

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html>**

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

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CRI-2017-085-3042  
[2019] NZHC 290**

**THE QUEEN**

v

**KEVIN PATRICK LEAHY**

Hearing: 28 February 2019  
Counsel: J M O’Sullivan for Crown  
B Crowley for Defendant  
Sentencing: 28 February 2019

---

**SENTENCING NOTES OF THOMAS J**

---

**Introduction**

[1] Mr Leahy, you appear for sentence having been found guilty by a jury of one charge of assault with intent to commit rape.<sup>1</sup>

[2] In sentencing you, I will first consider the appropriate sentence in the context of the facts of your offending, the impact on the victim, your personal circumstances,

---

<sup>1</sup> Crimes Act 1961, s 129(2); maximum penalty 10 years’ imprisonment.

and the pre-sentence and other reports. I will then consider whether that sentence is sufficient to meet the need to protect the community from you.

### **Facts**

[3] In the early hours of 24 November 2017, you and the victim were in Cuba Mall, Wellington. The victim was extremely intoxicated. You grabbed her by the hair and threw her on the ground. You lay down next to her, attempted to kiss her, tried to pull her pants down and tried to knock her out by punching her in the face. You stood up to check no one else was present and then knelt down to remove the victim's pants while she pushed you away forcibly with both hands.

[4] You tried to move the victim, who was semi-conscious at this stage. You picked her up from under her arms and dragged her behind a kiosk. She was repeatedly saying "no" and asking you to stop. You exposed her breasts, took down her pants and started to take off your own. You were interrupted by three members of the public who were passing by. They responded to the victim yelling for you to leave her alone. One of the witnesses reported hearing the victim refer to "rape" and one witnessed her fighting you off while sobbing. You pulled up your pants and left the scene. The police located you not far from where you left the victim.

[5] The victim suffered swelling, bruises and abrasions to her face, as shown in police photographs taken the night of your offending.

### **Views of the victim**

[6] The victim was known to you, having met you through a mutual acquaintance. She has been homeless in the past and considers the streets her second home, often choosing to sleep there. She has not provided a victim impact statement but in her evidence at trial she said she felt violated by your actions.

### **Personal circumstances**

[7] You are 59 years old. Your life has been one of hardship from the beginning. At the age of three, you were uplifted from your parents' care by state officials, given concerns of neglect. From then until the age of seven, you were placed with numerous

foster care families. From the age of seven, you remained with one foster family. You were made to work on their farm and were subject to cruelty and abuse, including sexual abuse, while in their care. At age 15, you ran away. You left school at the same time, without qualifications, and began a variety of jobs, including farm work and truck driving.

[8] You began drinking at the age of nine, in part to block out the abuse you suffered. Your records show 24 admissions to health facilities for alcohol related issues, starting in 1978. You have attempted several times to stop drinking, with several periods of extended contact with residential health care facilities. You were sober for some time in your forties but relapsed when your long-term relationship broke up. You were in the care of Community Alcohol and Drug Services at the time of the present offending. Notes from that service indicate you are able to maintain sobriety for several months but invariably relapse. The doctor at the service noted their reluctance to resume inpatient treatment due to your repeated failure to translate emergency care and short-term sobriety into long-lasting change. In 2018, you reported drinking either a litre of vodka or half a litre of methylated spirits per day. You are currently sober on account of being held in custody. You report being pleased about this, saying that you consider returning to alcohol will ultimately kill you.

[9] Your chronic alcohol abuse has clearly been a lifelong struggle for you. It has had a significant impact on your health. You have cerebral degeneration, mild cerebral atrophy and have suffered a seizure resulting in a subdural haematoma still apparent in brain scans. Consequently, you suffer chronic headaches. Your cognitive function is impaired, as is your gait and coordination, and you suffer resting tremors in your hands.

[10] In addition to the issues resulting from alcohol abuse, your medical records show significant psychological issues. You have been diagnosed with depression and have attempted suicide on numerous occasions, most recently in early 2018. Your mental health has presently improved to the extent that you do not currently have such plans. You are taking a variety of medications and have been monitored in the at-risk unit in prison.

[11] You were previously in a long-term relationship and have four children. You describe that relationship as tumultuous and indeed you have convictions for family violence, as well as convictions for assaulting one of your children. When the relationship broke up, you came to Wellington. You could not find work because of your problems with alcohol. You were for a time homeless but at the time of the offending you had rental accommodation and received a benefit.

[12] You have amassed a considerable criminal history of some 91 offences since you were 19. That includes convictions for burglary, theft, violence, breach of a protection order and driving with excess breath/blood alcohol. You have been subject to sentences of imprisonment as well as community-based sentences. Breaches of the latter sentences and bail conditions have resulted in still more convictions. Relevant to the current offending, you have four convictions for sexual connection with a young person from 2015 (the 2015 convictions), for which you were sentenced to two years' imprisonment and received your first strike warning. At the time of the present offending, you were subject to a sentence of supervision following conviction on possessing a knife in a public place and breaching release conditions.

### **Presentence report**

[13] You displayed a significant lack of remorse to the presentence report writer. You gave conflicting statements of the offending, initially denying any wrong doing, and then describing specific actions you took against the victim, and saying it was for her pleasure and not yours. This gave rise to concerns regarding your perception of your offending, and your inability to understand its seriousness. The writer concluded you have a high risk of reoffending with a high risk of harm to others.

[14] Additional concerns noted were your limited support in the community and the assessment you are at high risk of alcohol and methamphetamine abuse. The report writer considered your substance abuse issues would be best addressed in a custodial setting. Your struggles with alcohol in particular are evident in your criminal history, which also illustrates your poor compliance with community-based sentences.

## Starting point

[15] I turn now to assessing a starting point for the offending. That involves an assessment of your culpability in your offending. There is no guideline judgment for attempted rape. However, the culpability factors in the guideline judgment for sexual violation are relevant.<sup>2</sup> In setting the starting points, I have taken into account the following aggravating features:

- (a) *Associated violence and abduction.*<sup>3</sup> You grabbed the victim by the hair and moved her to a secluded location to avoid detection. You punched her in the face to subdue her. While I acknowledge this type of behaviour can be considered inherent in the charge, these actions require specific comment.
- (b) *Vulnerability.*<sup>4</sup> The victim was particularly vulnerable because she knew you, was alone with you and highly intoxicated in the early hours of the morning. You exploited that. Your own intoxication does not render the victim any less vulnerable.
- (c) *Extent of harm.*<sup>5</sup> The victim suffered bruises from punching and no doubt also significant emotional harm inherent in this type of offending.
- (d) *Planning and premeditation.*<sup>6</sup> Your actions were predatory and your actions in looking out for passers-by and moving the victim to a secluded area show planning and premeditation. Your intoxication, in and of itself, does not render your offending less premeditated in light of these clear predatory steps.

---

<sup>2</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750; and *Bowman v R* [2014] NZCA 92 at [17].

<sup>3</sup> Sentencing Act 2002, s 9(1)(a); and *R v AM*, above n 2, at [38] and [40].

<sup>4</sup> Section 9(1)(g); and *R v AM*, above n 2, at [42].

<sup>5</sup> Sections 9(1)(d) and 9A(2)(b); and *R v AM*, above n 2, at [44].

<sup>6</sup> Section 9(1)(i); and *R v AM*, above n 2, at [37].

[16] The Crown submits the scale of the offending<sup>7</sup> was the most serious of this kind. I do not agree. I have not considered this an aggravating feature in setting the starting point.

[17] There are no mitigating features of the offending.

[18] The Crown submits your offending is similar to cases which have attracted a starting point of between five and six years' imprisonment,<sup>8</sup> with the combination of aggravating features warranting a starting point at the upper end of that scale.

[19] Mr Crowley submits the cases referred to by the Crown are not comparable as most involve child complainants and more serious aggravating factors than those present in your offending. I disagree. *Ross v R* involved a 28 year-old complainant who was dragged off the street into the bushes at night by the defendant. Force was used in an attempt to subdue the complainant, including punches to the face. A starting point of five years, six months' imprisonment was adopted by the High Court and upheld on appeal.<sup>9</sup>

[20] I consider your offending to be most similar to that in *Ross v R*. A starting point of five years, six months' imprisonment is appropriate.

