

**IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE**

**CRI-2018-020-1315
[2018] NZHC 3188**

THE QUEEN

v

COURTNEY TREMAIN CURRY

Appearances: S B Manning for Crown
E J Forster for Defendant

Sentenced: 5 December 2018

SENTENCING REMARKS OF CLARK J

Introduction

[1] Mr Curry, you appear for sentence this morning having pleaded guilty to one charge of sexual violation by rape. The maximum penalty for that offence is 20 years imprisonment.¹

[2] I will be sentencing you in two stages. First, I will look at the circumstances of the offending and the effect on the victim so I can fix a starting point for your sentence. As part of the first stage I will look at your personal circumstances, along with other factors, and arrive at what I consider is an appropriate term of imprisonment.

¹ Crimes Act 1961, ss 128 and 128B; maximum penalty 20 years imprisonment.

[3] At the second stage, I will consider whether you should be sentenced to preventive detention.

[4] You may be seated. I will ask you to stand when I sentence you.

Three strikes warning

[5] Before dealing with sentencing, there is a preliminary matter. You have committed a “serious violent offence”.² The Sentencing Act 2002 requires you to be warned of the consequence of committing another serious violent offence. Normally that warning is given when the offender is convicted.³ You have not previously been given a warning so this is your first.

[6] If you are convicted of any serious violent offence, except murder, committed after this warning, and if a Judge imposes a sentence of imprisonment, then you will serve that sentence without parole or early release.

[7] If you are convicted of murder committed after this warning is given, you will be sentenced to life imprisonment, and serve that sentence without the possibility of parole unless that would be manifestly unjust. In that event the Judge must sentence you to a minimum term of imprisonment.

[8] That warning will be given to you in writing and your lawyer can explain it to you.

Circumstances of the offending

[9] You have pleaded guilty to the charge of rape on the basis of a summary of facts which sets out the circumstances of the offending.

[10] On the night of 28 April 2018 the 28 year old victim had been watching a band, with a friend, at a bar in Hastings. When the bar closed the victim went to an address nearby and continued drinking. In the early hours of the morning of 29 April she left

² Sentencing Act 2002, s 86A.

³ Section 86B.

that address to walk to her vehicle. It was raining heavily. The victim was very intoxicated. She recalls taking shelter under the eaves of the shops at a nearby shopping centre. Her next recollection is “coming to” in the backseat of a car with you raping her. She was startled and scared.

[11] When you had finished, you got into the front seat. The victim asked you to take her to an address. On the way there and unnoticed by you, she managed to take your cell phone.

[12] Upon arriving at the address, she asked you to wait. She spoke to someone at the address, became angry and returned to where you stood beside the car. She yelled at you and, using a metal object, hit and cracked the windscreen of the car.

[13] You drove away, but the victim called the police. She gave them your cell phone. When they located you, you denied having met her. You also gave a false explanation as to how you lost your cell phone and how the car’s windscreen was cracked.

Purposes of sentencing

[14] The purposes of sentencing or otherwise dealing with an offender are set out in the Sentencing Act.⁴ The particular purposes relevant to your sentence are the need to hold you accountable for the harm you have done, to denounce your conduct, to protect the community and to assist in your rehabilitation.

Principles of sentencing

[15] In sentencing you I must consider, and take account of, a number of matters set out in the Sentencing Act. Desirably, your sentence should be consistent with sentences of other offenders in similar circumstances.⁵ I must take into account the seriousness of your offending, the impact on the victim, your particular circumstances including your background, and your rehabilitation prospects.⁶

⁴ Sentencing Act, s 7.

⁵ Section 8(e).

⁶ Sections 8(a), (b), (f), (h) and (i).

[16] I turn first to the victim impact statement.

