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COMPLAINANTS PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA375/2011
[2012] NZCA 27**

BETWEEN	THE SOLICITOR-GENERAL Appellant
AND	MAUREEN SAMANTHA ITI Respondent

CA376/2011

AND BETWEEN	THE SOLICITOR-GENERAL Appellant
AND	JASON LLOYD JONES Respondent

Hearing: 13 February 2012

Court: Stevens, Ronald Young and Andrews JJ

Counsel: M D Downs for Appellant
G Boot for Ms Iti
B J Hesketh for Mr Jones

Judgment: 24 February 2012 at 11.30 am

JUDGMENT OF THE COURT

A The sentence of four years and eight months imprisonment with respect to Ms Iti is quashed and instead a sentence of five years and eight months imprisonment imposed.

B The sentence of nine years and six months imprisonment with respect to Mr Jones is quashed and instead a sentence of 13 years imprisonment is imposed together with a minimum period of imprisonment of six years.

REASONS OF THE COURT

(Given by Ronald Young J)

Introduction

[1] The respondent, Mr Jones, was convicted by a jury of raping two women in the space of six weeks in late 2009 and early 2010. On the later count, Ms Iti, the other respondent, was convicted of rape as a party to Mr Jones' rape. Mr Jones was sentenced by Duffy J to nine and half years imprisonment without a minimum period of imprisonment.¹ Ms Iti was sentenced to four years and eight months imprisonment, also without a minimum period of imprisonment.

[2] The Crown in this appeal says both prison sentences were manifestly inadequate and Duffy J, the trial and sentencing Judge, was wrong not to have imposed a minimum period of imprisonment with respect to Mr Jones.

[3] The Crown says the inadequate sentences arose from the following errors by the Judge in:

- (a) her assessment of premeditation;
- (b) her assessment of the proper starting point and totality for the offending;
- (c) the six month discount for Mr Jones for good character and other personal factors;

¹ *R v Jones* HC Hamilton CRI-2010-019-993, 20 May 2011 [sentencing remarks].

- (d) failing to impose a minimum period of imprisonment on Mr Jones;
and
- (e) her assessment of the relative culpability and relative seriousness of
Ms Iti's offending.

Facts and High Court Sentencing

[4] The respondents faced a six count indictment alleging they had in broadly similar circumstances sexually assaulted at least three different female complainants. The respondents were both acquitted of two counts, there was no verdict in relation to Mr Jones with respect to two counts and no verdict in relation to Ms Iti with respect to two counts. Mr Jones was convicted of raping complainant A on 13 December 2009 (count five) and of raping complainant B on 24 January 2010 (count six). There was no verdict in relation to Ms Iti in count five but she was convicted on count six.

[5] At sentencing the Judge concluded that the two respondents had enjoyed "a lifestyle that involved drinking, clubbing and casual sex, even group sex".² As to count five the Judge described the facts as follows:

[5] The background events that led to the victim being with you and Ms Iti on the night of the offending have never been the subject of any real dispute. It seems to me that it was common ground at the trial that you and Ms Iti encountered the victim at a time when you were driving in your van along Anglesea Street at approximately 3.45 am in the morning. You were in a part of Anglesea Street that is in close proximity to a nightclub by the name of Firecats.

[6] The victim, who was then aged 18 years, was alone and crying. She had been out nightclubbing and had parted from her friends. In her evidence, she had described drinking bourbon before leaving for the nightclubs in the central city area at about midnight. She went to Bahama Hut, Charmers and Coyotes. When she left the last nightclub with her friends, an argument occurred. She left them arguing, and began walking along Anglesea Street towards Firecats, which is the last nightclub to close in Hamilton.

[7] It seems that everyone who wants to continue clubbing after the other clubs have closed goes to Firecats. The evidence at the trial was that Firecats is also a strip club and brothel.

² At [24].

[8] As the victim was walking towards Firecats – where she hoped to meet other people she knew – you came driving by in your van. When you saw her, you did a U-turn in the vehicle, and you approached her. You offered her a ride. The victim's evidence was that seeing a woman in the vehicle, she believed she would be safe; so she accepted the offer of a ride and got into the vehicle. Once in the vehicle, she was offered alcohol, and you, Mr Jones, are said to have opened a bottle of wine. The vehicle was driven to a secluded location near the Waikato River. While the vehicle was parked there, you and the victim smoked cannabis and drank some wine. The three of you were sitting in the front of the van. The impression I gained from the evidence was that the victim was willing to participate in drinking alcohol and smoking cannabis with you both.

[9] In her evidence, she described herself as drunk and stoned. However, it needs to be recognised that she had been drinking alcohol before she went to any of the nightclubs. That she was intoxicated when she was with you in the van was not entirely due to your efforts.

[10] At this stage, there was probably nothing that unusual in three people, who have all been nightclubbing, either separately or together, getting together for further fun in the form of consuming alcohol and cannabis in a van. Given that the use of cannabis is illegal, it may not seem surprising that the van was at a secluded location. However, matters then progressed beyond this.

[11] The victim described Ms Iti starting to kiss her and making what she described as sexual advances towards her. In her evidence, Ms Iti rejected this account of events. Although Ms Iti was jointly charged with you, Mr Jones, in count 5, the jury did not find her guilty as an accomplice. This suggests to me that the jury could not be sure that Ms Iti was anything more than a passive observer of the events which next took place. Those events were you, Mr Jones, moving over to the victim's side of the van, pulling her seat down and raping her. During this event, the victim struggled and tried to resist you. At the immediate conclusion of this incident, the victim left the vehicle, leaving her shoes and cellphone in the van. Although one of you is said to have yelled out to her, she did not respond, and she continued to make her way towards Hamilton East. She arrived at an address there upset and distressed and later, at the encouragement of others, she contacted the police to inform them of what had occurred.

[6] As to count six the Judge said:

[12] I now turn to count 6. Again, Mr Jones, the fact that the jury found you guilty of count 6 means that they concluded you had non-consensual intercourse with the victim. Your defence at the trial was that, in this case, there was sexual intercourse, but with the victim's consent. Again, the jury's verdict signifies a rejection of this defence.

[13] The background events that led to count 6 were not the subject of any real dispute at the trial. The evidence was that this victim had been in town with friends, and she had been consuming alcohol on the night of the incident. Having gone to other nightclubs in Hamilton, in the early hours of the morning she was at Firecats nightclub. She intended to walk to a friend's house, as she was a visitor to Hamilton. As she left the nightclub, she saw

your van parked by the roadside with the side door open. She said that Ms Iti smiled and waved to her and offered her a drink. The victim said in her evidence that she would not have got into the vehicle had it not been for the presence of Ms Iti. The victim was offered a drink, which she accepted.

[14] The vehicle was started up and driven around the streets of Hamilton by you, Mr Jones. During this time more alcohol was consumed. The vehicle was eventually driven to a remote location outside of Hamilton, where the victim was offered a cannabis joint. It seems again that cannabis was smoked in the van. The victim said she passed out and some time later woke up to find Mr Jones lying on top of her, removing her pants and underwear. At this time, Ms Iti is said to have come over from the front seat to where the victim was lying, and tried to distract her while Mr Jones attempted to have sexual intercourse with the victim. The victim protested, both by words and actions, saying “no, no”, and moving her knees around and pushing to make it more difficult for Mr Jones to penetrate her.

[15] During the sexual intercourse that occurred, Ms Iti was beside the victim and held her hands to her chest, telling her, “it’s okay, it’s okay, it’s okay, it’s all right”. The victim said that at some time they were in the van, Mr Jones and Ms Iti had sexual intercourse themselves. Mr Jones then returned his attention to the victim and had sexual intercourse with her again. At this point, the victim was crying, and Ms Iti tried to comfort her. Mr Jones and Ms Iti then drove the victim back to her Hamilton address. At this time, Ms Iti said to the victim as she left the vehicle, “bye and sorry”.

[7] The Judge took count five as the lead offence as far as Mr Jones was concerned. She then considered this Court’s guideline judgment for sexual offending in *R v AM*.³ The Judge concluded that the offending in count five was at the top of band one in *R v AM* and adopted a starting point of eight years imprisonment. She increased the eight years by two years to reflect the second rape (count six). The Judge then deducted five per cent, or six months, for Mr Jones’ “previous good conduct, your family circumstances, and the shame you have expressed”,⁴ resulting in a final sentence of nine and a half years imprisonment.

[8] As to Ms Iti the Judge identified a starting point of eight years imprisonment as the proper sentence for a principal offender with respect to count six. She then deducted two and a half years to reflect Ms Iti’s lesser role in the offending and a further 15 per cent to reflect what the Judge considered “to be real and genuine expressions of remorse”.⁵ This resulted in a final sentence of four years and eight months imprisonment.

³ *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750.

⁴ At [108].

⁵ At [112].

Submissions and Discussion

Mr Jones

Premeditation

[9] The Crown submitted at sentencing that there was a high level of premeditation involving the offending. The Judge rejected this submission. She said:⁶

There was nothing that suggested you set out deliberately to find women for the purpose of forcing them against their will to have sexual relations with either of you.

[10] And further:

[25] Thus I reject the Crown's argument that what has occurred here was the result of a high level of premeditation with the two of you acting together in a joint enterprise to lure vulnerable victims into your vehicle for the purposes of sexually violating them. The verdicts the jury reached do not logically support that interpretation. Furthermore, there is no reliable evidence established to suggest you have on any occasion, other than count 5 and count 6, engaged in non-consensual sexual relations. The evidence shows that by the time Firecats had closed, if you met someone who was open to further socialising, including sex, you were open to doing that with them. What has happened in the case of counts 5 and 6 is that you lost your bearings completely and in doing so, you crossed a line between legal sexual conduct and illegal sexual conduct. The evidence shows that both of you became indifferent to whether the women who you invited to join you in the van in the early hours of the morning would consent to sexual relations with you. This view of the facts is consistent with the directions I gave to the jury in my summing up and the verdicts that the jury returned.

[26] The supply of alcohol and drugs to the victims is not necessarily consistent with you attempting to stupefy them or in any way overbear their will so that Mr Jones could have non-consensual sexual intercourse with them. I think that by the time you were all in the van together and alcohol and drugs were consumed, your focus was on having a good time and when that moved to sexual activity with the person who joined you on the occasions in counts 5 and 6, you, Mr Jones, became indifferent to whether she consented to the sexual activity. I also consider that regarding count 6, you, Ms Iti, were indifferent as to whether or not the victim consented to have sexual intercourse with Mr Jones.

⁶ Sentencing remarks at [24].

[11] And further the Judge said:

[85] In terms of the other culpability factors, I think there was low level premeditation or planning to the extent that on the evening of the offence, I think that you were open to a sexual encounter, and when you saw the victim walking along Anglesea Street on her own, you recognised the opportunity that she presented and you took that opportunity. It is not clear to me, however, that at the time you invited the victim into the van, you intended to have non-consensual sexual relations with her.

[12] The Crown says that in making these remarks the Judge wrongly assumed that premeditation in sexual offending only existed where an offender had a fixed intent to have non-consensual sex. The Crown submitted that the Judge's conclusion (especially at [25])⁷ from the facts of the case was that when the victims were invited to join Mr Jones and Ms Iti in the van, they were indifferent as to whether the victims would consent to a sexual relationship with them or not. The Crown submitted that the Judge's conclusion was therefore consistent with a premeditated intention to rape.

[13] Counsel for Mr Jones submitted that the Judge's remarks were properly taken as indicating that the respondents' indifference to consent only arose shortly before the rapes occurred and not earlier when the victim got into the van. Counsel submitted that this Court should not depart from the sentencing Judge's assessment of the evidence.⁸

[14] We agree with the Crown submissions. Our conclusions are based on the Judge's own sentencing remarks and do not involve any reconsideration by us of the facts on which the sentencing proceeded.

[15] The Judge's remarks at [25] make it clear that her view was that when each of the victims were invited into the van both respondents were indifferent as to whether the victims would consent to any sexual activity. Expressed another way the respondents were intent on sexual activity with the victims. They hoped the victims would consent but were prepared to proceed with sexual activity without their consent.

