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

IN THE DISTRICT COURT
AT HAMILTON

CRI-2015-024-000358
[2018] NZDC 4143

THE QUEEN

v

[WHIRO MERETANA]

Hearing: 6 March 2018

Appearances: R Mann for the Crown
J Bell and G Prentice for the Defendant

Judgment: 6 March 2018

NOTES OF JUDGE P R CONNELL ON SENTENCING

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[1] Mr [Meretana] you are for sentence today, having been found guilty of a charge of rape and a charge of indecent assault, and further, a charge of indecency with a girl aged between 12 and 16. The offences occurred a very long time ago. You might even recall at trial the acknowledgement of the passing of time between when the offences were committed and when you were finally put on trial for them. The jury were told to be cautious because of that length of time in terms of their acceptance of evidence and things of that nature.

[2] It is one of things that is taken into account in law and yet despite that, as you well know, the two victims' evidence was accepted by the jury. They believed them. My own view as I sat and watched them, I too was convinced in the truth of what they were telling the Court and telling the jury. They were credible witnesses. It is clear that the offending has had a prolonged effect on them. It has made their lives difficult. The process of a second trial has been particularly difficult for them, I am the first to acknowledge it.

[3] The offending broadly speaking happened in this way. You put your hand into the first victim's underwear. You inserted your fingers into her vagina, moving them in and out as you did. You entered the second victim's bedroom and you touched her vagina. You would put your fingers in her vagina and masturbate in front of her, sometimes ejaculating on her legs. That behaviour progressed then to rape with that victim. You entered the victim's bedroom, you inserted your fingers into her vagina and you inserted your penis into her vagina.

[4] Those are the main facts and is really a brief summary of what occurred all that time ago, but as they have pointed out today, it seems as if you took advantage of their very young age. You were almost in a position of a parent at the time that these two young women were with you and you have severely breached their trust in the way that you behaved towards them. I know you continue to deny the offending and that is something that simply means the Court cannot take into account any remorse for the offending of this nature.

[5] I have looked at your previous convictions. The probation officer has made an assessment in the report that is before the Court that you are at low risk of re-offending. That is only so because of the historic nature of the charges combined with any similar convictions in the past. It said that if you were to re-offend then the risk of harm to others is potentially moderate to high. That is in effect because of your denial and you remain uncounselled or untreated for this type of offending. You are assessed in the probation officer's view as having no remorse. You do not accept responsibility for the offending and that has an effect which is a difficult one for you when you are in prison because you will not receive any offer of counselling or treatment during the term of your imprisonment.

[6] I have had to consider the victim impact statements that were provided in writing to the Court and which have been read to the Court today. They have been read, as has already been commented on by Crown counsel, in a way that suggests they were carefully prepared, they were carefully presented, but presented in a strong way and a strong manner that has left the Court in no doubt as to the effect of your offending on them. That has been, in my view, done courageously and done very well today in this courtroom. If you are unaffected by that then that certainly is a problem

for you. They were affected by what happened to them, what they have said to the Court is the truth, they have told the Court of their stress, their emotional response to this behaviour that has been with them for so long and remains with them as something that affects the way in which they live. Anybody who works in this field of sexual abuse of young people will have no difficulty understanding the views they have expressed in this Court today and the very sad effect that behaviour like this has on people basically for the rest of their lives. I accept everything that they say in terms of that effect and what it has meant for them. If anything, as I was at trial, I was greatly saddened by the fact that there was clear evidence that they endeavoured to have contact with their nieces and nephews. They tried to put aside and forget what had happened in their efforts to maintain a sense of whānau about all of this and you were able to sit at those family celebrations knowing what you had done and pretending, in effect, to not acknowledge in any way whatsoever, that behaviour. They tried to overcome these things that happened to them at an early age. My view of it is that you should be ashamed but you are clearly not and you are holding fast to the notion that you are not guilty of this offending.

[7] The Court has to take account of sentencing in like situations and in this case, particularly the penalties that were imposed in and around the time that this offending occurred. I have had particular regard to authorities that guide this Court from higher Courts on that particular issue. The offending is described as historical offending and indeed it is so, hence 40 years ago that these events occurred. With that the penalties applicable between 1973 and 1979 have to be considered. In *R v R*[1] the Court of Appeal discussed the proper approach in cases of historic sexual abuse. That Court recognised the difficulties in using an end sentence that was imposed in the 1970's as if it were a starting point as required today. The Court's conclusion was that a starting point should be fixed based upon the sentencing levels at the relevant time and in recognition of the aggravating features of the case and allowances may then be made for mitigating features.

[8] There has never been in the Courts' view over the years any change in the identification of aggravating features and they were discussed in *R v Pawa*[2] and

[1] *R v R* (CA 244/04) 2 November 2014.
[2] *R v Pawa* [1978] 2 NZLR 190.

R v Puru[3]. Those aggravating features and what was said about them largely mirror those in the current tariff decision of *R v AM*[4]. In this case the aggravating features submitted by the Crown and accepted by the Court are the issues of premeditation, vulnerability of victim, they were vulnerable because of age. They were in a position where they were being looked after by you and your wife, there was harm done to them, that is another aggravating feature, and as I say that goes on for them for the rest of their days. The offending occurred over a period of time and was gross offending and it is perhaps the only way that it can be described.

[9] It has been said today by Crown there was a breach of trust and indeed there was a point where the complainants trusted you, they wanted to be looked after by you, they should have expected that they could have trusted you at their young age to not harm them in any way.

[10] I have considered a number of cases in this exercise of sentencing you, *R v Devery*[5], *R v Accused*[6] and *R v Elwin*[7]. If counsel want citations I will give them to them. The Court of Appeal in *R v Puru,* similar type of offending, said that a sentence of five years would be adequate to mark society's denunciation of this conduct and to punish the offender as well as taking into account the abuse of trust, as much as was in this case. I have considered *R v Elwin* as well. Those are matters that have helped me in coming to a decision about what should be done in this case.

[11] The Crown in this case has submitted that the lead charge is the sexual violation by rape. It has submitted that the indecent assault against the second victim should be treated as an aggravating feature of that lead charge. The Crown here acknowledge that sentencing must be based on the maximum penalty in place at the time of offending and I acknowledge that as well. The Crown has cited *R v R* as providing the correct approach to sentencing historical sexual abuse, just as I have mentioned, and they have mentioned the aggravating features which I have agreed with and have mentioned previously as I have gone through this.

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[3] *R v Puru* [1984] 1 NZLR 248.
[4] *R v AM* [2010] 2 NZLR 750.
[5] *R v Devery* and *R v Accused* [1988] 1 NZLR 422.
[6] *R v Accused* (CA 147-94) (1994) 11 CRNZ 622.
[7] *R v Elwin* CA290/93 10 August 1994.

[12] The Crown has submitted that in light of the aggravating features an appropriate starting point is in the range of five and half to six years' imprisonment. It has submitted that an uplift is required to reflect the indecent assault against the first victim. You will understand along the basis that offending as it is submitted would attract a sentence in the range of 15 to 18 months' imprisonment. The Crown notes here that at sentencing following the first trial a standalone start point of 18 months was identified. I have indicated to both counsel that I have not deliberately referred to the sentencing notes of the Judge who dealt with the first trial for the reason that I presided over the trial. I heard the evidence that I did and it is for me and my view of it to come to the conclusion on my own without influence from any other source by way of the sentencing in respect of the first trial.

[13] It is submitted here that concurrent terms of imprisonment are appropriate and overall the six and a half to seven years' imprisonment is the point the Crown say it should be the start point for this Court. The Crown has acknowledged that a 12-months' discount was given at the first sentencing. That was done to reflect the defendant's contributions to the community, his family and his character and the time between the offending and conviction. He has not offended. He has brought up a family. He has successfully worked and in this case those are matters that must always be acknowledged and are acknowledged by every Court when someone is sentenced. The sentencing process takes account of the effect on victims but it is a balancing exercise in which things that are of help and are good about the defendant are also taken into account. It is a part of the role of a Judge to ensure that there is a balance to the sentencing that all matters are taken into account, both for the victims and for the defendant, and that must be so. I intend to make it clear that while accepting what the victims have said and despite their views about acknowledging things such as credit for good character in the past, I have in this case determined that I will not allow anything for health issues, there is not sufficient in those to warrant a discount, but I do consider that there should be some acknowledgement of good character.

[14] A very good point was made by one of the victims that that good character would have never been in existence if these matters had been acknowledged in the past but the Court cannot coldly wipe aside a good record from the point where the offending finished through to the present time and I do not intend to do it.

[15] In this case there is no issue around minimum terms of imprisonment as the Crown have acknowledged. I considered carefully the submissions filed by Mr Prentice and Mr Bell in relation to Mr [Meretana]'s position. It is acknowledged by him that he does not feel any remorse around this, that he does not acknowledge the offending. From the Court's point of view, of course, that is something that he is entitled to say. I do not in any way consider it should be something that makes this Court impose any harsher sentence, that is his position, it is simply so and I need to sentence just on the basis of what it was that the jury determined in the course of this case and, as I have explained, apply the authorities and legal principles that must be part and parcel of a sentencing of this nature.

[16] I have already said I accept, having read the references that were supplied to me by counsel, about the good character of Mr [Meretana]. Those references come from his family, from friends, from people he has had an association with, all of them speak highly of him in terms of his service to the community, the way that he has bought up his children, the love that those children feel for him, those are things that too should always be taken into account as I have said.

[17] I have reached the view that on the lead charge, being the sexual violation by rape, there should be a starting point of six years. That is taking into account the other offences. That is the total starting point across the three offences. There is a deduction of 12 months for good character.

[18] That then makes it a five-year term of imprisonment that will be served by Mr [Meretana]. That sentence is now imposed on Mr [Meretana].

P R Connell
District Court Judge