NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA606/2019
[2020] NZCA 198

BETWEEN	THE QUEEN Appellant
AND	BENNY HAEREWA Respondent

Hearing:	13 May 2020
Court:	Collins, Duffy and Edwards JJ
Counsel:	Z R Johnston and A D H Colley for Appellant W C Pyke for Respondent
Judgment:	29 May 2020 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of 7 years and 7 months' imprisonment for sexual violation by unlawful sexual connection is quashed and substituted with a sentence of preventive detention.

C The minimum period of imprisonment of 6 years remains in place.

D All other sentences imposed by the High Court remain in place and are to be served concurrently.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Two general questions are raised by the Solicitor-General's appeal against the decision of Powell J not to impose a sentence of preventive detention upon Mr Haerewa:[1]

(a) Did the High Court Judge err when he concluded the statutory requirements to impose a sentence of preventive detention upon Mr Haerewa were not satisfied? If so,

(b) Should a sentence of preventive detention be imposed?

[2] The question posed in [1(a)] arises from the requirements of s 87(2)(c) of the Sentencing Act 2002 (the Act), which provides that a sentence of preventive detention can only be considered, where, amongst other criteria, the sentencing judge is satisfied the defendant "is likely to commit another qualifying sexual or violent offence" upon the expiration of a finite term of imprisonment. At issue is whether Mr Haerewa was likely to commit a violent offence being, any offence specified in s 87(5)(b) of the Act.[2]

[3] In the High Court, Powell J concluded he had "really no information" from the medical specialists who had assessed Mr Haerewa which enabled the Judge to be satisfied that the qualifying criterion for preventive detention in s 87(2)(c) of the Act was satisfied.[3] The Judge therefore decided he could not impose a sentence of preventive detention.

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1 *R v Haerewa* [2019] NZHC 2663.

2 The specified violence offences include manslaughter, attempt to murder, wounding with intent, injuring with intent, aggravated wounding or injury, abduction for the purposes of sexual connection, kidnapping, robbery, aggravated robbery, and assault with intent to rob.

3 *R v Haerewa*, above n 1, at [44]. That is, that it is likely that Mr Haerewa would commit one of the qualifying violent offences.

[4] Powell J sentenced Mr Haerewa to a finite term of 9 years' imprisonment, with a minimum period of imprisonment (MPI) of 6 years.

[5] On appeal, the Solicitor-General contends the High Court Judge misconstrued the evidence that was before him concerning the requirements of s 87(2)(c) of the Act and that Mr Haerewa should be sentenced to preventive detention.

Background

[6] In May 2019, Mr Haerewa pleaded guilty to 15 charges of serious violence and sexual offending. The victims were Mr Haerewa's former partner, F, and two of her children, N and T.

[7] Mr Haerewa and F knew each other when they were younger. They became reacquainted when Mr Haerewa was released following a sentence of 12 years' imprisonment for manslaughter. The victim in relation to that offence was the four-year-old son of a previous partner of Mr Haerewa.

[8] Mr Haerewa and F began living together in 2014. At the time he was 36 years old. Initially, four of F's children lived with her and Mr Haerewa. The family unit expanded when F's two eldest children came to live with them. In addition, F became pregnant and gave birth to a daughter in 2015.

[9] The relationship between Mr Haerewa and F began to deteriorate from about the time she became pregnant through to 3 December 2017. During that period, Mr Haerewa repeatedly inflicted acts of violence on F.

[10] The summary of facts Mr Haerewa accepted when he entered his guilty pleas recorded several of the instances of violence that Mr Haerewa perpetrated against F:

> [He] frequently punched [F] in the head and face and she commonly had black eyes and bruising as a result of the assaults. On one occasion, he punched her in the face in the car as they were driving to a child's basketball game. He did this because he did not like her speaking to other men and she had been communicating with the coach in relation to the basketball game…
>
> [He] also frequently used objects such as a tomahawk to threaten [F]. On one occasion, [F] was lying in bed and [Mr Haerewa] started talking about how he

> was a child killer. He then slammed the tomahawk down hard right next to [her] on the bed, approximately 20cm away from her…
>
> On one occasion, … [he] became angry with [F] … [and] began to hit her with a wooden broom stick …

[11] The principal offending took place on 2 and 3 December 2017. The summary of facts records that on 2 December 2017 Mr Haerewa made F stand outside their home with her top pulled up to reveal her abdomen and that:

> He was yelling out to anyone walking past offering to sell her for twenty dollars. He then had her [sit] on a chair outside the door but wouldn't let her inside. He brought her out a pot of water and some old bread and told her she had to be treated like a dog so placed them on the ground for her to eat and drink.
>
> He … [then] wrapped a cord around her neck pulling it tight for a time. He told her she was "going to die today".
>
> …
>
> [F] said to [Mr Haerewa] she would do anything if he didn't kill her.
>
> [Mr Haerewa] told [F], "you know what to do" and told her this was all her mouth was good for. He then … [exposed] his penis. [F], fearing for her life gave [Mr Haerewa] oral sex.

[12] The next day Mr Haerewa again engaged in acts of violence against F. The summary of facts records Mr Haerewa punched F on the right side of her jaw, grabbed her by her hair and dragged her inside their home, slammed her head on the floor and punched her on the arm. Mr Haerewa then broke a mug and threatened F with a splintered portion of the mug. He then picked up a frying pan and tried to strike her. F was able to escape from the home.

[13] In addition to the offending against F, Mr Haerewa frequently punched and kicked N, who was aged 14. He also often struck T on the head including, on the day of T's ninth birthday when he threw a can of soft drink at T, hitting him on the head.

[14] Mr Haerewa also damaged the house that he and F rented from Housing New Zealand. He used a tomahawk to create holes in the walls of that home, and carved and wrote messages on the walls about him being a "child killer".

[15] The charges to which Mr Haerewa pleaded guilty comprised:

(a) sexual violation by unlawful sexual connection;

(b) five charges of assault with intent to injure;

(c) threatening to kill;

(d) three charges of assault with a weapon;

(e) two charges of male assaults female;

(f) assault on a child;

(g) common assault; and

(h) intentional damage.

[16] Mr Haerewa's history of criminal offending includes two charges that arose from events in 1996 and 1999. In the first of those cases, Mr Haerewa was sentenced to 9 months' imprisonment for intentionally injuring the very young child of his then partner. Following his release from prison, Mr Haerewa continued to live with his partner and her child but, in 1999, Mr Haerewa seriously assaulted his partner's son, the four year old whom we referred to at [7]. The injuries were so severe that the young boy died. This led to Mr Haerewa being sentenced to 12 years' imprisonment for manslaughter.[4] He served the entire term of that sentence.

Legislative regime

[17] A sentence of preventive detention may be imposed in order to protect the community against persons who pose a significant and ongoing risk to the safety of members of society.[5]

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4 *R v Haerewa* HC Napier S5/99, 18 August 1999.
5 Sentencing Act 2002, s 87(1).

[18] There are three preconditions set out in s 87(2) of the Act that must be satisfied before a sentence of preventive detention can be considered:

(a) the offender must have been convicted of a qualifying sexual or violent offence; and

(b) the offender must be 18 years of age or over at the time of committing the offence; and

(c) the court must be satisfied that the offender is likely to commit another qualifying sexual or violent offence if he or she is released at the expiration of any sentence of imprisonment.

[19] If the court is satisfied of these threshold criteria, then, it may decide whether or not to impose a sentence of preventive detention. In doing so, the court must take into account:[6]

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

(b) the seriousness of the harm to the community caused by the offending; and

(c) information indicating a tendency to commit serious offences in future; and

(d) the absence or failure of efforts by the offender to address the cause or causes of the offending; and

(e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

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6 Section 87(4).

Reports from health professionals

[20] Reports were obtained from two psychiatrists and a psychologist to assist Powell J in determining whether or not Mr Haerewa should be sentenced to preventive detention.

