

**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**

**I TE KŌTI PĪRA O AOTEAROA**

**CA376/2019  
[2020] NZCA 73**

BETWEEN JOHN-LEE LUISI  
Appellant

AND THE QUEEN  
Respondent

Hearing: 27 February 2020

Court: Clifford, Simon France and Lang JJ

Counsel: N S Leader for Appellant  
A F Devathasan and Y H Olsen for Respondent

Judgment: 23 March 2020 at 10 am

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**JUDGMENT OF THE COURT**

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**The appeal against sentence is dismissed.**

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**REASONS OF THE COURT**

(Given by Lang J)

[1] Mr Luisi was found guilty by a jury in the District Court on two charges of rape,<sup>1</sup> two charges of male assaults female,<sup>2</sup> and one charge of theft.<sup>3</sup>

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<sup>1</sup> Crimes Act 1961, ss 128 and 128B.

<sup>2</sup> Crimes Act, s 194(b).

<sup>3</sup> Crimes Act, ss 219 and 223(d).

On 2 August 2019, Judge D G Harvey sentenced Mr Luisi to seven years and six months' imprisonment.<sup>4</sup>

[2] Mr Luisi appeals against sentence on the basis that the Judge selected an overall starting point that was too high. He says this resulted in an end sentence that was manifestly excessive.

### **The offending**

[3] At the time of the offending, Mr Luisi was 20 years of age. He was involved in a short relationship with the complainant who was around 19 years old at that time. All the charges were laid as a result of incidents that occurred during the course of the relationship.

[4] The first charge of rape was laid as a result of an incident that occurred on an unknown date between March and July 2017. On that date Mr Luisi and the complainant engaged in consensual sexual intercourse at their home. Whilst this was occurring, however, Mr Luisi put his hands around the complainant's throat and squeezed her throat sufficiently hard to make her extremely uncomfortable. The complainant made it clear that she wanted Mr Luisi to stop squeezing her throat. She was struggling and endeavouring to scratch Mr Luisi, but he refused to stop squeezing her throat. When he eventually released the complainant, Mr Luisi continued to have sexual intercourse with her when she was angry and wanted him to stop. This incident resulted in the first charge of rape.

[5] The complainant then described a subsequent incident that occurred when she and Mr Luisi were showering together. Whilst in the shower Mr Luisi again placed his hands around her throat and began to strangle her. On this occasion the strangulation continued to the point where the complainant almost became unconscious.

[6] Notwithstanding these incidents, Mr Luisi and the complainant continued their relationship although they separated on at least two occasions. On one of these

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<sup>4</sup> *R v Luisi* [2019] NZDC 15079.

occasions the complainant invited Mr Luisi to visit her flat. He arrived late in the evening and consensual sexual intercourse subsequently occurred. Mr Luisi stayed the night at the complainant's flat and the couple engaged in further consensual sexual intercourse the following morning.

[7] Mr Luisi then asked the complainant to call her workplace to say she was not coming in because she was unwell. The complainant complied with this request. She and Mr Luisi then engaged in consensual sexual intercourse for the second time that morning. The Judge said that when Mr Luisi later suggested they engage in further sexual intercourse the complainant agreed but was "less than enthusiastic".<sup>5</sup> On this occasion they began having sex but the complainant told Mr Luisi she was sore and that he had to stop. Mr Luisi's response was to apply some saliva to his penis. This did not alleviate the situation for the complainant. She began to struggle and squirm in an effort to stop Mr Luisi having intercourse with her. This progressed to the point where she and Mr Luisi fell off the bed and onto the floor. Undeterred, Mr Luisi continued his efforts to have sex with the complainant despite knowing she was not consenting. He was able to penetrate her vagina with his penis on at least two further occasions before she was able to get away from him and go to the bathroom.

[8] Matters did not end there. Mr Luisi kept trying to touch and hold the complainant. She attempted to call for help, but discovered that the landline in the garage of the address was inoperative. She then went back to the bedroom where she tried to get dressed. Mr Luisi was still trying to hold her whilst she was doing so. Matters got to the point where the complainant told Mr Luisi she was going to call the police on her cellphone. This prompted Mr Luisi to seize the complainant's cellphone and refuse to give it back. He also told her that if she was going to ring the police then he would give her something to complain about.

[9] The complainant then went to escape by jumping out of a window. Mr Luisi told her that if she did this he would smash her cellphone. This persuaded the complainant to remain inside the address. Thereafter, however, Mr Luisi assaulted her by punching her on numerous occasions in different parts of the head and body.

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<sup>5</sup> At [3].

Photographs produced at trial depicted numerous bruises over the complainant's body. Evidence given by a doctor who subsequently examined the complainant confirmed this fact.

[10] Eventually the complainant was able to escape by jumping out of a window. Mr Luisi then locked her out of her own address.

### **The sentence**

[11] The Judge considered that Mr Luisi's strangulation of the victim before engaging in the first act of rape meant that it occurred in circumstances involving violence over and above that inherent in the act of rape. That was not the case in relation to the second charge of rape. In addition, there was an element of an abuse of trust given that the offending occurred in the context of an ongoing relationship in which each party ought to have been able to trust the other. The Judge did not consider the fact that consensual sexual intercourse had occurred on both occasions before Mr Luisi committed the rapes diminished Mr Luisi's culpability to any significant degree.<sup>6</sup>

[12] The Judge also observed that the complainant indicated in her victim impact statement that she suffered substantial physical and emotional harm as a result of the offending.<sup>7</sup>

[13] The Judge identified the first rape as being the most serious and concluded that a starting point of nine years' imprisonment was appropriate to reflect both rapes. He then applied an uplift of one year to reflect the remaining charges. This produced a starting point of 10 years' imprisonment.<sup>8</sup>

[14] The Judge then applied discounts totalling 25 per cent to reflect mitigating factors. He allocated five per cent to reflect Mr Luisi's youth and 10 per cent to reflect mental health issues from which Mr Luisi suffers. He applied the remaining

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<sup>6</sup> At [12]–[14].

<sup>7</sup> At [13].

<sup>8</sup> At [17].

10 per cent to reflect Mr Luisi's lack of previous convictions. This resulted in the end sentence of seven years and six months' imprisonment.<sup>9</sup>

### **The arguments**

[15] On Mr Luisi's behalf Mr Leader submitted the Judge ought to have selected a starting point of less than nine years on the two charges of rape. In particular, he contended that the Judge was wrong to regard breach of trust as an aggravating factor in the offending. He says this was a neutral factor in the circumstances of the present case.

[16] Mr Leader acknowledged the first rape was accompanied by violence in the form of strangulation. He submitted it therefore fell within rape band one identified by this Court in *R v AM*.<sup>10</sup> This band of offending calls for a starting point of between six and eight years' imprisonment.<sup>11</sup>

[17] Mr Leader submitted that the second rape, however, falls into a different category. He referred us to this Court's observation in *R v AM* that some cases may fall below the bottom of band one because of their unusual fact pattern.<sup>12</sup> As an example the Court referred to *R v Greaves*.<sup>13</sup> In that case the victim had invited the offender to her flat, where consensual sexual intercourse began. The complainant changed her mind whilst this was occurring, however, and asked the offender to stop. The offender refused and continued to have sexual intercourse with her even though he knew she was no longer consenting. Mr Leader submits that the second rape falls within this category, and that a starting point of less than three years' imprisonment would be available.

[18] Mr Leader does not take issue with the uplift of one year that the Judge applied to reflect the remaining offending.

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<sup>9</sup> At [18]–[21].

<sup>10</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

<sup>11</sup> At [90].

<sup>12</sup> At [96].

<sup>13</sup> At [96]; citing *R v Greaves* [1999] 1 Cr App R (S) 319 (CA).

[19] Ms Devathanan for the Crown relied on the fact the first rape was preceded by significant violence. She reminded us that this Court observed in *R v AM* that rape band one will not generally be appropriate where sexual offending is accompanied by serious violence.<sup>14</sup> Ms Devathanan therefore argued the first rape fell either towards the top of rape band one or the lower end of rape band two. Rape band two requires a starting point of between seven and 13 years' imprisonment.<sup>15</sup> On that basis the Crown contended a starting point of seven to eight years' imprisonment would have been appropriate for the first act of rape viewed on a standalone basis.

[20] Ms Devathanan acknowledged that the second rape was less culpable because there was no violence other than that inherent in the offence. She therefore contended it fell at the lower end of rape band one.

### **Decision**

[21] Mr Luisi's culpability in relation to the first rape was obviously aggravated significantly by the strangulation that preceded it. We therefore accept the Crown's submission that this offending fell either towards the top of rape band one or the lower end of rape band two. On a standalone basis we consider the first rape justified a starting point of no less than seven years' imprisonment.

[22] We are not persuaded by Mr Leader's argument that the starting point for the second rape could be set as low as three years' imprisonment. This would be less than half the suggested starting point for sentences in rape band one, and we do not consider it would adequately reflect Mr Luisi's culpability. Even accepting the argument to be correct, however, our assessment of Mr Luisi's culpability in relation to the first rape means that a starting point of nine years' imprisonment to reflect both rape charges was clearly well within the available range. It also factors in an appropriate reduction to reflect totality principles.

[23] Furthermore, we consider Mr Luisi was fortunate to receive an uplift of just 12 months to reflect the balance of his offending. This involved a further act of

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<sup>14</sup> *R v AM*, above n 10, at [93].

<sup>15</sup> At [90].

strangulation as well as the prolonged and serious assaults that followed the second rape. Even having regard to totality principles, these charges could easily have justified an uplift significantly greater than 12 months.

[24] As we have already recorded, Mr Leader does not challenge the discounts the Judge applied to reflect mitigating factors. It follows that the end sentence was not manifestly excessive.

### **Result**

[25] The appeal against sentence is dismissed.

Solicitors:  
Crown Solicitor, Manukau for Respondent