NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA750/2012
[2013] NZCA 263

BETWEEN	STEPHONE ROSS Appellant
AND	THE QUEEN Respondent

Hearing:	17 June 2013
Court:	Stevens, Courtney and Dobson JJ
Counsel:	G R Tomlinson for Appellant B D Tantrum and J F MacGibbon for Respondent
Judgment:	26 June 2013 at 2.00pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] The appellant pleaded guilty to one count of assault with intent to commit sexual violation. He was sentenced by Judge Wolff in the District Court at Tauranga to four and a half years imprisonment.[1]

---

[1] *New Zealand Police v Ross* DC Tauranga CRI-2012-087-1080, 8 October 2012.

[2] The appellant appeals against his sentence on the ground that the end sentence is manifestly excessive. Two aspects are relied on. First, that appropriate discounts for youth, lack of previous serious matters at the time of the offending, and the fact that the offending was out of character were not applied. Second, the discount for his early guilty plea was inadequate.

Background

[3] On the evening of Friday 20 August 2004 the victim, then aged 28, went out with friends in Kawerau. At 4.30 am she left her friends on the corner of Onslow Street and began to walk down Fenton Street towards her home address. The victim had only been walking for a couple of minutes when she noticed a male person on a push bike approaching her on her right side. When the male stopped and asked if she was alright she made a noncommittal reply. The male rode off and the victim continued walking. She then became aware of the male hiding in the shadows to the right of her. At this point she became scared and started to run.

[4] The male crossed the road and grabbed the victim. With his arm around her neck, he pulled her away from the footpath into a dark area. As this occurred the victim's buttocks dragged on the ground, causing her jeans and underwear to come down. The male then got on top of the victim, straddling her, and told her to shut up and be quiet. When the victim continued to struggle and scream, the male forcefully placed his hand over her mouth. The victim tried to remove the hand from her mouth, causing her to get a number of scratches to her face and neck. The victim also managed to scratch the male's face and neck several times.

[5] When the male straddled the victim, she could feel his bare skin on hers and realised that he had his pants down. She could feel his erect penis against her stomach and then on her legs and groin as the male attempted to position himself on her. The male continued to try to force her legs apart while the victim screamed and struggled. The victim was in no doubt that the male was intending to rape her.

[6] The male then got angry, told the victim to shut up, and started punching her on the head and cheeks. He continued to try to force his penis inside her. When the

victim continued yelling, the male got off her and ran off into the darkness. At this point, an associate of the victim arrived and chased unsuccessfully after the attacker.

[7] As a result of the attack the victim received severe abrasions to the face and neck, scratches down both sides of her buttocks and thighs, and bruising on her inner left thigh and shin. She also had grab marks on her arms.

[8] The appellant was charged after a match was made between his DNA and the skin tissue taken from the victim's fingernails. Eight years passed between the date of the offending and the date that the appellant was charged.

Sentencing

[9] Referring to the circumstances of the offence, Judge Wolff accepted that the victim had been put through the physical terror of an impending rape, and had come very close to being raped. If the appellant had succeeded in raping the victim, the offending would have attracted a sentence in the range of eight to 10 years imprisonment.[2] The Judge was satisfied that once this was adjusted to account for the fact that the offence of rape was not finally carried out, a starting point of five and a half years imprisonment was appropriate.

[10] Judge Wolff then considered the appellant's personal circumstances. First, the fact that at the time of the offending, the appellant was aged 17. The Judge noted that, although the appellant had not offended in this way again in the intervening period, he had certainly offended again. A six month discount was allowed.

[11] The Judge noted that the appellant had pleaded guilty once the evidence against him was disclosed. Credit for the guilty plea was appropriate because the victim had not had to give evidence and the guilty plea gave her certainty that the matter had been resolved. A further six month discount was allowed for this factor. As a result an end sentence of four and a half years imprisonment was imposed on the appellant.

---

2 Citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

Submissions

[12] Counsel for the appellant, Mr Tomlinson, realistically accepted at the hearing that the starting point of five and a half years imprisonment could not be challenged. However he still contends that the sentence is manifestly excessive. He submits that the end sentence should have been between three years and three years, seven months imprisonment.

[13] First, Mr Tomlinson submits that the discount of six months for personal mitigating factors was inadequate. He relies on the appellant's "extreme youth" and lack of any previous serious matters at the time of the offending to submit that a discount of at least 12 months should have been allowed. Further, he submits that the offending was and remains "wholly out of character" for the appellant.

