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OF THE CRIMINAL PROCEDURE ACT 2011.**

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

**I TE KŌTI MATUA O AOTEAROA  
WHANGĀREI-TERENGA-PARĀOA ROHE**

**CRI-2021-088-1448  
[2024] NZHC 376**

**THE KING**

**v**

**MARK DAVID JOHN FRANKLIN**

Counsel:	G A Kelly for Crown W D McKean and J M G Riley for Defendant
Sentenced:	29 February 2024
Charges:	Indecent assault in a young person; Sexual violation by unlawful sexual connection
Plea:	Not Guilty

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**SENTENCING NOTES OF BREWER J**

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Solicitors:  
Meredith Connell (Auckland) for Crown  
WRMK Lawyers (Whangārei) for Defendant

## **Introduction**

[1] Mr Franklin, on 21 May 2023 a jury in the District Court found you guilty of indecent assault on a young person<sup>1</sup> and sexual violation by unlawful sexual connection.<sup>2</sup> Your victim was a 13 year old boy.

[2] You are being sentenced in this Court because the Crown contends that you should be sentenced to preventive detention. Preventive detention is an indefinite sentence. Your lawyer, Mr McKean, submits that preventive detention is not appropriate and that a finite term of imprisonment would be adequate to protect the public.

[3] Mr Franklin, I am sorry I cannot simply tell you what your sentence is going to be. I know that is what you are in court to learn. But my audience here goes beyond you. The remarks that I make have to be understood also in their legal context, possibly by courts higher than mine. So, you are just going to have to bear with me while I say what I have to for those other audiences.

[4] I will first decide what your finite term of imprisonment would be and then decide whether, instead, you should be sentenced to preventive detention.

## **The facts**

[5] Your offending occurred during a three month period between June and August in 2015. At that time you were on parole for earlier offending.

[6] The victim, who I call N, was the brother of S. You and S were in a relationship. N frequently visited S's home. N was 13 and you were 29.

[7] N became close to you and regarded you as a father figure. You encouraged that. N was experiencing difficulties at home with his own mother and stepfather.

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<sup>1</sup> Crimes Act 1961, s 134(3). The maximum penalty is seven years' imprisonment.

<sup>2</sup> Sections 128(1)(b) and 128B. The maximum penalty is 14 years' imprisonment.

[8] The charge of indecent assault arose from an incident in the living room of S's house. S left the room. You and N were alone on a couch. You told N that you wanted to show him something and then grabbed his penis and testicles over his clothing, holding him for around 10 seconds. You asked N how it felt. He did not know how to respond.

[9] On a later day at S's home, N was having a shower. When he got out of the shower you came into the bathroom and approached him from behind. You leant over N, removed your trousers and underwear and began to masturbate yourself. You then held N firmly by his torso and inserted your penis into his anus. You made thrusting movements for a time before stopping and leaving the bathroom. N described your conduct as rough, uncomfortable and painful.

[10] It took N some years before he felt able to disclose your offending. He suffered significant consequences from your offending and continues to do so. I have read his victim impact statement. He has been diagnosed with complex post-traumatic stress disorder and takes medication for ongoing anxiety and depression. Following your offending, N sought to self-medicate by smoking cigarettes and consuming alcohol. It got to the point where he was engaging in self-harm. N left high school as soon as he turned 16 years, struggling with the academic load. You have damaged N significantly.

### **Finite sentence**

[11] I now assess what would be your finite sentence if I impose one. First, I will set a starting point by looking at the nature and extent of your offending. I will then consider whether there is anything in your personal circumstances that means the starting point should be adjusted, either up or down.

[12] There is a guideline case called *R v AM*.<sup>3</sup> The case sets out sentencing bands for sexual violation. In deciding where your case fits, I look at the facts that go to the seriousness of your offending.

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<sup>3</sup> *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

[13] The first factor is N's age and vulnerability. He was 13. You were 29. The offending took place in his sister's home, a place where he felt safe and secure. N did not have a settled home life and was having trouble with his mother and stepfather

[14] Second, your offending was a breach of the trust that N had in you. You were a role model in N's life, akin to a father figure. N's sister trusted you to care for him. You breached the trust given to you.

[15] Third, there were two separate instances of offending.

[16] The Crown submits your offending was premeditated and planned. There was a degree of premeditation, particularly with the sexual violation offence, but it was equally opportunistic and exploitative. I will not give weight to this factor.

[17] The Crown also submits that the fact that the offending occurred at the sister's home justifies a more significant sentence. I think this factor is part of N's overall vulnerability and part of your breach of trust. I will not give it weight as a separate factor.

[18] I have been referred to a number of cases which are said to be similar to yours.<sup>4</sup> However, all cases inevitably have differences as well as similarities. I will give greater weight to the discussion around the cases in *R v AM*.

[19] Given the aggravating factors I have identified, I find that your offending falls between band 1 and band 2 of *R v AM*. Band 1 carries a starting point between six and eight years' imprisonment. Band 2 carries a starting point between seven and 13 years' imprisonment.

[20] I adopt an initial starting point of eight years' imprisonment for your offending against N. I now turn to your personal factors to see whether this starting point should be adjusted upwards or downwards.

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<sup>4</sup> *R v Wirangi* [2007] NZCA 25; *R v Stusky* [2009] NZCA 197; and *R v Anderson* CA199/05, 2 November 2005.

[21] I have to take into account that this offending occurred while you were on parole. I also have to take account of your relevant criminal record. In 2009, you were convicted of seven offences which occurred on 21 August 2008. One conviction was for the rape of a female and another was for unlawful sexual connection with a female. You were sentenced to eight years' imprisonment. Your victim was 17 at the time and you were 20. You raped the victim after she refused to begin a sexual relationship with you.

[22] Taking into account the totality of your offending, I would increase the initial starting point by nine months for these factors, to make a total of eight years and nine months' imprisonment.

[23] I have been asked by Mr McKean to take into account your family background. You are now 36 years old. You have moved between Australia and New Zealand throughout your life. Your parents separated when you were approximately one year old and you were raised by your father and stepmother.

[24] You began to get into trouble at an early age. At the age of 15 you were placed in a boy's home. You perceived that your father and stepmother rejected you and you felt abandoned. You began committing relatively minor crimes.

[25] I do not see any causative link between your unhappy childhood and your present offending. I will not decrease the starting point. Accordingly, your finite sentence would be eight years and nine months' imprisonment.

[26] I would also impose a minimum period of imprisonment.

[27] You were first released on parole in relation to the 2008 offending between 7 April 2015 and 30 May 2015. You were recalled to prison and then released back on parole between 24 June 2015 and 10 August 2015. You had been back in the community for only about three months before you committed the offending for which you are being sentenced. I consider that a longer minimum period of imprisonment than the standard one-third is required to hold you accountable for the harm done to

N, to denounce your conduct, to deter you from similar offending and, importantly, to protect the community from you.

[28] The Crown submits that a minimum period of imprisonment of two-thirds is appropriate. Mr McKean accepts that a finite sentence would be lengthy. However, if I were to order a finite sentence, I would still have regard to the reports by Dr Skipworth and Ms Young as to your likelihood of reoffending. They assess a significant level of risk of further offending. I need to protect the community.

[29] I would impose a minimum period of imprisonment of two-thirds, which would equal five years and 10 months.

### **Preventive detention**

[30] I now consider preventive detention. For the offending against N, you are eligible for a sentence of preventive detention. A sentence of preventive detention is not a punishment. Its purpose is to protect the community from those who pose a significant ongoing risk to the safety of its members. If I conclude that you are likely to commit another qualifying offence when you are released at the end of any finite sentence, then I may sentence you to preventive detention. Preventive detention is not a sentence of last resort. However, a finite sentence is preferable when it would adequately protect the community.

[31] There are factors I must take into account in deciding whether preventive detention is appropriate. The first is whether there is any pattern of serious offending disclosed by your history. When deciding that, I have to look at you as you are now. That is to say, I do not pretend that we are back in 2015 at the time of your offending.

