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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY
I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CRI-2016-091-2957
[2018] NZHC 2608

THE QUEEN

v

TERI TE WAIMARAMA THOMPSON
LEWIS ERU CRAIG
SHAYE GARY MICHAEL HOLLAND
JORDAN WHITINUI
JEFFREY TERRANCE MAXWELL TROON

Hearing:	5 October 2018
Counsel:	S C Carter for Crown E A Hall for Mr Thompson L Ord and E Blincoe for Mr Whitinui S Robinson for Mr Holland I M Antunovic for Mr Craig S A Thistoll for Mr Troon
Sentencing:	5 October 2018

SENTENCE OF CLARK J

Introduction

[1] Because I am sentencing five of you this morning, it will take a little longer than a usual sentence, so you may remain seated while I go through that process. But I will ask you to stand at the point when I am going to pass sentence on you.

[2] I also need to say at the outset that there is no significance in the order in which I propose to sentence each of you. Nothing turns on the order. To underscore the point, I propose to sentence you in alphabetical order. I mean no disrespect in doing it this way. Alphabetical order is a neutral approach and no meaning at all should be taken from it.[1]

[3] My sentencing process will be in two parts:

(a) In the first part I will address matters of relevance to all five defendants: the charges to which you all pleaded guilty; the background to the offending; and a brief description of the trial. The victim impact statement will be addressed. I will refer to the principles and purposes of sentencing that have particular relevance to your offending, and I will also mention in this first part the broad approach I intend to take to your guilty pleas.

(b) After setting out the matters which apply to all of you I will turn to the individual sentencing. For each of you I will:

(i) First, set a starting point which reflects the level of seriousness and the criminality of your conduct.

(ii) Then I may adjust the starting point to reflect factors personal to you.

(iii) Then any discounts for guilty pleas or remorse will be applied.

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[1] Because Ms Hall had commitments in another Court it was agreed the sentencing would proceed in alphabetical order except for Mr Thompson who would be sentenced first.

[4] At the end of that assessment I will ask you to stand for sentence.

Charges

[5] You have each pleaded guilty to, and on 28 August 2018 were convicted of, the following charges:

(a) Mr Craig – one charge of indecent assault.[2]

(b) Mr Holland – one charge of being a party to indecent assault.[3]

(c) Mr Thompson – two charges of indecent assault.

(d) Mr Troon – two charges of indecent assault.

(e) Mr Whitinui – one charge of indecent assault.

The facts

[6] The circumstances of the offending are set out in the summary of facts – and I am sorry Mr Thompson, I do need to go through it. On the evening of 28 October 2016 S was driving along Kapiti Road, Paraparaumu in her car. She noticed a white utility vehicle following her. The occupants were making hand gestures towards her. The ute was owned and driven by you, Mr Holland. Messrs Craig, Thompson, Troon and Whitinui were passengers.

[7] S was followed to her home address. She did not know any of you. Two of you spoke to S when she got out of her car. After a short conversation S ended up sitting in the front passenger seat of the ute on your knee, Mr Craig. S was asked if she had kids or a boyfriend. The other occupants were yelling and clapping. The ute was driven to Mr Troon's home address.

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2 Crimes Act 1961, s 135 (maximum penalty seven years imprisonment).
3 Crimes Act, s 66(1) and s 135 (maximum penalty seven years imprisonment).

[8] When inside, Mr Troon gestured to S to follow and she did so, into his bedroom. Once inside your bedroom you closed the door behind S. The facts leading to your first indecent assault charge, Mr Troon, are that you then pushed S to her knees, held her head with one hand and, without her consent, put your penis in her mouth. You then partially pulled down S's pants.

[9] While her pants were down some of the other defendants entered the room including Mr Holland who was laughing and encouraging what was happening. Your encouragement, Mr Holland, led to your charge of being a party to indecent assault.

[10] One of you smacked S on her bottom. Mr Troon, you told the others to get out, that it was "[your] turn". You sat on the bed and S was made to continue performing oral sex on you. The rest of you returned to the room and S's top was removed. S was again slapped on her bottom.

[11] Mr Craig, you put your penis into S's mouth. You did so without her consent. This act constitutes the basis of the charge of indecent assault to which you have pleaded guilty.

[12] Mr Thompson, you put your penis into S's mouth, also without her consent. This is the basis of the first indecent assault charge to which you have pleaded guilty.

[13] You then took a beer bottle and inserted it into S's vagina. You accept that S asked for it to stop. This act led to the second charge of indecent assault to which you have pleaded guilty.

[14] Mr Troon, you took up a homemade screw driver tool made from a cylindrical piece of wood for a handle. It had a metal shaft and head attached. You intended it to be inserted into S's vagina. S protested. One of your co-defendants also objected causing you to stop.

[15] Mr Whitinui, you then entered the room and touched S's genitalia. This is the basis of the charge of indecent assault to which you have pleaded guilty.

