

**PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF  
COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA611/07  
[2008] NZCA 581**

**THE QUEEN**

**v**

**ROGER TIRA KAHUI**

Hearing: 26 November 2008  
Court: Ellen France, Potter and MacKenzie JJ  
Counsel: Appellant in person  
M D Downs for Crown  
Judgment: 22 December 2008 at 10.30 am

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**JUDGMENT OF THE COURT**

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- A The appeal against conviction is dismissed.**
- B The appeal against sentence is allowed to the extent that the minimum period of imprisonment of 16 years is quashed and a period of 13 years is substituted.**
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# REASONS OF THE COURT

(Given by Ellen France J)

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## Introduction

[1] The appellant was convicted after a jury trial of a number of counts of sexual and violent offending committed over a four to five hour period in relation to the complainant. The appellant was sentenced on 12 October 2007 by Hugh Williams J, the trial judge, to preventive detention with a minimum period of imprisonment of 16 years: HC AK CRI 2006-057-001135.

[2] The appellant appeals against a number of his convictions and against sentence. The conviction appeal is brought on the basis that the verdicts were unreasonable or could not be supported having regard to the evidence. The sentence is said to be manifestly excessive.

## Factual background

[3] The complainant lived on her own. The appellant lived nearby. He had never met the complainant before the night of 13 June 2006 when the offending occurred. However, from the appellant's knowledge of objects owned by the complainant, the Judge inferred that he had been stalking or watching the complainant or that he had been inside her house before 13 June.

[4] The appellant gained entry to the complainant's home on the pretext that his vehicle had broken down and he needed to telephone for help. The complainant tried to protect herself by handing over her cordless telephone and locking the door. The appellant forced his way into the house carrying a pair of scissors and a hammer taken from her shed. The appellant was partially disguised and wore gloves throughout. A struggle ensued in the course of which the appellant subdued the complainant. He threatened her with the weapons and punched her four or five times around the head. As Hugh Williams J in sentencing the appellant said at [7], "[t]he degrading sexual offending then began". Over the next few hours, the appellant raped the complainant on a number of occasions. He performed oral sex on her and made her do the same to him. The complainant was forced to use a vibrator upon herself and the appellant also penetrated her with his fingers.

[5] The appellant also took a number of steps which, as Mr Downs for the Crown submitted, showed a level of forensic acumen. The Judge in his sentencing remarks put it this way:

[8] [The appellant] ... placed a pillowcase over her head because, as [the appellant] told Police, [the appellant] did not want her to see [him]. The pillowcase remained in place for virtually the whole of the rest of the time [the appellant was] in her flat, although it must be acknowledged that during the latter part of the period that was her choice. She said:

"I believed the less chance of seeing his face the more chance I had of surviving that night".

[9] [The appellant] ordered her to shower twice during the episode, emphasising she should wash between her legs. Obviously [the appellant] knew enough to know that would reduce the chances of [his] DNA being found. When she later had [his] pubic hair in her mouth [the appellant] ordered her to wipe it on [his] glove. The toilet roll [the appellant] used [he] put on the duvet, obviously intending to take away – again, to lessen the chance of [his] discovery.

[6] The offending had some particularly concerning aspects which were described by Hugh Williams J as follows:

[10] [The appellant] ... ordered her to don clothing which [the appellant] selected. It was at that point [the appellant] told her [he] had seen her wearing a long black skirt prior to that night and that she looked "sexy" in it.

...

[12] ... Knowing she had a vibrator, [the appellant] used it on her and forced her to use it on herself on a number of occasions ...

...

[15] Telling her [he] knew she had a pornographic video, [the appellant] required her to play it and raped her during the playing of the movie [(count 22)]. [The appellant] did not believe her reply when [he] asked if she would go to the Police but said:

“that doesn’t matter because I’ve got you for as long as I want you now”.

[7] Various threats to kill were made over the course of the offending. In the end, the appellant decided to leave, taking the complainant with him. What then occurred is described by the Judge as follows:

[17] [The appellant] apparently recorded her voice on some device – probably her cellphone – saying that everything which occurred was consensual. [The appellant] handcuffed her and left in her car. When [the appellant] stopped the car at an ATM machine she managed to escape despite [the appellant] pulling her hair to stop her. She ran some distance to an all-night service station to call the Police and summon other assistance. [The appellant] then drove off in her car.

[18] Throughout the time [the appellant was] in her home, she was plainly terrified, repeatedly asked [the appellant] not to kill her and was repeatedly verbally abused by [the appellant]. The effect on the woman that night was seen and heard by the jury on the service station surveillance tape and the recording of the 111 call. As can be readily understood, she was deeply, deeply disturbed by what occurred and any chance that the jury might have accepted [the appellant’s] defence that the later events occurred with consent was, in all likelihood, completely destroyed by the playing of her recordings to the jury.

[19] To the Police, [the appellant] said that [he] went to her house for money to support [his] P habit, not for sex, and never intended to kill her, though [the appellant] acknowledged threatening her.

[20] [The appellant] burnt the gloves, threw [his] shoes into the rubbish, and disposed of her cellphone by throwing it away. It has never been found.

[8] In his video-taped interview, the appellant admitted sexual activity took place including two occasions of sexual intercourse but he said the sexual activity was consensual. He denied anything occurred after the complainant had finished her second shower.

[9] At trial, the appellant faced 26 counts. Counts 1 to 6 were essentially related to the forced entry, assaults (including assault with intent to injure) and the sexual

offending including two incidents of rape up until the point when the complainant had a second shower. Counts 7 – 8, 10 – 22 related to the sexual offending that occurred after that point including further two incidents of rape, six counts of unlawful sexual connection and seven of indecent assault. Counts 9, 23 and 25 were charges of threatening to kill; count 24 was a charge of assault and count 26 one of kidnapping.

[10] The appellant did not give evidence. His defence reflected the approach taken in his video statement, that is, the sexual activity was consensual and nothing happened after the complainant showered for the second time. The trial proceeded on the basis of an admission of facts under s 369 of the Crimes Act 1961. For these purposes, we note that the following was accepted:

- (a) The appellant was the person the complainant described as being involved in the incident, the subject of the counts in the indictment;
- (b) The appellant was living approximately 550 metres away from the complainant's house; and
- (c) Forensic scientists from the Institute of Environmental Science and Research Limited ("ESR") examined the complainant's house for two days and the appellant's semen was located on the carpet in the lounge and on the carpet in the bedroom. In addition the ESR found the appellant's semen on vaginal swabs taken from the complainant by a medical examination which took place on 14 June 2006.

### **Conviction appeal**

[11] The conviction appeal relates to counts 7 to 25 inclusive on the indictment.

[12] In terms of the counts relating to the sexual offending, the appellant's primary submission is that if the complainant's account of what had occurred after her second shower was true, the activity she described was such that additional DNA evidence would have been before the jury.

[13] In developing this submission the appellant says, first, that wet and dry swabs were taken from the complainant and were sent to ESR and analysed. If incidents of sexual offending had occurred as the complainant said they did after the second shower, the appellant argues that it would have been expected that DNA evidence would have been found. Moreover, the appellant submits, the officer in charge misled the jury when he gave evidence that there had been no ESR analysis of these swabs.

[14] Second, the appellant notes that there was nothing to indicate that the vibrator had been analysed. The appellant says that the complainant said she was forced to use the vibrator on a number of occasions after the second shower and that the appellant had ejaculated. If that was so, the appellant says that there would have been DNA evidence on the vibrator.

[15] Third, the appellant says that ESR told him in a letter dated 9 May 2008 that there was no saliva found on the complainant's body when she was examined at hospital on 14 June 2006 and a police rape medical kit prepared.

[16] In terms of the other offending reflected in counts 23 (threatening to kill), 24 (male assaults female) and 25 (threatening to kill), the appellant says that the only threat to kill was made at the outset and not at any later point. In this context, the appellant referred to a change in the complainant's statement by which we understand him to mean a change at least in emphasis between the complainant's initial account to the police and her evidence at trial.

### *Discussion*

[17] We deal first with the submissions relating to the absence of DNA evidence. In doing so, we need to explain that although the appellant was initially represented on the appeal there was no indication in the notice of appeal that the appeal would be based on the absence of DNA evidence. In answer to the standard question on the notice of appeal as to whether the appellant wished to call any witnesses on the appeal, the appellant responded: "Yes. ESR." The follow-up questions relating to the nature of the evidence to be given were not answered. The sole ground of appeal

against conviction set out in the notice was however one of counsel incompetency which has not been pursued. Certainly, the appellant had asked for and was sent the ESR file. But no detail was provided by the appellant prior to the hearing as to the basis for his challenge.

[18] In these circumstances, we gave Mr Downs the opportunity to review the ESR file after the hearing and to file a post-hearing memorandum on these matters following that review. The appellant was given an opportunity to respond to Mr Downs' memorandum in writing. He sought and was given a brief extension of the time allocated for his response.

[19] Mr Downs says that the position apparent from the trial record and the ESR file concerning the ESR's examination and findings is as we have set out above from the agreed statement of facts. In addition, he says that the corresponding medical examination kit contained samples which by their nature might have revealed the presence of saliva. However, ESR did not test for saliva given the results of its DNA analysis relating to the presence of semen. Nor were other samples retained by ESR (such as pubic hair found on the complainant's couch) tested because of the results of the DNA analysis set out above.

[20] The appellant's response is to emphasise that the events described by the complainant would have led to the presence of saliva and other sources of DNA evidence. In support of this submission, the appellant sets out relevant passages of the complainant's evidence including some of the cross-examination. He has also provided details as to the material taken as part of the medical examination.

[21] In our view there is nothing of any substance in the matters raised by the appellant.

[22] The officer in charge, Detective Senior Sergeant Grimstone, gave evidence at the trial about the DNA testing. He said that not all of the samples that had been taken were analysed once ESR gave the police the DNA profile from the vaginal swab and from the seminal staining at the scene. Essentially, the officer said he made the decision that further testing was not required as the time and expense was

not warranted. For example, he said that testing of hairs such as those found on the couch was lengthy and costly. He confirmed in answer to a question from defence counsel that the wet or dry swabs were not analysed to ascertain their DNA profile because of his operational decision not to do so.

[23] There is nothing to support the contention the position was other than as outlined by Detective Senior Sergeant Grimstone. Indeed, the approach he said he took is consistent with that taken in the agreed statement of facts.

[24] At best for the appellant on this point, there is some ambiguity in ESR's letter of 9 May 2008. In answer to the appellant's question, "Was there any saliva found on the victim's body ... when she was examined at [the] Hospital on 14 June 2006 and a Police Rape Medical kit done?". Dr Jill Vintiner of the ESR responded that, "Case records have been checked and it does not appear saliva was detected." As we understand it, the position more accurately put is that no saliva was detected because there was no testing for saliva.

[25] In any event, even if there was an issue about the extent of testing and about the results of that testing, we do not consider this would necessarily give rise to any concerns about the adequacy of the evidence or the reasonableness of the convictions. As Mr Downs put it, this was not a case where forensic science was going to play a role given that the case proceeded on the basis of the appellant's admission that he was the person in the house and that his semen was found there. Rather, the focus was on the complainant's credibility. Whether or not the jury accepted her evidence was very much a jury question.

[26] Plainly, if the jury accepted the complainant's account, as they obviously did, there was sufficient evidence on which to convict. She gave clear evidence of each of the events giving rise to the counts now in issue, including two incidents of rape (counts 11 and 22 in the indictment). We note that the later episode occurred in the lounge in front of the television. The complainant in her evidence-in-chief said she was not sure whether the appellant ejaculated either during this act of rape or during the incident more generally although in cross-examination she appeared to accept he ejaculated in the course of the incident where she was on the floor. The semen stain



containing DNA of the appellant was found in an area of the lounge near to the television.

[27] It is relevant also that it was expressly put to the complainant by defence counsel that nothing happened after the second shower. She denied that saying that there was “continued rape after that second shower”. The jury had the appellant’s alternative account on this issue from his video-taped interview, defence counsel closed on this basis and the defence case was explained further by the Judge in summing up. The case for the appellant was before the jury and the matters now raised are very much jury questions.

