

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY
SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF
COMPLAINANTS IN 2000 OFFENDING PROHIBITED BY S 139 OF
THE CRIMINAL JUSTICE ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA129/2018
[2018] NZCA 600**

BETWEEN RENE MISHELLE DE KWANT
Appellant

AND THE QUEEN
Respondent

Hearing: 12 November 2018

Court: Asher, Lang and Moore JJ

Counsel: A M Toohey for Appellant
S K Barr for Respondent

Judgment: 18 December 2018 at 3 pm

JUDGMENT OF THE COURT

- A An extension of time to file the appeal is granted.**
B The application to adduce fresh evidence is declined.
C The appeal is dismissed.
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REASONS OF THE COURT

(Given by Asher J)

[1] The appellant, Rene de Kwant, appeals against a sentence of preventive detention.¹ It is submitted for him that he should have been sentenced to a finite sentence, possibly with an extended supervision order. His appeal was filed late because of various matters, some of which appear to have been beyond his control, and we grant his application for an extension of time to file the appeal.

The circumstances of his offending

[2] In 2014 Mr de Kwant was 49 years old. He attended a party held for a friend. Her son, who would ultimately be his victim, was in attendance. Mr de Kwant told the victim's mother that he felt he had a personal connection with her son. It appears that she accepted that and trusted him. From that time onwards he cared for the victim on numerous occasions, usually when the victim's mother was away on business. Mr de Kwant's partner was often away when he was looking after the victim, meaning that Mr de Kwant was alone with him. The overnight stays commenced in June 2015 and continued through to January 2017.

[3] On the overnight stays, Mr de Kwant indecently assaulted the victim, pulling his pants down to around knee-level before commencing to masturbate him. This took place on every occasion when Mr de Kwant was alone with the victim. It is estimated that there would have been at least 12 occasions over the 18-month period.

[4] The victim, who was aged between eight and ten years, would often freeze and remain motionless and speechless throughout the ordeal. Ultimately in February 2017, the victim confided to his mother. What had prompted this disclosure to the mother was a proposed tramping trip organised by Mr de Kwant for himself and the victim. When confronted, Mr de Kwant admitted the facts and stated that he thought the offending had taken place on between five and eight occasions.

¹ *R v de Kwant* [2017] NZHC 2291.

Mr de Kwant pleaded guilty to a representative charge of doing an indecent act on a boy under 12.²

[5] We will refer to this offending as “the index offending”. The victim impact statements reveal that the victim had to deal with serious stress and anxiety during the period of the offending. Now, after it is over, his parents have observed him to be physically and emotionally exhausted, and suffering at times from depression-like symptoms. He has lost his delight in usual childhood activities and become concerned about his sexuality. He has trouble sleeping in his own room at night, fearing abuse. He has regressed at school, and has social problems including a fear of adult males.

The sentence

[6] Mr de Kwant was sentenced to preventive detention by Mander J on 21 September 2017 with a minimum period of imprisonment of five years.³ The Judge considered there was a high risk of Mr de Kwant reoffending and that, absent appropriate intensive treatment being effective, he would be likely to commit another qualifying sexual offence at the expiry of a finite sentence.⁴ He stated that the sentence that would otherwise have been appropriate in this case would have been three years and seven months’ imprisonment, once the appropriate discounts had been deducted.⁵

[7] Mr de Kwant had been involved in earlier serious sexual offending on young victims. The Judge noted that, despite having comprehensive offending-related treatment, Mr de Kwant had reverted to a pattern of behaviour that enabled him to minimise and justify the ongoing sexual abuse of his victim.⁶ This involved secrecy, and a breach of the trust of the victim’s family.⁷ This occurred despite appearances of genuine remorse, apparent motivation to address the causes of the offending, and the presence of a support network in the community and of family and friends. He had also had a significant period of successful life in the community before reoffending.

² Crimes Act 1961, s 132(3).

³ *R v de Kwant*, above n 1.

⁴ At [48].

⁵ At [49].

⁶ At [40].

⁷ At [40].

In the view of the Judge, he remained at high risk of reoffending, presenting a significant level of harm.⁸

The earlier offending

[8] We turn to Mr de Kwant's earlier offending, "the 2000 offending". In 2000, Mr de Kwant was sentenced to nine years' imprisonment for sexual violations and other indecencies upon [redacted] (aged approximately six to 12 and six to 13 years old respectively) and [redacted] (four years old).⁹ The first victim was [redacted]. The offending started shortly after Mr de Kwant had commenced [redacted]. The offending continued over six years between 1993 and 1998. The offending commenced with him rubbing her genitalia and escalated to digital penetration when she was around 12 years old. In relation to her, Mr de Kwant was convicted of representative charges of committing indecent acts, indecent assault and sexual violation by digital penetration.

