

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2018-090-3557
[2018] NZHC 2946**

THE QUEEN

v

ATTUL KUMAR PATEL

Hearing: 13 November 2018
Counsel: E Woolley for Crown
J A Anderson for Defendant
Judgment: 13 November 2018

SENTENCING NOTES OF WHATA J

Solicitors: Meredith Connell, Auckland

[1] Mr Patel, you appear for sentence on one charge of indecent assault. The maximum penalty is seven years' imprisonment. This is your fourth such offence in five years. Because of this, I must consider whether you are subject to what is known as a third strike sentence. If you are, you must be sentenced to the maximum term of imprisonment without parole, unless it would be manifestly unjust to do so.¹ If you are not, it is accepted by your counsel that you must be sentenced for a second-strike offence. This will mean that you must serve, in full, any sentence of imprisonment imposed by me.²

[2] My sentencing will be in three parts. First, I will describe the facts of your offending and your personal circumstances; second, I will address whether you are subject to a third strike sentence; and, third, I will sentence you.

Facts

[3] On Sunday, 22 July 2018, the complainant and her sister went to Event Cinemas at Westgate, Massey, to watch a movie. At about 4.30 pm, the complainant and her sister sat in a row of seats in one of the cinemas at the complex. Walking past several empty seats, you sat next to her. You then looked at the complainant a number of times during the movie, before you slid your right hand under the complainant's buttocks on her seat. The complainant was startled by your actions and looked to see your right hand on the seat next to her and she asked what you were doing. She then told you to move. You eventually moved one seat from the complainant. The complainant's sister then told you to get out of the theatre and you left the theatre. When asked by police about the offending, you explained that you had an issue with anxiety and cannot control your hands, and you did not know why you sat next to the complainant.

Personal circumstances

[4] I turn now to your personal circumstances. As noted, this is your fourth such offence since 2013. On the first occasion, you entered the cinema, sat next to the victim and indecently assaulted her by rubbing her leg and moving your hand up her

¹ Sentencing Act 2002, s 86D

² Section 86C.

thigh. On the second occasion in 2014, you again entered a cinema, sat next to the victim and placed your hands on her bare upper leg. This happened on three separate occasions before she pushed you away and you left the theatre. You were convicted and sentenced for both offences in the Waitakere District Court on 13 May 2014. You received a first strike warning verbally and in writing for these offences. You were sentenced to 18 months of intensive supervision and 230 hours of community work. You were also ordered to pay \$400 in reparation.

[5] The next indecent assault occurred on 22 January 2017. Again, you entered a cinema, sat next to the victim and indecently assaulted her by rubbing your hand up and down her thigh. It is accepted that you were given a verbal second strike warning for this offending, but a written notice of the consequences of the warning was not sent to you. Rather, you were sent another first strike warning letter. You were sentenced to two years intensive supervision and six months community detention. You also have convictions for other offending, including being in a building unlawfully, driving while disqualified, drink driving and offensive behaviour.

[6] In terms of your wider personal circumstances, I have the benefit of three expert reports about you. Ms Chapman, a counsellor employed by Te Tai Awa o Te Ora, notes that you are remorseful about your offending and that extreme anxiety is a trigger for it. She says that you are receptive to counselling and other therapy.

[7] Dr Goodwin, a psychiatrist, says that you have been diagnosed as suffering from generalised anxiety disorder, dissociative amnesia, avoidant personality traits and depression. Dr Goodwin also observes that you suffer from Obsessive Compulsive Disorder (OCD) and you have previously been placed on medication to treat this. In Dr Goodwin's view, your behaviour is driven by your OCD which causes you to experience strong compulsions to touch others or stroke their hair. He says that a month or so before the present offending, you stopped taking your medication. Dr Goodwin believes that when medicated, your risk of reoffending is low.

[8] Finally, Ms Visser, a clinical psychologist, has been treating you following referral by Dr Goodwin. She says that you have taken steps to prevent your offending, including avoiding cinemas and making sure your wife observes you taking your

medication. She says that you experience disassociation because of severe anxiety caused by a history of abuse and neglect. In her opinion, your offending is not driven by sexual deviance. She, nevertheless, recommends you continue to engage in full treatment.