[28] The same analysis applies to the appellant’s argument about the other, non-sexual, counts. The complainant’s evidence was sufficient to found a conviction and the appellant’s version of events was before the jury. We add that the complainant was cross-examined about differences between her initial statement and her evidence at trial so, again, these matters were before the jury and the appellant does not point to any matters which give rise to any concerns in this regard.

[29] In summary, we accept the submission for the Crown that there is nothing in the appellant’s submissions that could establish a reasonable doubt. The appeal against conviction is accordingly dismissed.

### **The appeal against sentence**

[30] We turn then to the appeal against sentence.

#### *The sentencing remarks*

[31] In terms of the offences which qualified for preventive detention, Hugh Williams J said there was essentially only one issue, namely, whether to impose preventive detention or a very lengthy finite term. The Judge proceeded to consider the factors listed in s 87(4) of the Sentencing Act 2002 to determine whether to impose a sentence of preventive detention:

- (a) any pattern of serious offending disclosed by the offender's history; and
- (b) the seriousness of the harm to the community caused by the offending; and
- (c) information indicating a tendency to commit serious offences in future; and
- (d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and
- (e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

[32] In terms of the considerations for the imposition of preventive detention, the Judge noted first that there was plainly a pattern of serious offending disclosed by the appellant's history. As the Judge said, excluding the present convictions, the appellant has been convicted of over 130 crimes since 1985. The Judge described these at [74] as of "varying seriousness" but including "a large number for dishonesty, a large number of anti-social offences and a number involving violence". His Honour continued at [74] that all the offences had resulted in "lengthy" terms of imprisonment. The Judge referred to the probation officer's calculations that the appellant had been sentenced to "a century of imprisonment, although many of the sentences were concurrent": at [74].

[33] The Judge attached the most significance in terms of previous convictions, and the pattern of serious offending, to the two groups of offending which occurred in 1989 and 1992.

[34] The Judge described how, in 1989, when the appellant was 19 years of age, he was sentenced to three and a half years imprisonment for a number of offences including burglaries with intent to commit crime and being found with a knife. On the same day the Judge said the appellant robbed the occupant of a house. Shortly thereafter he escaped from prison twice and threatened a police officer with a knife. The sentencing judge on that occasion, Greig J said that the appellant was a young man "who has suffered many years of negligence, the price for which the community is now paying": *R v Kahui* HC PMN S4/89 24 February 1989 at 2.

[35] In 1992, His Honour explained, the appellant was sentenced to a finite term of imprisonment of seven years and one month's imprisonment by Ellis J for conspiracy to rape, indecent assault, two kidnappings and three aggravated burglaries: *R v Kahui* HC PMN T32/91 24 August 1992. Hugh Williams J said of the latter group of offending:

[34] That is a case which has some disquieting echoes of what took place in this instance ... . [The appellant] broke into a house with an associate, armed with a knife. One of the women ran away. [The appellant] chased her, caught her and held the knife to her throat. Later that same night, [the appellant] burgled another property and confronted a woman in her bed. [The appellant] let [his] associate in and then agreed that you would rape the two women in the house [The appellant's] associate raped one, but [the appellant] did not persist with the other. But, as the Judge said, that brief summary scarcely describes the "horror of what [the appellant] did and the ordeal of the three women involved" in the two sets of offending.

[36] As to the tendency to commit future serious offences, the Judge said there was no doubt about that. That was so especially where the appellant had spent over half his adult life in prison since he was about 16. Hugh Williams J said that "doubtless" the only reason more convictions had not been amassed was that the appellant had been in prison for so much of his life: at [77].

[37] The Judge considered the community had suffered significant harm at the appellant's hands. Similarly, the fourth criterion, the absence or failure of efforts to address the causes of offending, was also, "plainly" satisfied: at [79]. On this the Judge said at [79]:

[The appellant has] had many opportunities to engage in programmes available to those in prison to rehabilitate themselves and reduce the risk of reoffending. But [the appellant has] steadfastly refused throughout [his] lengthy prison history to participate and, as the Probation Officer said, [the appellant] really [has] no idea about how to embark on such programmes and no wish to do so.

