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S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA484/2021  
[2022] NZCA 235**

BETWEEN                      ASHLEIGH CROWLEY-LEWIS  
Appellant

AND                              THE QUEEN  
Respondent

Hearing:                      29 March 2022

Court:                              Brown, Lang and Mallon JJ

Counsel:                      F D Steedman for Appellant  
J E Mildenhall for Respondent

Judgment:                      9 June 2022 at 10.30 am

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**JUDGMENT OF THE COURT**

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- A   The appeal against sentence is allowed.**
- B   The sentence of nine years' imprisonment without parole on the representative charge of rape is quashed. In its place we substitute a sentence of eight years and six months' imprisonment with a minimum period of imprisonment of four years and three months.**
- C   The other sentences and the protection and disqualification orders are unaffected.**
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## REASONS OF THE COURT

(Given by Mallon J)

### Introduction

[1] The appellant pleaded guilty to and was convicted of sexual offending involving two women: B and G. Judge Carter sentenced him to nine years' imprisonment without parole.<sup>1</sup> The order to serve his sentence without parole was made because the offending was a "second strike" under the "three strikes" sentencing regime.

[2] The appellant appeals this sentence. He says it was manifestly excessive because the starting point adopted by the Judge was too high, the discounts allowed were inadequate and the order that he serve his sentence without parole rendered the sentence disproportionately severe.

### The offending

[3] The appellant was in a relationship with B from October 2009 when he was 17 and she was 15 years' old. The couple were living together in 2010 and B was pregnant with their first child. They married in March 2017 and separated on 11 July 2018. The offending against B involved:

- (a) Male assaults female.<sup>2</sup> The appellant bit B's face in 2009 after she accidentally hit his testicles when they were "fooling around". The bite drew blood, but no medical attention was needed, nor was there any long-term scarring.
- (b) Intentional damage.<sup>3</sup> In 2010, when B was driving the appellant to community work, they were arguing and the appellant put his feet on the dashboard and kicked the windscreen with his steel capped boots causing it to shatter.

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<sup>1</sup> *R v Crowley-Lewis* [2021] NZDC 20049.

<sup>2</sup> Crimes Act 1961, s 194(b), maximum term of two years' imprisonment

<sup>3</sup> Section 269(2)(a), maximum term of seven years' imprisonment.

- (c) Rape.<sup>4</sup> In 2010, when B was 16 years' old and 20 weeks pregnant, the couple were having consensual sexual intercourse which became painful for B. She asked the appellant to stop but he continued with the intercourse despite her pain.
- (d) Intentional damage.<sup>5</sup> In 2011 or 2012, when B was driving the appellant and they were having an argument, B stopped the car and told the appellant to walk home. The appellant responded by kicking and damaging the door panel.
- (e) Male assaults female.<sup>6</sup> In early July 2018 the appellant tipped B off the couch and poured a beer over her head after kicking a wooden tea trolley. She was pregnant with their second child at the time.

[4] The appellant was in a relationship with G between July 2018 and January 2020. They have one child together, who was born in June 2019. The offending against G involved:

- (a) A representative charge of rape.<sup>7</sup> The appellant raped G on three occasions. The first two occasions were in September 2018 and March 2019. The third occasion came a few days after the birth of their child. On each of these occasions, G was asleep in the bed she shared with the appellant and awoke to find she had semen or a rag with semen between her legs. On the first occasion the appellant admitted he had sex with her and claimed it was consensual. On the third occasion the appellant denied that any had sex occurred.
- (b) Unlawful sexual connection.<sup>8</sup> In December 2018, G went to bed and awoke to find the appellant performing oral sex on her without her

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<sup>4</sup> Sections 128(1)(a) and 128B, maximum term of 20 years' imprisonment.

<sup>5</sup> Section 269(2)(a), maximum term of seven years' imprisonment.

<sup>6</sup> Section 194(b), maximum term of two years' imprisonment.

<sup>7</sup> Sections 128(1)(a) and 128B, maximum term of 20 years' imprisonment.

<sup>8</sup> Sections 128(1)(b) and 128B, maximum term of 20 years' imprisonment.

consent. B told the appellant to stop but he ignored this request and continued to perform oral sex.

- (c) Reckless driving.<sup>9</sup> In November 2019, G was driving a car with the appellant in the front passenger seat and their baby in the back seat, when the appellant became angry with G because he thought she had taken too long to do some shopping. As they entered a 100km/h zone, he pulled the handbrake on, causing the car to veer across the yellow centre lines into oncoming traffic. G managed to steer heavily to the left but one of the oncoming vehicles collided with the rear of their car. No one was injured in the incident.
- (d) A representative charge of breaching a protection order.<sup>10</sup> G obtained a temporary protection order on 8 January 2020. The appellant breached this by sending letters to G from prison.

[5] B and G both suffered trauma from the appellant's offending. B described the trauma as being so bad that it felt like her brain was injured. They both suffer from anxiety and post-traumatic stress disorder, and have difficulty sleeping. B described having lived in "survival mode" for ten years not knowing what the appellant would do next. G described nights waking up in a panic and remembering all the horrible things the appellant did.

### **The first strike**

[6] The appellant was convicted of aggravated robbery in 2011. The appellant was 18 years old and was with his co-offender, T, who was 20 years old. They had spent the afternoon drinking alcohol. When they ran out of alcohol, they approached a 16-year-old boy who was walking along a central city street in his school uniform. The appellant asked the boy for money. He only had a 10-cent coin on him. T asked the boy what else he had. He showed them his iPod. T told the boy to give them the iPod or he would beat him up. Fearing for his safety, the boy handed over his iPod.

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<sup>9</sup> Land Transport Act 1998, s 35(1)(a), maximum term of three months' imprisonment, maximum fine of \$4,500.

<sup>10</sup> Family Violence Act 2018, ss 90(b) and 112(1)(a), maximum term of three years' imprisonment.

The appellant demanded that the boy also hand over his wallet and his backpack, which he did. The appellant admitted the offending. He was sentenced to 300 hours' community work and to pay reparation. He received a first strike warning.<sup>11</sup>

### **Personal circumstances**

[7] The appellant was 28 years old when he was sentenced on the offending involving B and G. The appellant has other previous convictions in addition to that for aggravated robbery, the majority of which are for breaches of sentences of community work and driving offences. He also has a 2009 conviction for sexual connection with a child.

[8] The appellant told the pre-sentence report writer that he was raised by his grandmother from when he was two years old until he was 17 as a result of being removed from his parents' care. He described his childhood as "good and bad". While he never "went without", he was the victim of sexual abuse "as far back" as he could remember.

[9] The appellant described his relationship with B as having its "ups and downs", but that B was a "good partner" and "deserved better" than him. He was low in mood when their relationship ended and soon afterwards he commenced his relationship with G. He expressed his regret for his actions, saying he felt like a "piece of shit", and that he was aware he could not treat women like this. He expressed no animosity towards them and did not attempt to blame them in any way. He wished to reconnect with his children through supervised visits when released from prison.

[10] He told the report writer that he liked to work and had previously had labouring, building and automotive jobs. He was in contact with his parents.

[11] The information in the pre-sentence report was supplemented by detailed defence submissions about the appellant. These submissions were a product of detailed instructions counsel obtained from the appellant in lieu of a report prepared under s 27 of the Sentencing Act 2002, that could not be commissioned in time for the

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<sup>11</sup> Sentencing Act 2002, s 86B(1).

sentencing. The submissions provided detail about the sexual abuse the appellant had suffered, his problematic time at school including his suspensions and ultimate expulsion, his ADHD diagnosis, the fact that his mother and her partner let him smoke cannabis and drink alcohol with them, and his early trouble with the Police. The one positive feature of his life was his relationship with B, who provided him with support over a long period.

[12] The appellant also wrote articulate letters of apology to B and G. In these letters he acknowledged the harm his behaviour had caused, saying that B and G deserved better and that he was truly sorry for his actions.

### **The District Court sentence**

[13] The Judge adopted a starting point of 10 years' imprisonment for the representative rape and the unlawful sexual connection. He did so because he regarded the offending as falling in the middle of band 2 in *R v AM (CA27/2009)*.<sup>12</sup> The Judge identified the aggravating features as being planning and premeditation, the vulnerability of G because she was asleep, the harm G suffered, the scale of the offending (three rapes and unlawful sexual connection), and the breach of trust. He compared the case with *van der Merwe v R* and *R v Chetty*, which each involved a single incident of rape of a sleeping victim, and in which starting points of seven years and seven years and six months, respectively, were adopted.<sup>13</sup>

[14] The Judge considered the rape of B fell below band 1 in *R v AM* and had similarities with *Crump v R*, where a starting point of two years and three months' imprisonment was adopted.<sup>14</sup> The Judge added one year and six months to the 10-year starting point for the rape of B.<sup>15</sup>

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<sup>12</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [90].

<sup>13</sup> *R v Crowley-Lewis*, above n 1, at [33]–[36]; *van der Merwe v R* [2021] NZHC 1108; and *R v Chetty* [2016] NZHC 1957.

<sup>14</sup> *R v Crowley-Lewis*, above n 1, at [37]; and *Crump v R* [2020] NZCA 287, (2020) 29 CRNZ 402.

<sup>15</sup> *R v Crowley-Lewis*, above n 1, at [37].

[15] For the remaining charges the Judge uplifted the sentence by a further six months. This produced an overall starting point of 12 years' imprisonment, before consideration of personal aggravating and mitigating factors.<sup>16</sup>

[16] The Judge observed that the appellant's previous convictions would ordinarily lead to an uplift but, because the appellant was subject to the three strikes regime, no uplift was appropriate.<sup>17</sup> He allowed a 20 per cent discount for the appellant's guilty plea and a five per cent discount for the appellant's family background and upbringing, as discussed in the submissions for the appellant. This meant an end sentence of nine years' imprisonment.<sup>18</sup>

[17] The Judge said there was no right to parole because this offending involved a second-strike offence.<sup>19</sup> Had it been otherwise, he would have imposed a minimum period of imprisonment of two-thirds of the end sentence, amounting to a minimum period of six years. He considered this was appropriate because of the need for accountability, denunciation and deterrence, and protection of the community.<sup>20</sup>

## **The appeal**

### *Starting point*

[18] The appellant submits the starting point for the representative charge of rape was too high. He submits that the offending was more opportunistic than planned and premeditated, and that there was an overlap between the vulnerability and breach of trust factors that the Judge identified. He submits *van der Merwe* had different features to those present here, including that the offender filmed part of the sexual violation while the victim was unconscious, had a history of engaging in sexualised online chats and stored objectional publications on his phone. The appellant also submits the Judge erred in his analysis of *Chetty* because the starting point of seven years and six months' imprisonment adopted in that case was for a second rape that the offender committed when on bail for charges relating to an earlier rape of an unconscious woman.

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<sup>16</sup> At [38].

<sup>17</sup> At [39]; and *Anderson v R* [2019] NZCA 294 at [46].

<sup>18</sup> *R v Crowley-Lewis*, above n 1, at [42]–[44].

<sup>19</sup> Sentencing Act 2002, s 86C(4).

<sup>20</sup> *R v Crowley-Lewis*, above n 1, at [45]–[47].

[19] For these reasons, the appellant says his offending was on the cusp of band 1 and band 2 of *R v AM* and a starting point of seven years would have been appropriate. He does not take issue with the uplifts for the other offending. That would mean an overall sentence of nine years' imprisonment, subject to any totality adjustment and before considering personal aggravating and mitigating factors.

[20] We agree with the appellant that the offending was more opportunistic than planned (the number of instances is better accounted for under the "scale of the offending" aggravating factor identified in *R v AM*).<sup>21</sup> Apart from that, we consider the Judge correctly identified the aggravating factors. Vulnerability was present because G was sleeping. Breach of trust was present because G and the appellant were partners who shared the same bed. There were three instances of rape and a further instance of unlawful sexual connection and G has suffered ongoing mental health issues as a result of the offending.

[21] This means that that there are three to four aggravating factors present to a moderate degree. That puts the offending towards the middle of band 2. The 10-year starting point is consistent with that. The offending was more serious than *van der Merwe* and *Chetty* because of the number of incidents, and the breach of trust was greater because those cases did not involve offending in the context of a relationship. And, contrary to the appellant's submission, a starting point of seven years and six months was taken in *Chetty* for a single incident of rape of a sleeping woman. The offending was also more serious than in *Tahiri v R*, where this Court upheld a starting point of eight years' imprisonment for a single incident of rape of a sleeping woman in her home.<sup>22</sup> This Court considered that the starting point was near the top of the available range for the type of offending in question, however it was still available to the Judge.<sup>23</sup>

[22] We conclude that the 10-year starting point for the representative charge of rape was within the available range. While a slightly lower starting point might also have been available, this is balanced out by the uplifts for the other charges.

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<sup>21</sup> *R v AM* (CA27/2009), above n 12, at [47].

<sup>22</sup> *Tahiri v R* [2013] NZCA 73 at [15].

<sup>23</sup> At [15].



The appellant queries whether the Judge applied the totality principle because he did not expressly refer to it. However, it is apparent from his uplifts that totality was incorporated in them. They were at the lower end of the available range, taking into account totality, given the number and range of incidents and their features: the rape displayed entitlement and disregard for B; the two male assaults female incidents were demeaning of B; and the reckless driving incident displayed an alarming disregard for the safety of G, their child and other road users.

[23] We therefore reject this ground of appeal.

*Discount for family background and upbringing*

[24] The appellant submits that the five per cent discount for family background and upbringing was insufficient. He says it should have been 10 per cent, particularly as no separate allowance was made for remorse. A comparison is made with *Waikato-Tuhega v R* in which this Court increased a 10 percent total discount for youth and personal factors to separate discounts of 15 per cent for each of those elements.<sup>24</sup> The respondent accepts the discount for the appellant's personal circumstances was on the low side but says the guilty plea discount was generous.

[25] We agree that the five per cent discount was too low. While there was no s 27 report, the detailed submissions from experienced counsel provided the Court with the relevant information. This Court has approved discounts in the range of 10 to 15 per cent for similar features as those present here.<sup>25</sup>

[26] We acknowledge, as does the appellant's counsel, that the guilty plea discount was arguably generous. The pleas were entered on 2 June 2021 and the trial was set to commence on 28 June 2021. However, the discount recognised that new counsel

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<sup>24</sup> *Waikato-Tuhega v R* [2021] NZCA 503 at [57], [71] and [73].

<sup>25</sup> See for example *Nuku v R* [2022] NZCA 11 at [37] (where a 15 per cent discount was appropriate for factors including family dysfunction and ADHD); *Minogue v R* [2020] NZCA 515 at [52] (where a 15 per cent discount was appropriate for background factors including limited education and drugs and alcohol in the childhood home); *Woodstock v R* [2020] NZCA 472 at [35] (where a 15 per cent discount was appropriate for factors including childhood physical abuse and expulsion from school at a young age); *Davidson v R* [2020] NZCA 230 at [34] (where a 14 per cent discount was appropriate for factors including exposure to drugs and alcohol at a young age, and deprivation); and *Carr v R* [2020] NZCA 357 at [67] (where a 15 per cent discount was appropriate for factors including sexual abuse by a family member and early exit from the education system).

had been engaged and there had been some adjustment to the charges, and the prosecutor agreed at sentencing that 20 per cent was appropriate. We do not think the discount was too generous in these circumstances so as to make up for the inadequate discount for the appellant's background.

[27] We therefore accept this ground of appeal. We consider that a discount of 10 per cent for the appellant's family background and upbringing is appropriate.

### *Second strike*

[28] The last ground of appeal is the one on which the appellant primarily relies. Because the offending was a "second-strike" offence, s 86C(4)(a) of the Sentencing Act applied. That section provides that the court "must order that the offender serve the full term of the sentence ... without parole". The Judge's order to serve the sentence without parole was made pursuant to that section.

[29] Since the delivery of the Judge's sentencing decision, the Supreme Court's decision in *Fitzgerald v R* and this Court's decision in *Matara v R* have been given.<sup>26</sup> *Fitzgerald v R* concerned an offender being sentenced for his "third strike" offence under s 86D(2) of the Sentencing Act, which required the High Court to impose the maximum term of imprisonment prescribed for that offence.<sup>27</sup> The Supreme Court held that the three strikes regime was not intended to prevail over s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA).<sup>28</sup> That section affirms the right that everyone has not to be subjected to disproportionately severe punishment. The Court held that, where imposing the maximum sentence under s 86D would breach s 9, the offender was to be sentenced in accordance with ordinary sentencing principles.<sup>29</sup> In *Matara v R* this Court held that the same approach must apply to s 86C, such that a court is not required to make a non-parole order under s 86C(4) if this would result in a disproportionately severe sentence for the purposes of s 9 of NZBORA.<sup>30</sup>

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<sup>26</sup> *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551; and *Matara v R* [2021] NZCA 692, (2021) HRNZ 944.

<sup>27</sup> *Fitzgerald v R*, above n 26, at [25] per Winkelmann CJ.

<sup>28</sup> At [112], [121], [124], [128]–[130] and [135] per Winkelmann CJ.

<sup>29</sup> At [137] and [139] per Winkelmann CJ, [231] per O'Regan and Arnold JJ and [252] per Glazebrook J.

<sup>30</sup> *Matara v R*, above n 26, at [58] and [62].

[30] Sentencing the appellant in accordance with s 86C(4), and allowing a 10 per cent discount for the appellant's background in addition to the 20 per cent guilty plea discount, would result in an end sentence of eight years and five months' imprisonment without parole.

[31] If he was sentenced in accordance with ordinary principles, the term of imprisonment imposed would be higher. That is because the total starting point of 12 years' imprisonment would be uplifted because of the appellant's previous convictions. Most relevant is the appellant's conviction for sexual connection with a child. An uplift of three months would be appropriate because of that. Deducting 30 per cent for the guilty plea and background factors would mean an end sentence (rounded down) of eight years and six months' imprisonment.

[32] On ordinary principles, a minimum period of imprisonment would also be appropriate. We take a different view from the Judge about the appropriate length of the minimum period.<sup>31</sup> The pre-sentence report writer regarded the appellant as posing a medium risk of reoffending. The appellant's comments to the report writer showed some insight into his offending, in that he understands he struggles with anger and is aware that he cannot treat women in the manner he has treated them in the past. His guilty pleas demonstrated an acceptance of responsibility. His letters of apology to B and G also showed some insight, acceptance of responsibility and remorse. These are factors that point away from a minimum period set at two-thirds of the end sentence. We regard the more usual 50 per cent period to be appropriate.<sup>32</sup> This would mean a minimum period of imprisonment of four years and three months.

[33] This means that under s 86C(4) the appellant would be required to spend eight years and five months in prison. In contrast, under ordinary principles he would have the opportunity to seek release from prison after four years and three months.

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<sup>31</sup> *R v Crowley-Lewis*, above n 1, at [47].

<sup>32</sup> See for example *S v R (CA676/2018)* [2019] NZCA 395 at [11] where this Court noted that the cases reviewed by the sentencing Judge "showed that indicated minimum terms of between 50 and 64 per cent had been imposed for sustained sexual offending"; *R v AM (CA27/2009)*, above n 12, at [156] noting "the imposition of an MPI of at least half of the nominal sentence is very routine" in cases of sexual offending against children; and *Rippey v R* [2018] NZCA 306 at [39] noting that minimum periods of imprisonment are "commonplace for sexual offending" but not mandatory.

Removing that opportunity from him is disproportionate and engages the principles identified in *Fitzgerald* and *Matara*, particularly in view of the nature of his first strike offence. As reflected in the sentence he received for that offence, it was at the low end of the range of aggravated robbery offending: it involved no planning, no weapons or actual violence and the appellant was young and from a difficult background. This offending could have been charged as demanding with menaces<sup>33</sup> and as such would not have attracted a first strike.

[34] We conclude that, interpreting s 86C(4) consistently with s 9 of NZBORA, the Judge was not required to make an order that the appellant serve his sentence without parole. The Judge was without the benefit of the guidance provided by *Fitzgerald* and *Matara* when he made that order.

## **Result**

[35] The appeal against sentence is allowed.

[36] The sentence on charge six (the representative charge of rape) of nine years' imprisonment is quashed and replaced with a sentence of eight years and six months' imprisonment. The order that the appellant serve his sentence without parole is quashed. It is replaced with a minimum period of imprisonment of four years and three months.

[37] The sentences on the other charges and the protection and disqualification orders are not altered by this judgment.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>33</sup> Crimes Act 1961, s 239(2).