

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

CRI 2006-088-000282

THE QUEEN

v

KHAN MANE DRAKE

Hearing: 30 November 2006

Appearances: P J Magee for the Crown
A B Fairley for the Accused

Judgment: 30 November 2006

SENTENCING REMARKS OF ANDREWS J

Solicitors: Crown Solicitor, PO Box 146, Whangarei
Thomson Wilson, PO Box 1042, Whangarei

[1] Khan Drake, you appear for sentencing today having pleaded guilty to two charges of rape, one of which is a representative charge, and two charges of indecently assaulting a girl under the age of 12 years. I am sure that you are aware that these are very serious charges. They carry maximum penalties of 20 and 10 years imprisonment respectively. I am not going to set out the facts relating to the offences in great detail. However, I must give a summary of what occurred.

[2] The offences all occurred during the period from the beginning of 1996 to the end of 1998. At the time you were living with relatives in Hikurangi. During that time you were between 15 and 17 years old. Your victims were between five and 11 years old. They were either family members or daughters of friends of the family. Most of the offences took place in or near to the house at Hikurangi but on one occasion you drove your victim to a quiet road where you raped her.

[3] The circumstances of the first rape charge are that you pushed the victim, who at that time was aged between nine and 11, down on her back; put your hand over her mouth and held her down. You pulled her underwear down and you put your penis into her vagina. She told the Police that you raped her in a similar way more than ten times over a period of about two years. You told her to keep quiet about it.

[4] The second rape charge relates to a girl who was between just 5 and 8 years old at the time. You were asked to go to a shop with the victim and her two cousins. You went to the shop then you dropped the cousins off at a friend's house then drove your victim to a quiet road. You removed her underwear, your own pants, and started playing with your penis. You then sat the victim on your lap and put your penis into her vagina; you kept it there until you ejaculated. You then made the victim put her clothing back on before driving back to the shop.

[5] The first of the indecent assault charges concerns a girl who was 11 years old at the time. She was visiting the house where you were living. You lured her into a bedroom, laid her down and removed her underwear. You then removed your pants and attempted unsuccessfully to penetrate her vagina with your penis.

[6] The victim of the second indecent assault charge was also between 5 and 8 years old. She also visited the house where you were living and you babysat for her on several occasions. One time when you were babysitting her she accidentally hit her head and started to cry. You led her into a bedroom, sat next to her when she lay down on a bed. You then put your hand down her pants and started rubbing her vagina area.

[7] The offences came to the attention of the Police during 2004 when one of the victims went to the Police. You were initially charged with a total of 12 offences, some of them were representative charges. Your guilty plea came at the start of the trial after the jury had been empanelled.

[8] I now come to consider what sentence is appropriate. The process I follow is to decide what sentence would be appropriate for the most serious offence, in this case the rape charges, for an adult offender after a defended trial and this will be the starting point.

[9] Then I take into account any aggravating or mitigating features that relate to the offences. That is, things that make it more or less serious and mean that the starting point should be increased or decreased. Then I go on to consider the totality of your offending and matters that relate to you personally to determine the appropriate sentence. That procedure has been set by the Court of Appeal and counsel will be aware of the decision in *R v Taueki*¹

[10] In sentencing you I have to take into account what the law has set out as the purposes of sentencing and that is set out in s 7 of the Sentencing Act 2000. Particularly, I have to hold you accountable, to make you responsible for what you have done. I have to consider deterrence and protection of the community and I also have to express the fact that society in general utterly condemns what you have done. At the same time the purpose is to help you with getting back into the community and becoming a useful member of it.

¹ *R v Taueki* [2005] 3 NZLR 372 (CA)

[11] Section 8 of the Sentencing Act 2000 sets out general principles of sentencing that must be considered. In your case I consider that the most relevant ones are the gravity of your offending, including your culpability; the seriousness of your offending in comparison with other types of offences; and the fact that it is generally desirable to keep sentencing levels consistent. I take into account information provided about the effects of your offending on your victims. I am directed to impose the least restrictive outcome that is appropriate in the circumstances. I must also take into account your personal and family background and any circumstances that might make any particular sentence disproportionately severe. Once those are considered I can establish the starting point which is the sentence that is appropriate for your offending, before considering your personal factors.

[12] I note that s 16 of the Sentencing Act 2000 provides that I should have regard to it being desirable to keep offenders in the community as far as that is practicable with regard to the community's safety. However, the Court of course can impose a sentence of imprisonment in order to achieve the purposes of sentencing that are relevant to your case.

[13] With respect to the offences to which you have pleaded guilty, I am satisfied that having regard to the matters that I have referred to, a sentence of imprisonment is inevitable. You and your counsel have accepted that.

[14] Mr Drake, under s 9 of the Sentencing Act 2000 I have to look at the aggravating and mitigating features of your offences. Your victims were all young, two of them as young as five at the time. The age of the victims is of course a feature of the offences themselves but these were particularly young girls; they were particularly vulnerable. Further, on at least one occasion you had been entrusted with their care as a babysitter. Both they, and their families, entrusted them to you and you abused that trust utterly.

