

**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**

**CA3/2013  
[2014] NZCA 302**

BETWEEN                      ABDINOR ABDI  
Appellant

AND                              THE QUEEN  
Respondent

**CA763/2013**

BETWEEN                      MOHAMMED ALI BASHIR  
Appellant

AND                              THE QUEEN  
Respondent

Hearing:                      9 June 2014  
Court:                          Randerson, Keane and MacKenzie JJ  
Counsel:                      D R F Gardiner for Appellant Abdi  
                                        I Jayanandan for Appellant Bashir  
                                        S K Barr for Respondent  
Judgment:                      3 July 2014 at 11:00am

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**JUDGMENT OF THE COURT**

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- A    An extension of time to appeal is granted to the appellant Mr Abdi but his  
      appeal against conviction and sentence is dismissed.**
- B    An extension of time to appeal is granted to the appellant Mr Bashir but his  
      appeal against sentence is dismissed.**
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## REASONS OF THE COURT

(Given by Randerson J)

### Introduction

[1] On 25 September 2012 the appellants were convicted after a High Court jury trial before Duffy J on multiple charges of rape. The victim was a 44 year old woman. The Crown case was that she was abducted from Karangahape Road in Auckland by a group of four men in a motor vehicle, taken to a suburban address and subjected to multiple rapes by the appellants and two other men who were not identified.

[2] Each appellant was convicted on one charge of rape as a principal and three charges of rape as a party. In addition to the rape convictions Mr Abdi was convicted of abduction and threatening to kill the victim.

[3] On 22 November 2012, Duffy J sentenced Mr Abdi to an effective sentence of 16 years imprisonment with a minimum period of eight years.<sup>1</sup> On the same date, Mr Bashir was sentenced to 15 years imprisonment with a minimum period of seven and a half years.<sup>2</sup>

[4] Mr Abdi now appeals against both his conviction and sentence. Mr Bashir initially appealed against both conviction and sentence but formally abandoned his appeal against conviction at the hearing before us. He maintained his appeal against sentence.

[5] Both Mr Abdi and Mr Bashir's appeals were filed out of time.

### Background facts

[6] The following summary of facts is largely drawn from Duffy J's findings at sentencing. At approximately 10.30 pm on 4 June 2011, Ms C was at an Auckland bar. She met a group of males, one of whom had two gold front teeth. This man was

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<sup>1</sup> *R v Abdi* [2012] NZHC 3134.

<sup>2</sup> *R v Bashir* [2012] NZHC 3135.

later identified by Ms C from a photo montage as the appellant Mr Abdi. After leaving the bar, the Crown case was that Ms C was forced into a motor vehicle. There were four men in the vehicle, the two appellants and two unidentified men who were described at trial as male A and male B. Ms C was driven to a central city park. She was allowed to get out of the vehicle but was then forced back into it and taken to a suburban address she could not identify. There she was taken into a garage in which there was a curtained-off area containing a bed. Her clothes were removed by one of the men who had been in the vehicle. She was held down by another man and forced to perform oral sex on him. She was then successively raped by the appellants and two other men. During the course of this ordeal, Mr Abdi told her she was to leave the area where the bed was located and dance naked in front of other men present at the address. Mr Abdi threatened to kill her if she did not do this. Faced with this threat, Ms C was obliged to do as Mr Abdi demanded. Throughout the sexual assaults, Ms C tried to fight off the offenders but became exhausted and ceased to resist the acts of rape.

[7] The Crown case at trial depended largely upon Ms C's evidence but her identification of Mr Abdi as one of the offenders was supported by Ms C's friend, Ms T who also identified Mr Abdi from the photo montage although not until some time later. Ms T was a witness at the time Ms C got into the motor vehicle but was not a witness to the subsequent rapes. The Crown case was also strongly supported by DNA evidence linking both Mr Abdi and Mr Bashir as two of those responsible for the rapes. This evidence resulted from forensic testing of semen samples taken from Ms C's underwear and from genital swabs.

[8] When interviewed by the police, Mr Abdi denied ever having met Ms C. However, in closing, counsel for Mr Abdi accepted that Mr Abdi had intercourse with Ms C that evening but maintained that it was consensual. As the Judge noted in her summing-up, it was never suggested to Ms C at any time during cross-examination by Mr Abdi's then counsel that she had consensual sexual intercourse with him that night. Instead, the cross-examination proceeded on the basis that Mr Abdi was not present that night although there was also a suggestion in cross-examination that Mr Abdi had arrived later that evening and that she willingly masturbated him. Ms C rejected both those propositions.

