

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA565/2019
[2020] NZCA 182**

BETWEEN	WAYNE ARABA MAHANI Appellant
AND	THE QUEEN Respondent

Hearing:	18 May 2020
Court:	Brown, Venning and Simon France JJ
Counsel:	S W Hughes QC for Appellant M L Wong for Respondent
Judgment:	27 May 2020 at 11.00 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Venning J)

[1] Wayne Araba Mahani pleaded guilty to one charge of sexual violation by unlawful sexual connection, one charge of injuring with intent to cause grievous bodily

harm and one charge of wilful damage to property.¹ The victim of all the offences was his partner at the time.

[2] Mr Mahani was sentenced by Judge Crayton to five years, four months' imprisonment.² As it was a second strike offence Mr Mahani must serve that full term. Mr Mahani appeals against the sentence on the ground it is manifestly excessive.

Factual background

[3] On Friday, 10 November 2017 the victim and Mr Mahani were visiting family members. At around 2.00 pm in the afternoon Mr Mahani began drinking. Later that evening they visited the victim's sister. While there they began to argue. On their way home, having left their children at the victim's sister's home, the argument continued. Mr Mahani reached over to grab the steering wheel while the victim was driving. The victim stopped the car and made Mr Mahani get out. She drove home and locked the doors to the house. Mr Mahani arrived home shortly after and began yelling that he wanted to be let in. The victim rang her mother who told her it was too late, and just to let Mr Mahani in. In the meantime, Mr Mahani had smashed the side window of the victim's car to retrieve his cigarettes.³

[4] The victim let Mr Mahani into the house as she thought if she cooked him something to eat he would calm down. But as soon as she opened the door Mr Mahani charged at her, grabbed her by the throat and slammed her to the ground. He pinned her to the ground face down. He then put his hands around her neck and choked her numerous times. The victim had difficulty breathing. Mr Mahani told her he would kill her. She believed he was going to as he was using a lot of force. Mr Mahani then grabbed her by the hair and dragged her into the bedroom. There he banged her head into the floor and twisted her ears. While she was on the ground Mr Mahani kicked and punched the victim's rib cage on both sides of her body. During the assault Mr Mahani also ripped all her clothes off so that she was naked. He then pulled her onto the bed by her hair. Mr Mahani accused the victim of sleeping with someone else. She tried hugging him as she thought it might calm him down.

¹ Crimes Act 1961, ss 128(1)(b), 128A and 189(1); and Summary Offences Act 1981, s 11(a).

² *R v Mahani* [2019] NZDC 19438.

³ The wilful damage charge.

[5] Mr Mahani told the victim to “suck his balls”. She did not want to but did so reluctantly as she felt that if she didn’t, she would be assaulted further. The victim sucked his penis for less than a minute.⁴ She described it as very difficult as she had a fat lip as a result of Mr Mahani’s earlier assault. Mr Mahani then told her to get on top of him to have sexual intercourse. After the intercourse they went to sleep.

[6] The next morning Mr Mahani told the victim he did not care if she rang the Police as he would find her and kill her.

[7] As a result of the assault on her the victim received the following injuries:

- (a) extensive bruising to both sides of her rib cage;
- (b) extensive bruising to her face, forehead and ears;
- (c) bruising to her arms and hands;
- (d) strangulation marks to her neck; and
- (e) swollen and cut lip.

[8] The victim required medical treatment at Palmerston North Hospital for her injuries. She needed IV fluids to assist her kidneys to flush out toxins caused by the extensive heavy bruising to her ribs and kidneys.

[9] The victim went to the Police and made a complaint about the violence. During the course of her interview she disclosed the two sexual incidents. Mr Mahani was initially charged with unlawful sexual connection and also with rape. The rape charge was subsequently withdrawn.

[10] Mr Mahani has a number of relevant previous convictions, including two of male assaults female.

⁴ The sexual violation by unlawful sexual connection (hereafter referred to as the unlawful sexual connection).

The District Court sentence

[11] Judge Crayton considered that the unlawful sexual connection on its own would support a starting point of seven to seven and a half years' imprisonment. After uplifting that for the preceding violence and considering totality, the Judge took an adjusted start point of eight years, eight months' imprisonment. The Judge declined to uplift the sentence for Mr Mahani's previous prior history of violence as he considered it was accommodated within the strike framework of the sentencing.

[12] Judge Crayton then considered mitigating factors. He gave Mr Mahani a substantial discount for personal mitigating matters. The Judge considered Mr Mahani's disadvantaged background, the significant steps he had taken to try and turn his life around, and his genuine remorse all combined to support a reduction of 18 per cent from the starting point. The Judge also then allowed a full 25 per cent reduction for the guilty pleas. That led to the end sentence of five years, four months' imprisonment.

The appeal

[13] Mr Mahani does not challenge the credits applied in mitigation. For Mr Mahani, Ms Hughes QC submitted the sentence was manifestly excessive because the starting point taken for the unlawful sexual connection was too high. Ms Hughes submitted that the sexual activity and the preceding violent offending were discrete. She argued that the "heat" had gone out of the situation by the time of the sexual activity and that it should be considered separately.

[14] Ms Hughes argued that when considered on its own, the unlawful sexual connection was brief, and occurred against a background that the parties were in a relationship where sexual intercourse often followed an argument and was the way the parties made up.

[15] Ms Hughes emphasised that the victim had initially gone to the Police to complain about the violence and it was only during the course of her interview that the issue of sexual offending arose. She drew the Court's attention to the following passage from the victim's interview:

His way of having sex is to say he's sorry, mm... .

[16] While Ms Hughes accepted that at the time of the unlawful sexual connection the victim was vulnerable, given that she had just endured a beating, she submitted there was no premeditation involved, nor was there any violence or injury involved in the brief sexual activity itself. Ms Hughes submitted that, importantly, the previous violence was not delivered for the purposes of extracting compliance with the sexual activity. Ms Hughes also submitted that Mr Mahani believed that the victim was consenting.

[17] In Ms Hughes' submission, if the unlawful sexual connection was regarded as a discrete offence, it should have attracted a starting point of no more than five and a half years and, while conceding in her submissions to the District Court that the violence itself would support a starting point in the range of four years, when totality was considered an uplift of no more than 12 months for the violence offending was appropriate. She submitted the adjusted starting point should be no more than six and a half years. Applying the discounts would lead to an end sentence of four years.

Discussion

[18] At the outset we make it clear that we do not accept any suggestion that Mr Mahani could have had any reasonable basis for believing the victim consented to the unlawful sexual connection. As Ms Hughes accepted in her written submissions, Mr Mahani's belief in consent was unreasonable and the victim's willingness to participate in the oral sex was not freely given, but was given in an effort to avoid further violence. That concession must follow from the summary of facts which records that, in relation to the unlawful sexual connection:

The victim did not want to but did so reluctantly as she felt if she didn't do as he said she would be assaulted further.

[19] Nor do we accept the premise underlying the appeal that the circumstances of the violence offending can be separated from the unlawful sexual connection which followed it. The offending cannot be compartmentalised in that way. The context of the unlawful sexual connection was that, immediately prior to it, the victim had been dragged by the hair to the bedroom, her clothes had been stripped from her, and she

had been pulled onto the bed by her head. Immediately before that, she had been severely kicked, beaten and throttled.

[20] Despite the fact the victim had sustained a fat lip as a result of the earlier beating she was forced to provide oral sex to Mr Mahani. Immediately after the passages in the victim's interview that Ms Hughes referred us to, the victim went on to say:

Yeah, and I tried to tell him I couldn't, "my lips is, I have a fat lip, I can't do it". "But just try". So I tried again and I said "It's sore". Then he tells me to jump on top.

[21] The fact the victim may have been conditioned to submit to Mr Mahani because of their abusive relationship does not decrease the seriousness of the sexual offending. The starting point of seven and a half years for the unlawful sexual offending was, given the background to the offending, open to the Judge. The uplift for the earlier violence was, in the circumstances, modest.

[22] Further, as the Crown submits, the starting point for the totality of the offending of eight years, eight months could be sustained in a number of ways. Even if we accepted Ms Hughes' argument that the starting point for the unlawful sexual connection should have been no more than five and a half to six years, an uplift of four to five years was available for the serious violence offending that immediately preceded it.

[23] The case of *R v R* provides a helpful check to the starting point in this case.⁵ The appellant had gone to his ex-partner's house for a pre-arranged visit. An argument followed during which he threatened her with a knife and strangled her repeatedly until she lost consciousness. He then left the property but later returned and demanded sex. When she refused he raped her. This Court pointed out the principal aggravating feature of the sexual offending was the violence that led up to and accompanied the rape (even though in *R*, the appellant had left the property for a period before returning to commit the rape). The violence of the attack had rendered the victim vulnerable. It was over and above the violence inherent in the act of rape. This Court considered

⁵ *R (CA13/2017) v R* [2017] NZCA 462.

that would have placed the offending within band 2 of *AM*.⁶ However, the sentencing Judge had added an uplift of three and half years' imprisonment for the violent offending to the eight year starting point for the rape. This Court pointed out that this was effectively one overall incident and concluded there was an element of double-counting in the resultant starting point of 12 years' imprisonment.⁷ This Court considered a seven year starting point for the rape with three and a half years uplift for the violence offending would have been appropriate. The overall starting point should have been 11 years' imprisonment.

[24] The rape in *R* may be regarded as more serious than the unlawful sexual connection in this case, but the previous violence in the present case was at least as serious. In *R* the victim was restrained, strangled and threatened with a knife but she was not physically beaten, kicked and stripped as the victim in the present case was.

[25] As this Court has said on numerous occasions, the focus must be on the end sentence, not how it is arrived at. The same principle applies to consideration of an adjusted starting point which reflects more than one offence and when the Court is required to then stand back and consider totality.

[26] However it is viewed, an adjusted starting point of eight years, eight months was well within the range available to the Judge when the issue of the totality of Mr Mahani's offending against the victim in this case is considered.

[27] As there is no challenge to the discount applied the appeal against the end sentence of five years, four months must be dismissed.

Result

[28] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁶ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

⁷ The 12 years took account of a further six month uplift for the charge of perverting the course of justice.