

**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

I TE KŌTI PĪRA O AOTEAROA

**CA644/2017
[2018] NZCA 263**

BETWEEN	TAIRONE RAWIRI HENRY Appellant
AND	THE QUEEN Respondent

Hearing:	21 May 2018
Court:	French, Ellis and Woolford JJ
Counsel:	G A Walsh and M J James for Appellant S K Barr for Respondent
Judgment:	20 July 2018 at 2 pm

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B The appeal against sentence is allowed to the extent that the sentence of 11 years and nine months' imprisonment imposed in respect of the offence of abduction for the purpose of sexual connection and the two offences of sexual violation by unlawful sexual connection are quashed and substituted with a sentence of 10 years and nine months' imprisonment. All other sentences are confirmed.**
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REASONS OF THE COURT

(Given by French J)

[1] Mr Henry was convicted following a retrial before a jury and Judge KBF Saunders in the District Court of five offences against an 18 year old woman:

- (a) abduction for the purposes of sexual connection;
- (b) two charges of sexual violation by unlawful sexual connection;
- (c) indecent assault;
- (d) assault with intent to injure.

[2] Judge Saunders sentenced Mr Henry to a term of imprisonment of 11 years and nine months.¹

[3] Mr Henry now appeals his convictions and his sentence.

The Crown case

[4] The complainant was an American visitor to this country. She had been for a night out in Hamilton with some New Zealanders she had met during the course of the evening. While she and another woman were waiting in the street for a taxi, Mr Henry approached them and struck up a conversation. They agreed to go back to his house to continue the evening.

[5] At approximately 4.30 am the complainant decided to call it a night. Mr Henry offered to drive her and the friend she arrived with back to their respective residences. The Crown alleged that shortly after Mr Henry had dropped off the other woman, he told the complainant that if she wanted him to take her home, she would have to suck his penis first. She refused and attempted several times to get out of the car but Mr Henry prevented her from escaping. At some stage during the ensuing struggle,

¹ *R v Henry* [2017] NZDC 24384 [sentencing notes].

she tried to phone the police but, not knowing the emergency number in New Zealand, she rang 000.

[6] Eventually, thinking that if she complied with his demands, he would let her go, she told Mr Henry to pull over and she would do it. Mr Henry then allegedly touched her clitoris with his hand or finger and also forced her to put her mouth on his penis. That alleged conduct was the basis of the two charges of sexual violation by unlawful sexual connection. The complainant said she found it so “gross” she was unable to continue and so Mr Henry told her to use her hands which she did. That alleged conduct was the basis of the charge of indecent assault.

[7] According to the complainant, Mr Henry then accused her of hurting him and he became more aggressive. He hit her several times in the head and strangled her to the point she thought she was going to pass out. Another vehicle suddenly pulled up behind them, prompting Mr Henry to drive off at speed. She was screaming and tried to escape again but he allegedly grabbed her by the back of her head holding tightly onto her hair and jamming her head between the two front seats. Every time she tried to break his hold, he hit her and then resumed his hold on her hair, verbally abusing her. He gripped her hair so tightly it felt as though he was pulling it out. Clumps of her hair were later found in the car.

[8] The complainant was only able to escape when she managed to grab the steering wheel and the brake, causing the car to crash. Mr Henry released his grip and she opened the door, rolling out of the car onto the ground and fleeing to a nearby house.

[9] When the police arrived at the scene, they found Mr Henry still in the car. Breath testing procedures were undertaken and a level of 750 micrograms of alcohol per litre recorded. When asked about the complainant’s allegations of sexual assault, Mr Henry told the police there had been sexual activity but it was consensual.

[10] At trial, Mr Henry gave evidence to similar effect. He told the jury the complainant had been the instigator of the consensual sexual activity in his car but then had turned on him when she became regretful for cheating on her boyfriend.

His motivation thereafter was to ensure her safety and not let her out of a moving car until it was safe to stop.

[11] We now turn to the appeal against conviction which relied on two grounds.

Appeal against conviction

Failure to control the complainant who derailed the trial

[12] The complainant was what can fairly be described as a feisty witness. At times, she became argumentative and exasperated with defence counsel and made unsolicited comments about Mr Henry suggesting he was capable of committing similar offences against others. She also made comments about the screen behind which she was giving her evidence, telling the jury that at the first trial there were not any screens, and that she had felt intimidated and stared down by Mr Henry.

[13] At the conclusion of the complainant's evidence, defence counsel Mr Walsh relied on these comments in support of an application for a mistrial. The application was declined by Judge Saunders.²

[14] On appeal, Mr Walsh submitted the Judge should have declared a mistrial. In his submission, the Judge had failed to exercise adequate control over the complainant and as a result the trial had miscarried.

[15] Having read the notes of evidence, we disagree. In our view, the Judge's handling of the complainant was appropriate and fair. The Judge intervened where necessary and never stopped the defence from asking questions. Mr Walsh was unable to identify a single example of the complainant declining to answer a question and the Judge failing to direct her to answer it. All questions were answered, even although some of the questioning was repetitive. The defence was able to put its case clearly and strongly to the jury.

[16] As for the complainant's comments about Mr Henry, it would have been obvious to the jury that they were just expressions of opinion. As Mr Barr for the

² *R v Henry* [2017] NZDC 21439.

Crown pointed out, the prejudicial effect of the comments was dependent wholly on whether the jury accepted her version of the events at issue. If they did, then they would be likely to understand the comments. If however they doubted her credibility then they would have been equally sceptical of the opinions she expressed about Mr Henry.

[17] We note too that the Judge specifically raised the issue in her summing up, instructing the jury in the following terms:

[6] You will remember also I am sure that [the complainant] was clearly frustrated by some of the questions that were being asked of her by Mr Walsh. She was at times feisty. She talked back and she was also I suggest very emotional. In that context you may recall her concern that Mr Henry had done this before or would do it again but I need to make it very clear to you there is absolutely no evidence before you to support [the complainant's] view at all and indeed it is not part of the Crown case and of course you know Mr Henry was asked if he has ever been charged with or convicted of a sexual assault and he said no. So while [the complainant] may genuinely feel that way it is not relevant to your task and I suggest you simply put it to one side because it does not help you in determining whether Mr Henry acted as [the complainant] says he did in that car in the early hours of the morning or not. Because that is your focus and there were only two of them in the car. How you assess [the complainant] is for you of course and there was a lot she did not remember. She readily accepted that she had been drinking that night and she had smoked cannabis but when it came to what happened in the car the real focus, your real focus, when they were in the car together she had I suspect you will have concluded a much clearer memory of what occurred and you will recall her explanation why that was. She sobered up very quickly, her adrenalin was rushing.

[18] Having regard to that direction, we agree with the Crown that any risk of unfair prejudice was negated.

[19] The further complaint made by Mr Walsh about the complainant's testimony was her evidence regarding the use of screens in Court. However, the comments were made in response to questions regarding inconsistencies between the evidence she was giving and the evidence she had given at the first trial. The complainant was entitled to give the explanation that she was able to be more forthcoming this time due to the screen.

[20] We conclude that none of the concerns raised about the complainant's testimony warrants appellate intervention.

Comment by prosecutor

[21] During cross-examination the complainant was questioned (we consider impermissibly) about alleged sexual touching by her of another female at Mr Henry's house. The complainant responded by asking defence counsel to focus on why she had travelled all the way to New Zealand for the trial. She was given an opportunity to answer her own question in re-examination when she explained that she had returned to make sure Mr Henry did not do it again.

[22] In closing, the prosecutor referred to this evidence and submitted it would defy belief that the complainant would have travelled to New Zealand to "stitch up" a random stranger.

[23] On appeal, Mr Walsh submits the comment was improper because it evoked sympathy and prejudice and also suggested by implication that people who travel from overseas to give evidence are more credible than locals, a suggestion for which there was no foundation. Mr Walsh further submitted that the comment also improperly invited the jury to rely on the absence of any evidence of motive to lie.

[24] In our view, these criticisms are not well founded. After making the impugned comments, the prosecutor went on to emphasise there was no onus on Mr Henry to point to any reason why the complainant was lying.

[25] The Judge made the same point in her summing up and also told the jury that it was their task and not the lawyers' task to decide whom to believe. Contrary to another submission made by Mr Walsh, we do not consider the Judge was required to go further and give a general lies direction.

[26] We are satisfied this ground of appeal also lacks merit. The appeal against conviction is accordingly dismissed.

