IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI -2021-092-005322
[2024] NZHC 598

THE KING

v

RENE FRANCIS THOMAS

Hearing:	21, 24, 25, 28, 29, 30, 31 August, 1, 4 September 2023
Appearances:	E T Fletcher and H A M Watts for Crown P Kaye and K Lamb for Defendant
Sentencing:	19 March 2024

SENTENCING NOTES OF ANDERSON J

Solicitors:
Kayes Fletcher Walker Ltd, Auckland

[1] Mr Thomas, you are for sentence having been found guilty at trial of seven charges, the most serious of which are sexual violation by unlawful sexual connection, and strangulation. The maximum periods of imprisonment for the seven convictions range between three years and 20 years' imprisonment.

[2] A key issue I have to consider today is whether to sentence you to preventive detention. That is a sentence of imprisonment for an indefinite period. You would be released only when the Parole Board is satisfied that you no longer pose a risk to the community.

The offending

[3] I will first set out the facts of your offending. I take them from the essential elements of the charges which the jury must have found proved and from the facts which, as the trial Judge, I am satisfied were proved.

[4] Between April and November 2019, you and the victim shared a cell at Wiri Prison. Your cell contained a single bunk bed. You slept on the bottom while the victim slept on the top. You shared a shower and toilet area and a landline phone. You were locked up together from around 5 pm each evening until the morning.

[5] During the period that you and the victim were cell mates, you controlled what he could do. That was even down to the level of when and whether he could use the toilet or shower and what he could do in his spare time. You ate the victim's meals so that over a period of eight months he lost over 30 kilograms. You would abuse, humiliate and threaten the victim with physical violence. You made sexualised remarks and forced him (to use your term) "strip dance" in front of you for hours and hours on end.

[6] You have been convicted of seven charges of physically and sexually assaulting the victim over the 230 days you were celled together.

[7] Charge 1 is a representative charge covering effectively the whole time you were celled together relating to you punching the victim. This was a daily occurrence and would occur for next to no reason. You would punch the victim in the back of the

head, or ribs, or nose, mouth or face. You particularly targeted the victim's left ear so that it became very swollen and he suffered cauliflower ear.

[8] Charges 2 and 3, assault with a weapon, involve you hitting the victim as he lay on his top bunk. You hit him with the electrical cord of his radio causing bruising and soreness to his back and ribs.

[9] Charge 4, of injuring with intent to injure, relates to an occasion where the victim was forced to come down off his bunk due to what he described as a "crook stomach". You had instructed him not to do so. This led to you giving the victim a "hiding". You punched him in the head and then brought the victim's head down on your knee, splitting it open. You caused a gash from the start of the victim's hairline to near the crown of his head. You forced the victim to wear a beanie to conceal the injury from the guards. Later you gave him a mohawk haircut which had the effect of hiding the scar.

[10] Charge 5, which is assault with a weapon, involved you waking the victim up by punching him in the head and threatening to stab him. You obtained a plastic cutlery knife and started doing that. As the victim says, you "took two swings at it", so you actually hit him in the side of the head first, then got him under the eye. The cut bled and the victim received a small but lasting scar.

[11] Charges 6 of strangulation and 7 of sexual violation by unlawful sexual connection are connected. One night in October or November 2019 as the victim was getting ready to shower, you came up behind him, put his arm around his throat and choked him until he lost consciousness. That is despite the victim's best efforts to get you to stop. When the victim came to, you were pulling up his pants. He could sense he had been sexually assaulted. You told him to have a shower and he noticed blood and semen coming from his anus which was very sore. The jury has accepted by its verdict that the inference could safely be drawn that you had anally raped him. They were right to accept that inference.

Victim impact statement

[12] Fittingly, the Crown describes the 230 days the victim was celled with you as a living hell for him. The Court heard the shocking way you treated the victim in your own words on calls you made to your partner.

[13] You have heard the victim's impact statement read to the Court. Now, nearly five years later the victim continues to suffer daily from emotional and physical pain because of you. There are the physical scars, the daily headaches, and his nerve damage. There is his PTSD and depression. He has sleepless nights and nightmares. He cannot earn a good wage because of these impacts.

