



11 October 2019 to 11 years and three months' imprisonment.<sup>1</sup> He now appeals his sentence.

## **Background**

[2] At the commencement of his trial, Mr Wihongi faced the following charges:

- (a) five counts of rape;
- (b) 12 charges of sexual connection with a person under 16 years of age (in the alternative to the rape charges); and
- (c) three counts of supplying cannabis.

[3] After the first complainant gave her evidence in chief, Mr Wihongi and the Crown reached an agreement which resulted in Mr Wihongi pleading guilty to:

- (a) one charge of rape;
- (b) ten charges of sexual connection with a person under 16 years of age; and
- (c) one charge of indecent assault.

[4] The summary of facts to which Mr Wihongi pleaded guilty did not change in any material way in relation to the sexual offences to which he pleaded guilty. Following his sentencing hearing, Mr Wihongi appealed both his convictions and sentence. His appeal against his convictions was abandoned earlier this year.

[5] The offences to which Mr Wihongi pleaded guilty took place between 2009 and 2011. At the time, Mr Wihongi was between 22 to 24 years of age. He was 31 years old when he was sentenced.

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<sup>1</sup> *R v Wihongi* [2019] NZDC 20321.

[6] Mr Wihongi's offending came to light in 2017 when one of the complainants, whom we shall refer to as P, informed the police of a number of sexual offences committed against her by Mr Wihongi. The police investigations led to a number of other victims coming forward who gave similar accounts of being subjected to sexual abuse by Mr Wihongi when they were young teenagers.

[7] The victim impact statements included in the case on appeal reveal Mr Wihongi's actions had a profound emotional and physical impact on the victims. Two of the victims acquired an STD from Mr Wihongi and his actions caused them deep emotional trauma.

[8] We will refer to the complainant in the rape charge to which Mr Wihongi pleaded guilty as A. At the time of the offence she was 15 years of age. A went to Mr Wihongi's flat where she consumed a large quantity of alcohol. She told Mr Wihongi she needed to sleep. When she woke up, she found she was naked from the waist down and Mr Wihongi was having intercourse with her. She told him to stop, but he persisted even when she turned her head and vomited. When Mr Wihongi finished, he went into the lounge and was heard to gloat "any hole's a goal".

[9] The charges of sexual connection with a person under 16 concerned complaints made by P, D, A-L and A-Z. They all involved very similar offending.

[10] P was aged 14 to 15 at the time of the offending against her. Mr Wihongi started offending against P by supplying her with vodka in his flat. She became seriously intoxicated and vomited. While she was lying on a bed Mr Wihongi engaged in sexual intercourse with her.

[11] D was 13 when Mr Wihongi offended against her. She went to Mr Wihongi's flat expecting other people to be there. She became concerned when she found no one else was present. Mr Wihongi forced D to perform oral sex on him.

[12] A-L was 14 when she ran away from home and went to Mr Wihongi's flat. There he supplied her with alcohol and cannabis. While A-L was in a very intoxicated state Mr Wihongi performed oral sex and engaged in sexual intercourse with her.

[13] A-Z was about 15 when Mr Wihongi offended against her. He invited her to his flat where he forced her head onto his penis. This gave rise to the charge of indecent assault to which Mr Wihongi pleaded guilty.

### **Sentencing decision**

[14] Judge Harvey identified the rape of A as the lead offence and adopted a starting point of eight years' imprisonment in relation to that charge.

[15] The Judge adopted a starting point of six years' imprisonment for the remaining charges to which Mr Wihongi had pleaded guilty. This produced an overall starting point of 14 years' imprisonment.

[16] The deductions made from the overall starting point were:

- (a) five per cent to reflect Mr Wihongi's personal circumstances and that at the time he was going through a period of his life that was "effectively a storm";
- (b) ten per cent in recognition of Mr Wihongi's guilty pleas; and
- (c) five per cent in recognition of the totality principle.

[17] This produced the end sentence of 11 years and three months' imprisonment, which was imposed in relation to the rape conviction. The convictions for sexual connection each attracted concurrent sentences of four years' imprisonment. The indecent assault conviction was dealt with by a three-year concurrent sentence of imprisonment.

### **Grounds of appeal**

[18] Mr Brickell, counsel for Mr Wihongi in this Court, challenged the overall starting point of 14 years' imprisonment. He accepted the starting point of eight years' imprisonment for the rape of A was within the range that was available, having regard

to the criteria set out by this Court in *R v AM*.<sup>2</sup> It appears to be common ground that Mr Wihongi's offending fell within band two of *R v AM*, thereby attracting a starting point of between seven and 13 years' imprisonment.

[19] Mr Brickell also accepted that if Mr Wihongi was sentenced only in relation to the charges of sexual connection with a person under 16 years and the indecent assault charge, then a starting point of between five and a half to six years' imprisonment would have been appropriate.

[20] Mr Brickell's submission in relation to the starting point was that by combining the two starting points, Judge Harvey ended up with an overall starting position that was grossly excessive.

[21] Mr Brickell also challenged the appropriateness of the discounts applied by Judge Harvey. He submitted:

- (a) The discount of five per cent to account for Mr Wihongi's personal circumstances was too low and that a discount of ten per cent would have been more appropriate.
- (b) A discount of five per cent should have been made to reflect the restrictive bail conditions imposed on Mr Wihongi before trial.

[22] Mr Brickell accepted that the ten per cent discount for Mr Wihongi's guilty pleas was appropriate. Thus, Mr Brickell argued for deductions of 25 per cent. We shall first examine the starting point and then the deductions.

### **Starting point**

[23] Current sentencing methodologies can present challenges for Judges in cases where there are multiple victims. Judges must recognise the harm done to all victims, but at the same time produce an end sentence that fairly reflects the totality of the defendant's offending and all mitigating factors.

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

[24] We think the Judge was correct to treat the rape of A as the lead offence for sentencing purposes and to adopt a starting point of eight years' imprisonment for that offence.

[25] Mr Wihongi took advantage of a particularly vulnerable young woman, who was effectively comatose at the time he removed her lower clothing and started to have intercourse with her. When A realised what was happening, she immediately told Mr Wihongi to stop what he was doing. He persisted and took advantage of A's vulnerability by continuing to have intercourse with her, even while she was vomiting. Mr Wihongi's degrading comment after he had finished having sex with A reflected his appalling attitude towards his victim.

[26] The age and vulnerability of A, and the particularly abusive nature of Mr Wihongi's offending warranted an eight-year starting point.

[27] Also within range was the starting point of six years' imprisonment adopted by the Judge in relation to the ten convictions for sexual connection with a person under 16 and the indecent assault.

[28] The ten incidents of underaged sex and the indecent assault to which Mr Wihongi pleaded guilty had the following common features:

- (a) The victims were young teenage girls.
- (b) The age disparity between Mr Wihongi and his victims was between eight to ten years. This was significant in the circumstances of this case as one of the victims was 13 years old, while Mr Wihongi was 22 to 24 years of age.
- (c) Mr Wihongi met most of the victims through his younger brother, who was a friend of many of them. Mr Wihongi was caring for his younger brother and was a father figure to him. Mr Wihongi was in a position of trust not only in relation to his brother, but also his brother's friends

who visited Mr Wihongi's flat. Those friends included most of the victims.

- (d) Mr Wihongi nurtured his association with many of the victims. He obtained the cellphone numbers of some victims and invited them to his flat.
- (e) The victims were highly vulnerable, having consumed heavily intoxicating quantities of vodka and wine. In many cases the alcohol was supplied by Mr Wihongi. Mr Wihongi also supplied one of his victims with cannabis.
- (f) Mr Wihongi took advantage of his victims when they had been rendered almost unconscious and unable to prevent him from removing their clothing and engaging in intercourse and other sexual acts.

