

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

**CRI 2007-019-9642**

**THE QUEEN**

v

**DAVID ALAN MALONE**

Hearing: 30 October 2009

Counsel: J Foster for the Crown  
T Sutcliffe for the Prisoner

Judgment: 30 October 2009

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**SENTENCE OF POTTER J**

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Solicitors: Crown Solicitor, P O Box 19173, Hamilton 3244

Copy to: T Sutcliffe, P O Box 19021, Hamilton 4322

## **Introduction**

[1] David Alan Malone is before the Court for sentencing in relation to a continuum of serious criminal offending between August 2007 and July 2008. During that period he committed no less than twenty crimes against thirteen victims, two of which were banks and eleven of whom were individuals, most of them young people.

[2] The crimes for which Mr Malone must be sentenced include four charges of rape, three of threatening to kill, six of blackmail, two of arson, one of aggravated robbery, one of being an accessory after the fact to aggravated robbery and three of threats to property. These offences carry maximum penalties ranging from three years' imprisonment for the offence of threat to property to twenty years' imprisonment for rape. The offences of arson, aggravated robbery and blackmail all carry a maximum penalty of fourteen years imprisonment. The seriousness of the offences Mr Malone has committed is demonstrated by the maximum penalties Parliament has seen fit to prescribe by legislation.

[3] Mr Malone entered guilty pleas to the charges on 6 March 2009 (three charges on indictment) and 10 March 2009 (seventeen charges). Following the guilty pleas the matters did not proceed to trial, saving for the many victims the trauma of giving evidence which would have been additional to the significant anguish they have suffered as a consequence of the prisoner's offending.

## **Background facts**

[4] It is necessary for me to summarise the factual background to this offending. This will unavoidably be a lengthy process because of the number and range of the offences involved. The prisoner entered his guilty pleas on the basis of a summary of facts which he has accepted. I shall now endeavour to summarise the essential facts.

[5] I commence by repeating the summary which precedes the detailed facts relating to the specific offences.

[6] Over the twelve month period July 2007 through to July 2008 the prisoner was the architect and primary facilitator of extensive criminal offending targeting primarily vulnerable young people.

[7] Essentially the offending involved the prisoner gaining control over certain individuals through the use of various forms of intimidation. Generally the prisoner utilised a stratagem whereby he was able to convince his victims that gang organisations such as the Mongrel Mob or the Black Power were targeting them and that their lives or the lives of those close to them were in danger.

[8] The victims were generally known to the prisoner. He would deliberately target them by forwarding anonymously via cellular telephone, text message threats including personal information relation to the victims. In that way the threats generated a belief in the victims that either they or a member of their family were being targeted.

[9] On occasions the prisoner took further measures to enforce the threats including staging crime scenes utilising gang colours and portraying to the victims that he himself was being subjected to similar threats. On occasions the prisoner utilised co-offenders to engage in behaviour such as role play designed to convince the victims that the threats were real.

[10] Throughout the course of his criminal offending the prisoner operated several cellular telephones at any one time. He was able to send messages from one cellular telephone purporting to be an unidentified gang member while simultaneously sending independent messages from another cellular telephone portraying himself as a victim of similar offending in order to convince the victims the threats were real or offering his assistance to the victims.

[11] As a result the prisoner's victims viewed him as a friend who was attempting to assist them. He was a person in whom they placed a significant level of trust.

[12] During the period of offending a common enterprise was formed during the course of which aggravated robberies were carried out on two banks and a house was the subject of two arsons. The prisoner's co-offenders explained that those acts were performed because of an overriding threat from a criminal gang. In reality the source of those threats was the prisoner himself.

#### 1. **Offending against T, A and R**

[13] In July 2007 the prisoner was living at a Hamilton address with three others including a daughter of the owners of the property who were the landlords. A younger daughter of the landlords, T, began visiting the address. The prisoner befriended T over a period of about a month. Towards the end of the month T received a series of threatening text messages on her cellphone from a cellphone number she did not know or recognise. The messages were threatening including statements such as "we can see you, we are watching you" and "you are a pretty little thing, we are going to make you my bitch".

[14] The prisoner arranged for his associate to contact the victim and ask her to come to the address. She did so and confided in the prisoner and his associate about receiving the messages. They told her they had gang connections, that the Mongrel Mob were after her and that she should stay at the address that night. They convinced her that the only safe place was a small room in the basement which is surrounded by concrete. The prisoner explained to T that he was concerned she would attempt to run away if she heard gunshot fire, which would place her in more danger. To avoid that risk they tied T's hands behind her back with rope and tied her feet together. They placed duct tape across her mouth, tied a red bandana around her face and pulled her hoodie over her head. They locked her in the small room and turned the lights off.

[15] Shortly afterwards they set up sounds of commotion outside the room to convince the victim the threats were real. One of the men entered the room while it was dark. T felt her legs being grabbed at before the person left the room and slammed the door. Further noise of banging was made outside the room. The prisoner's associate then entered the room and advised T that he and the prisoner had

fought off the people that had come to kidnap her but they had received a text message from a gang member containing an order that T be raped. They told her if she did not comply she would be shot by gang members. The prisoner pinned T down on the mattress in the room. He then told the associate to leave the room. Against T's pleas and struggling to resist, he had sexual intercourse with her. The prisoner then got up, dressed himself and left the room.