Victim impact statement

[17] The victim's statement to the Court reveals a strong and thoughtful young woman, not without compassion. In the initial weeks after the offending the victim was determined not to let it beat her but as she gained more information and knowledge about you, you became real to her in a way that started to affect her life, her emotions and her identity. Her normal day-to-day interactions with people were altered. She became anxious about leaving her home and spent days locked in her home without going to work which, as she has described is her passion. She felt her life slipping from her grasp. You took from the victim what she describes as gifts that do not belong to you — her freedom of choice and her wairua. While she feels unable to forgive you at this stage she wishes that you use the time serving your sentence to educate and develop yourself and become an asset to society and a role model to your whānau. If you do not, your victim says she will be insulted and will wish loneliness and hardship on you. She prays that you will make the right choices for her, for your future whānau and for yourself even if it has come at her expense and the expense of her whānau.

Provisional advice to courts

[18] The Department of Corrections report, called a PAC report, records you saying you drove past the shopping centre. You noticed the victim was drunk so you took advantage. It describes you as being willing to accept responsibility for your actions but, at the same time, there was no evidence you understood the impact of your offending on the victim. Your risk of reoffending is assessed in that report as moderate as you do not have an extensive conviction history but your risk of harm to members of the public is assessed as high because of the nature of the convictions you do have. The PAC report says your expressed willingness to attend treatment needs to be seen in light of the fact you have participated in treatment but that has not deterred you from committing a further similar offence. The report assessed your ability to comply with community-based sentences as moderate. Ultimately, a sentence of imprisonment is recommended.

Personal circumstances

[19] You are 26 years old. Your iwi affiliation is to Ngā Rauru and Ngāpuhi. You are the second eldest of seven children. It is not necessary that I detail your childhood experiences but it is clear your childhood was characterised by parental neglect, and emotional, physical and sexual violence. The perpetrator of the sexual violence against you was charged, and tried but acquitted. While you received counselling to address the personal consequences for you of the abusive experience, you would have preferred to have seen the perpetrator punished.

[20] You and your older brother were placed in your uncle's care when you were around 9. You stayed at your uncle's until you were 16. You received your first conviction in the Youth Court in 2009. Your Youth Court convictions in 2009 were for three counts of burglary but also for one count of indecent assault. That offending occurred in 2006 when you were only 14 years old. You received your first sentence of imprisonment in 2010 for unlawful sexual connection with a female.

[21] When you were released from prison in 2014 you were engaged in road working, then you worked in a timber yard and in forestry before returning to road working. You report you were a patched member of the Mongrel Mob before having to hand in your patch and being fined by the gang for the current offending.

[22] You have experienced significant learning difficulties but have knowledge of te reo and describe yourself as a highly skilled rugby league player.

[23] Your parents have passed away, as has your eldest brother, who was the victim of gang violence earlier this year. You have been in a relationship for approximately five years. Your partner is supportive of you and wants to ensure you do not do this again. However, you report that many friends, your family, and your partner's family, want nothing to do with you because of what you have done.

Starting point

[24] I turn now to assess a starting point for your sentence. The offending is serious. That is reflected in the 20-year maximum term of imprisonment and the presumption

of imprisonment.⁷ The Court of Appeal has established four bands of offending for sexual violation.⁸ Each band reflects a different level of seriousness. I need to assess the seriousness of your offending to determine which band it fits into.

[25] In setting the starting point I regard the following factors as aggravating your offending:

- (a) *Vulnerability*:⁹ The victim was particularly vulnerable because she was alone, in the early hours of the morning, and highly intoxicated. Her intoxication rendered her defenceless. You exploited her vulnerability and you did so deliberately.
- (b) *Extent of harm*:¹⁰ The victim has described the “devastating” effect on her of being unable to function, or go to work, and having her life slip from her. That she is capable of expressing hope, both for your future and for hers, reflects her strength but it does not take away from the harm she has experienced and suffered.
- (c) *Planning and premeditation*:¹¹ Sexual violation of an impulsive nature tends to be regarded as less serious than premeditated sexual offending such as the grooming of children or young people. That said, predatory behaviour involves a degree of planning and premeditation. Offenders who show predatory behaviour, and who are more likely to offend in an opportunistic manner, should not be considered as lacking premeditation.¹² While, as far as we know, there was no planning in your offending it was certainly predatory. You saw the victim, intoxicated and alone. And you decided you would have sex with her. In those calculated moments your actions were predatory.

⁷ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [77].

⁸ *R v AM (CA27/2009)*, above n 7.

⁹ Sentencing Act, s 9(1)(g) and *R v AM*, above n 7, at [42].

¹⁰ Sections 9(1)(d) and *R v AM*, above n 7, at [44].

¹¹ Section 9(1)(i) and *R v AM*, above n 7, at [37].

¹² *R v AM*, above n 7, at [37].

[26] The Crown submits a starting point of eight to nine years imprisonment is justified. Your counsel recognises a starting point of between six and eight years imprisonment is justified.

[27] If one or more of the features that aggravate offending are present, to a low or moderate degree, a higher starting point within band one is required. When I consider the cases which the Court of Appeal has said take sexual offending into the bottom of band two, I consider your offending must be in band one, but at the top end.¹³ In my view, a starting point of seven years is appropriate having regard to the overall seriousness of your offending and comparable examples.¹⁴ I fix the starting point at seven years.

Factors personal to you

[28] Your conviction in 2010 for unlawful sexual connection is relevant and, in my view, warrants an increase in the starting point. That is not to punish you twice. Rather, your prior offending of an identical kind suggests, if not disregard for the law, an ongoing disregard for the victims and a failure to take steps since your last period of imprisonment to try and put yourself beyond the impulses you seem unable to resist. There is a need to deter you from this kind of offending.

[29] The Youth Court matters are not to be totally ignored. While it is not what we call a court of criminal record the matters dealt with in the Youth Court form part of your behavioural history. They therefore have relevance to the determination of an appropriate sentence.¹⁵ Indeed, that prior offending may be given significant weight.¹⁶

[30] As I have said I must avoid punishing you twice for previous offences but your current conviction, coupled with your convictions in 2010 and 2009, suggests a predilection for serious sexual offending. You need to be deterred, and others need to be protected. A significant uplift is warranted. The starting point is uplifted by

¹³ *R v AM*, above n 7, at [99].

¹⁴ *R v AM*, above n 7, at [93]–[94] and [98]–[102].

¹⁵ *Kohere v Police* (1994) 11 CRNZ 442 (HC) at 444.

¹⁶ *R v Rongonui* [2009] NZCA 279, [2010] 1 NZLR 742 at [88]. Reversed on a different point in *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23.

15 months. That produces a sentence of eight years and three months before taking into account mitigating factors.

[31] Although the Crown submits there are no personal circumstances mitigating your offending I take a different view. You have described your upbringing as “challenging”. From what I have read that seems to be an understatement. Your upbringing was characterised by domestic violence and appalling abuse. It seems to me that, at no point in your young life, did you have emotional or physical security. You have been disadvantaged as well by the significant learning difficulties you experienced at school. It may be that those difficulties are attributed to your mother’s alcoholism while she was pregnant. That possibility has been raised by the health professionals but they acknowledge there is no evidence of that.

[32] I believe there is an obvious inference to be drawn: that your background of deprivation and abuse has materially contributed to your present sense of entitlement, your anger, your offending and your inability to understand the effects of your offending on your victims. I am able to take into account such mitigating factors as I think fit.¹⁷ I am satisfied your personal circumstances are properly reflected in a discount of 10 per cent.

[33] Mr Forster submits you are entitled to a further discount for your remorse. I had misgivings about that. You also expressed remorse when you were sentenced in 2010. You have written a letter to the Court in time for sentence today and I have read that letter several times. Given the offending occurred in April this year and we have nearly reached the end of the year, your expression of remorse, I thought, came rather late in the day. But some aspects of your letter may provide some comfort to your victim. You say you are ashamed, that you take full responsibility for your actions and that you want to complete the sex offender programme. It may be that the victim’s statement has had some effect on you because parts of your letter echo what she herself hopes for. For example, that you think the programme may make you a better person. And that you hope it repairs your family and the hurt caused to your victim. You acknowledge the shame you have brought on your family and your friends. I am

¹⁷ Sentencing Act, s 9(4).

prepared to treat your letter as a genuine expression of the remorse you feel, at least at this stage, and to give a further discount of five per cent. And, I add, that it appeared to me in court just now that you were moved by the reading of the victim's statement.

