

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

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA101/2012
[2012] NZCA 367**

BETWEEN	JAMES WHEROWIREMU AWHI Appellant
AND	THE QUEEN Respondent

Hearing: 13 August 2012
Court: Stevens, Heath and Andrews JJ
Counsel: G Boot for Appellant
F E Cleary for Respondent
Judgment: 20 August 2012 at 3.00 pm

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Andrews J)

Introduction

[1] The appellant, James Awhi, was sentenced by Judge Spiller in the District Court at Hamilton on 2 February 2012 to imprisonment for 11 years and six months,¹

¹ *R v Awhi* DC Hamilton CRI-2010-019-8680, 2 February 2012.

following his conviction on three charges of sexual violation by unlawful sexual connection, five charges of assault with a weapon, and three charges of assault on a child. He has appealed against sentence.

Background

[2] The appellant's offending was between 2001 and 2003. At that time the two complainants, who were brothers aged 4–5 and 7–8 respectively, were living with the appellant's relative. The appellant was about 26 years old at the time, and lived at his relative's house, but also spent periods living at a nearby address with his partner.

[3] The appellant was charged on indictment with, in all, 13 offences. At the beginning of his trial he pleaded guilty to three charges involving the younger complainant, being two charges of assault with a weapon and one representative charge of assault on a child. He also pleaded guilty to four charges involving the older complainant, being three charges of assault with a weapon and one representative charge of assault on a child. We refer to this group of charges as "the assault charges".

[4] The appellant pleaded not guilty to four charges, all involving the younger complainant. These comprised three charges of sexual violation by unlawful sexual connection, and one charge of assault on a child. The appellant went to trial on those charges before Judge Spiller and a jury, and was convicted. We refer to this group of charges as "the sexual offending charges".

[5] The appellant was also charged on two counts of wilfully ill treating a child. However, the prosecution did not proceed with those charges at trial, no doubt because they related to the same events as were the subject of charges of assault with a weapon.

[6] The assault charges arose from incidents in which the appellant punched and kicked the complainants, and struck them with a belt or stick. There was also an occasion where the appellant held the flame of a cigarette lighter to the

complainants' hands, causing burns to each of them. The appellant's explanation for these was that he was disciplining the children.

[7] The three charges of sexual violation by unlawful sexual connection, and the further charge of assault involving the younger complainant, arose out of two separate incidents. On the first of these, leading to two charges of sexual violation, the appellant was entrusted to pick the complainant up from kindergarten to take him home. Instead of taking the complainant home, the appellant drove to a secluded area of a local park. He then moved to the passenger seat, pushing the complainant in front of the seat. The appellant then pulled his pants down to his knees and struggled with the complainant as he attempted to force him to perform oral sex. He overpowered the complainant by holding his hand over the back of the complainant's head, and threatening him and his family with violence. The complainant opened his mouth over the appellant's penis before moving his head away.

[8] The appellant then pulled the complainant's pants down and turned him round, and the appellant inserted his penis into the complainant's anus and moved the complainant up and down. The complainant writhed, and he began to bleed from his anus. When the appellant became aware of the bleeding, he lifted the complainant off, and threw him on to the back seat of the car. The appellant then drove to his partner's house, where he made the complainant shower.

[9] The third charge of sexual violation arose out of a further incident when the appellant picked the younger complainant up from kindergarten. He drove the complainant to his partner's house, where nobody was at home. He took the complainant to a bedroom and removed his clothes before making the complainant sit on his hands and knees. The appellant then inserted his penis into the complainant's anus. Following that, he ordered the complainant to get dressed, and made him walk the short distance home. The appellant warned the complainant that if he told anyone what had happened, then the appellant would kill his family.

District Court sentencing

[10] The Judge took the charges of sexual violation by unlawful sexual connection as the lead offending. In his sentencing remarks the Judge referred to the victim impact statements produced by the two complainants, and summarised counsel's submissions. In discussing the starting point, the Judge referred to this Court's judgment in *R v AM*.² The Judge identified the aggravating factors of the appellant's offending, including the jury's finding that there was actual violence, and the appellant's guilty pleas to the assault charges, the long-term psychological harm to the complainants, the abuse of trust, and, in particular, the vulnerability of the two very young complainants. The Judge also took account of the jury's finding that the appellant had sexually violated the younger complainant on more than one occasion.

[11] The Judge then adopted a starting point of 11 years' imprisonment for the lead offending. He applied an uplift of six months to account for the assault charges. The Judge declined to make any adjustments, either by way of increase or decrease for personal factors, and arrived at an end sentence of 11 years and six months' imprisonment. That sentence was imposed for each of the three charges of sexual violation. Sentences of either one or three years' imprisonment were imposed for the assault charges. All sentences were to be served concurrently. The Judge declined to order a minimum period of imprisonment.