⁷ Set out at [10].

⁸ See *R v R* (CA244/09) CA244/04, 2 November 2004; *R v Hunter* [1985] 1 NZLR 115 (CA).

[16] Premeditation relevant to sentencing in sexual offending need not be only a pre-determined decision by an offender to have non-consensual sex. It can equally be, as here, preparedness to continue with sexual activity if consent is not forthcoming. It therefore follows that we consider the Judge was wrong when she said these circumstances illustrate “low level premeditation”.⁹

[17] We are satisfied that there was a significant level of premeditation for both sets of offending. From the time the two victims were invited to get into Mr Jones’ van, both respondents were prepared to proceed to have non-consensual sex.

[18] Further, in view of the jury’s verdict on count five, Mr Jones and Ms Iti would have known that Mr Jones had raped complainant A when he and Ms Iti picked up complainant B from the roadside six weeks later. This earlier rape could, therefore, properly be taken into account in assessing premeditation with respect to both respondents in the second rape.

[19] We are satisfied, therefore, there was significant premeditation with respect to both rapes relevant to the ultimate sentence.

Starting point too low

[20] The Crown submitted that the Judge’s starting point for the overall offending at ten years for Mr Jones was too low, especially given the premeditation. We agree.

[21] There were two possible approaches to the sentencing of Mr Jones. A sentencing Judge could consider the relevant aggravating and mitigating circumstances of each rape separately, identifying a separate sentence for each (taking account of the fact that count six was a second rape), then cumulating the sentences (as separate events),¹⁰ followed by reducing that total sentence for totality.¹¹

⁹ *R v Jones & Iti* at [85].

¹⁰ Sentencing Act 2002, ss 83, 84.

¹¹ Sentencing Act 2002, s 85.

[22] The sentencing Judge's approach was different. She took the offending in count five as the lead offence and increased that sentence to reflect the second rape. While either approach was open, the important point was that whichever approach was used the ultimate start and end sentence had to fairly reflect the overall criminality of the respondents.

[23] The Judge, apparently, selected count five as the lead offence because she considered it was the more serious of the two. She did so, it seems, because the victim in count five was especially vulnerable compared with the victim in count six. The other factor that seemed to influence the Judge in reducing the seriousness of the offending in count six was that the victim may have consented to some sexual activity with Ms Iti shortly before the rape. We will return to this aspect of the Judge's remarks later in this judgment.

[24] Adopting the Judge's approach to the sentencing, we consider the offending in count six was more serious and that it, therefore, should have been the lead offence. The victim vulnerability in count six was less than in count five. However, the victim in count six was still vulnerable. She was 21 years of age, had consumed alcohol and was out on the streets of Hamilton late at night. It was in this state she was convinced to get in to Mr Jones' van.

[25] Premeditation in both counts was significant for the reasons we have previously given. However, count six was a second rape and given the respondents were effectively repeating the circumstances that gave rise to the first rape, the premeditation was somewhat more serious in the second rape.

[26] The rape in count six involved Ms Iti physically restraining the complainant when she resisted Mr Jones. Until Ms Iti's intervention, the complainant had been able successfully to resist Mr Jones' attempt to rape her. This was a serious aggravating feature not present in the first rape.

[27] Further, this was, as we have noted, Mr Jones' second rape in six weeks. For these reasons we think the offending in count six was overall more serious and therefore more properly the lead offence.

[28] To return to the Judge's sentencing remarks. The Judge noted that complainant A was 18 years of age, Mr Jones approximately 38 years of age and Ms Ita 32 years of age when the offending occurred. The Judge then said:¹²

A disparity in age between the victim and offender may be relevant to assessing the extent of the vulnerability. However, it is assumed that this factor generally relates to young children, rather than young adults. I consider, therefore, that although this culpability is present, it is present at a low level.

[29] The Judge went on to say that she thought that Mr Jones and Ms Ita, as parents of children, would have understood particularly that the victim in count five was someone who needed help.

[30] In this case there was a substantial disparity in age between the victims and the respondents. However, the important point as to vulnerability was that both victims were young women who were intoxicated and with respect to complainant A, clearly upset. They were young women on the streets of Hamilton, late at night, and on their own. While it could not fairly be said that the victims were in a very high category of vulnerability we consider the Judge's comments did not adequately reflect the victims' actual vulnerability.

[31] The Judge acknowledged in her sentencing remarks the fact that there were two victims was an aggravating feature. But she said:¹³

However, as there were only two victims, I consider this is a relatively low level aggravating factor. In addition, this can only relate to you, Mr Jones, as with Ms Ita there was only one victim.

[32] While the later comment is clearly correct, the fact the respondent, Mr Jones, raped two women within six weeks in very similar circumstances was a serious aggravating feature and of significance in setting the appropriate starting sentence.

¹² Sentencing remarks at [83].

¹³ At [90].

[33] As to count six and the fact that Ms Iti helped Mr Jones rape the complainant, the Judge said:

[104] In relation to count 6, there is the additional factor of multiple offenders because there was the involvement of Ms Iti. This is an aggravating feature. But as with the other offence, the degree and scale of the violation is the same.

[34] It is not entirely clear what the Judge meant by her last sentence. However, as we have noted, until Ms Iti intervened, the victim had successfully fought off Mr Jones. The assistance provided by Ms Iti to Mr Jones was physical restraint of the victim. This was a serious aggravating feature as far as Mr Jones' rape was concerned and is, for the reasons we later identify, also important in the sentencing of Ms Iti.

[35] The Judge said with respect to the victim in count six:

[105] The conduct of the victim is a relevant factor. Whatever may have been the willingness of the victim in count 6 to engage in a consensual sexual encounter of oral sex with Ms Iti; I consider that her later conduct in resisting you, Mr Jones, and the fact that Ms Iti became involved and helped hold her down, would have demonstrated to you that she was not consenting. But I do accept that in the prelude to the offending, the victim willingly and knowingly entered the van and willingly and knowingly took the alcohol and drugs that were offered. In this case, it is unclear on the evidence, which is unsatisfactory, as to whether or not the victim in count 6 willingly engaged in sexual activity with Ms Iti, knowing that you, Mr Jones, were present in the van. Put neutrally, it seems that she engaged in sexual activity with Ms Iti without objection.

[36] We do not consider the conduct of the victim was relevant in setting a proper sentence for Ms Jones or Ms Iti. What consensual sexual conduct there was between Ms Iti and the complainant is not relevant to the rape. It would have been abundantly clear to both respondents that the victim was not consenting to any sexual contact with Mr Jones.

[37] As to count five the aggravating features included the particular vulnerability of the victim. She was 18 years of age, intoxicated and distressed, on her own late at night, on the streets of Hamilton. It is in this condition and in these circumstances that the respondents stopped and convinced her to get into the van. Count five was also a premeditated rape for the reasons we have given.

[38] In summary, there were serious aggravating features involving premeditation, two rapes within six weeks and two offenders involved in the second rape. There was moderately serious victim vulnerability in both instances. These aggravating features place the offending within band three of *R v AM* and, therefore, a range of 12 to 18 years.

[39] Given our analysis of the seriousness of this offending, we consider (taking account of the fact that this is a Solicitor-General appeal against sentence) the appropriate starting point for Mr Jones for the total offending is 13 years imprisonment. A starting point of 12 to 18 months higher than the 13 years, if imposed in the High Court, could not have been successfully challenged in this Court. The starting sentence of 13 years imprisonment can be reflected in a starting sentence for count six (our preferred lead offence) of ten years imprisonment with an uplift of three years imprisonment for the count five offending.

Six month deduction

[40] The sentencing Judge deducted six months imprisonment from Mr Jones' start sentence for his "previous good conduct, your family circumstances, and the shame that you have expressed".¹⁴ Mr Jones has had at least 20 previous convictions between 1987 and 1999. The first two convictions were in the Youth Court. The most recent conviction was for careless driving. However Mr Jones was imprisoned in the early 1990s for drug dealing and violence. He had earlier convictions for assault and sexual intercourse with a girl aged 12 to 16 years.

