18/8

[redacted]

550

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 141/80
C.A. 142/80

THE QUEEN v. NORMAN MAKATU WILLIAMS

THE QUEEN v. FRANK GRIFFO BLUEGUM

Coram — Woodhouse J (Presiding)
Richardson J
Chilwell J

Hearing — 6 August 1980

Counsel — R.B. Squire for Crown
D.J. Maze for Williams and Bluegum

Judgment — 6 August 1980

JUDGMENT OF THE COURT DELIVERED BY WOODHOUSE J

Norman Makatu Williams is a young Maori aged twenty years. Frank Griffo Bluegum is his stepbrother and two years younger. On the night of 22 February 1980 they had been drinking at a hotel and later at a so-called party. They left the second place in a car driven by Bluegum and accompanied by a girl who had that evening struck up an acquaintance with Williams. They went off unsuccessfully looking for another party to attend. It is not entirely clear but at that stage the girl may have asked to be taken to her home. However, while driving about they met another group and for a period there appears to have been some discussion between the occupants of the car as to what next should be done. Then, Bluegum still driving the vehicle, they went off once more and stopped close to a bridge where a second group of acquaintances or friends

discussed what they all might do together. In the end the two groups did not join forces. Instead the car driven by Bluegum as formerly drove to a riverbank and there the girl was sexually assaulted by Williams and then by Bluegum.

After leaving the first house the evidence is clear that the girl had been flirting with Williams; they appear to have been embracing one another. Nonetheless when Williams made it plain to her that he wished to have intercourse she protested and when he persisted in that intention she did her best to resist the man. However, he succeeded in removing her clothing or part of it and he then attempted to complete an act of intercourse while she lay across the back seat of the vehicle. He was unsuccessful in his attempt probably because of his over indulgence in alcohol. Then he required her to subject herself to a gross act of indecency. During this period the younger man, Bluegum, had remained in the front seat of the car encouraged it seems by what had been going on. He then came to the back of the vehicle and he actually completed an act of intercourse. In the result Williams was sentenced to imprisonment for two years following upon his conviction by a jury of the attempted rape and the act of indecency, while Bluegum who was convicted on the charge of rape brought against him was sentenced to serve a term of periodic detention for a period of nine months.

It is obvious that the Judge dealt with both these young men with particular leniency. It is because of that

fact that the Crown now seeks leave to appeal against each of the sentences on grounds that they were manifestly inadequate in all the circumstances. In order to understand the approach of the Judge it is helpful to turn to his remarks on sentence. He said in relation to the lenient view he proposed to take:

> "Now, it must be stated that in this case there were mitigating factors. I am quite prepared to accept - although Mr Maze has not put this forward and I can understand why - but I think it must be accepted that it was the girl's own behaviour earlier in the evening that put ideas into your heads. No doubt you thought she would be a willing party, and she was very foolish to let things get as far as they did before she made her own feelings clear. Once she made it clear she was not a willing party any longer you would not accept no as an answer. Perhaps in your case Williams, your better feelings were dimmed by the amount of liquor you had had to drink. Perhaps this girl was different from other girls you had had to deal with in that you thought she did not really mean what she said. These are things that are relevant and I also think it is relevant in this case that she was not injured and that you were proposing to take her home. It was not one of those cases where the girl is abused and thrown

> on the side of the road to make her own way home. It was not a bad case of its kind."

The Judge then turned to the reports of the probation officer. Williams despite his young age is described as most unfortunately quite badly affected by an addiction to alcohol; but the probation officer felt able to use the somewhat surprising description of the man as "by nature somewhat shy". The report on the other youth is also quite favourable. It concludes: "Bluegum impresses as a respectful, polite and well set up Maori youth of average abilities but good potential. He is ashamed of his actions and should prove careful in future not to re-offend."

Upon giving their verdict the jury in Bluegum's case had added a recommendation for leniency and the Judge was obliged of course to give the attention to that fact that was appropriate. So with that in mind and because he considered that Bluegum's offence had largely stemmed from the conduct of the step-brother and also because Bluegum was a virtual first offender only 18 years of age, the Judge was persuaded to embark upon what he regarded as a salvage operation. He said speaking to Bluegum:

> "You should go to prison too or at least to borstal, but in your case I am going to take a very unusual course. It is necessary, if possible, as Mr Maze has acknowledged, that when a Judge sentences somebody, he sentences in a way that is

> consistent with other sentences imposed for the same sort of crime and with that given to the person who does the crime along with him, your co-offender. However in this case, I think the personal circumstances outweigh the need for that kind of consistency and in any event I think the circumstances insofar as they apply to you are very different from the normal and sufficiently different to allow me to take the course I am going to take."