[9] In the same period Mr de Kwant offended against [redacted]. Mr de Kwant was convicted of representative charges of indecent assault by masturbation, sexual violation by oral sex, and rape by anal penetration. The boy was six or seven years old when the offending commenced, and this offending continued for over eight years. The sentencing Judge emphasised that anal penetration was inflicted on the boy on "countless" occasions over that period.¹⁰

[10] The third victim was [redacted]. He was convicted of inducing her to do indecent acts upon him, including touching and rubbing his penis. The offending started when [redacted] was four years old.

[11] It was revealed Mr de Kwant used bribes, favouritism, and pleading to secure his victims' compliance, as well as administering sleeping medication to obtain [redacted] compliance.

⁸ At [57].

⁹ *Police v de Kwant* DC Christchurch CRI-2000-009-338876, 6 April 2000.

¹⁰ At 5.

[12] The victims all suffered severe impacts. Their physical, emotional and psychological wellbeing were dramatically affected. The sentencing Judge at the time was concerned that they might never recover from the effects of the attacks.¹¹

[13] Mr de Kwant committed very serious sexual offending, involving the grossest breaches of trust, and for two of the three victims, repeated penetrative violations. There had also been a pattern of escalation at least in relation to two of his three earlier victims.

First appeal ground — comparatively minor index offending

[14] Ms Toohey’s submissions for Mr de Kwant on appeal focused on three major grounds. First, that the Judge drew an “insufficient distinction ... between the two sets of offending” and failed to recognise that the index offending, against which preventive detention would provide protection, was “comparatively minor”.

[15] However, in his sentencing notes, the Judge was careful to acknowledge that the 2000 offending was more serious than the index offending.¹² This is very obvious, given that the notional starting point for the present offending was fixed at four years, whereas the starting point adopted for the 2000 offending was 12 years’ imprisonment.

[16] We accept entirely that the 2000 offending was more serious. However, on both occasions the offending was still relatively serious. Further, in our view, the starting points fixed for sentence in both cases should be regarded as low. The starting point adopted in 2000 of 12 years’ imprisonment may well have been appropriate then, but today in the light of the decision of *R v AM (CA27/2009)* it is likely that the starting point would have been higher.¹³

[17] As to the index offending, the maximum penalty for indecent assault on a child is ten years’ imprisonment. In our view, this offending, involving repeated masturbation of a boy who was initially aged eight over an 18-month period, is towards the top of the spectrum of seriousness for indecent assault. We take the view that,

¹¹ At 7.

¹² *R v de Kwant*, above n 1, at [32]–[33].

¹³ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

although the starting point chosen by the Judge was within the range, it could have been higher, given the particular premeditation, breach of trust, and damage to the victim. There could then have been a considerable uplift for his prior offending, although the Judge chose a relatively modest period of 12 months.¹⁴ He then proceeded to allow a discount of 25 per cent for the guilty plea and three months for Mr de Kwant's remorse and efforts at rehabilitation.¹⁵

[18] Although we accept that the index offending is considerably less serious than the 2000 offending, it is not correct to suggest that the present offending was minor, or that the Judge made any error in his analysis of the index offending.

Second appeal ground — the assessment of risk

[19] Mr de Kwant submitted that the Judge did not give sufficient weight to health assessors' reports relating to Mr de Kwant's risk of reoffending. Ms Toohey sought leave to produce an affidavit of Mr de Kwant's prison counsellor, Toby Stocks. Mr Stocks is a member of the New Zealand Association of Counsellors and, while not contesting Mr de Kwant's clinical dangers, in a short statement gives his opinion that Mr de Kwant has the capacity and motivation to develop an "attachment style" and skills to lead a safe lifestyle in the community. Although fresh, in our view this short expression of opinion derived from counselling visits has insufficient probative value to warrant admission, given Mr de Kwant's history and the extensive reports from three psychologists that were before the High Court, and which we will refer to. We find it of no assistance, and decline to admit it.

[20] As we have said, the index offending, while less serious than the 2000 offending, was nevertheless still serious involving gross breaches of trust, and repeated offending over a long period of time. The platform for reoffending had been set by guile and premeditation with Mr de Kwant ingratiating himself with the victim's mother. This offending was showing no sign of ending. To the contrary, there were some signs of escalation, with him having organised a tramping trip with the victim, foiled only by the victim when he disclosed what was happening to his mother.

¹⁴ *R v de Kwant*, above n 1, at [19].

¹⁵ At [20]–[23].

[21] A particular feature of this case, in relation to the consideration of preventive detention, is that Mr de Kwant is not at all in denial in the sense that he fully admits his offending and that it was wrong. He is, on the face of it, remorseful and has shown a willingness to undertake courses and therapy. This acceptance of wrongdoing and willingness to accept treatment to fix the problem would normally work against preventive detention in that it would reduce the likelihood of the offender committing another qualifying sexual offence. It will show a willingness on the part of the offender, in terms of s 87(4)(d) of the Sentencing Act 2002 to address the cause or causes of the offending.

[22] The problem with this line of reasoning in this case, is that Mr de Kwant went through the same process of remorse and rehabilitation in relation to the 2000 offending, and it did not stop him reoffending. When the 2000 offending was revealed he expressed remorse and attended a STOP programme. Then, during his prison sentence, and afterwards, he undertook extensive therapy. One of the registered psychologists who presented a report for the High Court in this case, summarised the history in this way:

During his previous prison sentence Mr De Kwant completed Kia Marama Special Treatment Unit (KM STU) in January 2003. He remained engaged as a graduate in the KM unit until his release on parole in 2006 and his STU treatment progress below is summarised from a report to the New Zealand Parole Board (A Frost, A Foster and B Rutherford, 11 October 2005).

Mr De Kwant was reported to have engaged well in a generally open manner, expressed his thoughts, challenged others and worked to resolve conflicts during the KM STU treatment. He achieved gains in identifying his emotions and demonstrated effective emotional management techniques. It was reported that he developed a very sound understanding of his offence process *and accepted full responsibility for his offending, including expression of emotion consistent with remorse and a sound appreciation of the negative impact of his offending on his victims.* Mr De Kwant was described as “especially clear” about the relationship between his personal difficulties and offending, the role fantasies played and the pattern of faulty thinking that accompanied and enabled his offending. He learned and practiced sexual reconditioning techniques to address his deviant sexual attraction; Mr De Kwant reported little attraction to deviant fantasies by the end of treatment although objective phallometric re-assessment was unable to support his stated desistance as he produced a non-responding profile. This might reflect an attempt to suppress sexual arousal to any stimuli, rather than the intention to assist him to develop a more healthy attraction to adult female consenting sexual contact. *Mr De Kwant was reported to have accepted the need for lifelong vigilance, with knowledge of detailed strategies for managing high risk situations.*

Upon his release from prison, Mr De Kwant attended a monthly community group for monthly maintenance for KM STU completers. It was reported Mr De Kwant acknowledged he found those groups to be of little benefit and attended to fulfil his parole requirements, rather than for internally motivated reasons. Mr De Kwant was reported to have attended consistently and generally engaged actively in group discussions (G Joughin, 11 February 2009).

Individual psychological treatment continued across Mr De Kwant's release period, between 2006 and his sentence completion in 2009. His treating psychologist Mr Joughin reported (11 February 2009) the focus was upon enhancing Mr De Kwant's self-efficacy, social and relationship functioning, and management of emerging safety or risk concerns. Early in treatment Mr De Kwant reported going on dates with two women who had children, and it necessitated thorough discussions and challenging in treatment to encourage him to realise the potential safety concerns. Mr De Kwant was provided with information and opportunity to address his sexual functioning and sense of inadequacy although Mr Joughin reported that Mr De Kwant elected not to take up this opportunity. Aside from these, De Kwant was described to have engaged thoroughly, and grasped new concepts quickly although did not complete homework tasks consistently. *Due to Mr De Kwant's stable lifestyle and limited presence of overt dynamic risk factors by the end of the treatment period, Mr Joughin assessed him to be presenting with a low risk of sexual recidivism at that time (11 February 2009).* Together with his responsiveness to oversight and gains from continued engagement in treatment, Mr De Kwant would not have been eligible for consideration for an Extended Supervision Order at that time.

(Emphasis added.)

[23] It was then commented that despite having completed his previous prison sentence and intensive offending-related treatment, Mr de Kwant reverted to his historical pattern of cognitive distortions. These enabled him to minimise and justify ongoing sexual abuse, as well as his continued secrecy and breach of the trust of his victim's family and his own partner. The psychologist's opinion was that Mr de Kwant presents a high risk of sexual recidivism. A second psychologist has the same view:

Mr De Kwant's propensity to place his needs above others in regards to meeting his social or sexual needs, has been a consistent feature across his life. Mr De Kwant's views of himself as lacking necessary skills and his fear of being rejected by others appear to have contributed to his sense of alignment with children to meet these needs. He sees children as less judgemental and finds them easier to form relationships with, and places children in adult roles. Mr De Kwant has a tendency to use avoidance strategies when problem solving conflict with others. Mr De Kwant has a number of cognitive distortions that minimise and justify his actions. He relies particularly on the belief that his sexual offending is caused by his social deficits and is also a means to fulfil missed childhood activities.

[24] Remorse and extensive therapy did not stop Mr de Kwant from deliberately cultivating another relationship with the current victim and subjecting him to the same kind of abuse (although without there being penetrative violations). As an articulate and mature man he expressed sympathy for his victims, and yet with that professed awareness contrived to achieve a situation where he could assault another young victim. It is not possible to have any confidence that Mr de Kwant would not, if he served a finite sentence and was released, do it again. The pattern of Mr de Kwant's serious offending is that he presents as an articulate, intelligent and sympathetic man who understands right and wrong, but despite that he lies and betrays trust to get himself into a position to achieve his sexual goals. He may have felt genuine remorse, but it did not last, or he sublimated it.

[25] Thus, despite all the previous therapeutic interventions and also the support of friends and family willing to assist and involve themselves in his ongoing rehabilitation, Mr de Kwant shows the ability to secretly resume sexual offending. We agree with the Judge that he demonstrates an inability to sustain whatever gains he has made as a result of intensive treatment.¹⁶ As the Judge observed, his present voluntary engagement with a psychologist mirrors his response to the earlier situation where he voluntarily attended a STOP programme.¹⁷

[26] The opinion of the experts of him being a high risk is therefore strongly confirmed by an overview of the facts. There can be no confidence that further remorse and rehabilitation will work; that even after a time in prison and completion of programmes, and with full support from friends and family, he will not reoffend.

Third appeal ground — efforts by Mr de Kwant to address the cause of the offending

[27] Mr de Kwant's final ground of appeal related to evidence of his current efforts to address the causes of his offending. This issue has in effect been addressed by the preceding part of our analysis. Mr de Kwant's efforts at rehabilitation can give a court no confidence in him not reoffending.

¹⁶ At [43].

¹⁷ At [44].

Overall conclusion

[28] We do not find it helpful to consider individual cases referred to us by Ms Toohey in these circumstances.¹⁸ They all have considerably different facts. For instance the case particularly relied on for Mr de Kwant, *Carline v R*, involved a far less serious single indecent assault.¹⁹ It is better to focus on the words of s 87(1) of the Sentencing Act, and in particular whether Mr de Kwant will pose a significant and ongoing risk to the safety of members of the community on his release, here in particular pre-pubescent children. Section 87(4) elaborates:

87 Sentence of preventive detention

...

- (4) When considering whether to impose a sentence of preventive detention, the court must take into account—
- (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.

[29] In our view Mr de Kwant will pose such a significant and ongoing risk. In terms of 87(4)(a) there has been shown to be a pattern of serious offending. That offending has caused harm of the utmost seriousness to four young victims so far (s 87(4)(b)). The information before us indicates a tendency on his part to commit serious offences in the future (s 87(4)(c)). On the basis of the 2000 offending and the index offending, he may well reoffend.

¹⁸ We were referred to *Carline v R* [2016] NZCA 451; *R v Parahi* [2005] 3 NZLR 356 (CA); *R v T* CA125/02, 19 July 2002; and *R v Bailey* CA 102/03, 22 July 2003.

¹⁹ *Carline v R*, above n 18, at [3].

[30] After he was sentenced for the 2000 offending in April 2000, Mr de Kwant would have had ample time to reflect on what he had done and the harm he had caused. Despite this, and all the extensive therapy he had undergone and promises he had made, he deliberately and repeatedly assaulted the young vulnerable victim. Although there had therefore been efforts by him to address the cause or causes of the offending (s 87(4)(d)), he showed himself to be unable to achieve a permanent benefit from this. What is particularly disturbing in this case is the premeditated nature of the index offending in 2014 and 2015, and the fact that it extended over 18 months. Mr de Kwant must have planned his actions. We also agree with the Judge that, while a number of health assessors referred to age as potentially being a factor which reduces the risk Mr de Kwant presents, this was qualified by observations that Mr de Kwant's recent offending is more consistent with a group of sexual offenders whose risk is less affected by age.

[31] We are conscious of the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society (s 87(4)(e)). Mr de Kwant has support from a number of persons who are close to him. He appears to have skills and application, the ability to hold a job, and the ability to develop relationships. However, the protection of the community comes first under s 87. It is not a balancing process where Mr de Kwant's good qualities can be called in aid and balanced against the risk; they can be taken into account in assessing risk, but not used simply as a counterweight. In this case they do not ameliorate the risk.

[32] The possibility of an extended supervision order on release can tip the balance against preventive detention sentences for lower level sexual offenders. There can be control over where a defendant lives and works. In this case, because of the ongoing risk posed by Mr de Kwant, it does not tip the balance. This is in particular because of his demonstrated ability to ingratiate, manipulate and exploit opportunity when in the company of others.

[33] We add that in our view the five-year minimum term imposed by the Judge was required for the purposes of the safety of the community in light of Mr de Kwant's age and the risk posed by him to that safety at the time of sentence.²⁰

[34] It follows that we agree with the reasons and the result of Mander J's decision.

Result

[35] An extension of time to file the appeal is granted.

[36] The application to adduce fresh evidence is declined.

[37] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

²⁰ This is the minimum term required under s 89(1) of the Sentencing Act 2002.