PUBLICATION OF NAMES OR IDENTIFYING PARTICUALRS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA640/2011
[2012] NZCA 18

BETWEEN	DION SELWYN TAU Appellant
AND	THE QUEEN Respondent

Hearing: 13 February 2012

Court: Stevens, Ronald Young and Andrews JJ

Counsel: N G Cooke and V J Feyen for Appellant
J M Jelas for Respondent

Judgment: 21 February 2012 at 3.00 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] The appellant, Mr Tau, pleaded guilty in the District Court to a total of 14 charges relating to three distinct episodes of sexual offending. The charges were: six counts of sexual violation by unlawful sexual connection; two counts of assault with intent to commit sexual violation; two counts of indecent assault; two counts

of threatening to kill; one count of burglary; and one count of theft. Mr Tau was sentenced by Lang J in the High Court to a sentence of preventive detention, pursuant to s 87 of the Sentencing Act 2002, with a minimum term of eight years imprisonment.[1]

[2] Mr Tau now appeals against the sentence of preventive detention. He says that two of the applicable criteria, having regard to the mandatory considerations in s 87(4), were not met: that he posed a significant and ongoing risk to the safety of the community (s 87(1)) and that he was likely to commit another qualifying sexual offence (s 87(2)(c)).

[3] In short, he says that the sentence of preventive detention was manifestly excessive.

Factual background

[4] The offending relates to three attacks upon young females in the Auckland region. The first attack took place in June 2007 when the appellant lured the first complainant, then aged 13, into his car by pretending to be seeking directions to a West Auckland location. Once she was in his car, the appellant hit the complainant and then forced her to perform oral sex on him. During the assault the complainant was forced to remove her clothing from her lower body. The appellant kept driving his vehicle throughout and repeatedly threatened the complainant, by telling her he would kill her unless she complied with his demands. The attack ended when the appellant dropped the complainant off at an intersection.

[5] The second attack occurred in November 2008 during the early afternoon. The complainant was 15 years old and wearing her school uniform. She was walking alongside a West Auckland road towards her home address when the appellant approached her in his vehicle. He was tidily dressed, got out of the vehicle carrying a clipboard and explained that he was a school truancy officer and needed to investigate why she was not at school. He requested that the complainant enter his vehicle so that he could take her home, check her school identification and inform

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1 *R v Tau* HC Auckland CRI-2009-090-7995, 23 August 2011 [sentencing remarks].

her parents of where she was. The complainant, who had a legitimate reason for being out of school but was nevertheless convinced of the appellant's authenticity, got into his vehicle.

[6] The appellant then drove the complainant to her home address and demanded that he enter the house. Upon entry he became aggressive and began to hit the complainant around the neck. The complainant fought back, but was overpowered. While she was able to prevent him from pulling down her skirt, he punched her several times. The appellant then pushed the complainant down an internal flight of stairs and forced her to perform oral sex on him. Once this was over the appellant retrieved his wallet, which had fallen out of his pocket during the attack. He also stole the complainant's school bag and its contents, a camera and some DVDs from the complainant's home.

[7] The third attack occurred in July 2009 in Auckland city. The appellant parked his vehicle near a girls' secondary school. The complainant, who was 16, was walking along the road towards her home address after finishing work at a cafe. The appellant whistled at the complainant and she approached him. He asked her if she was a prostitute, to which she said no. When she turned away, the appellant grabbed her and forced her into his vehicle. He told the complainant that if she followed his demands, she would not come to any harm. He threatened that he was capable of killing her and had gang connections.

[8] The appellant then drove to a recreational area and parked the car. He ordered the complainant to get into the back seat and remove her clothing, which she did. The appellant proceeded to inflict various indignities upon the complainant, including digital penetration. He then forced the complainant to perform oral sex on him. When the ordeal was over the appellant drove the complainant back to a central city location.