[16] After an interval the prisoner returned to the room and advised that the gang were not content with her being raped once and had ordered that she should remain tied up in the room for several days. Her hands and feet were again bound and she was told that one of the prisoner and his associate would remain on guard outside the room. Over the next few days T was allowed to leave the room for short periods accompanied always by the prisoner or his associate.

[17] Ultimately she was given her freedom but remained under the instructions of the prisoner and shortly afterwards was involved as an offender in the robbery of the ANZ Bank at Te Rapa on 24 September 2007 which gives rise to the charge of aggravated robbery against the prisoner.

[18] On 23 September 2007, one day before the aggravated robbery, the prisoner became unhappy with T and, with his associate, decided to set fire to T's family home in Hamilton to "teach her a lesson".

[19] The prisoner undertook a number of preparations including assembling a Molotov cocktail. He gave his associate instructions on lighting the wick and throwing the bottle at the door so that it smashed and ignited the surrounding area. These instructions the associate carried out at 10.20 p.m. that night.

[20] When the prisoner saw the flames and smoke he telephoned emergency services and reported the fire to New Zealand Fire Services. Three fire units attended the fire and extinguished the flames. There was extensive damage to the doorway and entrance area of the house. A small fire also began in the basement caused by petrol leaking from the Molotov cocktail. Further damage was caused to property in the basement.

[21] On 28 October 2007, the prisoner was given a written eviction notice from the property he tenanted, by the landlords.

[22] That afternoon another daughter of the landlords began to receive threatening text messages from an unknown person.

[23] The next day the prisoner and an associate set up a burglary scene with gang overtones within the dwelling they occupied. The prisoner then rang the Police and reported the crime. When later arrested, he told Police that he had set up the burglary scene to intimidate and scare T, the victim of the earlier rape.

[24] On 31 October 2007 the prisoner and an associate while in the process of vacating the address, ignited a fire to a small amount of wallpaper piled on the floor in a wardrobe of one of the bedrooms. Simultaneously a text message was sent to one of the landlords from the prisoner's associate's telephone advising that someone had "tried to burn down the house". She found the prisoner and his associate in the house packing up their property. They provided no explanation for the fire. The prisoner admitted he was present when his associate lit the fire and acknowledged that the text message had been sent to the landlord. He said he had made no attempt to put the fire out.

[25] These facts are the basis for charges of sexual violation by rape of T, doing a threatening act to property and two charges of arson.

## **2. Offending against ANZ Bank and Kiwi Bank**

[26] Prior to 24 September 2007 the prisoner and his associate discussed how to obtain a large sum of money. An improvised explosive device was prepared. The prisoner drove around several of the banks in the Te Rapa area examining features such as security, traffic flow and door types in order to locate the most suitable bank to rob. Shortly after 1.30 p.m. on Monday 24 September 2007 the prisoner's associate and the victim T travelled to the ANZ Bank in Te Rapa in a Nissan Skyline vehicle which had stolen number plates. T placed the explosive device housed in a

Pulp shoe box on a counter inside the bank. She handed the teller a note which stated:

I'm a hostage, give over \$50,000 or in that shoebox is a bomb that they'll blow it, don't think of hitting that silent alarm or nothing.

[27] The teller handed over \$3,390 in cash. T then joined the associate in the Nissan motor vehicle and they returned home where the prisoner had been listening to the Police scanner radio and advising the associate via text communication of the best route to avoid Police cordons. The prisoner assisted in counting the money obtained from the bank.

[28] The very next day 25 September 2007, at 3.15 p.m, the prisoner's associate entered the Kiwi Bank premises at The Base shopping centre in Hamilton. He handed a note to the teller demanding \$20,000. The note stated:

I got bomb at door, you pull the alarm it goes off got it in bag and now.

[29] The teller handed the prisoner's associate \$1,740 in notes. Again the prisoner was at home listening to the Police scanner radio and directing the associate away from Police cordons as he left the scene of the robbery. Again the prisoner assisted with counting the money obtained from Kiwi Bank. He assisted with hiding the money in the ceiling of the house before disposing of it at a later date.

[30] These facts are the basis for the charges of aggravated robbery and being an accessory after the fact.

### **3. Offending against P and C**

[31] Between 15 October and 5 November 2007 the prisoner sent the victim P a series of text messages portraying himself as a member of the Black Power gang. Between 5 November and 13 November 2007 the prisoner sent the victim C a series of similar text messages. The messages were sent from a telephone number unknown to the victims. The messages stated that the victims had to have sexual intercourse with the prisoner and if they failed to comply, they would be gang raped and killed.

[32] Contemporaneously the prisoner contacted P by text messages from a cellphone number she identified as his. She was an acquaintance of the prisoner. The prisoner acted as a friend and advised P that he could help her and C. A meeting was arranged in which the three discussed the gang related threats which P and C had been receiving and which they believed the prisoner was also receiving. The prisoner advised them that the only way they could save themselves and others was to do as the gang requested and have sex with him. He told them not to go to the Police as they were being watched by the gang.