## **Uplift**

[21] The 2015 convictions warrant an uplift. This involved offending against a 15 year-old victim when you were in your mid-50s. The sentencing Judge noted the victim's vulnerability, not only by reason of her age but also her limited emotional and intellectual development, something he said would have been obvious to you. The concerns with your behaviour led the Department of Corrections to apply for an extended supervision order on your release from prison. This was declined in April 2017 and the offending for which you are to be sentenced occurred in November 2017.

---

<sup>7</sup> Section 9(1)(e); and *R v AM*, above n 2, at [47].

<sup>8</sup> *Pesefea v R* [2016] NZCA 35; *Ross v R* [2013] NZCA 263; *R v M* HC Whangarei CRI-2011-027-567, 12 March 2012; *R v Keen* [2010] NZCA 112. *Pesefea* concerned a conviction for attempted sexual violation but the Court of Appeal has considered the distinction of no significance for sentencing purposes: *R v Hassan* [1999] 1 NZLR 14 (CA).

<sup>9</sup> *Ross v R*, above n 8.

The Crown also points to your repeated breach of release conditions from your 2015 sentence of imprisonment as evidence of your continued disregard for the law.<sup>10</sup>

[22] You were sentenced on 14 September 2017 to one years' supervision on the fifth breach of release conditions imposed in respect of the 2015 convictions. You, therefore, offended while subject to that sentence.

[23] The Crown submits an uplift of 12 to 18 months is appropriate to account for these aggravating factors. Uplifts as high as 20 per cent have been upheld by the Court of Appeal for convictions for previous offences of the same nature, offending while subject to release conditions for that offending and offending soon after being released from prison.<sup>11</sup>

[24] In light of the proximity of the 2015 convictions, five convictions for breaching release conditions associated with your prison sentence for the 2015 convictions and the fact of offending while subject to sentence, I impose an uplift of 12 months' imprisonment.

### **Personal mitigating circumstances**

[25] Mr Leahy, your difficult background is clear from the reports before me. You lived a childhood of abuse, both physical and mental, which led you to abuse alcohol at nine years old. As Mr Carlyon, a clinical psychologist who assessed you, noted:

29 Mr Leahy was raised in circumstances where he was subject to significant instability, disconnection from his family of origin and traumatic experiences. His experience of trauma and disrupted attachment is likely to have had a significant detrimental effect upon his view of himself, others and the world around him. Furthermore, his early sexualisation may have distorted Mr Leahy's understanding about sexual norms and legal obligations.

[26] The obvious difficulty that comes with your upbringing has been compounded by the medical complications you face to which I have already referred.

---

<sup>10</sup> Mr Leahy has five convictions for breach of release conditions following the 2015 conviction for sexual connection with a young person: 2015 (two months' imprisonment); 2016 (two months' imprisonment); 2016 (three months' imprisonment); 2016 (14 days' imprisonment); 2017 (one years' supervision).

<sup>11</sup> *Lavea v R* [2014] NZCA 192 at [24].

[27] Dr Hansby, the psychiatrist who assessed you, linked your cognitive impairments, paired with alcohol abuse and the presence of a vulnerable victim, to your future risk of offending.

[28] Discounts for mental disorders which fall short of insanity have been held to moderate culpability where they are causative of the offending.<sup>12</sup> Discounts of five to ten per cent discount may also be appropriate to recognise significant personal trauma.<sup>13</sup>

[29] I consider a discount of six months appropriate in light of your cognitive impairments<sup>14</sup> and your traumatic background. The expert reports addressed below refer to these factors and the complex treatment and rehabilitation which is required as a result. The prison authorities must give priority to your assessment and treatment.

