IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 133/87

THE QUEEN

v.

JOHN CHRISTOPHER DURNO

Coram: Cooke P.
McMullin J.
Casey J.

Hearing: 4 December 1987

Counsel: Ms Rennie Gould for Appellant
C.J. Thompson for Crown

Judgment: 4 December 1987

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an application for leave to appeal against a sentence for rape, the accused having been found guilty of raping two girls on 18 May 1985. He was tried in April 1987 and sentenced on 18 May 1987.

It is an extraordinary case. While he was on bail on those charges he failed to answer the terms of his bail, and on 3 May 1986 committed another rape, on that occasion of one young woman only, whom he in effect detained for the night. As regards that crime, he pleaded guilty and was sentenced to three and a half years imprisonment on 3 June 1986. Possibly that sentence was a lenient one but the appropriateness of it is not before us in any way today and should not affect the sentence we have to impose for the two rapes that we do have to consider, save to the extent that

it is clear that any sentence for them should be cumulative upon that for the rape committed on 3 May 1986. To make it cumulative is in accordance with the philosophy, if not the letter, of the new s.5A of the Criminal Justice Act 1985, but that section was in any event not in force at any time material for the purposes of this case.

We have referred to having to impose a sentence and that is the position because the sentencing Judge was under the misapprehension that he had jurisdiction to impose preventive detention for the two rapes, and that was the sentence selected by him. In truth he had no jurisdiction because under s.75(1) of the Criminal Justice Act 1985 the offence which qualifies a person for preventive detention must be the subject of a conviction before the offence for which he is now being sentenced. It will be seen from the dates already recited that that was not the case here. Counsel are agreed that the Judge did lack jurisdiction to impose preventive detention and that, in the circumstances, this Court must substitute a finite sentence.

With regard to the facts of the two rapes, they are conveniently set out in written submissions presented to us by counsel for the Crown:

> 3. ... On the evening of Friday 17 May 1985 the two complainants, then both aged about 17 years and who were neighbours and friends, decided to purchase, through the medium of a friend of one of them, a small quantity of cannabis. They telephoned the friend who came and picked them up in a car. With

him was Durno who until that evening was a stranger to both of the girls. They all went to an address in Auckland where they obtained some cannabis and smoked some of it in the car. They then went to other addresses and later in the evening the two girls and Durno apparently slept in the car for a short time. He was in the front and the two girls were in the back. When they awoke the girls thought that they were being taken home by him but instead they were driven to a forest area north of Albany. Durno explained this on the basis that he was going there to harvest or collect cannabis. The girls were somewhat alarmed. Durno got out of the car and rummaged in the boot. One of the complainants, said something to him about taking them home. He said 'I am not going to take you anywhere until I get a screw out of you'. She at first refused but became frightened and submitted. He tied the hands of the second girl. He then had intercourse with the first girl. That was interrupted by the second girl. He struck the second girl in the head and had intercourse with her and then continued intercourse with the first girl. All three then stayed in the car for some time. Durno then told the girls to get out of the car and took them some distance further into the forest on foot. They walked for a time variously estimated by the girls at betwen half an hour and one and a half hours. At a clearing in the forest he forced both girls to remove all their clothing and threatened them with a pole he was carrying. Both girls were frightened into submission. He subjected both to sexual indignities and had intercourse with the first girl only. The second girl said she was pregnant as an excuse to avoid intercourse on that occasion. Shortly thereafter they returned to the car and he drove them home apparently as if nothing untoward had occurred.

4. AT the trial Counsel for the Crown relied on the first act of intercourse with the first girl (i.e. that in the front seat of the car) to establish the count in respect of her.

5. WHEN interviewed two days later Durno acknowledged intercourse with the first girl on two occasions, in the car and in the clearing in the forest. He denied having intercourse at all with the second girl but acknowledged fondling her breasts in the car. He indicated that both acts of intercourse were consensual. He denied having struck the second girl.

6. AT the trial his evidence was somewhat different. He then said that he had had intercourse with the

> second girl in the car during the course of the collection of the cannabis from the house. He said then that he had intercourse with the first girl in the car in the forest while the second girl was asleep on the back seat. He denied any striking of her or any act of intercourse with her in the forest. He acknowledged another act of intercourse in the clearing of the forest with the first girl but said that too was consensual.

It will be seen that the case was a bad one in that two girls were violated; there was some element of violence, particularly a black eye and an injury to a cheek; and the girls were subjected to a very long ordeal. Such mitigating features as there are, and they are not really so much mitigation as the absence of aggravation, are that the violence was not in the more extreme category and the victims were not in the most vulnerable category, that is to say they were young women - neither elderly nor children nor particularly youthful. That having been said, it should be added that the sexual activities in which this man indulged were confined to rapes and a certain amount of infliction of indignities but not of the very worst kind which unfortunately this Court has to consider quite often in dealing with appeals in this area.

Counsel for the appellant quite rightly directed our attention to the case of R. v. Te Pou [1985] 2 N.Z.L.R. 508 and, more particularly, to the case of Tekii there referred to. His case is discussed on pp. 510 and 512. That was a rather worse case than the present. On the other hand, Tekii had displayed true remorse and had pleaded guilty. By

contrast the present appellant fought this case at the trial and indeed lodged an application for leave to appeal against conviction, although this has been abandoned. It was indicated by this Court that Tekii, but for his guilty plea, would have received a sentence of the order of 10 years imprisonment. Comparing this case with that and with the general range of sentencing and weighing all the facts already mentioned, we think that the appropriate sentence here is eight years, to be cumulative upon the three and a half year sentence previously mentioned.

The application for leave to appeal will be allowed and the sentence referred to will be substituted for the one of preventive detention. The conviction appeal is formally dismissed.

R B Cooke P.

Solicitors:
Crown Law Office for Crown