[38] Looking at the overall question as to whether the material satisfied the Court that the appellant was likely to commit other qualifying sexual or violent offences if released at the normal sentence expiry date, the Judge saw as significant the manner in which the offences were committed. In particular, the Judge said that the present offences were not simply offences of violence and violent sexual offending, but "violent sexual offending committed in circumstances of degradation and cruelty"

where the appellant saw that what he was doing was “a matter of entitlement”: at [81].

[39] Viewed alongside the history of other violent offending and offending generally, Hugh Williams J said that the only conclusion open was that the appellant was likely to commit other qualifying sexual or violent offences if released at the normal sentence expiry date.

[40] The Judge had no doubt that the appellant did pose a significant and ongoing risk to members of the community and that a lengthy finite sentence would not provide adequate protection. The Judge put the matter this way at [85]:

It is not putting the matter too high to say that essentially all [the appellant’s] limited periods of liberty over the past 20 plus years have been occupied in offending, as the Probation Officer noted, and there is no reason to doubt that the same would apply were [the appellant] to be released at the end of a finite sentence.

[41] The Judge considered that society needed to be protected from the appellant for longer than that. The sentence of preventive detention was imposed on all the counts of sexual violation and the kidnapping.

[42] The Judge then dealt with the imposition of a minimum period of imprisonment. The first step (s 89(2)(a)) in that analysis requires consideration of the minimum period required to reflect the gravity of the offence. In terms of this step, the approach taken by the Judge was to consider the minimum period of imprisonment that might have been imposed had the appellant been sentenced to a finite term “but with the two-thirds mandatory maximum being just a factor”: at [89]. On that analysis, the Judge said at [91] that a finite term of imprisonment of “perhaps somewhere near 18 years” with the maximum non-parole period would have been appropriate, ie, about 12 years.

[43] Considering all of the factors discussed throughout the sentencing, the Judge concluded that a longer period than 12 years was required for the protection of the community. The minimum period of imprisonment imposed was 16 years.

*Submissions on the sentence appeal*

[44] The appellant says that preventive detention was not appropriate where the charges were not properly proven. If the appeal on the convictions was dismissed, the appellant maintained that the sentence was still a harsh one. In that circumstance, his primary concern was with the 16-year minimum period of imprisonment. The appellant submitted that this was harsh especially when preventive detention had also been imposed. The appellant's submission was that a 13-year minimum period of imprisonment in these circumstances would be more appropriate.

[45] Mr Downs acknowledged that, assuming a finite term of 19 – 20 years imprisonment, the authorities would suggest a minimum period of imprisonment of 12 years. However, in support of the Judge's conclusion that a higher term was warranted, Mr Downs emphasised a number of factors. First, he pointed to the total of 130 convictions and the fact the offending had continued virtually uninterrupted since the appellant was in his teens. The only constant in his life was the commission of criminal offences.

[46] Second, Mr Downs emphasised the offences in 1989 and 1992 and the eerie similarity particularly of the latter offending with the present offending.

[47] Third, Mr Downs said that there was nothing before the Court to suggest that the appellant was going to change and nor to suggest any remorse or insight. Further, the appellant had no material family support or indeed any support outside of the prison. He had no obvious skills or any motivation to reform and was wholly institutionalised.

[48] Fourth, and underscoring the previous point, the various reports before the sentencing Judge painted a rather "grim" picture.

[49] Finally, with reference to *R v Johnson* [2004] 3 NZLR 29 at [32] (CA), Mr Downs pointed out this Court's recognition of the fact that ultimately the

question was one of assessment for the individual judge. Mr Downs submitted that the particular assessment in this case was an available one.

### *Discussion*

[50] There are two issues. First, whether preventive detention was appropriate and, second, whether the minimum period was manifestly excessive.

[51] The question relating to preventive detention can be shortly disposed of. In terms of s 87(2)(c), the sentence of preventive detention can be imposed if:

the court is satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released at the sentence expiry date (as specified in subpart 3 of Part 1 of the Parole Act 2002) of any sentence, other than a sentence under this section, that the court is able to impose.

[52] We have set out the considerations in s 87(4) which the Court must take into account in deciding whether to impose a sentence of preventive detention. As is apparent from the discussion above, the Judge has considered all of these and there is no error in the approach taken. Given the appellant's history, the expert reports available which we discuss below, and the circumstances of the offending, the decision to impose preventive detention was properly available. In our view, any other sentence would have been inadequate to reflect the circumstances of this offending and to reflect the requirements of the Sentencing Act.

[53] We turn then to deal with the minimum period of imprisonment.

[54] In imposing the minimum period of imprisonment of 16 years, Hugh Williams J applied the following provisions of s 89 of the Sentencing Act:

#### **89 Imposition of minimum period of imprisonment**

- (1) If a court sentences an offender to preventive detention, it must also order that the offender serve a minimum period of imprisonment, which in no case may be less than 5 years.
- (2) The minimum period of imprisonment imposed under this section must be the longer of—

- (a) the minimum period of imprisonment required to reflect the gravity of the offence: or
- (b) the minimum period of imprisonment required for the purposes of the safety of the community in the light of the offender's age and the risk posed by the offender to that safety at the time of sentencing.

[55] We accept the force of Mr Downs' submission that an assessment is required by s 89(2)(b) and we need to be cautious about interfering with that assessment. However, there has to be some basis in the material before the Judge on which to found the judgment made. This Court put the matter in this way in *R v Reekie* CA339/03 3 August 2004:

[35] It would seem reasonably clear that the longer minimum period of imprisonment imposed to reflect the gravity of the offending under s89(2)(a) the less likely the Judge will be able to be satisfied a further period is necessary under s89(2)(b) to protect the community from risk. There was no evidence in the present case that would enable us to say that 20 years was clearly inadequate to protect the public and that a further five years was required. Understandably evidence as to the risk the appellant might be to the community in 20 or 25 years time does not at present exist. We do not know whether or not the appellant's personality will change over those years. We do not know whether treatment regimes will or will not come into existence over those years that might assist the appellant and provide protection for the community. The most that can be said is that at the time of sentencing the appellant represents a danger to the community for a period of time that cannot be accurately assessed. The period is not clearly one exceeding the 20 year term justifiably taken by the Judge to represent the gravity of the appellant's horrendous offending.

[56] In *Reekie* this Court therefore concluded that it was not open to the Judge to decide that a minimum period longer than the 20-year period fixed to mark the gravity of the offending was necessary.

[57] In the present case, the two reports provided for the purposes of the preventive detention assessment do not particularly assist in the current exercise.

[58] Dr Ian Goodwin, a consultant psychiatrist, noted that the appellant refused to be interviewed for the purposes of preparing his report. Accordingly, he said that this "renders any attempts to provide the Court with information on a clinical basis entirely speculative". For this reason, along with the absence of any mental illnesses indicated by the clinical materials, Dr Goodwin did not offer any opinion as to

whether the appellant was likely to commit serious offences in the future. He did note the appellant's extensive previous forensic history and the statements from the victim as to the harm suffered as a result of the offending.

[59] The second report was prepared by Ms Renate Bellve-Wack, a registered clinical psychologist. Again the appellant refused to be interviewed. Ms Bellve-Wack based her assessment on the various reports provided and two standardised risk assessment instruments. The appellant's scores on those assessments indicated a number of risk factors.

[60] Overall, Ms Bellve-Wack said the appellant's history indicated the presence of a large number of static and dynamic risk factors that correlate with future anti-social, violent and sexual recidivism. However, given the length of any determinate sentence likely to be imposed on the appellant, she concluded that it was not possible to predict at this point in time what risk level and attitude towards ongoing offending the appellant would have at the end of such a sentence. She said that is "impossible to make such a far reaching prediction" in light of increasing age, the possibility the appellant might engage in programmes and undergo a change of attitude.