Dr Pillai

[21] Dr Pillai is a consultant psychiatrist. The key portions of his report concerned the likelihood of Mr Haerewa committing a further qualifying offence and whether the criteria in s 87(4) of the Act were satisfied.

[22] In relation to the s 87(2) threshold criteria, Dr Pillai concluded that although Mr Haerewa had engaged in serious sexual offending, his pattern of offending brought into focus Mr Haerewa's acts of violence in domestic settings. After examining risk assessment criteria, Dr Pillai explained that Mr Haerewa's historical risk factors indicated "a high level of risk for future violent behaviour". Dr Pillai said:

> For Mr Haerewa, there is clear potential for violence in the context of future intimate relationships. Likely victims would include both his partner and any children within the house. The severity of violence has been at the most extreme level in the past with loss of life and sexual assault. This has led to very serious psychological and physical harm. Were Mr Haerewa to engage in a further intimate relationship violence would return within a matter of months heralded by deterioration in the quality of the relationship possibly including mistrust and jealousy. The frequency of violence both in terms of the current and previous convictions has been high with multiple attacks on the victims over extended periods of time. On the basis of recent and more remote past behaviour the likelihood of recurrent violence within an intimate relationship is high.

[23] When considering the criteria in s 87(4) of the Act, Dr Pillai:

(a) said Mr Haerewa had "a clear pattern of extreme domestic violence";

(b) refrained from commenting on the seriousness of harm to the community caused by Mr Haerewa's offending;

(c) reasoned Mr Haerewa had a "high risk of future violence";

(d) observed that the violence prevention course Mr Haerewa had previously completed did not lead to a reduction in violence; and

(e) suggested Mr Haerewa's "risk of violence may be reduced at the end of a long period of incarceration".

Dr Jacques

[24] Dr Jacques is also a consultant forensic psychiatrist, who conducted a risk assessment of Mr Haerewa in order to evaluate the likelihood of him "committing a further qualifying violent offence". Dr Jacques explained the assessment tools he used and summarised Mr Haerewa's risk factors, which included his extensive history of previous violence.

[25] Based upon his assessment, Dr Jacques concluded Mr Haerewa was:

> … at high risk of similar serious and life threatening violent reoffending if he is not engaged and does not benefit from psychological interventions to reduce his risk of recidivism. Potential victims in the future are of course likely to be future partners and their children and potential violence will almost certainly remain at serious and life threatening levels.
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> (Emphasis in original.)

Ms Isaacson

[26] Ms Isaacson is a clinical psychologist, who conducted an assessment of Mr Haerewa at the request of his counsel in the High Court. Ms Isaacson used a number of assessment tools, which assisted her in reaching the following conclusions:

> … Mr Haerewa currently presents with a **high** risk of violent reoffending against an intimate partner and children whom he [perceives] as disrespectful and disobedient … Future violence could include verbal aggression, intimidation and threats, and physical assault that could include strangulation, kicking, punching and using items at hand as weapons to inflict harm.
>
> Mr Haerewa's high likelihood of reoffending is most likely within situations where he experiences righteous anger, increased stress and frustration, and his ability to self-soothe and effectively manage his anger arousal is compromised (e.g., through intoxication, sleep deprivation, rumination, etc.).

[27] When considering the criteria in s 87(4) of the Act, Ms Isaacson said:

(a) Mr Haerewa's most recent offending demonstrated his capacity for serious offending but, nevertheless, "a pervasive or persistent pattern of serious offending [was] not evident".

(b) Mr Haerewa's serious offending causes harm in domestic contexts "and did not generalise to harm of the wider community".

(c) If untreated "Mr Haerewa's tendency to commit serious offences in the future would likely be restricted to a cohabiting intimate relationship and not generalise to wider community contexts".

(d) Mr Haerewa was likely to benefit from family harm focused treatment.

(e) "[A] lengthy prison sentence may provide adequate protection to the community, particularly if relevant treatment is provided for Mr Haerewa".

