consent to the act by an express or implied threat of a kind described in subsection (5); and
  - (b) a person is induced to consent to an indecent act whether—
    - (i) he or she is induced to consent to the doing of an indecent act with or on him or her; or
    - (ii) he or she is induced to consent to do an indecent act himself or herself.
- (5) The kinds of threat referred to in subsections (3) and (4)(a) are—
  - (a) a threat that the person making the threat or some other person will commit an offence that—
    - (i) is punishable by imprisonment; but
    - (ii) does not involve the actual or threatened application of force to any person; and
  - (b) a threat that the person making the threat or some other person will make an accusation or disclosure (whether true or false) about misconduct by any person (whether living or dead) that is likely to damage seriously the reputation of the person against or about whom the accusation or disclosure is made; and
  - (c) a threat that the person making the threat will make improper use, to the detriment of the person consenting, of a power or authority arising out of—
    - (i) an occupational or vocational position held by the person making the threat; or
    - (ii) a commercial relationship existing between the person making the threat and the person consenting.

[37] Ms Heah noted that s 129A(1) specifically provides for the offence of having sexual connection with another person knowing that the other has been induced to consent to the connection by threat. It is clear from the drafting of the section that

some threats may be effective, while falling short of having the result of vitiating the complainant's consent.

[38] Ms Heah contrasted s 129A with s 128A, which provides for the circumstances in which "allowing sexual activity does not amount to consent". She noted that s 128A(2) provides that a person does not consent to sexual activity if he or she allows the activity because of force applied, a threat of the application of force, or fear of the application of force. She argued that in the context of the present case, consent had not been vitiated by any of the circumstances outlined in s 128A and the charge should have been laid under s 129A. In fact, she conceded that the facts would have supported a conviction under that section.

[39] For the Crown, Ms Jelas submitted that the Judge made no error in summing up. The circumstances vitiating consent were not limited to those specified in s 128A and fear of non-physical consequences can have the effect of vitiating consent. Viewed in the context of the summing up as a whole, the Judge's reference at [28] of his summing up to a woman consenting to sexual intercourse because of fear of what the defendant might do was unexceptional, especially given the jury's conclusion that there had been blackmail.

### **Our evaluation**

[40] We are in no doubt that the conviction appeal must fail. In order to convict the appellant the Crown had to show that the complainant did not consent to the sexual intercourse with the appellant when that took place, and that the appellant did not believe on reasonable grounds that the complainant was consenting. In our view, the passages we have quoted from the summing up, read as a whole, demonstrate that the Judge adequately addressed these issues for the jury.

[41] The facts showed a sustained and oppressive campaign on the part of the appellant directed towards an end that he was eventually able to accomplish. We are in no doubt that the nature and number of the text messages he sent would have created in the complainant's mind a legitimate fear that he would carry out his threats of publishing naked photographs of her to her family and her employer. This would have been an intensely humiliating event. In our view, it was well open to the

jury to conclude on the facts that the complainant had not consented to the sexual intercourse that occurred.

[42] In the circumstances of this case it is not legitimate to suggest, as Ms Heah submitted, that the complainant had voluntarily chosen one of several so-called “options” open to her. One of those options was complaining to the police, but the evidence was that she had spoken to the police on a number of occasions without effect. The second option Ms Heah identified was that of simply letting the appellant carry out his threat. The third “option” was the one she chose, to submit to the sexual intercourse to avoid the threats. We cannot accept that it is appropriate to describe what she did as a voluntary choice. These were not options to be freely chosen by the complainant, but options imposed on her by the appellant’s criminal threats.

[43] It may well be that the appellant’s conduct would have sustained a conviction for the lesser offence set out in s 129A of the Act. However, as this Court made plain in *R v Brewer*,<sup>5</sup> conduct falling within s 129A may also fall within s 128. As the Court observed in that case, s 128A:<sup>6</sup>

... recognises that submission or acquiescence by reason of the application or threat of force, or the fear thereof, or certain kinds of mistake do not constitute consent, but goes on to declare in subsection (3)<sup>7</sup> that nothing in the section shall limit the circumstances in which there is no consent for the purposes of s 128. This may be taken as an indication that all matters bearing on the reality of consent will be relevant, and in the circumstances of this case they would obviously include coercion of the kind described by the Judge in the above answer he gave the jury.

[44] The Court went on to refer to the fact that the inducing conduct described in s 129A(1)(a), (b) and (c)<sup>8</sup> might in some circumstances vitiate consent with the consequence that “some overlapping between inducing sexual connection under s 129A by coercion and the s 128 offences of unlawful sexual connection must be recognised”.<sup>9</sup> This, however, does not mean that the prosecution is obliged to

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<sup>5</sup> *R v Brewer*, above n 3, at 10–11.

<sup>6</sup> At 10–11.

<sup>7</sup> The reference was to subs (3) as it stood prior to amendment by s 7 of the Crimes Amendment Act 2005, and is now to be understood as a reference to s 128A(8).

<sup>8</sup> The reference was to subs (1) as it stood prior to amendment by s 7 of the Crimes Amendment Act 2005, and is now to be understood as a reference to s 129A(5).

<sup>9</sup> *R v Brewer* at 11.

proceed under s 129A where a threat is alleged to have vitiated consent in a case where the facts would also sustain proceedings under s 128. And it is to be noted, as Ms Jelas emphasised, that s 128A(8) specifically provides that the section does not limit the circumstances in which a person does not consent to sexual activity.

[45] In the present case, the jury was satisfied beyond reasonable doubt that the complainant had not consented. In our view, that conclusion could not possibly be criticised as unreasonable. Of course, the guilty verdict means they also thought that the appellant did not have reasonable grounds to believe she was consenting.

[46] While there may be cases in which it will be necessary for the Judge to give a more detailed direction about the possibility that a threat may fall short of vitiating a consent, we do not consider that that course was necessary here. In our view, the Judge's summing up did all that was necessary to properly inform the jury of the law that was to be applied.

[47] Consequently, the conviction appeal is dismissed.

### **The sentence appeal**

[48] The Judge had to construct a sentence which reflected the totality of the offending: two counts of blackmail, one of threatening to kill and sexual violation by rape. In reality, the two blackmail counts reflected one long series of transactions and the differentiation between them appears to be on the basis that in the case of the first count (based upon events between 18 December 2010 and 5 January 2011), the threats were made in order "to obtain sexual favours", and in respect of the period covered by the second count (6–10 January 2011) the threats were made "to obtain continuing contact with her".

[49] The Judge took the rape as the lead offence and treated the first blackmail count as constituting a serious aggravating factor. He noted that the Crown had referred to four aggravating factors, namely planning and premeditation, vulnerability as a consequence of the intimate photographs that the appellant possessed, emotional stress and trauma caused to the complainant and breach of trust

arising from the fact that the appellant had ingratiated himself with the victim after re-establishing their relationship on “an initially platonic basis”.

[50] The Judge regarded the last three considerations as being of relatively minor significance, considering that the complainant’s distress would have arisen chiefly from the blackmail. However, he thought the premeditation was a significant aggravating factor, placing the case on the cusp of bands one and two described in this Court’s decision in *R v AM (CA27/2009)*.<sup>10</sup> Consequently, he took a starting point of eight years’ imprisonment for the rape considered on its own account. He treated the two blackmail charges as essentially relating to one ongoing course of conduct. He noted that there had been a serious and persistent series of threats made to a victim who was vulnerable and the threats had ultimately been successful. He imposed an uplift of 15 months’ imprisonment in respect of the two charges of blackmail taken together.

[51] On the charge of threatening to kill, he referred again to the vulnerability of the complainant and noted that the jury’s verdict showed that it was satisfied the complainant believed his threat would be carried out. The Judge imposed a further uplift of three months. He expressly did not make any allowance for the appellant’s previous record, notwithstanding that it included some violent offending. Nor did he weight the sentence to reflect the fact that the present offences had been committed whilst the appellant was on bail awaiting trial on a charge of burglary.<sup>11</sup>

[52] Ms Heah submitted that the sentence was excessive. She argued that the starting point for the rape had been set too high and, given there was only one aggravating factor, the Judge should have adopted a starting point of seven years for that offence. Insofar as the starting point reflected the aggravating factor of planning and premeditation there was, she said, a degree of double counting. Since this factor was based on the text messages sent, it would notionally have been taken into account in the uplift of 15 months imposed on the two blackmail counts.

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<sup>10</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

<sup>11</sup> By the time of sentencing the appellant had been convicted of receiving.



[53] She submitted that double counting was also evident in the uplift of three months for the threat to kill, as the Judge again took into account the history of the “text messaging assault”.

[54] This Court has said repeatedly that what matters is not how a sentence is constructed, but the appropriateness of the overall outcome. We have not been persuaded that the effective sentence of nine years and six months was excessive. This was serious offending and the Judge’s conclusion that considered on its own it would justify a sentence of eight years was open to him in accordance with the discussion in *R v AM* having regard to the array of aggravating features of the offending. These included the lengthy period during which the appellant went about overcoming the complainant’s resistance as well as the complainant’s vulnerability and the deeply distressing nature of the repeated threats that were made.

[55] Since the rape was treated as the most serious offence, and only concurrent sentences were to be imposed, the Judge had to ensure that the sentence for that offence carried the penalty that was appropriate for the totality of the offending. There was the charge of threatening to kill and two counts of blackmail which had to be taken into account. Looked at in the round we do not consider that the final outcome of nine years and six months was excessive, having regard to all of the offending.

[56] Nor do we accept the appellant’s argument that there was “double counting”. In this respect, we note that the second count of blackmail was for offending that occurred after the rape on Christmas Day, and the first blackmail count also included conduct which post-dated the rape. The sentences of 15 months for the blackmail counts and of only three months for threatening to kill were moderate responses, and considered on their own may well have justified a higher penalty.

[57] The fact that the Judge did not impose any uplift to reflect that the offending was committed whilst the appellant was on bail is another factor that leads us to conclude that the effective sentence of nine years and six months was not excessive.

## **Result**

[58] The appeals against both conviction and sentence are dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent