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

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IN THE DISTRICT COURT
AT DUNEDIN

CRI-2016-012-002898
[2018] NZDC 4665

THE QUEEN

v

[JOVANI COOPER]

Hearing: 9 March 2018

Appearances: C Power for the Crown
A Dawson for the Defendant

Judgment: 9 March 2018

NOTES OF JUDGE M A CROSBIE ON SENTENCING

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[1] Mr [Cooper], you are 38 years of age and you are for sentence today having been found guilty by a jury of your peers on three charges: one of sexual violation by rape in contravention of s 128(1)(a) and 128B Crimes Act 1961, maximum penalty 20 years; assault with intent to commit sexual violation in contravention of s 129(2), maximum penalty 10 years' imprisonment; and one charge of injuring with intent to injure in contravention of s 189(2), maximum penalty five years' imprisonment.

[2] The facts of the matter are dealt with at some length in the Crown's submissions and I believe that the way the Crown has referred to it with extracts from the transcript is entirely appropriate. I am going to give a more potted summary of the facts but in fact, when I look at what happened during the trial and my indication to you of 14 June 2017, the facts are almost exactly the same. Apart from the end part

of my sentencing indication, I am going to adopt almost everything that is in there, because it is relevant and accurate.

[3] I acknowledge that I have received in advance of today written submissions from your counsel Mr Dawson and from Mr Power for the Crown. I have received a probation report. I have heard through [the Detective] your former partner's Victim Impact Statement. I have taken into account all the purposes and principles of the Sentencing Act 2002 and I am obliged to sentence you on the basis of the jury's verdicts and the law.

[4] So the victim is your former partner. You had been in a relationship with her for [more than ten] years at the time of the offending. At the time of the offending she was [personal details deleted]. As I have said, I adopt the Crown's characterisation of the facts but the salient facts are that you came home from work after socialising and you were affected by alcohol. You suggested sexual intercourse take place and she reluctantly agreed. The victim withdrew her consent when you became rough. You pulled her hair, you pinned her down and continued to have sexual intercourse with her.

[5] In relation to the assault with intent to commit sexual violation, you were half on top of her and tried to pull her pants down in order to have sex with her. In relation to the violence charge you punched her in the jaw and, when she retaliated, you punched her twice more including to the nose. She sustained swelling and bruising to her face and arm.

[6] There has been reference to the manner in which she gave her evidence today. One of the striking features was that she really gave her evidence in an understated way. She was not there, on any analysis, to stick the knife in, so to speak. Nor has she since through her interaction with the police and the probation report. That is one of the more difficult parts of this sentencing.

[7] The Court does occasionally deal with cases of sexual violation by rape where consent is withdrawn. However, this is not simply a case of consent being withdrawn. This is a case of overt and additional violence surrounding that act and to enforce that

act. Rape is always violent but it is made more so when there are separate acts of assault and a physical and power imbalance, as there was in this case.

[8] Today is about holding you to account and promoting in you some responsibility. Now the positive thing today is, I am told, that you accept the consequences of your offending. You have said to the Probation Service that if necessary, you will serve the duration of your sentence in order to make amends to your wife and family. You said you had experienced an alcoholic-induced blackout and could not explain your behaviour. You said you began drinking heavily when you experienced relationship issues and avoided taking any steps to address that.

[9] The probation officer says that your initial denial of the offence may be a barrier to treatment. However, my experience of sexual offenders, and it is quite a bit of experience now, is that you have at least taken the first step which is to acknowledge what occurred and the harm that it caused. Also, the Probation Service said you were very open to discussing your offending and your attitude and behaviour when intoxicated.

[10] Until this night you had not appreciated the negative impact on your children or considered yourself to be prone to violence. You said you never had a physical fight in your life; always avoiding confrontations. Despite saying those things, the Probation Service says you have limited insight into your potential for anger related to sexual offending. Imprisonment is recommended and that outcome is not in dispute. It does appear that alcohol took over your life at the expense of your relationship. But despite all of that, your former partner still has positive things to say about you being a parent and you need to hold onto that.

[11] Today is about denouncing your conduct. You took, in real terms, advantage of your partner. She made it very clear that she did not want to continue. The jury accepted that. On any analysis of her evidence, that was the correct assessment. You took advantage of her in a vulnerable situation where she had rejected your advances. And, more than take advantage of her, you became violent. So I have to denounce that conduct as overbearing self-gratification and disrespect for your partner and for her privacy.

[12] Marriages and relationships are very intimate things. These types of offences, while not common, are not rare. Partners in a relationship have to read and respect the signals of the other. Marriage or a relationship does not provide a partner who seeks sex with a licence to do that without the consent of the other. As you now know, when consent is withdrawn it is a full stop, not a comma.

[13] This has had a dramatic effect on her and the children. I can see from you today that you are affected by all of that. You were affected by her Victim Impact Statement, as well you should be. I detect that your approach to what you have heard is genuine and that your attitude and your response to what you have heard is genuine.

[14] Today's sentencing also has to involve an element of deterrence. And, for at least the third time today, sending a clear signal that the Court will deal sternly with those who commit rape and violent sexual offences.

[15] To the extent that I can, I am obliged to promote your rehabilitation. While ultimately a matter for you, I strongly suggest that you hold onto your thoughts and feelings about your offending and what it has done to your family and register as soon as possible for, at the very least, the dependency treatment unit – to deal with the issue of alcohol.

[16] Then, to the extent that a psychologist assesses you as qualifying to attend any other programme. From my knowledge of sexual offender treatment, it may be that you are not considered suitable for either Kia Marama or Te Piriti. However, you might well be considered suitable for one-on-one psychological counselling or a STURP programme. My advice to you is to get on with those as soon as possible.

[17] I am obliged to impose the least restrictive outcome. It is acknowledged, as I have said, that prison is going to happen today. However, even where a Judge considers that prison is appropriate, the Court's obligation is to ensure that the sentence is consistent with the authorities.

[18] In terms of the aggravating and mitigating features of the offending, counsel are agreed in relation to that. There is of course the seriousness inherent in the charge:

the pinning-down of the victim; the pulling of her hair in violence; the crying and wanting you to stop; your comments to her at the time of the rape; the accompanying assault and violent acts including striking her to the jaw; the injuries suffered by her; the duration of the offending; the maximum penalties; and the fact that this is also domestic violence.

[19] In terms of the aggravating features of the offending, I accept this was an abuse of a position of trust. The victim at the time, due to your intoxicated state and physical stature compared to her, was vulnerable. Further, the harm to her and to the family. There are no mitigating features of the offending.

[20] In terms of the aggravating and mitigating features of you, the offender, the Crown submits there are no aggravating features. In terms of mitigating features, there does now appear to be acceptance and remorse. The Crown in its submissions submitted a mitigating factor was a lack of previous offences of violence. However, when clarifying that issue at the start, you do have previous convictions although not for violence. Credit is usually given for otherwise good character. That cannot be said as far as your list is concerned.

[21] The position of the Crown is that the lead charge of rape falls within band 1 of *R v AM*[1] with a starting point of six years' imprisonment as appropriate. The Crown submits an uplift of two to two and a half years on a totality basis to reflect the other two charges. After a three month discount is applied for lack of previous convictions, an end-point of seven years nine months to eight years three months is submitted.

[22] For you, Mr Dawson submits that the offending falls either at the bottom of rape band 1 or even outside the lower end, with a starting point of five and a half years or six years' imprisonment. Mr Dawson submits considering the violence offending falls within band 1 of *R v Nuku*[2] and could have been reflected in a less serious charge, an uplift of six months only is appropriate. With an adjustment for totality a nominal starting point of six years is submitted. Mr Dawson submits that you should receive a 10 percent discount for your remorse and acceptance of your responsibility and the

[1] *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750
[2] *R v Nuku* [2004] BCL 1053 (CA)

fact that a custodial sentence will remove you from your children, (something that in fact your partner regrets). He sees an overall sentence of five years and five months' imprisonment as appropriate.

[23] The Court of Appeal in *R v AM* discussed how culpability may be affected where consensual sexual activity takes place immediately before offending and followed the approach taken in *R v A*[3] and in the SEU draft guidelines. The Court said that the SEU draft guidelines follow the *R v A* approach and suggested that, in limited circumstances, seriousness may decrease where the offender and an adult victim have engaged in consensual sexual activity just before the offending.

[24] The SEU indicated that the relevance of this factor depends on the circumstances, including the type of earlier consensual activity, the similarity to what comprised the sexual violation and the timing. The SEU draft guidelines also make it plain that the seriousness of the non-consensual act may outweigh any mitigating effect of the prior consensual activity. The Court also said:

> We do not envisage that this factor will have a great deal of impact in many cases. The focus is on assessing the seriousness of the offending. The sentencing Judge has to proceed on the basis that the act constituting the offence was non-consensual or the belief in consent unreasonable. The totality of the behaviour comprising the sexual violation has to be considered.

[25] Although the factor of prior consensual activity may diminish a defendant's culpability in some circumstances, the Court said in *R v AM* that, "Culpability will not be reduced by any sense of entitlement associated with a current or previous relationship".