Reports summarised

[28] The reports prepared by the health assessors explain:

(a) "Mr Haerewa was raised in an environment where violence, criminal behaviour, gang affiliation, domestic violence, harsh physical punishment and antisocial attitudes were normalised".

(b) Mr Haerewa has limited formal education and a poor employment record.

(c) He lacks empathy and mistrusts others.

(d) Mr Haerewa has a number of antisocial traits.

(e) His personal relationships have been dysfunctional.

(f) Mr Haerewa lacks the ability to cope with stress in domestic relationships.

[29] The reports also revealed Mr Haerewa had undertaken a number of programmes in prison that were aimed at addressing his tendencies towards violence:

(a) Between November 2005 and June 2006, Mr Haerewa engaged in a 28-week specialist offence focused group treatment programme in the violence prevention unit.

(b) In 2007, he engaged in individual psychological treatment aimed at violence prevention.

(c) In March 2010 Mr Haerewa engaged in further psychological treatment sessions that aimed to assist him to develop insight into relapse prevention.

(d) Between November 2010 and January 2012, he engaged in 25 psychological treatment sessions to strengthen his relapse prevention plan to mitigate harm to a child.

Mr Haerewa also completed drug and alcohol programmes and rehabilitation programmes prior to his release from prison.

Pre-sentence report

[30] The pre-sentence report recorded Mr Haerewa breached his release conditions soon after leaving prison in 2011. This led to the imposition of 6 months' intensive supervision. The pre-sentence report writer explained that the summary of facts was read to Mr Haerewa and that while he accepted some of the details in the summary, he attempted to minimise a lot of the contents of the summary and blamed his victims for his offending.

[31] The pre-sentence report also said that there was:

(a) "a real potential for Mr Haerewa to repeat his violent mode of offending";

(b) "Mr Haerewa would possibly present as a real threat to those close to him, if provoked in any way"; and

(c) "It would appear Mr Haerewa resorts to extreme violence as a means of coping with any perceived stressful situation".

High Court sentencing decision

[32] After setting out the factual background and the purposes and principles relevant to Mr Haerewa's sentence, Powell J:

(a) adopted a provisional starting point of 6½ years for the lead offence of sexual violation by unlawful sexual connection;

(b) increased that provisional starting point by 3 years to reflect the violent offending against F;

(c) added a further 6 months' imprisonment to reflect the intentional damage charge; and

(d) added a further 2 years' imprisonment to reflect the violent offending against N and T.

[33] Powell J then:

(a) applied an uplift of 6 months' imprisonment to reflect Mr Haerewa's previous offending that we have summarised at [16].

(b) deducted five per cent to reflect difficulties in Mr Haerewa's upbringing, which had "clearly affected [his] neurodevelopmental

connections and ability to control [his] behaviour, particularly in a family environment";[7] and

(c) deducted a further 20 per cent to give credit for Mr Haerewa's guilty pleas, which were entered three weeks before his trial was scheduled to commence.

This produced an end sentence of 7 years and 7 months' imprisonment for the lead offence. Powell J then added 1 year and 5 months' imprisonment, to be served cumulatively for one of the charges of assault with a weapon against T. The sentences for all other offences were to be concurrent.

[34] This produced a finite sentence of 9 years' imprisonment. The High Court Judge then considered whether an MPI was required. After applying the criteria in s 86(2) of the Act, Powell J set an MPI of 6 years.

[35] Before us it was accepted by both parties that the approaches taken by Powell J that we have summarised at [32]–[34] and the conclusions he reached in this part of his decision were appropriate.

[36] As we have foreshadowed, the issue on appeal concerns the High Court Judge's approach to the criterion in s 87(2)(c) of the Act. Powell J said he was:[8]

> … required to be satisfied that it is likely that [Mr Haerewa] will not just offend, or violently offend, or even commit serious violence offences, but that [he] will commit one of the qualifying violent offences … It is on that point that there is really no information given by the specialists. Their overall focus was on whether preventive detention should be imposed, not on the qualifying threshold, and while Dr Jacques did refer to qualifying violent offences he was not in any way specific about that and therefore his comments are of limited assistance to the Court.

[37] It is apparent from the transcript of the sentencing hearing that Powell J foreshadowed his concern that the criterion in s 87(2)(c) had not been established. When counsel for the Crown realised this, he sought an adjournment to enable the

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7 *R v Harewa*, above n 1, at [29].
8 At [44].

medical experts to specifically address the Judge's concern. That application was, however, declined. Powell J said:[9]

> It is a principle of sentencing that the Crown must be ready to proceed on the day of sentencing, but more fundamentally this is a question for me as the Judge, rather than a question for the specialists.

[38] The Judge went on to explain that he was unable to be satisfied that Mr Haerewa was likely to commit a qualifying violent offence and that, as s 87 of the Act did not apply, the sentence of preventive detention was unavailable.[10]

Summary of submissions on appeal

[39] Ms Johnston, senior counsel for the Solicitor-General, submitted that there was ample evidence before the High Court Judge that Mr Haerewa was at a high risk of committing serious violent offences upon release and that a clear inference was available that future offending by Mr Haerewa would include a qualifying violent offence. It was contended on behalf of the Solicitor-General that Powell J fell into error by assuming he could not be satisfied that the criteria in s 87(2)(c) of the Act was established without the medical experts specifying the exact offences that Mr Haerewa might commit.

[40] Ms Johnston urged us to conclude that the threshold set by s 87(2)(c) of the Act had been satisfied and that this was a case that mandated the imposition of a sentence of preventive detention. In relation to the criteria in s 87(4) of the Act, Ms Johnston submitted:

(a) Mr Haerewa's conduct demonstrated an overwhelming pattern of domestic violence towards both his partners and their children;

(b) the seriousness of the harm caused by Mr Haerewa's offending was self-evident;

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9 At [45].
10 At [49].

(c) Mr Haerewa had a clear tendency to commit serious offences in the future; and

(d) notwithstanding his previous offending, Mr Haerewa had been undeterred with treatment and counselling on this occasion; and

(e) this was a case that required the imposition of a sentence of preventive detention in order to protect society.

[41] The MPI imposed in the High Court was said by Ms Johnston to be appropriate if a sentence of preventive detention were imposed by this Court.

[42] Mr Pyke, counsel for Mr Haerewa, submitted that it is apparent from a careful reading of the sentencing decision, and the transcript of the hearing in the High Court, that Powell J fully appreciated and properly applied the criterion prescribed in s 87 of the Act.

[43] Mr Pyke contended that even if an error was found and the threshold for preventive detention met, this Court should exercise its discretion to not impose a sentence of preventive detention. He argued that Mr Haerewa's pattern of offending against children is decreasing in seriousness and severity and that there is no established pattern of sexual offending.

Governing principles

[44] Both counsel submitted this appeal is governed by the principles articulated by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[11] This Court has taken "an expressly evaluative approach" to appeals that engage s 87(2)(c) of the Act.[12] Thus:

(a) The Solicitor-General must establish an error in the High Court decision.

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11 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
12 *Kumar v R* [2015] NZCA 460 at [82].

(b) An error will be established if we are satisfied Powell J misunderstood and/or misapplied the evidence relevant to the threshold in s 87(2)(c) of the Act.

(c) If we are so satisfied we should reach our own conclusion as to whether or not a sentence of preventive detention should be imposed.

Analysis

Section 87(2)(c) threshold

[45] We emphasise two preliminary points:

(a) Under s 87(2)(c) of the Act, before a Judge can consider imposing a sentence of preventive detention, they must be satisfied that a defendant is likely to commit another qualifying sexual or violent offence upon the completion of a finite prison sentence. An evaluative assessment is required by the Judge when determining if the threshold requirements of s 87(2)(c) are satisfied. The Judge's decision may be informed by a range of information, including the reports prepared by at least two health assessors under s 88 of the Act and all other relevant evidence.

