

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT INVERCARGILL**

**CRI-2017-025-001877
[2018] NZDC 1465**

THE QUEEN

v

[ARCHIE ROSE]

Hearing: 26 January 2018
Appearances: M-J Thomas for the Crown
H T Young for the Defendant
Judgment: 26 January 2018

NOTES OF JUDGE M J CALLAGHAN ON SENTENCING

[1] [Archie Rose], you are for sentence on charges of: assault with a weapon; with intent to injure assaulting the victim; threatening to kill the victim; male assaults female; but the more important charge is that you unlawfully without consent with intent to cause the victim to be detained - commonly referred to as kidnapping.

Facts

[2] The facts are that at about 10.50 pm on [date deleted] 2017 you arrived at your home. When you got there, you discovered that the victim, who had been there about an hour, had waited in the garage for you to return. At that stage you and she were partners.

[3] An argument happened in the garage and she left and walked out onto the street. You followed. You were telling her to come back into the house but she declined to do so.

[4] At that point it is said that you threatened to go to her house. For personal reasons she did not want you to go there so she came into the house. As you walked round the rear of the house near the garage, you told her to go inside as you wanted to talk to her. She said “no”. You then grabbed the hoodie that she was wearing and pulled her onto the concrete, causing her to fall and lie on her back. You then dragged her along the concrete for approximately 10 steps, up a small concrete ramp to the washhouse area of the house. This caused the victim’s back to be scraped along the ground. While she was lying on the ground you then pushed her face against the floor. She moved her head, so you then pushed the other side against the floor and while doing this you were saying words to the effect, “Are you happy now?” You became angry and began abusing her. You started to call her names.

[5] The victim believed that she was going to get beaten so she did as you said, out of fear of being hit. She then said that she wanted to go to the bathroom and was allowed to do so. While she was on the toilet you stood in the doorway preventing her leaving and watching her. She again asked if she could leave. When she did that, you approached her and punched her once to the right side of her head. This caused immediate redness and soreness around her right eye. She became terrified. You then grabbed her and dragged her out of the toilet and into the hallway area, and pushed her along the hallway until she could walk by herself.

[6] As you approached the spare room in the house you threw her onto the floor. She ended up lying on her back between a bed and a built-in wardrobe. She was crying for you to stop. You then got on top of her. She continued to scream at you to stop. She turned her head away from the wardrobe door at the same time that you opened the door and slammed it into her back, causing pain to her back area. After that, you told her to get up and walk to the master bedroom of the address. While walking into the bedroom the victim could smell petrol. She sat on the bed. You continued to abuse her.

[7] The victim was confined to that room for the next 10 hours, where she was subjected to physical and verbal abuse and was prevented from leaving. She attempted to leave on two occasions but you refused to allow her to leave. You did leave the victim in the room on occasions and went outside, presumably for the purposes of consuming alcohol or drugs.

[8] While confined to the room, you made numerous comments such as that you and she were both going to die on that day. That was repeated on numerous occasions. The victim believed that she was going to die. You then got a cloth and put petrol on it. You pinned her down on the bed by sitting on her and held the petrol soaked cloth over her mouth and nose for periods of times, suffocating her. She fought to get the cloth off her face. She had difficulty breathing on each of those occasions. It was said that this occurred between 12 and 15 times, although you estimated it was only seven.

[9] The victim thought that you were going to kill her, and out of fear she gave up all resistance and she told you to "get on and do it". When that happened you again placed the petrol cloth over her mouth and nose, suffocating her. The victim did consider running from the address but believed that such an attempt would be futile because you would catch her and she believed that you would kill her.

[10] During the time that the victim was confined in the house, you would say to her that you would take her home, but then you would say that you were only joking.

[11] At 9 o'clock in the morning you then allowed her to leave. As a result of the ordeal, as she left the house she vomited. The petrol soak cloth caused burning to her nose and mouth area. She also suffered a bruised and sore shoulder, and a sore face from when she was punched.

[12] When you were spoken to, you acknowledged the incidents with the petrol soaked cloth, the dragging of the victim on the ground, and holding her inside the house against her will.

Previous history

[13] You have some previous convictions: possession of an offensive weapon in 2017; breach a protection order in 2007; assault in 2001; assault on a female in 1997; and numerous convictions prior to that date, but not a great deal in the recent past.

Victim impact

[14] I have read the victim impact statement. The victim said she had been in a relationship with you for about three months and then you broke up. You then recommenced the relationship for the three month period leading up to the day of this event.

[15] She says that she was terrified and she believed she was going to be killed. She realises that it was the drug methamphetamine that made you act the way you did. As to injuries, she said that she had a sore back for a few days following the incident and she felt guilty about reporting this incident. She is concerned that you will spend time in prison. She says she knows you are remorseful for what you did and she does not want you see you put in jail. She says she has no concerns for her safety as long as you abstain from drugs. She does not want to resume the relationship and would like a protection order.

Restorative justice

[16] Restorative justice was recommended. However, you do not fit the profile for the assessment that was carried out.

