**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 86/2007**
**[2008] NZSC 8**

**STEPHEN PETER TANDY**

v

**THE QUEEN**

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: P T R Heaslip for Applicant
S B Edwards for Crown

Judgment: 22 February 2008

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

**REASONS**

[1] The applicant seeks to appeal a sentence of eight years for rape, imposed by the Court of Appeal on a Solicitor-General's appeal. He had been convicted in the District Court after pleading guilty part-way through trial and after the complainant had given her evidence in chief and been cross-examined on behalf of two co-defendants. Judge Hubble sentenced the applicant to 6½ years imprisonment. The Court of Appeal increased the sentence on the basis that the sentence was manifestly inadequate and had been arrived at by the sentencing Judge on an erroneous basis.

[2] The complainant was a vulnerable 14 year old who had run away from home. She fell in with a crowd of young men and went with them to the grounds of a school where they began drinking. The applicant, who was 17 years at the time of the offence, sexually violated the complainant in the presence of the other young men and with their assistance. At the time, the applicant knew that the complainant had already been sexually violated by others in the group.

[3] It was apparent on the face of the Judge's sentencing remarks that he had made an error in arriving at the sentence he imposed. He had double-counted the allowance he made for the applicant's guilty plea. The Court of Appeal accepted that the effective discount of 2½ years for the guilty plea was too high both by reason of the double-counting and in application of the approach to late guilty pleas adopted in *R v Fonotia*[1] and *R v C*.[2] In addition, the Court of Appeal accepted the Solicitor-General's contention that the sentencing Judge had adopted a lower starting point than the eight years indicated by *R v A*,[3] a decision which has been a guideline for rape sentencing for nearly 15 years and which has been recently affirmed by the Court of Appeal.[4] Moreover, the Court of Appeal pointed out that the sentencing Judge had been wrong to distinguish the case of *Solicitor General v Mihaka & Taia*,[5] which indicates that a starting point of 12 years would not have been out of line for the offending here.

[4] The applicant claims that the Court of Appeal erred in law in discounting the allowance for his guilty plea because of the late stage at which the plea was entered. He criticises the Court of Appeal for its failure to recognise that the offending was opportunistic rather than deliberately predatory, as in *Mihaka & Taia*. He contends that the Court of Appeal failed to take into account his remorse. In addition, it is said that the Court of Appeal was in error of law in "failing to acknowledge the unfettered right of a trial judge to issue a merciful sentence".

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1 [2007] 3 NZLR 338.
2 (Court of Appeal, CA 51/00, 22 September 2003.)
3 [1994] 2 NZLR 129.
4 In *R v Tawha* (Court of Appeal, CA 396/02, 26 February 2003) and *R v Takiari* [2007] NZCA 273.
5 (Court of Appeal, CA 397/98, 23 February 1999.)

[5] In so far as the grounds advanced claim error in the reasoning adopted by the Court of Appeal, they are misconceived. The sentencing Judge did not indicate in his sentencing remarks that he was invoking a discretion to be merciful. Indeed, the Court of Appeal correctly viewed the sentencing Judge as having not been prepared to make allowance for remorse on the part of the applicant. The sentence imposed was arrived at by a flawed process which entailed double-counting of the discount for guilty plea. This was a case where error in the sentence required the Court of Appeal to reconsider it. The Court was entitled to regard the circumstances as limiting the discount for guilty plea available, especially in the absence of acceptance by the sentencing Judge of the applicant's remorse. There is no question of the imposition of any impermissible "fetter" on the sentencing Judge's discretion. The offending was serious. The Court of Appeal rightly considered that *Mihaka & Taia* was not properly distinguishable. On that authority, a starting point higher than eight years would have been warranted.

[6] In addition to the grounds based on the reasoning adopted by the Court of Appeal, the applicant seeks to make a general attack on *R v A* and the starting level it suggests. As noted earlier, the guideline adopted by the Court of Appeal in *R v A* has been applied for nearly 15 years and has recently been affirmed. The Court of Appeal is the court with the principal responsibility for keeping sentence levels under review. This court will be reluctant to interfere with its assessment, except where it is clear that some error of principle has been made in the setting of appropriate sentencing levels. That is not the case here. Moreover, the enactment of the Sentencing Council Act 2007 establishes a Sentencing Council which is to supervise sentencing levels for the future. It would be inappropriate for this court to anticipate any revision the Sentencing Council, when established, might make under its legislation.

[7] No matter of general or public importance is raised by the proposed appeal. No basis for concern about any substantial miscarriage of justice has been identified. We decline leave.

Solicitors:
Paul Heaslip, Auckland for Applicant
Crown Law Office Wellington for Respondent