NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA678/2009
[2010] NZCA 172

BETWEEN	PETER JORDAN DAY Appellant
AND	THE QUEEN Respondent

Hearing: 22 April 2010

Court: Glazebrook, Winkelmann and Venning JJ

Counsel: H E Juran for Appellant
M D Downs for Respondent

Judgment: 7 May 2010 at 3.30 pm

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASON OF THE COURT

(Given by Venning J)

[1] Following a jury trial in the District Court at Manukau, the appellant was found guilty on two counts of sexual violation of the complainant. The jury found him not guilty on a further count of sexual violation and on a count of burglary. During the course of the trial Judge McAuslan accepted that the complainant's

evidence did not support a further count of unlawful sexual connection by digital penetration and discharged the accused in relation to that count.

[2] The Judge sentenced the appellant to seven and a half years' imprisonment.

[3] The appellant appeals against conviction and sentence.

Background

[4] The complainant's evidence was that on the evening in question, she was walking home from a friend's place. She was close to home when she was approached by the appellant. He asked her if she had a cigarette. She said "hold on" but kept walking. There was no-one else around. The appellant then came up behind her, pushed her to the ground, pulled up her skirt, pulled down her undies, and then penetrated her anus. When he was finished he got up. She also got up and continued walking home.

[5] When she got home she walked through the front door, went into her room, and tried to turn on the light but it did not work. She then turned on her television and when she turned around, she saw the appellant had followed her into the house and was right behind her. She had not asked him in. The appellant then pushed her onto the bed. He pulled her skirt and undies off and lifted her shirt up. He then turned her over, anally raped her again and then turned her over onto her back and penetrated her vagina. During this incident the appellant was crying out to her father who was in the house but, as he was deaf, he could not hear her. The appellant was telling her to shut up. The complainant told the appellant she had a boyfriend. He said he didn't care.

[6] When the appellant had finished having sex with her, she invited him to accompany her to a friend's house. She explained that she invited him there because she knew other people would be there and she would be safe. When she got to her friend's house she was crying. She told her friend's sister what had happened. The police were called.

[7] The appellant was spoken to by the police and agreed to give a video interview. In the course of the video interview he denied raping anyone. The appellant accepted he had met the complainant that evening but said that all that happened on the roadside was they had had a couple of cigarettes and that they had gone back to her house because she wanted to show him something in her room. He said that they had consensual vaginal sex. When asked about anal sex at the complainant's house his response was confused:

> Q. What about anal? Did you have any anal sex with her?
>
> A. Oh I can't remember. Nah, nah fuck off. I don't think so. Nah.
>
> Q. I'm only asking mate. Some people do, some people don't.
>
> A. I don't know. She was saying hit it over here.
>
> Q. So it's a definite no?
>
> A. I don't know, yeah, nah.

[8] The appellant did not give evidence at trial. He did however call a witness, a cousin, Mr Andrews, who gave evidence that he saw the appellant and complainant when they were going to her friend's house. Mr Andrews said the complainant appeared happy and they were both drinking as they were walking along.

[9] At trial the defence was that the first incident of anal rape had never happened and that while the incidents of sexual connection described by the complainant at the house had happened, they were consensual. Although the appellant's statement was confused on the issue of the anal sex, counsel closed to the jury on the basis that the accused did have anal sex with the complainant but it was consensual. That was a legitimate trial tactic, given the appellant had expressly admitted vaginal sex. Counsel suggested to the jury that the appellant's confused response to the police officer about the anal sex was because he was embarrassed about the whole idea.

[10] In sentencing the appellant, the Judge applied *R v A*[1] and took a start point of eight and a half years to reflect the two incidents of sexual offending. The Judge then arrived at the final sentence of seven and a half years after taking account of the

---

1 *R v A* CA301/05, 11 April 2006.

appellant's age and lack of other relevant convictions. The Judge noted that she was not able to provide any further reduction for remorse or acceptance of responsibility as the appellant maintained his innocence.

Submissions

[11] The appellant says that a miscarriage of justice has occurred because there was an inconsistency in the jury verdicts. He submits that the findings of guilt on counts 3 and 4 (the second alleged anal rape and vaginal rape respectively) were inconsistent with the acquittals on counts 1 and 2 (the first alleged anal rape and burglary respectively). Mr Juran suggested the inconsistency may have occurred because the Judge allowed the appellant's video interview to be replayed on a second occasion at the jury's request without further explanation or direction.

[12] The appeal against sentence is advanced on the basis that a sentence less than seven and a half years "was, in all the circumstances, available to the Court, and particularly that insufficient weight was given to the accused's age".

Were the jury verdict's inconsistent?

[13] The burden is on the accused to demonstrate an inconsistency in the verdicts and that the only explanation for the inconsistency must be that the jury was confused or adopted the wrong approach thus making the verdicts unsafe. This Court is reluctant to interfere with jury verdicts: *R v A*;[2] *R v H*.[3]

[14] Mr Juran properly accepted that if the jury accepted the complainant's evidence in this case there was sufficient evidence before them to support the convictions on counts 3 and 4. Nevertheless, he submitted that the verdicts were inconsistent because the jury must have rejected the complainant's evidence on count 1, the first incident of alleged anal rape and, more importantly, must have rejected it on count 2, the burglary, so that for the jury to have then accepted her evidence about the later incidents involved in counts 3 and 4 was inconsistent.

---

2 At [75] – [76].
3 *R v H* [2000] 2 NZLR 581.

[15] The fact a jury may have found a witness' evidence on one count credible but may not have been satisfied of the same witness' evidence on another count does not, of itself, mean the verdicts are inconsistent: *R v A*; *R v Stewart*.[4] This is not, for example, a case of the jury accepting certain evidence for one count but rejecting the same evidence in relation to another count.

[16] The acquittal on count 1 and the convictions on counts 3 and 4 are readily explicable on the basis that the jury may have given the accused the benefit of the doubt in relation to count 1. Count 1 alleged anal rape in a public street. It was completely denied by the appellant. On the other hand the sexual offending in counts 3 and 4 took place in the privacy of the complainant's home. Importantly the appellant accepted that the sexual acts took place but said that they were consensual. So the only issues in relation to counts 3 and 4 were the complainant's consent and the appellant's reasonable belief as to consent. Given the evidence that the parties had not met before this evening, the jury may well have considered it unlikely that the complainant consented to such acts, or that the appellant could reasonably have considered she did, particularly on the basis of the very limited discussion and contact between them. Also, as Mr Downs submitted, the complainant's evidence about this second set of offending was more detailed and compelling than the first incident. Further, there was also evidence supporting injuries to the appellant's anus and her post-incident distress. The jury were quite entitled to take a different view on counts 3 and 4 to count 1.

[17] Mr Juran suggested that the finding of not guilty on count 2, burglary, was inconsistent with counts 3 and 4 as the burglary count must have related to the appellant's entry into the house for the purposes of committing the sexual offending there. However, the elements of burglary are quite different to the elements required to establish counts 3 and 4. For the burglary count, the focus was on the appellant's intent at the time he entered the complainant's home. Again, the jury may have given the appellant the benefit of the doubt in relation to that matter, particularly as it appears the complainant either left the door open or at least the door was not locked so the appellant was apparently able to follow her into the home.

---

4 *R v Stewart* CA515/05, 15 August 2006.

[18] In his written submissions Mr Juran also suggested that when the appellant's interview was replayed, the jury should have been directed that statements put to an accused person are not evidence unless accepted. He also expressed concern that the jury may have unduly focused on the appellant's confused response to the allegation of having anal intercourse with the complainant. Mr Juran did not pursue the matter in oral submissions. He was right not to do so. The case for the appellant was closed on the basis that he did not deny having anal sex. Given the evidence of the injuries to the complainant's anus that was a realistic concession. Counsel also explained the appellant's confused response on the basis he was embarrassed. Both were reasonable approaches by trial counsel and it was a legitimate tactic to focus on the issue of consent. The Judge identified that as the issue in summing up. Nothing more was required.

[19] We conclude that the appeal against conviction must be dismissed.

Sentence appeal

[20] Given the two incidents of sexual violation, the Judge's starting point of eight years six months was available to her. As the appellant refused to accept responsibility or express remorse the only mitigating factor for the appellant was his age. Of itself, youth does not automatically attract a sentencing discount, particularly for offending of this nature. At 19 at the time of the offending the appellant was not particularly young. He could not be said to be of a tender age. Nor is there any suggestion in the material before the Court he suffered from a lack of maturity which might have reduced his culpability. To the extent youth was relevant, the deduction of a year was sufficient in this case particularly given the lack of remorse: *R v Takiari*.[5]

[5] *R v Takiari* [2007] NZCA 273.

Result

[21] The appeals against conviction and sentence are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent