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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

**CA229/2020
[2021] NZCA 161**

BETWEEN	DAVID TAITAPANUI Appellant
AND	THE QUEEN Respondent

Hearing:	15 March 2021
Court:	Clifford, Brewer and Dunningham JJ
Counsel:	N P Chisnall for Appellant C Ure for Respondent
Judgment:	5 May 2021 at 10.30 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Dunningham J)

Introduction

[1] The appellant, David Taitapanui appeals his sentence of 10 years and four months' imprisonment imposed on him by Judge Rea at the District Court at Napier on 28 April 2020.¹ He submits the sentence is manifestly excessive and

¹ *R v Taitapanui* [2020] NZDC 7056 [Judgment under appeal].

should be reduced to between eight and eight and a half years' imprisonment. A corresponding reduction in the length of the minimum period of imprisonment (MPI) is also sought.

Factual background

[2] The appellant and the victim met and began a relationship in early 2016. Soon after moving in together, he began offending against her doing so on various occasions between April 2016 and August 2018. The appellant pleaded guilty to 19 charges. These included two charges of sexual violation by rape,² two charges of sexual violation by unlawful sexual connection,³ two charges of assault with intent to injure,⁴ six charges of male assaults female,⁵ three charges of injuring with intent to injure,⁶ and four charges of breach of a protection order which had been served on him in August 2017.⁷

April 2016

[3] The first group of charges relate to offending which took place at the family home in April 2016. The appellant pushed a door into the victim, hitting her in the face. He then punched her and, after the victim fell to the ground, punched and kicked her four or five times to the body. The appellant picked the victim up, threw her into a wardrobe, and then stomped on her ribs. He then threw the victim on the bed. The victim by that point was crying and had a bloody nose. The appellant apologised to the victim and asked for oral sex. He placed his penis in her mouth and then raped her. Throughout this, he was verbally abusive, calling her a “bitch” and a “whore”. As a result, the appellant was charged with a representative charge of assault with intent to injure, sexual violation by unlawful sexual connection and sexual violation by rape.

² Crimes Act 1961, ss 128(1)(a) and 128B(1).

³ Sections 128(1)(b) and 128B(1).

⁴ Section 193.

⁵ Section 194(b).

⁶ Section 189(2).

⁷ Domestic Violence Act 1995, ss 19(1)(a) and (b), 49(1)(b) and 49(3).

July 2016

[4] The next offending occurred in early July 2016. The appellant returned home in the early hours of the morning and demanded sex. The victim was angry that the appellant had been out all night and did not want sex. He then raped her and after a few minutes demanded anal sex; when that was refused, he then punched the victim on the side of the face and forced his penis into her anus. Whenever the victim told him to stop, the appellant punched her to the back of her head. This happened about six times. The appellant grabbed her hair and pulled it, forcing her head back which made it difficult for her to breathe. He told her to handle it and moan like she was enjoying it. As a result, the appellant was charged with a representative charge of male assaults female and sexual violation by unlawful sexual connection.

[5] Later that same month, the appellant walked up to the victim and punched her in the jaw, explaining this was because she had asked his 11-year old daughter to put her washing away. The victim said she could not eat or chew properly for two weeks and her jaw was swollen. The appellant was charged with injuring with intent to injure.

[6] The next assault, occurring approximately a week later, was described by the victim as the worst incident of violence. The appellant came in from outside and punched the victim with his fist, hitting her in the right eye. The punch knocked her backwards into the kitchen where she fell on the floor. Her glasses were knocked off, the frame broken and the skin above her eye was cut. After dragging her across the floor by her hair, the appellant kicked her in the face, splitting open the cut caused by the earlier punch and making her bleed profusely. When she asked for her phone so she could call an ambulance, he refused. After about an hour, he threw the phone towards her, although it hit the wall and came apart. After she put her phone back together, she called an ambulance. Six stitches were required to close the cut. In the following days, the appellant did not allow her to go to the doctor to get the stitches removed, so she took them out herself. She now has a permanent scar above her eye. The appellant was charged with injuring with intent to injure.

September 2017

[7] In mid-September 2017 the victim and the appellant were attending a birthday party at a relative's house. The appellant was angry at a family member who wanted a loan, so he gave his money card to the victim and told her to put it in her van. When she was in the van, he walked up to it asking her where his "fucking card" was. She told him it was in the glovebox, then got out of the van and locked it and went inside to get the children. He followed her and cornered her in the kitchen. He then grabbed hold of her hair pulling it out in clumps. Members of the appellant's family intervened, and the victim left and stayed at a motel that night.

[8] She spoke to the appellant the following day at home where, initially, he seemed calm. At his request, she drove him to a relative's address, where she accidentally backed into another car while attempting to jumpstart another car. The appellant walked up to the driver's window and punched the victim with full force to the side of the face, calling her a "fucking idiot". Her top tooth was knocked out and her glasses were smashed. She had a cut to her right eyelid just below her eyebrow. She went to the hospital but left before receiving treatment. As a result of these events, the appellant was charged with a representative charges of injuring with intent to injure and breaching the protection order issued only a month earlier.

October 2017

[9] In the early morning on 22 October 2017 the victim was asleep at her home. She was woken by two punches to her head and two punches to her ribs. The appellant said he punched her because he had wanted to take his children to the A & P show and complained about having to go to Taranaki the previous day with the victim. This led to a charge of male assaults female and of breach of the protection order.

[10] A couple of days later, when angry with the victim, the appellant grabbed her by the throat and squeezed it with his hand causing her difficulty breathing. The appellant's mother, who was present, intervened. She grabbed his arm and told him to stop and to let the victim go, but he shoved her away hurting her wrist. He was charged with male assaults female in relation to his mother and with male assaults female and breach of a protection order in relation to the victim.

Representative charges for April 2016 – June 2018

[11] Between April 2016 and late 2017, the appellant punched and kicked the victim “[e]very few days” and would also have sex with her against her will. She said it felt like every time the appellant got angry with her, he would force her to have sex with him. The sex was painful and violent.

[12] In November 2017 the appellant went to prison on unrelated charges of breaching a protection order.

[13] On 11 June 2018 the appellant was released from prison and returned to the victim’s house. Again, it is alleged that he punched and kicked her every day. He also had sexual intercourse with her against her will.

[14] These allegations led to two representative charges of male assaults female (relating to the time periods before and after imprisonment) and a representative charge of sexual violation by rape.

August 2018

[15] On 12 August 2018 the appellant was at the victim’s home. The victim heard him yelling and smashing plates because the dishes were not done. She left the house for a short time but then returned with the appellant’s cousin and her children. The appellant began to verbally abuse the victim, telling her he was going to kill her. He grabbed her by the neck and pulled her close, squeezing her throat and making it difficult for her to breathe. As he squeezed her neck he said “you dumb cunt, I’m going to snap your neck”. He held her throat that way for about 10 seconds. The appellant’s uncle and nephew managed to intervene and get the appellant away from the victim. This led to a charge of assault with intent to injure and a charge of breach of a protection order.

[16] The charges were laid in August and September 2018. In due course, reports were obtained to determine whether the appellant was fit to stand trial. Once that issue was resolved, the appellant sought a sentence indication. That was given on 28 January 2020, and the Judge indicated an end sentence of 12 years nine months’

imprisonment. The appellant accepted the sentence indication and pleaded guilty to the charges.

The sentencing decision

[17] In sentencing the appellant, the Judge described the offending as inflicting “a reign of terror” over the victim for a period of more than two years.⁸ He then referred back to, and adopted, the starting point of 16 years’ imprisonment he reached in his sentencing indication.⁹ That starting point comprised 13 years’ imprisonment for the sexual offending which was then uplifted by three years to account for the violence, but moderated by one year to account for totality. That was then uplifted by one year for previous relevant convictions to reach an overall starting point for the offending of 16 years’ imprisonment.

[18] The Judge acknowledged that the appellant had suffered a head injury as a result of an accident in 2010 which resulted in “increasing difficulties with managing his anger”, although noting that prior to the accident he already displayed “mood difficulties, emotional dysregulation, suicidal ideation, anger issues, violence, poor impulse control, conflictual relationships and perhaps most importantly, substance misuse”.¹⁰

[19] The Judge referred to the cultural report prepared under s 27 of the Sentencing Act 2002 but observed:¹¹

There is not much in it really that explains why somebody like Mr Taitapanui would subject his partner to nearly two and a half years of physical and sexual violence.

[20] He also noted the probation officer’s report which indicated that the appellant was prepared to address the situation he finds himself in, although it was considered highly likely he would offend again.¹²

⁸ Judgment under appeal, above n 1, at [2].

⁹ At [12].

¹⁰ At [3].

¹¹ At [8].

¹² At [4].

[21] In the end, the Judge concluded:¹³

When I look at the effect of his brain injury, the cultural features, the preparedness, at least at this stage, to engage in rehabilitation and some remorse, I am prepared to reduce the overall sentence by 15 percent and I consider that that is generous in the circumstances, bearing in mind the level of offending and Mr Taitapanui's past record.

That discount reduced the sentence to 13 years. He then gave a 20 per cent deduction for the guilty pleas to reach an end sentence of 10 years and four months' imprisonment on the sexual violation charges, with concurrent sentences on the balance of the charges.¹⁴

[22] Finally, noting the need to prioritise the sentencing principle of deterrence and to protect the community, the Judge imposed an MPI of five years' imprisonment,¹⁵ being slightly less than half the sentence.¹⁶

Grounds of appeal

[23] The appellant says the Judge erred in two material ways and, as a consequence, a different sentence should be imposed.¹⁷ First, it is submitted the Judge applied an excessive uplift to account for the appellant's previous convictions for violence. Secondly — and the primary focus of the appeal — the appellant challenges the adequacy of the 15 per cent global discount given for mitigating factors.

Was the uplift for the appellant's previous convictions too high?

[24] Section 9(1)(j) of the Sentencing Act requires a court to take into account the number, seriousness, date, relevance and nature of an offender's previous convictions. Previous convictions are potentially relevant in three ways:¹⁸

- (a) as demonstrating the need for a greater deterrent response;

¹³ At [12].

¹⁴ At [13].

¹⁵ Sentencing Act 2002, s 86.

¹⁶ At [25].

¹⁷ Criminal Procedure Act 2011, s 250.

¹⁸ *Beckham v R* [2012] NZCA 290 at [84], citing *R v Casey* [1931] NZLR 594 (CA) at 597; and *R v Ward* [1976] 1 NZLR 588 (CA) at 591.

(b) as an indicator of the risk of reoffending; and

(c) as an indicator of character and culpability.

[25] Mr Chisnall submits that any uplift for prior offending must be proportional, otherwise it will simply constitute “double punishment”. He says proportionality must be considered at two points. First, there must be proportionality between the sentence adopted for the offending and the uplift to account for a defendant’s personal aggravating features. Secondly, there must be proportionality between the uplift and the sentence(s) imposed for previous offending.

[26] It is that second test of proportionality that Mr Chisnall says the Judge did not satisfy in imposing the uplift of one year. While he accepted that the appellant had a long list of convictions for violence, a number of which were against a domestic partner, he pointed out that the lengthiest term of imprisonment the appellant had previously received for such offending matched the uplift imposed by the Judge of one year. In his submission, the uplift should have been in the region of three months’ imprisonment.

[27] As examples, he referred us to *Piper v R*¹⁹ and *Brown v R*.²⁰ In *Piper v R*, the issue was whether an uplift of two years on a two-year sentence of imprisonment for drug dealing offending to reflect five previous convictions for drug dealing was disproportionate. This Court held it was and the uplift was reduced to one year on appeal.²¹ Similarly, in *Brown v R*, this Court held that an eight-month uplift for two prior assault convictions was disproportionate on a sentence of two years’ imprisonment, particularly where the starting point itself was at the upper end of the available band.²²

[28] We do not think these examples are anything more than the application of the principle that an uplift should bear a reasonable relationship to the starting point for

¹⁹ *Piper v R* CA345/05, 12 September 2006.

²⁰ *Brown v R* [2014] NZCA 93.

²¹ *Piper v R*, above n 19, at [10]–[11].

²² *Brown v R*, above n 20, at [13].

the current offending. Applying that measure to the present case, a 12 month uplift on a 13 year sentence — an increase of less than seven per cent — is not disproportionate.

[29] However, we accept this Court has also said an uplift is unlikely to be proportionate if it exceeds the sentence imposed for the previous offending.²³ But in those cases the relevant previous offending was more limited in scope. In *Orchard v R*, this Court held that an uplift of six months for previous convictions was disproportionate on charges of violence against his wife and breaching a protection order while suffering from anxiety, depression and PTSD.²⁴ The Court reduced the uplift to two months.²⁵ But the offender's previous history only involved two breaches of a protection order and attracted sentences of five months' home detention and one month's imprisonment.²⁶

[30] In the present case, Mr Taitapanui's criminal history is extensive. He has five convictions for male assaults female, five for breaches of protection orders and nine for other family violence related charges which predate this offending, as well as six convictions for such offences which occurred during the period of this offending. This is in addition to many other charges of assault over a 10 year period prior to this offending.

[31] That is why we do not consider overall that an uplift of one year is disproportionate or manifestly excessive, even though it is equivalent to Mr Taitapanui's lengthiest term of imprisonment. As the Crown rightly points out:

[A]nchoring the proportionality assessment to a singular instance of sentencing doesn't properly allow for the true nature of his previous conduct to be considered. Properly characterised he is a recidivist domestic violence offender.

[32] While a court must always be cognisant of the need to avoid 'double punishment' in uplift cases,²⁷ we consider that the need for deterrence is particularly strong here. We think the fact that Mr Taitapanui reoffended against the victim in this

²³ *Patel v R* [2017] NZCA 234 at [61]; and *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [41].

²⁴ *Orchard v R*, above n 23, at [40].

²⁵ At [42].

²⁶ At [41].

²⁷ New Zealand Bill of Rights Act 1990, s 26(2).

case shortly after being released from prison for breaching a protection order (albeit an unrelated one) is demonstrative of that.

[33] In our view, the 12-month uplift is justified by the principles underpinning the concept of uplift — protection of the public, the need for deterrence, and the degree to which it reflects on the offender’s culpability.

Did the Judge give an inadequate discount for mitigating factors?

The appellant’s submissions

[34] The appellant submits that both of the psychologists’ reports before the Judge identified mitigating factors for sentencing. The first report, by Dr Parsonson, referred to the traumatic brain injury the appellant suffered in 2010 which resulted in the appellant developing epilepsy. He noted that neurological testing in 2015 “indicated cognitive processing and memory deficits”. It also drew a link between the head injury and increased criminal offending saying:

Whilst there was one incident of Male Assaults Female (28.02.2006), one of Assault Police (06.04.2006) and Common Assault (06.03.2006) and four charges of Family Violence related offending (01.01.2008) apparently arising from the one incident, the frequency and intensity of such offending has increased significantly following Mr. Taitapanui’s head injury in April 2010. Other offending, including unlicensed and drink-driving relate to his post-injury impulsiveness and his unwillingness to accept that his associated epilepsy makes him ineligible to hold a driver’s licence.

[35] The second report, by Ms Mathieson, stated that the appellant reported that he was previously a calm person, but could now “go from 0 to 60 really quickly”, and he “easily got frustrated, angry, and pissed off and he would start swearing”. It also reported the appellant as saying “I’m sick of being a criminal, I’m getting too old”. In respect of the head injury, Ms Mathieson noted that:

[It] undoubtedly impacted on his functioning. He has poor impulse control, anger issues and emotional dysregulation. But rather than being seen as a precipitating factor to his anger, violence and relationship difficulties, it has exacerbated difficulties that were already there. The development of epilepsy, the subsequent loss of his job and his drivers’ license, and difficulties remembering things are continuing sources of frustration for Mr Taitapanui who acknowledges that he responds to stressors with anger which has been harder to control since the head injury. He also acknowledged that his daily methamphetamine use increased his anger and emotion regulation difficulties.

In these circumstances Mr Taitapanui has posed a significant risk to others because of his violence towards them but also a risk to himself as he experiences low mood and suicidal ideation.

[36] Mr Chisnall submits that despite Dr Parsonson's opinion there was a causal nexus between the appellant's 2010 injury and his offending, the Judge did not take sufficient account of this. Mr Chisnall accepts that the appellant presented with a complex amalgam of factors which had a bearing on his offending, including his pre-disposition to violence, and his longstanding addiction issues, as well as his head injury. He also acknowledges that judges must be afforded broad discretion in order to assess what impact a particular disorder should have on sentence outcome, given the need to balance competing considerations including public safety. However, because the appellant presented as genuinely motivated to rehabilitate, he submits the Judge erred in concluding the need to protect the public should temper the discount available for the head injury. Instead, a careful weighing of the competing interests should have resulted in a reduction in the starting point of between 10 to 15 per cent.

[37] Mr Chisnall also pointed to the s 27 report as identifying relevant mitigating factors. The report writer recorded that:

Mr Taitapanui's background is characterized by poverty, alcohol and drug abuse. As a child he was moved around a lot and attended a number of schools. According to Mr Taitapanui he spent most of the time with his whaangai parents and stayed for a short time with his biological mother in Flaxmere. He said he had nothing really to do with his culture growing up and was disconnected from all this.

[38] Mr Chisnall submits that the appellant's upbringing directly engages the principles in *Solicitor-General v Heta*, which recognised that a wide range of discounts could apply for factors including deprivation, trauma, youth, drug and alcohol abuse, and mental health issues, particularly where there are linkages between personal circumstances and the offending.²⁸ In response to the Judge's conclusion that "serious violence must be met with denunciation and often that means that cultural reports will not represent a significant feature in the sentencing",²⁹ Mr Chisnall refers to *Carr v R*, where it was said "while the gravity of the offending might temper the extent of any discount allowed for such considerations, that is a different proposition from saying

²⁸ *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [63].

²⁹ Judgment under appeal, above n 1, at [10].

there should be no allowance”.³⁰ Mr Chisnall points out that in *Carr v R*, a 15 per cent discount for s 27 factors was applied, despite the Court recognising that the violence offending was very serious.³¹

Discussion

[39] The Judge gave a global discount of 15 per cent for the effect of the appellant’s brain injury, the issues identified in the cultural report and his preparedness, at least at this stage, to engage in rehabilitation and some remorse. He described that discount as “generous in the circumstances bearing in mind the level of offending and Mr Taitapanui’s past record”.³²

[40] We acknowledge the head injury exacerbated pre-existing difficulties for the appellant. In particular, he could no longer pursue his occupation as a shearer, nor could he hold a driver’s licence. Those were sources of anger and frustration for the appellant. That said, Ms Mathieson’s report notes that his daily methamphetamine use was also acknowledged by him to be a source of his anger and emotional regulation difficulties. She pointed out that his cognitive functioning had returned to “pre-morbid levels subsequent to his head injury”. We also note his offending pattern was clearly established before the head injury occurred.

[41] Similarly, the cultural report revealed a mixture of factors in the appellant’s upbringing. He had a positive relationship with his adopted father who was good to him and taught him how to fix cars. On the other hand, he was moved around a lot and went to several different schools and began associating with anti-social peers from a young age. He left school at age 14 and by age 17, he reports starting to use crack.³³ By the age of 17 he was a recidivist offender and began moving in and out of the criminal justice system. The cultural report acknowledges there was no physical or mental abuse during his childhood but does say he grew up with “poor parenting, poverty, drug taking and social deprivation”.

³⁰ *Carr v R* [2020] NZCA 357 at [65].

³¹ At [67].

³² Judgment under appeal, above n 1, at [12].

³³ Although within the same report he also said he started using it when he was 21 and when he was 20.

[42] We accept that the cultural report discloses a background of deprivation and a degree of instability, although he had a good role model in his adopted father. However, leaving school at 14 and gravitating towards drugs and alcohol as a teenager no doubt drove some of his offending behaviour.

[43] We also acknowledge there was some embryonic expression of a desire to change and rehabilitate himself. However, we agree with the conclusion of the pre-sentence report writer that his remorse is limited as he says he “has always used violence to get his own way, particularly when challenged by others or if he feels threatened”. The report writer concludes:

Based on his past and current offending, and even allowing for his willingness to address his offending behaviour as well as his remorse, which I consider to be in part, at least, genuine, I assess that Mr Taitapanui’s likelihood of re-offending is very high as is his risk of harm to others.

[44] Taking all these matters into account, there are no doubt personal mitigating factors and warranted a discount on sentence. However, we do not consider the overall discount given by the Judge was erroneous. While the head injury may have exacerbated the offending, there was a clear pattern of violent behaviour before this occurred. While we accept the evidence regarding Mr Taitapanui’s upbringing, it does not explain the extent of partner violence or more importantly, the repeated sexual offending. Given the caveats on both Mr Taitapanui’s remorse and rehabilitative potential, those factors, too, warrant only a modest discount. Overall, while another Judge may have afforded a greater discount, we cannot say that the global discount of 15 per cent was out of range.

[45] In any event, the ultimate question on a sentence appeal is whether the end sentence is manifestly excessive. In our view, given the repeated incidents of sexual violation against the victim, the violence which accompanied it and the fact that some of it occurred when a protection order was in place, the appellant’s offending falls within band 3 of *R v AM (CA27/2009)*.³⁴ The Judge’s starting point could be justified on this offending alone. We also consider the discount for guilty pleas of 20 per cent was generous.

³⁴ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [105].

[46] As a result, we are not persuaded that the end sentence was wrong or that another sentence should be imposed.

Result

[47] The appeal is dismissed.

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Crown Law Office, Wellington