PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S139 OF THE CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA11/03

THE QUEEN

v

FENI VILI

Hearing: 27 March 2003

Coram: Keith J
Robertson J
Doogue J

Appearances: S J Gill for the Appellant
M F Laracy for the Crown

Judgment: 7 April 2003

JUDGMENT OF THE COURT DELIVERED BY KEITH J

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[1] Following a jury trial in the District Court, the appellant was found guilty of abduction, indecent assault and sexual violation by unlawful sexual connection. He was acquitted of two charges of sexual violation by rape arising out of the same events. All the charges involved the same complainant.

[2] The appellant appeals against his sentence of 5½ years imprisonment.

[3] The 17 year old victim and 29 year old offender belonged to the same church and had met there. The sentencing Judge, who had also been the trial Judge, provides this account in her sentencing remarks of the offending:

> [3] … On the day in question [the complaint's] mother had driven her over to spend the night at the house of her best friend. Her best friend … was also the daughter of the minister of the church that you both go to. You were there fixing the minister's car. That evening the complainant and her friend went to the nightclub where they played pool, and had some drinks. Late that night the complainant got separated from her friend. You happened to be there, you had been drinking and you offered the complainant a ride in your car provided she gave you a kiss. She refused. You then said you would take her to where her friend was even if she did not kiss you. She got into the car with you and asked you to take her to her friend's home.
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> [4] Instead of going there you drove into the grounds of the school where your church held services in the school hall. You asked her whether she was a virgin and she told you she was. She also said she had a boyfriend. According to her evidence you then said, "Let's go", and she thought you meant that you were going to take her to her best friend's house, but instead you drove the car further into the school grounds in between two school buildings. There you told her you wanted to kiss her. She said, "No", but you kept trying even though she kept turning her head away. You then moved to her side of the car and got on top of her, pinning her down with the weight of your body so that she could not under the seat belt. Then you put your hand underneath her top and tried to touch her breasts. You pulled up her skirt and inserted your fingers in her vagina. She kept moving up the seat so that your hand would come out but you kept putting your fingers in again. This happened a number of times. At one time she tried to open the door but found it had been locked. All the while she was saying, "No" to you and crying.

[4] The Judge recorded the agreement of counsel that there is no fixed tariff for this kind of offending. She discussed comparable cases, *R v Talataina* (1991) 7 CRNZ 33, *R v Latu* CA439/92, 14 June 1993 and *R v M* [2000] 2 NZLR 60, referring to differences between the facts in those cases and the present. Comparing *Talataina* where a sentence of 2½ years was upheld, she noted that the present appellant had not pleaded guilty, had shown no remorse and had persisted in his claim that he remembers nothing. Further, the present complainant was much younger than the appellant (Talataina received the benefit of his age – the same as the complainant's – and his social immaturity), the appellant had abused her trust and there was the additional aggravating feature of an abduction.

[5] In *Latu* this Court upheld a four year sentence for digital penetration, while noting that it was a severe sentence. It involved intrusion into the complainant's dwelling. This Court's judgment begins with this description.

> The appellant, who was friendly with and a neighbour of the complainant, went into her flat on the day in question and commenced to kiss her and make sexual suggestions. We interpolate that the Judge was satisfied that there was no background which would have led the appellant to think that he would have been welcome. The complainant escaped to a neighbouring flat and hid in a cupboard there, but the appellant followed her and continued to persist with his suggestions that they should have intercourse. The complainant then was able to make her way back to her own flat where she locked herself in. The appellant then called again, this time with what seems to have been a pretext relating to a vacuum cleaner which he brought or returned, and eventually made his way into the complainant's flat through a window. He pinned the complainant down, removed her pants and committed digital penetration. Generally he forced himself on her and endeavoured to have intercourse with her. The complainant's cries were heard by a neighbour and it is clear that it was only his intervention that put an end to the incident and avoided anything even more serious.

[6] The sentencing Judge in this case said that there was a similarly persistent attack on an unwilling victim who protested throughout her ordeal. She continued:

> [12] The effect on the complainant is serious, far reaching, and continuous. She says that she is on edge all the time and very frightened. This case has split the close-knit Samoan Church of God community. There have been incidents which caused her to be reluctant to go out, and even to go to work. She says that what happened that Friday night was the worst thing that has happened to her in her life. It has changed how she feels about people, how she trusts people and how she acts in the community. Instead of feeling safe and secure within what she calls her beloved extended family of the church community she feels isolated, hated, and blamed for something that was not her fault.

[7] *Talataina* and *Latu*, she noted, were decided before the maximum sentence for sexual violation was increased from 14 to 20 years. In *R v M*, as the sentencing Judge says, this Court noted that although there is no fixed tariff the cases showed sentences fixed against starting points ranging from two to five years on conviction after trial and before allowing for mitigating factors. In that case, on a Solicitor-General appeal, a term of three years imprisonment was imposed. Comparing the three cases with the present, the sentencing Judge said that here there was a sustained assault against the complainant's continuing protests and repeated digital penetration.

[8] The Judge continued:

> [14] I consider the appropriate starting point for the indecent assault and sexual violation is five years imprisonment. On top of that is the added aggravation of abduction. The case of *R v Parker* CA286/97, 2 October 1997, showed that the courts view abduction seriously. In that case the Court of Appeal upheld a sentence of three and a half years' imprisonment imposed following the appellant's conviction by a jury on a charge of detaining a woman without her consent with intent to have sexual intercourse with her. In your case the detention of the complainant was persistent and prolonged, although not as much as in *Parker* case, and you used a lesser degree of violence. I consider that the abduction should add another year, so that taking your offending in its totality the starting point is six years' imprisonment.

[9] The only mitigating matter was the appellant's previous relatively good record. The sentence was reduced by six months on that account leading to the final sentence of five and a half years imprisonment.

[10] The Judge rejected the Crown's application to impose a minimum term of imprisonment. That is not before us.

[11] The careful statement of reasons given by the sentencing Judge enables us to move to what in the course of the hearing became the critical issue in this appeal – the significance of the abduction. The Judge at first treats it as an additional aggravating factor of the unlawful sexual connection (para [4] above) contributing to the starting point of five years for those offences, but then, later (para [8] above), adds another year, leading to a totality figure of six years.

[12] We consider that that double counting based on a top starting point does lead to a final starting point which is too high. The totality of this serious and terrifying offending, given its substantial effects on the victim, does justify a starting point of five years given what this Court said in *R v M*. That would still provide the deterrent message that we agree should be given. From that is to be deducted six months for the appellant's record.

[13] Accordingly the appeal is allowed, the original sentence is set aside and a sentence of imprisonment of four years six months is imposed.

Solicitors:
Gill & McAsey, Lower Hutt for the Appellant
Crown Law Office, Wellington.