

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY
SECTION 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA419/2013
[2014] NZCA 338**

BETWEEN CHRISTOPHER MICHAEL ROBB
Appellant

AND THE QUEEN
Respondent

Hearing: 9 June 2014

Court: French, Venning and Mallon JJ

Counsel: A M McCormick for Appellant
K A L Bicknell for Respondent

Judgment: 22 July 2014 at 10.00 am

JUDGMENT OF THE COURT

The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] Mr Robb was convicted following jury trial of abduction, sexual violation (three counts), and indecent assault.¹ He was sentenced to 11 years' imprisonment

¹ Crimes Act 1961, s 208(b); ss 128, 128B; and s 135.

with a minimum period of imprisonment of five years and six months.² He appeals against his conviction on the ground that the guilty verdicts were unreasonable because the complainant's evidence was unreliable. He appeals against his sentence on the ground that it is manifestly excessive.

The conviction appeal

[2] The charges arise out of an incident that occurred on 7 May 2005. The complainant was a slightly built 18 year old male. In the early hours of the morning he was lying on a footpath in central Christchurch, in a highly intoxicated state as a result of an evening drinking with some friends. He had also consumed a small amount of cannabis.

[3] The Crown case was that the complainant was approached by Mr Robb and offered a ride to his home, which was about a 35 minute drive from Christchurch city. He was instead taken to rural Darfield, some distance past his home. There Mr Robb dragged the complainant from the car by a chokehold, pushed him to the ground and bound his wrists with tape. Mr Robb then pulled the complainant's pants down, digitally penetrated the complainant's anus, stroked and sucked the complainant's penis and forcefully penetrated the complainant's anus with his penis and ejaculated. He then removed the tape from the complainant's hands and drove off at speed, with his car tyres skidding, leaving the complainant alone on the side of the road.

[4] The complainant called 111 at 4.11 am. Police arrived at the scene and found the complainant upset and shaking. There were fresh tyre marks on the grass. The complainant made a statement to the police at the time and was medically examined. The evidence from the doctor who examined him said that he had fresh injuries. They included red marks on his neck, legs and arms and ligature marks around his wrists. His anus was bruised, cut and scratched and indicated recent forceful penetrative contact.

² *R v Robb* [2013] NZHC 1266.

[5] Mr Robb was not charged until 2012. This followed his arrest on unrelated charges in respect of which a DNA sample was provided. Mr Robb's DNA was matched with the DNA from the semen found in a rectal swab that had been taken from the complainant at the time. Mr Robb was interviewed. He said he did not recognise the complainant and had not had any homosexual experiences. He was told that his DNA had been identified as matching the DNA of semen found on the complainant at the time. He said he was shocked by this. He offered no explanation. He agreed to provide a saliva sample. The DNA in that sample matched the saliva DNA found in a penile swab taken from the complainant at the time.

[6] The trial took place in 2013. Mr Robb gave evidence in his defence. He claimed that he had a consensual sexual encounter with the complainant earlier in the evening. He said that he had been in town looking for a friend when the complainant approached him at about 1.30 am. He said they went to a nearby car park in Gloucester Street, where the complainant pulled down his pants. He said that he sucked the complainant's penis but that this felt "wrong". He said that the complainant suggested anal intercourse and he "just went along with it" and that as soon as it was over he "just felt gross". He said that he had not told the police about this before out of embarrassment, because he was not homosexual.

[7] Counsel for Mr Robb submits that the complainant's evidence at trial was inconsistent with his earlier police statement, and patchy and devoid of detail due to his intoxicated state and the passage of time. He says that, in contrast, Mr Robb's account was clear and his earlier lies to the police could be explained. He submits that in these circumstances the jury's verdicts were unreasonable.

[8] The inconsistencies in the complainant's account relied on are as follows:

- (a) In his statement to the police the complainant said that when he was sitting on the footpath intoxicated he saw two people sitting in a grey Subaru. He did not mention seeing this other car in his evidence-in-chief. When cross-examined about this omission he said he had forgotten but that his statement made the next morning would be the best account of what happened.

- (b) In his statement to the police the complainant described his attacker as a Māori man in his late 20s to early 30s. Mr Robb was aged 37 at the time, is not Māori and does not have a dark complexion.
- (c) In his statement to the police and as described to the doctor, the complainant said that a thumb was inserted into his anus during the assault. In contrast, in his evidence at trial, he said that it was a finger.

[9] Counsel for Mr Robb submits that these inconsistencies, combined with other factors, have led to unreasonable verdicts. The other factors are that:

- (a) the doctor could not give conclusive evidence as to whether the anal sexual encounter was consensual;
- (b) there was no evidence of indentations in the ground at the scene of the assault consistent with the assault taking place there;
- (c) the mud found on the complainant's trousers was not tested against the dirt at the scene;
- (d) the complainant said to the police that the assailant's vehicle was a white sedan, either a Ford Telstar or a Nissan Sentra, whereas the unchallenged evidence at trial was that Mr Robb drove a grey BMW at the time; and
- (e) the complainant gave evidence that the assailant did a U-turn before driving away whereas the scene examination indicated that two 360 degree turns were performed.

