

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

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA784/2013
[2014] NZCA 92**

BETWEEN KAURI JOHN BOWMAN
 Appellant

AND THE QUEEN
 Respondent

Hearing: 13 March 2014

Court: Wild, Goddard and Clifford JJ

Counsel: P M Keegan for Appellant
 P K Feltham for Respondent

Judgment: 25 March 2014 at 3 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Wild J)

[1] This appeal is against a sentence of three years imprisonment imposed by Judge MacDonald in the New Plymouth District Court on 21 October 2013.¹ The nub of the appeal is that the Judge sentenced Mr Bowman on a factual basis that was not available, given the jury's verdicts. As a result, the Judge's sentencing start point of five years imprisonment was far too high.

¹ *R v Bowman* DC New Plymouth CRI-2012-043-2535, 21 October 2013 [Sentencing remarks].

[2] For the reasons we will explain, we do not accept that the Judge's view of the facts was inconsistent with the jury's verdicts. Mr Keegan submits the jury must have accepted Mr Bowman's account of what happened. We do not agree. But even if they did, and the Judge had also accepted Mr Bowman's account, we consider the Judge's sentencing starting point was within the available range.

What happened

[3] Following a family gathering, Mr Bowman ended up in a bed with two young women. We will refer to them as A and B. He was charged with sexual offending against both. Mr Bowman was acquitted of the alleged sexual offence against A. We therefore need not mention her again, except to note that A got out of the bed and left after the alleged offence. That left Mr Bowman and B in the bed together. Both had been drinking heavily during the gathering and, Mr Keegan suggested to us, also smoking marijuana.

[4] Mr Bowman, in his evidence at his trial, said he and B had consensual sexual intercourse for about 10–15 minutes following which he left and went outside for a time to have a cigarette. He said B was not very responsive during the intercourse. He then got back into bed with B who had fallen asleep. He put his finger into B's anus, mistakenly thinking it was her vagina. When B woke she was angry and he apologised. He then tried to put his penis into B's vagina but again penetrated her anus. He apologised again. He and B then went to sleep together in the bed until the morning.

[5] B's evidence was quite different. She said no consensual sexual intercourse had taken place. She was asleep lying on her stomach but was woken by the pain of Mr Bowman putting his penis and finger into her anus. She tried to push Mr Bowman off but he turned her over and forced his penis into her vagina briefly before she managed to push him away.

[6] In summary the counts Mr Bowman faced and the jury's verdicts on them were:

Count No	Nature of charge	Jury's verdict
1	Indecently assaulting A.	Not guilty.
2	Sexually violating B by putting his penis into her anus.	Not guilty.
3 (added on the Crown's application during the trial as an alternative charge to 2)	Attempting to rape B by sexually violating her.	Guilty.
4	Sexually violating B by putting his finger into her anus.	Not guilty.
5 (added on the Crown's application during the trial as an alternative charge to 4)	Attempting sexually to violate B by "introducing" his finger into her genitalia.	Guilty.
6	Sexually violating B by raping her.	Not guilty.

[7] In a discussion with counsel in court before the sentencing began, the Judge observed the two added alternative counts were "specifically intended to cover the possibility that the jury might accept [Mr Bowman's] evidence that he had accidentally penetrated the victim's anus with first his penis and then his finger when his actual intention was to penetrate her vagina".²

[8] In that pre-sentence discussion, the Judge said two other things relevant to this appeal. First, he observed:³

... it seems to me that there is agreement both from the victim and the prisoner that there was one sexual act where the victim was asleep and she was awoken to find that the prisoner had penetrated her anus, first with his penis and then with his finger. The jury by its verdicts obviously accepted that that happened and that it was without the victim's consent and without any reasonably held belief on the prisoner's part that she had consented.

[9] Second, the Judge said the not guilty verdicts (on counts 2 and 4) reflected the jury's acceptance that Mr Bowman had mistakenly penetrated the victim's anus. And, as to the acquittal on count 6:⁴

² Legal discussion before Judge J E MacDonald, 21 October 2013 at 2.

³ At 3.

⁴ At 5.

I suspect that sympathy may have played a role in this ... here was a young man only 17 at the time with no previous convictions. Various quantities of alcohol had been consumed and here he found himself in the same bed with these two young women.

[10] Although the discussion we have been quoting from may not, strictly, have been part of the sentencing, it immediately preceded it and helps explain the basis on which the Judge sentenced Mr Bowman.

