IN THE COURT OF APPEAL OF NEW ZEALAND C.A.129/96

THE QUEEN

v

SILILEAO MAULOLO

Coram: Gault J
Tompkins J
Heron J

Hearing: 15 August 1996 (at Wellington)

Counsel: M Dyhrberg for Appellant
S P France for the Crown

Judgment: 15 August 1996

JUDGMENT OF THE COURT DELIVERED BY TOMPKINS J

The appellant pleaded guilty to two charges of unlawful sexual connection and one charge of kidnapping. On 1 March 1996 he was sentenced in the High Court at Auckland to ten years imprisonment on the two charges of sexual violation and five years imprisonment on the charge of unlawful detention, the sentences to be concurrent. He has appealed against those sentences.

The offending

On the afternoon of Monday 1 January 1996, the appellant was hitchhiking on State Highway 1 near Wellsford, north of Auckland. He was picked up by the complainant, a male. They drove to Orewa looking for accommodation for the appellant. At one stage they stopped at a lookout point

near Orewa. The appellant made sexual advances to the complainant. He protested, the appellant continued and forced the complainant to suck his erect penis. He then took the complainant out of the car and into some bushes where he had anal intercourse with the complainant, despite his protests.

They returned to the car and the appellant forced the complainant to drive south to Huntly. There the complainant escaped at about 2 am the following day. The appellant was apprehended shortly afterwards. He initially claimed that the complainant was consenting. He pleaded guilty at an early stage.

The effect on the complainant

The complainant is a single European living on an invalid's benefit. The victim impact report describes the effect these events have had on him, referring in particular to a fear of Aids as a result of which he had monthly blood tests. He feels vulnerable to the appellant, if he were released. He no longer trusts people. Fortunately, he has had support from his family during what he describes as a very difficult time. The complainant must have suffered significant emotional stress in being detained for a lengthy period after suffering two sexual violations.

The appellant

The appellant is aged 28 years. He was born in Samoa and came to New Zealand 20 years ago. He claims to have been sexually abused when he was aged about seven by a friend of the family. By 13 he was a male prostitute. He professes to be confused about his sexual identity. The probation officer said that when the threads of his life are drawn together, a picture of an angry, addicted, abused, confused and emotionally immature individual emerges. The appellant has a lengthy list of previous convictions that includes two charges of indecent assaults on a male.

A psychiatric report has been obtained from the Regional Forensic Psychiatric Services. The report refers to the appellant having been in counselling with a psychologist with the Justice Department that was terminated as he was "totally unresponsive". The appellant talked of shame, guilt and confusion about his sexual orientation and social status. The doctors considered that the appellant has a severe dysfunctional personality style with borderline and anti social traits. At the time of interviews he was not mentally disordered. He does not have a major psychiatric illness nor a disease of the mind. He does have, in the opinion of the doctors, a chronic impairment of his personality functions which is exacerbated by his abuse of alcohol. The appellant believes he is suffering from a Samoan curse, or malaia. He at times believes that he is influenced by spiritual evil forces which, in his view, impair his ability to resist acting in a planned or impulsive manner. Potentially dangerous behaviour in the future cannot be discounted. There is a considerable risk of him behaving in a sexually aggressive manner in the future, if he is unable to make changes in his behaviour. The doctors conclude:

> "If [the appellant] is placed in the community at this stage, we would consider that he is an on going real danger to others."

It is apparent from the report that he is prone to sudden urges to have sexual intercourse with white men. The report refers to the appellant planning how to seduce the object of his sexual wishes, and that with men he is aggressive and "rough".

