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S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA727/2014
[2016] NZCA 22**

BETWEEN KOWHAI LANCE GALVIN
Appellant

AND THE QUEEN
Respondent

Hearing: 29 August 2016 (report received 23 November 2016)

Court: Wild, Courtney and Woodhouse JJ

Counsel: P T Eastwood for the Appellant
T A Simmonds for the Respondent

Judgment: 24 February 2017 at 10.30 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Woodhouse J)

[1] Mr Galvin appeals against a sentence of eight years and 10 months' imprisonment for rape.

Procedural background

[2] Mr Galvin was originally charged with three offences arising out of an incident in November 2012. In addition to the charge of rape, there were charges of abduction with intent to have sexual connection and indecent assault. Following negotiations between Mr Te Kani, counsel then acting for Mr Galvin, and counsel for the Crown, Mr Galvin pleaded guilty to the charge of rape and the two other charges were dismissed. Sentencing proceeded on the basis of a summary of facts which had been prepared by the Crown and expressly accepted by Mr Galvin as part of the arrangements leading to the guilty plea and dismissal of the other charges.

[3] There was an earlier hearing in this Court arising out of contentions by Mr Galvin that he had not understood that he was pleading guilty on the basis of a summary of facts which included facts relating to the abduction and indecent assault as well as the rape.¹ The hearing included cross-examination of Mr Galvin and Mr Te Kani, both of whom had earlier provided affidavits. Mr Galvin's contentions were rejected. The Court dismissed an application by Mr Galvin to remit the matter to the District Court for a disputed facts hearing.²

The facts

[4] In November 2012 the 14-year-old female victim was walking from a friend's home to her own home when she encountered Mr Galvin. Mr Galvin was 24 years old. They began talking as they walked along the street. Mr Galvin asked the victim to come back to his home with him. She refused and said she wanted to go to her own home. He then said that he could go back to her home and she again said "no". He persisted. She told him that if he did not leave her alone she would scream, but he continued to follow her. He then offered her a smoke, which she accepted.

[5] As they were crossing a small bridge Mr Galvin grabbed the victim by her wrist, forced his hands between her legs, and lifted her onto his shoulder. He began carrying her to a nearby reserve. At one point, with the victim facing backwards over his shoulder, Mr Galvin began touching her vagina under her underpants. At

¹ *Galvin v R* [2016] NZCA 370.

² At [25].

the reserve he began walking and dragging her towards his home. The distance was around one kilometre. She continued telling him to let her go, but he told her to shut up and keep quiet.

[6] At his home Mr Galvin forced her into the house, pulled her up the stairs to a bedroom, and threw her onto the bed. The victim was screaming at him. He told her to shut up and be “human”, but also told her that the screaming was turning him on. The victim was attempting to fight Mr Galvin by punching him. He grabbed her hands and held her down on the bed preventing her from moving. He ripped her underpants off, unzipped his pants, began licking her face and neck and then forced her legs apart and raped her. He did this in spite of the victim’s wriggling and trying to close her legs.

[7] Mr Galvin then flipped her over and attempted to penetrate her anus. She told him she did not want this to happen. There was a knock on the door and at this point the victim managed to get up, find her clothes and leave despite being pushed over by Mr Galvin.

District Court sentence

[8] Mr Galvin was sentenced by Judge Macdonald in the Rotorua District Court.³ The Judge took a starting point of 11 years’ imprisonment and reduced that by 20 per cent for the guilty plea, resulting in the end sentence of eight years and 10 months’ imprisonment.⁴

[9] In fixing the starting point the Judge identified five aggravating factors: (1) unlawful detention; (2) a degree of actual violence beyond what is inherent in rape; (3) the vulnerability of the 14-year-old victim walking home at night, and with Mr Galvin being aged 24; (4) significant harm to the victim as recorded in her victim impact statement; and (5) a degree of planning or pre-meditation.⁵

³ *R v Galvin* DC Rotorua CRI-2012-063-4404, 2 August 2013.

⁴ At [14].

⁵ At [8].

[10] The Crown had referred to the first four of those aggravating factors and Mr Te Kani, for Mr Galvin, had accepted that they applied. The Crown had submitted that the starting point should be nine to 11 years' imprisonment. It appears from observations the Judge made that he adopted the longer period of 11 years' imprisonment because of the additional aggravating factor of planning or premeditation.

Grounds of appeal

[11] Mr Eastwood, for Mr Galvin, submitted that the end sentence was manifestly excessive on two principal grounds:

- (a) The starting point was too high because the Judge relied on some aggravating factors which should not have been taken into account.
- (b) No account was taken of Mr Galvin's mental health.

Evaluation: the first ground

[12] In large measure the first ground involved a challenge to facts contained in the agreed summary of facts. Given the earlier judgment of this Court arguments to this effect should not have been advanced and are dismissed.

[13] We will assess submissions directed to the weight to be attached to aggravating factors recorded in the agreed summary of facts.

[14] The starting point adopted by the Judge was around the middle of rape band two as described in *R v AM*.⁶ Band two has a range of seven to 13 years. The type of offending coming within band two is described as follows:

[98] By comparison with rape band one, this band is appropriate for a scale of offending and levels of violence and premeditation which are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.

⁶ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

[15] Mr Eastwood submitted that the starting point should be at the top of rape band one, which has a range of six to eight years.