### **Mr Abdi's conviction appeal**

[9] On Mr Abdi's behalf, Mr Gardiner raised three grounds of appeal against his convictions:

- There was insufficient evidence identifying Mr Abdi as one of the group who raped the complainant.
- The Judge misdirected the jury on the question of identification.
- Discrepancies in the evidence meant that the jury could not reasonably have relied on Ms C's evidence as credible or reliable.

[10] As we indicated to Mr Gardiner during the hearing, we had difficulty in accepting that the identification issue had any merit given the identification of both Ms C and Ms T of Mr Abdi as one of the offenders; the DNA evidence and, most importantly, the admission by Mr Abdi's counsel in closing that Mr Abdi was one of those who had intercourse with Ms C on the night in question.

[11] In the light of this evidence and Mr Abdi's own admission, his submission that he did not have or wear a gold tooth is irrelevant. Even if it were, Ms C's evidence that the man she identified as Mr Abdi did have a gold tooth was supported by the evidence of Ms T who described seeing Ms C with African men, on an evening in June 2011, one of whom had a gold tooth. As earlier noted, Ms T also identified Mr Abdi from a photo montage as being the man she saw with the gold tooth. In addition, a Crown witness who knew Mr Abdi (Abdi Jailane) said Mr Abdi had missing front teeth and that he sometimes wore gold false teeth in that gap.

[12] We are satisfied there was a strong Crown case identifying Mr Abdi as one of the offenders, a fact that Mr Abdi's counsel ultimately admitted on his behalf. We also note that Mr Gardiner did not advance the misdirection point in his oral submissions. He was right not to do so since we are satisfied the identification warning given by the Judge was appropriate and fully complied with the requirements of s 126 of the Evidence Act 2006.

[13] Mr Gardiner also developed an argument to the effect that there were significant discrepancies in Ms C's evidence such that the jury should properly have entertained doubts about her credibility and reliability. Particular reliance was placed on Ms T's evidence that Ms C got into the motor vehicle willingly and despite Ms T's evidence that she warned Ms C not to do so. Other points raised had to do with Ms C's evidence about the colour and make of the motor vehicle in contrast with Ms T's evidence on that issue; some vagueness in Ms C's evidence about the length of time over which the offending was said to have occurred; alleged discrepancies in the expert evidence relating to the DNA testing; and the evidence of a neighbour as to what she saw in the driveway outside the address where the offending was said to have occurred.

[14] We accept there were some discrepancies in the evidence but these matters were all before the jury. In the end, they did not avail Mr Abdi. We are not taken to the point where we could conclude that no reasonable jury could convict on the evidence presented. The Crown acknowledged there were some discrepancies in the evidence but submitted to the jury, for example in the case of Ms T's evidence of the complainant's willingness to get into the motor vehicle, that Ms T was mistaken on some matters and that her evidence in that respect should be treated with some caution by the jury. Given the ordeal Ms C underwent, it is not surprising that her evidence as to the length of time for which she was detained at the house where the rapes occurred was uncertain in some respects. Importantly, her evidence that the appellants engaged in sexual activity with her that evening is supported by the DNA evidence and also by Mr Abdi's own admission.

[15] As to the challenge to the DNA evidence, Mr Gardiner submitted there were discrepancies in Ms C's evidence as to whether she had showered between the night of the alleged offending and her medical examination five days later on 9 June 2011. Similarly, there was some uncertainty whether she had changed her underclothes between those dates. A Dr Lo conducted the medical examination. Dr Lo's findings were essentially neutral as to whether intercourse had occurred as Ms C alleged. According to her notes, she was told by Ms C that she had showered and changed her underwear after the alleged offending and before the examination. Nevertheless, swabs were taken from the mouth and genital areas and the underwear was sent for

forensic testing. Dr Lo's evidence was however that fluid can drain out of the vagina onto new underwear and still provide an important source of evidence. Dr Lo's evidence in that respect was confirmed by Ms Jane, a forensic scientist with the ESR. She confirmed that semen could drain from the vagina with traces left in the complainant's underwear for up to seven days from the time intercourse occurred. While there may have been some discrepancies in Ms C's evidence as to when she showered and changed her underwear, the scientific evidence shows that any such discrepancy was immaterial.