[41] While it is proper to acknowledge that Mr Jones has not seriously offended for approximately 20 years, it was not appropriate for the Judge to give a discount for good conduct to Mr Jones. While an uplift for past offending could not have been justified, it could not be said that Mr Jones' past record justified the claim that he was a person of good character entitled to a sentence discount.

[42] Secondly, shame. The respondent, Mr Jones, pleaded not guilty and went to trial. He was convicted of raping two women. His defence on count five was that no

¹⁴ At [108].

sexual contact had occurred. The jury clearly rejected this claim. His defence in count six was that while there had been sexual intercourse this was consensual. The jury rejected that proposition.

[43] In his pre-sentence report the probation officer noted that Mr Jones admitted to a “sexual liaison” with both victims but still maintained that the sex was consensual. This stance, admitting there was a sexual liaison with both complainants, was in conflict with his stance at trial.

[44] While Mr Jones admitted to the probation officer he behaved badly, that what he had done was wrong and that he was ashamed of his actions, no discount could be given for that concession. Mr Jones was not remorseful for what he had done because he did not consider he had done anything wrong.

[45] As the probation officer said, that while on the one hand he did show some insight into the victim’s possible feelings, “he effectively discounted this by minimising his actions in the offending”. The Judge was wrong to give a reduction in sentence for Mr Jones’ attitude. Nor is there anything in Mr Jones’ family circumstances which would have justified a reduction in sentence. We are satisfied the Judge was wrong to have given a six month deduction from the appropriate start sentence.

Ms Iti

[46] The Judge’s approach to Ms Iti’s sentencing was to take the eight years imprisonment she considered to be an appropriate sentence for a principal offender on count six and reduce that sentence to reflect the culpability of Ms Iti. The Judge deducted two and a half years from the eight years imprisonment to reflect what she considered to be Ms Iti’s reduced culpability. The Judge then deducted a further 15 per cent because, as she said, the respondent had “true insight into the enormity of what has happened, and have expressed full remorse for what has happened”.¹⁵

¹⁵ Sentencing remarks at [113].

[47] We agree with the Crown that the reduction of two and a half years imprisonment from the eight year starting point (31 per cent) was far greater than could be justified in the circumstances. We are satisfied that a proper assessment of Ms Iti's relative culpability illustrates that only a very small deduction from the proper start sentence for a principal was appropriate.

[48] This Court in *Hills v R*¹⁶ considered the position of an appellant who had been found guilty of aiding and abetting her husband to rape a young woman. The appellant and her husband groomed a young woman and the appellant had participated in drugging the victim and was present while her husband committed the offence. The sentencing Judge deducted one year for her lesser role from a seven year starting point.

[49] This Court with respect to that discount said:¹⁷

A one year deduction for a lesser role was more than adequate when one reads the evidence as a whole. It is plain that Ms Hills aided her husband in his rape of V. She was the point of contact in encouraging visits, and she participated in the drugging of V. We are not surprised by the Judge's firm condemnation of her "comforting" role while a 14 year old girl was raped. One year sufficiently marks the difference.

[50] Ms Iti's involvement as a party was very much at the higher end of participation. Firstly, Ms Iti attempted to "comfort" the complainant in count six. She was concerned to reassure the victim that everything would be "okay", to try to convince the victim to stop resisting Mr Jones' attempt to have intercourse with her. When that did not work and the victim continued to resist Mr Jones, Ms Iti physically restrained her to facilitate the rape. This, therefore, made Ms Iti's participation very serious.

[51] As the Crown identified, the other relevant factor was that Ms Iti had been present six weeks before when Mr Jones had raped another young woman. Ms Iti was aware of that previous rape when she agreed to accompany Mr Jones on the evening of the second rape and agreed to participate in encouraging the victim to get

¹⁶ *Hills v R* [2010] NZCA 483.
¹⁷ At [75].

into the van knowing that background. In these circumstances only a modest deduction from the appropriate sentence of a principal offender was required.

[52] We agree with the Crown a reduction of 15 per cent is the maximum Ms Iti could have expected for her lesser involvement. The Crown do not challenge the Judge's other discounts of a further 15 per cent. The total 30 per cent discount would therefore reduce the eight year sentence to five years and eight months imprisonment.

[53] As we have noted the sentencing Judge considered that the proper starting point for the offending of Mr Jones (as the principal) on count six was eight years. We have decided it was at least ten years. However, in considering the appropriate sentence for Ms Iti the Crown were content to accept (for this purpose only) the eight year starting point for a principal as appropriate in count six.

Summary

[54] In summary, therefore, as far as Mr Jones is concerned we are satisfied the sentence imposed was manifestly inadequate. We quash the sentence of nine years and six months imprisonment and impose instead one of 13 years imprisonment.

[55] With regard to Ms Iti we are satisfied the sentence imposed was manifestly inadequate and we quash the sentence of four years and eight months imprisonment. We impose instead one of five years and eight months imprisonment.

Minimum period of imprisonment for Mr Jones

[56] This aspect of the appeal relates only to Mr Jones. As to minimum period of imprisonment the Judge said:

[121] I consider that here the relevant factors to take into account are: denunciation, deterrence, and protection of the community.

[122] Regarding denunciation, I consider that the aggravating factors of the offence are properly reflected in the choice of starting point taken from the *R v AM* tariff bands. Those bands are calibrated to reflect factors which

are also relevant to denunciation when it comes to considering the question of a minimum period of imprisonment.

[123] Regarding deterrence, I consider that the two offences, when viewed against the previous historical criminal history of both of you, demonstrate no heightened need for deterrence.

[124] Regarding protection of the community, your previous criminal history is relevant when considering the protection of the community, as well as deterrence. There is nothing in the nature of the offending for which you both are being sentenced, or your criminal history, which causes me to conclude that protection of the community will not be satisfied by the sentences of imprisonment I have imposed on you both. You are both ashamed of the offending. The consequences of the offending have already had a serious detrimental impact on you and your children. I have every reason to believe that you will want to avoid any repeat of those consequences. I believe, therefore, that, on release from prison, both of you are most unlikely to offend again.

...

[126] Regarding you both, I consider that the need for denunciation of your conduct, deterrence and protection of the public is achieved through the sentences I have already imposed.

[127] Your criminal history shows that neither of you are a criminal recidivist, nor do either of you pose such a risk to the community that a minimum period of imprisonment is warranted. The nature of your previous offending is far less serious than the crime for which you are now being sentenced. There is every indication from the pre-sentence reports that each of you will mend your ways as a result of this offending.

[57] The Judge's assessment of the need for a minimum period of imprisonment was made on the basis of her assessment of the seriousness of the offending. We have taken a different view as to the seriousness of the offending. This view informs our assessment of the need for a minimum period of imprisonment. We consider the very serious offending here brings a heightened need for denunciation, deterrence and the need for community protection.

[58] The offending involved a worrying pattern of behaviour over the two offences. The respondents cruised the streets of Hamilton in the early morning looking for vulnerable young woman. They were indifferent as to whether or not the victims were prepared to consent to what they were intent upon, some sexual activity. This heightens the need for denunciation and deterrence.

[59] The Judge’s assessment that Mr Jones was “most unlikely to offend again”¹⁸ seems to fly in the face of the trial evidence. The serial nature of the offending, the failure to accept that he had raped, and the fact that the respondent has a long criminal history including previous sexual offending, point towards concern for future offending and therefore the need for community protection.

[60] We are satisfied, given this assessment, that eligibility for parole after the expiry of one third of a sentence would not adequately deter, denounce and protect the public. The Crown suggested that a minimum period of imprisonment of 50 per cent of the sentence was sufficiently appropriate.

[61] We are satisfied that a minimum period of imprisonment of slightly less than 50 per cent, being six years imprisonment, given this is a Solicitor-General appeal, adequately reflects the factors in s 86 of the Sentencing Act 2002.

[62] We, therefore, impose a minimum period of imprisonment of six years imprisonment with respect to Mr Jones.

Solicitors:
Crown Law Office, Wellington for Appellant

¹⁸ At [124].