[32] In 2017, you committed a series of violent assaults against N's sister. One of the charges for which you were convicted was kidnapping, which is a qualifying offence for preventive detention. In 2018, you were sentenced to preventive detention for this offending.<sup>5</sup> But the Court of Appeal overturned that sentence and substituted

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<sup>5</sup> *R v Franklin* [2018] NZHC 1868.

a sentence of three years two months and 15 days' imprisonment.<sup>6</sup> Of course, no-one knew then about your offending against N.

[33] Dr Skipworth and Ms Young consider your history in detail. There were definite sexual overtones in your violent offending against S. Having considered the reports of the experts and looked at your criminal history, I find that you do have a pattern of serious offending.

[34] I must also consider information indicating a tendency to commit serious offending in the future. Again, the reports from Dr Skipworth and Ms Young are very detailed and very thorough. Both assess you as having what I will term a significant risk of committing serious offending in the future. I agree. The way you regard relationships, and the way you react to others you consider close to you, mean that you are now, and will be for years to come, a significant risk to the community. And this is despite the very considerable therapeutic programmes you have engaged with.

[35] I next consider the seriousness of the harm to the community caused by your offending. Sexual offending of this nature against children causes extreme harm not only to the victims but also to their families. I have already talked about the harm caused to N. This is a significant factor.

[36] I also have to consider your efforts to address the causes of your offending. Again, both Dr Skipworth and Ms Young go into considerable detail about the efforts you have made. As I have said, you have participated in intensive programmes, both collective and individual, designed to reduce your risk. The health assessors have taken that into account in assessing your risk. It is true that you have not been treated for child sexual abuse. But, you deny the offending anyway.

[37] Mr McKean, appropriately, submits that the reports I have from Dr Skipworth and Ms Young are flawed because they do not have regard to two psychological reports describing your further progress while in prison for your 2017 offending and after you were released. You were released in 2020. The reports say that you made significant treatment gains. However, both Dr Skipworth and Ms Young assessed you

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<sup>6</sup> *Franklin v R* [2018] NZCA 495.

as you currently are, and their assessments include the offending for which you are now being sentenced. Ms Young, in particular, has the view that because you self-reported in an apparently candid way, the psychologists who were helping you in prison took you at face value. In any event, their reporting did not include the offending against N because no-one knew about that.

[38] I must also take into account whether a further extended supervision order (ESO) when coupled with a finite sentence of imprisonment would be sufficient to ameliorate your risk to the public. However, your record shows that ESOs are insufficient to protect the public. Your sentence for the 2009 offending ended on 7 December 2016. A 10-year ESO was imposed on 8 January 2017. It failed to protect S. Shortly after your release you got in touch with S and began a covert relationship with her knowing that was in breach of your ESO conditions. You went on to offend against her shortly afterwards.

[39] The reports of the health assessors as to your motivations for offending, embedded as they are within your psychological makeup, lead me to conclude that the availability of a further ESO, if coupled with a finite sentence, would be insufficient protection for the public.

[40] Overall, I find that an indeterminate sentence for you has the advantage that your future release from custody could only occur at a time when the Parole Board determines that your release on specified conditions would not pose an undue risk to the safety of the community. A finite sentence would not provide such protection for the community and would be inadequate.

[41] When a court sentences an offender to preventive detention it must also order that the offender serve a minimum period of imprisonment of not less than five years. The actual minimum period must be the longer of that required to reflect the gravity of the offence or that required for the purposes of the safety of the community in the light of the offender's age and risk.

[42] If I were to sentence you to a finite sentence, I would impose a minimum period of imprisonment, as I have said, of five years and 10 months. I reached that figure

largely in response to the health assessors' view of your future risk, as well as responding to the gravity of your offending. Therefore, that is the period I will impose.

### **Sentence**

[43] Mr Franklin, on the charge of sexual violation by unlawful sexual connection, I sentence you to preventive detention. I impose a minimum period of imprisonment of five years and 10 months.

[44] On the charge of indecent assault on a young person, I sentence you to one year and six months' imprisonment. Of course, this is concurrent with the sentence of preventive detention.

[45] You may stand down.

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Brewer J