[15] I am also required to consider whether your offending involved actual or threatened violence. Well, violence is inherent in the act of rape. The victim does not consent, it is against her will. It is also the case however, that on occasion you

used some force on your victims. You held them down and you held your hand over one victim's mouth.

[16] Then there is the number of offences over the period from the beginning of 1996 to the end of 1998. Your offences involved a number of victims and an ongoing course of conduct.

[17] For at least one of the offences it appears that you planned it in advance. I am referring there to the time when you dropped the two cousins off before taking the little girl to a quiet road where you raped her.

[18] On the other hand there is your age at the time of the offences, and your own background, and there are other matters that relate to you personally and I will talk about them later.

[19] Mr Drake, sentencing is not just about you. It concerns the four people who were the young girls at the time. They are now young women and they have had to live with what you did. They have had to endure the physical and mental consequences of what happened. I have read victim impact statements from all four of them. One way or another they have all suffered terribly. These were experiences that nobody, whether adult or child, should have to go through. They will have to live with the effects of those experiences for the rest of their lives. The rather clinical summary that I gave in summarising your offences cannot possibly do justice to the suffering that you caused your victims.

[20] I have also read statements from the mothers of your victims. You have heard two of these read out in court. They too have suffered terribly. First, they have had to suffer guilt at not having protected the girls against you and secondly, they have had to try to help their daughters as they have suffered.

[21] Finally I have read the statement by the grandmother of two of your victims. You were living at her house when you committed the offences. She had given you a home and she trusted you and again, you utterly abused that trust.

[22] I turn now to consider the pre-sentence report prepared by the Probation Officer. You are 26 years old, you are married with two young daughters. You have the support of your wife, her family and close friends. You have a good employment record. You told the Probation Officer that you knew that what you were doing ten years ago was wrong. However, you developed what you called an uncontrollable urge to act as you did on each occasion. You told the Probation Officer that you had yourself suffered sexual abuse while you were in your pre-teen years and you felt that you were reliving your own experiences with your offences. You have expressed regret and remorse for your actions and for the experiences the victims have gone through during the processes leading up to the trial. I am told by the Probation Officer that you prepared a letter of apology to be passed on to the victims.

[23] Your offending ceased in your late teens when you began interacting with people of your own age. Since then you have led an exemplary family lifestyle. All of that, all of that, is now at risk because of what you did eight or ten years ago. I do note that you have one conviction dated back to 2000. It appears to relate to a traffic matter and it will play no part in your sentencing.

[24] Now I turn to consider what the two counsel have said here today about your offending and about you.

[25] Mr Magee, on behalf of the Crown, referred me to the matters relevant to sentencing that I have already commented on. He suggested that the proper starting point is a sentence of imprisonment of between eight and ten years and I would then have to consider the aggravating factors I talked about earlier. He also noted a number of matters that I could take into account as mitigating factors.

[26] In Court today, he noted that perhaps one of the most significant things to come out of this process, at least for the victims, is your acknowledgement of your completely wrongful behaviour to them. As he said, that cannot be measured. I, like Mr Magee, hope that they, those young women, will be able to go forward with your acknowledgement that what they said happened did in fact happen. He then noted that in sentencing you the Court is in the situation where society demands that, while for you there may not need to be an element of deterrence in your sentence, there is

still a need to protect the community's children. They are our future and conduct such as yours will not be tolerated.

[27] As Mr Magee noted, the sentence that will be imposed on you will for some people, never be enough, but we are bound by guidelines and decisions of the Court of Appeal. Mr Magee noted as relevant to your sentence your youth at the time of the offending, your guilty plea, your contrition, and your good record since the offending.

[28] On your behalf Mr Fairley submitted that at the end of the day an appropriate sentence would be in the range of four to six years imprisonment. He referred me to a number of decisions of the Court as to sexual offending and in particular he referred to a judgment of Nicholson J in the case of *R v IWM*². That case has some similarity to your case but it would have to be said there were many more charges involved but in that case the offender was sentenced to seven years imprisonment.

[29] Today in Court Mr Fairley told me that you are thoroughly ashamed of what you had done. He drew my attention to the comments in the probation report and he advised me that you do not hide behind your current family situation; you know what you now have to do.

[30] As Mr Fairley went on to say, there has to be a deliberate exercise of balancing the pain and grief that we have heard, that was the impact on the victim's lives, with the fact that people's lives do not remain static. The principles of sentencing, as he said, are clear and you have acknowledged that there can only be a custodial sentence. He pointed out that we all live in a human world and we all act in the way humans act. He noted that when the offending occurred you were a youth. If you had been apprehended at that time then you would have been before a Youth Court Judge, not in this Court before High Court Judge. He urged me to consider your background. He did not offer that, as you do not offer it, as an excuse, but as an explanation of what had happened.