[10] However, all of these matters were before the jury. The jury had to decide whether to accept as a reasonable possibility Mr Robb's account of a consensual sexual encounter earlier in the morning (sometime between 12.57 am and 2.17 am

when there was a lull in the complainant's cell phone activity³), whether followed by a second (non-consensual) sexual assault near Darfield or not. Or the jury could accept the Crown's version of events that the DNA was left by the person who drove the complainant to the rural road near Darfield and sexually violated him.

[11] It was open to the jury to consider that the inconsistencies referred to at [8] and the matters referred to at [9(d)] and [9(e)] were errors explicable by the complainant's intoxication and to accept, as he said, that "they were just details ... just tried to repress them, as I said I didn't think that I'd have to come back here eight years later and to recall the whole thing again". The jury could reasonably consider that the matters at [9(a)] to [9(c)] were neutral to their assessment of the competing accounts of what occurred.

[12] In making their assessment it was open to the jury to find that the independent evidence supported the complainant's account of an abduction and sexual violation on the rural road near Darfield. That was where he was found soon after making the 111 call. The police who responded to the call found the complainant upset and shaking. There were fresh tyre marks on the grass. His physical state at that time was consistent with a recent, forceful sexual violation. He had fresh injuries, high blood pressure and was displaying anxiety, and he had debris in his anal hair and mud on his trousers and on his wrists.

[13] If the jury concluded that a sexual violation occurred where the complainant was found, then either Mr Robb was the assailant, or the earlier consensual sexual encounter had occurred (despite the complainant having no memory of it), and he was subsequently sexually violated by another person. However no evidence of another perpetrator was found. It was open to the jury to consider Mr Robb's account to be implausible and a convenient story made up in an attempt to fit the forensic evidence, as the Crown submitted in its closing address.

³ The Crown, however, referred to evidence that the complainant was still in a bar until at least 2 am, and that the complainant's cell phone in the period between 2.12 am and 3.30 am was pinging off a site that would put him on the footpath where he said he was when the assailant offered to drive him home.

[14] Matters of credibility are for the jury. They were entitled to accept the complainant's account and to be sure that Mr Robb was the assailant. The verdicts were not unreasonable.

The sentence appeal

[15] At sentencing, Whata J adopted a starting point of 11 years.⁴ He took the charge of anal penetration as the lead offence. He identified three aggravating factors: (1) the complainant's vulnerability (due to his intoxication and size); (2) multiple acts of subjugation and violence; and (3) the risk of transmission of sexually transmitted infections given that the offending involved unprotected sex. He saw these aggravating factors as placing the offending in the top end of band two of the guidelines in *R v AM (CA27/2009)*.⁵

[16] Counsel for Mr Robb submits that the Judge placed excessive weight on the risk of transmission of sexually transmitted infections. Counsel submits that sexual offending is often likely to occur without protection from transmission of sexual infections, and that unprotected anal penetration is no more aggravating than unprotected vaginal penetration. Counsel submits that the absence of protection should be aggravating only where an infection is in fact transmitted. Here there was no evidence that Mr Robb had any sexual infection that could be passed on to the complainant.

[17] Counsel for the Crown accepted that the risk of transmission of a sexually transmitted infection should not have been treated as aggravating when there was no evidence that Mr Robb had any sexual infection and when no such infection was in fact transmitted to the complainant. We agree.⁶ There was also no evidence from

⁴ *R v Robb*, above n 2, at [30].

⁵ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750. Band two has a range of seven to 13 years' imprisonment. The Crown contended that a starting point of 12 to 14 years' imprisonment was appropriate. The defence submitted that the starting point should be between nine and 11 years. The Judge therefore adopted a starting point at the top of the range submitted by the defence and below what the Crown submitted was appropriate.

⁶ The comments in *R v AM (CA27/2009)*, above n 5, at [44] refer to the "risk of pregnancy or infection or if it has those effects". We do not read those comments as meaning that unprotected intercourse is in and of itself a particular aggravating factor regardless of the reality of the risk eventuating or any particular harm to the victim as a result.

the victim that he suffered particular psychological harm because of a fear of a risk of this kind.

[18] Counsel for the Crown nevertheless contends that the 11 year starting point was available to the Judge. We agree. The offending involved the abduction of a vulnerable victim (in that he was highly intoxicated and slightly built and therefore not in a position to protect himself). The abduction occurred in the early hours of the morning. The complainant was taken to a lonely, dark, rural road. He was dragged from the car. His wrists were tied. He was subjected to a number of violations. With reference to the cases referred to on behalf of Mr Robb, we consider that this offending was more serious than *Pakau v R*, particularly because of the abduction, the location of the offending, and that the complainant's wrists were bound;⁷ more serious than *R v Anderson* for the same reasons;⁸ and quite similar to *R v Afamasaga*.⁹ A comparison with these cases reinforces our view that the 11 year starting point was appropriate.

Result

[19] The appeal against conviction and sentence is dismissed.

Solicitors:
Brandts-Giesen McCormick, Rangiora for Appellant
Crown Law Office, Wellington for Respondent

⁷ *Pakau v R* [2012] NZCA 522.

⁸ *R v Anderson* CA199/05, 2 November 2005.

⁹ *R v Afamasaga* CA271/02, 21 November 2002.