Appeal against sentence

Sentencing in the District Court

[27] In setting a starting point for the two charges of sexual violation by unlawful sexual connection, the Judge identified the aggravating factors of the whole incident as being an element of premeditation, the detention, the physical violence which exceeded that inherent in the offending, the vulnerability of the complainant and the physical and emotional harm done to her. The Judge said the complainant was an 18 year old girl in a country she did not know and Mr Henry had taken advantage of that. The complainant had thought she was going to die.³

[28] Having regard to those aggravating factors and the fact this was a prolonged course of conduct involving three distinct sexual acts, Judge Saunders found the offending fell on the cusp between band 2 and band 3 of the guideline decision of *R v AM (CA27/2009)*.⁴ She then adopted a starting point of 12 years' imprisonment for the offending which she uplifted by three months on account of Mr Henry's previous convictions.⁵

[29] As regards mitigating factors, the Judge considered the only factor warranting a discount was the fact Mr Henry had spent significant time on bail. She allowed a reduction of three months for that and then a further three months for totality.⁶

[30] That resulted in an end sentence of 11 years and nine months. That was imposed in respect of the sexual violation by unlawful sexual connection and abduction offences,⁷ along with concurrent sentences of 18 months for the indecent assault and nine months for the assault with intent to injure. A sentence of one month's imprisonment was also imposed concurrently in respect of the charge of driving with excess breath alcohol, Mr Henry having pleaded guilty to that offence.⁸

³ Sentencing notes, above n 1, at [20]–[23].

⁴ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

⁵ At [24].

⁶ At [26].

⁷ Although the starting point was set with respect to the two charges of sexual violation by unlawful sexual connection, the Judge imposed the same sentence for the abduction as she did for those: at [24] and [27].

⁸ At [27]–[30]. The driving with excess breath alcohol sentence was not appealed.

Arguments on appeal

[31] On appeal, Mr Walsh argued the sentence was manifestly excessive because the starting point was too high, the three month uplift for previous convictions was not warranted, and an additional discount should have been allowed to reflect the fact that Mr Henry agreed to the briefs of 12 witnesses being read. No issue was taken with the discount for the time spent on standard bail.

Analysis

The starting point of 12 years

[32] Mr Walsh submitted that correctly analysed each of the aggravating factors relied on by the Judge increased culpability to only a moderate degree. The entirety of the offending occurred over approximately 30 minutes and the sexual offending itself was very brief. In his submission, having regard to the authorities cited in *AM* such as *Anderson v R*, *Hannagan v R* and *R v Morris*,⁹ the offending was at the lower end of band 2 in *AM* and therefore the appropriate starting point on the lead charges was eight years' imprisonment. He submitted there should then have been an uplift of a further two years for the balance of the offending, making the appropriate end starting point one of 10 years' imprisonment.

[33] Our own review of comparator cases confirms that 12 years' imprisonment was on the high side.¹⁰ We would not however have interfered with it were we not also satisfied that three months was an insufficient adjustment for totality having regard to the fact that this was one continuous course of conduct. We consider a 12 month reduction for totality was justified and that accordingly the appropriate starting point was 11 years' imprisonment.

[34] We also agree with Mr Walsh that an uplift for Mr Henry's criminal history was not warranted. Mr Henry did not have any previous convictions for sexual

⁹ *Anderson v R* CA199/05, 2 November 2005; *Hannagan v R* CA396/04, 9 June 2005; and *R v Morris* [1991] 3 NZLR 641 (CA).

¹⁰ *Sa Leavai v R* [2017] NZCA 368; *Matthews v R* [2017] NZCA 493; *R v Ecclestone* [2015] NZHC 2054; *Robb v R* [2014] NZCA 338; *Dempsey v R* [2013] NZCA 297; *Pakau v R* [2012] NZCA 522; *Tahitahi v R* [2008] NZCA 549; *R v Martin* HC Auckland CRI-2006-004-17743, 18 May 2007; and *R v Afamasaga* CA271/02, 21 November 2002.

offending. He did have convictions for violent offending but none of those had resulted in a custodial sentence.¹¹

[35] We do not however agree that the Judge can be criticised for declining to give a discount for Mr Henry agreeing to the evidence of 12 witnesses being read. We are not persuaded this was such a significant contribution to the saving of trial time as to warrant any discount let alone one of six months as suggested.

[36] We conclude that an inadequate allowance for totality combined with an unwarranted uplift for previous convictions has resulted in a manifestly excessive end sentence which should be reduced by one year.

Outcome

[37] The appeal against conviction is dismissed.

[38] The appeal against sentence is allowed to the extent that the sentence of 11 years and nine months' imprisonment imposed in respect of the offence of abduction for the purpose of sexual connection and the two offences of sexual violation by unlawful sexual connection are quashed and substituted with a sentence of 10 years and nine months' imprisonment. All other sentences are confirmed.

Solicitors:
Crown Law Office, Wellington for Respondent

¹¹ Namely three convictions for common assault, one conviction for assault with intent to injure and one conviction for male assaults female, all dated from 2011–2013.