

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF  
COMPLAINANT PROHIBITED BY S 139, CRIMINAL JUSTICE ACT 1985**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA446/05**

**THE QUEEN**

v

**GEOFFREY PAUL AFFLECK**

Hearing: 30 and 31 August 2006

Court: O'Regan, Williams and Heath JJ

Counsel: P F Gorringe for Appellant  
M A Corlett for Crown

Judgment: 14 September 2006 at 11 am

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**JUDGMENT OF THE COURT**

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**The appeals against conviction and sentence are dismissed.**

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**REASONS OF THE COURT**

(Given by Heath J)

## **Introduction**

[1] Following a trial before Judge Spear and a jury in the District Court at Hamilton, Mr Affleck was convicted on one charge of sexual violation by rape, two charges of sexual violation by unlawful sexual connection and one charge of indecent assault on a girl aged between 12 and 15 years. Mr Affleck had earlier entered guilty pleas to two charges of supplying cannabis to a person under the age of 18 years and one charge of cultivating cannabis.

[2] Mr Affleck was sentenced on all charges on 7 November 2005. An effective term of imprisonment of 12 years was imposed.

[3] On the lead charge of sexual violation by rape, Mr Affleck was sentenced to a term of imprisonment of 11 years. On the charges of sexual violation by unlawful sexual connection, he was sentenced to six years imprisonment. On the indecent assault and cannabis supply charges he was sentenced to three years imprisonment. All sentences were to be served concurrently.

[4] On the cultivation of cannabis charge, Mr Affleck was sentenced to one year's imprisonment, cumulative on the 11 years imposed on other charges.

[5] The Crown sought a minimum sentence under s 86 of the Sentencing Act 2002. The Judge regarded Mr Affleck's offending as falling within the scope of s 86 on the grounds that, if a minimum sentence were not imposed, the sentencing goals of accountability, denunciation and deterrence would not adequately be met.

[6] Mr Affleck appeals against both conviction and sentence. The appeal against sentence encompasses a challenge to the minimum non-parole period ordered.

## **The issues on appeal**

[7] The appeal against conviction is put on the grounds of counsel error. The complaint is that an eye witness (Mr Affleck's wife) was not called to give evidence on his behalf at trial.

[8] Both counsel accept that, for an appeal against conviction to succeed on this ground, any counsel error must have produced a miscarriage of justice: *R v Sungsuwan* [2006] 1 NZLR 730 (SCNZ) at [63]-[70], per Gault J, delivering the joint judgment of himself, Keith and Blanchard JJ.

[9] However, a conclusion that there had been no counsel error would not prevent the appeal from succeeding if we were satisfied that material evidence was available but not put before the jury. If there were a real risk that the absence of creditable evidence might have affected the outcome of the trial, the usual course will be for a new trial to be ordered to avoid an unsafe verdict: *Sungsuwan* at [70].

[10] The sentence appeal is brought on grounds of manifest excess. It is contended that the effective sentence of 12 years imprisonment was not justified having regard to the totality of the offending. In addition, the minimum non-parole period is challenged on the basis that the Judge erred in imposing a minimum sentence or in fixing it at 50% of the effective sentence.

[11] Mr Corlett, for the Crown, accepted that, if the version of events given by Mrs Affleck in her evidence in this Court were the evidence she would have given at trial, if called as a witness, then it was evidence that ought to have been before the jury and its absence gives rise to a miscarriage of justice.

### **Background facts**

[12] In order to understand the significance of Mrs Affleck's evidence it is necessary to recount, in brief, the evidence on which the jury acted to find Mr Affleck guilty. We base our summary on the sentencing remarks of Judge Spear.

[13] The alleged sexual offending and the supply of cannabis to two young girls occurred on or about 30 October 2004 at the Affleck home in Whitianga. Mr Affleck and his wife lived at that property, together with Mr Affleck's 14 year old daughter.

[14] During the day, Mr Affleck's daughter was joined by a school friend. We refer to her as the complainant. She was also aged 14 years. The complainant and Mr Affleck's daughter helped to paint the daughter's room. All intended that the complainant would stay overnight with the Affleck family.

[15] Mr Affleck supplied both girls with alcohol. The sentencing Judge described this as a "concoction of home made vodka and orange". After they had been drinking alcohol, Mr Affleck offered the two girls some cannabis to smoke. Mr Affleck smoked some cannabis with them. The end result was that the two girls became intoxicated, as well as feeling the effects of the consumption of cannabis.