[34] You pleaded guilty at an early stage in the proceeding. There is no dispute that you are entitled to a full 25 per cent discount.

[35] This produces an end finite sentence of five years and three months imprisonment.

[36] If I sentenced you to that term you would be eligible to apply for parole after serving one-third of that sentence.¹⁸ In my view, a third – that is one year and nine months imprisonment – would be completely inadequate in terms of the need to protect the community from your offending.¹⁹ As such, I am able to impose a minimum period of imprisonment of two-thirds of your sentence. Two-thirds of your finite sentence would be three years and six months.

[37] This raises then the question whether a sentence of preventive detention should be imposed.

Preventive detention

[38] The purpose of preventive detention is to protect the community from those who pose a significant and ongoing risk to its safety.²⁰ You have been convicted of a qualifying sexual offence and you were over the age of 18 when you committed this offence. Therefore, if I am satisfied you are likely to commit another qualifying sexual offence if released from prison at your sentence expiry date, a sentence of preventive detention may be imposed.²¹

¹⁸ Parole Act 2002, s 84.

¹⁹ Sentencing Act, s 86(2)(d).

²⁰ Section 87.

²¹ Section 87(2). Note: a sentence expiry date is the date at which a determinate sentence is fully served: Parole Act, s 82(1).

[39] In considering whether to impose a sentence of preventive detention I must take into account five factors:²²

- (a) any pattern of serious offending disclosed by your history;
- (b) the seriousness of the harm to the community caused by your offending;
- (c) information before the Court indicating a tendency to commit serious offences in future; and
- (d) the absence or failure of efforts by you to address the cause of your offending.
- (e) the principle that a lengthy determinate sentence is preferable if it provides adequate protection for society.

[40] In looking at these matters I have had careful regard for the reports of two health assessors:

- (a) a psychological assessment dated 16 October 2018 prepared by Niall Morrison, registered psychologist; and
- (b) a psychiatric report dated 19 November 2018 prepared by Dr Greg Young.

[41] The key points that emerge from Mr Morrison's report are these:

- (a) You have reported an intense interest in sex since your first sexual relationship with an older woman when you were in your early teens. You engaged in creeping and peeping behaviour and stole underwear from washing lines.
- (b) During the assault in 2006 you were highly sexually aroused by the victim's distress and resistance and her efforts to push you off spurred

²² Section 87(4).

you on. You are highly aroused by fantasies of accosting females who are strangers to you and raping them.

- (c) During the second offence in 2009 you repeatedly punched the victim in the head but she was able to scream for help and neighbours responded. Your only explanations for the attack were that it “just happened”; it was unplanned; you had a high sex drive and you felt entitled to engage in a sexual act. You did not consider the consequences for her and thought it unlikely you would be caught by the Police.
- (d) During your first custodial sentence, you commenced the assessment phase of the Adult Sex Offender Treatment Programme (ASOTP) but exited the programme because of concerns about your ability to comprehend its content and participate a group-based programme. Following that exit you attended 23 individual treatment sessions over a one-year period while in Whanganui Prison. During that time high-risk situations were identified as anger and relationship conflict particularly when coupled with sexual preoccupation. Following release from prison you had a further five treatment sessions between August and December 2014 while under supervision of Community Probation service. Treatment stopped when your sentence ended. You were encouraged to continue but you candidly considered that, while the treating psychologist tried his best, you “just ticked the boxes”.
- (e) Mr Morrison assessed you as cognitively capable of participating and engaging in Departmental programmes and treatment and made recommendations designed to maximise for you these opportunities to learn and acquire new skills.
- (f) You are aware of the role your deviant sexual interest plays in your offending yet despite the significant efforts by treatment providers, you have maintained that interest. The covert nature of this activity means any treatment provider is reliant on your meaningful engagement. You

have not yet demonstrated meaningful engagement despite numerous opportunities to do so. There is no indication of what the professionals describe as your deviant sexual interests diminishing or evidence that you wish to manage those interests.