High Court sentencing

[9] The essential question before Lang J was whether he should sentence the appellant to a lengthy finite sentence or to an indeterminate sentence of preventive

detention. The Judge first undertook the analysis for a finite sentence. In terms of a starting point, the Judge noted that the tariff decision for this kind of sexual offending was *R v AM*[2] and that each attack fell firmly within the second band, indicating a starting point of between seven and 13 years imprisonment. The first attack would warrant a starting point of eight years, while the other two would individually warrant a starting point of ten years.[3]

[10] Taking into account totality, the Judge settled upon a starting point of 16 years imprisonment for all of the offending.[4] While there were no aggravating factors, the only relevant mitigating factor was that the appellant had pleaded guilty to the charges on the morning of the trial. For this the Judge allowed a discount of three years, or around 20 per cent, in line with Crown submissions. This indicated an end sentence of 13 years imprisonment.[5] The Judge also considered that a minimum period of imprisonment of at least seven years would be warranted.[6]

[11] A key issue for determination was whether the appellant was likely to commit another qualifying sexual offence when he was released.[7] The Judge paid particular regard to three reports concerning the appellant prepared by health professionals (two psychologists and a psychiatrist). All three reports concluded that the appellant was at a high risk of serious sexual and/or violent offending in the future, if significant steps were not taken to address his underlying issues.[8] The reports noted that the appellant exhibited a large number of indicators associated with psychopathy which, alongside a tendency towards sexual deviant behaviour, would make it difficult for the appellant to respond properly to treatment and therapy. The Judge found that the appellant presented a high risk of re-offending in the future.[9]

[12] Having reached this conclusion, the Judge considered whether he should exercise his discretion under s 87 to impose a sentence of preventive detention. The following factors were present: the appellant did not accept the full extent of his

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2 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
3 Sentencing remarks at [45].
4 At [47].
5 At [50]–[51].
6 At [54].
7 Sentencing Act 2002, s 87(2)(c).
8 At [60].
9 At [64].

offending; he had in-built personality disorders; and he could adapt easily to institutional environments, making monitoring of his rehabilitative progress difficult.[10] Given these factors, alongside the high risk of recidivism, the Judge decided to impose a sentence of preventive detention with a minimum term of eight years imprisonment.[11]

Submissions

Appellant's submissions

[13] Mr Cooke accepted that the serious nature of the offending warranted a finite sentence of 13 years imprisonment. Further, the appellant could not have objected to a minimum term of imprisonment of up to 66 per cent. But counsel challenged the imposition of preventive detention over a finite sentence. Counsel submitted that the appellant does not meet s 87(2)(c), which refers to the likelihood that the appellant will commit another qualifying sexual offence at the expiry of a sentence.

[14] Mr Cooke submitted that Lang J failed properly to consider the mandatory considerations in s 87(4). With respect to any pattern of serious offending disclosed by the appellant's history,[12] counsel submitted that Lang J placed insufficient weight on the fact that there was no previous history of serious or violent offending. As to the seriousness of harm done to the community,[13] counsel contended that the appellant's offending was not at such a level that the statutory preference for a lengthy determinate sentence should be displaced.

[15] Counsel's main focus was on the issue of whether there was a tendency to commit serious offences in the future.[14] Counsel acknowledged that all three psychological assessments had found that the risk of re-offending by the appellant without treatment was high. However, he submitted that in determining the future risk posed by the appellant, Lang J erred in failing to consider all relevant factors.

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10 At [68]–[70].
11 At [71]–[74].
12 Sentencing Act, s 87(4)(a).
13 Section 87(4)(b).
14 Section 87(4)(c).

[16] The first was the appellant's willingness to engage in treatment, which is evidenced in the psychological assessments. Counsel submitted that the appellant had expressed a genuine desire to engage in any available treatment, as demonstrated by his actions in undertaking a range of counselling programmes on remand. The second factor was that there has been no previous treatment for the causes of the offending, meaning that it was difficult to judge whether the appellant was likely to respond to such intervention. Counsel submitted that Lang J erred in failing to consider the reports' assessment as to the effectiveness of targeted treatment. Counsel also referred to the principle that a lengthy determinate sentence is preferable if it provides adequate protection for society,[15] submitting that Lang J failed to consider the full merits of a finite sentence in this case. In particular, the Judge failed to have regard to the appellant's (advanced) age, as sexual recidivism reduces with age. The imposition of preventive detention in this case was premature.