[14] Second, Mr Tomlinson submits that the guilty plea discount of six months, or 10 per cent, was wholly inadequate to reflect the savings to the state and to the complainant in not having to go through a trial. The appellant's plea came at his fourth appearance, without seeking a sentence indication and prior to committal. In addition, the appellant declined the opportunity to challenge the DNA evidence. For these reasons, he submits that a discount of at least 20 per cent was warranted.

[15] For the respondent, Mr Tantrum submits that the end sentence was not manifestly excessive. The offending had a variety of significant aggravating features. Thus the sentence viewed overall was not outside the range available to the sentencing Judge.

Our evaluation

[16] This Court has previously accepted that offenders are entitled to be sentenced on the basis that culpability is to be assessed by reference to their age at the time of the offending. Immaturity and lack of judgment on the part of a young person may reduce his or her criminal responsibility.[3] The correct methodology is to fix the appropriate starting point for an adult and treat youth as a mitigating factor.[4]

---

3 *R v JFA* [2009] NZCA 205 at [66].
4 *R v Takiari* [2007] NZCA 273.

[17] However, a discount for youth may be reduced to take into account relevant factors including the appellant's history in the Youth Court. Although Youth Court notations are not convictions, they may be considered by the Court by virtue of s 9(4) of the Sentencing Act 2002.[5] In *R v Putt*, this Court held that it was appropriate to offset the appellant's history of appearances before the Youth Court against the discount that might otherwise be given for youth.[6]

[18] While the appellant was aged 17 years at the time of the offending he had received notations in the Youth Court for a range of offences including burglary (x 2), unlawfully taking a motor vehicle (x 6), unlawfully interfering with a motor vehicle (x 2), theft from a motor vehicle, possession of a cannabis pipe and resisting arrest. We are satisfied that taking this history into account a discount of six months for youth could not be criticised.

[19] We also consider that, given the appellant's history in the Youth Court, it was open to Judge Wolff to decline to allow a greater discount for "lack of serious matters" at the time of the offending.

[20] Further, we reject the submission that Judge Wolff erred in failing to allow a discount for the fact that the offending was "wholly out of character". Since the offending in August 2004 the appellant has had a number of convictions for assault, including assault with intent to injure, assaulting police, and three convictions for male assaults female. In *R v Barrett*, this Court held that the sentencing Judge may have regard to the fact that, following the commission of the offence in respect of which sentence is to be imposed, the offender committed a further offence of the same or similar kind.[7] Similarly, in *R v Stephens* it was held that post-offending convictions meant that no credit could be allowed for good character.[8]

[21] In light of the range of subsequent convictions we consider that Judge Wolff did not err in declining to impose a discount for the appellant's good character. The

---

5 *Geros v R* [2011] NZCA 122 at [16].
6 *R v Putt* [2009] NZCA 38 at [19].
7 *R v Barrett* [1999] 1 NZLR 146 (CA) at 150–151.
8 *R v Stephens* CA 272/01, 6 December 2001 at [20].

offending in August 2004 could not be seen as an isolated incident but was part of a troubling trend or pattern of offending.

[22] Finally, the circumstances of the guilty plea were somewhat unusual in that the appellant was charged eight years after the offending. Once charged, the appellant pleaded guilty at a relatively early stage (at his fourth appearance). Given that this plea was made prior to committal there is merit in Mr Tomlinson's submission that a more substantial discount could have been given. Mr Tantrum accepted that the discount of 10 per cent was at the lower end of the range.

[23] A number of factors must be taken into account when assessing the discount for a guilty plea.[9] One such factor applicable here was the strength of the Crown case once the DNA match was found. Had this been a re-sentencing rather than an appeal, we would have considered a discount of around 15 per cent to be appropriate on account of the guilty plea. That would result in a discount of a further three months.

[24] However, the appellant must satisfy the Court that the sentence imposed was manifestly excessive. We are not satisfied that a difference of three months on a sentence of four and a half years imprisonment renders the sentence manifestly excessive. This offending involved a violent, prolonged attack, at night on a vulnerable victim, and was very close to actual rape. Accordingly, we do not consider that appellate intervention is called for.

[25] The appeal must be dismissed.

Solicitors:
Gowing & Co Lawyers Ltd, Whakatane for Appellant
Crown Solicitor, Auckland for Respondent

---

9 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [51].