[9] I also note that you have a degree in accountancy and that you are currently employed as an accountant. You have been married for 22 years and have two children aged 22 and 17. Furthermore, you have strong supporting references and, as Ms Visser observes, your offending is not characteristic of your general behaviour or your lifestyle.

[10] Before I turn to whether you are subject to a third strike offence sentence, I wish to touch upon the victim impact statement. The victim of your offending is a relatively young woman. Since the event, she has struggled for weeks and months to make a trip to any cinema. Indeed, since the incident she finds it physically difficult and, indeed, cannot step inside a cinema. She says the incident has also affected her outlook on life and made her mistrustful of people that she would not normally be bothered by. She also finds herself extremely upset when thinking back to the event.

Second strike sentencing

[11] Dealing then with the form of sentence. Before handing down a sentence, as foreshadowed, I must address whether you must face what is known as a “third strike” sentence. Section 86C(1) states:

- (1) When, on any occasion, a court convicts an offender of 1 or more stage-2 offences other than murder, the court must at the same time—
 - (a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-2 offence for which the offender is being convicted); and
 - (b) record, in relation to each stage-2 offence, that the offender has been warned in accordance with paragraph (a).

[12] Section 86C(3) also stipulates:

On the entry of a record under subsection (1)(b), the offender has, in relation to each stage-2 offence for which a record is entered, a record of a final warning.

[13] Section 86C(4) then provides:

- (4) If the sentence imposed on the offender for any stage-2 offences is a determinate sentence of imprisonment, the court must order that the offender serve the full term of the sentence and, accordingly, that the offender,—
 - (a) in the case of a long-term sentence (within the meaning of the Parole Act 2002), serve the sentence without parole; and
 - (b) in the case of a short-term sentence (within the meaning of the Parole Act 2002), not be released before the expiry of the sentence.

[14] All of this then bears on the operation of s 86D, which sets down the minimum sentence for stage three offending, that is, a serious violence offence committed after the offender had a “record of final warning”. Section 86D(2) states:

Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.

[15] However, s 86C(7) directs:

The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (1)(a).

[16] Both your counsel, Mr Anderson, and Ms Woolley, for the Crown, submit that s 86C(7) requires a written warning of the consequences of a second-strike offence to be given, and that the failure to do so means that you should be sentenced on the basis you received a first strike warning only. I agree.

[17] Judge David Harvey, with respect, thoroughly and cogently addressed this issue in the context of a purported first strike warning in the case of *R v Allen*.³ The Judge concluded:

³ *R v Allen* [2017] NZDC 14972.

[34] There is a further reason for ensuring the written warning is given. For some defendants the sentencing process is a frightening one which may well affect their concentration. Also, many defendants are interested solely in how long a sentence they are to receive and have little focus on anything else. Given the importance of the strike warning it is vital that in addition to the verbal warning the consequences of further like offending are reinforced with the written warning to ensure a defendant is fully and fairly informed of his or her position.

[35] It is clear that this was the intention of Parliament as earlier discussed. Accordingly, it is not, in my view, appropriate to regard the failure to serve the written notice as simply being an administrative oversight. In order for a first strike warning to be valid, a written notice must be given in accordance with the section. To hold otherwise would be to totally ignore the mandatory language of the subsection.

[18] I would simply add that any purported “record of final warning” is imperfect and invalid for the purpose of s 86D(3) unless and until the statutory duty at s 86C(7) is discharged. This outcome accords with observation of the Court of Appeal in *DO v Police*, also cited by Judge Harvey:⁴

In the three strikes regime, Parliament recognised a need for warnings not because offenders must be given express notice of the law in advance, but because the penalty that would follow for a second or third offence, as the case may be, is very likely to be disproportionate but for the warning

[19] I therefore proceed on the basis that because you offended without a valid record of final warning, but were at the time subject to a record of first warning, you must be sentenced on the basis that the current offending is, in fact, a second stage offence.