[17] Counsel also advanced an alternative argument: that the sentence of preventive detention was manifestly excessive. He contended that Lang J failed to take into account s 8(e) of the Sentencing Act: the principle of consistency in sentencing. He submitted that the offending in the current case fell within band 2 of *R v AM*. Counsel made an observation to the effect that preventive detention has rarely, if at all, been imposed in examples of band 2 offending.[16] Counsel further submitted that preventive detention also offended against the totality principle in s 85 of the Sentencing Act.

Respondent's submissions

[18] Ms Jelas submitted that there was no error in imposing a sentence of preventive detention. Counsel noted that the essential issue was whether the appellant is likely to commit another qualifying offence if released at the sentence expiry date. Ms Jelas submitted that Lang J was correct to conclude that the appellant's current offending established a pattern of serious offending and that the offending had a significant impact upon the community.

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15 Section 87(4)(e).

16 We note that this is not the case here: the fact of three band 2 offences squarely placed the offending in totality within band 3.

[19] With respect to the evidence concerning a tendency to commit serious offences in the future, counsel referred to the psychological assessments. The reports all noted the behavioural aspects that make the risk of recidivism high, given the elements of psychopathy in the appellant's character. Counsel accepted that the appellant has not yet received treatment to address the cause of his offending. Counsel noted that two of the medical experts provided assessments critical of the appellant's ability and willingness to respond to such treatment.

[20] Counsel submitted that a lengthy determinate sentence is not preferable in this case as it cannot provide adequate protection for society beyond the expiration of the sentence. Here there was a very clear pattern of serious offending; the victims were all adolescent young women whom the appellant was easily able to overcome. The appellant has also been assessed as having a number of barriers that might preclude him from deriving benefit from therapeutic interventions in prison.

Our evaluation

[21] There is no doubt that this offending is serious. It clearly amounts to a troubling pattern of conduct. The seriousness of the harm to the victims and the community is obvious and not seriously challenged. The key issue in deciding whether to impose a sentence of preventive detention over a finite sentence is whether the information before the Court establishes that the appellant has a tendency to commit serious offences in the future. Section 87(4)(c) of the Sentencing Act requires this factor to be assessed as a mandatory consideration when determining whether to impose preventive detention. Associated with this is the issue of whether therapeutic treatment offered as part of a finite sentence would be adequate to address the reasons for the offending and ameliorate the future risk. This engages with s 87(4)(d): the absence of, or failure of, efforts by the offender to address the cause or causes of his offending. These issues necessitate consideration of the psychological and psychiatric assessments of the appellant.

[22] In the High Court, the Judge properly acknowledged the principle that a lengthy determinate sentence is preferable to the indeterminate sentence of

preventive detention.[17] The Judge then gave his conclusions on the central issue before us. He said:

> [68] Several factors inform the decision [whether to impose preventive detention]. The first of these may be merely a reflection of your psychopathic tendencies, but nevertheless, it is, in my view, extremely important. This is that, notwithstanding your guilty pleas, the interviews that you have had with all three health professionals demonstrate that you have not yet accepted your responsibility for this offending. Much of your comment when asked about the offending was to the effect that other factors were to blame. You have blamed a breakup from, or rejection by, your previous partner. You have laid the blame for your offending on your use of methamphetamine and, to some extent, you appear to have laid some of the blame for it on the victims. The overwhelming impression I have from reading these reports if that you do not accept the full extent of your offending. Unless and until you do so, you will remain, in my view, a great risk to our community.
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> [69] Second, you have the in-built personality disorders to which the health professionals refer. They are going to present as a very real barrier to effecting real and lasting change in you.
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> [70] Third, you have a makeup that permits you to live relatively easily in institutional environments such as the army and, I suspect, prison. The health professionals opine that you are likely to be able to survive reasonably well in prison because of your natural attributes. You may also give the superficial impression that you are undertaking therapy and rehabilitative programmes. The real issue for the health professionals who monitor your progress from now on will be to determine the extent to which these are real or artificial efforts. If there is any hint that they are the latter, you cannot be released.
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> [71] I consider that if a finite sentence of imprisonment was imposed on you there would be a real risk that you would simply serve your sentence until such time as the authorities had no option but to release you. At that point you would be let loose in our community. Your counsel points to the fact that the authorities could apply for an extended supervision order for a lengthy period after your release. He submits that that would be sufficient to guard against the likelihood that you would re-offend in a similar way in the future.
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> [72] I have very real doubts about that because of the deep-seated nature of your problems. I am not sure that any amount of supervision is realistically going to marginalise or remove the risk that you will present to our community unless you are treated in a full and meaningful way whilst in prison.