[16] It appears that Mr and Mrs Affleck and the two girls had dinner, probably sometime between 8pm and 10pm. After dinner, more cannabis was consumed. Mr Affleck introduced the complainant to "spotting" cannabis, where drops of cannabis oil are placed on a knife or similar instrument and fumes inhaled after the instrument has been heated. The Judge observed that "spotting" provides a more potent form of delivery of the active ingredients of cannabis than smoking. Later, cannabis smoke was blown directly into the complainant's mouth.

[17] Both girls reached the point at which they had become so intoxicated that one (Mr Affleck's daughter) was vomiting and the other (the complainant) was lying prone on the floor.

[18] While the complainant was lying vulnerable on the floor (described by Judge Spear as in "a state of stupefaction") Mr Affleck picked up her hand and placed it on his penis. When released, her hand fell to the floor. This occurred in front of Mr Affleck's daughter.

[19] Mr Affleck's daughter tried to protect the complainant. She told her father that she intended to take the complainant to bed. Mr Affleck intervened, telling his daughter to go to bed but to leave the complainant with him. His daughter was unable to resist those directions.

[20] Once Mr Affleck's daughter had left the room, he removed or lowered the complainant's lower clothing, rolled her onto her stomach, lifted up her pelvis and raped her.

[21] Mr Affleck then turned the complainant over and, while doing so, sexually violated her by digital penetration. He took her into the couple's bedroom where he continued to rape her. At some point oral sexual connection occurred by Mr Affleck licking the complainant's genitalia.

[22] Mr Affleck then put the complainant's underwear and pants back on. He carried her through to his daughter's room and left her, in a stupefied state, on the bed. This appears to have been at about 1am.

[23] At trial, the evidence of both the complainant and Mr Affleck's daughter was that Mrs Affleck was asleep on a couch in the lounge at the time the alleged offending occurred.

#### **The significant aspects of Mrs Affleck's proposed evidence**

[24] There are two aspects to the evidence Mrs Affleck says she could have given at trial. They are both relevant to the credibility of the complainant and to the confirming evidence given by Mr Affleck's daughter.

[25] First, Mrs Affleck deposes that she had been in the lounge area both before and after the evening meal. Up to the time at which they ate, Mrs Affleck accepts that she was on the couch asleep. That part of her evidence is confirmed by both the complainant and Mr Affleck's daughter. So, the issue arising from Mrs Affleck's evidence in this Court is whether she was awake or asleep after dinner.

[26] Mrs Affleck says that after dinner she stacked the dishes then returned to the lounge. She says she sat at the table speaking to Mr Affleck. Her evidence is that she was awake at all times after they had the evening meal and did not see any activity of the type described by the complainant occur.

[27] The second aspect concerns the time at which Mrs Affleck retired to bed. She says that she went to the bedroom at about 10pm. She says she remembered hearing the television and the three people talking in the lounge.

[28] Mrs Affleck deposes that, after going to bed and before she fell asleep, no one else came into the bedroom. She was unaware of any activity in the bedroom after she fell asleep.

[29] The significance of this evidence is obvious. If Mrs Affleck were awake after the evening meal and saw nothing happen in the lounge, it is difficult to see how the Crown case could have succeeded. If Mrs Affleck were in the bedroom, it casts even greater doubt on the possibility of her husband dragging the complainant into the bedroom to continue to violate her sexually.

[30] The possibility that Mr Affleck engaged in sexual activity with the complainant in the lounge, with nobody else present, yet decided to move into the couple's bedroom while his wife was in bed seems inherently implausible. There is little realistic prospect that Mrs Affleck could have been in the bedroom yet not have been awoken by activity of that nature.

### **The allegations of counsel error**

[31] We gave leave to Mr Affleck to call evidence on the appeal. We received affidavits from him and his wife. Following a waiver of privilege, trial counsel, Mr Johnson, provided an affidavit. All three witnesses were cross-examined before us.

[32] Both Mr and Mrs Affleck gave evidence that they told Mr Johnson, prior to trial, that Mrs Affleck could give evidence that she was awake at all material times. There is no documentary evidence to support that contention. Indeed, Mr Johnson conducted the case for Mr Affleck contrary to that proposition.