As indicated he then imposed the sentence of periodic detention.

There can be no doubt that this is an unusually lenient sentence against a conviction for rape. The question we must answer in dealing with the application made by the Solicitor-General and the careful submissions presented by Mr Squire in respect of it is whether the sentence is so lenient that we are satisfied that the Judge has moved outside any proper exercise of his discretion; and that question really depends first on whether the circumstances that can be taken into account in favour of Bluegum have been over emphasised in the mind of the Judge and then whether in any event this type of offence is one that requires the element of deterrence to exclude the extension of mercy to this degree. As to the first point there is of course the opinion of the jury that Bluegum deserved to be treated leniently. In that regard

we are invited to take the view by Mr Maze, who appeared here on his behalf, that there was no evidence in the case that the two men had set about on the basis of a conspiracy to rape the girl at the riverbank: rather the evidence indicates, so Mr Maze would submit, that what happened was that the car was driven there by Bluegum to give Williams the opportunity he was seeking to have intercourse with the girl but not necessarily against her will. In other words this was not a premeditated offence by these two offenders. There is also an argument that to some degree there was initial encouragement by the girl. In recognising that fact, in no way would we wish to minimise the submission advanced by Mr Squire that the flirtatious conduct which took place before they got to the river bank could in no way excuse what happened there. Nonetheless this not the case of a girl abused by people who were complete strangers to her. Then there is another matter which could perhaps be taken into account. It concerns the stops the car made while driving around: when they met the first group of friends and later when they stopped at the bridge in the way already described. It is submitted that she could have taken the opportunity on the one occasion or the other of leaving the vehicle and the two men in it; and the fact that she did not do so seems to confirm that up until that time she had not been alarmed.

It is important that a sentencing error which produces injustice from the point of view of the public interest should be corrected and, as we have said, on the face of it the two sentences we are concerned with are very

lenient, in particular the sentence of periodic detention. Accordingly no criticism can be made of the decision to bring the present applications for leave to appeal. And in advancing those applications Mr Squire quite properly has referred to remarks of this Court in R. v Pui (1978) 2 NZLR 193 where it was made clear that it was necessary to attempt to achieve some reasonable degree of uniformity in sentencing. On the other hand, of course, it is obviously important to avoid pursuing that objective to a point where in a proper case and for correct reasons the discretion to exercise a merciful approach to a sentence is virtually removed: cf R v Wihapi (1976) 1 NZLR 422, 424.

In the present case insofar as Bluegum is concerned it is clear that his personal circumstances as revealed by the favourable probation report and the part he played in the affair together with the recommendation of the jury persuaded the Judge that a merciful sentence was justified and possible. In adopting that course the Judge would appreciate, and we emphasise, that the resulting sentence in itself would in no way become a precedent. And then, having arrived at his conclusion in the case of Bluegum, the issue he faced was the extent to which the leniency he had decided to extend should be allowed to enlarge any disparity in the sentence imposed upon Williams. Upon that point we are quite satisfied that in this case it was inevitable that the second sentence must be influenced to some degree by the other. If that were not so then the disparity that could

arise might seem so great as to produce injustice. Mr Squire submittted in this regard that the Judge really ought to have assessed the proper sentence for Williams largely divorced from the considerations that affected the sentence upon the other man who had been the subject of a recommendation of the jury. But that argument we are unable to accept.

Returning now to the question as to whether we have been persuaded that the Judge did move beyond a proper exercise of a merciful discretion, we would simply say this. In the case of the younger man he clearly has been treated as leniently as could be possible in all the circumstances of the case. In the case of Williams the sentence of two years imprisonment may properly be regarded not only as at the lower end of the scale but a sentence fixed at that level because it was considerably influenced, as it had to be, by the treatment meted out to his companion. In that regard no doubt he was very fortunate.

Mr Squire presented a careful and balanced argument in respect of the application but we are not left satisfied that the Judge erred too greatly on the side of mercy on the present occasion. Accordingly leave to appeal is refused.

N.O. Woodhams J