IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CRI 2005-070-453

THE QUEEN

v

TONY DOUGLAS ROBERTSON

Sentence: 4 October 2006

Counsel: S J Bridges & S A Christensen for Crown
T Sutcliffe for Accused

SENTENCE OF KEANE J

Solicitors:

Crown Solicitor, Tauranga

[1] Tony Robertson, you appear for sentence, having been found guilty at trial of seven offences on 14 – 15 December 2005: abducting one child, attempting to kidnap two others, committing three indecencies on the child you abducted; and, to end with the offence with which your offending began, robbing a further child.

[2] You have also offended while in custody, and you have pleaded to two offences: assault with intent to injure and behaving threateningly for which you are also for sentence. I shall sentence you for those offences once I have dealt with your principal offending.

Facts

[3] At about 3.30 pm on Wednesday 14 December 2005, you accosted AK, aged 12, who was walking home from school along Victory Street, Tauranga, just by the entrance to the Johnson Reserve. You asked to borrow his cellphone. He went with you into the reserve and that is where the cellphone came into your possession. You said that he lent it to you freely but left before you could return it. He said that you obtained it from him by threats, if not force, and that it was you who left. By its verdict, the jury accepted his account as truthful and rejected yours.

[4] At about 3.40 pm that day, the jury found also by its verdict, you approached three young children, TAR, aged eight, AR, aged six, and JH, aged seven, close to the intersection of Kaitemako Road and Arawa Place, which are streets near the reserve, when they were walking home from Maungatapu Primary School. You pulled up, the jury was satisfied, in your mother's white Mitsubishi Lancer saloon and spoke to AR and JH. TAR stood back. You said that their mother had a present for them at the service station. You invited them to get into the car. JH in particular hesitated. TAR ran to his mother, who was just up the hill. She came to the street and called out. The children moved towards her. You drove off and fortunately that is where that incident ended.

[5] The following morning, however, at 8.45 am, as the jury found, you approached KM, aged five, and her seven year old brother, DM, who were walking along Maungatapu Road to the school. You invited KM into your car, telling her that

her mother had a present for her at the beach. You pretended to contact her mother using AK's cellphone. You told KM's brother, DM, not to get into the car. You drove away with KM.

[6] An extensive police search was mounted after DM alerted his teacher and at 9.45 am a police sergeant, acting on instinct, extended the search to the area near Kaiate Falls, out of Tauranga. He found you in your mother's car parked on Kaiate Falls Road, a short distance from the entrance to the Falls. When you sat up he saw KM in the front passenger seat, which was set back in the reclined position. She was upset and crying and told him that she wanted to get out of the car.

[7] KM, in her disclosure interview, said she had got into the car because she had anticipated that she was to get a Christmas present just as you said. She said that at Kaiate Falls you made her lie back on the seat. You asked to photograph her boxer shorts, which were later found in the back of the car. You then told her to roll on to her stomach. You wished to photograph her bottom. She described you as touching her knickers and bottom and licking her thigh and trying to kiss her face. She pushed you away and protested.

[8] You denied picking KM up outside the school. You said you were, on the Crown's own case, well away from there at the time. You were visiting a friend in the vicinity of the Falls, and it was there that you had found KM standing, distressed, by the roadside. You said that you had intended to take her home. You denied touching her indecently. The jury rejected your account by its verdict.

Victim impact

[9] KM has, as a result, has lost confidence in herself and others, especially men. She is easily scared. She cannot walk easily to school and she does not trust many people. She cannot easily be reassured. KM's mother has blamed herself. She has, at very real cost, left Tauranga and returned with her children to the town in which KM's father and whanau live.

[10] What effect your offending had on JH is not clear. His mother, however, has

since felt insecure and unsettled and moved house. She finds it difficult to let him out of her sight. She has placed him in child-care after school, again at real cost. What effect your offending had on AR is not stated either. But TAR has lost trust, particularly in strangers. He fears everyone is a potential kidnapper.

[11] AK, from whom you took the phone, too has also lost a large amount of confidence. He does not like being on his own or catching the bus home. He finds it difficult to walk through the reserve to his father's house. He also lost his phone for three months and a $50 credit.

Pre-sentence report

[12] Two features of your pre-sentence report stand out, the first of which is the contrast noted between your past and your present offending. You have a history of violent offending: four common assaults, an assault with intent to injure, speaking threateningly and disorderly behaviour. You have obstructed and resisted the police and been party to an aggravated robbery. But this present offending for which you are for sentence, as the report says, is of a more sinister character.

