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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA567/2012
CA89/2013
[2013] NZCA 408

BETWEEN	ADAM JOSEPH KARETU Appellant
AND	THE QUEEN Respondent

Hearing: 12 August 2013

Court: Ellen France, Rodney Hansen and Mallon JJ

Counsel: E J Forster for Appellant
M E Ball for Respondent

Judgment: 30 August 2013 at 12.30 pm

JUDGMENT OF THE COURT

A The application for an extension of time to appeal the sentence for sexual offending is granted.

B The appeals against sentence are dismissed.

REASONS OF THE COURT

(Given by Ellen France J)

Introduction

[1] It was alleged that, in November 2010, the appellant was involved in the group rape of a young woman. Before the trial on that matter took place, the appellant, whilst in custody, injured a fellow inmate with intent to injure and, later, wounded a prison officer with intent to injure.[1] The two injuring events were dealt with first. The appellant went to trial on the charge of injuring the other inmate and was convicted of that charge after a jury trial in July 2012. He pleaded guilty to the charge of wounding the prison officer. Judge Adeane sentenced the appellant on 17 August 2012 to four years and three months imprisonment for these two offences.[2]

[2] In September 2012 the appellant was convicted after trial as a party to various sexual offences arising out of the rape. In October 2012, Judge Adeane sentenced the appellant to nine years imprisonment for this offending. This sentence was cumulative on the earlier sentence with a minimum period of imprisonment of five years.[3]

[3] The appellant appeals against both sentences on the basis they are manifestly excessive. The appeal raises two issues, which are:

(a) whether a small reduction for totality should have been made to the sentence of four years and three months imprisonment; and

(b) whether the sentence for sexual offending should have been reduced to reflect the appellant's lesser role.

[4] After discussing the facts and the Judge's approach we deal with each issue in turn.

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1 We understand that the appellant was in custody on remand although the summary of facts states he was a sentenced prisoner.

2 *R v Karetu* DC Napier CRI-2012-020-4267, 17 August 2012 [sentencing remarks (prison assaults)].

3 *R v Karetu* DC Napier CRI-2011-041-114272, 12 October 2012 [sentencing remarks (sexual offending)].

Facts

[5] On 2 November 2011, the appellant and another man went into the cell of a fellow inmate at the prison and beat him. The beating left the victim with a deep cut to his lip and what Judge Adeane described as "significant" swelling and grazes to his face.[4]

[6] The second incident in the prison took place about four months later, on 5 March 2012. The appellant was sentenced on the basis he engineered a confrontation with the prison officer in the dining room and "blind-sid[ed]" him with a single punch.[5] The punch left the officer with two open wounds inside his mouth. These became infected and ruptured. Further, the punch caused a brain injury although that was not diagnosed until later after the officer became unwell. He needed treatment and was off duty for some months.

[7] The sexual offending charges arose out of an incident on 20 November 2010. The appellant found the complainant, a 21 year old woman, apparently distressed and drinking in her car in a carpark that night. The appellant befriended her and persuaded her to drive them to the home of an acquaintance where they might obtain some ecstasy. Judge Adeane said the complainant "obviously had an interest" in both alcohol and drugs.[6] They then went for a drive during which, at the appellant's direction, they picked up three other men. The appellant was a recent recruit to the Mongrel Mob Notorious Chapter and the other three men were more senior members of that group.

[8] The car was then driven to a remote location. There the complainant was "manhandled, sexually propositioned, indecently assaulted and then raped by [Gene] Skipper and likewise forced into oral sexual connection both with him and the other two men".[7] Judge Adeane said the appellant "oversaw" these events having initiated them, ignoring the complainant's protests and urging her to comply.[8] The Judge concluded that the complainant was forced to comply because of the

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4 Sentencing remarks (prison assaults), above n 2, at [2].
5 At [5].
6 Sentencing remarks (sexual offending), above n 3, at [2].
7 At [3].
8 At [3].

circumstances and because of the "unmistakable threat of more violent means being adopted" if necessary.[9]

[9] The group then went their various ways. The appellant kept the complainant with him over the next day. The Judge saw this as "a means of prolonging his control and oversight".[10] He then lost patience with her, threatened to stab her and run her over with a car and assaulted her. She ultimately escaped and complained to the police.

[10] Prior to complaining to the police, her clothes had been washed except for her bra. That was analysed and a small trace of DNA led to the identification of Mr Skipper.

[11] Mr Skipper was found guilty of indecent assault, sexual violation by rape and by unlawful sexual connection (oral sex). The appellant was found guilty as a party to these offences and to one count of assault and one count of threatening to do grievous bodily harm. The charges of assault and threatening to do grievous bodily harm related to the events that took place the day after the sexual offending. The other two men involved in the sexual offending have not been identified.

The sentencing remarks

[12] In sentencing on the first of the two prison assaults, Judge Adeane treated the involvement of the two assailants as the same. The Judge took a starting point of 18 months imprisonment and uplifted that to two years to give a "deterrent effect to a sentence which is concerned with prison discipline and protection of other vulnerable inmates".[11]

[13] In relation to the wounding of the prison officer, Judge Adeane took a starting point of three years imprisonment. With the discount for the guilty plea this was reduced to two years and three months.

