IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2016-004-010995
[2019] NZHC 537

THE QUEEN

v

DEAN BROOK KING

Hearing:	22 March 2019
Appearances:	Nick Webby and David Green for the Crown Asishna Prasad and Conrad Wright for the Defendant
Judgment:	22 March 2019

SENTENCING NOTES OF MOORE J

Introduction

[1] Dean Brook King, at the age of 34, you appear for sentence having pleaded guilty on 27 June 2017 to the following five charges:

(a) sexual violation by unlawful sexual connection;[1]

(b) abduction for the purposes of sexual connection;[2]

(c) robbery;[3]

(d) assault with a weapon;[4] and

(e) possession of an offensive weapon.[5]

[2] The Crown seeks a sentence of preventive detention. Your lawyer, Ms Prasad, presses for a finite sentence. And so, as is customary in cases of this kind, I shall approach this sentencing in two stages:

(a) first, I shall fix a finite sentence and set any minimum period of imprisonment ("MPI"); and

(b) then I shall decide whether you should be subject to preventive detention and if so, the length of the MPI to accompany that sentence.

[3] If I decide against the imposition of preventive detention, you will receive the finite sentence and any MPI I determined at the first stage.

Facts

[4] I now turn to set out the background to your offending. I do so by reference to the summary of facts which, by your guilty pleas, you accept as true.

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1 Crimes Act 1961, ss 128(1)(b) and 128B(1); the maximum penalty is 20 years' imprisonment.
2 Section 208(b); the maximum penalty is 14 years' imprisonment.
3 Section 234; the maximum penalty is 10 years' imprisonment.
4 Section 202C; the maximum sentence is five years' imprisonment.
5 Section 202A(4)(b); the maximum sentence is three years' imprisonment.

[5] The facts will obviously be well-known to you but because sentencing is a quintessentially public function it is necessary that I traverse the facts in open Court.

[6] On 26 October 2016 the 25-year old victim was walking to work along Mount Albert Road, in Mount Roskill, Auckland. It was early in the morning; about 5:00 am. As she passed some public toilets, you approached her and wrapped your arm around her neck. You held a knife to her stomach and dragged her into the toilets. You told her, "Do as you're told or die." She begged you not to kill her. You repeated that you would kill her if she did not comply.

[7] Once inside the toilets, you pulled down her jeans and underwear and attempted to insert your penis into her anus. You were unsuccessful. So you forced her to her knees and made her perform oral sex on you. Once this was over, you demanded that she swallow your ejaculate.

[8] But that was not the end of your victim's ordeal. After leaving the toilets, you lead her to a nearby ATM. You made her withdraw $20. Only then did you leave her.

[9] She called the Police. At around 5:30 am, officers made enquiries at the nearby lodge where you were staying. They noticed your clothing matched the description given by the victim. After questioning, the officers arrested you.

[10] Your reaction to this was dramatic. You produced a knife. It is unclear whether this was the same knife you used against your victim. But that does not matter. You held the knife to your throat and told the Police that you would kill yourself before you would go anywhere with them. They managed to subdue you.

Victims impact statement

[11] Your victim has filed a victim impact statement. It was written seven months after the offending. It is a most impressive, even courageous, account of how and what you did affected that young woman. Plainly she is a young woman of great inner strength and character. Her statement is objective and factual. Despite an ordeal which was plainly and rightly a terrifying experience, she has maintained an optimism and focus on life for which she deserves great credit. Her job, in which she has

excelled, brings her happiness and comfort. She says this is because she is able to help people. What you did to her, it seems, has motivated her to help others. At the time of writing she was doing well at work and had recently been awarded employee of the month.

[12] Despite her evident inner strength there is, however, a dark side. Your offending has taken a toll. She says she feels isolated. Naturally a solitary person, her sense of isolation has intensified. Companionship is found in the company of her siblings. Your offending has made her afraid to meet new people. She no longer goes out as often as she did. She finds herself anxious in new situations.