Pre-sentence report

[17] The pre-sentence report that I have read says that you advised that this was what was described as a “toxic relationship.” You regret your decisions. The report says that you have a minimal level of remorse, that you lay the blame with the victim and you did not accept your own behaviour. The report says that these incidents shows a controlling and manipulative motive behind your actions. You minimise the use of force and violence.

[18] The report recommends imprisonment. The report questions whether you have sufficient insight into the harm that you caused and what actually happened. It acknowledges that there has been a significant gap in the offending but the majority of your offending is against women; it is historical but nonetheless it is offending against females.

[19] The Crown and your counsel have filed submissions. They both agree that the lead charge is the kidnapping charge.

Crown submissions

[20] The Crown says that the aggravating factors are the use of violence, the length of the detention, the extent of the harm caused, the threats, the use of the weapons, the emotional harm caused to the victim, and the breach of trust. They submit there is no tariff case for kidnapping, particularly when it is accompanied by violence.

[21] The Crown suggests, with references to cases, that a start point of four to four and a half years would be appropriate and that that does not breach the totality principle. You are entitled to your discount for a guilty plea.

Defence submissions

[22] Your counsel has similarly filed submissions and says that a starting point between three and three and a half years would be appropriate, with an end sentence of between two and three years.

[23] There is a dispute in that you denied punching her when she was on the toilet, but you accept that you did hit her with an open hand. Your counsel says that the force of the blow was the issue there and not necessarily the method by which it was struck.

[24] There is also reference that the use of the petrol soaked rag or cloth over the mouth did not happen as many times as the summary of facts alleges.

[25] Your counsel refers me to the decision of the *R v Wharton*¹ and says that Crown starting point is too high and I should adopt his starting point.

Assessment

[26] The lead charge here has to be the kidnapping charge, which carries the maximum penalty of 14 years' imprisonment.

[27] With reference to the decision of *Wharton* the Court of Appeal stated:

There can be an infinite variety of circumstances which underlie the crime of kidnapping. Some may relate to the abduction of citizens to be held for ransom ... others may involve gang activity for the collection of proceeds of crime or for financial extortion ... Many are an adjunct to or part of sexual criminal offending ... and others, regrettably becoming more common, are part of the activity of a former spouse or partner who defies a protection order and detains a fearful, often battered and helpless female ex-partner for motives of power, revenge, jealousy or irrational anger ...

Wharton goes on to say at:

[14] It has been long established that the court may take into account facts and circumstances, which might of themselves constitute separate offences, in order to determine the gravity and appropriate punishment for an offence for which an accused is charged and convicted; ... The principle was recently emphasised by this court in *R v Pattison*² that even though factors of aggravation may constitute separate offences it does not mean that they cannot be considered as part of the sentencing exercise.

[15] In terms of s 85 of the Sentencing Act 2002 the court was required to consider the totality of the offending, and whilst the most serious offence might normally be that which carries the greatest maximum penalty it may, however, be only becoming a more serious offence through the totality of circumstances surrounding it which, as in the case here, involved the commission of the so-called lesser offence of assault with intent to injure.

[28] The Court went on to say that the category of offences for kidnapping is a wide range of sentences.

¹ *R v Wharton* (2003) 20 CRNZ 109.

² *R v Pattinson* (2002) 19 CRNZ 407.

Starting point

[29] I have looked carefully at all the material that has been placed before me. This offence has the hallmarks of a lead-up to a homicide in a domestic situation - the dragging of the victim into the house, the pulling back at the doorway, the control exercised over her (even while she was on the toilet), the keeping of her in the bedroom, the assaults upon her, and in particular the assaults with the cloth soaked with petrol between 12 and 15 times which restricted her breathing and caused her to believe that she was in fact going to die - are all aggravating factors to the kidnapping. While they all form discrete charges, they nonetheless put into context the confinement that this victim was subjected to.

[30] In my view the starting point for the kidnapping, with those aggravating factors, has to be one of four years and three months' imprisonment.

Adjustments

[31] Please stand, Mr [Rose]. Having fixed that starting point of four years and three months' imprisonment, there is no necessity for an uplift for the other offences because they all form part of the one series of offences. You are entitled to a full discount for your guilty plea, which I set at 25 percent.

Sentence

[32] That means that on the charge of kidnapping, you will be sentenced to imprisonment for three years and two months.

[33] The victim seeks a protection order. In all the circumstances here, with the clear case of family violence, it is appropriate that one issues. All of the offences in fact form part of the family violence regime. She requires a protection order because if you were released from prison she does not want to have you anywhere near her in terms of contact. Accepting that you have both moved on, I am satisfied that a protection order is necessary for her protection. The protection order will

accordingly issue. You will be served with the details of that protection order and the course that you must undertake.

[34] In respect of the charges of:

- (a) Assault with a weapon, you will be sentenced to two years' imprisonment; concurrent with the three years and two months.
- (b) Male assaults female, nine months' imprisonment; concurrent.
- (c) Threaten to kill, two years' imprisonment; concurrent.
- (d) Assault with intent to injure, 12 months' imprisonment; concurrent.

M J Callaghan
District Court Judge