[26] In *R v AM* the Court of Appeal identified *R v Greaves*[4] as a case that fell outside the bottom of band 1, because of the unusual factual pattern. There the victim invited the defendant to her flat and they engaged in sexual intimacies. It was accepted that sexual intercourse was initially consensual. However, the victim changed her mind during the act and asked the defendant to stop. He did not stop until the act of sexual intercourse was completed.

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[3] *R v A* [1994] 2 NZLR 129 (CA)
[4] *R v Greaves* [1999] 1 Cr App R (S) 319 (CA)

[27] The English Court of Appeal reduced the sentence of three and a half years' imprisonment to 18 months, noting that in these types of cases, "It is essentially a matter of impression, having regard to the circumstances of the offence and the background of the offender." Here of course, I must have regard to relevant New Zealand authorities and, in my view, the offending is much worse due to the accompanying violence.

[28] *R v Bloor*[5] is a New Zealand High Court decision. The essential facts were:

> The defendant and the victim had been in a relationship for two years prior to the offending but were not living together. They commenced having consensual vaginal intercourse and the defendant placed lubricant on her and proceeded to penetrate her anally. The victim immediately protested for him to stop. The defendant pulled away, then recommenced in penetration, taking hold of her and holding her face-down on the bed with a pillow.

[29] Asher J accepted that the defendant's act in proceeding to the sexual violation was spontaneous and could be seen as having arisen out of consensual sex. However, there were a number of aggravating factors including the violence of the sexual act, the general application of force, and the damage caused to the victim. The learned Judge considered that the offending fell at the boundary point between rape band 1 and rape band 2 of *R v AM* and held that a starting point of eight years' imprisonment was appropriate.

[30] As in *R v Bloor,* the offending in this case was spontaneous rather than premeditated and can be seen as having started out of consensual, albeit reluctant, sex. There was the aggravating factor of associated violence, giving that you held her wrists down and pulled her hair. The other violence offending occurred after the sexual violation.

[31] In my view, because of those other factors, the case does fall within band 1 of *R v AM*, a starting point of six to eight years' imprisonment. The issue is whereabouts in band 1 it sits. The task is not straight forward, given that there are limited authorities where consent has been withdrawn part-way through.

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[5] *R v Bloor* [2014] NZHC 2086

[32] Another issue here is that the sentencing indication process was quite a fulsome one. My sentencing indication remarks, which of course you did not accept and which you may now regret, were some 36 paragraphs. The basis on which the Crown couched its submissions were essentially the same in terms of the facts the charges that went to trial, other than the rape, increased in seriousness.

[33] I need to be cautious in the overall approach today because, in my view, there needs to be some consistency between the Crown's approach at that point. The Crown did not make concessions at the sentencing indication in terms of starting point. The only concessions that were arrived at were an early guilty plea and co-operation. In fact, in your case any concessions that might have been present were withdrawn by the replacement of other charges.

[34] As to the extent of the harm on the victim, she states that she was shocked by your behaviour and has found it hard raising her children without you. She is still confused. However, overall, she wants to maintain a relationship for the children's sake but does not want to be in a relationship with you again.

[35] As I have said, the case falls at the lower end of band 1. It is always difficult to analyse one case against another but my assessment of the actual sexual act that it is less serious than *R v Bloor,* where a different sexual act constituted the sexual violation and a greater degree of force was involved. A starting point of no higher than six years' imprisonment on the lead charge is appropriate.

[36] There is some force in the defence submission on the injuring charge that it could have been reflected in a lesser charge, therefore placing it in band 1 of *R v Nuku.* The offending does need to be looked at in totality given that the three separate charges arose out of one continuing course of events. However, an uplift is appropriate to reflect the other charges. That uplift ought to be along the lines of that submitted by Mr Dawson when looked at on a totality basis. While it might be an uplift of 12 months, totality would see the total starting point one of six years and six months.

[37] You are entitled to a discount for recognising the consequences of your offending and your willingness to make amends for the sake of the family and your

willingness to undergo treatment. In my view, there are some other features of this matter in relation to aspects of the Victim Impact Statement and the overall effect of your offending on the dynamic of this young family that means that I can slightly increase the discount from that advocated by Mr Dawson.

[38] In the end, on a totality basis and having regard to all of the facts and features of this case, I will on the charge of rape impose a sentence of five years and four months. I will on the charge of assault with intent to commit sexual violation impose a sentence of nine months, to be served concurrently. I will on the charge of injury with intent to injure, impose a sentence of six months to be served concurrently.

[39] My understanding is that a strike warning has already been given. I am obliged to counsel for their assistance.

M A Crosbie
District Court Judge