[16] Mr Troon, you then inserted your penis into S's vagina. S told you she needed to go home, but you said "let's finish" and would not let her go. This offending gives rise to the second charge of indecent assault to which you have pleaded guilty.

[17] When S was eventually able to leave the address, she was taken back to Mr Holland's ute by Mr Craig and Mr Holland. Mr Holland drove and Mr Craig was in the passenger seat. S was dropped off along Kapiti Road. In a distressed state S called the manager of the boarding house where she was staying and he came and picked her up.

The trial

[18] The trial of the 65 charges you collectively faced began on 20 August 2018. The first days were occupied by legal argument. S commenced her evidence on 22 August, the third day of trial. Cross-examination commenced after the lunch adjournment on 22 August and continued until just before midday on Monday 27 August. On Tuesday 28 August I granted leave to the Crown to amend and withdraw charges. The circumstances in which the application was made, and granted, are detailed in the ruling which I gave.[4]

[19] You were arraigned and guilty pleas entered on 28 August 2018. A 'stage one' warning was given to each of you under s 86B of the Sentencing Act 2002.

[20] Accordingly, this sentencing proceeds on the basis of your guilty pleas to the charges and the material in the summary of facts which you have agreed and which you have agreed.

Victim impact statement

[21] In her victim impact statement S describes experiencing much distress as a result of what happened. She says it has been hard for her to trust others and have supportive relationships and she has required much support from people around her to

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4 *R v Thompson* HC Wellington CRI-2016-091-2957, ruling no. 4 (amendment and withdrawal of charges), 30 August 2018.

get through the past two years. S recounted feeling unsafe after the offending and moving to Wellington to reduce the chance of coming across any of the defendants. She had not been in New Zealand for long and was a stranger to Wellington but moved even so. She felt scared and anxious and sometimes struggled to leave her room. Her sleep was disrupted with nightmares and she experienced flashbacks which made her distressed. This was difficult when she was trying to finish at a new school. She had several admissions to hospital and stays in respite for post-traumatic stress disorder as the trauma of the event had a severe psychological impact on her. S describes self-harming at times to assist her to cope. I place no great weight on the self-harm, however, as S had resorted to such strategies for coping prior to this offending.

Pre-sentence reports

[22] I have also read, and had regard to, the pre-sentence reports prepared in respect of each of you and I will address the content of the reports when I move to your individual sentences.

Approach to sentence

[23] I am going to address briefly now my approach to sentence.

[24] A charge of indecent assault attracts a maximum sentence of seven years imprisonment. There is no tariff or guideline judgment for indecent assault. That reflects the varied circumstances in which indecent assaults may occur. Each case falls to be considered on its facts.

[25] In sentencing each of you for your indecent assaults on S I consider the following purposes of sentencing in the Sentencing Act to have particular relevance:

- to hold you accountable for the harm to S;
- to promote in you a sense of responsibility for, and acknowledgment of, that harm;
- to denounce your conduct;

- to deter you from committing similar offences; and

- to assist rehabilitation.

[26] Unless circumstances personal to the offender make it inappropriate to do so, the Sentencing Act requires me to impose a penalty near to the seven year maximum prescribed for indecent assault if the offending is close to the most serious cases of indecent assault.[5] But I must also impose the least restrictive outcome that is appropriate in the circumstances.[6] I must also take into account the general desirability of consistency with sentences for offenders committing similar offences in similar circumstances.[7]

[27] The final matter that is relevant to each of you is the approach I propose to take to your guilty pleas. As your counsel may have advised you, guilty pleas attract discounts in sentence. The discount can be up to, but should not exceed, 25 per cent.[8] The maximum credit of 25 per cent is not in my view warranted for any defendant in this case.

[28] The credit to be given for a timely guilty plea reflects the benefits to the justice system and to the participants, including of course complainants who are spared having to give evidence. I accept guilty pleas were entered quickly following discussions with the Crown about amendment and withdrawal of charges. In *Johnson v R* a guilty plea was entered on the morning of the trial in response to a lesser charge.[9] The Court of Appeal was satisfied a 10 per cent discount was appropriate. The victim would have already suffered the anxiety attendant on expecting to give evidence, the jury had been empanelled and the Court had already allocated significant resources to dealing with the matter.

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5 Sentencing Act 2002, s 8(d).
6 Section 8(g).
7 Section 8(e).
8 *Hessell v R* [2010 NZSC 135, [2011] 1 NZLR 606.
9 *Johnson v R* [2016] NZCA 144 at [26].

[29] So too in this case, S not only endured the anxiety of anticipating her return from overseas for the purpose of giving evidence but was cross-examined by five counsel over a three-and-a-half day period.

[30] But I do accept there was nevertheless a benefit to S from the guilty pleas. It is a matter of record that when S had completed her evidence and there was no prospect of being recalled Ms Carter spoke to her about the outcome she would wish to have from the trial. Ms Carter said: "validation is for her the most important thing".[10] From the professionals' point of view there was a good chance S would progress following guilty pleas, whereas otherwise there were real concerns for her safety.