² *R v IWM* HC HAM CRI 2004-075-03043, 26 April 2006

[31] As he noted you were yourself subject to sexual abuse when you were younger and as he said in your offending you were acting out what had happened to you. He pointed out that the man you are, standing before me now since, as he described it properly, the vile behaviour of eight to ten years ago, has led an exemplary life. You have married and you have two daughters. You have the enormous support of your wife, her family and your many friends. You are described as a good husband and father.

[32] Mr Fairley pointed out that you are genuinely remorseful. He acknowledged that the guilty plea came just at the eve of trial but he does point out that it was going to be a 14-day trial and in pleading guilty at the start of it you do show that you have acknowledged your offending.

[33] Finally, Mr Fairley acknowledged on your behalf that no sentence that this Court imposes can assuage the grief, the anger and the loss of your victims and their families.

[34] As both counsel have pointed out, sentencing in your case is a very difficult balancing exercise. It always is, but I feel in this case it is particularly difficult.

[35] I have looked at a number of sentencing decisions for sexual offences. Mostly, the offenders in those cases were adults at the time of the offences so one has to consider that the Judge sentencing those people might have been looking at them in a different way from the way that I must look at you, given that you were in your mid-teens at the time of the offending. I note (for counsels' reference) the judgment in the Court of Appeal in *R v Mahoni*³ where the Court noted that there is a well established principle that youth and immaturity may lead to a reduction in an otherwise appropriate sentence. It has to be said though that the Court in that case was considering a case where the offender was still a youth at the time of sentencing; you are not.

³ *R v Mahoni* (1998) 15 CRNZ 428 (CA)

[36] The Court of Appeal has said that the appropriate starting point for a sentence for rape is a term of eight years imprisonment and I refer there to *R v A*⁴. But in your case, in my view, it is appropriate to increase that by two years so that the starting point must be at ten years to take into account the aggravating features I talked about earlier.

[37] I now turn again to your personal circumstances. I consider that the following matters are particularly relevant. The first is your guilty plea. I accept this as being evidence of your having accepted and acknowledged both to your victims and to yourself and I must add, to your family, that what you did was wrong. It has also meant that your victims have been saved the distress and embarrassment of having to come to Court to give evidence. However, it did not come until your trial had begun. The jury had been selected. Your victims had had to prepare themselves to see their interviews played in Court and to be cross-examined. I acknowledge that they were saved from actually having to do that but by the rather late guilty plea you are entitled to less discount for it than you have been had it come at a much earlier stage.

[38] Secondly, you are being sentenced as a first offender. You have no previous convictions for sexual offences and further, there is no evidence that you have offended since 1998.

[39] Third, you were yourself the victim of sexual abuse when you were young. I accept that your very difficult upbringing may well have had some part to play in your offending.

[40] Fourth, I come again to the love and support you have from your wife, her family and many friends. I have read the many letters submitted through Mr Fairley. Without exception they speak of your being a loyal and loving husband and father to your wife and your two daughters. They offer support to you and your family in the future. Some spoke of your having triumphed over the trial and suffering of your childhood; of your having broken the cycle and become a fantastic role model, and I

⁴ *R v A* [1994] 2 NZLR 129 (CA)

am quoting from the letters there. In its decision of *R v Carruthers*⁵ the Court of Appeal noted that this was a relevant consideration.

[41] Finally, I have read the letter you have sent through Mr Fairley. You have expressed your deepest apologies to all involved. You say that with the help of God you will use the time of your sentence to reflect and rebuild your life in order to repay your family.

[42] I come back to what I said at the start. These were serious offences. You now have, I hope, a real understanding of the impact they have on your victims. I have had to try to balance that against our own circumstances. You were a victim yourself, you were immature and I feel it is likely you lacked full understanding, or perhaps any understanding, of the effect of what you were doing. In the years since 1998 you have clearly shown that you have overcome the urges that you say caused the offending. You have settled into a normal and law-abiding life and I have to recognise that. Moreover, I am acutely aware of the impact that a lengthy period of imprisonment is going to have on your wife and daughters.

[43] Taking all of these factors into account and trying as best I can to reach the right balance, I consider that there should be a reduction of three years from the term of ten years.

[44] Mr Drake on the representative charge of rape you are sentenced to seven years imprisonment.

[45] On the other charge of rape you are sentenced to five years imprisonment

[46] On each of the charges of indecent assault on a girl under 12 you are sentenced to two and a half years imprisonment.

[47] All of the sentences are to be served concurrently that is, at the same time. That means that the effective period of imprisonment is seven years.

⁵ *R v Carruthers* CA401/94, 10 April 1995

[48] Finally, I note that you have unpaid fines. An application has been made for them to be remitted and I order that the fines be remitted. When you are released you should have a fresh start without the fines hanging over your head.

[49] Would you please stand down.

Andrews J