

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

**ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES),
OCCUPATION(S) OR IDENTIFYING PARTICULARS OF THE
DEFENDANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.**

**IN THE DISTRICT COURT
AT GISBORNE**

**CRI-2016-016-000358
THREE STRIKES WARNING
[2018] NZDC 611**

THE QUEEN

v

[TIMOTI WHIU]

Hearing: 16 January 2018
Appearances: C Gullidge for the Crown
A W Clarke for the Defendant
Judgment: 16 January 2018

NOTES OF JUDGE W P CATHCART ON SENTENCING

[1] Mr [Whiu], the first stage of the sentencing is to give you a stage one strike warning. Given your convictions for sexual violation by unlawful sexual connection, attempted sexual violation by rape and attempted sexual violation by unlawful sexual connection in connection with the victim, [victim 1], you are now subject to the three strikes law.

[2] I am now going to give you a warning of the consequences of another serious violence conviction. You will also be given a written notice outlining these consequences which lists the serious violent offences. First, 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. Second, 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.

[3] Your offending against these five victims is shocking, Mr [Whiu]. Your offending started with, if I could use the phrase, the three [details deleted] victims, [victim 2, victim 3 and victim 4]. Between [dates deleted] you sexually abused them. At that time, you were in your early to mid-twenties. Your offending did not stop then. Between [dates deleted] you sexually abused [victim 1]. At that time, you were aged in your mid-thirties to mid-forties. Also, on three occasions between [dates deleted] you assaulted [victim 5] who tragically passed away [details deleted].

[4] It is accepted that [the families] were very close, more like one extended family or whanau.

[5] I must deal with the specifics of your offending in this sentencing to the degree it is necessary to describe the horrific acts you committed against these women and this young girl.

[6] I deal, first, with the offending against [victim 4]. You rubbed the outside of your genitalia on the outside of her genitalia on a weekly basis. On several occasions, you digitally penetrated her anus when she was aged between six and 10 years. Those charges are reflected in the sexual violation by unlawful sexual connection and the indecent assault charges.

[7] I move to deal with the offending against [victim 2]. On one occasion, you tickled the outside of her genitalia. On another occasion, you licked her genitalia and made her touch your penis. On two separate occasions, you rubbed your penis against her genitalia. Those acts are reflected in the charges of indecent assault (x4) and sexual violation by unlawful sexual connection. [Victim 2] was aged between six and 10 years of age over that period.

[8] I now deal with the offending against [victim 3]. On two separate occasions, you rubbed her genitalia. She was aged between four and eight years. That offending is reflected in the two charges of indecent assault relating to her.

[9] I then move on to the offending involving [victim 1]. That offending indicates your propensity to sexually offend against young girls in close whānau connection with you, did not stop in the [decade deleted]. That propensity continued as your continuous mindset is reflected in the offending against [victim 1]. You offended against her on a regular ongoing basis through an eight-year period. You digitally penetrated her, performed oral sex on her, simulated sexual intercourse with her by rubbing your penis against her genitalia and you attempted to have sexual intercourse and anal intercourse with her. She was aged a mere five years when it started and it continued until she was 13 years of age.

[10] Your offending also included a propensity to be violent towards [victim 5] who, as I said, passed away [details deleted]. On three occasions, you punched [victim 5]. Two of the occasions involved punches to the head while one involved a punch to the stomach. [victim 5], at the time, was aged 14 or 15 years. Those charges are reflected in the three assault charges.

[11] I must approach the sentencing exercise in a principled and balanced way. This offending is horrific but I must ensure the reasoning is objective. It is for that reason the Crown and your counsel have gone to some length to analyse the case law. This is because I must be consistent with other decisions by other Courts so that like offenders are treated in like fashion.

[12] The aggravating features here are self-evident. This was a tsunami of abuse. Through it, all your victims were vulnerable by their age. Overall, they were aged from four to 13 years when you sexually abused them. That vulnerability is further reflected in the age difference between you and the victims at the time you committed the offending. That age difference ranged from approximately 15 years up to 30 years.

[13] Also, there was a significant breach of trust as argued for by the Crown, particularly with respect to [victim 1]. She is your [relative]. However, there is an element of breach of trust in the fact that [the families] had a close whānau connection.

So, in that wider whānau context there has been an element of breach of trust. I therefore agree with the Crown's position that overall the breach of trust was profound with respect to all victims.

[14] The scale of the offending speaks for itself. It involved multiple victims. It occurred over a substantial period.

[15] Also, there is an element of premeditation. The reason I say that is after the [earlier, decade deleted] offending the police and CYFS were notified of aspects of those allegations. You became aware of that yet you continued your offending against [victim 1]. There is thus a mindset factor involved here. As I said earlier, it indicates you have a strong propensity to sexually abuse young girls in your whānau care.

[16] I move then to one of the most significant aggravating features and that is the harm caused to these women and to this young girl, [victim 1]. I do not intend to cite every single victim impact statement. They are sad reading but they have a core commonality. You have altered the course of their lives. They have been devastated emotionally. Their own behaviour changed during their lives. They could not talk to anyone about it.