### **Finite sentence**

[30] That calculation would take your finite sentence to six years' imprisonment. As you were given a second-strike warning upon conviction, any finite sentence imposed must be served without parole. Had the three-strike regime not applied, I would have ordered a minimum non-parole period of two thirds, namely four years' imprisonment, as the period necessary to deter and denounce your offending as well as protect the community<sup>15</sup>

### **Preventive detention**

[31] The Crown submits that a sentence at that level, even if served without parole, would be inadequate to protect the community from you. The Crown requests that I consider imposing a sentence of preventive detention. The assessment is two-stage.

---

<sup>12</sup> *Nelson v R* [2014] NZCA 121 at [22].

<sup>13</sup> *Solicitor-General v Heta* [2018] NZHC 2453 at [65]. Ms Heta suffered a traumatic childhood of alcohol abuse and isolation from positive whanāu and other pro-social influences which significantly impaired her wellbeing and life choices.

<sup>14</sup> This discount reflects Mr Leahy's underlying cognitive impairments alone rather than any alcohol consumption that may have been associated with the offending as per *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775 at [55].

<sup>15</sup> Sentencing Act 2002, s 86C(6).

First, it requires three threshold criteria to be met.<sup>16</sup> Secondly, if those criteria are met, it requires a discretionary assessment of five statutory factors.<sup>17</sup>

[32] Given you are over the age of 18 and have committed a qualifying offence,<sup>18</sup> the remaining threshold criterion I must consider is whether you are likely to commit another qualifying sexual or violent offence if released at end of the finite sentence of six years. The risk assessment I must undertake has a protective, rather than punitive purpose.<sup>19</sup> Preventive detention is not a sentence of last resort.<sup>20</sup>

[33] In assessing your level of risk and in deciding whether to impose preventive detention, I must consider the five statutory factors. These are:<sup>21</sup>

- (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 indicating a tendency to commit serious offences in future;
- (d) the absence of, or failure of, efforts by you to address the cause or causes of the offending; and
- (e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

[34] In assessing these statutory factors, I must consider the full range of your previous offending and not confine myself to your previous qualifying offences.<sup>22</sup> I must also consider whether the availability of an extended supervision order would adequately meet the purposes of sentencing.<sup>23</sup>

---

<sup>16</sup> Section 87(2).

<sup>17</sup> Section 87(4).

<sup>18</sup> Section 87(2).

<sup>19</sup> Section 87(2)(c); *R v C* [2003] 1 NZLR 30 (CA) at [5].

<sup>20</sup> At [5] - [6].

<sup>21</sup> Sentencing Act 2002, s 87(4).

<sup>22</sup> *R v Hetherington* [2015] NZCA 248 t [83].

<sup>23</sup> *R v Parahi* [2005] 3 NZLR 356 (CA) at [87].

### *Health assessors' reports*

[35] In making my assessment, I must consider the reports from the two health assessors who have assessed you.<sup>24</sup>

[36] Psychiatrist Dr Oliver Hansby met with you on two occasions and focused on a clinical assessment of your level of risk. He traversed your personal history, medical history including alcohol abuse, and criminal history. He considered you have risk factors indicating an increased risk of violence, namely that you have experienced trauma, are socially isolated and unhappy, suffer physical and mental health issues, and have a tendency to turn to alcohol to manage distress.

[37] Dr Hansby canvassed your previous conviction for a 2006 rape which was quashed on appeal, the 2015 convictions, and charges of sexual offending for which you were found not guilty at a 2007 trial. The 2006 allegations were that you were drinking with a female acquaintance in her 30s. She lost consciousness due to intoxication and “came to” with you on top of her. She allegedly screamed, said she “did not want it” but you forcibly persisted. You were convicted of rape and sentenced to five years’ imprisonment. The Court of Appeal ordered a re-trial but the complainant did not wish to proceed and you were subsequently discharged.<sup>25</sup> The 2007 allegations were that you were drinking with a female, proposed you had sex but she declined. You ignored her repeated refusals, removed her trousers and underwear, performed oral sex on her and then raped her.

[38] When Dr Hansby raised these matters, you said variously that both you and the complainants were drunk and it was consensual. In response to questions about your family violence convictions, you stated you were not a violent person. You did, however, admit to having violent thoughts towards the victim of the present offending.

[39] Dr Hansby also referred to 2011 allegations of rape but could not take that any further as he had no details of the allegation. It was, however, assessed by the second health assessor as discussed below.

