IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 3/2022

BETWEEN **THE KING**
Appellant

AND **CLARKE-IN-CHARGE TOU**
Respondent

Coram: White P, Fisher JA, Asher JA

Hearing: 31 October 2022

Counsel: J Crawford and L William for the Crown
N George for the respondent

Judgment: 24 November 2022

JUDGMENT OF THE COURT

A. The appeal against sentence is dismissed.

B. The sentence of nine years imprisonment in total is confirmed.

Introduction

[1] The respondent was found guilty by a jury on eight counts of sexual offending against his under-age niece. He was convicted on two charges of rape, three of indecent assault on a girl between 12 and 16 years and three of performing an indecent act on a girl between 12 and 16 years. He was sentenced to a total of nine years' imprisonment. The Crown appeals against the sentence.

Factual background

[2] The respondent did not give evidence at the trial. His counsel challenged the victim's version of events in cross-examination. By their verdicts the jury must be taken to have accepted her version. It is no longer open to the respondent to challenge her version in this Court.

[3] The victim lived in New Zealand until moving to the remote island of Manihiki at the age of 9 years. In January 2021, when she was still 14, she moved to Rarotonga to attend secondary school there. Her family put her in the care of her Aunt and Uncle, the respondent. They undertook to look after her. She knew few people in Rarotonga.

[4] The household was spread between two adjacent buildings. The Aunt and the respondent slept in one. The victim and an older woman slept in the other. All four appear to have had access to both buildings. The respondent took the victim to school each day in his truck.

[5] The victim was still aged 14 years during her first two weeks in Rarotonga. During the first week the respondent came into her bedroom while she was asleep. He touched her waist and tried to pull her shorts down, saying that he wanted to "hold it". She cried, held onto her shorts, and said "no". He left but returned later on the same night. This time he touched her waist and leg and again tried to pull her pants down saying he wanted to "hold it". He left when she resisted. From that time the victim began locking her door at night.

[6] The Aunt was at work on most days. The victim gave evidence that during those days the respondent tended to come up behind her and touch her buttocks while she was washing dishes. She said it happened a lot during daytime and that it made her annoyed and disgusted. There was no evidence to the contrary. The precise periods involved were not explored further, presumably because no separate charges had been laid on that account.

[7] On a night in April 2021 the victim forgot to lock her door. The respondent came into her bedroom, pulled off her pants, spread and pinned her legs down, and engaged in oral sex. He kissed her breasts and had penetrative sexual intercourse. He left the room but returned and repeated the oral and sexual intercourse.

[8] On the following day, the victim and the respondent drove to their family business. The respondent touched the victim's thigh and asked her to go into the shop with him, alone. He said he "wanted to put it in again". When she refused they returned home.

[9] On an afternoon two days later, the victim was at home in her bedroom watching television. The respondent came into the bedroom and told her to lie down. She refused. He tried to remove her top, kissed her and massaged her shoulders. When the respondent left the room for a few minutes the victim locked the bedroom door behind him. She refused to open it again. He went to the side window where he poked her with a stick, called her name and told her to open the door. When she ignored him he eventually left.

[10] The victim told her school friends about the offending. They reported it to authorities. The respondent was arrested. The victim moved to a school friend's house where she has remained ever since.

Effect on the victim

[11] The victim impact report showed the consequences familiar in cases of this kind. Despite counselling, the victim remained fearful for her safety, was unable to concentrate on school work, felt unsafe with older men, and contemplated suicide. The probation officer considered that the respondent's actions have left her traumatised for the rest of her life.

The sentencing

[12] In sentencing the respondent the Chief Justice accepted that the four rape bands established in New Zealand[1] should be adopted after reductions for the Cook Islands. Reductions are needed given the maximum sentence of 14 years' imprisonment for rape in the Cook Islands compared with 20 in New Zealand. That led him to a starting point of five years before aggravating factors. As we discuss later, this starting point was consistent with recent sentences in the Cook Islands High Court and was not challenged by the appellant or the respondent.

[13] The Chief Justice noted that the aggravating factors were the victim's age, the disparity with the respondent's age, her vulnerability, her isolation in Rarotonga, the breach of trust, his

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[1] *R v AM* [2010] NZCA 114.

persistence and the long-term effect on the victim. That led him to the higher starting point of 7 ½ years concurrent on each of the two rapes. To that he added another 1 ½ years cumulative for the seven charges of indecent assaults and acts. The result was a total sentence of 9 years imprisonment.

Submissions on behalf of respondent

[14] Before turning to the appeal proper we need to comment on Mr George's written submissions to this Court. The effect of his submissions was that the total sentence should be reduced from 9 to 7 ½ years in light of the following:

(a) The victim's sexual history before her encounters with the respondent.

(b) The implication that the victim must have consented because she had failed to take ample opportunities to stop the assaults.

(c) The implication that the victim must have consented because she "participated mildly in some of the sex acts".

(d) The implication that the victim must have consented because she did not make a voluntary complaint and her official complaint was only a response to questions from her college welfare officer.

(e) The victim's impact statement was a "stunningly breath-taking narrative of both reality and imagination on her part".

[15] In her oral submissions Ms Crawford submitted that Mr George's submissions were not only irrelevant but an attempt to slander the victim.

[16] Relevant to Mr George's submissions are the following:

(a) Even at trial, s 20A(2)(a) of the Evidence Act 1968 would have imposed a statutory prohibition against leading evidence, or cross-examining, as to the victim's prior sexual experience with persons other than the accused.[2] The same

[2] Evidence Act 1968 s 20A(2)(a)(i).

applied to her reputation in sexual matters.[3] Those prohibitions were introduced in 1987 and continue today.[4]

(b) To attempt to raise prior sexual experience as a fresh topic on appeal was an attempt to introduce fresh evidence without an application to do so. Had such an application been made it would have been refused for three reasons: (i) the fresh evidence would have been contrary to the spirit of the Evidence Act; (ii) the victim would have had no opportunity to respond to fresh allegations seeking to impugn her character; and (iii) any prior sexual experience she may have had would have been irrelevant to the respondent's own culpability.

(c) Any suggestion that the victim consented would be inconsistent with the verdict of the jury on the rape charges. There was no appeal against conviction.

(d) It is also now well-recognised that there may be many reasons why a sexual complainant may delay the making of a complaint. In New Zealand if the defence argue that such a delay supports their client's innocence, trial judges normally warn juries that there may be many reasons for the delay.[5]

(e) Mr George's comment on the victim's impact statement was intemperate and unjustified.

[17] If any of Mr George's points had been proper and relevant to sentence they ought to have been raised in the Court below prior to sentencing. But none would have qualified there any more than here. Modern understanding of relevance and irrelevance in a rape trial was expressly adopted by Parliament 35 years ago. And on a sentence appeal it is pointless to raise matters designed to cast doubt on a jury's verdict. These submissions should not have been filed.

[18] We put this aspect of Mr George's submissions to one side and turn to the substance of the appeal.

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[3] Evidence Act, s 20A(2)(a)(ii).

[4] Evidence Amendment Act 1986-87.

[5] NZ Evidence Act 2006, s 127, and "The Second Review of the Evidence Act 2006 Te Arotake Tuarua i te Evidence Act 2006" NZLC R142, February 2019, at [12.29] and [12.103].

The appeal

[19] Ms Crawford submitted that the sentence of 9 years was inadequate for these reasons:

(a) The starting point of 7 ½ years for two rape charges did not reflect the seriousness of the offending;

(b) The Sentencing Judge did not have sufficient regard to the maximum sentence of 14 years' imprisonment given the aggravating features that were present;

(c) The sentence imposed on a totality basis was also inadequate.

[20] Ms Crawford submitted that a starting point for the rapes in the region of 10 years' imprisonment was appropriate having regard to previous case law and the maximum penalty. She did not take issue with the 18-month uplift imposed for the indecency offending imposed on a totality basis. She submitted that an end sentence of 11 ½ years was appropriate.

Rape sentencing bands

[21] We agree with the Chief Justice, the Crown, and Mr George, that the four rape bands established in New Zealand[6] should be adopted here after downward adjustment.

[22] The downward adjustment is justified by the difference in the maximum sentences available in the two countries. New Zealand rape bands were set against a maximum sentence of 20 years' imprisonment. The maximum in the Cook Islands is 14 years. We agree that the ranges suggested for the four rape bands should be reduced on that account.

[23] However while arithmetically in comparison to the New Zealand bands the bottom of band one could start as low as 4 years, we do not think that the bottom of the range for the lowest band can be less than 5 years. In New Zealand the starting point for rape without aggravating factors was already 5 years by the time the maximum was increased from 14 years to 20 years.[7] Also relevant are evolving social attitudes to rape and the upward trend in rape sentencing levels. Two recent Cook Islands sentences showed an increase to 5 years before aggravating features.[8]

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6 *R v AM* [2010] NZCA 114.

7 *R v Clark* [1987] 1 NZLR 380 (CA).

8 *Police v Travel Engu* (2015) Cr No. 349/15; *R v Marakai Mahitu* (2017) Cr No. 550/16.

[24] Bearing in mind those considerations, and expressing the result in rounded figures, the sentencing guidelines for the Cook Islands can be expressed as follows:

(a) *Rape band one:* 5 to 6 years' imprisonment. This band was described by the New Zealand Court of Appeal as "offending at the lower end of the spectrum; that is, offending where the aggravating features are either not present or present to a limited extent. Rape band one is not an appropriate band for offending where the level of violence is serious, the case involves an extended abduction, a victim who by reason of factors such as age (children or elderly persons) or mental or physical impairment is vulnerable or an offender acts in concert with others. Where none of the factors referred to above at [37] to [52] which increase the seriousness of the offending are present a starting point at the bottom end of this band would be appropriate. Where one or more of these factors is present to a low or moderate degree, a higher starting point within the band would be required."[9]

(b) *Rape band two:* 6 to 10 years. Described as "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."[10]

(c) *Rape band three:* 9 to 12 years. Described as "offending accompanied by aggravating features at a, relatively speaking, serious level. Rape band three is appropriate for offending which involves two or more of the factors increasing culpability to a high degree, such as a particularly vulnerable victim and serious additional violence, or more than three of those factors to a moderate degree. Particularly cruel, callous or violent single episodes of offending involving rape will fall into this band."[11]

(d) *Rape band four:* 11 to 14 years. Described as "The same sorts of factors that place offending towards the higher end of rape band three will apply here but it is likely that the offending in rape band four will involve multiple offending over considerable periods of time, usually years, rather than single instances of rape.[12]

[25] In applying these guidelines two further considerations should be borne in mind. First, valuable guidance is to be found in the many actual examples provided by the New Zealand Court of Appeal to illustrate the way the bands work in practice. The second is that sentencing can never be a mechanical exercise. So long as appropriate regard is paid to the bands involved,

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9 *R v AM,* at [93].
10 *R v AM,* at [98].
11 *R v AM,* at [105].
12 *R v AM,* at [108].

a discretion must remain with the sentencing Judge to act on factors unique to the particular case.

Application of the sentencing guidelines to this case

[26] It is the total sentence for the offending that matters. Although it would be possible to deal with different classes of offence separately, we think it more useful to approach the case as a single course of offending against one victim over four months. Approached in that way, it is possible to identify four aggravating features:

(a) The victim's age of 14 and 15 years respectively at the time of the offences, particularly when compared with the respondent's age of 53 and 54 years respectively.

(b) The gross breach of trust given the victim's relative isolation in Rarotonga and reliance on the respondent and her Aunt as her carers.

(c) The frequency and persistence of the respondent's sexual offending over four months including the seven indecency charges, the sexual behaviour in the kitchen and the two principal charges of rape.

(d) The likely long-term harm to the victim.

[27] The Chief Justice considered that for the rapes alone the case fell into the upper end of band two or the lower end of band three but added another 18 months for the indecency charges. By that means he arrived at the total of nine years.

[28] On a global approach we consider that the aggravating features we have mentioned place this case in the middle of band three. That suggests a starting point of at least 10 years. There are no features in mitigation.

[29] However on a prosecutor's appeal a sentence will normally be increased only where it is manifestly inadequate or contrary to principle.[13] Any increase should take the new sentence to only the lower end of the available range.[14] Although we would have been inclined to impose

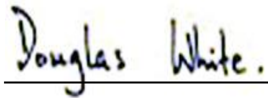
[13] *R v Pue* [1974] 2 NZLR 392 (CA); *R v Muavae* [2000] 3 NZLR 483 (CA), at [10].
[14] *R v Davidson* [2008] NZCA 484; *R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23.

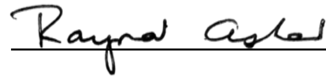
a sentence of 10 years we do not consider that 9 years was outside the range available to the Chief Justice. Accordingly his sentence should stand.

[30] Mr George applied for costs. The grounds on which we have dismissed the appeal did not form part of his submissions. Costs are declined.

Result

[31] The appeal is dismissed. The total sentence of 9 years imprisonment will stand.





Douglas White, P **Robert Fisher, JA** **Raynor Asher, JA**