[13] The other feature is that you continue, as you did at trial, the report confirms, to deny completely the offending for which you have been found responsible. You are assessed, therefore, as showing no instinct to change. The report sees no basis for a therapeutic sentence and instead it recommends imprisonment.

[14] Psychological and psychiatric reports were also obtained once the Crown gave notice, when the jury had given its verdict, that it intended to seek a sentence of preventive detention. I will refer to those reports when considering whether that sentence can be justified.

Sentencing purposes, principles and features

[15] In sentencing you for these offences I must hold you accountable for the harm you have done, promote in you a sense of responsibility, if that can be

achieved, denounce your conduct, deter you and others from acting in this way, protect the community, and provide for the interests of your victims: s 7(1)(a), (b), (c), (e), (f) and (g). I must also, so far as it can be achieved, assist you in your rehabilitation and reintegration into the community: s 7(1)(i).

[16] In this I must have regard to the following sentencing principles: the gravity of your offending; the need to be consistent in sentence with other cases; the need to impose a sentence near the maximum should that be warranted. Equally, I must take account of the contrasting purposes, the need to adopt the least restrictive outcome appropriate in the circumstances; the need to take account of anything that would make any otherwise proper sentence disproportionately severe; and the need to recognise your personal, family and cultural background: s 8(g), (h) and (i).

[17] The issue is, that said, is how your offending is to be characterised. The Crown contends that on 14 - 15 December 2005 you engaged in three separate passages of offending, the most serious of which was the abduction of KM and her indecent assault. That pattern is so serious in its import, the Crown says, that you ought to be sentenced to preventive detention or, if not that, sentenced finitely and cumulatively for each of your offences, leading to a total sentence in the vicinity 12 – 14 years, before any factor personal to you is taken into account.

[18] Your counsel, by contrast, contends that yours was a single, sustained passage of offending and that the sentence to be imposed on you ought to be fixed by reference to the most serious of your offences, in which it culminated, the abduction of KM. Preventive detention cannot be justified, he contends, because this is the first occasion on which you have offended in such a serious way and it cannot be assumed that you will offend in this way again. Nor, he contends, is your offending against KM, while serious, so serious as to justify a near maximum sentence, let alone one on which other sentences accumulate. The highest sentence, he contends, that might be imposed on you for the abduction is three and a half years imprisonment but, having regard to the prior offending and the indecencies afterwards, that might be increased to five – six years imprisonment with concurrent sentences imposed for those lesser offences. He does accept that a cumulative sentence might be imposed for the offending within the prison.

Preventive detention

[19] The first issue then is whether your offending in its totality is so serious and entrenched as to justify a sentence of preventive detention; a sentence which I have jurisdiction to impose on you under s 87(2). The abduction and the indecencies are qualifying offences under s 87(5), and you committed these offences aged 18. The question is rather whether such a sentence is called for to protect the community from any significant and ongoing risk to its safety: s 87(1). I must also, under s 87(2)(c), and this is crucial, be satisfied that you are likely to commit another qualifying offence if released at the expiry date of a finite sentence.

[20] In considering that s 87(4) requires me to take into account five factors: one, whether you have a pattern of serious offending; (subs (a)); two, how seriously you harmed the community by your offending (subs (b)); three, whether there is information indicating that you have a tendency to commit serious offences in the future (subs (c)); four, any absence or failure of effort on your part to address the causes of your offending (subs (d)); and five, and ultimately, the principle that a lengthy determinate sentence is preferable if that will provide adequate protection for the community (subs (e)).

[21] As to the first, you have already, as is said in the pre-sentence report, shown a propensity to violence and offending of other kinds of a sufficiently serious level to justify sentences of imprisonment, albeit sentences that were quite short. But the offences for which you are now for sentence are of a different kind and order. In less than 24 hours you targeted five young children. Your first offence, the robbery of the cellphone, may have been opportunist. Your real intent became clear in the two following instances of offending and it can only have been sexual.

[22] Whether that can be described in itself as a pattern of serious offending is central to the sentence to be imposed on you. Equally in issue is how serious the harm to the community finally was. Potentially it was very serious. Fortunately, because you were frustrated on the first day and the second, the actual harm you caused was held to a minimum. But that was fortuitous and the issue is rather, given that you deny this offending totally and show no instinct to address it, whether you

are likely to commit such serious offences in the future. To that the psychological and psychiatric reports are relevant and they are not unanimous.

Psychiatric and psychological reports

[23] You are assessed psychologically as being at high risk of further sexual offending following release from prison unless you have successfully completed intensive specialised psychological treatment, but that is thought unlikely because you deny the offending for which you have been found responsible.

[24] Your offending, taking it at face value, is said to show a deviant urge to engage in sexual activity with young girls. To offend as you did you accepted risk but you also planned. You were persistent. Before your offending became more serious you were interrupted. All that suggests to the assessor that you may have had this inclination for some time and your level of denial suggests also that you will not address it. That leads to the prediction that you present a high risk and statistical measures applied also confirm that to be so.

[25] That, however, is not how you are assessed psychiatrically. If your account is taken at face value you are considered to suffer from no diagnosable psychiatric disorder and your risk of sexually offending in the future is rated to be very low. As against that however, as the report says, you may simply be skilfully dishonest, as the jury's finding at trial suggests that you are. Even then, however, the report does not rate you at any increased risk.

[26] Critical to that are two observations. One is that this is the first occasion on which you have apparently offended in this way. You show no history of prior or diverse sexual offending. The other is that you committed these offences at the age of 18 and that is important in itself. It is impossible, the report says, to predict how you will be when you are more mature and have served, as you inevitably must, a significant term of imprisonment.

Conclusion

[27] I have then two reports going to the issue that I have to decide and they are opposed. The psychological report assumes what the psychiatric report does not, and that is that your offending over the two days demonstrates that you had then an entrenched deviancy. That is not an assumption that I can confidently make.

[28] While it is clear that you acted with great determination over those two days, accomplishing on the second what you could not on the first, there is nothing in the information that I have about you from any source which predicts that this was going to happen. And so why it happened is still highly problematic. I cannot be confident, therefore, that what led you to act as you did was the result of an entrenched deviancy. It may have been the beginning of one but that is another thing.

[29] The second thing is that you committed these offences at the age of 18 and, while you show presently no instinct to address what happened, in fact you are in complete denial, that may change if you are given time to reflect and accept help. You are not simply to be assumed to be a lost cause at the age of 19.

[30] For those two reasons, I am unable to be satisfied to the degree that I need to be that preventive detention is the only sentence that will serve to protect the community. Furthermore, a relevant factor identified by the Court of Appeal recently in *R v Parahi* [2005] 3 NZLR 356 is the ability to impose an extended supervision order on release. That measure is in its early days but the Court considered that it could tip the balance in a doubtful case.

[31] In that case the Court of Appeal set aside a sentence of preventive detention, though the offender was aged 42 with an entrenched deviant pattern of sexual offending. You and your offending are not in that category and I decline to impose preventive detention on you.

Abduction offence

[32] I come then to the issue what finite sentence to impose on you and, as

counsel agree, that is to be fixed primarily by reference to the abduction in which your offending culminated, the essence of which was that you took KM against her will intending sexual relations with her. It is accepted equally that this offence is not to be divorced from the three indecencies which then happened. How serious that offending was, though, is the subject of contesting submissions.

[33] The Crown submits that you lured KM into your car, as you had attempted the day before with the other children, by offering presents. She was, as they were, particularly vulnerable because of her age. You acted brazenly on a busy urban road near a primary school. You offended in a planned way consistent with the way you had acted the day before. You took her to an isolated location and you then performed the three indecencies on her, despite her protest. It is entirely fortuitous, the Crown says, that you were interrupted, as you had been the day before. But for that, you might have held the child for longer. You might have offended more seriously.

[34] The Crown contends for a starting point of ten years imprisonment for this offence, relying on *R v Bond* (CA 302/95, 8 November 1995), where a nine year starting point was endorsed by the Court of Appeal and two instances where a ten year starting point was adopted: *R v Abraham* (16 February 1995, T 20/94, Penlington J) and *R v Gibson & Brown* (5 December 1996, T 123/96, Panckhurst J).

[35] Those cases all bear similarity to this but in each there were aggravating features that are not present. In *Bond*, while the victim, a woman, was abducted briefly by car, that was accompanied by considerable violence, she was tied in her own clothing and escaped when the car was moving. In *Abraham*, while the child there was four and lured by an offer of an ice cream and held for a short time, there was also actual violence. The child was throttled and lost consciousness for two minutes and suffered physical as well as psychological injuries. In *Gibson & Brown*, again a case like this where a child was lured from the street while walking to school, she was held for six hours, plied with alcohol and extensively sexually violated. Fortunately none of those aggravating features eventuated in your case.