- (g) As long as you retain these appetites you are assessed as presenting a “significant risk of sexual assault” on adult females in the community.

[42] Further key points emerge from Dr Young’s report:

- (a) Your present partner of some five years is concerned about your welfare and has made some effort to encourage family members to assist her in supporting you emotionally while you are in prison. They seem not to have done so. You are very dependent on your partner.
- (b) Dr Young describes as “impoverished” your upbringing prior to the sexual abuse of you between the ages of nine and 12 by someone who was charged with your care. A specific diagnosis of post-traumatic stress disorder was not possible. You display a pattern of avoidance when asked to give accounts of the victimisation. That is not uncommon.
- (c) You have issues with anger and with intimacy.
- (d) Since your first sexual offending there has been an escalation in its seriousness. You do not seem to have benefitted from the rehabilitation programme you attended. As things are at present a significant risk exists of you committing a qualifying sexual offence in the future. Dr Young could not quantify the risk but outlined factors that might cause the risk to change such as addiction counselling; and forming a therapeutic relationship with a clinician and being honest with the clinician.

[43] The clinical task will be to overcome your avoidance in therapy and take into account cognitive functioning which, in some circumstances, is more like that of a pre-teenager than a 26 year old. The process is likely to be long and arduous and will demand considerable motivation and commitment from you. If the therapy were effective Dr Young would expect a reduction in the risk you presently pose of reoffending.

[44] I turn now to the five factors which the Sentencing Act requires me to take into account when considering preventive detention.

Section 87(4)(a): any pattern of serious offending disclosed by the offender's history

[45] Your past sexual offending involves three separate incidents:

- (a) 4 December 2006 – indecent assault
- (b) 7 November 2009 – unlawful sexual connection
- (c) 28 April 2018 – sexual violation by rape

[46] Each offence has escalated in seriousness from the last. It is also relevant that the November 2009 offending would have been (on your own admission) more serious had you not been interrupted. You intended to rape that victim but stopped when she experienced an asthma attack during your assault on her.

[47] The expert evidence is that you indicate a clear pattern of escalating sexual offending underpinned by a pre-existing and long-standing deviant interest in coercive (that means without their consent) sexual activity.

Section 87(4)(b): serious of the harm to the community caused by the offending

[48] You have been directly responsible for serious sexual assaults on three separate women. The harm from this offending (alone) to the women, and therefore the community, is unarguably significant.

Section 87(4)(c): information indicating a tendency to commit a serious sexual offence in future

[49] Turning to the future risk you pose, the health assessors and the PAC report writer, assess the risk of you harming others as high, or significant.

[50] One of the benefits to this sentencing process, of Mr Morrison's report is that he traversed your previous psychological reports and assessments from early 2007 to the present. The Court therefore has an almost continuous narrative of your offending, your attitudes to sexual matters and attempts to rehabilitate over an 11-year period.

[51] Mr Morrison considers your high risk of sexual offending is most likely to occur when you experience negative emotion coupled with a high level of deviant sexual interest. Adult females who are strangers to you are at risk of serious sexual assault with the act of rape being the desired goal on your part. Your choice of strangers as victims means a much larger victim pool than is available to most other sexual offenders is available to you.

[52] Similarly, Dr Young concluded that as things are at present, a "significant risk" exists of you committing a qualifying offence in the future.

[53] The experts' reports show you have manifested an enduring and sustained deviant interest in coercive sexual activity. That interest has not diminished despite lengthy intervention. You do not dispute that you have this continued interest.

Section 87(4)(d): absence of, or failure of, efforts by offender to address the cause or causes of the offending

[54] The PAC report writer considers it positive that you have expressed a willingness to attend treatment but you have participated in treatment previously. Unfortunately, treatment has not been effective in deterring you from committing another similar offence.

