NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA35/2015
[2016] NZCA 209

BETWEEN	JOSEPH WARREN LEPPER Appellant
AND	THE QUEEN Respondent

Hearing: 3 May 2016

Court: Wild, Courtney and Gilbert JJ

Counsel: H T Young for Appellant
S K Barr and J D Slankard for Respondent

Judgment: 18 May 2016 at 2.30 pm

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] In October 2013 the appellant, Joseph Lepper, along with a younger associate, pulled a young woman off a street in Dunedin and tried to force her into

their van. He pleaded guilty to abduction with intent to commit unlawful sexual connection.[1] This offending occurred seven months after Mr Lepper had been released from prison following a lengthy sentence for the 2002 rape of, and unlawful sexual connection with, another woman.

[2] Gendall J imposed preventive detention along with a minimum period of imprisonment of five years.[2] Mr Lepper appeals that sentence, asserting error by the Judge in:

(a) not disregarding information contained in the s 88 reports[3] about an allegation of grievous bodily harm of which Mr Lepper was acquitted;

(b) giving insufficient weight to his psychiatric illness and motivation to change;

(c) finding that he would only engage with health professionals if he knows that such engagement is a prerequisite to being released from prison;

(d) failing to take into account the availability of an extended supervision order; and

(e) taking too low a starting point when considering a provisional finite sentence.

[3] Mr Lepper filed his appeal out of time. The delay is explained by his health problems and the fact the time to appeal ran over the Christmas period when his lawyer was away. The Crown does not oppose an extension of time to appeal and we grant one.

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1 Crimes Act 1961, s 208.

2 *R v Lepper* [2014] NZHC 3015.

3 Section 88(1)(b) of the Sentencing Act 2002 provides that a sentence of preventive detention must not be imposed unless the court has considered reports from at least two appropriate health assessors about the likelihood of the offender committing a further qualifying offence.

Background

[4] In 2002 Mr Lepper forced a woman in her 50s off the street and into a park. He held her round the throat and told her that he would kill her if she called for help. He then raped her. He was sentenced to 10 years' imprisonment. It was only during the preparation of reports for the purposes of sentencing in this case that he finally accepted that offending.

[5] Mr Lepper was released from prison in March 2013. He lived in Nelson while on parole. After his parole period had been completed he went to Christchurch. On 19 October 2013 he and his co-offender drove to Dunedin in Mr Lepper's van. They planned to abduct a woman for sex. At about 9.30 pm they drove along Vogel Street, a poorly lit street in an industrial area. They passed a 22-year-old woman who was walking to meet her parents at a nearby restaurant. Mr Lepper pulled over some way in front of the victim. Both men got out. Mr Lepper grabbed the young woman and tried to force her into the van. The victim struggled sufficiently to fend the men off until nearby residents came to help. Mr Lepper and the co-offender fled.

[6] The victim was distraught. She suffered numerous bruises and scrapes and lost handfuls of hair. In her victim impact statement she describes the sickening effect of the attack on her and her family. She suffers panic attacks whenever a van passes her on the street, has trouble sleeping and feels fearful around groups of young men.

[7] Mr Lepper's co-offender was sentenced to two years and eight months' imprisonment.[4]

Sentencing in the High Court

[8] The sentencing Judge, Gendall J, reviewed Mr Lepper's personal circumstances, which included a very unstable and dysfunctional childhood and a long and diverse criminal history. We say more about Mr Lepper's personal circumstances later.

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4 *R v McVeigh* [2014] NZHC 1936.

[9] The issue at sentencing was whether preventive detention or a finite sentence should be imposed. In considering what finite sentence would be appropriate, the Judge identified six years as the starting point with an uplift of 18 months to reach a provisional starting point of seven years and six months, with a final sentence of six years and four months' imprisonment once mitigating factors were taken into account. The Judge also considered that a minimum period of imprisonment of 60 per cent would be appropriate.