[31] But the guilty pleas were not acts of self-sacrifice by any defendant. Ms Hall submitted it would have been understandable if her client had rejected the Crown offer but to his credit he chose not to await the jury verdict and to enter a plea of guilty.

[32] I observe that S was unexpectedly steadfast in her evidence notwithstanding the sustained cross-examination. I say "unexpectedly" because, as everyone who was involved in the trial was aware, there was a very real possibility, right up until the point when she was sworn, that S would not be strong enough to give evidence. But she gave evidence and withstood lengthy cross-examination. I do not share counsel's view that the cross-examination significantly impacted on the credibility of the complainant. In pleading guilty each defendant avoided any possibility of a jury verdict against him in respect of charges of sexual violation attracting a maximum period of 20 years imprisonment. There is no room for regarding any of the guilty pleas as synonymous with self-sacrifice. The pleas to lesser charges presented obvious benefits to the defendants in addition to the incidental benefit to S.

[33] In the circumstances, and in light of broadly analogous cases, I consider 10 per cent discounts from individual starting points to be appropriate.

[34] I turn now to the individual sentences.

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[10] Ruling No 4, above n 4, at [7].

Mr Thompson

[35] Mr Thompson, the facts underlying the two charges of indecent assault to which you have pleaded guilty are that you put your penis into the mouth of the complainant without her consent and you inserted a beer bottle into her vagina – also without her consent.

Starting point

[36] The Crown submits a starting point of three to three-and-a-half years imprisonment appropriately recognises the two offences, both serious examples of their kind, and accounts for the impact on the victim. You have a number of previous convictions. The Crown also submits there should be a discrete uplift to reflect that two convictions for assault of females are relevant as is the fact this offending occurred while you were subject to release conditions. That is now recognised to be wrong and I will amend my sentencing notes to reflect that. You did not commit the offending while subject to release conditions.

[37] Your counsel submits the appropriate starting point is of no more than two to two-and-a-half years imprisonment. You did not initiate the sexual contact. It is also submitted it is not appropriate to adopt a higher starting point for you than for Mr Troon.

[38] Ms Hall submits your offending was less serious than Mr Troon's, because the Court of Appeal in *R v Castles* considered penetration with an object or digit was considered to be less serious than penile penetration.[11] The Court of Appeal actually observed that use of an object, particularly a weapon, is a sufficiently gross act that it is to be expected the appropriate starting point would be at least close to the starting point for rape.[12] Since *R v Castles* the Court of Appeal has confirmed that any suggestion violation other than penile violation will be treated less seriously, is not tenable.[13]

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11 *R v Castles* CA105/02, 23 May 2002.
12 At [23].
13 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [73].

[39] The features that aggravate the offending are the same for each defendant. You carry some of the responsibility for the harm to S which she described in her victim impact statement, although of course I cannot attribute to your offending particular identifiable harm. The difference in age is a relevant factor. She was 17. You were 26. And you acted as a group of multiple offenders. Ms Hall submitted "group or multiple sex is not uncommon with young people". In my view the submission overlooks the non-consensual aspect of this occasion.

[40] Despite the Crown's submission, I consider an appropriate starting point is five years imprisonment. It is difficult to imagine an indecent assault more serious than non-consensual penetration of the complainant's vagina with a beer bottle, and penetration of her mouth with your penis. A five-year starting point recognises the offending is near the most serious cases for indecent assault. A five-year starting point is slightly more than two thirds of the maximum penalty but in my view gives effect to the statutory principle that a sentence near to the maximum should be imposed for offending that is within the most serious of cases for which the penalty is prescribed.

[41] I now consider whether that starting point should be adjusted by reference to your personal circumstances. You are now 28 years old. You are in a relationship with the mother of your youngest daughter. You have a close relationship with your grandmother who says you are very good with your daughters, nieces and nephews and are very helpful to her when you stay with her.

[42] The pre-sentence report writer says you are well known in the Kapiti area having grown up and been educated there. Your youngest brother is a patched member of the Mongrel Mob. You are regularly seen with Mongrel Mob members and wearing red coloured clothing, but you advised you are not seeking to join any gang.

[43] Your family suspects you have been affected by foetal alcohol syndrome and that this has impacted on your ability to learn, to make good decisions, to manage frustrations, and understand the effect of your actions on others. I have read the report of the clinical psychologist who interviewed you on several occasions. She concluded you did not meet the criteria for such a diagnosis, though you are "at risk" for foetal alcohol syndrome disorder and neurodevelopmental disorder.

[44] Ms Hall has expressed frustration that the pre-sentence report fails to understand your cognitive difficulties and that there has never been an assessment by Community Corrections. The report writer observed however that Ms Hall had arranged for a specialist assessment to address concerns about your cognitive functions but the report was not shared with them.

[45] The Crown acknowledges the challenges identified in the report of the Communications Assistant but submits any such personal characteristics can only result in a reduction of your sentence if they facilitated the offending or will unduly impact on your ability to cope with the sentence imposed. There is no suggestion of that relationship in the psychologist's report. Importantly, for the purpose of sentencing, the psychologist said you demonstrated a good understand of the charges and your plea options.

[46] But there is very much more in this full report. I could not do justice to the report by attempting to summarise its 150 paragraphs. I make two points however.

(a) While it was originally said that you committed the offence on release conditions – and we now know that not to be so – I nevertheless had accepted Ms Hall's submission that an uplift to your sentence was not appropriate because you had long suffered from undiagnosed cognitive issues.

(b) My second point relates to the report itself which is a comprehensive assessment of your emotional and cognitive development by a highly trained specialist. The report is an important tool for those who will have responsibility for your care following my sentence. Ms McFadden identified many areas of concern but also formed the view the results she obtained on some of the tests most likely underestimated your actual abilities. These abilities need to be cultivated. Ms McFadden also observes that your heavy alcohol and substance use possibly have exacerbated pre-existing central nervous system vulnerabilities, some of which may have been reversed following an extended period of abstinence due to time spend in prison

on remand. Although you have not been diagnosed as having the condition, Ms McFadden is of the view you would likely benefit from the same services known to be of assistance to those with a diagnosis of foetal alcohol syndrome disorder.

[47] I agree with Ms Hall that it is to your credit Mr Thompson that you have taken an interest in understanding what drives you and you are willing to continue to gain a greater understanding.

[48] Returning to the relevance of the report to sentencing, I take the Crown's point that there is no direct evidence that the characteristics and features Ms McFadden describes contributed to the offending. While I am unable to identify from the report any proper basis for reducing your sentence I am prepared to set aside those factors that would normally justify an increase: your lack of remorse; your extensive criminal history resulting in 38 convictions and 17 sentences of imprisonment.

[49] Ms Hall submits you have already spent approximately 18 months in custody and it would be unjust, particularly when considering equivalence with your co-defendants, to receive a sentence that sees you returned to prison. But the Court is expressly prevented by s 82 of the Sentencing Act, from taking into account any part of your pre-sentence detention when determining the length of your sentence. The period which you have spent in custody will be taken into account by others.

[50] On my approach the possibility of a community based sentence does not arise but for completion I summarise why such a sentence is inappropriate, if not impossible, for you at this stage.

(a) You did not consent to electronic monitoring. You stated you would prefer to "do jail".

(b) Your current address was not deemed suitable for EM bail.

(c) You have a poor record of compliance with community based sentences, and re-offending whilst serving community based sentence.

You have incurred five convictions for breaching release conditions and your last term of community work, imposed on a breach – I am sorry – that is irrelevant as well – what is relevant is the fact that you have been on bail with complete compliance.

(d) You do present with complex needs due to your impulsivity, lack of insight, poor attitude towards Police and Probation, and transience.

(e) You are also assessed to be at risk of relapse into alcohol and drug abuse once bail conditions are removed. In the 10 years you have been appearing before the courts you have completed very little in the way of interventions: a short programme of alcohol and drug counselling in 2016 and an education assessment in 2018 while on remand.

[51] As I earlier observed, I trust that those who are responsible for your immediate care will strive to give effect to Ms McFadden's recommendations so that your needs and aspirations can be addressed in preparation for your release from imprisonment.

[52] You are entitled to a 10 per cent discount for your guilty plea bringing your end sentence to a term of imprisonment of four and a half years.

[53] Mr Thompson please stand. On the charge of indecent assault by penetration with an object I sentence you to four years six months imprisonment. On the charge of indecent assault by oral penetration I sentence you to three years imprisonment to be served concurrently.

[54] You may be seated.

Mr Craig

[55] Mr Craig, the facts underlying the charge of indecent assault to which you have pleaded guilty are that, without her consent, you put your penis into the mouth of S. Recognising that such conduct is a serious example of indecent assault the Crown submits a starting point of two to two-and-a-half years imprisonment is appropriate.

[56] Your counsel, Mr Antunovic, contends the appropriate starting point is two years imprisonment. Mr Antunovic submits a discount from that starting point is warranted because:

(a) You have been on restrictive bail conditions since your release on bail following your arrest on 15 December 2016. Mr Antunovic points to the fact you were placed on an evening curfew for three months until 15 March 2017 when you were placed on a reverse curfew for approximately six weeks until it was revoked on 1 May 2017.

(b) You have 10 previous convictions for relatively minor offences and no convictions for previous sexual offending.

[57] Mr Antunovic takes issue with the Crown's approach to sentence as having changed since its discussions with counsel leading to the reduction in charges and guilty pleas. I see no inconsistency in the Crown's approach. Ms Carter advised the Court on 28 August that, except in respect of Mr Thompson, the Crown's submissions on sentence would leave open the option of an electronically monitored sentence.