---

<sup>24</sup> Sentencing Act 2002, s 88(1)(b).

<sup>25</sup> Criminal Procedure Act 2011, s 347.

[40] In assessing your risk, Dr Hansby used the Risk for Sexual Violence Protocol (RSVP) structured clinical assessment and the Static-99R actuarial tool for recidivism amongst adult male sexual offenders. The Static-99R tool indicated that you share characteristics with a population of male sexual offenders who are at well above the average risk of being charged or convicted of another sexual offence. Dr Hansby emphasised there is no scientific evidence to the effect it is possible to estimate a particular person's likelihood of committing sexual offences with a reasonable degree of accuracy. However, his clinical assessment, informed by RSVP, found you to be at a "concerningly increased risk of committing another serious sexual offence". He noted common features of your offending included use of alcohol and coercion. In terms of risk factors, he noted your denial of the offending and previous sexual and violent offending and minimising your responsibility. Additional risk factors were your lack of social connections, unemployment and, more concerningly, lack of coping skills, dissocial personality and alcohol abuse. He considered scenarios where you would plausibly offend again, including for instance, using alcohol in the company of vulnerable intoxicated women. He described you as posing a significant and ongoing risk in such a situation. Although he found you were at an increased risk of committing further general violence, he did not consider you likely to commit a qualifying violent offence.

[41] Dr Hansby did not specifically address the type or length of sentence which might be imposed. He did consider, however, that your cognitive impairments could be viewed as a mitigating factor in sentencing. In addition, he suggested that your clear problems with alcohol ought to be addressed through therapeutic interventions. He suggested Corrections investigate whether any of your cognitive impairments could be reversible and, if they worsen, you ought to be placed in specialist care within the prison.

[42] In his submissions dated 12 December 2018, Mr Crowley took issue with several aspects of Dr Hansby's report. Specifically, that he had categorised your 2014 conviction for offensive behaviour involving public urination as a violent sexual offence in his RSVP assessment and had concluded it represented part of a pattern of escalating sexual offending. Mr Crowley also took issue with the characterisation of the facts of the 2015 convictions as "repeatedly sexually [violating] and [raping] a

15 year-old female” when you were convicted of sexual connection with a young person. You had been charged with four counts of sexual violation, with the charges of sexual connection with a young person as alternatives. After two days of trial, you pleaded guilty to the charges of sexual connection with a young person and were discharged on the sexual violation charges. Dr Hansby criticised you for “minimising” your behaviour with the 15 year-old. Finally, it was noted that Dr Hansby had used measures which were not validated in New Zealand.

[43] Sentencing was then adjourned to ensure Dr Hansby was provided with the summaries of fact for these convictions and to enable him to respond to the issues raised.

[44] Dr Hansby updated his report but did not substantively change his findings in relation to the RSVP assessment. He remained of the opinion that the offensive behaviour conviction should be considered a sexual (although non-violent) offence, and that it was part of an ongoing escalation of sexual offending. It is further evidence of the significance of alcohol use in your offending. He noted the summary of facts stated that you were in public drinking alcohol at about 1.00 pm “where people go to have their lunch” when you “urinated on the window and blackboard” of a store. He then updated his RSVP assessment accordingly.

[45] Dr Hansby confirmed his view that there has been an escalation of sexual violence, given the escalation from the 2015 convictions to the elements of violence associated with the current offending.

[46] Dr Hansby also confirmed his opinion that, due to the 2015 and 2017 convictions, you present with “chronicity of sexual violence”. The offensive behaviour conviction is still relevant, he said, as it adds to the chronicity of general sexual offending and demonstrated your minimising your behaviour. Dr Hansby said, in any event, you deny sexual violence in respect of the 2017 offence and minimise your 2015 offending, describing the 15 year-old as “a few weeks shy of 16”.

[47] In respect of the 2015 convictions, Dr Hansby updated the physical coercion in sexual violence section in the RSVP to clarify that any suggestion of physical

coercion was in the summary of facts. He was aware when he wrote his initial report of the differences between the convictions and summary of facts.