[16] The point raised on Mr Abdi's behalf regarding the neighbour's evidence does not take Mr Abdi anywhere. She described hearing a party at Mr Abdi's address on an evening between May and August 2011. At about 11 pm, she saw an older woman in the driveway who fitted the description of Ms C. She was coming down the driveway with a male. Although she did not mention other men accompanying Ms C at that point, she went on to describe seeing seven males in the driveway later on about 1.30 am. One of the men (not Mr Abdi) was complaining that the woman was old whereas the men had been told she was young. There was nothing in the neighbour's evidence that directly contradicted Ms C's account and parts of her evidence support Ms C's account.

[17] We conclude that this was a strong Crown case and that there is no risk of a miscarriage of justice on any of the grounds raised on Mr Abdi's behalf. We observe that Mr Abdi did not help his case by ultimately admitting that sex had occurred in complete contradiction of his emphatic denial to the police that he had ever met the complainant. It was accepted that Mr Abdi had lied to the police on this central point. The fact that his experienced defence counsel did not put to the complainant Mr Abdi's ultimate defence of consensual intercourse strongly suggests that he did not give any such instructions to defence counsel before Ms C was cross-examined. We note there is no complaint against his trial counsel. Mr Abdi is granted an extension of time to appeal but his appeal against conviction is dismissed.

### **Mr Abdi's sentence appeal**

[18] In sentencing Mr Abdi, Duffy J treated the sexual offending as the lead offences. She placed Mr Abdi's offending at the low end of band 4 of this Court's decision in *R v AM(CA27/2009)*.<sup>3</sup> Band 4 has an indicative range of 16 to 20 years but partly overlaps with band 3 which may attract a sentence of between 12 to 18 years imprisonment. She adopted a starting point of 16 years imprisonment but this took into account the totality of the offending including Mr Abdi's conviction for abduction and threatening to kill Ms C. The Judge found that no adjustment was required to that starting point.

[19] The aggravating features identified by the Judge were the premeditated abduction and continued detention of the complainant; the prolonged nature of the offending; the fact that there were multiple violations in circumstances amounting to a gang rape; the threat to kill; and the indignity and humiliation Ms C suffered when forced to dance naked in front of men who either had raped her or were about to do so.

[20] The Judge also noted there had been serious adverse effects on Ms C in consequence of the offending. While the Judge said the harm to the victim did not extend beyond that inherent in the offending of rape, this should not be treated as diminishing the seriousness of those harmful effects. Duffy J accepted that the vulnerability of a victim may be an aggravating feature, but she did not attach great weight to this factor. The victim was 44 years of age and was, at the time, living in a night shelter. For ourselves, we would have added some weight for this factor given that Ms C was a woman alone amongst four offenders and a number of other males at the place to which she was abducted and raped.

[21] The Judge sentenced Mr Abdi to concurrent terms of 16 years imprisonment for rape as a principal; 12 years for each of the three offences where he had been convicted as a party to rape; 10 years for the offence of abduction and five years on the charge of threatening to kill. The minimum period of eight years imprisonment was then imposed.

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<sup>3</sup> *R v AM(CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

[22] Mr Gardiner submitted that a proper starting point would have been 14 years imprisonment with a corresponding reduction in the minimum period of imprisonment. He noted that Mr Abdi's preference was that the minimum period of imprisonment be removed completely.

[23] In our judgment in *R v Goundar and Prasad* delivered contemporaneously with this decision, we reviewed relevant authorities in relation to similar offending.<sup>4</sup> We do not propose to again canvass those authorities. In that judgment, we upheld sentences of 16 years and 15 years respectively for two offenders who were found guilty of the abduction and sexual violation of a 15 year old complainant. She was held against her will and repeatedly raped and forced to perform oral sex on the offenders over a period of at least four hours, accompanied by, in the case of one of the offenders, a threat to kill. There was also a second complainant in that case who was released by the offenders at an earlier stage. She was punched (for which the offenders were convicted on a charge of male assaults female) but was not sexually violated.