[13] She says she felt she died the moment you held a knife to her. Sometimes she still feels dead; such is the sense of numbness caused by your offending. Her aspirations to travel and study have been abandoned, her zest for life muted. Instead, she lives day-to-day, avoiding change or becoming attached to people or things.

[14] To her great credit, despite the terror of that morning, she still finds the courage to walk to work. Sometimes she walks past those public toilets. She says this makes her scared, but she is resolved to soldier on and not let your offending define who she is.

Finite sentence

[15] As I mentioned, before I consider whether to order preventive detention the law requires me to first fix what I consider to be the appropriate finite or determinate sentence. And that is the task to which I now turn. First, the starting point.

Starting point

[16] The Crown says your offending falls between bands 2 and 3 of *R v AM*.[6] Mr Webby suggests a starting point of 12 years for all offending. He identifies the following aggravating factors:[7]

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6 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.
7 *R v AM* at [34]-[64]; Sentencing Act 2002, s 9(1).

(a) Premeditation: the Crown says you saw the victim walking past the lodge where you were staying, armed yourself with a knife and followed her some 400 metres down the road to the public toilets. It says you selected this venue by reason of its seclusion.

(b) Violence and detention: The offending involved actual and threatened violence. You grabbed the victim, held her at knife-point and threatened to kill her. You did this to secure her submission to dominate and control her, even after the sexual violation has finished.

(c) Harm to your victim: I have summarised the victim impact statement. There can be no doubt that she suffered significant psychological harm as a result of what you did.

(d) Vulnerability of the victim: She was a young woman walking alone in the early hours of the morning.

(e) Degree of violation: The Crown says your offending was prolonged and invasive. Additionally, Mr Webby points to your attempt to have anal intercourse with the victim and forced her to swallow your ejaculate.

[17] The Crown justifies its starting point of 12 years by reference to three similar sentencing decisions.[8]

[18] These are the cases of *Takiari, Galvin* and *Marsh*. While there are some differences, there are also some marked and obvious parallels. In *Takiari* and *Galvin* the victims were young and were, effectively, abducted while walking home. They were taken to secluded areas where they were repeatedly sexually violated. In *Takiari* and *Galvin* the Court of Appeal held starting points of 10 and 11 years respectively were appropriate.

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8 *R v Takiari* [2007] NZCA 273; *Galvin v R* [2017] NZCA 22; *R v Marsh* [2016] NZHC 747.

[19] In *Marsh*, the complainant, by subterfuge, was lured to the defendant's home where, in circumstances where she believed the defendant was armed with a knife, she was strangled and twice sexually violated. Asher J adopted a starting point of 12 years' imprisonment.

[20] Mr Webby says your offending is most comparable to *Galvin*. That is because that case shares with yours similar elements of abduction, limited violence and attempts to have anal intercourse.

[21] Ms Prasad takes a different view. She says a starting point of nine years for the sexual violation charge, being the lead charge, is appropriate, with an uplift of one year to reflect the other charges in the interests of totality. Referring to the aggravating factors advanced by the Crown, Ms Prasad submits:

(a) in terms of the scale of the offending, the incident was a one-off attack of relatively short duration. The victim was abducted at around 5:00 am and you were located by Police only half an hour later. On the complainant's account, she was detained for a period of between five and 10 minutes;

(b) the attempt at anal sex was unsuccessful. However, Ms Prasad correctly accepts that the forced swallowing of your ejaculate aggravates the offending;

(c) although she was threatened with a knife, the victim suffered no physical injuries; and

(d) the offending was not premeditated. Rather, your account of the offending is that you were cleaning the lodge where you stayed, saw the victim walking past, grabbed the knife and then went after her. You also told the health assessors, whose reports I will come to shortly, that you had been using methamphetamine and had not slept in three days. In this way it is submitted, your offending was largely impulsive and

opportunistic. However, against that, I balance the fact that you did take a knife with you, which must reveal some degree of planning.

[22] I accept there is some merit to each of these points. In particular, I do not accept that your offending was premediated to a significant degree although, as I have just remarked, the possession of a knife does point to some level of planning. But, however, it is viewed what you did that morning was not well thought out; if it was planned at all. You were caught almost immediately. This is because your offending took place right next to where you were living. You made no attempt to change your clothes. This view is consistent with your account that you were taking methamphetamine at the time. It goes some way to explaining the volatility of your behaviour and your impulsive decision-making. It does not, of course, excuse anything you did.

[23] Ms Prasad has referred me to two cases referred to in *R v AM* as examples of offending in the lower end of band 2: *R v Batt* and *R v Anderson*.[9] She says they are similar to your offending.

[24] In *R v Batt* the victim was a night-porter in a hotel. The defendant was a guest. The victim was lured into the defendant's room and raped at knifepoint. In *R v Anderson* the defendant sexually propositioned the 18-year-old victim as she was walking home. She refused. The defendant reacted by pushing her to the ground and raping her.

[25] I am satisfied that your offending falls in the middle of band 2 of *R v AM*. The abuse was not prolonged. There were no physical injuries nor was there the same sort of vulnerability seen in the other cases referred to me which tend to attract sentences in the upper range of band 2.

[26] I am satisfied the offending is less serious than *Galvin*, where the victim was particularly vulnerable due to her tender age and the period of abduction greater. Although there was no weapon used in *Galvin*, the offender did physically restrain the victim. The degree of abuse and violation was also greater. Your offending is also

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9 At [98]; *R v Batt* [1987] 1 NZLR 760 (CA); *R v Anderson* CA199/05, 2 November 2005.

considerably less serious than the offending in *Marsh*, which involved a calculated plan to lure the victim to the offender's bail address and two instances of forced oral sex. The use of threats and the use of a knife is similar. But the victim in *Marsh* was also strangled to the verge of unconsciousness.

[27] I am of the view your offending is most comparable to *Takiari*. The relatively spontaneous nature of the attack in both cases is similar. Both could be said to involve a predatory attack, with the victim set upon by the offender opportunistically, taken against her will to a secluded place in a public setting and then sexually assaulted. Although the victim in *Takiari* was particularly vulnerable due to her disability, the offending in that case was not elevated by the use of a weapon and threats. However, that point needs to be balanced against the fact that the degree of violation in *Takiari* was greater. It involved rape as well as oral and attempted anal sex.

[28] It is for these reasons I adopt a starting point of 10 years' imprisonment.

Personal factors

[29] You are 34 years old and despite not spending substantial periods of your life in prison you have amassed a number of convictions for previous offending. You accumulated most of these in Australia but they are nevertheless relevant to my assessment.[10] Specifically you have been convicted of various property, driving and minor assault offences. In 2006 you were convicted of stalking with intent to cause physical or mental harm and aggravated breaking and entering. You were sentenced to two years' imprisonment. In 2012 you were convicted of aggravated sexual intercourse with a young person between 14 and 16 and were sentenced to a further two years' imprisonment. Upon your release from prison you were deported to New Zealand.

[30] Since coming to New Zealand you have been convicted of burglary, shoplifting and possession of an offensive weapon.

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[10] *Fry v R* [2014] NZCA 174.

[31] Both Ms Prasad and Mr Webby agree that your criminal history warrants an uplift. I agree. But the question is by how much? Ms Prasad says it should be six months; Mr Webby says it should be 12. The Crown puts this on the basis your criminal record shows "comparable" offending. With respect, I do not think this assessment is correct. As I shall discuss later, I do not accept that your 2012 conviction for aggravated sexual intercourse with a young person is similar to the index offending. It was quite different. I propose to adopt Ms Prasad's suggested uplift of six months. While you have an extensive criminal history, all your past offending is substantially less serious and conceptually different to what you are being sentenced for today.

[32] In the course of oral submissions, Mr Webby advised that at the time of the offending you were subject to release conditions consequential upon the sentence imposed by Judge Glubb on 18 September 2015. Mr Webby advised that you were not recalled to serve the rest of this sentence, a factor which is relevant to whether a further uplift is justified. Mr Webby submitted that offending while subject to release conditions supported the Crown's submission of a 12 month uplift. Ms Prasad accepted this feature justified an uplift, but no more than two months. I agree with the Crown. This is a personal aggravating factor which justifies a further uplift of six months.

[33] Ms Prasad also presses for a discount for what she says is your "significant mental impairment". In her oral submissions, she pressed for a discount in the order of 15 to 20 per cent for this factor and cited the cases of *Shailer v R*[11] and *E v R*.[12] Neither of those cases in my view is directly on point although *Shailer* reinforces the general principles around mental health discounts. Amongst other consequences, mental health disorders may diminish the extent of a sentencing response if they reduce a defendant's ability to make a willed choice.

[34] In your case, I do not think such a discount is appropriate. First, neither of the mental health assessors has diagnosed you with a recognised mental illness. Rather, each appears to suggest that you have a low intellectual capacity which has been

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11 *Shailer v R* [2017] NZCA 38; [2017] 2 NZLR 629 at [50].
12 *E v R* [2010] NZCA 13.

further clouded by years of drug and alcohol abuse. Secondly, I am not satisfied that there is an established causative link between this and your offending. Instead, a more credible explanation is your admitted methamphetamine use before the offending and the resulting lack of sleep for the previous three days. This seems to be the operative background to your offending.

[35] Taking into account all these matters I am of the view a provisional sentence of 11 years' imprisonment is appropriate, before turning to address the matter of your guilty pleas.

Guilty pleas

[36] You pleaded guilty immediately after a finding was made under the Criminal Procedure (Mentally Impaired Persons) Act 2003. The health assessors found you were fit to stand trial.[13] Although the enquiry into fitness was not immediately set in train by counsel, Ms Prasad says any consequential delay should not be held against you. She seeks a full discount of 25 percent in accordance with *Hessell v R*.[14]

[37] Mr Webby agrees you should be entitled to a discount. But he would limit this to 15 percent. He says that the evidence against you was strong. I agree with Ms Prasad that you entered your guilty pleas at the first reasonable opportunity after your mental state had been determined. Any delay in completing that necessary process was not your fault and should not be held against you. In these circumstances, I consider the maximum discount of 25 per cent is appropriate.[15]

[38] Applying that discount, I come to a finite sentence of eight years and three months' imprisonment.

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13 The procedural history provides context to the timing of Mr King's pleas of guilty, so I will set it out briefly. Mr King was charged on 27 October 2016. He received a sentence indication on 16 May 2017. This was not accepted because Mr King's counsel raised concerns about his mental health and ability to give instructions. On 18 May 2017, a combined hearing was set down pursuant to ss 9 and 14 of the CPMIP Act. The hearing took place on 27 June 2017. Judge Taumaunu found that Mr King was fit to stand trial and enter a plea. Mr King entered guilty pleas that day.

14 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607

15 For a similar situation see *Tuau v R* [2012] NZCA 146 at [9]-[12] and [50]-[52].

Minimum period of imprisonment

[39] I now turn to consider whether to impose an MPI.

[40] In the lead up to this sentencing there has been some uncertainty around whether the requirements of s 86B(4) of the Sentencing Act 2002 were complied with. This relates to service of the notice of the first warning under what is commonly referred to as the three strikes law.

[41] You were sentenced on 18 September 2015 in the Waitakere District Court by Judge Glubb on a charge of aggravated burglary. That engaged the three strikes legislation and you were given the standard first strike warning as part of the Judge's sentencing remarks. However, s 86B(4) requires the Court to give the offender written notice setting out the consequences if the offender is convicted of any serious violent offence committed after the warning was given.

[42] I record the Court's gratitude to Mr Webby for the enquiries which he has caused in relation to this issue and the responsible attitude the Crown has adopted because it seems that there is some real doubt over whether you were given written notice as the law requires.

[43] If you had been, the law requires you to serve the whole of the sentence imposed without parole.[16] And so the question of a minimum period of imprisonment would be academic.

[44] However, given the doubt around this issue I must proceed on the basis that the statutory requirements were not met and, as a consequence, the present sentencing will proceed on the basis that this is a first strike. In the event I do not order preventive detention I will give you a first strike warning and written notice will be given to you after the sentencing process has been completed.

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16 Sentencing Act 2002, s 86C(4).

[45] Mr Webby says that the statutory maximum, that is two thirds of your finite sentence, is a necessary response to your offending.[17] He says this is what is required to protect the community from you.[18]

[46] Ms Prasad accepts that a minimum period of imprisonment is necessary. And so do I. In addition to the need to protect the community, an MPI is necessary to hold you accountable for the harm you have caused.[19] This was a cruel and unprovoked attack on an entirely unsuspecting and innocent victim. Not only did you make her fear for her life, but you also degraded her through your actions. Such conduct necessarily demands a stern response from the Court.

[47] As I will come to, your need for rehabilitation is pressing. You accept that involvement in intensive rehabilitation will inevitably and rightly form part of your sentence. If I were to sentence you to a finite term of imprisonment, I consider that a lengthy MPI is necessary to ensure that you have the best chance of making substantial treatment gains before being released. The protection of the community requires this.

[48] In these circumstances, I agree with Mr Webby that an MPI of two thirds is the only appropriate response. This brings the MPI to five years and six months.

Preventive detention

[49] I now turn to consider whether I should make an order for preventive detention. That option is available to me because you have committed a qualifying offence.[20] I may only sentence you to preventive detention if I am satisfied you are likely to commit another qualifying offence if you are released on parole after a finite sentence.[21]

[50] The purpose of preventive detention, as mandated by Parliament, is to protect the community from those who pose a significant and ongoing risk to the safety of its

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17 Sentencing Act 2002, s 86(4)(a).
18 Section 86(2)(d).
19 Section 86(2)(a).
20 Sections 87(2)(a) and (5)(a).
21 Section 87(2)(c).

members.[22] Protection of society has always been a dimension of sentencing; in the case of preventive detention, that dimension predominates.[23] But it is important to recognise that preventive detention is not a sentence of last resort or a punishment in itself.[24] It is all about assessment and evaluation of risk.

[51] When considering whether to impose preventive detention, I am obliged by law to take into account five matters. These are:[25]

(a) any pattern of serious offending disclosed by your history;

(b) the seriousness of the harm caused by your offending;

(c) information indicating a tendency for you to commit serious offences in the future;

(d) the absence of, or failure of, efforts by you to address the cause of your offending; and

(e) the principle that a lengthy determinate sentence is preferable, if this provides adequate protection for society.

[52] To help me in this decision two reports, as the law requires, were ordered from health assessors. In those reports they discussed the likelihood of you committing another qualifying offence.[26] I will briefly cover each. However, I make clear that the ultimate decision rests with me.[27] In coming to my decision I will, of course, take into account the experts' opinions but I must make my own decision as to risk having regard to all the evidence.

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22 Sentencing Act 2002, s 87(1).
23 *R v C* [2003] 1 NZLR 30 (CA) at [5].
24 *R v Evans* [2018] NZHC 69 at [27].
25 Sentencing Act 2002, s 87(4).
26 Section 88(1)(b).
27 *R v Johnson* [2004] 3 NZLR 29 (CA) at [19]; *R v Exley* [2007] NZCA 393 at [46].

Dr Goodwin's report

[53] In Dr Goodwin's report of 13 February 2019[28] he notes that you are one of four children. You were born in Christchurch, but your family relocated to Australia when you were just six months old. You lived there until you were deported in 2014.

[54] Your parents separated when you were young. You report suffering physical and emotional abuse at the hands of your mother's subsequent partners. You also report that your mother suffered from serious drug problems. Throughout your youth, you were unable to attain any educational qualifications. You have not been in a relationship since you were 15.

[55] It is clear that you have serious substance abuse problems. You have struggled with alcohol, cannabis and methamphetamine addiction.

[56] You state that in prison you have received diagnoses for various psychiatric conditions such as intellectual disability, schizophrenia, ADD and delusions. But Dr Goodwin has been unable to confirm that you suffer from any recognised psychiatric diagnosis. He says that any evaluations within the criminal justice system would have been complicated by your history of drug and alcohol abuse. Your clinical presentation is consistent with a person of less than average intelligence but not to the point of intellectual disability. However, you suffer from epilepsy and the associated seizures. You are currently on low dose antidepressant and anticonvulsant medications.

[57] You admitted the facts of the offending to Dr Goodwin. You said you did not think long about what you wanted to do when you saw the victim walk past. You did not know why you chose to attack that particular victim.

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[28] I read Dr Goodwin's report in conjunction with another report he has prepared, dated 2 July 2018. The later report was prepared to take into account materials received pertaining to Mr King's offending in Australia. However, Dr Goodwin makes it clear that the conclusions in both reports do not differ in any significant way.

[58] As for the Australian sexual offending, you told Dr Goodwin that you engaged in consensual sex with the victim after you both consumed whiskey. You said the complainant told you she was 18. But that was apparently untrue.

[59] In terms of your risk of committing another sexual offence, Dr Goodwin outlines the following factors which he says may predispose you to re-offending:

(a) you offended against victims who are unknown to you;

(b) your history of non-sexual violent offending;

(c) your poor social support and lack of previous relationships;

(d) your lack of future plans;

(e) your untreated substance abuse problems; and

(f) your limited intellect.

[60] Dr Goodwin concludes that you have a high risk of re-offending in a similar way in the future. But he qualifies that opinion by noting your risk could be mitigated if you continue to abstain from drugs and alcohol and undertake an appropriate treatment course for adult sexual offending. The doctor highlights that you have not undertaken any intensive treatment or rehabilitation in the past and that you have told him you are willing to do so now.

[61] This morning, in the course of the hearing you gave me a handwritten document headed, "Remorse letter". There you repeat your expressions of remorse and regret for what you did and for the harm you inflicted on your victim. But, in my view, of greater relevance are the two certificates attached to that letter; one which is dated 4 September 2018 and confirms you have engaged and completed a course in critical thinking. The other is a certificate of completion of a four session alcohol and other drug programme which you completed in February this year. These provide some level of comfort that you have insight into the needs you plainly have to change and reform your thinking and behaviour.

Dr Karayiannis' report

[62] Dr Karayiannis' report is dated 1 January 2019. It is broadly similar to Dr Goodwin's. However, it does include some further, helpful, details about your upbringing.

[63] Chief among these is that you also report suffering sexual abuse from your mother's partners. This brought you to the attention of the Department of Community Services in New South Wales at age 5. When you were 10 you were placed in a boys' home. At age 13 you were fostered out to the Brooks family. You remained with them until you were 18. You continue to regard Mrs Brooks as your real mother. You endeavour to remain in weekly phone contact with her and, while in Australia, worked intermittently as a cleaner for her business.

[64] Clarifying your drug use, you told Dr Karayiannis that you abused alcohol and cannabis while you lived in Australia. It was only after you were deported to New Zealand that you developed problems with methamphetamine, as well as synthetic cannabis. You said you were using both of these drugs in the days leading up to the offending. Worryingly, you told the doctor that you did not think you had a problem with drugs or alcohol, but also agreed to attend counselling if required.

[65] In terms of your 2012 offending, you told Dr Karayiannis that you were drinking whiskey in a park when you were approached by a female who asked you for a drink. You enquired how old she was. She said she was 18. And so you shared your drink with her before going home and having consensual sex. The next day her family came to your home and confronted you. The Police arrested you and you pleaded guilty.

[66] In relation to the current offending, you again admitted the facts as outlined. You emphasised it was not planned. You said you were sorry and expressed a wish to apologise to the victim.

[67] In assessing the risk of you committing another sexual offence, Dr Karayiannis agrees broadly with Dr Goodwin, but adds the following factors which elevate the relevant risk:

(a) poor employment history and compliance with Court orders;

(b) historical sexual abuse;

(c) suicidal ideation;

(d) escalation of severity of offending;

(e) some externalisation of responsibility and attitudes that condone offending; and

(f) general ambivalence towards treatment.

[68] Dr Karayiannis says you have a high risk of sexual and violent recidivism. The only protective factor available to you is professional care within the conditions of a custodial setting. He says that you have "a general poverty of risk-modifying or protective factors … potentially subject to rehabilitative intervention".

[69] However, and significantly in my view, the doctor concludes with the comment that an indeterminate sentence is not necessary to address your risk of offending, but could be a mechanism to ensure treatment gains and risk reduction occurs prior to your next release.

[70] I now return to my decision. I start with the relevant s 87(4) factors.

Is there a pattern of serious offending?

[71] The Crown acknowledges that your conviction history does not contain multiple offences of a similar nature to the index offending. But Mr Webby says your 2012 offending does bear some similarities. He says that you show a "growing propensity to offend against vulnerable younger women". In his submission, the Court

could consider two serious examples of sexual violence to be enough to establish a pattern of serious offending.

[72] As I touched on earlier, I am not convinced that the 2012 conviction constitutes a serious example of sexual violence such that it establishes a pattern of that type of offending in conjunction with the index offending. Instead I accept Ms Prasad's submission that the suggestion you have shown a growing propensity to offend mischaracterises the two offences and fails to recognise the significant differences between them. Ms Prasad further points out that your account of what happened in 2012 is consistent with the nature of the charge to which you pleaded guilty.[29]

[73] Mr Webby responds with the submission that your offending is increasingly violent, such that you have a "propensity mix of dangerous behaviours".[30] But Ms Prasad points out that your only recent conviction for actual violence was for common assault in 2013.

[74] Overall, I find myself in agreement with Ms Prasad. Your current offending is something of an outlier when viewed against your criminal history. It follows that I do not accept you have demonstrated a pattern of serious offending.

What is the seriousness of the harm?

[75] Both counsel acknowledge that the victim, and by extension the wider community, suffered serious harm in relation to your offending. That has been made plain by the victim. I have already covered this. I need say no more.

Do you have a tendency to commit serious offences in the future?

[76] I accept that both Dr Goodwin and Dr Karayiannis assess your risk of offending in the future as high. However, I take a slightly different view.

[77] In the absence of any established pattern of offending or convictions for similar conduct in the past, your risk of re-offending necessarily falls to be determined by

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29 Crimes Act 1900, s 66C(4) and (5)(g) (NSW).
30 *Strootbant v R* [2018] NZCA 10 at [23].

other factors. As I read the health assessors' reports, the primary factor of concern is your history of alcohol and drug abuse. You have not been diagnosed with a mental illness or any other entrenched psychiatric issue. You have shown some insight into your offending and have taken responsibility for it, evidenced by your guilty plea and your limited expression of regret. While your social support, employment and relationship history are poor, you are not entirely alone. The continued contact you maintain with your foster mother is encouraging. Indeed, I recognise that your deportation, which was beyond your control, may have removed you from her support to some extent.

[78] It is also relevant that both doctors placed technical emphasis on the fact that you have a previous conviction for sexual offending. But, as I have indicated, I do not believe your 2012 conviction fits in the same category as your current offending such that it should bear materially on risk-assessment.

[79] However, your history of drug and alcohol abuse does give me pause for thought. The escalation in the scale of your offending coincided with an escalation in the nature and seriousness of your drug use. Prior to being deported you report using only alcohol and cannabis. But once in New Zealand you took up methamphetamine and synthetic cannabis. You used both of these drugs in a sustained way in the immediate leadup to the offending. This culminated in you committing an offence at a quite different level of seriousness when compared to what you have done in the past. In that way, it seems to me there is a clear correlation between your offending and your substance problems.

[80] The other side of that coin is that you have agreed to undertake treatment for these problems and you have demonstrated already a willingness to participate in programmes. That is shown by the two certificates you handed up at the beginning of the sentencing. And I am confident that the maintenance of your sobriety would result in a much-reduced risk of you offending seriously in the future. As it stands, you have not been given the chance to engage in intensive rehabilitation for your substance abuse problems. If you were to do so in a meaningful and committed way, I consider your risk of re-offending would be manageable.