(b) Health assessors can provide helpful assistance to the Court by providing expert evidence on the likelihood of an offender committing further qualifying offences upon the completion of a finite sentence. It is not desirable, however, for health assessors to try to predict precisely what offences an offender is likely to commit upon completing a finite sentence. That task would require a health professional to understand the details of the offences listed in s 87(5)(b) of the Act. We think the limits of a health professional's expertise enable them to provide guidance on the likelihood of a defendant committing a sexual or violent offence, the likely seriousness of such offending and the circumstances in which it is likely to occur. Health assessors who go

further and try to predict precisely what offence a defendant is likely to commit risk trespassing beyond their domain.

[46] Unlike Powell J, we are satisfied the health professionals in this case provided helpful guidance on the likelihood of Mr Haerewa committing a qualifying violent offence if he were to complete a finite sentence for his most recent offending.

[47] As we have previously noted:

(a) Dr Pillai was satisfied "there is clear potential" for Mr Haerewa to engage in "violence in the context of future intimate relationships". Dr Pillai observed that Mr Haerewa's past violence has "been at the most extreme level … with loss of life …". Dr Pillai said the "likelihood of recurrent violence within an intimate relationship is highly likely".

(b) Dr Jacques was of the view that there is a high likelihood of Mr Haerewa engaging in serious violence. He said that such future violence was likely to be "at serious and life threatening levels".

(c) Ms Isaacson also agreed Mr Haerewa posed a high risk of violent reoffending against a partner and children. She went so far as to suggest Mr Haerewa could engage in acts of strangulation, kicking, punching and using available items as weapons to inflict harm.

[48] We therefore agree with the Solicitor-General's submission that Powell J misunderstood and therefore failed to properly assess the medical assessor's evidence concerning the s 87(2)(c) threshold. The reports from the medical assessors laid a firm foundation for Powell J to conclude Mr Haerewa was likely to commit a qualifying violent offence upon completing a finite term of imprisonment.

[49] Having reached this conclusion, we are now required to decide if we share the health assessors' concerns. If so, then we need to decide if future likely offending by Mr Haerewa would:

(a) include one of the qualifying offences specified in s 87(5)(b) of the Act; and

(b) whether such offending is likely to occur upon the completion of a finite sentence.

[50] We agree with the health assessors that there is a likelihood Mr Haerewa will commit another serious offence. The factors documented in the reports that support this conclusion include Mr Haerewa's:

(a) history of serious violent offending;

(b) inability to manage his emotions in a domestic environment;

(c) history of anti-social attitudes;

(d) inability to cope with domestic stress;

(e) lack of personal insight;

(f) propensity to engage in acts of extreme violence when those he lives with are perceived to have undermined his authority; and

(g) failure to respond positively to earlier anti-violence therapy and counselling.

[51] We also conclude that such offending is likely to be an offence specified in s 87(5)(b) of the Act. Qualifying violent offences include wounding, grievous bodily harm and injuring with intent to cause grievous bodily harm. We agree with the Solicitor-General that future violent offences by Mr Haerewa against a partner or child are very likely to include these types of offences, if not even more serious violent offences. This assessment is based on the history of Mr Haerewa's violent offending and his characteristics and shortcomings that we have summarised at [50].

[52] We are also satisfied that it is very likely Mr Haerewa will offend in the way we have suggested upon being released at the completion of a finite sentence of imprisonment. In making this assessment we provisionally adopt Powell J's reasons for reaching a finite sentence of 9 years' imprisonment. We have therefore approached our task on the basis that we need to assess the probability of Mr Haerewa committing a qualifying violent offence after the completion of a sentence of 9 years' imprisonment.