[36] Equally, the two cases on which your own counsel relies to justify a starting

point in the range three and a half – five and a half years, are marked by differences. In *R v Parker* (CA 186/97, 2 October 1997), where a three and a half year starting point was taken after trial, the victim whom the offender took to an unpopulated area in his car and tried to force himself on until interrupted by a police dog handler, was an adult. She had been drinking with him before the offence and had entered the car voluntarily. In *R v Burne* (CA 367/01, 20 June 2002), the six and a half – seven year starting point for abduction was accompanied by a wounding involving a knife. But again the victim was an adult.

[37] Two other cases, to which neither counsel have referred, are *R v Phelps* (CA 75/87, 14 May 1987) and *R v Brown* (HC Wellington, S 1523/98, 14 August 1998). Those bear similarities to this case too but each resulted in a different response on sentence. Each involved children under 12 kidnapped and indecently assaulted, the first in a car, the second held in a flat. A sentence of three years after a guilty plea was endorsed on appeal in the first and a sentence of five years imprisonment after trial imposed in the second.

[38] As these cases indicate, while like cases always assist, my focus in sentencing you must be on you and the features that characterise your offending.

[39] What distinguishes your offending, I consider, is that even though there may be no evidence that you had an entrenched deviancy on 14 – 15 December 2005, you were both calculating and determined. You may have offended by robbing AK almost fortuitously. Your real intent, as I have said earlier, was disclosed when you approached the three children shortly after and attempted to induce one at least into the car only to be frustrated; a stratagem you persisted in the following morning, that time successfully. Your intent was graphically demonstrated by the indecencies disclosed by KM after she was rescued by the police. Everything suggests that you preyed on these children for sexual relief.

[40] But, it must also be said, though it may have been fortuitous, there was no violence and the sexual offending that did happen was confined to the least serious order.

[41] Having regard then to the totality of your offending and to the range of sentences imposed in the cases to which I have referred, the proper starting point for your abduction is, I consider, seven and a half years imprisonment, any personal factor apart. There is, to my mind, only one such factor and that is your youth. But that does not, to my mind, justify any lesser sentence, especially as you do not admit this offending.

[42] For the abduction offence, therefore, you will be sentenced to seven and a half years imprisonment.

Other related offences

[43] Your other offending, which I have just taken into account in fixing the sentence for your principal offence, does not, to my mind, warrant cumulative sentences.

[44] All were offences part of one sustained passage of offending, as your counsel says, even though the victims were different. And that is more especially so because the offending never culminated in actual harm on the first day. That was accomplished on the second. All those offences, however, were nevertheless inherently serious. Distinct commensurate, though concurrent, sentences are called for.

[45] You will be sentenced concurrently to two and a half years imprisonment for the attempted kidnapping of AR and JH, to two years imprisonment for each of the three indecencies on KM and to six months imprisonment for the robbery of JK.

Later offences

[46] You must be sentenced cumulatively for the assault with intent to injure on the prison officer on 19 February 2006 when you brought an electric fan down on his head while he was relocating you from one cell to another; an assault resulting, fortunately, in no great injury or any psychological harm.

[47] An assault on a prison officer is always serious and justifies a deterrent sentence. Mindful of the principle of totality, however, it will be enough, I consider, to impose on you a cumulative sentence of six months imprisonment. For behaving threateningly you will be convicted and discharged.

Minimum term

[48] Your effective total sentence is therefore eight years imprisonment and the Crown seeks a minimum non-parole period under s 86 on the basis that the usual parole period is insufficient either to hold you accountable, or to denounce your conduct, or to deter you or others or to protect the community.

[49] The Crown points to the fact that within 24 hours you offended against five victims, that you showed no remorse and that you continue to deny your offending. The protection of the community, therefore, must be given paramount importance. Your own counsel says that this measure is not called for and is disproportionate. You are 19, you are susceptible to change and there is always the possibility that an extended supervision order could be imposed on you. I accept, however, the Crown's submission.

[50] The minimum non-parole period that would otherwise apply, one-third, seems to me insufficient to bring home to you your offending or its causes or to induce you to take the treatment essential to assist you to face up to why you have acted as you have. Those purposes can only be accomplished, I believe, if a minimum sentence of two-thirds the length of the sentence imposed is made. I make that order.

_____

P.J. Keane J