NOT
RECOMMENDED

IN THE COURT OF APPEAL OF NEW ZEALAND 25/6 C.A. 439/92

904

THE QUEEN

v

FANA KAVA LATU

Coram: Eichelbaum CJ
McKay J
Thorp J

Hearing: 14 June 1993

Counsel: Mary A Kennedy for Appellant
K Raftery for Crown

Judgment: 14 June 1993

JUDGMENT OF THE COURT DELIVERED BY EICHELBAUM CJ

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.

On these facts the appellant was charged with one count of sexual violation by digital penetration, and also a count of sexual violation by oral sex. He was found guilty on the first, and not guilty on the second.

In her submissions, Miss Kennedy concentrated on the finding of not guilty on the second count, but we see no particular significance in it save that on this particular aspect the jury must have entertained a doubt about the complainant's evidence. We are left with complaints about the Judge's findings of fact for sentencing purposes where, in our view, he was entitled to make the findings he did, none of which was inconsistent with the jury's verdict.

On the count on which the appellant was found guilty, he was sentenced to 4 year's imprisonment and the appeal is against the severity of that sentence. On analysis, the present sentence is not in any way out of line with the sentences imposed in ***R v Barden*** (CA 130/90, 15 April 1991) and ***R v Talataina*** 7 CRNZ 33, where in each case first offenders were involved who, however, pleaded guilty. Further, those cases lacked the element of intrusion into the complainant's dwelling.

For cases falling short of rape, 4 years is a severe sentence. However, here there was a persistent sexual attack involving repeated attempts at intercourse when the complainant had made it quite clear that she was unwilling; indeed on the facts the appellant may be regarded as fortunate not to have been charged with attempted rape. He deserves consideration as a first offender, but there is no other mitigating circumstance. Not being persuaded that the sentence was manifestly excessive, we dismiss the appeal.

Solicitors
Crown Solicitor's Office, Auckland.