Finite sentence

[14] In turning to your sentence for this offending, I will first determine a finite sentence for the charges. I will then consider whether you should be sentenced to preventive detention. Throughout the exercise, I must and do have regard to the purposes and principles of sentencing.[1]

[15] The lead offence is the sexual violation combined with strangulation. There is disagreement between the prosecution and your lawyer as to the starting point for this. The Crown says 10 years and the defence says eight. Both periods fall within what is loosely described as a "rape" band, rape band 2.[2] However, the defence says you fall to the lower end of band 2 whereas the Crown says the offending was more at the middle. The band covers offending involving a vulnerable victim and additional violence. I have considered the submissions and comparative cases to come to my own view.[3]

[16] Here, your offending involves four aggravating factors. First, there is the level of violence. The anal rape was preceded and facilitated by strangling the victim until he was rendered defenceless. Second, there is the degree of violation, indicated by the bleeding you caused. Third, is an element of premeditation in light of the first step of

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1 Sentencing Act 2002, s 7-8.
2 *R v AM (CA27/2009)* [2010] NZLR 750; [12010] NZCA 114.
3 *R v Gotty* [2017] NZHC 1102; *R v Thompson* [2022] NZHC 720; and *R v Brady* HC Rotorua, CRI-2006-070-6060, 29 September 2008.

strangling the victim and also the backdrop of sexualised remarks you had made towards him building to that point. Fourth, there is the vulnerability of the victim who had become so ground down and fearful that he was incapable of calling for help. Relatedly, there is offending in the prison environment where the victim could not go anywhere and where there is serious taboo at "narking".[4]

[17] In all the circumstances, a 9-year starting point for the rape and strangulation is appropriate.

[18] The second element is the uplift for your other charges. The Crown says this should be two and a half years whereas your lawyer says this should be one year. I agree with the Crown that the representative charge of assault itself justifies the maximum penalty of three years, given the nature and frequency of the violence.[5] Ultimately, I consider two years is an appropriate uplift from the 9 years to reflect totality.

[19] The third area in setting the starting point is the uplift for previous convictions. I will come back to these later when I discuss preventive detention. For present purposes, I record that you were 39 years old at the time of your offending. You had 58 previous convictions dating back to 1998 when you were 17. You have no previous convictions for sexual offending, but a number of convictions for violent offending. You were in prison on the most recent kidnapping and other violence charges at the time of the current offending. You have been sentenced to imprisonment on six previous occasions. I consider a further uplift of one year imprisonment is appropriate to reflect your prior offending and offending whilst subject to a sentence of imprisonment.

[20] This means that the global starting point I have come to for your charges is 12 years' imprisonment.

[21] Mr Thomas, your personal background features prominently in the reports I have received. You started life disadvantaged with drug addict parents and were

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4 *R v Gotty* [2017] NZHC 1102 at [8(f)].
5 Sentencing Act ss 8(c) and (d).

placed in the care of your aunt and her husband. You describe being well looked after there. However, when you were 13, you were left to stay in someone else's care for several months. You describe being repeatedly sexually abused and humiliated over that period. You have said that this was a significant turning point. You became a street kid and frequently became involved in fights. You became heavily involved in substance abuse, became depressed, was suicidal and had difficulty with intimate relationships. You also refer to claustrophobia and bullying as a child.

[22] The Crown acknowledges that this mitigates your offending. However, as I discuss shortly, regrettably the sexual abuse you received as a child is also a significant factor along with others that mean you now present a risk to the community.[6] In all, I discount by one year for your background.

[23] Finally, your lawyer submits in the written submissions that the prison staff should have been more pro-active. He says that the Department of Corrections needs to take some responsibility for this situation for not monitoring you properly. Mr Thomas, today is about your responsibility for what you did to the victim. This is not the forum for blaming the Department for your offending.

[24] So, to summarise. I take nine years for the combined lead offence of strangulation and sexual violation. I add two years for the other offending. I add a further uplift of one year for your conviction history. I apply a discount of one year. This leads me to a 11-year global starting point.