[29] We also think Mr Wihongi's mode of offending demonstrated a degree of planning and determination to take advantage of young women whom he invited into his flat and who consumed debilitating quantities of alcohol. Mr Wihongi's conduct was highly predatory.

[30] Mr Brickell accepted that a starting point of three and a half to four years' imprisonment would have been appropriate for the offending against P. That was an appropriate acknowledgement in light of the starting points of three and a half to four years approved by this Court in *R v H*,<sup>3</sup> *R v Johnson*<sup>4</sup> and *R v A*.<sup>5</sup> Those cases involved similar offending to the present case.

[31] The Judge was also correct when he recognised that there were five victims involved in this tranche of offending. The number of victims justified a meaningful uplift to the starting point. A starting point of six years for the underaged sex and indecent assault charges was therefore entirely appropriate.<sup>6</sup>

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<sup>3</sup> *R v H (CA94/08)* [2008] NZCA 237.

<sup>4</sup> *R v Johnson* [2010] NZCA 168.

<sup>5</sup> *R v A* [2007] NZCA 448.

<sup>6</sup> See *R v Upchurch* HC Wellington CRI-2007-032-2301, 19 October 2007, where a starting point of six and a half years' imprisonment was imposed for sexual offending against five victims.

[32] The gravamen of Mr Brickell's complaint about the combined overall starting point was that it needed to be adjusted downwards to about 12 years, to reflect the totality of Mr Wihongi's offending.

[33] The Judge explained that he bore the principle of totality in mind when he:

- (a) decided not to impose a cumulative sentence for the indecent assault conviction which, he said, might otherwise have been merited; and
- (b) deducted eight months from what would otherwise have been an end sentence of 11 years and 11 month's imprisonment.

[34] We have carefully assessed whether or not 14 years' imprisonment was an appropriate overall starting point for sexual offending that involved the rape of one victim and very serious sexual offending against four other vulnerable young victims, as well as a serious indecent assault.

[35] While 14 years' imprisonment may be the upper limit of the range that was an appropriate overall starting point, we are satisfied that it was not excessive.

### **Personal mitigating factors**

[36] The Judge deducted five per cent or nine months' imprisonment from the 14-year starting point to reflect a combination of factors relating to Mr Wihongi's age, the turmoil in his life, psychological circumstances and the absence of previous relevant convictions. Mr Brickell takes issue with the size of the deduction made in relation to these factors.

#### *Age*

[37] As we have previously noted, Mr Wihongi was between 22 and 24 years of age at the time of his offending. A Community Mental Health nurse described him as "emotionally immature".



[38] We accept that many men aged 22 to 24 may be immature and that some men in this age group do not develop the ability to resist impulse and peer pressure until their mid-20s or older.<sup>7</sup>

[39] Balanced against that contention, however, are two important considerations:

- (a) As Ms Wong for the Crown explained, Mr Wihongi used his position as a father figure to his brother to facilitate his connections to most of the victims. He used his comparative maturity to lay the foundation for his offending.
- (b) Mr Wihongi's offending bore the hallmarks of having been planned. He befriended many of the victims and subdued a number of them with significant quantities of alcohol in order to take advantage of their vulnerability. He was not a man who was acting impulsively or in response to peer pressure.

#### *Mental health*

[40] Two reports prepared for the purposes of s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 were before the Court. Mr Brickell also placed considerable weight on a psychological report prepared by Ms Isaacson, for the purposes of Mr Wihongi's sentencing hearing.

[41] Ms Isaacson's report explained in some detail Mr Wihongi's troubled upbringing. His parents separated when he was an infant. Mr Wihongi suffered from bullying and learning difficulties at school and he was the victim of physical abuse from his stepfather. He left home at 15 to escape the beatings he received from his stepfather. Mr Wihongi suffered a back injury in 2007, which led to him becoming dependent on opioid pain relief, cannabis and alcohol. In 2009, he became responsible for the care of his younger brother after their mother went to look after her ailing mother in Auckland. Mr Wihongi also suffered from suicidal ideation as a child and endeavoured to take his own life in 2015.