[33] P, fearing for her life and the lives of her family reluctantly met his demands. On 5 November 2007 the prisoner drove her to a dark unlit public area in Hamilton where against her will he had sexual intercourse with her. About an hour later the prisoner sent P a text message purporting to be from the gang and advised her that her name had been cleared and she was free to go.

[34] C refused to do as the threats demanded and turned her telephone off. On 12 November 2007 the prisoner and some associates went to C's address and advised her that the threats from the gang were not real and were made from some associates of his.

[35] These facts are the basis for charges of threatening to kill, rape of P and blackmail of C.

#### **4. Offending against G**

[36] In early May 2008 the prisoner had a chance meeting with G and they exchanged cellphone numbers. The prisoner then sent G several text messages implying that he would like a relationship with her. She responded that she was not interested and he should not contact her any more.

[37] About a week later the prisoner commenced a further series of text messages to G from a cellphone number unknown to G. He purported to be a member of a criminal gang. The content of the messages required sexual intercourse with the prisoner and ultimately threatened that failure to comply with the instructions would



ensure that the gang would find G, break into her house, rape her and burn her house down.

[38] G and a supporter confronted the prisoner about these text messages. He denied any involvement with them.

[39] These facts are the basis for a charge of blackmail in relation to G.

## 5. **Offending against H**

[40] The prisoner and H had become acquainted in 2006 but there had been no communication between them for about two years. In May 2008 the prisoner re-contacted H seeking to re-establish their previous relationship. At the same time intimidation against H started. The car he was using was subjected to extensive intentional damage and he was advised there had been a hit put out on him by a gang.

[41] An associate of both the prisoner and H made an accusation of theft against H. The prisoner subsequently approached H and offered the assistance of his associates to find out who was responsible for the damage to his vehicle and the intimidation. The prisoner said he was an associate of the Mongrel Mob and they could help H. Subsequently H received text messages from a cellphone unknown to H, from the prisoner purporting to be "G dog". The prisoner informed H that the assistance offered was going to cost \$2,000 in cash. The threatening text messages escalated saying that the \$2,000 debt had already been incurred and must be paid. The prisoner obtained H's telephone as security until the money was paid, and H was told he would get hurt along with the other people who lived at his house. The threats resulted in H sourcing \$2,000 and making cash payments to the prisoner.

[42] After the money was paid the prisoner sent a text message to H stating that the "hit" had not been cleared and that it would take a day for that to occur. He arranged a meeting between H and gang members in a public place to facilitate the return of H's telephone. The prisoner arranged for an associate to dress up as a Black Power gang member and intimidate the victim at the meeting. The prisoner

again contacted the victim and advised him that the Mongrel Mob was now owed \$10,000. He was threatened that both he and his family would get hurt if he did not pay the money. H did not reply to the text messages and did not see the prisoner again.

[43] These facts are the basis for two charges of blackmail of H.

#### **6. Offending against N**

[44] The prisoner did not know N. He obtained her contact telephone details from the list of contacts within H's cellphone which the prisoner had earlier obtained. Between 1 June and 16 July 2008 the prisoner sent N a series of text messages portraying himself as a member of the Black Power gang. He threatened to burn N's motor vehicle and subsequently implied that she also would be burnt.

[45] These facts give rise to a charge of threat to property in relation to N.

#### **7. Offending against F**

[46] As in the case of the victim N, the prisoner obtained the telephone number for F from the victim H's telephone. The prisoner was unknown to F. Initially the prisoner sent F a series of text messages implying that he would like to have a relationship with her. She responded that she was not interested. Between 20 June and 26 June 2008 the prisoner sent F a series of text messages portraying himself as a member of the Black Power gang. These messages were sent from a telephone number unknown to the victim. The text messages represented to F that her friend, the victim H, was being held captive against his will by the Mongrel Mob gang. They advised F that she had to have sexual intercourse with the prisoner to obtain information that would help her release H from captivity. The messages threatened that if she failed to comply with the instructions both she and H would be killed. She believed that the lives of herself and H were in danger if she did not comply with the instructions or if she went to the Police.

[47] She agreed to travel from Tauranga to Hamilton with a friend to meet up with the prisoner to have sexual intercourse with him. She met him and some associates outside his parents' address. He took her to a garage at his parents' home which was used as a bedroom. He told her that he would protect her and could help her and H get out of trouble. F advised the prisoner that she did not want to have sex and she was only doing it because she had to. The prisoner proceeded to have sexual intercourse with her.

[48] When spoken to by the Police in August 2008, the prisoner admitted sending the messages to F and having sexual intercourse with her. He said that he and his associates had planned to video the sexual intercourse and had intended to use it for commercial purposes.

[49] These facts are the basis for charges of threatening to kill, blackmail and rape in relation to F.