[58] Today, Ms Carter submitted that when one applies to the starting point of two to two-and-a-half years any discounts for personal mitigating factors, and a discount for a guilty plea, "the end sentence would likely be in a range where an electronically monitored sentence can be considered".

Starting point

[59] I turn to assess an appropriate starting point, one which reflects the nature and seriousness of your offending and your culpability.

[60] A feature which aggravates the offending is the age difference between you and S. While S was not a young child there was an age disparity between you such that it is a relevant factor in assessing the extent of her vulnerability. She was 17 and at school. You were 25.

[61] The Court of Appeal has recognised that harm is inherent in offending of this type.[14] S refers to the physical injuries from the assault which caused her discomfort and embarrassment and describes also non-physical harm such as the psychological impact on her of the offending. As I have said, that particular harm cannot be attributed to individual offenders but I am able to infer from the fact she suffered harm and that you all offended, that you share in the adverse effects on her. In other words, I do not attribute to you any particular, or discrete, responsibility for the generally aggravating factor that S suffered harm. I also acknowledge the relevance of S's underlying mental health challenges to the harm she suffered in consequence of the offending.

[62] The fact the indecent assaults involved several offenders acting together is a factor increasing culpability.[15] There were five of you. While your individual role and the extent of your participation is, of course, relevant in assessing your individual culpability the fact you were part of a group acting together involves an enhanced degree of harm.[16] I consider the nature of the group activity as involving a certain degradation of S. She, herself, referred to her "embarrassment" in her victim impact statement. Degradation or indignities are recognised as potentially aggravating an offence. That said, I do not aggregate this factor with the group sex aspect of the offending. In other words, I will be careful not to double count the two factors.

[63] Of the three cases which the Crown relied on, *Dayal v R*, *Johnson v R* and *S v R*, *Dayal v R* and *Johnson v R* are the most analogous.[17] The first involved external touching and contact of the complainant's vaginal area and in *Johnson v R*, although the intoxicated complainant was asleep, it was able to be inferred from her significant swelling and bruising that a charge more serious than indecent assault might have been sustained. In *Dayal v R* a starting point of three-and-a-half years imprisonment was held to be within range and in *Johnson v R* the Court of Appeal upheld a starting point of three years imprisonment.

[64] Your offending involved penetrating the complainant's mouth without her consent with your penis. This was serious offending and unquestionably at the upper

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14 *R v AM*, above n 13, at [44].
15 *R v AM*, above n 13, at [45].
16 *R v AM*, above n 13, at [45].
17 *Dayal v R* [2016] NZHC 1027; *Johnson v R*, above n 9; and *S v R* [2017] NZCA 459.

end of indecent assault cases. I consider a starting point of three years properly reflects the seriousness of the offending and your culpability.

[65] Next, I turn to examine whether there are any factors personal to you that mitigate your offending. This is your first appearance for sexual offending and your first offence since 2016. You have a number of previous convictions but I accept the submissions that none are relevant to the current offending.

[66] You live alone in the home you previously shared with your grandmother before she passed away five years ago. You are not involved with any local marae and while you have family in the Kapiti District, you do not describe your relationship with the family as strong. The report writer was unable to explore whānau support for you as you did not provide the writer with contact details for any member of your family.

[67] You have a child who is almost six years old and who you see every weekend.

[68] You stated to the report writer that you are currently employed and you are contracted to work for Goodman Contractors Ltd and that your direct manager is supportive of you and values your work. But you did not provide contact details to enable this information to be verified and confirmed with your employer. The report writer advised you this verification and confirmation was vital to maintaining your employment should you be subject to electronic monitoring. I note that this morning Mr Antunovic has instructed me that that information is now available, although of course neither I nor the report writer has seen it.

[69] You admitted to consuming two beers and no other substances on the day of the offending. While alcohol and drug use is not assessed as contributing to your offending it has been a factor in all of your previous convictions. You last attended counselling to address alcohol and drug use in 2009 while subject to a supervision sentence. You are assessed at moderate risk of harm due to your alcohol use.

[70] You demonstrate no remorse for your offending. You maintained to the writer of the pre-sentence report that your actions were welcomed by S. You expressed

remorse for being the subject of court proceedings but expressed the belief S was as much a party to the situation as you and your co-offenders were. It was of concern to the report writer that while you were able to articulate and describe and understand what consensual sex looks like, you were not able to exercise self-control around your group of associates. Your offending is described as opportunistic and influenced by your inability to exercise self-control in a social, peer-group situation.

[71] Your counsel makes the point that resolution of the trial was as much in the interests of the Crown as it was in the interests of the defendants; that the Crown accepted there were some "real potential hurdles for the Crown" and Mr Antunovic submits conviction was by no means a certainty. While Ms Carter did acknowledge at the time there were some real hurdles, she submitted in the same breath there was clearly evidence before the jury to enable it to return guilty verdicts.