[24] In the present case, we are satisfied that a starting point of 16 years imprisonment was well open to the Judge having regard to the totality of the offending. It does not matter whether the offending properly fell within band 3 or band 4 of *R v AM* given the overlap in those bands. Even if it were treated as being within band 3, a starting point of 15 years imprisonment would be about the middle of the 12 to 18 year range and an extra year for the offences of abduction and threatening to kill was entirely appropriate.

[25] The Judge rightly identified the aggravating features of this case. Critically, they involved a forced abduction by a group of men and the subjection of the complainant to a prolonged period of repeated sexual violations by multiple offenders accompanied by threats of violence and other humiliation and indignities. The circumstances of the offending in this case are at least as serious as those in *Goundar and Prasad*. On one view, this case is more serious because there were four offenders engaged in raping Ms C. But that factor is offset by the particular vulnerability of the 15 year old complainant in *Goundar and Prasad*.

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<sup>4</sup> *Goundar v R* [2014] NZCA 303.



[26] We are also satisfied that the minimum period of imprisonment was also justified on the evidence. The Judge noted that Mr Abdi was 29 years of age. He had continued to maintain his innocence; he was resentful towards the complainant's role in the prosecution; and he maintained that he had been persecuted because of his Somalian race. He was assessed by the probation officer as having a propensity for violence and a high likelihood of re-offending.

[27] The Judge considered that Mr Abdi did not have any insight into the offending (despite a letter handed up at sentencing at which he said he accepted responsibility and apologised for his actions). Duffy J considered Mr Abdi's attitudes were dangerous for society. He was unlikely to accept responsibility for what he had done and would likely re-offend in the future. As such, the Judge considered that a one-third minimum parole period would not be sufficient to hold Mr Abdi accountable for the harm done, to denounce his conduct, to deter him from further offending and to protect the community.

[28] We are not persuaded that the Judge erred in any respect in imposing the minimum period of imprisonment.

[29] Accordingly, Mr Abdi's sentence appeal is dismissed.

### **Mr Bashir's sentence appeal**

[30] Ms Jayanandan submitted on Mr Bashir's behalf that his sentence was manifestly excessive. She submitted that the sexual offending fell within the high end of band 2 or the lower end of band 3 in *R v AM*. She submitted that the appropriate starting point would have been 12 years imprisonment. She said that, unlike Mr Abdi, Mr Bashir had not been convicted of abduction or threatening to kill and was not involved in forcing her to dance naked in front of the other men.

[31] In imposing sentence on Mr Bashir, Duffy J recognised that Mr Bashir was less culpable than Mr Abdi. However, she considered Mr Bashir's offending was probably placed towards the top end of band 3 in *R v AM*. The aggravating features of his offending she identified were that he was a participant in a pack rape; he was at least involved as a party to the continued detention of the victim at the address

where the sexual offending occurred; and he was a party to the humiliation of the victim as he was present and watched when she was forced to dance naked in front of the males present.

[32] Addressing Mr Bashir's personal circumstances, the Judge noted that he was a 25 year old Somalian. Like Mr Abdi, he continued to deny the offending and had expressed no remorse. The probation officer had observed in the pre-sentence report that Mr Bashir had a sense of entitlement to a woman to satisfy his sexual needs. He was assessed as having a medium risk of re-offending.

[33] The Judge adopted a starting point of 15 years. She did not consider any adjustment was required to that starting point.

[34] Again, we do not see any material distinction between Mr Bashir's case and the second appellant Mr Prasad in *Goundar and Prasad*. The Judge properly recognised Mr Bashir's culpability by reducing the starting point for his offending by one year below that of Mr Abdi.

[35] There is no basis to interfere with the Judge's conclusion that a minimum period of imprisonment of seven and a half years (50 per cent of the effective sentence) was required in Mr Bashir's case. His lack of insight, his attempts to blame the victim and his sense of entitlement were clear indicators that he represented a significant future risk to the community and that the minimum period of one third imprisonment would not be sufficient to recognise the statutory purposes of sentencing.

## **Result**

[36] Mr Bashir's sentence appeal is well out of time but given his position as a co-offender with Mr Abdi, we consider it is appropriate to grant Mr Bashir an extension of time to appeal. However, for the reasons given, his appeal against sentence is dismissed.