Minimum period of imprisonment

[25] A minimum period of imprisonment is applicable when one third parole eligibility would not be sufficient to hold an offender accountable, denounce and deter his or her offending and protect the community from the individual.[7]

[26] Here, a minimum period is appropriate. I would settle on a minimum period of imprisonment of 6 years. This is warranted to denounce your conduct, to hold you accountable for the harm you have done, to deter other prisoners from offending in

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6 Sentencing Act, s 7(g)
7 Sentencing Act, s 86.

jail, and ultimately to protect the community from you until you are better able to control your violence.[8]

Preventive detention

[27] I turn to the issue of whether to impose a sentence of preventive detention. The purpose of preventive detention is to protect the community from those who pose a significant and ongoing risk to the safety of its members.[9] I can impose this if I am satisfied you are likely to commit a qualifying violent or sexual offence on release at the end date of a finite sentence. Even then, a discretion remains. Preventive detention, as you heard in the submissions, is exceptional. A long but finite sentence is preferable when it would adequately protect the community.

[28] To assist me to make my decision, I have received two health assessors' reports from Mr Ninad Patel, a clinical psychologist, and from Dr Krishna Pillai, a consultant psychiatrist. I have also considered carefully the submissions made by the Crown and by your lawyer.

Pattern of serious offending

[29] The first factor I need to consider is any pattern of serious offending disclosed by your history.

[30] Both assessors' reports highlight that your trauma and experiences as a child have contributed to your offending. This includes both the trauma from the sexual abuse you suffered and childhood experience of being bullied. You react with anger and aggression at feeling disrespected or challenged. Violence is a release valve as well as giving you a sense of control. The offending against the victim here is representative of both of these, combined with perhaps revenge and sense of justification of meting punishment on a sex offender.

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8 Sentencing Act 2002, s 86.
9 Sentencing Act 2002, s 87

[31] As I said before, you have 58 previous convictions. With the present offending, you now have 65. You have been committing offences since you were 17. While this is your first conviction for sexual offending, you have several for violent offending.

[32] You were serving a sentence of six years' imprisonment at the time of this present offending for two incidents. One was in January 2014 involving kidnapping, injuring with intent to injure and assault with intent to injure. The other was an incident in February 2014 for injuring with intent to cause grievous bodily harm. Dr Pillai relays from the summary of facts that this involved you kicking a defenceless victim lying on the ground, causing a head injury requiring surgery. That offence and the kidnapping are both qualifying offences for preventive detention.

[33] You also have ten convictions from 2004 and 2013 variously for male assaults female, assault with intent to injure, assault with a weapon, possession of a defensive weapon, threatening to kill or do grievous bodily harm and breach of a protection order.

[34] Most of this is tagged as family violence-related. However, you have been convicted of violence not only against intimate partners, but strangers, other family members and with and without a weapon. Most of your violent offending is described by Mr Patel as reactive in nature but it is also in the context of exerting control over a person or situation. The current charges took place over several months in a prison. Interspersed are traffic infringements, breaches of conditions, and breaching a protection order against an ex-partner. Your intimate partner violence appears to be exacerbated by substance abuse, a need for control and intense feelings of anger and jealousy.[10]

[35] I agree with the Crown and with the assessors that this history demonstrates an entrenched pattern of behaviour that imprisonment has not corrected. As the Crown has said this is so despite you having had some insight into your behaviour for some period.

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[10] Patel report at [16].

Seriousness of the harm to the community caused by the offending

[36] The second factor is the seriousness of the harm caused by the offending. I agree with the Crown that given the nature of the offending this speaks for itself.

Risk of reoffending

[37] Third, I need to consider information indicating a tendency to commit serious offences in the future.

[38] You did not respond to Corrections' contact to arrange a telephone interview for a pre-sentence report. So that report was written without your input. Based on your convictions, that report assesses you at being at a medium to high risk of reoffending and your risk of harm to others as medium to high. Offending related factors identified by the report are offending supportive attitudes and entitlements, propensity for violence, lack of consequential thinking and offending related sexual arousal.

[39] I have in depth assistance on the risk of reoffending from the two expert reports. Both assessors comment on the fact that your violent behaviour is increasing in intensity. Mr Patel assesses you at being at a high risk of being reconvicted of a further qualifying violence offence. He also assessed your risk of sexual offending as moderate moving to a high risk in particular circumstances. Mr Patel notes that the severity of the violence and sexual offending in this case suggests you have limited behaviour regulation and consequential thinking. He administered a number of tests which all put you in a high risk category for violent offending and above average for sexual offending.

[40] Turning to Dr Pillai, he assesses you as being above average risk for further sexual offending and at high risk of future violent offending. He describes you as having a significant history of anti-social personality disorder.[11] He considers you have been socialised to violence and have attitudes that support violence. He further

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[11] Pillai report at [64].

says that you are predisposed to violence through your emotional dysregulation and unresolved anger.

[41] The Court heard hours and hours of calls you made to your partner from the cell you were sharing with the victim. Even allowing for exaggeration on your part, they gave the Court a disturbing insight into your offending. The casual and indifferent way you described both how badly you were treating the victim, and the effect of your conduct on him was, frankly, chilling. You presented as controlling and self-entitled. Mr Patel refers to a psychopathic checklist on which you scored well above average. He reported that in this testing you demonstrated a high entitlement, low levels of empathy and remorse and ability to hide your intent and manipulate others. That is in addition to a pattern of avoidance of personal responsibility and interpersonal and effective deficits. This accords entirely with what the Court heard first hand.

[42] Part of the assessors' views about risk of future violence involves your propensity for impulsive violence, particularly in conflict with partners. The Court heard the vicious calls you made to your partner when you were frustrated with her. These included menacing threats to kill her when you got out.[12] I observe that your previous domestic violence offending has not yet resulted in a qualifying offence. I do not take comfort from this. You have convictions for possession of offensive weapons including one associated with threatening a family member. This underlines the risk that you represent. Mr Patel refers to judicial sentencing notes for your 2010 offending in which you assaulted your partner with a whisky bottle but it apparently slipped out of your hand before it could break. This is all sobering on the risk of serious future offending.

[43] In short, Mr Thomas, given the assessors' reports, your record and this offending I am satisfied you are likely to commit serious offences, including a qualifying sexual or violent offence, following release from even a lengthy finite sentence.[13]

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12 For example, Exhibit 3, calls 32, 33.
13 Sentencing Act, s 87(2)(c).

Absence or failure of efforts to address the cause or causes of the offending

[44] The next factor I must consider is any absence or failure of efforts to address the cause of causes of your offending.

[45] You have told the assessors that you will not do group rehabilitation work because of trauma-related concerns and not feeling comfortable talking about sensitive matters in group situations.

[46] That appears to be the case looking at the history. You were exited from the Medium Rehabilitation Programme in the community in 2010 due to non-attendances after 42 of 53 sessions. You did complete a Man Alive management course in 2014 and a four-session drug and alcohol programme in 2017, both in prison.

[47] You were assessed in 2017 as high risk, with a recommendation you engage in the Special Treatment Unit for Violent Offending and the Drug Treatment Programme. However, your notes record that you were removed from the waitlist due to low motivation and limited time left on your sentence.

[48] You do appear to be prepared to be open to one-on-one counselling. The assessors refer to ACC funded counselling that you have received to address PTSD and trauma due to the sexual abuse you received. I understand this occurred between 2015 to 2020. The ACC counsellor advised Dr Pillai that she saw you several years ago but that you failed to attend a booking she made to see you in prison last year after she received a notification to see you.

[49] Dr Pillai comments that the extent to which your persistent traits and attitudes can be mitigated by treatment is unclear. The assessors do say that you appear to have gained some insight from the counselling, and from earlier courses you did, that the sexual abuse in your past leads to certain behaviours. But your present offending was committed after that counselling and after that insight. Such insight you have received has not translated into insight into your offending and imperative for treatment.

[50] Dr Pillai reports that you remain as having limited insight into your need for further treatment for violence and other drugs. You continue to deny many aspects of

the index offending and past offending. You acknowledge that you gave the victim as you put it, "hidings", but you continue to deny stabbing him with the plastic knife and you deny the sexual assault and strangulation. You continue to view past victims as deserving the violence they received for various reasons. You minimise or justify the past offending.

[51] In summary, you have yet to complete the recommended treatment. You have had ACC trauma counselling which has failed to deter the present offending. You have limited insight into your offending and imperative for treatment.