[72] These matters become irrelevant though in light of the fact you have pleaded guilty to indecently assaulting S by putting your penis in her mouth without her consent. It is upon that basis alone that I am to sentence you. Ultimately, I am able to see nothing in your personal circumstances which mitigates your offending and warrants a reduction from the starting point. Time spent on bail before sentence is usually only taken into account when the conditions of bail were very restrictive.[18] Night time curfews are not generally regarded as warranting any discounts but it is ultimately left to the discretion of the sentencing judge to make an assessment in all the circumstances. I propose to reduce the starting point by a month in recognition of the period for which you were on bail, and your compliance with conditions. That brings the starting point to two years and 11 months.

[73] You are also entitled to a 10 per cent discount for your guilty plea.

[74] From the starting point of two years and 11 months, I deduct a rounded-up period of four months.

[75] Mr Craig, please stand. You are sentenced to imprisonment for two years and seven months. You may be seated.

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[18] *Winkelmann v R* [2010] NZCA 215 at [21].

Mr Holland

[76] Mr Holland, you were 26 at the time of the offending. The Crown submits a starting point of 12 to 18 months imprisonment is appropriate as it takes into account your lesser role as a party but also that you provided encouragement.

[77] There are sometimes cases which fall within a serious band of offending even though the offender is only convicted as a party.[19] You are charged as a party to offending that I have held to be very serious.

Starting point

[78] Mr Robinson submitted on your behalf a starting point of 12 to 18 months imprisonment is unduly high relative to the starting points proposed by the Crown in relation to your co-defendants. Mr Robinson submits you did not overtly assist in the commission of the offence. Mr Robinson suggests your offending could be more fairly described as incidental to your relatively fleeting presence in the bedroom and he submits a starting point of no more than 12 months imprisonment is appropriate.

[79] It is clear from the summary of facts that you played a significantly lesser role in the assault on S than any of your co-defendants. You did drive the ute to Mr Troon's house, but it is not suggested by the summary of facts that the offences were premeditated or that you knew what was to occur when you arrived. You did not touch S. You were however present although apparently briefly. By laughing you encouraged your co-offenders and you contributed to the harm which S experienced. The same features which I have identified as aggravating the overall offending apply to your particular offending.

[80] Nevertheless, the part you played, while distasteful and criminal, did not involve the degree of culpability that those who physically assaulted the complainant bear. I accept the Crown's suggested starting point range of 12 to 18 months. I adopt a starting point of 18 months as reflecting the seriousness of your party status while

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[19] *R v AM*, above n 13, at [85].

also preserving the necessary distinctions in culpability and seriousness of offending of your co-offenders.

[81] I examine now whether there should be any adjustments to that starting point by reason of factors personal to you. You are 28 years old. You live with your mother, your partner and your six week old son. You have a five year old daughter who resides in Kapiti and who you see on a regular basis. Your partner and mother are highly supportive of you. They were present each day of trial.

[82] You are employed by Goodmans Ltd, a local earthmoving and roading company. The pre-sentence report records that company management confirms you have been with the company for six years and describe you as a "balanced young man with leadership potential". The company is familiar with electronic monitored sentences and states it could continue to work with you if you are given a sentence of community detention but home detention would be untenable as you are currently employed on the new bridge south of Foxton. The company also has a policy of frequently moving its staff around the various work sites. The company's intention is to relocate you, if you wish, to their work site at Puhoi, north of Auckland, in order to give you further work experience. You informed your work management and colleagues about the charges and they know you as an "honest person".

[83] Your sister has written a letter in support. You often look after your sister's children and the property when your sister is away. You also alternate with your sister travelling to Whanganui to look after your late grandmother's deer farm. With a sentence of community detention, you will no longer be available in these ways to your sister.

[84] You are assessed as presenting a low risk of offending. Your responsible and otherwise apparently ethical conduct of your personal life entitles you to a deduction of six months from the starting point. That results in a provisional sentence of 12 months imprisonment before assessing other factors.

[85] Any greater discount is unavailable in light of your complete lack of remorse. Indeed, you apparently maintain you have done nothing wrong. Your position,

Mr Holland, flies in the face of your guilty plea and your acceptance of the summary of facts.

[86] I accept though the Crown's position in respect of your situation. A community based sentence is credibly available to you. You are at low risk of re-offending and your culpability in respect of the offence for which you have been convicted is such that you are a suitable candidate for a sentence of supervision

[87] Mr Holland please stand. I sentence you to supervision for six months with the following special conditions:

(a) You are to attend an assessment for psychological counselling as directed by a probation officer; to attend and complete any counselling, treatment or programme as recommended by the assessment as directed by and to the satisfaction of a probation officer.

(b) You are not to associate with or contact S, directly or indirectly, without the prior written approval of a probation officer.

(c) Thirdly, you are not to communicate in any way or associate with Teri Thompson, Jeffrey Troon or Jordan Whitinui, without the prior written approval of a probation officer. I recognise that you are likely to, and you therefore may, associate with Lewis Craig as part of your employment by the same employer.