[11] As the Judge had indicated in the discussion, he sentenced on the basis that the incident founding the charges had not been preceded by consensual sexual intercourse:

[5] I am afraid I am still of the view, as indicated at the outset, that I do not believe the jury accepted that there was this 10 to 15 minutes of consensual sexual intercourse. I have already outlined my reasons for that and I am not going to repeat them. As I say my view remains unchanged.

[12] In terms of s 24 of the Sentencing Act 2002, the Judge could form his own view of what happened provided it did not conflict with the jury's verdicts.

[13] We start by assuming – as did the Judge – that the jury had not accepted the offending was preceded by consensual sexual intercourse. The jury acquitted Mr Bowman of full penile anal violation (count 2) but found him guilty of attempted rape (count 3). Attempted rape involves non-consensual attempted penile penetration of the genitalia (vagina). Even on B's own account, the anal incident was a fleeting one, as was, on the complainant's account, the alleged rape. Add to that Mr Bowman's evidence that he had mistaken B's anus for her vagina, and those verdicts are explicable. They reflect the jury's acceptance both of B's evidence and of Mr Bowman's evidence about his mistake. Nor are they inconsistent with rejection of Mr Bowman's account that there had earlier been consensual (vaginal) sexual intercourse.

[14] We think the same explanatory analysis applies to the jury's verdicts on counts 4 and 5: the jury accepted both B's evidence that Mr Bowman had briefly put his finger into her anus and Mr Bowman's evidence that he mistakenly thought he was putting his finger into B's vagina. Again, those verdicts are not inconsistent with rejection of Mr Bowman's account of earlier consensual sexual intercourse.

[15] The not guilty verdict on count 6 is also explicable. This count was based on B's evidence that Mr Bowman put his penis into her vagina briefly after he had turned her over after she was woken by the pain of anal penetration. Mr Bowman denied he had done that. As we pointed out in [9] above, the Judge thought the verdict on count 6 was dictated by sympathy for Mr Bowman. The jury may also have given Mr Bowman the benefit of its doubt as to whether penetration had occurred. After all, B had just awoken from a drunken sleep. The verdict on count 6 is also not inconsistent with rejection that earlier consensual intercourse had taken place. Under cross-examination, Mr Bowman was obliged to concede that a sleeping woman cannot consent. And Mr Bowman could not reasonably have believed B was consenting in her sleep.

[16] The Judge sentenced Mr Bowman on the basis there had not earlier been 10-15 minutes of consensual sexual intercourse. The jury was not required to make any finding or return any verdict about that, because there was no charge in relation to any earlier sex that may have taken place. The Judge did not know what the jury's view on that was, if indeed it reached one. The jury's verdicts are explicable irrespective of any view they may have reached on Mr Bowman's claim that there had been prior consensual sexual intercourse.

[17] As we observed in [2] above, even if the Judge had found there had been earlier consensual sexual intercourse, we do not accept his starting point of five years imprisonment was manifestly excessive. As the Judge correctly noted, there is no guideline judgment for attempted rape "although the culpability assessment factors and banding in *R v AM*⁵ ... are still relevant and should be used".⁶ The comparison should be with rape band one in *R v AM*, with sentencing starting points in the range six to eight years imprisonment. The Judge was justified in observing this case instances the fine line that may exist between an attempt and the completed act. Indeed, the jury may have been merciful in finding Mr Bowman guilty only of attempts.

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

⁶ Sentencing remarks, above n 1, at [12].

[18] We also think the Judge rightly regarded this case as “arguably more serious” than the case of Mr Carter in *R v Tutu and Carter*.⁷ There, Gendall J adopted a starting point of five years imprisonment for a fairly concerted attempt to have sexual intercourse with a woman who was sleeping or unconscious. Gendall J commented “... I was initially inclined to fix a starting point of six years’ imprisonment, but given the Crown’s position I fix it at five years”.⁸

[19] We do not agree with Mr Keegan’s challenges to the three aggravating features the Judge factored in. Asleep, B was vulnerable and quite unable to protect herself or refuse consent. The offending undoubtedly caused significant emotional harm to B, as well as minor – and now healed – physical injury. And there was certainly an element of breach of trust, in that B believed she could safely share a bed with Mr Bowman. The two were related and had been close friends since they were “little”.⁹

[20] We conclude the Judge’s five year sentencing starting point was within the available range.

[21] There is no challenge to the several discounts the Judge allowed Mr Bowman. Indeed, Mr Keegan rightly accepts they were generous.

Result

[22] The appeal against sentence is dismissed.

Solicitors:
Crown Solicitor, Wellington for Respondent

⁷ *R v Tutu and Carter*, HC Napier CRI-2010-041-163, 4 February 2011.

⁸ At [23].

⁹ The word B used in her victim impact statement.