[10] The Judge then turned to the possibility of preventive detention. He identified the statutory test. He concluded that, notwithstanding that there had been only two convictions for sexual offences, a pattern of serious offending had been established. The seriousness of the harm to the community through the offending was, in the Judge's view, self-evident.

[11] The Judge then moved on to consider the information indicating a tendency to commit serious offences in the future. The Judge had before him a report from a psychiatrist, Dr David Parker, and a clinical psychologist, Jayde Walker. We discuss the contents of those reports later.[5]

[12] The Judge concluded that Mr Lepper was at high risk of committing sexual offences in the future unless he was willing to engage in intensive treatment while in prison. However, the Judge also considered that Mr Lepper would not be incentivised to engage with health professionals to get the help he needed unless he knew that such engagement was a prerequisite to being released. He therefore considered that the finite sentence of six years and four months' imprisonment that would otherwise have been imposed would not be appropriate and instead imposed the sentence of preventive detention.

Mr Lepper's personal history

[13] Mr Lepper was fostered out to various extended family members as a young child. He was exposed to serious domestic violence. He reported being the victim of

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[5] The Judge also had a report from Dr Bathgate, provided before Mr Lepper pleaded guilty for the purposes of determining whether he was insane for the purposes of s 23 of the Crimes Act 1961. That report did not have any bearing on the decision to impose preventive detention.

a serious physical and sexual assault when he was 10 or 11 years old. He began using alcohol and cannabis when he was 11 and has a history of using a variety of other drugs.

[14] Mr Lepper left school without qualifications. Apart from some seasonal work, he has never had any permanent employment. He sustained a head injury in a motor vehicle accident when he was 17, suffering loss of memory before and after the event and has been diagnosed with post-concussion syndrome. A neurological assessment four years later still showed signs of specific areas of dysfunction including in executive functioning.

[15] Mr Lepper has had contact with mental health services since 2000. Initially he reported unusual visions. It was considered at the time that this was related to ongoing poly-substance abuse rather than a psychotic illness. However, between 2004 and 2008 when Mr Lepper was in prison, he began showing both mood and possible psychotic symptoms. In 2009, he was diagnosed with schizoaffective disorder and trialled on anti-psychotic medication with limited success. He was admitted to hospital from prison in early 2012 and appeared to respond well to a different medication.

[16] Mr Lepper returned to prison from hospital in July 2012 and was released from prison in March 2013. He was followed up by the forensic mental health team in Nelson and took his medication as prescribed until about May 2013. He then reduced it without advice from his psychiatrist because of side effects. A psychiatric assessment at that time did not identify any relapse of psychotic symptoms. Mr Lepper stopped the medication altogether in August 2013, again without advice from his psychiatrist. He also resumed using cannabis during this time.

[17] Mr Lepper has over 70 convictions including for violent offending, wilful damage, property offences, contravening protection orders, unlawfully carrying a firearm and failing to answer bail. While in prison he was the subject of several misconduct charges; he exposed himself to other inmates and members of staff, allegedly assaulted a transgender inmate and threatened to kill a female officer and a

female nurse. He was also alleged to have seriously assaulted another inmate with a pool cue but was acquitted of that charge at trial.

The Health Assessors' reports

Report by Dr Parker, 28 October 2014

[18] This report was prepared pursuant to s 88 of the Sentencing Act 2002. Mr Lepper was initially uncooperative when interviewed but later during the interview agreed to provide information.

[19] In his review of Mr Lepper's criminal history, Dr Parker noted the 2008 psychological report to the Parole Board which referred to Mr Lepper's misconduct while in prison. He referred to the psychiatric records that noted Mr Lepper's threats of violence to clinicians when he did not get what he wanted. Dr Parker also referred to the alleged assault on another inmate with a pool cue. He noted Mr Lepper's acquittal but recorded the allegation nevertheless because he considered that it should be included as an incident of serious violence in his assessment of the risk of future violent offending.

