

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,
OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT
PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011.**

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

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA13/2017
[2017] NZCA 462**

BETWEEN	R (CA13/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	1 August 2017
Court:	Cooper, Brewer and Peters JJ
Counsel:	N G Cooke for Appellant E J Hoskin for Respondent
Judgment:	17 October 2017 at 11.30 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The sentence imposed in respect of the charge of rape is quashed. A sentence of nine years and four months' imprisonment is substituted.**
- C The other sentences, to be served concurrently with the sentence for rape, remain.**
- D Order prohibiting publication of name, address, occupation or identifying particulars of appellant pursuant to s 200 of the Criminal Procedure Act 2011.**
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REASONS OF THE COURT

(Given by Cooper J)

[1] This is an appeal against sentence.

[2] On 22 June 2015, the appellant engaged in a series of violent acts against the complainant, formerly his partner in a relationship that lasted on and off for a period of nine years. The assaults culminated in rape. As a result of the events of that evening he faced 12 separate charges. A further charge alleged that he had attempted to pervert the course of justice by subsequently texting the complainant in an endeavour to persuade her to withdraw the complaint.

[3] The first trial had to be abandoned when the complainant became distressed to such an extent that the trial Judge formed the view that there would be adverse effects on the jury and aborted the trial on that basis. Immediately prior to the retrial, the appellant sought a sentence indication. Judge Blackie appropriately took the rape as the most serious charge and considered it would justify a starting point of eight years' imprisonment. He considered that the sentence would have to be increased by three and a half years to take account of the various assault and injuring charges that were also before the Court. He indicatively added a sentence of six months in respect of the attempt to pervert the course of justice. From an overall effective sentence of 12 years' imprisonment, he said that in the event of a guilty plea, a discount of 10 per cent would be appropriate to reflect that plea, late as it would be. That would have resulted in a sentence of 10 years and nine months' imprisonment.

[4] The appellant accepted the sentencing indication and pleaded guilty. The sentence report indicated that the appellant had demonstrated a degree of remorse and had pleaded guilty to spare the complainant having to endure further proceedings. On that basis, the Judge said he was prepared to increase the discount from the original 10 per cent to 15 per cent. In the result, he imposed an effective term of imprisonment of 10 years and two months, made up as follows:

(a) A sentence of 10 years two months' imprisonment for the rape.

- (b) On the four charges of assault with a weapon, three and a half years' imprisonment.
- (c) On the three charges of aggravated injury, three and a half years' imprisonment.
- (d) On the charge of injuring with reckless disregard, three and a half years' imprisonment.
- (e) On the representative charge of threatening to kill, three and a half years' imprisonment.
- (f) On the two charges of male assaults female, one and a half years' imprisonment.
- (g) On the charge of attempting to pervert the course of justice, six months' imprisonment.

[5] He ordered that all of the sentences would be served concurrently with the sentence on the charge of rape. He said: "Those sentences will all be concurrent, in other words they will be absorbed into the principal sentence of 10 years and three months."¹

[6] It seems that the reference to 10 years and three months was a simple error: the Judge should have referred to 10 years and two months, which was the sentence that he imposed on the charge of rape.

[7] The appellant now claims that the sentence was excessive.

The offending

[8] In June 2015 the appellant visited the complainant for the purpose of celebrating their son's seventh birthday. They had discussed the visit in advance and the arrangement was that the appellant would visit the complainant bringing their

¹ *R v [R]* [2016] NZDC 24081 at [20].

son with him. However, the appellant arrived without him. They had an argument, apparently sparked by discussion about the complainant's relationship with a person she had met at work. During the argument, the appellant pushed the complainant down onto a mattress, before attempting to undress and kiss her. She pushed him away and left the room. He followed her into the kitchen, picked up a 30 centimetre long stainless steel knife from a bench and held that against her neck, shouting at her and threatening to kill her.

[9] The appellant forced the complainant from the kitchen and into a bedroom where he placed his hands around her throat and started to strangle her. Next, he wrapped a scarf around her neck, tightening it so as to cause her difficulty in breathing.

[10] The appellant then threw the complainant face down on to the bed and held her down by sitting on her back. He tied her hands behind her back using the scarf, took hold of another scarf and tied that around her neck. He pulled tightly on the scarf causing her to choke and struggle for breath. There was repeated tightening and releasing of pressure in this incident, during which he continued to threaten to kill her.

[11] At that point, the appellant stopped strangling her and untied her wrists so that she could get up from the bed. He apologised but then said that he would have to kill her as she would call the police and he did not want to go to jail. He again forced her back on to the bed, restrained her wrists and made further attempts to strangle her with a scarf. The complainant managed to get the appellant off her and he allowed her to leave the bedroom. The argument continued in the lounge and the kitchen. At one stage, the complainant was able to attempt to defend herself by throwing a frying pan at the appellant but she was overpowered, and dragged back into a bedroom where the appellant again threatened to kill her, restrained her and strangled her, this time until she lost consciousness.

[12] The appellant left the property to collect their son, but returned a short time later alone. He demanded sex from the complainant and threatened her when she declined. He removed her pants, pulled out a tampon she was wearing on account of

her menstrual cycle and had sex with her. The appellant eventually left and the complainant contacted the police.

[13] The charge of attempting to pervert the course of justice was based on attempts subsequently made by the appellant to have the complainant drop the charges against him and not to give evidence in relation to them. The prosecution relied on a series of text messages. Judge Blackie found that the messages contained, at least inferentially, a degree of threat.