Sentence

[20] I now turn to your sentence. I can do so relatively briefly. Your offending is low end offending of this type – a fleeting touch to the buttocks. Nevertheless, it was highly distressing to the victim – understandably, she felt violated and completely unsafe. I therefore adopt a starting point of six months’ imprisonment. This falls within the range for such offending approved by the Court of Appeal in *R v H*.⁵

⁴ *DO v Police* [2016] NZCA 420 at [14].

⁵ *R v H* CA 221/05, 17 October 2005. See also *Chugh v Police* [2015] NZHC 2356 and the cases cited therein at [29]-[31].

[21] Your prior offending, together with your decision to stop taking medication, are aggravating factors warranting an uplift of four months. While this is a substantial uplift on a start point of six months, the repetitive nature of the offending, together with the ineffectiveness of previous deterrent sentences and, importantly, your decision to stop taking your medication, mandates such an uplift. This takes the start point to 10 months.

[22] Turning to mitigating factors, plainly your mental health disorders contribute to your offending. They are also relevant to your rehabilitation. Management and treatment of your anxiety and OCD will appreciably reduce your risk of reoffending. I also understand that you have taken active steps to address this. This warrants a 20 per cent discount.

[23] You are deeply remorseful. This warrants a 10 per cent discount.

[24] You are entitled to a discount of 25 per cent for guilty plea.

[25] Accordingly, if I were to impose a sentence of imprisonment, it would be in the order of five months.

[26] However, I am not going to impose a sentence of imprisonment. Rather, I propose, as your counsel suggests, a sentence of home detention, including conditions that you must take your medication. This sentence will serve the principles of deterrence and denunciation and should make clear to you that your offending is not at all acceptable. Furthermore, given the relationship between your offending and your anxiety, it is clear that the best place for you is at home – a safe, supportive environment where you can focus on getting well and address your mental health needs.

[27] As a result, Mr Patel, please stand. I impose a sentence of home detention of five months. It will be a condition of your sentence that you take your medication. I have not adopted the standard one-half reduction from the term of imprisonment, because I consider home detention of this length is necessary to drive home to you both the seriousness of your offending and the need to get better.

[28] I also note it would be my preference that you be able to continue your employment. I also impose standard post-release conditions for the full period of twelve months after detention, together with the following special post-release condition, namely, that you continue to receive treatment with Dr Goodwin and/or Ms Visser and/or any other person approved by your probation officer. You must also make an emotional harm payment of \$500 to the victim.

[29] I am about to give you your formal second-strike warning. But before doing so, I want to stress to you in simple terms, Mr Patel, that if you do this again, you will be sentenced to a term of imprisonment of seven years.

[30] As to the second-strike warning, I note:

Given your conviction for indecent assault you are now subject to the three strikes law.

This is now your final warning which will explain the consequences of another serious violence conviction. You will also be given a written notice outlining these consequences, which lists these 'serious violent offences'.

1. If you are convicted of any serious violent offence other than murder or manslaughter, then you will be sentenced to the maximum term of imprisonment for each offence. That will be served without parole or early release unless it would be manifestly unjust.
2. If you are convicted of manslaughter committed after this warning, then you will be sentenced to imprisonment for life. The Judge must order you to serve at least 20 years' imprisonment unless the Judge considers it would be manifestly unjust to do so, in which case the Judge must order you to serve a minimum sentence of at least 10 years' imprisonment.
3. If you are convicted of murder after this warning then:
 - (a) you must be sentenced to imprisonment for life. The Judge must order that you to serve this sentence without parole unless it would be manifestly unjust to do so;
 - (b) if the Judge finds that it is manifestly unjust to do so then the Judge must impose a minimum period of imprisonment of at least 20 years unless that would be manifestly unjust, in which case the Judge must sentence you to a different minimum period of imprisonment.
4. If you are sentenced to preventive detention you must serve the maximum term of imprisonment of the most serious offence you are convicted of unless a Judge considers that would be manifestly unjust.

[31] Mr Patel, please stand down.