[20] In making his assessment Dr Parker used the HCR20, a structured assessment tool that assists in the assessment of violence towards others.[6] In Mr Lepper's case the risk factors included his history of previous violence, history of other antisocial behaviour, history of relationship instability, history of employment problems, history of substance abuse, history of major mental illness, history of personality disorder, history of traumatic experiences, history of violent attitudes and history of poor response to treatment or supervision. In particular, Dr Parker identified the significant neglect and abuse that Mr Lepper was subjected to as a child, the serious sexual assault he suffered as a child and his exposure to serious domestic violence, including sexual violence.

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[6] The HCR20 is based on identified static and dynamic features shown to have been empirically linked with risk for violence. It is not designed to produce a statistical probability of future violence but can assist in understanding the factors important for violence potential in an individual.

[21] Dr Parker considered that this early history had resulted in Mr Lepper failing to develop a normal capacity for caring and empathy for others, evident in his adult behaviour. In particular, his early exposure to violence had caused him to see violence as a relatively normal part of life and an appropriate response to interpersonal difficulties. His lack of capacity for caring and empathy had resulted in him being unable to form normal stable relationships and his experience with women had tended to be only in relation to sex. His lack of empathy and normalisation of violence appeared to underlie his willingness to use violence to obtain sexual gratification.

[22] Dr Parker also regarded Mr Lepper's past drug abuse and symptoms of mental illness as significant risk factors. He did note, however, that Mr Lepper's history of violence pre-dated his diagnosis of mental illness and his mental health appeared not to have been a factor in the 2002 offending. His failure to comply with prescribed treatment suggested a limited insight into the enduring nature of his mental illness and a likelihood of him failing to take prescribed treatment in the future unless closely supervised. Dr Parker concluded that Mr Lepper appeared to be at high risk of further offending.

Report by Jayde Walker, 11 November 2014

[23] The second report obtained under s 88 was provided by a psychologist, Ms Jayde Walker. She interviewed Mr Lepper twice over a total of four and a half hours. Mr Lepper was cooperative during these interviews.

[24] Ms Walker noted that although Mr Lepper has only three recorded convictions for violent sexual offences,[7] there are lower-level offences in his history that indicate some sexual motivation. This history includes a 2001 conviction for indecent language after he asked a woman to kiss him in a public situation. A history of disorderly behaviour was also reported to have had a sexual connotation. In addition there was the behaviour while in prison of exposure and threats made against staff and other inmates.

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7 The 2002 incident resulted in two convictions, unlawful sexual connection and rape.

[25] Ms Walker assessed Mr Lepper's risk of further offending by reference to the Automated Sexual Recidivism Scale (ASRS) on which he was assessed as medium-low risk. However, she considered that this assessment underestimated the actual risk posed because it did not include the current offending. If that offending was included, the ASRS showed Mr Lepper's risk as being in the medium-high category.

[26] On the STABLE-2007 assessment Mr Lepper was found to be in the high risk group with the following factors identified as problematic: significant antisocial influences, poor capacity for relationship stability, hostility towards women, general social rejection, impulsive acts, poor cognitive problem-solving skills, negative emotionality, sexual preoccupation, sex as coping, deviant sexual interests and poor cooperation with supervision.

[27] Ms Walker noted that the actuarial instruments on which these assessments were based did not take account of four particular factors: the short period between his completion of parole and the offending, his targeting of a stranger, lack of engagement or completion of offence-specific treatment, and recorded misconduct convictions for exhibitionist sexual offending while in prison.

[28] Ms Walker considered that Mr Lepper presented with multiple dynamic risk factors for sexual recidivism that had not been addressed through offence-specific treatment. She concluded that, overall, Mr Lepper should be considered to be at high risk of sexual recidivism within five years of release from prison and that future sexual offending could vary from a disinhibited exhibitionist act to another violent rape of a stranger in a public place. To reduce this risk Mr Lepper would need to engage in intensive offence-specific treatment, develop and maintain a pro-social support network in the community, address his pattern of substance abuse and adhere to treatment for his mental health condition. Ms Walker also considered Mr Lepper to be at high risk of general and violent recidivism within five years of release from prison. Such offending could range from threats to harm or kill, to verbal intimidation or physical acts of violence.

[29] Ms Walker concluded that it was critical that Mr Lepper could demonstrate significant progress towards addressing his dynamic risk factors and that he had not previously completed any intensive treatment targeting those factors. In this regard she noted that in 2010 Mr Lepper had 15 counselling sessions focusing on developing insight into factors leading to both his anti-social lifestyle and his sexual offending, but that Mr Lepper's developing mental illness interrupted this treatment.

[30] Mr Lepper also received treatment in 2013 (three sessions) focused on developing a Risk Management Plan to support him to stop sexual and violent offending. He was offered further treatment in 2013 while on parole but declined it.

[31] Ms Walker recorded Mr Lepper's indication to her that he was now willing to undertake the Adult Sexual Offender Treatment Programme (ASOTP) for higher risk sexual offenders. She viewed this stated willingness as positive but did express some caution about his degree of motivation to undertake treatment given his refusal to engage while he was on parole. She considered that, given his difficulty in engaging in community-based treatment, he might have more success in a programme that had greater external controls to support him to remain focused.

Appeal

First ground: failing to exclude the "pool cue" incident from consideration

[32] As mentioned, Dr Parker referred to an alleged incident in which Mr Lepper assaulted another inmate with a pool cue. Mr Lepper was acquitted on that charge at trial. Mr Young, for Mr Lepper, acknowledged that Dr Parker was entitled to take that alleged conduct into account by virtue of s 88(3) of the Sentencing Act, which specifically permits health assessors to take into account any conduct of an offender whether or not the offender has been charged with or convicted of the conduct. He also acknowledged that s 88(1)(b) entitled the Judge to take the report into account. However, he argued that it was irrelevant to the issue the sentencing Judge was considering and that the Judge ought to have specifically identified and excluded it as a relevant consideration.

[33] Mr Young referred to two cases, by way of example, of judges having specifically identified and excluded conduct of which an offender had been acquitted. In *R v Owen* the sentencing Judge specifically identified and excluded as irrelevant previous acquittals for sexual offending where the defence had been alibi rather than consent.[8] In *R v Davis* the sentencing Judge specifically indicated that he would not go behind acquittals in terms of identifying any pattern that might exist.[9]

[34] We do not accept that there is any requirement that a sentencing judge identify and exclude previous conduct that has been the subject of an acquittal. Dr Parker was entitled to include any conduct that he considered relevant to his assessment and the Judge was entitled to accept that assessment. The fact that judges in other cases did not consider it appropriate to do so does not mean that there is any general constraint.

[35] It is not clear to what extent the Judge placed weight on the pool cue incident. In canvassing Mr Lepper's personal circumstances the Judge referred to violent offending dating back to the 1990s. He also referred to re-offending in both a physical and sexual manner when considering Mr Lepper's efforts to address the causes of his offending. During that discussion he referred to Dr Parker's conclusion of his high risk of further re-offending. In considering whether a finite sentence was preferable if it could provide adequate protection for society, the Judge cited as a relevant factor that Mr Lepper was, in the Judge's view, at "high risk of further offending involving serious physical and sexual violence".[10]

[36] There was, however, no specific mention of the pool cue incident. Whilst the Judge may have taken the pool cue incident into account when he accepted Dr Parker's conclusions, that possibility needs to be viewed against the fact that Mr Lepper does have convictions for assault and, of greater concern, recorded incidents of threatening behaviour in the prison setting. Moreover, the main focus of the Judge's discussion in relation to any pattern of behaviour and tendency to commit serious offences in the future was overwhelmingly on sexual, rather than violent, offending. We are not satisfied that the Judge placed inappropriate weight

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8 *R v Owen* [2012] NZHC 499 at [24].
9 *R v Davis* HC Christchurch CRI-2010-009-10257, 4 May 2011 at [35].
10 *R v Lepper*, above n 2, at [46(a)].

on that particular aspect of Dr Parker's report and do not consider that the Judge made any error in not identifying and disregarding that piece of information.

