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

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS, OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2016-009-001990
THREE STRIKES WARNING
[2018] NZDC 21970

THE QUEEN

v

MIKIORA JAMES HORNE

Hearing: 17 October 2018

Appearances: B Hawes for the Crown
A Kelland for the Defendant

Judgment: 17 October 2018

NOTES OF JUDGE B P CALLAGHAN ON SENTENCING

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[1] Mr Horne, you are for sentence, the jury having found you guilty of the offence of sexual violation by rape of the complainant and indecent assault which occurred just immediately before that. I know you do not accept the verdict of the jury and you are entitled to that view. It just means I cannot give you any credit for remorse. The jury verdicts overwhelmingly support the complainant's evidence.

[2] She was a resident at the [location deleted], a residence for young people with a lot of mental health disorders. She had been diagnosed as suffering from a [mental disorder] previously. That was as a result of other events in her life completely

unconnected to you. She was undergoing counselling with her counsellor and was making progress, going from the victim impact statement prepared on her behalf by her counsellor, but this offending has set her back and it has had a significant effect on her rehabilitation. I am told immediately following the incident she relied heavily on substances to help her cope. The therapeutic process for her recovery is now slow. Her words to her counsellor were that this undid the progress that she had made. She will require long-term therapy.

[3] So, she was a person who was already disadvantaged by the issues that she was suffering from. You did not know about those and I am not suggesting that you were aware of these given the circumstances of what occurred but the effect of the offending on her, of course, is a matter that I have to take into account.

[4] There is no suggestion here of any unlawful detention by you in the sense that you corralled her into the car. You asked her if she wanted a lift. She said she did and she got in. It was following this that the variance in your stories occurs. You say that she was a consenting person. She says she was not and the jury agreed with her. I suppose I should say that I am not particularly surprised that the jury did not buy your version in this sense because it had found the charge is proven beyond reasonable doubt.

[5] You denied penetrating her. When you were told that your DNA was obtained from an introital swab you then said you could not remember but you did not think you had ejaculated inside her and it was put to the various professionals that the presence of semen, some of which at the entrance to the vagina, the introital swab which was your DNA possibly could have occurred by transference from clothing, you believing you had not penetrated her or ejaculated in her. In any event Ms Jane, the scientist disagreed with that. Dr Moretti thought it was highly unlikely and, in any event the semen was found as far up as the cervix which the jury clearly found was yours.

[6] You suggested to the complainant that she had invented this story to make up for her perhaps being in trouble for drinking or being caught drinking at the [location deleted], which was prohibited. She came across I think, for all her issues, as a

confident and competent and affected witness. She stood by her story notwithstanding the challenges that were made to her and completely denied the suggestion which you said to the police and put to her that she wanted another sexual encounter against a toilet wall.

[7] Again the jury rejected the suggestion that her walking up and down the road outside the [location deleted]] was because of the ruse that you had created because she wanted to come with you but that you might come back. Clearly, she as the jury verdict shows, was probably very worried, concerned and troubled by what had occurred and when she returned to the [location deleted] after having been picked up she disclosed what had occurred to her.

[8] Ms Kelland is right that in respect of the actual act of intercourse, although she suggests you pulled her from the front to the back of the car, there were no other, if you like, features of violence other than what the crime itself denotes in respect of the sexual violation by rape. As to her age I have just been reminded you told the police that she told you that she was a lot older, maybe 26. She denied that. It is hard for me to take a view as to how old she looked but when I saw the DVD footage of her up and down [street deleted] outside the [location deleted] it is possible that she looked older than [under 18 years of age]. In any event you have been found guilty of the offending.

[9] I have had regard to the pre-sentence report, to your personal life and your care of an autistic son. I agree with counsel there is no suggestion that you are a sexual offender generally. This clearly can be seen as one-off. I have decided, and it is not really pushed, that your previous offending, which is quite different, should not be taken into account in the sentencing regime.

[10] In respect of the offending itself the only real aggravating feature other than the offending itself was the effect on her, given her own personal issues and troubles and this has caused her to take a backward step in respect of her recovery but on the other side of the coin you did not know any of this and she did, initially at least, agree to get into the car but left rather quickly after this incident had occurred.

[11] In terms of *R v AM* which sets the benchmark for the offending the issue for me is where in band one between six and eight years does this offending lie?[1] It was a relatively short incident. As I have said the indecent assault is really part and parcel of the overall offending, although in its own right is a discrete offence but I treat it really as an aggravating feature, not of the worse kind but still aggravating in respect of the rape charge. The starting point is somewhere in the region of six and a half to seven years. One can never be absolutely accurate. I have decided that six years nine months is an appropriate starting point giving that *A & M* enjoins the Court to look at the starting point between six and eight years.

[12] As to time spent on remand or on restrictive bail conditions and the length of time to hearing these are really matters that are bundled up together because one really is just a mirror of the other but I accept it took nearly three years to be completed. You complied with your bail conditions. I hear what has been said about you being held in custody because of a warrant for your trial matter for approximately a month when you should have been released after your home detention sentence on an unrelated matter came or was changed back to a short term of imprisonment. It is no doubt correct that an allowance will be made in the prison records for that period of time but looking at the matter overall the length of time to trial and the restrictive bail conditions including, I think, the curfew which went until March of this year I have decided that I can make an allowance to you. I do not think 20 percent is appropriate but I still think something reasonable and I am going to make it a period of 12 months so the end sentence on the rape charge will be five years and nine months and in respect of the indecent assault a concurrent term of one year imprisonment.

[13] I have to give you a three strike warning given your conviction for the offending. So, I just need to tell you, Mr Horne, that given your convictions for sexual violation by rape and indecent assault you are now subject to the three strikes law. I am going to give you a warning of the consequences of another serious violence conviction. You will also be given written notice outlining these consequences which lists the serious violent offences.

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1 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

[14] One, if you are convicted of any serious violent offences, other than murder, committed after this warning and if a Judge imposes a sentence of imprisonment then you will serve that sentence without parole or early release.

[15] Two, if you are convicted of murder committed after this warning then you must be sentenced to life imprisonment. That will be served without parole unless it would be manifestly unjust. In that event the Judge must sentence you to a minimum term of imprisonment.

B P Callaghan
District Court Judge