[17] The offending against [victim 1] (as she read her statement to the Court) indicates the level of effect this offending had on her. She felt suicidal. People were questioning her own behaviour. She finally spoke up to her father in 2016. She did not speak earlier because she had mixed loyalties to support her [details deleted]. She has flashbacks. She has been diagnosed with PTSD. She has problems controlling her emotions. Her victim impact statement typifies the profound effect you have had on these victims.

[18] Because the offending involved historical sexual abuse, I am obligated in law to sentence you on those offences in the context of the maximum penalty available at that time and the sentencing practices at that time.

[19] I therefore adopt the following approach to the sentencing exercise. I start with the more recent offending against [victim 1] where the maximum penalty for sexual violation by unlawful sexual connection is 20 years.

[20] I will then assess the starting-point for the other three victims of the sexual offending. I will then adopt a global starting point making an adjustment for totality purposes, and then adopt an uplift for the assault offending against [victim 5].

[21] The Crown says the offending against [victims 2, 3 and 4] includes two charges of sexual violation by unlawful sexual connection. The first is a single incident that occurred between [dates deleted]. It is not known whether this happened before or after the increase in the maximum penalty of 14 years to 20 years' imprisonment on 1 September 1993. The other charge also occurred between [dates deleted] but because the offending was repeated throughout the period, in my view it can be inferred that part of the offending occurred after the increase in penalty.

[22] Mr Clarke submits, however, that in fixing the maximum penalty for those matters, the benefit of the doubt as to the timing of that offence should be given in your favour. He submits there is uncertainty about where those offences fitted in the timeline and the best approach is to adopt the cautious position that the offending occurred prior to the increase in the maximum penalty.

[23] I have considered that submission. In my view, the Crown must be correct that, because the offending was repeated throughout the period, it can be properly inferred that part of the offending I am talking about occurred after the increase in the maximum.

[24] I now move to the purposes and principles of the Sentencing Act 2002. There is clearly a need to deter and denounce your conduct, to hold you accountable for the harm you have caused to the victims and to promote in you a sense of responsibility for what you have done. I need to impose a sentence that takes into account the harm you caused to these victims. The Court of Appeal decision in *R v AM*¹ is the guideline case for me. As the lawyers know there are various bands in which offending of this nature falls.

¹ *R v AM* [2010] NZCA 114.

[25] The Crown also referred me to *R v Arioka*,² and *R v Lam*.³ But, I note that in a number of the cases cited to me there were charges not only of sexual violation by unlawful sexual connection, but also attempted rape.

[26] The Crown submits there should be a starting point of 12 years' imprisonment for the offending against [victim 1] alone. Mr Clarke submits the appropriate approach is to place that offending in the appropriate band in *R v AM* but then fix a slightly less starting point for the offending against [victim 1]. Having considered those submissions, I adopt a starting point for this offending alone of 11 years' imprisonment.

[27] That starting point must be increased to reflect the offending against [victim 2, 3 and 4]. Here, the Crown refers me to *R v White*,⁴ and other decisions to get a sense of the sentencing practices at the relevant time.

[28] Mr Clarke has also referred me to various cases. He submits there should be an uplift of only two and a half years from the starting point for the offending against [victim 1] to reflect the totality of the offending against all victims.

[29] If I were to deal with the offending against [victim 2, 3 and 4] alone, I would have adopted a stand-alone starting point of eight years' imprisonment. In my view, that figure fits the lower maximum and the sentencing practices at the time.

[30] In relation to the offending against [victim 5], I consider that offending on a stand-alone basis would warrant a one-year term of imprisonment. If I were to simply add up all those figures I would arrive at a total figure of 20 years' imprisonment.

[31] However, I recognise immediately I must adjust that figure to reflect the totality of the offending. That is an important principle set out in the Sentencing Act. All Courts must adjust the starting point in accordance with that principle. Here, I part ways with Mr Clarke's position. I consider the Crown is closer to the appropriate

² *R v Arioka* [2015] NZHC 1521.

³ *Lam v R* [2016] NZCA 114 and *R v Lam* [2015] NZDC 2646.

⁴ *R v White* HC Auckland, CRI-2007-044-3842, 24 August 2007.

global starting point. For you, Mr [Whiu], I adopt a global starting point of 15 years for all offending.

[32] In mitigation, Mr Clarke, who is dealing with a difficult brief, refers me to the clinical psychologist's report. It sets out your relevant personal background and upbringing:

Mr [Whiu's] childhood was characterised by exposure to substances and violence which would have interfered with his attachments and been undermining of a safe and positive start in life. It is also possible that through these early experiences, Mr [Whiu] became sensitised to violence and unclear boundaries and internalised this to some extent. He struggled with learning and was bullied by peers throughout school which would have further contributed to feelings of rejection, low self-worth, social development, and diminished confidence. Mr [Whiu] may have also struggled cognitively, although this was formally assessed during the current assessment. Long-term learning difficulties are likely to have impacted on his capacity to learn and retain information, and this would need to be considered regarding any future treatment programmes. It is likely that Mr [Whiu] did not learn effective ways to regulate his emotions, nor did he have the necessary skills to deal with some of his difficulties. He may also have used substances to manage and/or avoid his difficulties, and perhaps as a way to fit in or be accepted by peers. This however would have compounded his difficulties further and contributed to his already poor decision making, diminished coping, low self-esteem, and impulsivity.

Mr [Whiu] reported that he did not receive sex education, nor has he ever had an intimate relationship with an adult. He struggles to develop social connections with others and may have interacted with people much younger than himself in an attempt to establish some social engagement. This along with his poor capacity to problem solve, avoidance, possible social isolation, and associated challenges with learning may contribute to his risk of future sexual offending. Whilst Mr [Whiu] does not report specific deviant sexual interests, he does have a history of being sexually aroused by children which he himself reported having towards one of his victims which may be indicative of his emotional identification with children. Mr [Whiu] also reports that his "best friend" allegedly spent time in prison for sexual offending against children which is another risk factor for Mr [Whiu]. Any further support for Mr [Whiu] needs to include people who do not have sexual offending as part of their own histories.

Whilst Mr [Whiu] denied a majority of his sexual offending, he did acknowledge he had sexually offended against one victim and is motivated to seek help for. He displays a tendency to minimise responsibility and/or minimise or deny some of his actions, particularly his offending behaviour. If these issues are not addressed it is likely that Mr [Whiu] will be at further risk of sexual offending. His sexualised behaviour and his acknowledgment of his sexual attraction to young children requires treatment.

[33] Tragically, Mr [Whiu] your own childhood was characterised by exposure to illegal substances and violence. The report writes says you became sensitised to

violence. You were unclear of boundaries. You had low self-worth, diminished confidence. The writers says at page 9 you did not have any intimate relationships with other adults and struggled to form social connections. All of that is sad reading and I take it into account. But it cannot, in any way, justify this level of offending against these victims.

[34] I cannot give you any discount for good character. The reason for that is because your offending did not stop in the [decade deleted]; it continued with the offending against [victim 1]. Given the prolific and prolonged nature of your offending, no deduction for good character is appropriate.

[35] Also, no deduction can be given for remorse. I am told you are still in denial to a degree notwithstanding your guilty pleas. In the end, the only appropriate mitigating factor is the guilty pleas. The appropriate discount for guilty pleas is 20 percent. That reduces the sentence to 12 years' imprisonment on the lead offence.

[36] The next issue is whether I impose a minimum period of imprisonment. The Crown points out that minimum periods of imprisonment of 50 percent were imposed both in *Lam* and *Arioka* which I mentioned earlier. The Crown says your lack of insight and denial is particularly concerning. Also, they refer to the pre-sentence report findings, that you present as a risk of harm at a moderate to high level because of the nature of your offending and the denial you are going through.

[37] I am satisfied under the test in s 86 Sentencing Act that a minimum period of imprisonment is appropriate. Ordinarily you would be subject to consideration for parole after serving a third of your sentence. But that is not sufficient to hold you accountable for the harm you have done to the victims; nor is it sufficient to denounce your conduct nor to deter you and others from committing similar offending. Also, in your case there is a need to protect the community from you, and in particular female members of your wider whanau.

[38] I therefore intend to impose on the following charges a 50 percent minimum period of imprisonment. It is imposed on the charges relating to [victim 1] and on the charges of sexual violation involving [victim 2] and [victim 4].

[39] Mr [Whiu], the sentences are as follows:

- (a) On all sexual violation charges relating to [victim 1] you are sentenced to 12 years' imprisonment.
- (b) On the remaining sexual violation charges you are sentenced to nine years' imprisonment, concurrent.
- (c) On the indecent assault charges, you are sentenced to five years' imprisonment, concurrent.
- (d) On the charge of attempting sexual violation by rape involving [victim 1], you are sentenced to eight years' imprisonment, concurrent.
- (e) On the assault charges involving [victim 5], you are sentenced to eight months' imprisonment, concurrent.

[40] The final matter is dealing with the requirements of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

[41] [Timoti Whiu], you have been convicted of qualifying sexual offences against a child. As outlined, you are sentenced to a term of 12 years' imprisonment. This means you are now a registrable offender under s 7 Child Protection (Child Sex Offender Government Agency Registration) Act 2016. The Act establishes a child sex offender register which monitors child sex offenders in the community and also enables information sharing to occur between Government Agencies. Your details will be placed on that register and you will be provided with a written notice outlining your reporting obligations and the penalties for non-compliance as soon as practicable.

[42] Mr [Whiu], there will be a permanent name suppression of your details. It is designed, not for your benefit, but to protect the identity of the victims.

W P Cathcart
District Court Judge