PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA423/2008
[2008] NZCA 461

THE QUEEN

v

ZEPPELIN RONNY JAMES DIO TAANE

Hearing: 21 October 2008

Court: Baragwanath, Priestley and Venning JJ

Counsel: R Vigor-Brown for Appellant
K Raftery for Crown

Judgment: 4 November 2008 at 11am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Priestley J)

The appeal

[1] The appellant pleaded guilty to charges of indecent assault and robbery.

[2] In June 2008 Judge McGuire imposed sentences of two years three months imprisonment for the indecent assault charge and 18 months imprisonment for the robbery charge. Those terms of imprisonment were concurrent.

[3] The Judge made various recommendations and imposed release conditions suggested by the pre-sentence report. He also remitted outstanding fines totalling $6,485, although the jurisdictional basis for so doing is not clear.

[4] This appeal challenges the two years three months term of imprisonment.

Background

[5] Given the focus of the appeal, which requires a careful assessment of culpability and aggravating factors, we need to record most of the detail of the summary of facts to which the appellant pleaded.

[6] The offending took place in March 2008. The appellant, who had moved to Taupo to be close to his partner, was aged 20 and was then employed.

[7] His victim was a Korean woman in her late 20s. She came to New Zealand at the end of 2007 intending to travel for several months as a tourist. She and the appellant encountered each other at Taupo's bungy jump attraction overlooking the Waikato River. During the course of a casual conversation the victim indicated that she intended to walk to the Aratiatia dam at the head of the rapids. The appellant offered to show her the way. The offer was declined.

[8] The victim then walked several hundred metres to the start of the Huka Falls/Aratiatia track which follows the right bank of the Waikato River. On arriving she again encountered the appellant standing next to a track map. He yelled to the

victim and signalled to her to approach him. He again insisted that he show the victim the way to the Aratiatia dam.

[9] She eventually agreed. The couple walked for the next 40 minutes along the track to Huka Falls. During the course of that part of the journey the appellant was friendly and helpful. The appellant conversed about Maori and Korean culture.

[10] After viewing the falls the couple continued walking along the track. The track section from Huka Falls to Aratiatia is more isolated and would be a 75 minute walk. The appellant, under the pretext of obtaining a better view of jet boat operations, insisted that the couple leave the track to a secluded section of river bank. The victim initially refused but reluctantly followed. The couple sat on the bank, well away from the walking track, to rest.

[11] The appellant then raised the topic of Maori and Korean massages and asked the victim to perform the latter on him. Again the victim declined but eventually acquiesced to the appellant's pleas and massaged his shoulders. The appellant then insisted on reciprocating with what he described as a Maori massage. Despite the victim refusing his offer several times he began to massage her back and shoulders whilst she was sitting on the ground. The victim continued to say no. The appellant then stopped.

[12] The appellant, saying he was hot, stripped off his clothing to his shorts. He then proposed giving the victim another Maori massage. Despite the victim's refusal he began to massage her back. He lifted up her top and rubbed her bare back.

[13] The victim continued to say no. She tried to turn around but, because of the force the appellant was exerting on her shoulders, she could not move or stand.

[14] The victim began to scream. The appellant pushed her to the ground holding her there with his right hand. At the same time, with his left hand, he pulled down her shorts to her knees with sufficient force to rip off the top button. He began to rub her buttocks. He then lifted her tee-shirt and kissed her on her right breast.

[15] The victim continued to scream and attempted to push and kick the appellant off. In this she was unsuccessful because of the appellant's strength. She began to cry. The appellant then stopped his indecent assault and instructed the victim to stay where she was. He pushed her in her back with his feet. Whilst his feet were on her back he began to rifle through her bag, removing her digital camera and cellphone. The couple then stood up. The appellant gave the victim a hug, apologised, and then asked for $10. The victim declined to give him money. The appellant then walked away concealing the stolen property under his clothing.

[16] The appellant was subsequently apprehended by two mountain-bikers who had come to the victim's assistance and pursued the appellant as he was retracing his steps along the track. The appellant tried to hide in bush. He was eventually extricated from the bush by the police.

[17] He initially denied indecently assaulting his victim and also denied taking her camera and cellphone. The fate of the cellphone is unknown. The camera was eventually restored to the victim. The appellant pleaded guilty at an early opportunity a month after his initial appearance.

[18] The Judge did not have the benefit of a victim impact statement. The police were unable to obtain one from the victim because she continued to travel around New Zealand. Mr Vigor-Brown did not dispute, however, that the experience would have been an extremely frightening one for a woman travelling alone in a strange country.

[19] The appellant had no history of sexual offending. He had been convicted of theft in the Youth Court in 2005, not to be regarded as an aggravating factor. However, two days before his offending, he had been convicted and sentenced to 50 hours community work in the District Court for driving while disqualified.

Sentence

[20] The Judge referred to statements made by the appellant that at one stage during their walk he and the victim had held hands; that the appellant considered he

had got the wrong message; and that when the victim began to cry he took what he could and ran. The Judge referred to a comment in the pre-sentence report to the effect the appellant had an unhealthy sense of entitlement.

[21] The Judge correctly observed that the appellant had continued to press his company on the victim despite the reluctance she exhibited at an early stage. He categorised the appellant's references to massages as ruses.

[22] The Judge observed that communities such as Taupo and Rotorua relied on tourism and that if tourists were treated as the victim had been they would not return. He categorised the indecent assault as "reasonably serious" and commented on its duration, followed by the "dirty trick" of robbing the victim of her cellphone and camera.

[23] The Judge then examined two authorities cited to him by counsel; *R v Naylor* CA336/03 19 March 2004 and the High Court authority of *Mattock v Police* HC NWP AP 44/98 5 February 1999. The Judge accepted the Crown's submission that the indecent assault should be the lead offence. He considered a starting point of three years imprisonment was appropriate, to be discounted to two years and three months to reflect the early guilty pleas, the appellant's insignificant previous offending, and his youth.

Discussion

[24] Counsel submitted the term of imprisonment imposed should not have exceeded 18 months. The start point, reflecting the culpability of both offences, should have been two years and three months rather than three years. Although written submissions suggested the discount for mitigating factors should have been one third, in oral argument Mr Vigor-Brown accepted he could not challenge the 25 per cent discount the Judge allowed.

[25] Mr Vigor-Brown, without in anyway minimising the appellant's culpability and the seriousness of the offending, submitted that to some extent the appellant had been "chancing his arm" with the victim. He conceded that a degree of violence had

been involved but submitted this was at the low end of the scale. He conceded too that the victim was vulnerable and isolated at the time of the offending. The appellant's premeditation had been of short duration. Counsel categorised the robbery as being very much spur of the moment.

[26] Mr Vigor-Brown stressed the appellant's remorse and in particular his willingness to seek professional help by attending a sex offenders' programme to avoid repetition.

[27] Counsel compared and contrasted the appellant's offending with the offending scrutinised by this Court in *Naylor*. The indecent assault there constituted the victim being grabbed from behind by a drunken man who pressed his groin against her rear whilst giving her a bear hug. He had attempted to undo his fly. The victim broke free and was able to escape. Both counsel had sought a non-custodial sentence in the court below. This Court upheld a sentence of 400 hours community service. We do not consider the case is at all comparable.

[28] Although the appellant was properly charged with robbery we consider the offending was more akin to theft. The force employed by the appellant was primarily associated with the indecent assault. The robbery was, in our judgment, very much an after-thought. That said, the appellant's theft of the victim's property is an additional culpability factor.

[29] There is no tariff for sentences for indecent assault. The charge can cover a multitude of offending. Here there was the forcible removal of the victim's shorts, the rubbing of her buttocks, and the kissing of her right breast. Aggravating factors, over which there is no dispute, include the duration of the offending, the appellant's patent premeditation beginning with his second encounter with the victim at the start of the track, and his persistent advances to her despite her clear and repeated reluctance and refusals. These factors indicate a sustained and deliberate culpability which justified the Judge's comment that the indecent assault was reasonably serious.

[30] The sole issue in this appeal is whether, in these circumstances, the Judge's three year start point was too high.

[31] A correct start point must reflect not only the appellant's overall culpability but also balance the relevant competing purposes of s 7 of the Sentencing Act 2002. Highly relevant purposes here include the need to denounce predatory and premeditated conduct of this type; to deter similar offending, particularly in tourist areas; and to assist with the appellant's rehabilitation. Also relevant, and to be balanced, are the ss 8(a) and (g) principles of considering the offender's degree of culpability and imposing the least restrictive outcome in the circumstances. This latter principle needs special attention in the case of an offender aged 20.

[32] The Judge did not overlook any of these purposes and principles. Different judges might well have adopted a slightly lower start point or afforded a greater discount than was the case here. We consider the sentence was, in all the circumstances, a severe one, particularly for a young man. However, we do not consider its severity is sufficient to render the sentence manifestly excessive. Though it was at the top end of the available range, this Court does not consider interference is justified.

Result

[33] Accordingly the appeal is dismissed.

Solicitors:
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Crown Law Office, Wellington for Crown