Submissions

[12] Mr Boot acknowledged that the offending was serious, and that the younger complainant being of kindergarten age was particularly vulnerable, but submitted that the violence involved did not go beyond that which is inherent in the offence itself. He also submitted that the sexual offending could not be described as a prolonged course of conduct, and involved only one victim. Further, he submitted that the offending was opportunistic rather than premeditated. Finally, he submitted that the appellant could not be said to have been in a position of trust, as he was not the complainant's caregiver. Mr Boot submitted that the appropriate starting point

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

would have been nine years, with the end sentence imposed being nine years and six months' imprisonment.

[13] Ms Cleary submitted that the Judge did not err, and that the starting point was appropriate, having regard to this Court's judgment in *R v AM*, and the factors set out in that judgment.

Discussion

[14] Unusually the Judge did not, in his sentencing notes, set out a summary of the facts relevant to the sentencing exercise before him. In this case, it would have been helpful, in considering the appeal, for us to have had an outline of the facts that the Judge accepted, having heard the evidence at trial. Such a summary would have explained more readily the context in which the sexual offending occurred.

[15] There is no dispute that the two complainants were placed in the care of the appellant's relative between July 2001 and April 2003 – a period of some 22 months. The appellant admitted five specific charges of assaulting the complainants with items such as a belt, a stick, and an open flame, as well as representative charges of assault. His three convictions for sexual violation of the younger complainant must be seen in the broader context of violence against both complainants.

[16] In *R v AM*, this Court described four bands for sentencing where the lead offence is rape, penile penetration of the mouth or anus (as is the case here) or violation involving objects. Factors to be considered in assessing an offender's culpability (and thus the appropriate sentencing band) include planning and premeditation, the extent of violence involved, vulnerability of the victim, harm to the victim, the scale of the offending, the degree of the violation, and whether the offending involved a breach of trust.³

[17] Counsel agreed that "rape band two" was appropriate for the appellant's offending. As noted in *R v AM*:⁴

³ At [34]–[54].

⁴ At [98].

... this band is appropriate for a scale of offending and levels of violence and premeditation which are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.

[18] A starting point of imprisonment for seven to 13 years is appropriate for offending within band two. The sole issue in this appeal was whether the Judge erred in placing the appellant's offending towards the upper end of band two, leading to a starting point of 11 years' imprisonment, rather than at the middle of the band, as Mr Boot submitted.

[19] We are not satisfied that the Judge erred. The appellant's offending was against an extremely vulnerable victim (aged not older than five years) and involved both violence and threats of violence to him and his family. There were three separate offences of sexual violation. While the first occasion of the appellant's offending (involving two actual offences) might perhaps be viewed as opportunistic, the second is far less easily seen as such. Rather, it appears planned, given the appellant's knowledge that his partner's home would be unoccupied. Further, on each occasion, the appellant was entrusted with the care of the victim, for the purpose of seeing him safely home from kindergarten.

[20] Ms Cleary submitted that the present case is analogous to the circumstances in *R v R*,⁵ which was referred to in *R v AM* as illustrating offending which sat at the higher end of rape band three. This Court described the offending in *R v R* as follows:⁶

V, aged 3, was O's stepdaughter. V was staying with her mother and O. O and V were waiting for her mother when she began crying. O swore at her, pushed her over causing cuts and bruising. He struck her 8 or 10 times, took down her pants and put his fingers into her vagina and "worked them round". Then he pushed the neck of a soft drink bottle into her anus. After that, he inserted his penis into her vagina and moved her around on top of him. V suffered severe damage to the anus and genitals and was expected to have emotional problems requiring long-term rehabilitation.

⁵ *R v R* (1990) 6 CRNZ 370 (CA).

⁶ *R v AM* (CA27/2009), above n 2, at [106].

[21] This Court further noted in *R v AM* that:⁷

... the very young age of the victim together with the nature of the indignities forced upon her by someone who had responsibility for her care and the impact on her means this offending would attract a starting point towards the higher end of rape band three.

[22] While Ms Cleary accepted that the offending in *R v R* was far more serious than in the present case, the circumstances of the present case have some similarity to those in *R v R*, and certainly point to the fact that a starting point in the upper middle range of rape band two was available to the Judge.

[23] Further, even if we were to conclude that the starting point of 11 years' imprisonment was too high, we are satisfied that if a lower starting point were adopted, a greater uplift would be required, in order to take account of the three occasions of sexual violation, and the eight convictions for assaults on the complainants. Thus, the same end result would have been reached, albeit by a slightly different route.

Result

[24] We are satisfied that the Judge did not err in setting a starting point of 11 years' imprisonment, or in reaching a final sentence of 11 years and six months' imprisonment.

[25] Accordingly, the appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁷ At [107].