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OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA400/2020
[2021] NZCA 96**

BETWEEN PETER TAMIHANA CLARKE
Appellant

AND THE QUEEN
Respondent

Hearing: 23 February 2021

Court: Brown, Katz and Edwards JJ

Counsel: G D Prentice for Appellant
M H Cooke for Respondent

Judgment: 29 March 2021 at 10.30 am

JUDGMENT OF THE COURT

- A The application for an extension of time to bring the appeal is granted.**
- B The application for leave to adduce fresh evidence is granted.**
- C The appeal against sentence is allowed.**
- D The sentence of 10 years and two months' imprisonment is quashed and
a sentence of nine years and two months' imprisonment is substituted.**
- E The minimum period of imprisonment is quashed.**
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REASONS OF THE COURT

(Given by Katz J)

[1] Peter Clarke was found guilty by a jury of two counts of sexual violation by rape,¹ two counts of sexual violation by unlawful sexual connection,² and one count of injuring with intent to injure.³ He was sentenced by Judge M A MacKenzie to 10 years and two months' imprisonment with a minimum period of imprisonment (MPI) of five years.⁴

[2] Mr Clarke now appeals his sentence on the basis that it is manifestly excessive. The issues raised by Mr Clarke's appeal are:

- (a) whether the sentence starting point adopted by the Judge (10 years and six months' imprisonment) was too high;
- (b) whether a discount should be given for personal and cultural factors identified in a report prepared (subsequent to sentencing) under s 27 of the Sentencing Act 2002; and
- (c) whether an MPI should have been imposed.

Extension of time to appeal

[3] Mr Clarke's appeal is brought 16 months out of time. Although this is a lengthy delay, it has been adequately explained. The Crown has suffered no prejudice and did not oppose an extension of time for filing the appeal. We consider that it is in the interests of justice to grant the extension sought and order accordingly.

¹ Crimes Act 1961, s 128(1)(a).

² Section 128(1)(b).

³ Section 189(2).

⁴ *R v Clarke* [2019] NZDC 3289.

The offending

[4] Mr Clarke's offending was against his former partner. Although Mr Clarke and the victim were no longer a couple, they occasionally socialised together.

[5] On the day of the offending, Mr Clarke sought the victim's support in respect of a bereavement. They socialised together and drank some alcohol. An argument took place and the victim went home at around midnight. She had previously trespassed Mr Clarke from her home. Despite this, Mr Clarke went to the victim's home in the early hours of the morning and asked her to go with him to a nearby lake to collect watercress. She agreed.

[6] Instead of driving to the lake, however, Mr Clarke drove the victim to a secluded location. He then forced the victim out of the vehicle. He digitally penetrated her vagina, performed oral sex upon her and raped her twice. Violence was involved, including Mr Clarke punching the victim in the face, knocking her unconscious and causing her nose to bleed.

District Court sentencing

[7] Judge Mackenzie identified the aggravating features of the offending as:⁵

- (a) the moderate degree of premeditation in taking the victim to a secluded location;
- (b) the vulnerability of the victim being trapped at that location;
- (c) the violence associated with the offending;⁶ and
- (d) the scale of the offending.

⁵ At [12].

⁶ The Judge considered this an aggravating factor of the sexual offending rather than applying an uplift in respect of the conviction for injuring with intent to injure.

[8] The Judge applied *R v AM (CA27/2009)*, the tariff case for sexual offending.⁷ Mr Clarke's offending was assessed as being within rape band two (seven to 13 years' imprisonment). Having regard to the cases of *Archer v R*,⁸ *Dunick v R*,⁹ and *Ritebono v R*,¹⁰ the Judge considered that the appropriate starting point was 10 years and six months' imprisonment.¹¹

[9] No uplift was applied in respect of Mr Clarke's prior convictions.¹² A four-month discount was applied to reflect the time that Mr Clarke had spent on electronically monitored bail.¹³