[61] The factors advanced by Mr Downs certainly support the view that preventive detention was inevitable. They also provide a basis for pessimism about the possibility of change on the appellant's part.

[62] There is not, however, a sufficient basis to conclude that a minimum period of about a third longer than the minimum period required to reflect the gravity of the offending is necessary for the protection of the public.

[63] There is support for our view in the authorities, as is apparent in the tables we have attached to this judgment. Obviously, as this Court has said before, there are real difficulties in comparisons between such horrific offending particularly where the focus is on risk at some future point in time. Such a comparison, on its own, would not necessarily have persuaded us to interfere.



[64] Mr Downs drew our attention to *R v Hapi* [1995] 1 NZLR 257 (CA) where a 15-year minimum period was imposed. There are certainly some similarities in that *Hapi* involved one complainant and a series of incidents occurring over the course of an evening. *Hapi* also similarly involved violent as well as sexual offending. The complainant in that case was stabbed at least 20 times and left for dead. It is, however, significant that *Hapi* was decided on the basis of a different statutory test, as Mr Downs acknowledges. In our view that different test is highly relevant to the decision to uphold a period which was described by this Court as being at the top of the range.

[65] As to the appropriate term, the Crown accepts that a 12-year minimum period is more in line with the authorities. We do need, however, to factor in the combination of factors relied on by Mr Downs in support of the sentencing Judge's approach. It is the presence of all of these factors which makes appropriate a slightly longer term than the 12-year term imposed in, for example, *R v N* CA477/04 16 March 2006. The latter case involved a brutal attack by an appellant with a history of violent offending against women but, it appears, not with quite the level of institutionalisation, complete absence of support and so on as is apparent in this appellant. In our view, a 13 year minimum period is necessary.

[66] That does not of course mean that the appellant will be released into the community in 13 years time whatever else happens. Indeed, he will not be released into the community at all unless and until the Parole Board is satisfied on appropriate evidence that he will not pose an undue risk to the safety of the community or any person or class of persons: see ss 28(2), 82(3) and 86(3) of the Parole Act 2002.

## **Result**

[67] For these reasons, the appeal against conviction is dismissed. The appeal against sentence is allowed only to the extent that the minimum period of imprisonment of 16 years is quashed and a period of 13 years is substituted.

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**APPENDIX 1: CASES LOCATED\* INVOLVING SEXUAL OFFENDING WHERE A MINIMUM PERIOD OF IMPRISONMENT OF 11 YEARS OR MORE WAS IMPOSED**

Case name	Citation	Charges	MPI	Number of complainants	Period of time
<b>R v Johnson</b>	[2004] 3 NZLR 29 (CA)	Sexual violation by rape (x 2) Sexual violation by unlawful sexual connection (x 2) Assault with intent to commit sexual violation Indecent assault	11 years	Three	Offending took place over approximately three months.
<b>R v N</b>	CA477/04 16 March 2006	Sexual violation Intentionally causing GBH Wounding with intent to injure	12 years	One	Offending took place on one night.
<b>R v Latu</b>	CA358/95 26 September 1996	Sexual violation by unlawful sexual connection (x 2)	12 years	One	Offending involved one incident of an unspecified duration.
<b>R v Gulliver</b>	HC WANG CRI-2004-083-1569 12 December 2005	Attempted murder Sexual violation by unlawful sexual connection (x 2) Kidnapping	12 years	One	Offending involved one incident lasting the course of a day.
<b>R v Tuhou</b>	HC NAP CRI 2007-020-2820 11 September 2008	Sexual violation (x 3) Male assaults female Burglary (x 2) Robbery	12 years	One	Sexual offending took place at night during a robbery.
<b>R v Albert</b>	CA429/01 14 March 2002	Aggravated wounding (x 3) Assault with intent to rape Sexual violation by unlawful sexual connection (x 4) Sexual violation by rape Aggravated burglary Threatening to kill Aggravated robbery Unlawful taking of a motor vehicle Indecent assault	12 years	Three	Offending took place over a three-month period.
<b>R v Hapi</b>	[1995] 1 NZLR 257 (CA)	Sexual violation by rape Wounding with intent to cause GBH Aggravated robbery Burglary Conversion of a motor vehicle	15 years	One	Offending involved one incident that took place during the course of a night.

