

**NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF
NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF
APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE
ACT 2011 REMAINS IN FORCE.**

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203
OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA3/2016
[2018] NZCA 107**

| | |
|---------|---------------------------|
| BETWEEN | T (CA3/2016) Appellant |
| AND | THE QUEEN Respondent |

Court: Kós P, Clifford and Mander JJ

Counsel: G L Turkington for Appellant
K S Grau and P D Marshall for Respondent

Judgment: 20 April 2018 at 3.30 pm

JUDGMENT OF THE COURT (SENTENCE)

- A** The sentence of 16 years' imprisonment, with a minimum non-parole period of eight years' imprisonment, on charge 15 is quashed. A sentence of 10 years' imprisonment with no minimum non-parole period is substituted.
- B** The sentences of:
- (a) six months' imprisonment on charge 4;
 - (b) two years' imprisonment on each of charges 7, 11 and 14; and
 - (c) two years' imprisonment on charge 13,
- are confirmed and are ordered to be served concurrently with the substituted sentence imposed on charge 15.
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REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] In October 2015 T was found guilty, following a jury trial in the High Court, of multiple charges of sexual violation and associated sexual and physical violence. T was sentenced by the trial Judge, Brewer J, to a total of 16 years' imprisonment and ordered to serve a minimum period of imprisonment (MPI) of eight years.¹ T subsequently appealed his convictions and sentence to this Court. On appeal, we quashed all but one of T's sexual violation convictions, together with a number of the related violence convictions.²

[2] Pursuant to s 236 of the Criminal Procedure Act 2011 we now re-sentence T on the charges that were not affected by our decision in that appeal.

Background

[3] In the High Court T was found guilty on 16 charges: kidnapping (x 1); detaining with intent to have sexual connection (x 2, both representative); sexual violation by rape (x 5, four of which were representative); sexual violation by unlawful sexual connection (x 2, one of which was representative); attempted sexual violation by unlawful sexual connection (x 1, representative); assault with a weapon (x 3, two of which were representative); injuring with intent to injure (x 1); and male assaults female (x 1, representative).

[4] On appeal, we found that Brewer J had misdirected the jury as regards belief in consent on reasonable grounds.³ As a result, we quashed T's convictions on the representative charges of detaining with intent to have sexual connection, sexual violation by rape, sexual violation by unlawful sexual connection and attempted sexual

¹ *R v [T]* [2015] NZHC 3057 [Sentencing notes] at [38]

² *T (CA3/2016) v R* [2017] NZCA 626.

³ At [3].

violation by unlawful sexual connection; and the particular charges of sexual violation by unlawful sexual connection and of kidnapping.

[5] We dismissed T's appeal on the particular charge of rape on which he was found guilty (charge 15), the charge of male assaults female (charge 4), the three charges of assault with a weapon (charges 7, 11 and 14), and the charge of injuring with intent to injure (charge 13).

[6] We now re-sentence T on those charges. We do so with the concurrence of counsel, and in the context of the Crown having determined not to offer evidence at T's directed retrial.

[7] Brewer J structured T's sentence in this way. He first adopted as the lead charge the particular charge of sexual violation by rape (on which we dismissed T's conviction appeal), together with an associated particular charge of sexual violation by unlawful sexual connection (on which we allowed T's conviction appeal).⁴ The Judge said that if he had been sentencing T for that offending alone he would have adopted a starting point of around 10 to 12 years' imprisonment.⁵

[8] Taking account of the rest of T's sexual offending, he adopted a starting point for the sexual offending as a whole of 15 years' imprisonment.⁶ He uplifted that starting point by two years to take account of the balance of T's violent offending against the complainant.⁷ That resulted in an overall starting point sentence of 17 years' imprisonment.⁸

[9] The Judge declined to give any credit for personal mitigating factors, other than a period of one month to take account of the time T had spent subject to restrictive bail conditions (including a 24-hour curfew).⁹ Then, with reference to the totality principle, the Judge fixed T's overall sentence at 16 years' imprisonment.¹⁰

⁴ Sentencing notes, above n 1, at [27].

⁵ At [27].

⁶ At [29].

⁷ At [30].

⁸ At [30].

⁹ At [33].

¹⁰ At [38].

[10] As regards the separate charges, Brewer J sentenced T to 16 years' imprisonment concurrently on each of the charges of sexual violation by rape, sexual violation by unlawful sexual connection and attempted sexual violation by unlawful sexual connection.¹¹

[11] As regards the balance of T's offending, Brewer J imposed sentences of two years' imprisonment on each charge of assault with a weapon, on the charge of injuring with intent to injure and on each charge of detaining with intent to have sexual connection.¹² On the charge of kidnapping he imposed a sentence of 18 months' imprisonment and on the charge of male assaults female, he imposed a sentence of six month's imprisonment.¹³

[12] Given the seriousness of the offending taken as a whole, and the length of time over which it occurred, the Judge concluded a minimum period of imprisonment (MPI) of eight years was called for.¹⁴

[13] We must first, therefore, adjust the 16-year sentence and eight-year MPI Brewer J imposed on charge 15. In doing so we must also take account of the convictions on counts 4, 7, 11, 13 and 14 that were not disturbed by T's successful appeal.

T's offending

[14] T was in a relationship with the complainant from February 2014 to August 2014. T and the complainant lived together in Rotorua, Gisborne and Whakatane.

[15] The particular charge of sexual violation by rape, which is clearly the lead charge for these sentencing purposes, relates to an incident on a journey T and the complainant took from Gisborne to Mt Ruapehu in May 2014. T stopped their car in an isolated location and told the complainant to take her pants off. When the

¹¹ At [47].

¹² At [41].

¹³ At [41].

¹⁴ At [39].

complainant resisted, T proceeded to use his belt to whip her. This led to the complainant falling into a puddle where T continued to whip her. T then led the complainant back to the car and sexually violated her whilst she was restrained. The complainant was menstruating at the time.

[16] The balance of the charges now in issue reflect events that occurred over the 12-week period T and the complainant lived together in Gisborne. During that period T regularly assaulted the complainant — hitting her (the basis for the representative charge of male assaults female), whipping her with a belt (the basis for the first representative charge of assault with a weapon), and whipping her with DVD cords (the basis for the second). On one occasion, T went to a bedroom of the house and stood over the complainant. Seeing he was about to kick her, the complainant kicked T. In response, T repeatedly punched her leg. The complainant was left unable to walk, and the incident only ended when her cousin arrived. As a result, the complainant found it difficult to walk and had serious bruising to her legs.

Re-sentencing analysis

Submissions

[17] The Crown submits that the appropriate starting point for the lead offence of sexual violation by rape is approximately 10 years' imprisonment, with a one or two-year uplift for the additional violence charges. In addition, the Crown submits that an MPI is appropriate.

[18] For T, Mr Turkington submits that a starting point of between seven and nine years' imprisonment is appropriate. In doing so, Mr Turkington pointed to what he described as the far more benign character of T's overall offending given the outcome of his conviction appeal. After taking into account mitigating factors, the end sentence should be in the realm of seven years' imprisonment. No MPI is appropriate.

Our assessment

[19] Mr Turkington’s suggested starting point has T’s sexual violation offending at the upper end of band 1 and the lower end of band 2 in *R v AM*.¹⁵ The Crown’s 10-year starting point locates that offending in the middle of band 2.

[20] We are satisfied that the correct categorisation of the lead offence of sexual violation by rape is within band 2, where the offending is of moderate seriousness and there are two or three factors increasing culpability.¹⁶ This was premeditated offending. T took the complainant to an isolated area and raped her. The rape was particularly degrading — the complainant was menstruating. The complainant was vulnerable — although Mr Turkington emphasised that this was “a matter of degree”. There was associated violence, additional to that involved in the rape itself: T whipped the complainant when she resisted, forcing her to the ground and into a puddle.

[21] We are satisfied that, taken overall, a starting point of nine years’ and six months’ imprisonment is called for on the lead charge of sexual violation by rape.

[22] In his sentencing exercise, Brewer J considered an uplift of two years was necessary to respond to the associated violent offending (comprising detaining with intent, assault with a weapon (x 2), injuring with intent and male assaults female). The quashing of T’s convictions for detaining with intent calls for some adjustment of that uplift. Moreover, we are satisfied that the two-year uplift responded to the broader pattern of violence reflected by the charges on which T was originally found guilty by the jury. In the circumstances that now apply, we think an uplift of one year is a sufficient response to the remaining additional criminality.

[23] We turn, then, to aggravating or mitigating factors personal to T.

[24] Mr Turkington submitted that a discount of one year’s imprisonment was appropriate on account of T’s previous lack of convictions. He also pointed to the educational courses T has completed in prison. Given the ongoing nature of the offending for which T is now being sentenced — which extended through the period

¹⁵ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

¹⁶ At [98].

the couple lived together in Gisborne — we are not persuaded a previous good character discount is called for. We are, however, prepared to acknowledge some reformatory progress since the original sentence was imposed. Together with the limited discount for time spent on bail with a 24-hour curfew, as recognised by Brewer J, we consider an overall discount of six months responds to T’s relevant personal circumstances. That brings T’s end sentence to one of 10 years’ imprisonment.

The balance of the charges

[25] Brewer J imposed the following concurrent sentences as regards the balance of the charges on which we upheld T’s convictions:

- (a) Six months’ imprisonment on count 4;
- (b) Two years’ imprisonment on counts 7, 11 and 14; and
- (c) Two years’ imprisonment on count 13.

[26] We see no reason to adjust those sentences in light of the outcome of T’s appeal. They are also to be served concurrently with the sentence we have substituted for count 15.

Totality

[27] On the basis on which we are re-sentencing T, we see no need for an adjustment on account of totality.

Minimum period of imprisonment

[28] We now consider whether to impose a MPI.

[29] As we have noted, Brewer J sentenced T to 16 years’ imprisonment with an MPI of eight years. The material factors when it came to imposing a MPI were the

seriousness of the offending, the prolonged period over which it took place, and T's lack of insight into his offending.¹⁷

[30] In arguing that a MPI is no longer appropriate, Mr Turkington emphasised this Court's comments in *Skipper v R* — that a minimum period of imprisonment is not normally required “for a single rape with no unusual features”.¹⁸

[31] We agree with that submission. The rape was degrading and the associated violent offending aggravating. In our view, however, those factors are recognised in the finite sentence we have imposed. We do not think in the circumstances that now apply a MPI is called for.

Result

[32] The sentence of 16 years' imprisonment, with a minimum non-parole period of eight years' imprisonment, on charge 15 is quashed. A sentence of 10 years' imprisonment with no minimum non-parole period is substituted.

[33] The sentences of:

- (a) six months' imprisonment on charge 4;
- (b) two years' imprisonment on each of charges 7, 11 and 14; and
- (c) two years' imprisonment on charge 13,

are confirmed and are ordered to be served concurrently with the substituted sentence imposed on charge 15.

Solicitors:
Crown Law Office, Wellington for Respondent

¹⁷ Sentencing notes, above n 1, at [39].

¹⁸ *Skipper v R* [2013] NZCA 104 at [26].