NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA230/2011
[2011] NZCA 639

BETWEEN	ATONIO TUPUOLA Appellant
AND	THE QUEEN Respondent

Hearing: 24 November 2011

Court: Chambers, Heath and Allan JJ

Counsel: P E Dacre for Appellant
S B Edwards for Respondent

Judgment: 12 December 2011 at 3 pm

JUDGMENT OF THE COURT

A An extension of time for appealing is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Chambers J)

Sexual offending against two teenagers

[1] In early 2008, A (then 16) and B (14) came to stay with X in Auckland. Atonio Tupuola, the appellant, visited X's house from time to time. One night while visiting, Mr Tupuola asked A to walk down the driveway with him on the pretext of meeting some friends. According to A, he then pulled her through some bushes and

over a fence into a nearby reserve. He forced her onto the ground and lay on top of her. He removed her lower clothing as she struggled and tried to push him off. He then raped her. He threatened to give her a hiding if she told anyone what had happened.

[2] Later that year, the two teenagers visited Auckland again. During that visit, A and B went out with Mr Tupuola on a shopping errand. He suggested taking a shortcut through a park. According to A and B, he pushed them down onto a picnic table and held them there. He touched their breasts under their clothing and tried to kiss them.

[3] According to B, other sexual assaults on her took place on other occasions.

[4] The final incident occurred towards the end of 2008. Mr Tupuola took his family to Kaitaia for a weekend visit. While there, he saw B at a party. He asked B to show him the way home. While she was doing that, according to B, Mr Tupuola pulled her down the road and into a park. He pushed her onto the ground and touched her breasts and genital area while kissing her.

[5] While A and B told some others what had happened, they were adamant that they did not want their parents to be told. They did not tell their parents about the offending until January 2009. Only then was the alleged offending reported to the police.

[6] Mr Tupuola's trial took place in the High Court in Auckland in October 2010. He faced eight counts of sexual offending against A and B. The jury found that he had raped A and indecently assaulted her on two occasions. The jury also found him guilty of four indecent acts against B. In addition, with respect to the last incident in Kaitaia, the jury found Mr Tupuola guilty of assault with intent to commit sexual violation.

[7] In due course, the trial judge, Cooper J, sentenced Mr Tupuola to nine years nine months' imprisonment.[1]

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[1] *R v Tupuola* HC Auckland CRI-2009-090-6439, 9 December 2010.

[8] Mr Tupuola now appeals against both his convictions and his sentence.

Issues on the appeal

[9] Mr Tupuola was sentenced on 9 December last year. He did not, however, file his notice of appeal until 20 April this year. The only explanation for the delay is said to be difficulties arising from his transfer to a prison outside Auckland. Glazebrook J, when making the decision about mode of hearing under s 392A of the Crimes Act 1961, directed Mr Tupuola to provide an affidavit as to the circumstances supporting his application for an extension of time for appealing. Nothing was filed.

[10] Ms Edwards, for the Crown, submitted an extension of time should not be granted. Probably, on the authorities she cites, she is right. But we have decided to grant an indulgence. Mr Tupuola has been in New Zealand only since 2006. English is not his first language. He had not previously been to prison. We grant an extension of time for appealing.

[11] Mr Tupuola raises only one issue on his appeal against conviction. That is that the verdicts of the jury should be set aside on the ground that they were unreasonable.[2]

[12] On the appeal against sentence, Mr Tupuola complains that the Judge failed to take into account the totality principle, with the result that the overall sentence became excessive. Mr Dacre, for Mr Tupuola, submitted the overall sentence should have been no more than eight years six months' imprisonment.

[13] Before dealing with those issues, we mention one other matter. Prior to the hearing before us, we raised with Mr Dacre whether the Supreme Court's decision in *Abdula v R*[3] gave rise to any concern as to the way in which the trial was conducted. Mr Dacre said it did not. He explained to us Mr Tupuola's knowledge of English and also how the trial had been conducted. We are satisfied the trial was fair in this regard.

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2 Crimes Act 1961, s 385(1)(a).

3 *Abdula v R* [2011] NZSC 130.

Were the verdicts unreasonable?

[14] There was no dispute as to the appropriate test to be applied in circumstances where an appellant alleges verdicts were unreasonable. The test is set out in the Supreme Court's decision in *R v Owen*[4] and in this Court's earlier decision in *R v Munro*.[5] We need do no more than cite the following passages from the Supreme Court's judgment:

> [13] We return to the decision of the Court of Appeal in *Munro*. We propose to discuss the main judgment in that case only to the extent necessary for present purposes. We would endorse the following aspects of the decision in *Munro*:
>
> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
>
> (c) The weight to be given to individual pieces of evidence is essentially a jury function.
>
> (d) Reasonable minds may disagree on matters of fact.
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> (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
>
> (f) An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.
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> [14] At paras [86] and [87] of the main judgment in *Munro* the Court stated that test to be applied under s 385(1)(a) in these terms:
>
> > [86] The correct approach to a ground of appeal under s 385(1)(a) is to assess, on the basis of all of the evidence, whether a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant. We consider the word "ought" is a better indication of the exercise to be conducted than the word "must" used in *Ramage*. It emphasises the task that the court has to perform. This test also, in our view, accords with the statutory wording.

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4 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37.

5 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

> [87] We consider that McLachlin J's comments in *R v W (R)*[6] encapsulate the main elements of the test. The test is not whether the verdict is one that no jury could possibly have come to. A verdict will be deemed unreasonable where it is a verdict that, having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt ... the Court must always, however, keep in mind that it is not the arbiter of guilt, and that reasonable minds might disagree on findings of fact.

> [15] We agree with the Solicitor-General's submission that the third sentence at para [87] captures the substance of the correct approach. We did not understand the appellant, ultimately, to be suggesting any materially different test. We would not adopt the concept of a verdict being "deemed" unreasonable. It either is unreasonable or it is not. The word "deemed" suggests a reluctance to find a verdict actually unreasonable.

[15] This case comes nowhere near meeting that test. If the jury accepted the complainants' accounts of the offending against them, there is no basis for an assertion that the guilty verdicts were not supported by sufficient evidence.

[16] The complainants' credibility and the plausibility of their accounts were subjected to sustained challenge during the trial. While there were inconsistencies and gaps in their evidence, they mainly related to peripheral details or were readily explicable by their age and the passage of time since the events occurred. Despite rigorous cross-examination, neither complainant wavered in her evidence that the sexual offending happened.

[17] Mr Dacre, in his closing address to the jury, made every argument that could possibly have been made about the supposed implausibility of their accounts. The defence case was, as Mr Dacre accepts, fully and fairly summarised in Cooper J's directions to the jury.

[18] The jury must have accepted the complainants' evidence, at least as to the essential elements of what they said occurred. Assessments of truthfulness and reliability are a quintessential jury function. We are quite satisfied that the appeal against conviction must be dismissed.

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[6] *R v W (R)* [1992] 2 SCR 122.

Was the sentence too high?

[19] Cooper J approached sentencing in the following way. He sensibly decided this was a case for concurrent sentencing. He took the rape as the lead offence. The prosecutor had submitted that the lead offence in terms of the guideline judgment, *R v AM (CA27/2009)*,[7] was a band 2 offence, justifying a starting point for it alone in the region of eight to nine years' imprisonment. Mr Dacre on the other hand had submitted that the rape, on a stand-alone basis, "should be treated as within the upper end of band 1, justifying a starting point of between seven to eight years".[8] The Judge concluded he did not need to determine whether the case was a top end band 1 or a bottom end band 2 because the case was "in the territory where the bands overlap".[9]

[20] The Judge concluded the starting point should be eight years' imprisonment.[10] In reaching that starting point, his Honour took into account "the aggravating features of age disparity and breach of trust".[11] The Judge then applied an uplift of six months to take into account the other offending against A and then a further 18 months for the offending against B. That came to ten years' imprisonment. The Judge then allowed a three month discount for the fact Mr Tupuola had no relevant prior convictions.[12] That led to the end sentence of nine years nine months' imprisonment.

[21] Before us, Mr Dacre accepted that the Judge's starting point of eight years' imprisonment for the rape could not be faulted. He also accepted that he could not criticise the six month uplift for other offending against A. He further accepted that the overall offending against B would have justified, on its own, four years' imprisonment. (We observe in passing that that is exactly what Cooper J thought as well.[13])

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7 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
8 *R v Tupuola*, above n 1, at [20].
9 At [20].
10 At [22].
11 At [22].
12 At [25]–[26].
13 At [23].

[22] Mr Dacre's sole criticism was that the Judge had failed to apply the totality principle. The end sentence should not have exceeded eight years six months' imprisonment.

[23] We cannot accept that submission. It would mean that the offending against B effectively incurred no penalty at all. The Judge was fully alive to the totality principle.[14] That is why offending which otherwise would have earned at least four years' imprisonment in fact copped only an extra 18 months.

[24] We cannot fault the Judge's reasoning. We think all the sentences imposed were fair and that the overall sentence was not excessive. We dismiss the appeal against sentence.

Solicitors:
Crown Law Office, Wellington for Respondent

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14 He specifically discusses it at [27] and [28] of his sentencing notes.