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IN THE COURT OF APPEAL OF NEW ZEALAND

CAL39/87

R

THE QUEEN

v.

SHANE ANTHONY BENJAMIN and  
PETER JOHN EISENHUTT

Coram: Richardson J (Presiding)  
Bisson J  
Ellis J

Hearing: 23 February 1989

Counsel: J.C. Pike for the Crown  
P. Paino for Appellant EISENHUTT  
R. Chambers for Appellant BENJAMIN

Judgment: 23 February 1989

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JUDGMENT OF THE COURT DELIVERED BY ELLIS J

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Appellants were each found guilty by a jury of the rape of a 17 year old young woman by Eisenhutt and sentenced to 8 years imprisonment in the High Court at Auckland on 12 June 1987. The brief facts were as follows.

The complainant went to the Genesis Concert at Western Springs on the evening of 23 November 1986 with her boyfriend. After the concert they became separated, and as she was a newcomer to Auckland, she was lost. Eisenhutt, a stranger to the complainant, offered to take her to Hillsborough where she lived, and she accepted a ride with him and two other men: Benjamin and one Adams. The men however drove her in the opposite direction despite her protests and Eisenhutt began pressing his unwanted attentions on her. They drove to a lonely field at Takanini and between about midnight and lam the complainant was assaulted, raped by Eisenhutt and one other. The jury was not satisfied that Benjamin was that other and acquitted Benjamin of raping her himself, but found him guilty as a party to the rape by Eisenhutt.

The complainant struggled fiercely but was overcome by Eisenhutt and Benjamin. She sustained multiple bruising, abrasions and her earring was torn off, as was Eisenhutt's watch. The men then forced the complainant back into the car despite her protests. But as fate would have it the car was stopped by the police, to whom the complainant immediately told what had befallen.

Eisenhutt applied for leave to appeal against his conviction on the grounds that the jury's verdict was against the weight of evidence.

Mr Paino based his submissions on an analysis of inconsistencies in the testimony of the complainant. We are satisfied that there was ample evidence upon which the jury could convict Eisenhutt as they did, and accordingly leave to appeal against conviction is refused.

Eisenhutt and Benjamin each seek leave to appeal against the sentence imposed.

To the police, Appellants denied the complainant's account. In evidence Eisenhutt admitted intercourse, but claimed it was consensual. He said Benjamin did not have intercourse. The jury plainly rejected his evidence. There has been no expression of remorse or consideration shown to the complainant to this day.

The appellant Eisenhutt was then aged 31 and a university student. He had a long list of traffic and other offences, including common assault in 1973 and a variety of offences involving dishonesty. Benjamin was 23 and if anything, had a longer list of prior offences, including common assault in 1981 and aggravated robbery in 1983, for which he received 1 year's imprisonment. He was a contractor with his own digging machine.

It is now well established by the decision of this Court that the starting point for calculating sentences for rape where the charge has been defended is 5 years imprisonment: R v. Clark [1987 ]1NZLR380, R v. Cargill (1988) C.A. 122/88 Decision 21 July 1988. In this case there are no mitigating factors and there are aggravating factors of serious proportions. The complainant aged 17 years was lost, she was befriended then taken advantage of by three men and the appellants together dragged her out of the car, tore her clothes off and she was held down while Eisenhutt raped her. It was done in a lonely and deserted part of Auckland late at night.

The trial Judge said this in passing sentence:

"There have been a great number of rape cases recently. Many sentences have been reviewed by the Court of Appeal and a pattern established. One's duty is to fit the instant case within that pattern according to its circumstances. This rape was a frightening one. The young woman was offered a ride in a car and she foolishly accepted. When it became apparent that she was not being taken to her promised destination she protested, but in vain. She was taken to a remote country place where she was over-powered and she suffered some physical injury, although not of the gravest sort. It was a rape committed by two men using violence upon her. It is true one man played a slightly lesser role, but he has a substantial record of previous convictions including fighting and aggravated robbery. I see no cause to distinguish between them. They are each sentenced to 8 year's imprisonment".

The essence of the appeal was that 8 years was manifestly excessive and out of line with sentences for rape.

Mr Pike accepted that the sentence was at the top of the range for such offences and we accept this submission. However we are of the opinion that it was within the range available to the Judge, who had the advantage of conducting the trial and so able best to assess the aggravating matters we have referred to.

For Benjamin it was submitted that his sentence should in any event be less than that for Eisenhutt as Benjamin was not found to have himself had intercourse. The Judge specifically refused to make such a distinction and we are not disposed to interfere.

The applications for leave to appeal against sentence are accordingly dismissed.

*Atty. Gen. J.*  
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