[33] First, the complainant gave evidence that Mrs Affleck was asleep on the couch when the sexual activity was said to have occurred. That evidence was not

challenged in cross-examination. Indeed, Mr Johnson asked the complainant to confirm that Mrs Affleck was asleep on the couch at the relevant time. That cross-examination took place in the presence of Mr Affleck.

[34] Second, Mr Affleck's daughter gave evidence that Mrs Affleck was asleep on the couch at material times. During the course of cross-examination, Mr Johnson asked her why she did not wake up Mrs Affleck. That cross-examination took place in the presence of both Mr and Mrs Affleck. By this stage, Mrs Affleck was present in Court, the complainant having completed her evidence and Mrs Affleck having been informed that she was not required to give evidence.

[35] Neither Mr nor Mrs Affleck remonstrated with Mr Johnson about his cross-examination of the complainant and Mr Affleck's daughter on what they now say was an egregious error on his part. They had ample opportunity during the course of the trial to correct any error they believed Mr Johnson may have made on such an important issue.

[36] Mr Affleck elected not to give or to call evidence at trial. In closing to the jury, Mr Johnson, on two occasions, referred to evidence that Mrs Affleck was asleep on the couch. Plainly, he had adopted that position for the purpose of his jury address. Again, no criticism of Mr Johnson's closing address was made, immediately afterwards, either by Mr Affleck or his wife.

[37] In cross-examination before us, Mrs Affleck was firm that she had told Mr Johnson, that she had been awake. She said this occurred before the trial. She also deposed that, while she was surprised that evidence that she was asleep was not challenged by Mr Johnson, she did not raise the issue with him during the course of the trial.

[38] Mr Johnson was adamant that, had he been instructed that Mrs Affleck was awake at relevant times, he would not have run the defence as he did. He accepted the force of her proposed evidence and the damage it could have done to the Crown case.

[39] Mr Johnson accepted that, after the complainant had given evidence, he informed Mrs Affleck that he did not consider it necessary for her to give evidence. Thereafter she remained in the back of the Court during the hearing. That is consistent with Mrs Affleck's evidence that she thought it was too late, once she was sitting in the back of the Court, to be called as a witness.

[40] At some point during the trial, probably before an election not to call evidence was made, Mr Johnson provided a handwritten document to Mr Affleck. Mr Affleck believes that this document was given to him to sign while the jury were deliberating.

[41] The document, in full, states:

I have told my lawyer on more than one occasion that I do not wish to give evidence and this is still the case.

I also understand that my partner "Turtle" [Mrs Affleck] can not add very much of value and do not require her to give evidence on my behalf.

I am satisfied with the representation given by my lawyer. I fully appreciate the seriousness of my position and understand that in all probability I will go to prison for the offences I have already pleaded guilty to.

[42] Mr Johnson deposed that he drew up this document and had Mr Affleck sign it because of concerns that trial counsel error was being raised more frequently in this Court. Mr Affleck's evidence was that he did not read the document before signing it, being under too much stress at the relevant time.

[43] In one sense the document can be regarded as self-serving. It confirms satisfaction with representation and the nature of the instructions given by Mr Affleck to Mr Johnson. On Mr Johnson's evidence it must have been given to Mr Affleck before the Crown case was closed and an election made. Mr Johnson accepted no adjournment occurred between the close of the Crown case and an election being made.

[44] The document confirms that Mr Affleck did not wish to give evidence and purports to confirm that he understood Mrs Affleck could not "add very much of value" and was not required to give evidence on his behalf.

[45] While the signed document can and ought to be regarded as an indicator of Mr Affleck's views, the time at which it was procured during the trial is unclear. We find the note of little assistance in deciding the critical issue on this appeal. There is general agreement that, if evidence Mrs Affleck could have given at trial reflected what she said in this Court, material evidence was not before the jury. That being the case, it is unnecessary to place much weight on the note.

[46] The fundamental nature of the evidence that Mrs Affleck says that she could have given at trial cannot be overstated. It would have been blindingly obvious to Mr Johnson that the evidence could torpedo the Crown case. Indeed, had the possibility of such evidence been signalled to the Crown before the trial, we consider it likely that a serious reconsideration of the Crown case would have been undertaken at that time.