[48] Finally, Dr Hansby clarified that many international assessment tools, like the Static-99R and RSVP, are not validated in New Zealand as they were developed overseas. Dr Hansby said he was unaware of any publicly accessible sexual offending risk assessment tools which were specifically validated in New Zealand and was of the opinion that these tools are still “generalisable” to your case.

[49] Mr Crowley remains concerned at the way in which Dr Hansby assessed the conviction for offensive behaviour and seeks to use this criticism to undermine Dr Hansby’s overall assessment. Mr Crowley characterises the offensive behaviour conviction as a “minor offence of public nuisance” when you were “drunk and urinated in public”. Were that to be the sole conviction on your record, there might be some force in that submission. However, the point of the conviction and the basis for Dr Hansby’s reference to it, is that it forms part of your offending background and part of a pattern of behaviour. It is a further example of how alcohol plays a part in your offending and how you minimise your behaviour. When the facts of the offending are considered, this was more than simply a minor offence of public nuisance, such as urinating in a public place but being as discrete as possible. Your behaviour was anything but discrete – in a busy lunchtime environment, urinating over a blackboard and shop window, yet you maintain that the women who saw you would not have seen anything.

[50] Dr Hansby has satisfactorily explained how the conviction fits into his analysis. What the law classifies as a sexual offence does not necessarily equate with the psychiatric classification. Dr Hansby says:

Where a broader history of sexual offending exists, risk assessment literature considers an Offensive Behaviour conviction, arising from public urination, as a sexual offence.<sup>26</sup>

---

<sup>26</sup> Phenix, A Fernandex, Y Harris, A Helmus, M Hanson, K & Thornton, D (2016). Stasis-99R coding rules revised – 2016. STATIC99 [accessed 9 October 2018]. Retrieved from [http://www.static99.org/pdfdocs/Coding\\_manual\\_2016\\_v2.pdf](http://www.static99.org/pdfdocs/Coding_manual_2016_v2.pdf).

[51] Similarly, I do not accept Mr Crowley's criticisms of Dr Hansby's approach on the 2015 convictions. Dr Hansby distinguished between the allegations as recorded in the summary of facts, being rape and sexual violation by unlawful sexual connection, and the convictions for sexual connection with a young person. Contrary to Mr Crowley's submissions, there was clearly a basis for Dr Hansby's comments. Dr Hansby refers to empirically-derived risk assessment literature which considers charges are relevant to a clinical assessment of risk, even where no conviction results (or is quashed). The law provides for that approach.<sup>27</sup>

[52] The second report, from psychologist Paul Carlyon, was prepared following a review of documentary material and one meeting with you. To the list of sexual offending incidents assessed by Dr Hansby, Mr Carlyon added a 2010 incident which gave rise to several charges of sexual offending against a woman with cerebral palsy and a mild intellectual disability.<sup>28</sup> The police reported that you had a casual sexual relationship with her following the incident and the charges were dropped.

[53] Mr Carlyon considered you were raised in circumstances of significant instability, disconnection and trauma. Early sexualisation, through abuse, may have distorted your understanding of sexual norms and addiction to alcohol is directly related to your anti-social behaviour. Your reported feeling controlled and taken advantage of by your partner, and Mr Carlyon suggested this may have led you to experience feelings of worthlessness and cemented a degree of hostility toward women. He noted that you had previously refused to see a female psychologist.

[54] Mr Carlyon used several tools to assess your level of risk. First, the Roc\*Roi tool indicated a moderate-low risk of reimprisonment within five years of being released. Secondly, the Automated Sexual Recidivism Scale – Revised (ASRS–R) tool placed you in the medium-low risk category for reoffending. The five-year recidivism rate for that category is 6.35 per cent, and the 10-year recidivism rate is 9.24 per cent. Your results for the Static-99R tool returned an above average risk categorisation.

---

<sup>27</sup> Sentencing Act 2002, s 88(3). *Stroobant v R* [2018] NZCA 10.

<sup>28</sup> Charges of sexual violation by rape and sexual violation by unlawful sexual connection.