<b>R v Walter</b>	HC WN CRI 2006-032-3079 15 February 2007	Sexual violation by rape Sexual violation by unlawful sexual connection (anal penetration) (x 14) Sexual violation by unlawful sexual connection (digital penetration) (x 4) Sexual violation by unlawful sexual connection (oral sexual connection) (x 18) Sexual violation by unlawful sexual connection Indecent assault on boy under 12 (x 2) Indecent assault (x 2) Supplying cannabis (x 2)	15 years	15	Offending took place over seven years.
<b>R v Reekie</b>	CA339/03 3 August 2004	31 offences including burglary, unlawfully entering premises, assault, indecent assault, abduction, sexual violation by unlawful sexual connection, and sexual violation by rape	20 years	Four	Crimes committed over a ten-year period.
<b>R v Fleming</b>	HC AK T327/96 10 December 1996	Indecent assault on a boy under 16 (x 24) Anal intercourse (x 2) Sexual violation (x 7) Indecency on a boy under the age of 12 (x 15) Indecent assault on a boy aged 12 to 16 (x 8)	20 years	42	Offending took place over a 24-year period.
<b>R v Thompson</b>	[1996] 2 NZLR 429 (CA)	Rape (x 46) Sexual violation by unlawful sexual connection (x 15) Assault with intent to commit rape (x 10) Abduction (x 5) Aggravated assault Aggravated wounding (x 6) Entering with intent (x 6) Burglary (x 11) Aggravated burglary (x 29)	25 years	47	Offending took place over a 12-year period.

\* We have focused on cases for which the sentencing notes have been accessible and/or other sufficient detail is available.

**APPENDIX 2: CASES LOCATED\* INVOLVING MURDER AND SEXUAL OFFENDING WHERE A MINIMUM PERIOD OF IMPRISONMENT OF 11 YEARS OR MORE WAS IMPOSED**

Case name	Citation	Charges	MPI	Number of complainants	Period of time
<b>R v Smith</b>	CA315/96 19 December 1996	Murder Aggravated burglary Sexual violation (x 2) Indecent assault on a boy (x 2) Doing an indecent act on a boy (x 2) Kidnapping (x 2)	13 years	One sexual complainant. Murder victim was the father of the complainant involved in the sexual offending	Sexual offending took place over approximately a year.
<b>R v Poulter</b>	HC AK T71/97 4 September 1997	Murder (x 3) Attempted murder Sexual violation by rape Possession of an offensive weapon	15 years	One sexual complainant. Three murder victims.	Not stated.
<b>R v Lilly</b>	HC DUN T14/94 18 November 1994	Murder Sexual violation by rape	15 years	One	Not stated.
<b>R v Alder</b>	CA430/01 25 June 2002	Murder Sexual violation by rape (x 3) Abduction with intent to have sexual intercourse Assault using a motor vehicle as a weapon	17 years	One	Assault, sexual offending and murder took place over about two hours.
<b>R v Hotene</b>	HC AK S23/00 9 October 2000	Murder Rape Kidnapping Aggravated robbery	18 years	One	Offending took place one night.
<b>R v Waihape</b>	HC CHCH CRI-2005-009-14252 17 August 2006	Murder Rape Sexual violation by unlawful sexual connection Abduction	18 years	Two	Offending against the first complainant took place over about two hours on 11 December 2005. Offending against the second victim took place late in the evening of 14 December 2005.
<b>R v Randle</b>	HC WANG CRI-2005-083-380 11 May 2007	Murder Sexual violation	19 years	One	Offending occurred late one night.
<b>R v Reid</b>	HC CHCH Cri 2007-009-16445 12 December 2008	Murder Attempted Murder Rape (x 2) Sexual violation Robbery	26 years	Two	Offending against the first victim occurred on 15 November 2007. Offending against the second victim occurred late on 23 November 2007.

\* We have focused on cases for which the sentencing notes have been accessible and/or other sufficient detail is available.