[88] You may be seated.

Mr Troon

[89] Mr Troon, the facts underlying the two charges of indecent assault to which you have pleaded guilty are that you put your penis into the mouth of the complainant without her consent and that you had intercourse with her, also without her consent.

[90] I have discussed the aggravating features of the offending. The harm to the complainant; the age discrepancy between you, who were 26, and S, who was 17, and

that you offended as a group. These are all factors that serve to aggravate your offending.

Starting point

[91] Your counsel correctly submitted your offending was at the higher end of the spectrum of offending of this kind and proposed a starting point in the range of 25 to 28 months imprisonment. Ms Thistoll submitted that taking mitigating factors would result in an end sentence of under two years imprisonment and that a sentence of home detention is appropriate and the least restrictive sentence in the circumstances.

[92] Counsel referred to three cases in setting the starting point and I refer to those in my sentencing notes: *R v Hohaia*,[20] *R v R*,[21] and *Johnson v R*.[22]

[93] In *Johnson v R* the Court of Appeal approved a three year starting point for digital and oral penetration of the complainant's vagina. While I accept the potential relevance of this case I note the offending was less serious than Mr Troon's two charges of indecent assault for penile penetration of S's mouth and intercourse, both without consent.

[94] Again, I find myself unable to agree with the starting point proposed by the Crown. By pleading guilty to the agreed summary of facts, you have accepted you penetrated the victim's mouth with your penis and had intercourse with her while lacking any honest belief in her consent. This is indecent assault of a most serious kind and requires a starting point of five years to reflect that seriousness and your culpability.

[95] The next question is whether there should be any adjustment to that starting point by reference to aggravating or mitigating factors personal to you.

[96] You are now 27 years old. Your mother is your main support person and she has indicated she will give whatever it takes to help you move on from your offending.

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20 *R v Hohaia* CA221/05, 17 October 2005.
21 *R v R* [2015] NZHC 2999.
22 *Johnson v R*, above n 9.

You are assessed as at low risk of further sexual offending. This is your first conviction for an offence of sexual offending. You have found and maintained employment since your offending and are progressing towards an apprenticeship.

[97] Those factors warrant a reduction in the starting point. But the extent of the reduction is offset by the fact you seem not to accept your offending. The pre-sentence report describes you as remaining adamant the sexual contact with S was consensual. You are regretful but that is because you are angry with yourself for getting into a situation where you could be accused of such an act. You essentially deny the offending. I make that observation notwithstanding Ms Thistoll's instruction that you do now feel something for S and her vulnerability.

[98] Your protests though contradict your guilty pleas. As well, your protests contradict your acceptance of the summary of facts that underlies the charges against you. Further, your agreement with the summary of facts is acceptance that you picked up an object with the intention of inserting it into S but you stopped when one of your co-offenders objected. I say no more about that aspect of the evening because it is not the subject of any charge.

[99] As I say your present maintenance of your innocence has the effect of reducing the level of discount that would otherwise be available as a result of the constructive steps you have taken since the offending. But you are entitled nevertheless to a discount for your negligible criminal history, the low risk of offending which you present and for the real and meaningful steps you have taken since the offending. I consider a discount of four months from the starting point is appropriate, leading to a sentence of four years and eight months imprisonment.

[100] You have made an offer of reparation. Your counsel submits you are able to pay $500 "emotional harm reparation to acknowledge in a tangible way the harm experienced by the complainant". Where an offer or agreement to make amends reflects the offender's acceptance of responsibility, and is a genuine expression of contrition, it is appropriate to recognise that by way of a sentencing discount.[23] As

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[23] Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at SA32.04.

well, the Sentencing Act provides that the Court must take into account any offer of amends made on behalf of the offender to the victim.[24]

[101] You maintain S consented to your acts. Your position makes it difficult to regard the offer of reparation as a genuine expression of contrition or, in fact, an offer of amends. I decline to take into account the offer. It presents as little more than an attempt to purchase a discount without the underlying genuine acceptance of responsibility for the offences that would merit a sentencing discount.

[102] You are entitled to the same 10 per cent discount as your co-offenders for guilty pleas.

[103] Mr Troon please stand. On the first charge of indecent assault relating to intercourse without consent you are sentenced to four years and two months imprisonment. On the second charge of indecent assault relating to penetration of the complainant's mouth with your penis, you are sentenced to three years imprisonment to be served concurrently.

[104] Please be seated.

Mr Whitinui

[105] Mr Whitinui, you pleaded guilty to indecent assault on the basis you touched S's vagina without her consent.

Starting point

[106] The Crown submits a starting point of 18 months to two years imprisonment appropriately takes into account that your offending is a serious example of its kind.

[107] Your counsel, Ms Ord, submits a 12 month starting point is appropriate. Ms Ord relied on five cases.[25] The starting points range from 12 months to 21 months.