[10] The final sentence imposed was 10 years and two months' imprisonment.¹⁴ The Judge also imposed an MPI of five years.¹⁵ This was to recognise the variety of sexual offending involved in the incident, and Mr Clarke's hostility towards the victim and desire to shift the blame onto her, as recorded in the pre-sentence report.¹⁶

[11] Due to a misunderstanding on the part of counsel, a cultural report under s 27 of the Sentencing Act was not available at sentencing. Counsel for Mr Clarke had filed a memorandum on 8 November 2018 seeking an adjournment of the sentencing date on the basis that:

1.3 The writer has obtained instructions from the defendant that he **DOES** seek a cultural report be prepared for the Court for sentence.

...

2.1 This means that sentencing will need to be further deferred for the preparation of this report.

2.2 The writer respectfully requests a Court direction that a pre-sentence section 27 Report be prepared.

2.3 The writer further requests sentencing be administratively adjourned to accommodate the preparation of the report.

⁷ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

⁸ *Archer v R* [2018] NZCA 331.

⁹ *Dunick v R* [2008] NZCA 482.

¹⁰ *Ritebono v R* [2018] NZCA 598.

¹¹ *R v Clarke*, above n 4, at [23].

¹² At [25].

¹³ At [26].

¹⁴ At [29].

¹⁵ At [37].

¹⁶ At [36].

[12] As requested, the sentencing date was administratively adjourned. Unfortunately, counsel for Mr Clarke erroneously believed that the Court would arrange for the preparation of a s 27 report, not realising it was the responsibility of defence counsel to organise such a report. Accordingly, by the time of the new sentencing date, no s 27 report had been prepared. Mr Clarke nevertheless wanted to proceed with sentencing. The Judge recorded the situation in her sentencing notes as follows:

[27] I do want to say something now about a s 27 cultural report. I had inquired as to whether Mr Clarke wished to consider obtaining a s 27 cultural report. There is no report available to the Court today. It seems that is because of a misapprehension or misunderstanding about how that report might come before the Court. There is no jurisdiction for the Court to direct a report. It is for a defendant to obtain that report and it would seem that that was perhaps not understood. I indicated to Mr Rickard-Simms that I was prepared to adjourn sentencing for the obtaining of such a report if Mr Clarke considered that he was prejudiced by the lack of report. Mr Rickard-Simms has firm instructions from Mr Clarke that he wished sentencing to proceed and Mr Clarke is certainly clear about that. He indicated that to me himself. That is because Mr Clarke wishes to appeal his conviction apparently on grounds relating to counsel conduct at trial. That is entirely a matter for Mr Clarke once sentencing has been finalised.

[28] The reason I am recording this is to set out what the position was in respect of a s 27 report and why it is not a feature in terms of sentencing today. It needs to be clear that the offer to adjourn sentencing for that purpose was rejected.

Should the s 27 cultural report (prepared after sentencing) be admitted?

[13] A s 27 report was prepared post-sentencing and Mr Clarke applies for it to be admitted for the purposes of his appeal.

[14] This Court has previously observed that in general s 27 reports should not be submitted for the first time on appeal.¹⁷ That remains the general principle. In this case it would obviously have been preferable if Mr Clarke's s 27 report had been available to the Judge at the time of sentencing. It is clear, however, that Mr Clarke's firm instructions to counsel prior to sentencing were that he wanted a s 27 report to be prepared. The sole reason this did not occur in time for the adjourned sentencing date was due to a misunderstanding on the part of Mr Clarke's then counsel. With the benefit of hindsight, Mr Clarke no doubt realises that he should have taken up the

¹⁷ *Carroll v R* [2019] NZCA 172 at [8].

Judge's offer of a further adjournment. At the time, however, he was clearly focused on a possible conviction appeal (which was not ultimately pursued) and did not appreciate the potential significance of not obtaining a s 27 report.

[15] The Crown did not oppose admission of the s 27 report, noting that the content is cogent (despite not being fresh) and that trial counsel appeared to mistakenly believe that the Court would order the report.

[16] We have reviewed the s 27 report. It contains information that is clearly relevant to Mr Clarke's appeal and which would likely impact on his end sentence. We have accordingly concluded that, given the somewhat unusual background circumstances we have outlined, it is in the interests of justice to admit the report.

Was the sentence starting point too high?

[17] The first issue we must consider is whether the starting point adopted by the Judge was too high.

[18] It was common ground in both the District Court and this Court that the offending falls within rape band two of *R v AM (CA27/2009)* (seven to 13 years' imprisonment). Counsel differed, however, as to where in that band the starting point should fall.

[19] Mr Prentice submitted that the Judge's starting point of 10 years and six months' imprisonment was too high. He submitted that the offending falls just below the middle of band two and that the appropriate starting point was therefore between nine and nine and a half years.

[20] The Crown submitted that the ten and a half year starting point selected by the Judge was within range, and that *Archer* and *Ritebono* were correctly relied upon by the Judge in setting that starting point.

[21] In *R v AM (CA27/2009)*, this Court described rape band two as follows:¹⁸

By comparison with rape band one, 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.

[22] The Judge recognised four aggravating factors of Mr Clarke's offending, as set out at [7] above (moderate degree of premeditation, vulnerability of victim trapped at the location, violence, and scale of the offending). We agree with her Honour's assessment of those factors, although we would put the most weight on the first three.

[23] Mr Prentice referred to *R v Toru* as a case which was far more serious than this case.¹⁹ In *Toru*, Dobson J adopted a starting point of 11 and a half years for two convictions for rape.²⁰ His Honour treated the accompanying violence, sexual violence and kidnapping convictions as part of that course of conduct.²¹ The present case involved a lesser degree of violation and detention. The 10 and a half year starting point imposed by Judge Mackenzie, however, reflected that.

[24] The appellant also relied on *Henry v R*.²² In that case the offender was sentenced for violent offending against his partner in May 2013 (kicking her with steel capped boots) and sexual and violent offending in September 2013 (punching the victim's vagina three times, digitally penetrating her, raping her and attempting to penetrate her anus).²³ The Judge took a global starting point of 10 years' imprisonment, which he then uplifted by six months (taking into account totality) in respect of a separate charge of attempting to pervert the course of justice.²⁴

[25] Mr Prentice submitted that the starting point in this case should have been lower than in *Henry*, because the injuring charge in this case is less serious, and all of the offending occurred in one event, rather than two. We accept the Crown

¹⁸ *R v AM (CA27/2009)*, above n 7, at [98].

¹⁹ *R v Toru* [2018] NZHC 1598.

²⁰ At [16].

²¹ At [13].

²² *Henry v R* [2019] NZCA 407.

²³ At [6]–[13].

²⁴ At [35].

submission, however, that Mr Clarke's culpability is broadly comparable to that of Mr Henry, given that *Henry* did not involve the same degree of premeditation and victim vulnerability as this case.

[26] We also accept the Crown submission that the starting point should be above the nine-year starting point adopted in *Archer v R*.²⁵ In *Archer*, the offender was sentenced for sexual offending against his de facto partner occurring in their bedroom.²⁶ That case lacks the element of premeditation present here, where Mr Clarke used false pretences to persuade the victim to go with him, then took her to a secluded location before offending against her. Mr Clarke was also more violent than the offender in *Archer*, and was convicted of two counts of rape as opposed to one.

[27] With reference to the aggravating features of Mr Clarke's offending, the guideline case of *R v AM (27/2009)*, and the various cases referred to by counsel, it is our view that the Judge's starting point of 10 and a half years' imprisonment was within range. While the starting point may have been towards the upper end of the available range, it was not outside of it.

Is a discount for Mr Clarke's personal circumstances appropriate?