[55] Mr Morrison raised concerns regarding your resistance to treatment and the serious sexual offending that has occurred following treatment. In his opinion, your

willingness to engage in treatment must be viewed with caution due to what he described as your “covert belief system”.

[56] I take account of the efforts that have been made, and which you have made, to address the causes of your offending but it is relevant that they have been unsuccessful to date.

Section 87(4)(e): the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society

[57] The question for me is whether your unpredictable and episodic serious offending can be managed by a determinate sentence with conditions. For example, your counsel submits an extended supervision order to manage you for up to 10 years from release is preferable to the imposition of preventive detention. You have no recorded breaches of court orders showing you are likely to be uncooperative or non-compliant. Mr Forster suggested the threat of a “second strike” (I gave you a first strike warning at the beginning) for future offending would provide a strong deterrent to you.

[58] When having regard to the principle that a finite sentence is preferable if adequate protection can be provided I must take into account the possibility of an extended supervision order.²³

[59] Extended supervision orders (ESO) were originally designed to better manage the risks of child sex offenders who are perceived as often ingratiating themselves to the victim through a process of grooming.²⁴

[60] In my view, an ESO is unlikely to mitigate the risk of you committing intermittent acts of apparently spontaneous and sexual violence. Standing back, I consider there is little option but to impose a sentence of preventive detention rather than a finite sentence. The real risk is that if you receive a finite sentence you will take no steps to acknowledge or address the causes of the offending and eventually there is no option but to release you into the community. I accept that your present

²³ *R v Mist* [2005] 2 NZLR 791, (2005) 21 CRNZ 490 at [100]–[102].

²⁴ *Leota v R* [2018] NZCA 200 at [20].

intention and your stated desire is to participate in a programme but I must be realistic. Your rehabilitation prospects and the desirability of a finite sentence over an indeterminate sentence must be balanced against the need to keep the community safe from the real and serious risk you present.

Conclusion

[61] There can be no doubt that you pose a high-risk of serious sexual offending upon release from prison unless significant steps are taken to understand and address the cause of your offending. As Dr Young observed the process is likely to be long and arduous. Short of engaging in that process the community is at real risk. A sentence of preventive detention can be appropriate for someone who has resisted acknowledging their problem.²⁵ Preventive detention requires an offender to engage fully in treatment and rehabilitation because the offender must take responsibility for his or her own rehabilitation and establish to the satisfaction of the Parole Board that the rehabilitation has been successfully completed.

[62] The overview of your propensity and desire to offend points to the only presently available conclusion which is that you will continue to be capable of, and to be likely to commit, a sexual offence. Mr Forster's suggestion that you will be deterred by the prospect of a second-strike warning is not something I can accept. There is no basis for having that confidence. You were warned by Judge Radford when he sentenced you on 22 January 2010 that if you had been older you would have been liable to a sentence of preventive detention.²⁶ The Judge issued a formal warning, that if you were to offend in this way again you would be liable to be sentenced to preventive detention. The Judge expressed "grave concerns for the community" if you did not take that on board. It seems you have not taken it on board. Dr Young has suggested that may be due to an inability to behave differently without the intervention of effective therapy.

[63] The only way to safeguard against the significant risk of such impulsive, unpredictable and serious offending is if you are detained pursuant to a sentence of

²⁵ *Antonievic v R* [2017] NZCA 87 at [43].

²⁶ *R v Curry* DC Whanganui CRI 2009 0832830, 27 January 2010.

preventive detention where your engagement with treatment and its success can be monitored. In that regard I bring to the attention of those who are to be ultimately responsible for your rehabilitation, the recommendations which Mr Morrison included in his report. I would add Mr Curry that I consider the outlook for you is not pessimistic. That there is hope for change.

Sentence

[64] Mr Curry would you please stand. On the charge of sexual violation by rape I sentence you to a sentence or preventive detention with a minimum period of imprisonment of five years.

[65] You may stand down.

Karen Clark J