Is there an absence of efforts to rehabilitate?

[81] This leads me to my next point. The fact that you have not received any rehabilitative treatment in the past conventionally weighs in favour of a finite sentence. At the same time, if I am satisfied that there is a reasonable possibility that you will not develop sufficient insight to engage with treatment, that would support the imposition of preventive detention.[31]

[82] I accept that there are examples where you have expressed perhaps of lack of eagerness over the prospect of rehabilitation. Mr Webby is rightly concerned by that. He points also to your lack of insight into your offending and the specific risks which you pose to the community. But given you have completed two courses since this offending I cannot conclude that you will not engage in further rehabilitation or that there is a reasonable risk you will not do so. You have taken the first step to assuming responsibility by pleading guilty. You have expressed modest, albeit inconsistent, remorse for your actions. Crucially, you state you are willing to engage in rehabilitation. Moreover, despite any apparent lack of motivation, you do not have any entrenched attitudes or mental health issues that would make your successful engagement with other rehabilitation possesses unlikely to succeed. In such circumstances, I consider the fact you have not previously had the opportunity to engage in intensive rehabilitation counts in favour of a finite sentence.

A lengthy determinative sentence is preferable

[83] Where an offender sits on the cusp of preventive detention, as I am satisfied you do, the fact that he or she has never undergone a lengthy sentence of imprisonment or been warned of the possibility of preventive detention, may tip the scales in favour of a finite sentence.[32] The Crown acknowledges that despite spending some years in prison in Australia, this period was not significant.

[84] There is also the possibility that on your release you will be subject to an extended supervision order ("ESO"). This is a factor I am entitled to take into

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31 *Jenkins v R* at [44]-[45]; see also *Pritchard v R* [2010] NZCA 403 at [40].
32 *R v MH* [2013] NZHC 709 at [69]-[70]; see also *R v Komene* [2013] NZHC 1844 at [93]-[94].

account.[33] An ESO is not an "agreeable alternative" to preventive detention,[34] but it is a "potential safety valve" which shores up the principle that a lengthy finite sentence is preferable to preventive detention.[35] In finely balanced cases, the possibility of an ESO being imposed may tip the balance in favour of a finite sentence.[36]

[85] In these circumstances, I am satisfied that the scales are tipped in favour of a finite sentence. In my view you are not likely to commit another qualifying offence when you are released. The lengthy finite sentence you have received is sufficient to protect the community.

Result

[86] Mr King, please stand. As I mentioned earlier, before imposing sentence I am obliged to give you a first strike warning. You will be given a form of the warning in writing but I do so now in oral terms.

[87] You are now subject to the three strikes law. That means two things:

(a) If you are convicted of any serious violent offences other than 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.

(b) If you are convicted of murder committed after this warning then you must be sentenced to life imprisonment. That will be served without parole unless it would be manifest1y unjust. In that event the Judge must sentence you to a minimum term of imprisonment.

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33 *R v Mist* [2005] 2 NZLR 791 (CA) at [100].
34 *R v Hutchinson* [2007] NZCA 55 at [19].
35 *Mist*, above n 33 at [101].
36 *R v Parahi* [2005] 3 NZLR 356 (CA) at [87]; see also *R v Hohaia* [2018] NZHC 254 at [48].

[88] Mr King your sentence is as follows:

(a) on the charge of sexual violation by unlawful sexual connection, I sentence you to eight years and three months' imprisonment;

(b) on the charge of abduction for the purposes of sexual connection, I sentence you to four years' imprisonment;

(c) on the charge of robbery, I sentence you to one year's imprisonment;

(d) on the charge of assault with a weapon, I sentence you to one year's imprisonment; and

(e) on the charge of possession of an offensive weapon, I sentence you to six months' imprisonment.

[89] All these sentences are to be served concurrently, in other words at the same time. I also impose a minimum period of imprisonment of five years and six months.

[90] Stand down.

Moore J

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