Lengthy determinative sentence preference if this provides adequate protection to the public and determination

[52] Mr Thomas, there is a principle that the Court should impose a long finite sentence rather than preventive detention when it would provide adequate community protection.

[53] As I have said, you have not yet had the benefit of a structured and evidence-based specialist treatment programme for violent offending. Nor have you engaged in specialist treatment for alcohol and drug use or for sexual offending. You do appear open to one-on-one treatment, but against the background that you have limited insight into your offending and continue to deny key aspects. Yet the treatment required will be intensive and extensive. It will require significant commitment.

[54] Mr Patel suggests that because of your reluctance to participate in group treatment, and current refusal to attend a group, you would first need considerable individual work to address these barriers before attending a structured course such as provided in the serious treatment unit. He says that a treatment pathway may be to engage in intensive individual treatment with a Department Psychologist to address both the violent and sexual offending risk factors.

[55] The Crown says an indefinite sentence would motivate you to confront your behaviour and engage meaningfully in counselling as this would determine your final release date. I am referred to case law where this factor has been recognised.[14]

[56] In a recent decision, the Court of Appeal questioned the relevance of the incentive provided by preventive detention, at least on the facts of that case.[15] In my opinion, in your case the combination of your lack of insight and lack of acknowledgement of your offending, combined with the recognised need for you to have intensive individual treatment to address the underlying cause of your offending mean that incentivisation does have a role to play here.

[57] Your lawyer points to Dr Pillai's suggestion that a shorter term of imprisonment and prolonged period of community supervision might provide a strategy to manage your risk. That was partly because the present offending occurred in prison and because you told Dr Pillai that you were compliant with release conditions when last in the community. In fact, the bail decisions record that when on bail for the present offending you breached curfew on two occasions. It was alleged that in the first you arrived at your ex-partner's place but that was just an allegation. [16] In the second, you remained at large and committed several driving offences when the Police were trying to apprehend you in March and April 2022.

[58] Mr Thomas I am satisfied that a finite sentence combined with an extended supervision order or ESO would <u>not</u> provide sufficient protection to the community. An ESO would not sufficiently mitigate the risk you present across all of strangers, acquaintances, family members and intimate partners. This is so, Mr Thomas, even acknowledging that primarily your offending has been against those with whom you have had a relationship with.

[59] It is necessary for me to impose preventive detention. You have entrenched attitudes and traits. You have displayed a pattern of abusive and aggressive behaviour and violent offending. You pose a high risk of qualifying reoffending. Your history

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14 *R v Bryant* CA236/03, 16 December 203 at [23]; *R v parker* [2013] NZHC 2075 at [63](d)
15 *R v Tawhai* [2023] NZCA 444 at [23]
16 *R v Thomas* [2022] NZHC 1585.

includes offending across a range of victims. You lack insight into your present and past offending. You show unwillingness to accept the most serious of the offending and also minimise or self-justify your involvement.

[60] With a finite sentence, there is too much uncertainty as to whether you would commit to the necessary intensive treatment, whether that treatment would be effective and if so, what length of time that might take to achieve. A finite term does not provide an incentive to rehabilitate. Preventive detention is necessary to provide a safety net to protect the community if you do not rehabilitate.[17]

[61] For all these reasons preventive detention is the proper and responsible sentence. As Mr Kaye recommended I should, I expressly recommend that you receive intensive one-on-one counselling.

Minimum Period

[62] Preventive detention requires a minimum period of imprisonment of at least five years. The minimum period must be the longer of a period reflecting the gravity of the offending or as is required to protect the public. I concluded earlier that the former would be six years. I consider that the same period is appropriate to protect the public. Whether you will be released after that period will be a matter for the Parole Board.

[63] Mr Thomas please stand:

(a) On the charges of strangulation and sexual violation you are sentenced to preventive detention with a minimum period of six years' imprisonment.

(b) For the other convictions I impose the following sentences of imprisonment:

(i) Charge 1, assault with intent to injure, three years.

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17 *R v Flighty* [2009] NZCA 173 at [29].

(ii) Charges 2, 3, and 5, assault with a weapon, two years.

(iii) Charge 4, injuring with intent to injure, two years.

(iv) Charge 6, injuring with intent to injure, two years.

[64] All sentences are concurrent.

[65] You may stand down.

Anderson J