

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 ROTORUA**

**CRI-2016-063-000483
[2018] NZDC 1056**

THE QUEEN

v

TIMI TEPO ROBERT HOHEPA

Hearing: 23 January 2018

Appearances: A Gordon for the Crown
M Simpkins for the Defendant

Judgment: 23 January 2018

NOTES OF JUDGE A J S SNELL ON SENTENCING

[1] Mr Hohepa, you face sentence today on one charge of sexual violation by unlawful sexual connection. The maximum penalty on that charge is 20 years imprisonment.

[2] By way of summarising what occurred, you at the time were aged [age deleted] and [details deleted]. You were a person of status within the community and you, [details deleted].

[3] On the day that this occurred on [date and details deleted], , there was a barbecue and then alcohol consumed. [details deleted]. The victim fell asleep in his

chair. He had consumed alcohol. At the time that he fell asleep, there was only you and he left in the garage. The light was on and the garage door was open. He awoke to find you performing oral sex on him. That was without his consent. The garage door was closed and the light was out.

[4] At the time that this incident occurred, you were HIV positive and, as a result of that, the victim has had to undergo medical procedures which have been outlined in his victim impact statement to test as to whether he had contracted the HIV virus and/or to treat that virus.

[5] You entered a plea of guilty to the charge on the morning of the scheduled trial. You come before this Court with six previous offences. Only one of those six offences is relevant. That is an offence that was committed in July of 2008 involving the indecent assault on a male over the age of 16. You served a term of imprisonment as a result of that offence.

[6] Today, in terms of sentencing, I am assisted by the victim impact statement that has been read to the Court this morning. There is no doubt that the victim of your offending has faced utter devastation at what occurred. He faces ongoing psychological effects and I thought that in the way that he recounted matters, he was balanced, he does not blame your whanau at all, he blames you and you are to blame. There is nobody else to blame but you.

[7] I have a pre-sentence report to give me some assistance. That considers that you are a high risk of causing harm, given the offending that you have been convicted for and it especially notes that given that you were aware that you were HIV positive at the time that you committed this offence, that combined with your previous offending means that you are a high risk. Within that report, it said that you had no remorse. It says that you had stated that you only agreed to plead guilty so that you would serve less time and that you assert that the victim was consenting to the activity. It says that you remained dismissive during the interview but indicated that you would be willing to participate in any programmes. You maintained the sexual activity had been consensual. That position has been changed by your counsel who says that you now accept that you are guilty of the offending and that it occurred in the way that was

indicated in the summary of facts that you agreed to at the time of pleading guilty. You accept it was not consensual. You accept that what you did formed this offence.

[8] I have received a letter of remorse from you where you apologise to the victim and you apologise to his family. I have received a letter from a supporter of you who talks of your knowledge and your contribution within the community and in terms of your knowledge, he describes you as a keeper of the knowledge, customs, traditions and whakapapa of your community.

[9] As to whether you are really remorseful or whether you have what is known as sentencing remorse, I will never know. I intend to take the comments in the pre-sentence report which was prepared after your guilty plea into account, but I will also take into account the two letters, your apology and acceptance and the letter regarding your involvement in your community, as well as your counsel's submissions into account.

[10] The Crown submits that you are someone who is in the top of band 1, possibly the bottom of band 2 of *R v AM*¹ which is the tariff judgment for unlawful sexual connection cases. They submit a starting point for you of four and a half to five and a half years imprisonment. Your counsel says that you are in the top of band 1 of *R v AM* and that there should be a four and a half year starting point.

[11] In terms of the purposes of sentencing, I need to hold you accountable for your offending. I need to promote in you a sense of responsibility and ownership for what you have done. I need to uphold the interests of the victim of your offending. I need to sentence you in a way that denounces your conduct and it deters others from any sort of similar conduct and in this particular case, because I consider your offending to be predatory offending, there needs to be an aspect of sentencing that protects the community from your behaviour, because your proven behaviour on two occasions has been predatory for this type of offending.

[12] In terms of the principles of sentencing, the gravity of the offending, the comparative seriousness of the type of the offence, having consistency with

¹ *R v AM* [2010] NZCA 114.

appropriate sentencing levels for similar offending, taking into account the obvious traumatic and ongoing psychological effects of your offending on the victim, and imposing the least restrictive outcome that is appropriate in all the circumstances in accordance with the hierarchy of sentences are the appropriate ones to take into account.

[13] I find that in this case, there are four aggravating features of your offending. The first is that there was an inherent vulnerability of the victim. The victim was significantly younger than you. He had been drinking and he had fallen asleep in his chair. He awoke to find this offending taking place. No issue of consent could ever arise in those circumstances. When somebody is asleep, they are inherently vulnerable. Secondly, I find that there is an abuse of a position of trust in this case. I agree with your counsel, Mr Simpkins, that this is not a case of a parental abuse of trust, but you were somebody who [details deleted]. and there is no doubt that there is an aspect of grooming as you waited in opportunity [details deleted]. So there is an abuse of trust and that is particularly so when one examines the events that occurred on this day. [details deleted] The third aggravating factor is your HIV status. You knew at the time of this offending that you were HIV positive and whilst your counsel has submitted in a comprehensive way that the risk of transmission of that virus or disease was low, the fact is that there remained a risk and no matter how you look at it, you knew that there was that risk when you commenced your actions.

[14] Next and finally in terms of aggravating circumstances is the impact of your offending on the victim. You have heard the victim impact statement and I was pleased to hear that your counsel had shown you that document well before you came into Court today so you have had time to consider it. The impact on him has been profound and ongoing. Not only is there the shame and ongoing psychological effect of the sexual nature of the offending, there is the ongoing fear of the HIV status and risk of infection. It is clear that that has played heavily and still plays heavily on his mind, no matter what the risk is. There has been considerable psychological trauma in every way related to both of those aspects.

[15] It is clear from the case of *Mussa v R*², the fact that this victim has had to undergo blood tests and a course of medication for a period of weeks and the associated ongoing stress that that caused to him is clearly an aggravating factor which can be taken into account in this case.

[16] The tariff decision, as both counsel have identified, is *R v AM*. That identifies bands for the offence of unlawful sexual connection. Band 1 is two to five years. Band 2 is four to 10 years. Both counsel submit that this matter falls either towards the upper end of band 1 or for the Crown, possibly in the lower end of band 2. The two bands overlap.

[17] I have been referred to a number of precedent cases, aside from the tariff case of *R v AM*. They include *Heke v R*³, *R v Eason*⁴, *Gillan v R*⁵, *Pou v Police*⁶, and *Paia v R*.⁷ I have also referred to *T (117/2015) v R*.⁸ It seems to me that every case turns on its own individual facts.

[18] In setting a starting point for you, I need to focus on the facts of this case. With the aggravating factors that I have identified, I set a starting point for you of four years and 10 months imprisonment. That is taking into account the overall circumstances of this offending.

[19] I turn then to whether there are any personal aggravating factors. In my view, there is only one. That is your previous conviction for indecent assault in 2008. That conviction was in very similar circumstances to this case. The facts surrounding that were to be admitted as propensity evidence in your trial and, as I have said, given the stark similarities between the offending, I consider that an uplift to your sentence is warranted and your sentence starting point will be uplifted by four months. That takes your starting point to five years and two months.

² *Mussa v R* [2010] NZCA 123.

³ *Heke v R* [2012] NZHC 1003.

⁴ *R v Eason* [2016] NZDC 12262.

⁵ *Gillan v R* [2015] NZCA 85.

⁶ *Pou v Police* [2012] NZHC 1266.

⁷ *Paia v R* [2014] NZCA 107.

⁸ *T (117/2015) v R* [2015] NZCA 572.

[20] I am not sure whether you are remorseful for this offending. Your interview with the Department of Corrections for your pre-sentence report was not a favourable one to you at all. That displayed a denial of the offending, an absence of remorse and other aspects. Your letter of remorse submitted subsequently to the Court and your counsel's submissions say that you are and have accepted your position. I hope that you have. I do not think however that there is any justification for any discount over and above the discount for the plea which encompasses an aspect of remorse within that.

[21] There has been some debate as to what the appropriate discount for the guilty plea should be. It came about on the morning of your trial. It is recognised however that in this type of case especially, a guilty plea saves the victim from having to come along and give evidence and saves a significant amount of difficulty for them.

[22] You received an indication that there would be a level of discount and I intend to give you a discount consistent with the indication that you received before you pleaded. I therefore deduct eight months for your plea of guilty. That is just over 12 percent. Your counsel submitted for 12 to 13 percent, 12 to 14 percent and that discount is just over 12 percent. That takes your sentence from five years, two months to one of four years, six months.

[23] The Crown has submitted that there should be a minimum period of imprisonment imposed upon you. I have carefully considered that, particularly in light of your denial of the offending in the pre-sentence report and your lack of remorse indicated in that document. Your counsel argues against that. In my view, I consider that a minimum period of imprisonment in this case is not necessary. I have particularly taken into account the letter of remorse that you have expressed, the acceptance publicly and in Court today that this offending occurred, and your acceptance that you are guilty of this offending, so that your whanau and others in the Court know exactly what you have done and that you accept that you have done that and are guilty of that. If it were not for that letter of remorse and your acceptance through your counsel of your offending, I would have given greater consideration to the imposition of a minimum period of imprisonment. I consider however that the

Parole Board is going to be in a very good position to consider whether and when you should be released in terms of this sentence.

[24] I can give you some words of advice. If you continue to deny the offending, or if you try and place responsibility with the victim for this offending, then it is unlikely that you would be accepted for any of the courses that will be on offer as is indicated to you in the pre-sentence report and if you have not done those courses, then your eligibility for parole would be very, very limited. So you may want to think about that over time.

[25] Today, Mr Hohepa, you are sentenced on this charge to four years, six months imprisonment.

A J S Snell
District Court Judge