[16] We are in no doubt that the offending comes within the higher end of rape band two — 10 and a half to 13 years' imprisonment. The vulnerability of the victim by itself puts the offending in band two. This was compounded substantially by the other aggravating factors. What the Judge described as the unlawful detention of the victim amounted to a forceful abduction in which she was carried or dragged for over a kilometre and during part of which he was touching her vagina. Force was used over an extended period of time. There was psychological harm as recorded in the victim impact statement. There was a degree of planning or premeditation. On sentencing, the Crown submitted that Mr Galvin's behaviour was predatory. We consider that that is an apt description of the way he behaved after he had encountered the victim by chance. There was in fact a sixth aggravating factor, not referred to by the Judge, when at the end of this ordeal Mr Galvin turned the victim on her stomach and was about to penetrate her anus when there was a knock on his front door.

[17] Given the number and nature of the aggravating features we are satisfied that the starting point of 11 years' imprisonment was available, indeed appropriate. The end sentence was not manifestly excessive.

Evaluation: mental health

[18] The second ground of appeal was that the Judge erred in failing to reduce the sentence because of Mr Galvin's mental health.

[19] Section 9(2)(e) of the Sentencing Act 2002 provides:

- (2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

...

- (e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:

[20] As this Court stated in *E (CA689/10) v R*:⁷

A mental disorder falling short of exculpating insanity may be capable of mitigating a sentence either because: if causative of the offending, it moderates the culpability; it renders less appropriate or more subjectively punitive a sentence of imprisonment; or because of a combination of those reasons.

[21] Mr Galvin's mental health was not raised by counsel at the time of his sentencing, but two psychiatric reports were provided to this Court for the earlier hearing. Those reports contained opinions on whether Mr Galvin had been fit to plead when he entered his guilty plea. Both were completed in late 2015, three years after the offending.

[22] The opinion of Dr Rui Mendel was that, at the time of the offence, Mr Galvin was suffering from a chronic psychotic disorder, probably schizophrenia, but complicated by alcohol and drug misuse. Dr Mendel's assessment was that Mr Galvin was not "able to fully understand the implications of the charges against him, therefore his ability to instruct his counsel was compromised". The other report was from Professor Graham Mellsop. Professor Mellsop confined his opinion to Mr Galvin's mental state at the time of his guilty plea and did not address his mental state at the time of the offence. Dr Mellsop's opinion was that, at least from 2009 to 2010, Mr Galvin suffered from a psychotic disorder of uncertain cause, possibly drug-induced or a form of schizophrenia. There was, however, no available evidence to confirm or even strongly suggest this was present in the months leading up to his guilty plea in May 2013.

[23] At the hearing of the substantive appeal, although there was no extant issue as to Mr Galvin's fitness to plead, we considered we should obtain a further and independent psychiatrist opinion pursuant to s 38(1)(c) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 to assist in determining the type and length of sentence that might be imposed on Mr Galvin in the light of his mental health. Counsel agreed. We now have a report from Dr Peter Dean, a consultant psychiatrist.

⁷ *E (CA689/10) v R* [2010] NZCA 13, (2011) 25 CRNZ 411 at [68] (footnotes omitted).

[24] Dr Dean agreed with Professor Mellsoy's diagnosis that, from around 2009, Mr Galvin suffered from a psychotic disorder, but with an uncertain cause — either schizophrenia or a substance induced psychotic disorder.

[25] Notwithstanding uncertainty as to the cause of the disorder, Dr Dean's opinion does not indicate that the sentence should be reduced for either of the reasons identified in *E (CA689/10) v R*.⁸

[26] On the question whether a relevant mental condition was causative of the offence in 2012 Dr Dean's opinion was:

In my opinion, Mr Galvin's psychiatric condition did not directly drive his offending. His judgment was impaired by his use of alcohol. In the clinical records, and in retrospect, there is no information which definitively supports the presence of an active psychosis at the material time of the offending. It is possible his judgment was further impaired by his psychotic disorder but this is far from certain and clinical records suggest he had no mental illness symptoms in August 2012.

[27] Dr Dean's report also makes sufficiently clear that there is no current manifestation of a relevant mental disorder which would or could make completion of the existing sentence of imprisonment less appropriate or more subjectively punitive. Dr Dean said:

Mr Galvin does not currently present with an abnormal state of mind. His condition is in remission and he has been compliant with antipsychotic medication, namely olanzapine. Therefore, any risk he poses is unrelated to his mental condition. Mr Galvin is, in my opinion, not mentally disordered as defined by section 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992. He will not benefit from admission to a psychiatric inpatient unit at this time.

[28] We accept Dr Dean's assessments. For these reasons we are therefore satisfied that there is no aspect of Mr Galvin's mental health requiring reduction of the sentence.

[29] Dr Dean concluded with recommendations for ongoing treatment. We record those for the assistance of the responsible prison personnel and consultants and for the assistance of the Parole Board:

⁸ *E (CA689/10) v R*, above n 7.

Mr Galvin will benefit from ongoing treatment with olanzapine, an antipsychotic medication. This is currently provided by his general practitioner, but I would recommend the parole board consider seeking a formal plan for mental health care upon Mr Galvin's release from prison to ensure he does not relapse. His mental health care can be adequately provided by Community Mental Health Services, i.e. he does not require follow up by a forensic community team. An active psychotic disorder may impair Mr Galvin's judgment and an unstable mental state increases risk of recidivistic behaviour.

Mr Galvin may benefit from a drug and alcohol treatment programme, such as those provided in prison, to promote abstinence. He may also benefit from a treatment programme on his release, to re-enforce the benefits of a prison-based programme, while he is in a community setting.

Mr Galvin may also benefit from a formal psychological assessment of his sexual behaviour and sexual drive. He appears to have some cognitive distortion condoning his behaviour and justifying his actions. He does not identify early warning signs of impending risk and, therefore, would struggle to manage escalating risk should it occur. His potential response to such a programme remains unclear, as he reported he is yet to be offered a sexual offenders' treatment programme.

Result

[30] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent