

NOTE: PUBLICATION OF THE NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PROHIBITED BY SECTION 201 OF THE CRIMINAL PROCEDURE ACT 2011.

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA479/2019
[2020] NZCA 95**

BETWEEN	K (CA479/2019) Appellant
AND	THE QUEEN Respondent

Hearing:	3 March 2020
Court:	French, Dobson and Moore JJ
Counsel:	G D Prentice for Appellant C Ure for Respondent
Judgment:	8 April 2020 at 11 am

JUDGMENT OF THE COURT

- A The appeal against sentence is allowed in part.**
 - B The minimum period of imprisonment is quashed and substituted with a minimum period of imprisonment of three years and six months.**
 - C The sentences imposed in the District Court are otherwise confirmed.**
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REASONS OF THE COURT

(Given by Dobson J)

[1] After a jury trial in the District Court at Hamilton, the appellant, K, was found guilty of three charges of sexual violation by unlawful sexual connection, three of sexual conduct with a dependent family member and one charge of indecent assault.¹

[2] On 23 August 2019, K was sentenced by the trial Judge, Judge Spear, to seven years' imprisonment and ordered to serve a minimum period of imprisonment (MPI) of four years and eight months. This was the maximum that could be ordered under s 86 of the Sentencing Act 2002 (the Act) of two thirds of the determinate sentence.²

[3] K has appealed against the imposition of an MPI and, if that is unsuccessful, against the length of the MPI imposed.

The offending

[4] The complainant was K's step-daughter, who was living in the same household during the period of the offending. She was aged between 14 and 16 years old and K was aged between 40 and 42. The offending involved a prolonged course of grooming, which began under the guise of K inspecting the complainant's body for insect bites and cleanliness. The offending progressed from K smelling and touching the complainant's genitalia over her clothing whilst she was in bed to rubbing and kissing her breasts and penetrating the complainant's vagina with his finger. This offending was the subject of representative charges. There were also individual charges of sucking the complainant's breasts and licking her vagina.

[5] The complainant tolerated the offending for her mother's sake, the latter being very happy in her relationship with K after earlier difficulties in her life. The couple's relationship ended after the revelation of the offending and the mother and daughter left New Zealand. A victim impact statement records that the offending had a severe and lasting impact on the complainant's mental health.

¹ All the charges were representative except for one of charges of sexual violation and the charge of indecent assault.

² *R v K* [2019] NZDC 16660.

The sentencing

[6] The Judge treated the offending as having persisted over a two to three year period, involving the careful grooming of the complainant in a way that K knew would prevent her talking to her mother about what was happening. The Judge characterised this as a “shocking breach of trust”.

[7] At sentencing, K maintained his innocence.³ The pre-sentence report stated that he blamed the complainant’s mother for the allegations. The Judge observed that he had moved on in his life, having formed another relationship and having entered into a positive work situation. He was described by his counsel as a man of deep religious faith.⁴ The Judge considered it important that K had absolutely no remorse and showed no empathy for the harm he had done to both the complainant and her mother.⁵ Given his denial of any offending, the Judge was mindful that prison authorities would have difficulty finding courses for him to undertake.

[8] In sentencing K, Judge Spear followed the guidelines in this Court’s judgment in *R v AM*.⁶ The Judge adopted an overall starting point for all of the offending of seven and a half years and allowed a six month deduction for his previous good character.⁷ No challenge is advanced on appeal to those aspects of the sentencing.

[9] The Judge dealt succinctly with the prospect of an MPI:

[20] It is then a question as to whether a non-parole period should be imposed. The Court can impose a minimum period of imprisonment of up to two thirds of the sentence that is imposed if the usual one third of the sentence, when you would be eligible for parole, would represent an insufficient response by way of denunciation, punishment and deterrence.

[21] Mr Prentice argues against that but I consider that this is entirely appropriate for offending of this type.

[22] ... I direct that you serve a minimum period of four years, eight months’ imprisonment.

³ At [13].

⁴ At [14].

⁵ At [15].

⁶ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

⁷ *R v K*, above n 2, at [19].

The arguments on appeal

[10] Mr Prentice, for K, submitted that an MPI was not warranted for three reasons:

- (a) First, that K was a first offender and, with no previous convictions, it could not be said that previous sentences had not deterred his offending.
- (b) Secondly, although the offending was clearly serious, he argued that it was not of the worst kind.
- (c) Thirdly, that the MPI hindered rehabilitation because K could not be added to the wait list of appropriate courses until shortly before the MPI expired.

[11] In terms of the relative seriousness of the offending, Mr Prentice criticised an observation made by the Judge to the effect that, unless the complainant had disclosed the offending at the time she did, the offending would have escalated to rape. Arguably, that was too speculative an observation to have been taken into account.

[12] In supporting the decision to impose an MPI, Ms Ure, for the Crown, emphasised that this was a sustained course of offending over more than two years where the evidence justified the Judge concluding that it was fortuitous it had not progressed further. The course of conduct meant that the lack of previous convictions did not lessen K's culpability. It was relevant that he was assessed as high risk of re-offending and of causing harm to others. All of the grounds for imposing an MPI were available to the Judge.

Analysis

[13] The considerations relevant to whether an MPI is imposed are set out in s 86(2) of the Act:

86 Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment

...

- (2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of

the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:

- (a) holding the offender accountable for the harm done to the victim and the community by the offending;
- (b) denouncing the conduct in which the offender was involved;
- (c) deterring the offender or other persons from committing the same or a similar offence;
- (d) protecting the community from the offender.

[14] In the recent decision of *Blackler v R*, this Court has reiterated that an MPI ought not to be imposed in any mechanistic way, it is not sufficient to simply recite the statutory provisions of s 86(2) of the Act and a reasoned analysis is required in each case.⁸

[15] The Judge has not recorded a reasoned analysis in this case. In the absence of reasons, we will undertake that task in light of the views the Judge expressed about the offending and the offender, and in light of the submissions received on the appeal.

[16] Under s 84(1) of the Parole Act 2002, K would be eligible for parole after serving 28 months in prison if an MPI was not imposed.

[17] The features of the offending and the offender as summarised above are relevant in reflecting on whether potential release after a period of 28 months is sufficient to hold K accountable for the harm done, both to the complainant and the community, to denounce that conduct and to deter him and others from committing similar offences. In light of the continued denial of any wrongdoing, is was a case in which protection of the community is also a legitimate concern in assessing the need for an MPI greater than 28 months.

[18] We find that entitlement to release after 28 months would be inadequate to denounce this sustained and serious conduct. It would similarly be inadequate to hold K accountable for the harm he has done to the complainant. A longer MPI is warranted to deter him and to deter others and, given the limited prospects of rehabilitation he

⁸ *Blackler v R* [2019] NZCA 232 at [38]. See also *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 64 at [169].

displayed at sentencing, there is also an argument that a longer sentence should apply to protect the community from him. Accordingly, all four of the s 86(2) factors are engaged in this case.

[19] For these reasons, we are satisfied that an MPI was appropriately imposed.

[20] As to its length, the MPI of two thirds would require K to serve a minimum of four years and eight months in prison. An MPI of half his sentence would have him eligible for parole after three years and six months. Having regard to his lack of previous convictions, and what ought realistically to be the prospects of his appreciating the seriousness of his offending within three and a half years, we are satisfied that an MPI of half of K's sentence is sufficient. In this evaluation, we are not persuaded by Mr Prentice's submission that an MPI of two thirds ought to be reserved for only the most serious of cases. There can be no rule of thumb, and the decision on imposition of an MPI is a matter of judgement requiring an evaluative consideration of all relevant factors in every case.

Outcome

[21] The appeal against sentence is allowed in part.

[22] The MPI is quashed and substituted with an MPI of three years and six months.

[23] The sentences imposed in the District Court are otherwise confirmed.

Solicitors:
Crown Law Office, Wellington for Respondent