[28] We do not propose to set out the content of the s 27 report (much of which is very personal) in detail. We note, however, that the report indicates that Mr Clarke has had a disadvantaged life from an early age, including limited education. He was exposed to intergenerational and family violence as a child and was himself a victim of such violence.

[29] The s 27 report also details steps Mr Clarke has taken towards rehabilitation. Mr Clarke is currently a groundsman at Tongariro prison. He is participating in the Adult Literacy and Numeracy programme where he has achieved his level 3 certificate and is working towards his level 4 certificate. He is also open to counselling to help

²⁵ *Archer v R*, above n 8, at [17].

²⁶ At [3].

him work through his issues with anger and any potential mental unwellness caused by untreated childhood trauma.

[30] The Crown noted that these positive rehabilitative indications may well not have been available if the s 27 report had been prepared prior to sentencing (as it should have been). Nevertheless, that material is now before us, it is relevant, and it is in the interests of justice to take it into account.

[31] In *Solicitor-General v Heta*, Whata J commented that:²⁷

The evidence of the presence of systemic deprivation (or social disadvantage more generally) on an offender need not be elaborate. The symptoms of systemic Māori deprivation are reasonably self-evident, including (among other things) intergenerational social and cultural dislocation of the whānau, poverty, alcohol and or drug abuse by whānau members and by the offender from an early age, whānau unemployment and educational underachievement, and violence in the home.

[32] More recently, in *Zhang v R*, this Court observed that:²⁸

[159] First, ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability. Where these constraints are shown to contribute causatively to offending (whether associated with addiction or not), they will require consideration in sentencing.

(Footnote omitted.)

[33] As this Court observed in *Carr v R*, recognition of a causal linkage between matters relied on in a s 27 report and the offending does not require the Court to be satisfied the matters are the *proximate* cause of the offending.²⁹

[34] In this case, we consider that the s 27 report identifies a number of aspects of Mr Clarke's background and personal circumstances that have likely impaired his

²⁷ *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [50].

²⁸ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648, citing *Solicitor-General v Heta*, above n 28, at [50]; *Fane v R* [2015] NZCA 561 at [46]; and *Arona v R* [2018] NZCA 427 at [59].

²⁹ *Carr v R* [2020] NZCA 357 at [64].

choices and diminished his moral culpability, as referred to in *Zhang*. We are therefore satisfied that the necessary causative link exists.

[35] In our view, Mr Clarke's background circumstances and rehabilitative prospects, as summarised above, warrant a further sentence discount of 10 per cent. That reduces the sentence to nine years and two months' imprisonment.

Did the Judge err in imposing a minimum period of imprisonment?

[36] Finally, we consider whether the Judge erred in imposing an MPI.

[37] Mr Prentice submitted that an MPI should not have been imposed. The Crown submitted that the Judge did not err in imposing an MPI, based on the information before her. However, the Crown acknowledged that if the s 27 report had been before Judge Mackenzie, it is possible that she would have reached a different conclusion.

[38] We accept the Crown submission. In our view the principles of accountability, denunciation, deterrence and protection do not require the imposition of an MPI in light of the information now available (as set out in the s 27 report).³⁰ Rather, Mr Clarke's rehabilitation should be the primary focus. His efforts in that regard (including the steps he is taking to address both his anger issues and his past trauma) should be encouraged and incentivised. This will best be achieved by removing his MPI, leaving it to the Parole Board to monitor and assess his rehabilitation efforts at the appropriate time.

Result

[39] The application for an extension of time to bring the appeal is granted.

[40] The application to adduce the s 27 report as fresh evidence on appeal is granted.

[41] The appeal is allowed.

³⁰ See Sentencing Act 2002, s 86(2).

[42] We quash the sentence of 10 years and two months' imprisonment and substitute a sentence of nine years and two months' imprisonment.

[43] The MPI imposed in the District Court is quashed.

Solicitors:
Crown Law Office, Wellington for Respondent