The appeal

[14] Against that background, Mr Cooke argued for the appellant that the starting point adopted by the Judge was too high, and that a period of between four and six years would have been sufficient. A three year uplift for the violence that preceded the rape would then have been appropriate, together with three months for the attempt to pervert the course of justice. He submitted the Judge should have made greater allowance for the appellant's guilty plea, and the benefit that accrued to the complainant in not having to give evidence for a second time as a result of it.

[15] Mr Cooke's submission that the starting point for the rape was too high was based to a large extent on the account given by the complainant in her video interview. He relied on passages that he said showed that the complainant did not initially regard herself as having been raped.

[16] Mr Cooke noted that after the appellant left the house there was text communication between them before the complainant made a 111 call to the police. In that call she had not complained about rape, but rather the acts of violence committed. The police attended at about 3 am. Mr Cooke noted that the complainant then spoke alone with a female police officer without making any allegation of rape. Secondly, asked by another of the police officers attending whether a rape had occurred she had responded: "He did not force himself, I did say yes."

[17] Mr Cooke also relied on the fact that when the appellant was arrested some 24 hours later, he was initially charged with assault. Mr Cooke submitted it was

“extraordinary” that a mature woman such as the complainant had not been capable of expressing herself in clear terms shortly after the event about the rape. He claimed that the violence would have had more of an impact than the rape.

[18] For the Crown, Ms Hoskin submitted that the starting point of eight years for the rape was available to the Judge, having regard to this Court’s judgment in *R v AM (CA27/2009)*.² Ms Hoskin further submitted that the Judge had correctly viewed the offending as particularly serious because of the strangling of the complainant, which had been persistent, protracted and repetitive. The uplift of three and a half years was appropriate in those circumstances and consistent with other sentences upheld in this Court. The further uplift of six months for the attempt to pervert the course of justice was unremarkable. The discount given was appropriate and indeed generous given the fact that the proceeding had been before the Court for well over 12 months, as the Judge had noted when giving his sentence indication.

Discussion

[19] The appellant pleaded guilty and was to be sentenced accordingly. The tenor of the submissions on appeal has been to downplay the severity of the rape, but we do not accept that the Judge erred when, applying this Court’s decision in *R v AM (CA27/2009)*, he placed the offending in the top of band one or bottom of band two.

[20] It is clear that, notwithstanding the passages in her interview on which Mr Cooke focused, the complainant’s account overall was of a frightening and violent ordeal, culminating in forced sexual intercourse. The degree of violence that took place as a prelude to the rape merited the Judge’s conclusion that the complainant had been subjected to a terrifying ordeal.³

[21] The Judge identified two aggravating features of the rape itself, namely the long-term harm suffered by the complainant, and her vulnerability coupled with breach of trust. The former was evidently based on the complainant’s victim impact statement, which the Judge summarised in the following way:⁴

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

³ *R v [R]* DC Manukau CRI-2015-092-10470, 23 September 2016 at [20].

⁴ At [17].

... in this case the victim has been extremely harshly treated and as a result her life has been changed not just temporarily but certainly in the foreseeable future and maybe for the rest of her days. ... She is finding it difficult to carry on with day-to-day life, difficult to form relationships with other people. She is always fearful of you, she says. She believes you would hurt her again. You would kill her if you could. She obviously, even to this day, ... fears for her life as far as you are concerned.

[22] The breach of trust on which the Judge relied was based on the fact that the appellant had entered the complainant's home on the basis of the arrangement that he would be accompanied by their son. The Judge said that she would have let him in trusting that he would "behave responsibly towards her as the mother of [his] child".⁵ Instead the appellant had used the occasion solely to sexually abuse the complainant when she was off guard in the privacy of her own home.

[23] We accept that these were both features that were relevant to take into account in assessing the gravity of the offending, although on their own they would not in our view justify a sentence of eight years for the rape. The principal aggravating factor in the current circumstances is the violence that led up to and accompanied the rape. In terms of *R v AM (CA27/2009)* it was the violence that rendered the complainant vulnerable by the time the rape occurred and the violence was clearly "additional" to the violence inherent in the act of rape.⁶ This put the case into band two. This is consistent with the emphasis the complainant gave in her victim impact statement to her fear of potential future acts of violence towards her by the appellant.

[24] However, in this case there would be an element of double counting if an uplift of three and a half years' imprisonment was then added in respect of the other violent offending. In a sense there was one overall incident, although the Crown has quite properly proceeded on charges in respect of identifiable separate elements of what took place. Having regard to the seriousness of the violence, we consider the appropriate course to follow is to adopt a starting point for the rape of seven years and then leave the sentences imposed on the other charges intact. That would take the sentence to 11 years' imprisonment prior to the reduction for the guilty plea.

⁵ At [19].

⁶ *R v AM (CA27/2009)*, above n 2, at [98].

With the 15 per cent reduction the end sentence for the charge of rape (as the lead offence) is nine years and four months' imprisonment.

[25] That both sets the sentences for all offences at an appropriate level having regard to their seriousness, while properly having regard to the totality of the offending in accordance with s 85 of the Sentencing Act 2000.

[26] We reject the submission advanced by Mr Cooke that a more generous discount was appropriate. We consider the 15 per cent the Judge allowed was more than adequate given the late stage at which the guilty plea was entered.

[27] We consider the resultant effective sentence of nine years and four months on the rape will adequately reflect the overall gravity of the offending.

Result

[28] The appeal is allowed.

[29] The sentence imposed in respect of the charge of rape is quashed. A sentence of nine years and four months' imprisonment is substituted.

[30] The other sentences, to be served concurrently with the sentence for rape, remain.

[31] To protect the complainant's identity we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.

Solicitors:
Crown Law Office, Wellington for Respondent