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9 At [3].
10 At [4].
11 Sentencing remarks (prison assaults), above n 2, at [7].

[14] In reliance on *Tryselaar v R*, the Judge took the view there could be no reduction for totality given this was further violent offending in the prison environment and there was a resultant need for a deterrent sentence.[12] A cumulative sentence was seen as necessary leading to a total sentence of four years and three months imprisonment.

[15] At the time of his sentencing on the sexual offending, the appellant was 24 years of age. Mr Skipper was 39 years old and a senior patched Mongrel Mob member. Judge Adeane noted that the appellant was "an aspirant" to Mr Skipper's gang status and so the community had to be protected from him.[13] Neither offender showed any remorse and nor were there any personal mitigating factors.

[16] Against this background, Judge Adeane took a starting point for the rape of 12 years imprisonment. That put the matter at the top of band two in *R v AM (CA27/2009)*.[14] There were no mitigating features applicable to Mr Skipper. He was accordingly sentenced to 12 years imprisonment with a minimum term of six years. An adjustment was made to this starting point for the appellant to reflect totality given his sentence for the prison offending and his age. The appellant was sentenced to nine years imprisonment cumulative on the earlier term of four years and three months with a five year minimum period of imprisonment.

The sentence for the prison assaults

[17] For the appellant, Mr Forster submits that the Judge should have considered making a small adjustment to reflect totality considerations. Further, he says there are two factors that warranted a small reduction for totality. Those factors are, first, that this offending was less serious than that considered by this Court in *Tryselaar*. In that case, in the context of an escape from prison, the two offenders were both armed with metal brackets. Two prison guards were both hit in the head with the brackets. It was also not premeditated and was not as closely connected in time as the offending in *Tryselaar*. The second factor is the appellant's relative youth.

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12 *Tryselaar v R* [2012] NZCA 353.
13 Sentencing remarks (sexual offending), above n 3, at [11].
14 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

[18] We are satisfied that the sentence of four years and three months imprisonment was not manifestly excessive. A deterrent sentence was appropriate. As this Court said in *Tryselaar*, "[o]ffending in the prison environment, particularly where that offending goes to the maintenance of the discipline needed to effectively manage a penal institution, demands a stern response".[15] The point being made in *Tryselaar* was that it would undermine the need for a stern sentence to require an adjustment to reflect the fact the offender is already serving a sentence of imprisonment for other offending.

[19] While the offending in *Tryselaar* was more serious, that factual difference does not affect the importance of deterrence in cases involving offending within the prison environment. In any event, this offending does involve some aggravating features. The first incident involved two men acting together to attack one person. The second incident, as Mr Forster accepted, was not completely spontaneous and resulted in significant injury. Further, unlike *Tryselaar*, there were two incidents of unrelated offending within the prison environment, the second of which involved a prison guard. The appellant's relative youth is not such as to require adjustment on a totality basis. In any event, the Judge made an allowance for totality when sentencing the appellant for the sexual offending.

[20] In these circumstances, we agree with the Crown submissions that the sentence imposed was not manifestly excessive.

The sentence for the sexual offending

[21] The submission for the appellant is that the sentence should have been reduced to reflect two factors. First, the appellant did not participate in any of the sexual activity. Secondly, the notes of evidence show that after the other two unidentified men had been dropped off, the appellant dissuaded Mr Skipper from further sexual activity with the complainant.

[22] In the context of considering the approach to multiple offenders, this Court in *AM* observed that, "[t]he role and extent of participation of the various offenders will

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[15] At [18].

of course be relevant in assessing an individual's culpability".[16] However, while the appellant did not participate in the sexual activity, we agree with the Crown that a number of features of his offending warranted the 12 year starting point. The first point we make is that the appellant was sentenced on the basis that he instigated the enterprise. This Court in dismissing an appeal by the co-offender, Mr Skipper, noted that from the time the appellant collected the three other men, the Judge had found there was a "premeditated plan to take the victim to the riverside location with a view to committing the offending which occurred there".[17] Further, as Judge Adeane put it, the appellant "oversaw the events which he had set in train, ignored the [victim's] protests and urged her to comply".[18]

[23] Secondly, the appellant took advantage of a vulnerable young woman on her own in a carpark at night.

[24] Finally, the complainant was kept under the appellant's control the next day ending in his assaulting her and then threatening to stab her and run her over.

[25] The passage in the notes of evidence relied on by Mr Forster is a part of the complainant's evidence. She said that Mr Skipper referred to her going back to his place and finishing off what had been started at which point the appellant had said, "yeah dog, get out". However, in the context as we have described it, this brief show of charity did not require any adjustment in sentence.

[26] The appeal against the sentence relating to the sexual offending is out of time. The Crown questions the appropriateness of granting an extension. However, the appellant does provide some explanation for the delay. Further, given the link between the two sentencing exercises, we consider it is appropriate to extend the time for appealing and we order accordingly.

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16 *AM*, above n 14, at [45].
17 *Skipper v R* [2013] NZCA 104 at [18].
18 Sentencing remarks (sexual offending), above n 3, at [3].

Result

[27] For these reasons, the appeals against sentence are dismissed. An extension of time to appeal the sentence for sexual offending is granted.

Solicitors:
Crown Law Office, Wellington for Respondent