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

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IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI-2018-096-000124
CRI-2020-021-000111
[2020] NZDC 13908

THE QUEEN

v

KIRK DALE TERRIS

Hearing:	20 July 2020
Appearances:	J O'Sullivan for the Prosecutor B Hunt for the Defendant
Judgment:	20 July 2020

NOTES OF JUDGE P A H HOBBS ON SENTENCING

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[1] Mr Terris, on 18 February of this year, a jury found you guilty of seven charges: three charges of sexual violation by rape, one charge of sexual violation by unlawful sexual connection, one charge of threatening to kill, one charge of being a party to sexual violation by rape, and one charge of being a party to sexual violation by unlawful sexual connection.

[2] At the beginning of the trial, you also pleaded guilty to an intentional damage charge.

[3] It is now my duty to sentence you in accordance with the jury's verdicts and your guilty plea.

[4] It has also been drawn to my attention that there is a charge of breaching a protection order that is unrelated to the trial matters. You have today pleaded guilty to that charge.

[5] The trial offending occurred between [years deleted – a 3-year span]. It is relevant to note that both you and the victim were young at the time; the victim was [under the age of 20 years], and you 16 or 17 years of age.

[6] The evidence disclosed a violent and turbulent relationship. It was also apparent from the evidence that you were using drugs at the time and associating with a number of drug users and others who were selling you drugs, some of whom were gang members.

[7] On an occasion early in your relationship, the victim came home from work to find you sitting on the couch. She was concerned about your behaviour and asked what was wrong. You pushed the victim down onto the couch, asking her where she had been. You told her that if she was going to act like a slut, you would treat her like a slut. You put your forearm across her neck. You stuck your hand down her pants and roughly and forcefully put your fingers into her vagina. The victim described it as being like a hammer and a nail with your fingers inside her.

[8] You then took the victim's pants off and, without her consent, penetrated her vagina with your penis, ultimately ejaculating.

[9] On another occasion, while in [location deleted] celebrating [occasion deleted], you raped the victim while on a mattress in the kitchen. You had woken the victim up and told her to roll over because you did not want to look at her face. You forced your penis into her vagina, which she described as being "rammed in." The victim recalls having tears in her eyes. She described the hurtful things you were saying to her at the time as almost more hurtful than the sex itself.

[10] On another occasion, while living in [location deleted], you again raped the victim while holding a butter knife to the back of her head. The victim again described you forcing your penis into her vagina as you held the butter knife to the back of her head, obviously as a threat.

[11] It is apparent from the evidence that on these occasions, the victim feared for her safety. She often simply gave up any resistance in the hope of remaining safe and in the hope that the ordeal would end as soon as possible.

[12] As I have said, you also pleaded guilty to a charge of intentional damage. On this occasion, you forced your way through a door, damaging it as you did so, to gain access to the victim, who had locked herself in the bathroom with [another person]. It was during this incident that you threatened to kill the victim also, telling her that you would burn the house down.

[13] It was during your relationship with the victim sometime in [year deleted] that three men came into the victim's house. The victim thought the three men had come to the house to kill her. They told the victim that you had not paid a drug debt and that you had offered the victim as payment for that drug debt. One of the three men, who remains unidentified, raped the victim. Another man, who also remains unidentified, forced his penis into the victim's mouth. The jury was satisfied that this had occurred and that you were present when it occurred. The jury was also satisfied that you had helped, encouraged or assisted these men to rape and sexually violate the victim, by offering the victim as payment for the drug debt and by virtue of your presence in the room.

[14] In my view, the victim was a compelling witness. You have heard directly from her today about the effects this offending has had on her and, clearly, continues to have on her to this day.

[15] The guideline judgment for rape and unlawful sexual connection at the time of your offending was *R v A.*[1] I must have regard to any discernible sentencing regime at the time of your offending.

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[1] *R v A* [1994] 2 NZLR 129.

[16] However, the Court of Appeal decision of *R v AM* is the current guideline judgment for sexual offending.[2] While your offending pre-dates this decision, the guidelines set out in that decision remain applicable. The bands specified in *R v AM* were set with reference to a number of cases that occurred over the same period of your offending.

[17] There are a number of aggravating features to your offending. The scale and nature of the offending are relevant aggravating features. Over the course of your relationship with the victim, there were four rapes, one of which involved you as a party, and two acts of sexual violation by unlawful sexual connection, again one of which involved you as a party. The first rape was accompanied by additional violence, which involved you placing your arm over the victim's throat, and another involved the use of a knife to effectively threaten the victim.

[18] The rape and sexual violation to which you were a party involved three men, one of whom raped the victim while another forced the victim to perform oral sex on him. There was some planning and premeditation in relation to this group offending, as you had offered the victim to these men in order to settle a drug debt. They came to the house uninvited, essentially forcing their way into the house for that purpose. You stood by and did nothing to stop it. This offending was a particularly degrading and frightening experience for the victim.

[19] As I have already noted, beyond the fear and physical violence inflicted on the victim, your offending, which includes the group offending, has had a profound and lasting effect on her.

[20] I agree with the Crown that a global starting point for all of the sexual offending is appropriate. Ms O'Sullivan for the Crown submits that the offending falls within band 4 of *R v AM* and says that a starting point of 16 to 18 years' imprisonment is appropriate.

[21] Ms Hunt submits that the group offending which involved you as a party is the lead offence. Ms Hunt submits that this offending does not fall into the worst category

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

and, therefore, does not fall into band 4. Indeed, Ms Hunt submits that the offending as a whole falls within band 3 and submits that a starting point of 13 years is more appropriate.

[22] Sentencing is not a mathematical exercise but, rather, an evaluative exercise. The bands set out in *R v AM* are not to be applied in an overly rigid fashion. I must have regard to the particular circumstances of this case. While *R v AM* indicates that a gang or group rape is likely to fall within band 4, it must be remembered that you were found guilty as a party in relation to that offending, not a principal offender.

[23] I acknowledge that often no distinction can be drawn between the culpability of principals and parties. In this case, some recognition of that difference is appropriate. My impression from the evidence is that you were at the time a teenager well out of your depth, both in terms of your drug use but also in terms of how to appropriately deal with relationship issues, which is a matter that is referred to in the s 38 report ordered by me. You were using drugs and being supplied these drugs by older men, some with gang connections. Of course, none of that is an excuse for your actions, but is part of the factual matrix to be taken into account when considering the appropriate starting point.

[24] There is a significant overlap between bands 3 and 4, so reference to a particular band may not be helpful or necessary. On the Crown's range for a starting point, your offending could fall into either band 3 or 4. Ms Hunt is firmly in band 3.

[25] In my view, having regard to *R v AM* and the aggravating features of the sexual offending that I have referred to, and making the best assessment I can of your culpability, I think a starting point of 15 years is appropriate.

[26] There are no mitigating features in relation to the offending itself.

[27] I am also satisfied that looked at in the round, such a sentence adequately deals with the charges of threatening to kill, intentional damage, and breach of a protection order. They of themselves might not have attracted a sentence of imprisonment without the more serious offending.

[28] The breach of a protection order involved you being asked to leave by the protected person, with whom you are still in a relationship, but you refused to do so. So, it is at the lower end of the scale in terms of seriousness. But, I must also note that you have previously been convicted of breaching a protection order and male assaults female.

[29] This brings me to what personal matters can be applied in mitigation.

[30] Your youth at the time of the offending is a factor that I must consider. As I have noted, you were only 16 or 17 years of age. Senior Courts have long recognised that youth is a significant mitigating factor. I have already made mention of my impression that you were a troubled young man, well out of your depth, and dealing with matters beyond your limited experience of life at that time.

[31] The Crown submits to me that only a modest credit of 10 percent is appropriate for your youth. Ms Hunt submits that a much more significant credit of 30 percent is available for your youth.

[32] I also think your behaviour was, to an extent, shaped by your earlier life experiences, which are referred to in the s 38 report and the cultural report. The cultural report, based on your reporting, suggests that you were the victim of sexual abuse yourself at a young age. You were also exposed to domestic violence at a young age. You began using alcohol and drugs from a young age. You identify as Māori from Ngāti Awa. But the cultural report makes it clear that you have had very little to do with your culture and tikanga Māori.

[33] Recognising your youth and these earlier life experiences is not intended to suggest an excuse for your behaviour, nor is it intended to suggest you are not responsible for your actions. But it is something to be recognised by way of mitigation.

[34] There must also, in my view, be good prospects of rehabilitation. It is suggested in the s 38 report that you have made significant changes to your life since the time of this offending, and that is reflected in the fact that you have not offended

in a similar way since. You are described by your current partner, who is here in Court supporting you, as a good father and provider. I have letters of support from others who are here supporting you today.

[35] There has been some other criminal offending, but of a much more minor nature and nothing of a sexual nature since this offending.

[36] In my view, you are entitled to credit by way of mitigation for your youth at the time of the offending, those additional matters I have referred to, and what, in my view, must be good prospects of rehabilitation.

[37] No credit is available to you for a guilty plea because you defended the charges, which, of course, is your right.

[38] However, Ms Hunt submits that you should be given some credit for remorse. The Crown says little if any credit should be given for remorse, bearing in mind your not guilty pleas and the fact that the victim has had to endure the ordeal of a trial.

[39] The issue of remorse in this case is a difficult one. It is often difficult to justify a credit for remorse when there has been no acknowledgement of the offending by way of a guilty plea. In addition, the s 38 report discloses a denial of the sexual offending on your part. It also records a suggestion by you that the victim may have been exaggerating or fabricating some of what she said. Such expressions are clearly inconsistent with genuine remorse.

[40] In contrast, in the cultural report and pre-sentence report there is reference to you expressing deep regret and remorse for the harm you have caused the victim. My impression is that you are struggling to reconcile these historical events with your current circumstances, and you are struggling to accept responsibility for such serious offending that occurred so long ago, when you were young. You have variously expressed a lack of memory for the events in question, doubt about your own sanity as a result and denial of the events in question, but also at times you have expressed a recognition of the harm that you have caused to the victim. You have also expressed

a willingness to go to restorative justice, but that was not possible, for perfectly legitimate reasons.

[41] That recognition of the harm that you have caused, such that it is and belated as it is, can be recognised in mitigation, but only, in my view, in a minor way.

[42] Ultimately, Ms Hunt submits to me that you should be given credit of some 60 percent in total for your youth at the time, the factors contained in the cultural report, your remorse, and what she says is your previous good character.

[43] In my view, those credits in total are clearly excessive.

[44] For your youth at the time of the offending and your good prospects of rehabilitation, I think credit of 25 percent is appropriate.

[45] A further 10 percent is available to you for the matters that are referred to in the cultural report. There may have been some difficult circumstances for you in your youth; but in my view, the nexus between those matters and the offending is not as strong as Ms Hunt would have me accept.

[46] A further minor credit, as I have said, of five percent is appropriate for recognition of the harm you have caused to the victim.

[47] That is a total credit of 40 percent, well in excess of what the Crown suggest is appropriate but less than the 60 percent suggested by Ms Hunt.

[48] That results in an end nominal sentence of nine years' imprisonment.

[49] The Crown seeks a minimum period of imprisonment. The Crown submits that the offending was extremely serious and occurred during the course of a domestic relationship. The Crown also suggests that a risk of offending remains in any future relationship marked by conflict.

[50] The offending is undoubtedly serious. However, a formulaic approach to the imposition of minimum periods of imprisonment is not appropriate, and it does not

follow that lengthy sentences of imprisonment for sexual offending should inevitably attract minimum periods of imprisonment.

[51] I do not accept that a minimum period of imprisonment is necessary in your case. I am satisfied that the principles of deterrence and denunciation are adequately provided for in this case by the sentence I have referred to. I think it is also relevant to note that you were young at the time of the offending, and there has been no offending of this magnitude in the [years since], and certainly no sexual violation.

[52] I am therefore satisfied that no minimum period of imprisonment is necessary. The Parole Board will make its decision about when you are safe for release.

[53] Finally, this brings me to the issue of a protection order. The victim seeks a protection order. Protection orders are not to be made as a matter of course. There must be jurisdiction and a need. An order is appropriate where there are reasonable fears for the safety of the victim based on recent indications of family violence. This offending occurred [more than 12] years ago. There has been no suggestion of any further violence since that date perpetrated by you against the victim. As far as I am aware, and confirmed by Ms O'Sullivan for the Crown, there has been no attempt by you to inappropriately or in a nefarious way contact the victim since these charges arose. It is also relevant to note that you will be subject to the lengthy period of imprisonment that I have referred to.

[54] The Crown has not satisfied me that there is a need for a protection order, and I do not intend to order one. If circumstances were to change, then an application can be made by the victim through the Family Court.

[55] The end result, Mr Terris, is a sentence of nine years' imprisonment.

[56] On each of the sexual violation charges, you are sentenced to nine years' imprisonment.

[57] On the charge of wilful damage, one month's imprisonment.

[58] On the charge of threatening to kill, six months' imprisonment.

[59] On the charge of breaching a protection order, six months' imprisonment.

[60] They will all be served concurrently. The effective sentence is one of nine years' imprisonment.

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PAH Hobbs
District Court Judge

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