[53] We acknowledge the difficulties inherent in trying to make predictions about offending many years in the future. We can only do so after assessing Mr Haerewa's history of serious violent offending, his poor response to prior treatment and his known characteristics. Unfortunately, we can see little basis for an optimistic view about Mr Haerewa's prospects. In our assessment, even after completing a lengthy finite sentence of imprisonment, we believe there is a very real likelihood Mr Haerewa will commit another qualifying violent offence against a partner or child.

Should preventive detention be imposed?

[54] The answer to the second question posed in [1(b)] requires us to carefully apply the criteria in s 87(4) of the Act to Mr Haerewa's circumstances.

Is there any pattern of serious offending disclosed by Mr Haerewa's history?

[55] With the exception of the time he has spent in prison Mr Haerewa has, since 1996, demonstrated a history of serious offending against others with whom he has lived. In particular, Mr Haerewa's pattern of disturbing attacks upon his then partner's young child in 1996 and 1999 recommenced not long after his release from prison when he started living with F and her children.

[56] There is a suggestion in the High Court sentencing decision that Mr Haerewa's offending did not demonstrate "a steady escalation, nor indeed some sort of pattern which shows [Mr Haerewa] alternating between lower level offending and then building up to serious offending …".[13] We make the following three points:

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13 *R v Haerewa*, above n 1, at [47].

(a) The transitive verb "pattern" in s 87(4)(a) of the Act refers to the regularity with which serious offending occurs when assessed against a defendant's opportunity to offend. It does not require an escalation of seriousness of offending.

(b) Although the consequences of Mr Haerewa's offending against F, N and T did not have the disastrous consequences of his 1999 offending, his most recent offending was nevertheless, by any objective standard, serious. Mr Haerewa's strangulation of F while telling her she was going to die and his use of readily available objects as weapons when attacking F, N and T portrays a man with a very low level of self-control who regularly resorts to acts of serious violence against persons with whom he is living.

(c) On this occasion, Mr Haerewa was to be sentenced for a qualifying sexual offence as well as violent offences. The fact none of the offences for which Mr Haerewa was to be sentenced were qualifying violent offences does not detract from our assessment. The qualifying sexual offence was in itself an act of violence that lends weight to our concern Mr Haerewa is likely to commit a qualifying violent offence in a domestic setting if he is released upon the completion of a finite sentence of imprisonment.

[57] Mr Haerewa's offending against his victims has occurred on a regular basis during the periods he has been out of prison and his offending has been serious. Mr Haerewa's history demonstrates a disturbing pattern of serious offending.

Has serious harm been caused to the community by Mr Haerewa's offending?

[58] Ms Isaacson said that Mr Haerewa's serious offending has occurred in the context of domestic relationships and therefore "did not generalise to harm of the wider community". If Ms Isaacson was attempting to suggest that domestic violence does not cause serious harm to the community, then we reject that proposition. This Court has previously made clear that "[f]amily violence has become one of the

scourges of New Zealand society" and offending of the kind that Mr Haerewa has engaged in "affects the sense of security of the whole community".[14]

[59] The comments we have cited in [58] aptly explain why Mr Haerewa's offending in this case inflicts serious harm upon the wider community.

Is there information indicating a tendency for Mr Haerewa to commit serious offences in the future?

[60] While ultimately this is a matter for judicial assessment, the answer to this question can, in this case, be helpfully informed by the reports of the health assessors.[15]

[61] In addressing this question, we again acknowledge the challenge of attempting to predict the likelihood of Mr Haerewa committing serious offences at a distant future point in time. In making our assessment, we have weighed Mr Haerewa's history of serious violent offending, his lack of responsiveness to prior treatment programmes and his known characteristics. We have also had regard to the expert opinions of health assessors, all of whom recognise that Mr Haerewa has a tendency to commit serious offences in the future. The only optimistic appraisal of Mr Haerewa is contained in Ms Isaacson's report. She, however, acknowledges that if Mr Haerewa is not responsive to treatment, then he will have a tendency to commit serious offences in the future against those with whom he is "cohabiting".