[55] You are in the high-risk category on the Violence Risk Scale: Sexual Offenders (VRS–SO) tool. That category has a five-year recidivism rate of 30.6 per cent and 44 per cent for 10 years. This tool identified sexual deviance, compulsivity, cognitive distortion, offence planning and other matters as targets for treatment. You were in the 69.6th percentile for the sexual deviancy subscale, the 98.4th percentile for the criminality subscale, and the 100th percentile for the treatment responsivity subscale. Mr Carlyon considered the latter especially relevant because it suggests you may not alter, or may not maintain any alteration in, your behaviour. He suggested risk mitigation may therefore rely on external controls.

[56] In addition, Mr Carlyon considered you have a lack of protective factors. Although you have sought treatment for your alcoholism, your motivation has fluctuated. You have committed an offence at age 59 and, consequently, Mr Carlyon did not count advancing age as a protective factor.

[57] On this basis, Mr Carlyon found you to be at a high risk of sexual assaultive behaviour. He considered your risk most prominent with women who are vulnerable because of, for example, intoxication or youth. He considered you to have insufficient motivation and skills to manage your risk, which is compounded by your chronic alcohol dependence. Because of your previous breaches of conditions, he considered you do not possess a reliable willingness capability to comply with external controls. Your clinical presentation is complex, and likely includes a degree of cognitive deterioration related to your alcoholism. He concluded you require sexual offence focused treatment which, given your lack of motivation, will need a motivational approach at the outset. Irrespective of the sentence imposed and due to your lengthy history of suicidal ideation, Mr Carlyon recommended all agencies involved in your custody and care should prioritise your safety and wellbeing.

#### *Assessment*

[58] When one stands back and considers the number, nature, frequency and seriousness of the allegations and convictions against you, together with the expert analysis of your background and current presentation, it is impossible to disagree with the experts' conclusions that you pose a significant and ongoing risk of sexual

offending, in particular in circumstances where you are using alcohol and are in the company of vulnerable females.

[59] Your first convictions for a relevant qualifying offence are the 2015 convictions for sexual connection with a young person. To that is added the conviction currently before the Court for assault with intent to commit sexual violation.

[60] Allegations which have not resulted in convictions form part of your extremely concerning pattern of behaviour. In 2008, you were convicted and sentenced for sexual violation by rape which occurred in 2006. The conviction was quashed by the Court of Appeal in 2008 because of confusion surrounding the Crown case. A retrial was ordered but the complainant refused to undergo another trial.

[61] It was alleged that in 2007, you raped another adult female after consuming alcohol with her. You were acquitted at trial.

[62] In 2010, you were charged with a range of sexual offences against an adult female who had cognitive and physical impairment due to cerebral palsy. Ultimately the Crown did not proceed with the charges.

[63] Your conviction history demonstrates a pattern of serious sexual offending. There was a relatively short period between the two incidents for which you have convictions. Incidents for which you have been charged but not convicted results in an even more worrying pattern.<sup>29</sup>

[64] What emerges is a clear pattern of preying on vulnerable women. Whether due to intoxication, age or disability, all of the allegations you have faced have involved some of the most vulnerable members of our community.

[65] It is equally clear that the type of sexual violence of which you have been convicted gives rise to harm to the community in the most serious of categories.

---

<sup>29</sup> Conduct for which convictions have not resulted may still be taken into account: *Stroobant v R*, above n 27.

[66] Both health assessors concluded that your circumstances indicate you are in a category of persons with a high risk of committing serious sexual assault against adult women in the community. That is supported by the conclusion of the presentence report writer. I agree with these assessments.

[67] You have demonstrated a lack of acceptance of responsibility for your offending. In addition, you have severe alcohol dependency issues which are clearly associated with your offending and, not for want of trying, have yet to be addressed in a way which enables you to maintain sobriety long-term. Your efforts thus far have failed to address the causes of your offending.