## **8. Offending against Y**

[50] Y was known to the prisoner through his former partner. Between 13 July and 15 July 2008 the prisoner sent Y a series of text messages in which he purported to be "G dog", a member of a criminal gang. The messages were sent from a telephone number unknown to Y. The messages comprised a series of threats to the safety of Y and members of her immediate family if she did not comply with the gang requests. She was given an ultimatum that she was to have sex with a gang member and his associates or provide a replacement to complete the sexual acts, or she was to pay the gang \$3,000. The victim, Y, believed her life was in danger if she did not comply with the demands.

[51] At approximately 1.30 a.m. on 15 July 2008 Y walked to the prisoner's parents' home address where she met him as arranged. They went into the bedroom in the garage of his parents' home. They discussed the circumstances surrounding the threats and as they did, text messages were sent and received. The prisoner told Y that as the other gang members had not shown up she would need to have sex with him instead. She refused, to which the prisoner responded that if she did not have

sexual intercourse with him her decision would be reported to the gang. She believed she would be killed if she did not comply.

[52] The prisoner directed Y into various poses and using his cellular telephone took a series of photographs of her both clothed and semi-naked. He then had sexual intercourse with her, following which he told her not to contact the Police and directed her to walk home. Y later received a message from the prisoner portraying himself as “G dog”. She was advised that if she went to the Police she would be killed. She was also instructed to contact the prisoner’s former partner and that person’s brother and to advise them that she had been violently raped by several gang members.

[53] These facts are the basis for charges of threatening to kill, blackmail and rape in relation to Y.

#### **9. Offending against M**

[54] M is the brother of the prisoner’s former partner and the person the prisoner directed Y to contact to advise she had been raped by gang members. On 8 July 2008 a vehicle belonging to M was set alight while it was parked in the driveway of his home address. The fire was extinguished and caused minor damage. Between 13 and 14 July 2008 the prisoner sent approximately 55 text messages to M which were intimidating and threatening. They referred to the fire in M’s vehicle and made threats to set fire to his home. At about 11.55 p.m. on 13 July 2008 a brick was thrown through the window of the house of M’s parents. At about 1.03 a.m. on 14 July 2008 M received a text message referring directly to the damage to his parents’ house. These were followed by several more threatening messages the following day.

[55] On 15 July 2008 at about 7 p.m. M’s vehicle was again set alight in the boot area while the vehicle was parked in the driveway of his home address. The fire brigade and Police were called and the fire was extinguished.

[56] Approximately 15 minutes after the fire was extinguished M received a further threatening message referring to the fire in his vehicle.

[57] These facts are the basis for a charge of threat to property in relation to M.

### **Victim impact statements**

[58] I have received and read statements from eight of the prisoner's victims. Predictably they make harrowing reading. I do not propose to add to the anguish of the victims by referring in any detail to these statements. Suffice to say they vividly portray the deep fear, stress and worry the victims have suffered. The people who were the prisoner's landlords speak of their family being affected for life by the prisoner's offending and the way he went about it. The prisoner was known to them and had visited their home on many occasions with their daughters' friends. While not excusing their daughter T's criminal conduct, they hold the prisoner responsible for her ending up in gaol because of her involvement in the aggravated robbery of the ANZ Bank under the instructions of the prisoner.

[59] The damage to the victims has been physical, emotional and psychological. Some have been severely depressed to the point of attempting to commit suicide. For some the negative effects will be deep seated and enduring.

### **Pre-sentence report**

[60] Three reports have been prepared in respect of the prisoner: a full pre-sentence report and reports from a psychologist and psychiatrist. The latter two reports were obtained to assist the Court in considering a sentence of preventive detention. I shall refer to them later in that context. I now refer to the pre-sentence report.

[61] This report prepared in May of this year refers to Mr Malone's age, now 26 years. To his upbringing which he described as "standard" in a Christian home with "good parents". He disclosed no physical or psychological abuse. He first moved

out from home at aged 16 years but returned subsequently. He has had intermittent employment.

[62] He reported depression which he claimed was mainly the result of the way his former partner with whom he had a relationship for three years, treated him. The report states that Mr Malone lays much of the blame for his offending at the feet of his former partner, claiming that she would use emotional blackmail on him whenever he tried to leave her.

[63] Mr Malone has strong support from his parents and his current partner with whom he says he has been in a relationship since April 2008, although he has been on custodial remand since July 2008. Apparently his mother and his partner regularly visit and contact him in prison. Mr Malone's father has written a letter in which he describes the prisoner's offending to be "way out of character for him and undoubtedly a result of poor choices and friendships and some apparent misuse of drugs". He says he will stand behind his son as he works to get his life back on track.

[64] The pre-sentence report states that Mr Malone shifts blame for his offending to fall squarely on the unhappy relationship with his former partner, stomach problems for which he had stopped taking medication and drug use - cannabis and methamphetamine - which he said prevented him from thinking clearly. He expressed sorrow to the report-writer for his offending, remarking:

It was very stupid, all of it ... I can't believe it, I can't believe I did all that.  
I've hurt my family, my victims ... the list goes on.

[65] The report-writer notes the conflicting attitudes of the prisoner towards his offending, on the one hand saying how sorry he is for it, and on the other denying some of it and shifting blame regarding the rest.

[66] In this context I note the advice of Mr Sutcliffe, counsel for the prisoner, to the Court, that the prisoner has now full appreciation and total acceptance of his involvement in the offending, notwithstanding late indications that he might seek to withdraw some of his guilty pleas. This Mr Sutcliffe advises, was the result of

confusion as to his culpability for some of the criminal acts, but following clear legal advice, that is now accepted by the prisoner.

### **Purposes and principles of sentencing**

[67] Counsel have helpfully referred to the purposes and principles of sentencing in ss 7 and 8 of the Sentencing Act and are essentially on common ground.

[68] The relevant purposes for sentencing in this case are to hold the prisoner accountable for the harm done to the victims and the community by his offending; to promote in him a sense of responsibility for and acknowledgment of that harm; to provide for the interests of the victims of the offending (as far as that is possible in sentencing); to denounce the conduct of the prisoner; to deter him and others from committing the same or similar offences; to protect the community from the prisoner and to assist in his rehabilitation.

[69] I must take into account the gravity of the offending in this particular case and the degree of culpability of the prisoner, the seriousness of the type of offences for which the prisoner is to be sentenced in comparison with other types of offences, the desirability of consistency in sentencing, information concerning the victims and the requirement to impose the least restrictive outcome that is appropriate in the circumstances having regard to the hierarchy of sentences in the Sentencing Act.

### **Aggravating factors**

[70] The Crown submits, and I accept, that the following aggravating features are present in this case in relation to the offending viewed overall:

- (i) The offending involved both actual and threatened violence: s 9(1)(a). While there is no evidence of actual violence beyond the violence inherent in the crime of rape, the threats of violence used by the prisoner to his victims are extremely relevant. He threatened his victims, mainly vulnerable young women, and established control and

domination over them by a highly planned, premeditated and extraordinarily sinister series of acts designed to make them fear for their lives and the lives of those they loved, in order to manipulate them to achieve his own sexual gratification. In other cases the threats were used to extort money which he needed to fund his drug habit. Not only were there threats of violence if the victims did not meet the prisoner's demands, but he added meaning to those threats in some cases, by acts of arson.

The threats were also designed, and effective, to ensure the victims did not dare to seek assistance from other people or from the Police.

- (ii) Offending while on bail: s 9(1)(c). The offending against the victims F and Y occurred while the prisoner was on bail for previous offending on terms which included a 24 hour curfew.
- (iii) The extent of loss, damage or harm resulting from the offence: s 9(1)(d). I have already referred to the significant and ongoing trauma experienced by the victims. In some cases there was actual financial loss as a result of the prisoner's offending but much more significant is the deep and lasting psychological harm suffered by many of the victims.
- (iv) Particular cruelty in the commission of the offence: s 9(1)(e).

The deliberate manner in which the prisoner went about this offending and the significant psychological impact it had on his victims who were vulnerable and fearful for their safety, demonstrates the particular cruelty of this offending. The treatment of the victim T was physically particularly cruel. She was held in a basement room in the dark with her hands and legs tied with a rope, duct tape across her mouth and a bandana around her face with her sweatshirt pulled over her head. While in this situation the prisoner and his associate simulated the sounds of a commotion to infer that the prisoner was



trying to ward off threatened attacks and to protect the victim when exactly the opposite was the case.

- (v) Abuse of trust: s 9(1)(f). The prisoner deliberately ingratiated himself with his victims by posing as their friend and pretending he had their interests at heart. In the case of the family of his landlords, there was a background of friendship. In offending against his victims the prisoner deliberately and significantly breached the trust each had imposed in him at his own instigation.
- (vi) Vulnerability of the victims: s 9(1)(g). The victims of the prisoner's offending were largely young women whose naivety the prisoner set out deliberately to exploit.
- (vii) Premeditation: s 9(1)(h). The prisoner's offending was highly planned and deliberately, carefully and successfully executed. The extent and level of the planning in which he was prepared to be involved, to achieve sexual intercourse with young women against their will, is remarkable. It has to be noted that this planning and execution did not cease after he says he commenced a relationship with his current partner from April 2008. In each of the crimes he committed there was careful planning and organisation. None was impulsive or spontaneous. The degree of planning and manipulation and its repetitive nature, associated with the consequent offending, is sinister.

### **Mitigating factors**

#### ***Guilty pleas***

[71] The situation is complex. I have had the assistance of counsel who, at my request, have today checked the Court file and confirmed the relevant details.

[72] The prisoner entered guilty pleas to seventeen of the charges, including the rape charges, on 10 March 2009. At that stage proceedings had been on foot for about seven months and were at pre-depositions in the summary jurisdiction. However, the Information charging the rape of T had been filed only in March 2009 and it is accepted by the Crown that the guilty plea to that charge on 10 March 2009, was entered at the earliest opportunity. On 6 March 2009 the prisoner pleaded guilty to three charges on indictment of arson, aggravated robbery and accessory after the fact. I am advised that this was on the first day of trial.

[73] Mr Sutcliffe submits that the prisoner's remorse is "palpable". He refers to the statements of the prisoner in the pre-sentence report to which I have already referred. He also refers to the letters written from prison by the prisoner to the victims of which I have copies and which I have read. He further refers to the letter from the prisoner's father which states his belief that the prisoner's offending is entirely out of character. Mr Sutcliffe notes that the prisoner has no previous convictions. That is true, but his offending extended over a period of a full year.

### **Preventive detention**

[74] The Crown submits that whether the imposition of a term of preventive detention under s 87 of the Sentencing Act is appropriate, will be an issue for the Court. I turn to address that issue.

[75] Mr Malone qualifies for a sentence of preventive detention under s 87(2) by reason of his age and the qualifying offences he has committed. In addition, the Court must be satisfied that the offender is likely to commit another qualifying sexual or violent offence if the offender is released at the sentence expiry date of any finite sentence the Court is able to impose.

[76] When considering whether to impose a sentence of preventive detention the Court must take into account the following factors:

- a) any pattern of serious offending disclosed by the offender's history;
- and

- b) the seriousness of the harm to the community caused by the offending; and
- c) information indicating a tendency to commit serious offences in future; and
- d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and
- e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

[77] I address each of those factors:

- a) The prisoner has no previous convictions. However, the offending for which he is to be sentenced extended over a twelve month period and shows a pattern of very serious sexual and violent offending with distinct similarities in the methods used by the prisoner to secure his victims and to ensure they took no steps to protect themselves.
- b) The offending has caused serious harm to the community as is evidenced by the widespread harm caused to the victims. It involved the degradation of vulnerable young women and was ongoing throughout the period of a year until intervention by the Police caused it to stop.
- c) Reports by two health assessors have been obtained to assist the Court in assessing a tendency of the prisoner to commit serious offences in future. In addition, there is the pre-sentence report previously referred to, which was available to both the psychiatrist and psychologist who prepared reports under s 88 of the Sentencing Act.

Dr Shailesh Kumar, Consultant Psychiatrist at Regional Forensic Psychiatric Service, Health Waikato in a report dated 24 July 2009 notes that Mr Malone either denies his involvement in the crimes that

he has been charged with or holds his ex-girlfriend responsible for coercing him to play a part in them. He also maintained to the psychiatrist that his sexual relationship with the alleged rape victims was consensual. This self-reporting needs to be read in the light of Mr Malone's acknowledgment of his culpability in the form of guilty pleas and his assurance provided through his counsel, Mr Sutcliffe, that he now accepts full responsibility for these acts. Of concern, however, is his readiness to move responsibility for the offending to his former partner. The psychiatrist also states that on interview Mr Malone did not show any awareness or appreciation of the seriousness of the harm that his actions could have caused to his alleged victims.

Dr Kumar states that based on available scientific evidence it is difficult, if not impossible, to predict Mr Malone's likelihood of committing a serious violent or sexual offence in the distant future. He says that most of the actuarial factors reported in the scientific and criminological literature do not apply to Mr Malone. He states that Mr Malone does not present a number of significant risk factors, such as psychopathy or personality disorder, major mental illness or active symptoms of mental illness, history of previous violence, young age at first violence offence, prior supervision failure. He notes protective factors that could apply to Mr Malone including lack of apparent impulsivity and apparent good family and social support. He notes that Mr Malone has not received any intervention addressing his criminogenic needs. He says that Mr Malone's cognitive distortion of either minimising the impact of his actions on his potential victims or justification on the grounds that he was not taking his medication or that he needed money for his drug use are not based on any psychiatric grounds and are of concern. He notes that such cognitive distortions can be addressed through appropriate therapeutic intervention.

Mr Keith Edlin, a registered clinical psychologist with the Department of Corrections, provided a report dated 21 July 2009. He says that Mr

Malone showed no evidence of abnormal mood or effective states or thought or perceptual disturbances during the three interviews he conducted with him. Mr Malone, he says, appeared to respond in an open and frank manner, but in discussing the index offences, provided lengthy and elaborate explanations and at times appeared to respond in a manner that put him in a favourable light; that he generally denied or minimised his involvement in the offences.

He records Mr Malone's advice to him that he began using methamphetamine some months prior to the first of the offences, that his drug use had increased to become a cost of approximately \$1,000 to \$2,000 per week at the time of the offending. He blamed his former partner for some of the offending.

Mr Edlin notes that Mr Malone has received no previous treatment from the psychologists' office and his records show he has received no other offence-related treatment. He says that certain personality traits of Mr Malone are likely to perpetuate or maintain further offending risk but also notes a number of protective factors such as strong family support and an expressed motivation to lead a pro-social life. As to potential to re-offend, Mr Edlin states at paragraph 48 of his report:

In summary, the actuarial measures used in this assessment suggest Mr Malone has a medium-low risk of sexual re-offending and a moderate to low risk of re-imprisonment. However, his presentation during the interview combined with his high PCL-SV score and file information indicate life course persistent anti-social behaviour and personality traits known to be significant in maintaining serious violent offending.

Overall Mr Edlin assesses Mr Malone as being at moderate to high risk of serious violent re-offending.

- d) Mr Malone has undertaken no offence-related treatment.

- e) If he is not sentenced to preventive detention the prisoner will inevitably face a lengthy finite sentence.

[78] The difficulty, if not impossibility, of predicting the likelihood of the prisoner committing serious sexual or violent offending on release at a distant future date as the Court is required to do under s 87, clearly emerges from the health assessors' reports. This is particularly so when there is no pattern of serious offending in the prisoner's history, and he has not previously undertaken any offence-related treatment which could assist in addressing the cause or causes of his offending.

[79] Accepting the seriousness and harmfulness of the offending, I cannot be satisfied on the information available that the prisoner is *likely* to commit another qualifying sexual or violent offence on eventual release from a finite sentence. The preference accorded by s 87(e) to a lengthy determinate sentence must prevail in the circumstances of this case. I therefore turn to consider the appropriate determinate sentence.

#### **Length of determinate sentence**

[80] Counsel are agreed that the lead offences are the four charges of sexual violation by rape. *R v A* [1994] 2 NZLR 129 requires a starting point of eight years imprisonment for a single rape. That starting point must be increased to take account of the aggravating features of the offending which I have already identified, to reflect that the prisoner committed rapes against four separate victims, and also to reflect the totality of the offending: s 85 Sentencing Act.

[81] The Crown submits that the unique nature and extent of the prisoner's offending renders other case law of little assistance in identifying the appropriate sentence before having regard to mitigating factors.

[82] Mr Sutcliffe referred to four decisions which he considered should provide some guidance to the Court: *R v KKS* CA 348/05 5 February 2006, *R v Edwards* CA 17/07 5 September 2007, *R v Gordon* CA 563/2008 24 February 2009 and *R v Dixon* HC AK CRI 2009-044-486298 14 August 2009, Wylie J. Mr Sutcliffe made helpful

submissions seeking a basis for comparison with these cases. I have considered all those cases but find them of limited assistance given factual dissimilarities with the offending in this case.

[83] As the Court of Appeal observed in *KKS* at [12]:

It is difficult to compare a case of this sort involving extreme sexual brutality over an extended period, with representative sexual offending that occurs over months, or even years. Like all sentencings, it falls to be determined on its peculiar facts.

By way of example of the difficulty in comparing cases that are factually different, in *KKS* the appellant had been convicted or entered guilty pleas to numerous charges including sexual offending, kidnapping, assault, causing grievous bodily harm with intent, unlawful possession of a pistol and possession of equipment for the manufacture of methamphetamine. The offences occurred over the course of one night and the victims included a male and two females, one of whom was the mother of the male victim. Here the offending is absent the brutality and sadism of that in *KKS* but it extended over a period of about a year and showed a pattern of deliberate, manipulative and sinister criminal conduct.

[84] In the same context the Crown referred to *R v Tippary* [2009] NZCA 343 at [7] where the Court of Appeal referred to the difficulties of making a close comparison of sentences when the facts of other cases inevitably differ.

### ***Starting point***

[85] I approach the fixing of a starting point in this case as follows:

- a) The offending against T involved sexual violation by rape, prolonged detention in frightening and degrading circumstances, actual violence in the way T was bound and gagged, together with significant threatened violence. The offending had associated with it all of the aggravating factors I have identified above, including a high level of planning and premeditation and a breach of trust. I increase the

starting point of eight years in *R v A* by three years to reflect the serious aggravating factors of this offending, i.e. to eleven years.

- b) For the further three rapes committed by the prisoner, all of them in serious circumstances, I increase the starting point by a further three and a half years. In respect of each of these rape victims there was an additional charge of threatening to kill and in the case of two of them a further charge of blackmail. I note at this point my approach is approximately consistent with that advanced by Mr Sutcliffe that the *R v A* starting point of eight years should be increased by six years to fourteen years.
- c) To take account of the four additional blackmail charges which are separate from the rape charges, I add a further year.
- d) To take account of the property charges which were serious, aggravated robbery of the ANZ Bank, accessory after the fact in respect of the Kiwi Bank aggravated robbery, two charges of arson and two charges of threat to property, I add a further five years.
- e) As stated above, the offending against F and Y occurred while the prisoner was on bail and subject to a 24 hour curfew. The prisoner was arrested in November 2007 following the ANZ Bank robbery but in breach of his curfew he proceeded with extremely serious criminal offending. This is an aggravating factor not reflected in the aggravating factors associated with the offences themselves. I add a further six months.

[86] Those figures cumulatively produce a revised starting point of twenty one years' imprisonment before consideration of mitigating factors.



### *Discount for mitigating factors*

[87] The guideline authority of *R v Hessel* [2009] NZCA 450 states that the maximum reduction for a guilty plea will be one-third where the guilty plea is entered at the first reasonable opportunity, reducing to ten percent if the guilty plea is entered three weeks before the commencement of the trial. The situation in respect of the prisoner's guilty pleas is complex as I have stated. He entered a guilty plea at the first available opportunity, as the Crown accepts, in relation to the offending, including the charge of sexual violation by rape, against the victim T. He entered pleas to the other offending charged in the summary jurisdiction on 10 March 2009. He entered guilty pleas on the first day of trial to three charges in the indictment on 6 March 2009. No evidence was offered on the other charges in the indictment.