[23] We have carefully considered the reports of the three health professionals referred to. They amply support the Judge's conclusions, in particular, that Mr Tau failed to accept full responsibility for his offending; that he blamed other people and

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[17] At [66].

events, including the victims themselves, for the offending; and that several factors made therapeutic treatment problematic in this case. For example, the report of the clinical psychologist, Ms Bellve-Wack, deals with the issue of treatment responsivity factors as follows:

> Mr Tau presents with several responsivity barriers that could affect his treatment response negatively. While he states that he will do everything he can to address his offending, his motivation seems at this point driven mainly by his current legal situation. More concerning is that Mr Tau continues to hold beliefs and attitudes that condone his sexual offending and that he does not demonstrate any victim empathy. Rather, he abrogates responsibility by blaming the victims and he acknowledges neither the deceptive behaviours nor the violence he employed in his offending. The fact that he does not even have insight into how these attitudes affect his case, indicates how strong and ego-syntonic his cognitive distortions are.
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> Furthermore, his behaviours in other areas of his life also point to a pervasive pattern of using others. These longstanding patterns indicated a narcissistic personality organization which is difficult to shift via treatment. In addition, sexually deviant fixations as reflected in Mr Tau's offending and behaviour with sex workers also tend to be quite resistant to change.

[24] We also note that in the discussion of whether the appellant had a tendency to commit serious offences in the future, Dr Bellve-Wack concluded that (as the assessments showed) the appellant was at high risk of reoffending and "the combination of sexual deviance, anti-sociality and psychopathic traits is especially concerning".[18] There is no doubt that each element of this combination is difficult to treat and the presence of all three make the task more difficult.

[25] Section 87(1) of the Sentencing Act provides that the purpose of a sentence of preventive detention is to protect the community from those who pose a significant risk to the safety of its members. We are satisfied from the expert evidence that the appellant does pose such a risk to the community. We consider that the Judge properly weighed all of the applicable mandatory criteria in s 87(4)(a) to (e) when determining whether to impose a sentence of imprisonment.

[26] Before us Mr Cooke submitted that a sentence of preventive detention would be "crushing".[19] We disagree. Rather, such a sentence will provide a strong

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[18] Report of Renate Bellve-Wack, 24 May 2011 at 17.

[19] Citing a decision of this Court in *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627.

incentive on the appellant to undergo the treatment the health professionals say he needs. We agree with the following observations of Lang J:

> [73] You need to understand that the only way in which you will be released is if you co-operate fully in the rehabilitative and therapeutic interventions that are going to be offered to you in prison. Unless you engage in that way with the prison health authorities, you must understand that it is likely that they are likely to regard it as too dangerous to our community to release you in the foreseeable future. You need, in my view, to have the incentive to engage properly with the health authorities in order to demonstrate that you are a fit and proper person to be released back into our community. These factors persuade me that only one possible outcome is available in the present case and that is a sentence of preventive detention.

Result

[27] The appellant has shown no error in the sentencing approach or the sentence imposed. The appeal must be dismissed.

Solicitors:
Crown Law Office, Wellington for Appellant