[47] The oral evidence of Mr Affleck before us was confused. Having regard to the amount of alcohol and drugs it is likely he consumed that night, it is hardly surprising that his memory of what occurred seemed disjointed and vague. We reject Mr Affleck's evidence as unreliable.

[48] Mrs Affleck presented as a sincere witness. She maintained, during cross-examination, that she had been awake at relevant times and then went to bed. She remained adamant that she saw or heard nothing consistent with the complainant's evidence. She deposed that she consumed neither alcohol nor drugs on the night in question.

[49] We do not find it necessary to resolve all conflicts in evidence between Mr Johnson and Mrs Affleck. Ultimately, whether Mr Johnson was or was not told of the proposed evidence will not be determinative of the appeal. What will be determinative is whether there is evidence that, if believed, *could* result in a properly directed jury returning not guilty verdicts at trial.

[50] We find that Mrs Affleck gave her evidence genuinely. We think it likely that she now honestly believes what she says is the objective truth. But, we do not

accept that her evidence accurately reflects what occurred on the night. Nor do we accept that her proposed evidence was drawn to Mr Johnson's attention at any time.

[51] Had Mrs Affleck been awake at the material time, it is inconceivable that the evidence would not have been drawn to the attention of counsel. It is also inconceivable that counsel could have misunderstood the impact of any such information being passed to him.

[52] We conclude that, since Mr Affleck's conviction, Mrs Affleck has convinced herself that she was awake and saw and heard nothing consistent with the complainant's evidence. In our view, that reconstruction of events is entirely consistent with an attempt to find justification for a continued belief in her husband's innocence.

[53] We reject as implausible the evidence Mrs Affleck seeks to give. We find that Mr Johnson was not told that Mrs Affleck was awake at relevant times. We find that Mr Johnson conducted the trial according to the instructions he was given. No miscarriage of justice occurred.

[54] In those circumstances, the conviction appeals fail.

### **Sentence appeal**

[55] Mr Gorringe acknowledged difficulties with the sentence appeal. The lead charge for sentencing purposes was one of sexual violation by rape. This Court has held that the starting point for sentence in such a case is 8 years imprisonment before consideration of aggravating factors: see *R v A* [1994] 2 NZLR 129 (CA) at 131-132. In our view, no quarrel can be made with the addition of an uplift of three years to reflect the appalling conduct of Mr Affleck.

[56] Judge Spear explained his reasons for imposing a sentence of 11 years imprisonment on the supplying cannabis and sexual offending:

[26] This is the sentence that is necessary to mark society's outrage that the young and vulnerable in our society have been so grievously brutalised by

you in this way. It is a sentence that is designed to ensure that you understand that this is offending that will not only be dealt with firmly by the Courts but which is offending that society considers completely abhorrent. It is a sentence that recognises the harm that you have done this young girl, that recognises that self indulgent lifestyle of yours has lead you down the slippery slope to the bottom of the path that you now find yourself on. For this, you have nobody to blame but yourself.

We agree.

[57] The maximum period of imprisonment available on the rape charge was one of 20 years and the sentence imposed was just over 50% of that maximum. Having regard to the serious aggravating circumstances, it cannot be said that such a sentence was manifestly excessive.

[58] The second aspect of the sentence appeal was the imposition of a cumulative sentence of one year on the charge of cultivating cannabis. That offending was discrete from the other offending. It was offending on which the Judge was entitled to impose a cumulative sentence.

[59] Mr Affleck has a disturbing history of drug related offending. That history was directly relevant to the term of imprisonment to be imposed on the charge of cultivating cannabis. While the sentence was stern, particularly when it was to be accumulated with the remaining part of the sentence, it cannot be said to have been outside the range available to the Judge.

[60] Standing back and applying the totality principle, we are satisfied that the offending justified an effective sentence of 12 years imprisonment.

[61] In the context of offending of this type we are satisfied that it was necessary to impose a minimum sentence in order to achieve sentencing goals of denunciation, accountability, deterrence and community protection: s 86(2) of the Sentencing Act 2002. Although one might quibble with the Judge assessing the period of the minimum sentence by reference to the effective end sentence rather than to particular offending that gave rise to the lead sentence, we do not see such criticism as warranted. We are satisfied that a minimum term of six years was amply justified.

## **Result**

[62] For those reasons, the appeals against conviction and sentence are both dismissed.

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