[88] Mr Sutcliffe submits that a further discount should be allowed to reflect the prisoner's "palpable" remorse. He submits that a reduction of one-third should be given to reflect the prisoner's guilty pleas and expressions of remorse and that a further reduction should be given to account for his previous good character. He submits that the letters written to his victims express some insight into his offending and the desire to seek help to overcome the triggers to this offending.

[89] In relation to remorse, Mr Sutcliffe refers to [28] of *Hessel*. However, the Court of Appeal states in that judgment that as a general rule the discount for a guilty plea incorporates remorse. The Court, however, acknowledges that exceptional remorse demonstrated in a practical and material way, can attract its own reward.

[90] I hope Mr Sutcliffe is correct that the letters written by the prisoner expressing that he is sorry and that his behaviour was "stupid and not acceptable", indeed evidence genuine remorse and an insight into this very serious offending which his actual words belie. Certain of the victims thought the letter was a joke and said they did not appreciate it at all. That is perhaps an unsurprising reaction from people who have experienced the extremely harmful and traumatic effects of the prisoner's offending. I have to express a measure of disquiet in respect of Mr Malone's professed remorse, in that as recently as July this year in speaking with the report-writers, he was prepared to seek to blame his former partner for his offending

or at least some of it, which indicates an attempt to avoid responsibility rather than to accept it, with the accompanying remorse and insight now claimed by Mr Malone.

[91] As to previous good character, it is true that Mr Malone at the age of 26 comes before the Court for sentencing with no previous convictions. However, as I have previously observed the serious offending for which he must now be sentenced extended for almost a year back to August 2007. This qualifies his claim to previous good character in respect of that period.

[92] The Crown submits that the credit for mitigating factors should be twenty percent or less. As I have said, Mr Sutcliffe seeks for the prisoner a full discount of one-third. The discount must take account primarily of the guilty pleas which can only be an assessment given the complex situation regarding the entry of guilty pleas that I have previously summarised.

[93] I allow a discount of six years from the starting point of twenty one years' imprisonment. That is a discount of approximately 28.5%. The resultant end sentence is accordingly fifteen years' imprisonment.

[94] Standing back and considering the totality of the offending, I consider the end sentence of fifteen years appropriately reflects the overall criminality of the prisoner's serious and repetitive offending, with allowance for the mitigating factors, essentially the guilty pleas.

### **Minimum period of imprisonment**

[95] The Crown seeks a minimum period of imprisonment of two-thirds of the finite sentence which is the maximum period available under s 86(4) of the Sentencing Act.

[96] Mr Sutcliffe submits that no minimum period should be imposed, submitting the approach taken in *Dixon* which left the Parole Board to assess future risk factors, to be appropriate. I do not accept that submission. The offending in *Dixon*, two

separate rape attacks on two different victims within a six week period, was much less serious than the offending in this case.

[97] Section 86 of the Sentencing Act provides that the Court may impose a minimum period of imprisonment that is longer than the applicable non-parole period under the Parole Act 2002 (one-third of the finite sentence, five years in this case) if it is satisfied that period is insufficient for all or any of the following purposes:

- a) Holding the offender accountable for the harm done to the victim and the community by the offending;
- b) Denouncing the conduct in which the offender was involved;
- c) Deterring the offender or other persons from committing the same or a similar offence;
- d) Protecting the community from the offender.

[98] I am satisfied that all the purposes in s 86(2) apply in the circumstances of this case. However, in setting the minimum period of imprisonment the provisions of ss 7, 8 and 9 of the Sentencing Act to the extent the considerations under those sections are relevant in terms of s 86(2), must be taken into account. In relation to the factors of deterrence of the offender personally, and protection of the community from the offender, the mitigating factors to which I have referred above, particularly the guilty pleas, are relevant.

[99] I impose a minimum period of imprisonment of eight and a half years which is just over fifty-five percent of the finite period of imprisonment. It needs to be clearly understood that this is not the point at which Mr Malone will be released from custody. The matter will be in the hands of the Parole Board. This is the earliest point at which the Parole Board may consider release, but it will be entirely up to the Board as to when, after the expiration of eight and a half years, the prisoner should be released and on what terms. The Parole Board may well be concerned, Mr

Malone, to ensure that you have obtained appropriate treatment before even considering your eligibility for parole. That is a matter for the Parole Board at the relevant time but it is also a matter for you while you serve the minimum period of imprisonment I have ordered.

### **Sentence**

[100] Mr Malone please stand.

[101] The sentence I impose on you, Mr Malone, is fifteen years' imprisonment which is imposed on each of the lead charges of rape.

[102] I impose the following sentences to be served concurrently with the lead sentence:

- (i) On each of the two charges of arson, three years' imprisonment.
- (ii) On each of the six charges of blackmail, three years' imprisonment.
- (iii) On the charge of aggravated robbery, four and a half years' imprisonment.
- (iv) On the charge of accessory after the fact, one years' imprisonment.
- (v) On each of the four charges of threatening to kill, eighteen months' imprisonment.
- (vi) On each of the two charges of threatening act/threat to property, one years' imprisonment.

[103] I order a minimum period of imprisonment of eight and a half years under s 86 of the Sentencing Act.

[104] Please stand down.