The sentence in the High Court

The sentencing Judge referred to the facts surrounding the offending and to the psychiatric report. She concluded that the appellant was a real risk to the public because of his sexual aggression. For that reason she actively considered a sentence of preventive detention. She decided against that course, but emphasised how close the appellant came to an indeterminate sentence imposed for the protection of the public. She recorded counsel for the Crown's acceptance of the appellant's counsel's submission that the appropriate range of sentence is in the vicinity of eight

years and that the aggravating and mitigating circumstances cancel each other out. But she considered that the protection of the public was the most important consideration in determining the appropriate sentence. Although she made no express reduction for the early guilty plea, she referred to it at the commencement of her sentencing comments, and we have no doubt that she had it in mind when referring to the mitigating circumstances.

Submissions of counsel

Miss Dyhrberg for the appellant submitted that the Judge did not give any or any sufficient credit for the appellant's early plea of guilty. She accepted that the aggravating and mitigating circumstances of the case cancelled each other out, but in arriving at a sentence of ten years imprisonment, two years above the accepted starting point for offences of this kind (*R v A* [1994] 2 NZLR 129), the Judge did not in the final assessment of the term, sufficiently have regard to the guilty plea. Further she submitted that it had not been demonstrated that the appellant's attitude could not change with appropriate treatment.

Mr France for the Crown submitted that in the particular circumstances of this case, a starting point of higher than eight years may have been appropriate and that while the early guilty plea was a mitigating factor, the need to protect the public justified the sentence imposed.

Conclusion

In view of the findings contained in the psychiatric report to which we have referred, this was clearly a case where the need to protect the public was an important element in assessing the appropriate sentence. This need has been recognised in this court in the two recent decisions of *R v Carter,* CA.160/96, 31 July 1996 (arson) and *R v Staynor,* CA.31/96, 7 August 1996 (sexual offending). Both these judgments refer to the dicta of Myers CJ in *R v Casey* [1931] NZLR 594, where he commented on the duty of the court, for the protection of the public, to take into consideration a

predilection to commit a particular type of offence and lengthen the period of confinement accordingly. In *R v Ward* [1976] 1 NZLR 588 McCarthy P endorsed this approach. He said at 591:

> "We recognise this balancing is not easy. No rigid lines are really possible. Moreover, the protection of the public against those likely to offend repeatedly can all too easily be seen as an additional punishment for past offences. For these reasons the law has sought to preserve the preventive aspect being given too much importance. The controlling principle which it has developed to prevent it taking charge in a dominant way is that a reasonable relationship to the penalty justified by the gravity of the offence must be maintained. The desirability of prevention must be balanced against that gravity."

Both of the recent decisions to which we have referred also recognised that in certain cases such as the present, it is legitimate to have regard to the prospect of remission or parole in determining the appropriate sentence: *R v Roera* [1991] 2 NZLR 44, 46. This approach was also adopted in *R v Mwai* [1995] 3 NZLR 149 where Hardie Boys J said that there was no inflexible rule against having regard to parole eligibility and in an appropriate case it is permissible to have regard to the realities in order to ensure a just sentence.

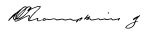
With the sentence of ten years, the appellant will become eligible for parole after a little over six and a half years. The appropriate period for which he should remain in prison requires a balancing between the gravity of the offence and the need to protect the public. The latter will depend upon the extent to which psychiatric or psychological therapy or counselling will enable him to overcome the propensities referred to in the psychiatric report. The Parole Board will be well placed to monitor the effectiveness of any treatment he receives in prison. It will be able to judge whether he has overcome these propensities to the extent that the public is unlikely to be at risk should he be released.

That the appellant represents a danger to the public is undoubted. That danger will continue unless the treatment and counselling he receives is successful. In our view, in the particular circumstances of this case, balancing the serious nature of the offending with the need to protect the public, a longer sentence than would otherwise be appropriate is justified, despite the early guilty

plea. When regard is had to all of these considerations, we are not satisfied that the sentence imposed was excessive.

The appeal is dismissed.

We record our view that in the interests of the community as well as this appellant, it is essential that comprehensive and effective therapy be made available to this appellant during his period in custody, and that this should commence sooner rather than later.



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