[68] I conclude you are likely to commit another qualifying offence if released at the end of your finite sentence. I do not consider a determinate sentence will adequately protect society. It is submitted on your behalf that the availability of an extended supervision order should be taken into account and that such an order would be adequate to address the risk.<sup>30</sup> Typically, it is in low-level sexual offending cases where a finite sentence coupled with an extended supervision order has been considered adequate protection for society.<sup>31</sup> This is in stark contrast to your history, which discloses repeated and constant allegations and convictions relating to serious sexual offences. You committed your most recent sexual offence while still subject to the supervision order imposed from the 2015 convictions. I also place weight on the evidence suggesting the obvious difficulties in managing you in the community and accept the Crown submission that management of the risk is best achieved through an indeterminate sentence. The availability of an extended supervision order is not a replacement for preventive detention. Preventive detention, as the name suggests, has a protective function with the ability to recall for offending.

[69] I also note the comments of the Court of Appeal to the effect that a sentence of preventive detention can be appropriate to require an offender to engage fully in treatment and rehabilitation.<sup>32</sup> I consider this factor particularly relevant in your case

---

<sup>30</sup> *R v Parahi* [2005] 3 NZLR 356 (CA) at [30], [58]–[60] and [90]–[91].

<sup>31</sup> At [86]–[87] and *R v Mitchell* [2018] NZHC 1112 at [82].

<sup>32</sup> *Antonievic v R* [2017] NZCA 87.

where you continue to deny responsibility and indeed place responsibility on your victims.

[70] In my assessment of the relevant factors, I consider yours is a case which requires a sentence of preventive detention adequately to protect society, despite the principle that a lengthy finite sentence is preferable.

### **Minimum period of imprisonment**

[71] I am now required to impose an MPI for your sentence.<sup>33</sup> You have received your second strike warning, but I have decided to sentence you to preventive detention rather than a finite sentence of imprisonment. This means I must address the MPI provisions relevant to preventive detention.

[72] First, I must consider what MPI would reflect the gravity of your offending. Secondly, I must consider whether that MPI is sufficient to protect the community in light of your age and the risk you pose to the community's safety.<sup>34</sup> If concern for safety clearly outweighs the gravity of the offending, I may adopt a higher MPI than that reached in the first instance. An MPI for a preventive detention sentence may not be less than five years.<sup>35</sup> The Crown submits an MPI of seven years is appropriate to reflect the risk you pose to the safety of the community.

[73] As indicated, had you been sentenced to a determinate sentence of imprisonment, I would have imposed the maximum MPI being two-thirds of the full term, namely four years. That would reflect the gravity of the offending.

[74] I have found you to have a high risk of reoffending. I am concerned about the difficulties you face in creating meaningful and lasting change to your problems with alcohol. I am also concerned about your prospects of rehabilitation given your refusal to accept responsibility, although I note the comments of Dr Hansby that tailored programmes in those circumstances have still been found to be effective.

---

<sup>33</sup> Sentencing Act 2002, s 89.

<sup>34</sup> *R v C* [2003] 1 NZLR 30 (CA) at [11].

<sup>35</sup> Sentencing Act 2002, 89(1).

[75] I am satisfied an MPI of five years is sufficient to protect the safety of the community. I acknowledge this is less than the finite sentence of six years which you would have served in light of your second strike and that I have concluded you are likely to commit a qualifying offence if released at the end of that sentence. However, I consider an MPI of five years in the context of a preventive detention sentence is appropriate, given the additional safeguards that such a sentence provides.

[76] There is much work for you to do in terms of your rehabilitation. However, I consider that work may be completed within that period, particularly if meaningful treatment can address your alcoholism and other risk-related factors. I am mindful, too, that the Parole Board can act as an additional mechanism to protect the safety of the community should concerns remain at the conclusion of your MPI.

[77] In those circumstances, I am satisfied an MPI of five years in the context of preventive detention is sufficient to give you enough time to access and absorb the treatment necessary to address the causes of your offending and to reduce the risk of your reoffending and compromising the safety of the community.

## **Result**

[78] Mr Leahy, on your conviction for assault with intent to commit rape, you are sentenced to preventive detention with a minimum sentence of five years' imprisonment.

**Thomas J**

Solicitors:  
Crown Solicitor's Office, Wellington  
Public Defence Service, Wellington for Defendant