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[24] Sentencing Act, s 10(1)(a).

[25] *Gerber v Police* [2013] NZHC 773; *R v Hohaia,*above n 20; *R v R*, above n 21; *R v Jones* DC Greymouth CRI-2009-018-1237, 19 January 2012; and *Hunt v R* [2012] NZCA 469.

I consider *R v Hohaia*, where there was a starting point of 12 months, to be distinguishable. While there was an assault there was no touching of the genitalia.

[108] Your assault involved skin-on-skin contact with the victim's vagina. There was only one touch to the genitals with no associated force, violence or threats, and no penetration. Importantly also, there was no consent.

[109] Ms Ord submits there was no suggestion you acted in concert with the other defendants at the time you touched S. I do not see it that way. You were all in this together.

[110] I am satisfied a starting point of 20 months imprisonment is appropriate.

[111] Are there any personal facts warranting an adjustment to the starting point?

[112] You are 27 years of age. To the pre-sentence report writer you described a positive and healthy upbringing with your family on the Kapiti Coast, with whom you currently reside in Paraparaumu. You left school at a young age but have been in regular employment since and also managed to obtain NCEA levels 2 and 3 after leaving school. You spend the majority of your time in full time employment and fulfilling your role as a father to your five year old son, who you care for during the week.

[113] You are fully employed in your family's blind installation business, Designer Blinds Ltd, where you have worked for approximately two years. The business was originally owned by your mother, however, the business was transferred into your name in September 2018. You typically work five days a week, Monday to Friday.

[114] You are the main caregiver to your five year old son who resides with you.

[115] Mr Whitinui, you have no previous convictions and therefore are entitled to a discrete discount for good character. I consider a four month discount is appropriate. That results in a provisional sentence of 16 months.

[116] You acknowledged you were in the bedroom for five to ten minutes when your role in the offending occurred. You confirmed the Police summary of facts was accurate, however, you did not see the sexual act as non-consensual; rather, that S was "giving out sexual favours". You further stated that "[you are] not that sort of person" and that the offending "felt like it was something that shouldn't have happened".

[117] You described feeling "weird and awkward" as a result of the presence of your co-offenders and that "[you] shouldn't have gone into the room". However, you did concede it was possible the complainant felt she was being taken advantage of. You wished to proffer your apologies to her and your remorse appeared genuine to the report writer. A further discount of four months appropriately reflects your reflection on the complainant's position and your remorse. This brings the provisional sentence to 12 months.

[118] You reported consuming six or seven beers over approximately four hours prior to the offending and that you were "a little tipsy". You had not consumed any illicit drugs. Departmental substance abuse screening indicates you pose a low overall risk of further substance abuse.

[119] Despite your alcohol use you have been assessed as being at low risk of further substance abuse. Your involvement in the offending appears to be strongly influenced by association with anti-social peers and an inability to withstand negative peer pressure. Given the otherwise constructive aspects of your life and lack of previous offending, it is highly likely your involvement in the offending was precipitated and aggravated by the influence of your co-offenders and alcohol.

[120] You have complied with bail conditions preventing the consumption of alcohol, contact with your co-offenders and a reverse curfew for a two year period. I consider a one month discount is appropriate to reflect those restrictive conditions. This brings the sentence, provisionally, to 11 months. You are entitled also to a discount of 10 per cent for your guilty plea. One further month is deducted. This results in an end sentence of 10 months imprisonment.

[121] You have positive support from your family and employment compatible with any community based sentence the Court may impose. You have not previously been subject to a community based sentence. You have indicated some anxiety around the possibility of a sentence of imprisonment and a high desire to comply with any community based sentence the Court imposes. No overall barriers have been identified to compliance and your family has confirmed their willingness to support you. No issue has been identified with your proposed address of your mother's house.

[122] Home detention is recommended to hold you to account. I accept the recommendation. A sentence of home detention sufficiently holds you to account while also enabling you to continue your employment, which I see as desirable for the wider family.

[123] Mr Whitinui, please stand. You are sentenced to home detention for five months on the following conditions:

(a) You are not to possess, consume or use any alcohol or drugs not prescribed to you.

(b) You are to attend an assessment for alcohol and drug counselling as directed by a probation officer. You are to attend and complete any counselling, treatment or programme as recommended by the assessment as directed by and to the satisfaction of a probation officer.

(c) You are to attend a psychological assessment with a departmental psychologist as directed by a probation officer and complete any treatment or counselling as recommended by the assessment to the satisfaction of a probation officer.

(d) You are not to communicate in any way or associate with Lewis Craig, Shaye Holland, Teri Thompson and Jeffrey Troon without the prior written approval of a probation officer.

(e) You are not to communicate in any way or associate with S, without the prior written approval of a probation officer.

[124] You may be seated.

[125] I wish to thank counsel for their assistance.

[126] All defendants may now stand down.

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Karen Clark J

Solicitors:
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