Grounds two and three: error in approach to appellant's mental health

[37] The second ground of appeal is that the Judge should have placed greater weight on the fact that Mr Lepper has demonstrated a level of insight into his offending. The third ground of appeal is that the Judge erred in his finding that Mr Lepper would not fully engage in treatment without the imposition of a preventive detention sentence. These grounds overlap and we deal with them together.

[38] The Judge said:

> [49] I take the view that there is a real risk that if I had imposed a finite sentence of imprisonment here, Mr Lepper, you would accept that sentence and work towards completing it without fully engaging with the health professionals who will be providing assistance to you to deal with the issues that underlie your offending. That would be most unfortunate because, even if the Parole Board kept you in prison for the full period of a finite sentence, you may still be released into the community without having fully addressed the issues underlying your actions. That in turn would place the community severely at risk from the probability that you would offend again in a similar way in the future.
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> …
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> [51] I consider that the only way, Mr Lepper, in which you will have the incentive to engage fully with health professionals is if you know that such engagement is a prerequisite to being released. Only in this I believe can the parole authorities be sure that you are properly motivated to address the causes of your offending. Then, once you have engaged with health professionals and undergone treatment, you can be released once the parole authorities are satisfied that you no longer pose a risk to female members of the community.

[39] Mr Young acknowledged that Mr Lepper's psychiatric illness and the legacy of his childhood in terms of current behavioural patterns weigh in favour of preventive detention. However, he argued that Mr Lepper now demonstrates a level of insight that means he does not present as a hopeless case and submitted that the Judge ought to have recognised and placed more weight on this aspect. In particular, the Judge's view that Mr Lepper would not engage adequately with treatment in the context of a finite sentence was not warranted.

[40] Mr Young also argued that Mr Lepper never had a real chance to demonstrate that he could engage in necessary treatment to address his sexual offending because he would only have been eligible for such treatment towards the end of his sentence for the 2002 offending, which coincided with the onset of his serious mental illness. This deprived him of the opportunity to show that he could engage. Now, however, after years of denying his earlier offending, he has acknowledged it and acknowledged that he needs treatment to address that offending and has signalled his desire to obtain that treatment. Mr Young submitted that, in these circumstances, the Court could have confidence that if a finite sentence was imposed, Mr Lepper would engage for the purposes of treatment.

[41] It is true that Mr Lepper has now expressed his regret for the offending and his desire and intention to obtain treatment for it. This is a positive step on his part. However, Mr Lepper's current circumstances do not provide an adequate basis for the Court to be confident that he will in fact fully commit to and engage in treatment. First, this expressed insight is a relatively recent development. Mr Lepper, through no fault of his own, is facing the daunting task of undoing decades of damage that have led him to his current offending. It may be too much to expect that his current frame of mind, coloured as it must be by the prospect of preventive detention, will necessarily endure. Secondly, as Ms Walker pointed out in her report, Mr Lepper was offered treatment while he was on parole and declined to participate in that. That decision was made when Mr Lepper was in a stable mental state as a result of having received treatment for his mental illness. Notwithstanding that, he made the unilateral decision to reduce, and ultimately discontinue, his medication and to resume using cannabis. Although Mr Lepper is once again receiving adequate treatment for his mental illness, there must be serious concern that he will exhibit a similar attitude towards treatment in the future.

Fourth ground of appeal: failure to consider expressly the impact of an Extended Supervision Order

[42] Mr Young argued that, given Mr Lepper had complied with his parole conditions, the Judge should have contemplated the likelihood of a finite sentence coupled with an Extended Supervision Order as being an effective tool for addressing the ongoing concern of the protection of the public. Mr Young

acknowledged that this error was not critical but would give this Court the opportunity to look at the matter afresh.

[43] Mr Barr, for the Crown, submitted that the Judge's reference to preventive detention not being a sentence of last resort is to be read as a reference to the decision in *R v Hutchison* in which one of the issues was the relevance of the availability of an Extended Supervision Order to the imposition of preventive detention.[11] Mr Barr submitted that it was implicit in Gendall J's reasoning that the availability of an Extended Supervision Order would not change his view as to the necessity for preventive detention to address the risk posed to the community.

[44] In any event, Mr Barr submitted that Mr Lepper's personal circumstances and the nature of his offending meant that the availability of an Extended Supervision Order would not adequately address the Judge's concerns. The offending was not of the lower level type found in *R v Parahi* in which this Court considered that the availability of an Extended Supervision Order might tip the balance against a sentence of preventive detention.[12] Nor does Mr Lepper have the potentially redeeming features that justified a finite sentence over preventive detention in *R v McDonald*.[13] In particular, the defendant in *McDonald* was found to be genuine in his intention to undergo treatment, was developing a level of insight into his risk factors and was showing a capacity to manage risk. For the reasons already discussed, Mr Lepper is not at that point.

[45] We agree that, even assuming the Judge had not taken into consideration the possibility of a finite sentence coupled with an Extended Supervision Order, such an omission would not have altered his conclusion, nor the correctness of that conclusion. Mr Lepper's sexual offences were extremely serious and he presents with a worrying and longstanding pattern of dysfunctional violent and sexual behaviour which, for several years now, has been exacerbated by serious mental illness. In these circumstances, the existence of an Extended Supervision Order could not have made any difference to the assessment whether preventive detention was the appropriate sentence.

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11 *R v Hutchison* [2007] NZCA 55 at [17].
12 *R v Parahi* [2005] 3 NZLR 356 (CA) at [87].
13 *R v McDonald* [2009] NZCA 248 at [37]–[42].

Fifth ground of appeal: nominal finite sentence too low

[46] The final ground of appeal was that in identifying what an appropriate finite sentence would have been, the Judge reached a term that was too low and would not have provided adequate protection for the public. Had the Judge adopted a higher starting point and imposed a greater uplift to reflect Mr Lepper's previous convictions, the outcome would have been a longer finite sentence that would have provided greater assurance in terms of public protection, thereby tipping the balance against a sentence of preventive detention.

[47] The Judge adopted a provisional starting point of six years for the offending which he described as being at the higher end of the scale; indeed, both Crown and defence had submitted that the appropriate range was five to six years with defence counsel at sentencing inviting the Court to adopt the lower of those points.[14] However, Mr Young submitted that the sentencing Judge could have legitimately arrived at a higher finite sentence, relying on *R v Keen* in which this Court considered similar offending on a Solicitor-General's appeal and, in that context, adopted a starting point of six years but indicated that the available range would have been up to seven years.[15]

[48] We accept that the Judge could have adopted a somewhat higher starting point. But we do not accept that a higher starting point, together with a greater uplift for the previous sexual offending could have been justified. In any event, it is evident that the Judge's decision to impose preventive detention was driven not so much by a comparison with the finite sentence that could otherwise have been imposed, but by the considerations over how best to ensure that Mr Lepper received the treatment he needs to minimise the serious risk he presents to the community. We are satisfied that the Judge made no error in identifying the nominal finite sentence that would have been imposed.

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14 *R v Lepper*, above n 2, at [18].
15 *R v Keen* [2010] NZCA 112 at [30].

Result

[49] We grant an extension of time to appeal but dismiss the appeal against sentence.

Solicitors:
Crown Law Office, Wellington for Respondent