[62] If Mr Haerewa were to serve a finite term of 9 years' imprisonment, then he would be 51 at the time of his release. It is likely he could quickly form another relationship thereby setting the scene for further serious violent offending against his partner and any children with whom he lives. We are therefore satisfied that the criterion prescribed in s 87(4)(c) of the Act is satisfied.

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[14] *Solicitor-General v Hutchison* [2018] NZCA 162, [2018] 3 NZLR 420 at [27]; and *R v McLean* [1999] 2 NZLR 263 (CA) at [12].

[15] *R v Johnson* [2004] 3 NZLR 29 (CA) at [19].

Is there an absence of, or failure of efforts by Mr Haerewa to address the causes of his offending?

[63] As we have previously noted, during his last term of imprisonment Mr Haerewa completed four rehabilitative programmes and courses of treatment that were focused upon his tendency towards domestic violence.

[64] Notwithstanding these efforts Mr Haerewa soon relapsed into a pattern of serious domestic violence when he started living with F and members of her family.

[65] We note Ms Isaacson has emphasised Mr Haerewa's willingness to engage in further treatment and that he would benefit from treatment that focused upon mitigation of him engaging in violent acts towards a partner. Notwithstanding Ms Isaacson's suggestions, we consider it significant when Mr Haerewa began to feel stressed in his relationship with F he quickly resorted to acts of very serious physical and psychological violence.

[66] Tragically, Mr Haerewa was not able to respond positively to the courses and treatment programmes he received prior to commencing his relationship with F and he has therefore failed to address the causes of his offending.

Is a lengthy determinate sentence preferable if this provides adequate protection for society?

[67] We firmly endorse the principle that a lengthy determinate sentence is preferable to a sentence of preventive detention, provided a finite sentence of imprisonment provides adequate protection to society. We also appreciate the need to consider whether less restrictive options, such as the imposition of an Extended Supervision Order (ESO) upon release from prison may mitigate the risk of Mr Haerewa reoffending if sentenced to a finite term of imprisonment.

[68] We are satisfied that a sentence of preventive detention is required in order to protect the community from the significant and ongoing risk that Mr Haerewa poses to the safety of members of the community, and in particular, those women and children with whom he may end up living.

[69] An ESO may provide adequate protection to society in cases where the Court can have confidence about the efficacy of such an order. Regrettably, that is not so in this case. We have reached this conclusion because Mr Haerewa has demonstrated an inability to comply with community-based orders and we are satisfied that nothing short of a sentence of preventive detention will serve the needs of society. Mr Haerewa's failures to comply with community-based orders and directions include:

(a) breaching his conditions of release following the conclusion of his manslaughter sentence; and

(b) acknowledging to Dr Jacques that he withheld information from Oranga Tamariki during his relationship with F.

[70] We are also concerned Mr Haerewa has continued to minimise the impact of his offending and that he even attributes blame to his victims for the circumstances he created.

[71] We therefore have no confidence that a determinate sentence coupled with an ESO would provide adequate protection for society, and in particular, those who are likely to become further victims of his profound potential for very serious domestic violence.

Minimum period of imprisonment

[72] Section 89(1) of the Act requires us to impose an MPI, which must not be less than 5 years. Section 89(2) of the Act requires an MPI longer than 5 years when such an order is necessary to reflect the gravity of a defendant's offending or to protect the community.[16]

[73] We consider Powell J was correct to impose an MPI of 6 years when he sentenced Mr Haerewa to 9 years' imprisonment. An MPI of 6 years in this case is appropriate in order to reflect the gravity of Mr Haerewa's offending and to protect

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16 *Ellmers v R* [2013] NZCA 676 at [38].

the safety of the community bearing in mind Mr Haerewa's age and the risk he currently poses.

Result

[74] The appeal is allowed.

[75] The sentence of 7 years and 7 months' imprisonment for sexual violation by unlawful sexual connection is quashed and substituted with a sentence of preventive detention.

[76] The MPI of 6 years remains in place.

[77] All other sentences imposed by the High Court remain in place and are to be served concurrently.

Solicitors:
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