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<sup>7</sup> *Woodstock v R* [2020] NZCA 472 at [32].

[42] Ms Isaacson explained that Mr Wihongi's symptoms of anxiety and depression were consistent with his medical history. She opined that Mr Wihongi's offending was "fuelled by underlying low self-esteem and personal distress" and that his "pathway to sexual offending was one of intimacy deficit and lack of emotional regulation rather than sexual deviance".

[43] We have difficulty in accepting there is a connection between Mr Wihongi's psychological issues and his grave sexual offending. When committing the offences Mr Wihongi behaved in a way that was the antithesis of a person seeking to make up for intimacy deficits in his life. Mr Wihongi sexually abused nearly comatose young girls, who were incapable of providing any intimacy or emotional response.

*Previous good character and prospects for rehabilitation*

[44] Mr Wihongi has no relevant previous convictions and the sentence he appeals is the first prison sentence imposed upon him.

[45] It is accepted that being sentenced to a long period of imprisonment at this stage of his life will have a severe impact on Mr Wihongi and his ability to support his family, which now includes a young son. The report from Ms Isaacson also advises that there is nothing to suggest Mr Wihongi is likely to offend in a similar way again. The Judge did not refer to rehabilitative prospects, but we accept that Mr Wihongi appears to have reasonable prospects for rehabilitation and reintegration into the community.

[46] For the reasons we have explained at [37] to [43], we do not think that any weight can be placed on Mr Wihongi's age or his psychological difficulties at the time he offended. We do, however, place weight on his previous good character and prospects for rehabilitation, particularly as he did not offend between 2012 and 2017.

[47] While the five per cent discount given to reflect Mr Wihongi's personal circumstances was not generous, it could not be described as unreasonable or an error in the sentencing process. Accordingly, we will not make adjustments to this sentence on these grounds.

### **Restrictive bail**

[48] No reference was made in the sentencing decision to Mr Wihongi's bail conditions prior to his conviction and sentencing.

[49] Mr Wihongi spent a significant period of time on bail with a 24-hour curfew. Bail was granted on 18 September 2017, but amended the following month to enable him to undertake part-time work. Further amendments were made in July 2018 to enable him to leave his home accompanied by approved persons.

[50] We are satisfied that had Mr Wihongi's comparatively restrictive bail conditions being emphasised to the Judge, he is likely to have exercised his discretion in favour of granting a discount to reflect time on bail. A discount of five per cent would, in the circumstances of this case, been appropriate.

### **Guilty pleas**

[51] Mr Wihongi received a discount of ten per cent to reflect the guilty pleas he entered before any of the complainants were required to be cross-examined. The Crown has described this as a generous discount. We think it was within the range that was appropriate in the circumstances of this case, particularly as Mr Wihongi's guilty pleas circumvented the need for vulnerable young complainants to give evidence in circumstances which would undoubtedly have been very distressing for them.

### **Overall assessment**

[52] Adopting the overall starting point of 14 years' imprisonment, we think the appropriate deductions would have been in the vicinity of 20 per cent. This would have produced an end sentence of 11 years and two months' imprisonment which, in our assessment would have been at the upper range of an appropriate end sentence that reflected Mr Wihongi's total offending and the mitigating factors that can properly be considered in this case.

[53] It is not our role to make minor adjustments to sentences imposed in the courts below. We should only allow a sentence of appeal in cases such as the present where the end sentence was manifestly excessive.

[54] The sentence imposed by the Judge, whilst high, was not manifestly excessive. Accordingly, we shall not change the sentence.

### **Result**

[55] The appeal against sentence is dismissed.

Solicitors:  
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