

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

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA261/2014  
[2015] NZCA 154**

BETWEEN                      GEORGE JASON PULE  
Appellant

AND                              THE QUEEN  
Respondent

Hearing:                      22 April 2015  
Court:                              Wild, Clifford and Dobson JJ  
Counsel:                      C J Tennet for Appellant  
                                        G A Kelly for Respondent  
Judgment:                      11 May 2015 at 9.30 am

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**JUDGMENT OF THE COURT**

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- A        An extension of time to appeal is granted.**  
**B        The appeal against sentence is dismissed.**
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**REASONS OF THE COURT**

(Given by Wild J)

**Introduction**

[1]        Mr Pule was convicted of sexual violation by rape following a jury trial. He appeals against the sentence of nine years imprisonment imposed on him by Judge

Harrop in the District Court at Wellington on 17 December 2013.<sup>1</sup> Mr Pule argues the sentence was manifestly excessive because it should have been in the range seven to seven and a half years imprisonment.

### **The facts**

[2] The 20-year-old complainant had been at a 21st birthday party in the Hutt Valley before coming into central Wellington with a group of female friends. They went to a few bars and clubs together. The complainant was intoxicated. One of her friends had been looking after her valuables for the night. After the group came out of a bar that friend decided to go home, and left taking the complainant's passport (the only form of identification she had) and her ATM card. The complainant decided she would also go home, and the two remaining women then went into a bar. It was only when the complainant went to an ATM machine to get money for the bus fare that she realised her friend had gone home with her passport and ATM card.

[3] While the complainant was standing on Courtenay Place wondering what she should do, Mr Pule approached her. He asked if she was alright. After she explained her predicament, he told her he was a bouncer and could help her get back into the bar where her two friends were, but he first had to go and collect something or see someone.

[4] Mr Pule and the complainant then walked down Courtenay Place together. The complainant accepted in evidence she held Mr Pule's hand, explaining that she did not want to lose her "help" in the crowd. It was the time of the 2011 Rugby World Cup and Courtenay Place was very busy.

[5] The complainant's account was that Mr Pule led her around various back streets with which she was not familiar. She said she rebuffed Mr Pule on two successive occasions, first when he tried to kiss her and next when he put his hand down her underpants.

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<sup>1</sup> *R v Pule* DC Wellington CRI-2012-085-2531, 17 December 2013 [Sentence notes].

[6] Down an alleyway off Taranaki St, Mr Pule bent the complainant over, pushed her up against a wall and raped her. It is unclear to us whether he ejaculated inside the complainant, but there was no dispute that it was unprotected sex.

[7] After that Mr Pule left. The complainant, who did not know where she was, followed him back to Courtenay Place.

### **The sentencing**

[8] Judge Harrop noted Mr Pule had a number of previous convictions, including burglary, some offences involving violence towards women, in 2007, and obstructing the course of justice. But he accepted, as did the Crown, that those previous convictions did not warrant any uplift in sentence. Nevertheless the Judge regarded them as counter-balancing Mr Pule's assertion of good character, which was based on the facts he attended church and had a good employment record as a doorman for various central Wellington establishments over the previous six years. The Judge noted Mr Pule continued to assert his innocence on the basis the sexual intercourse was consensual.

[9] The Judge then turned to this Court's guideline judgment in *R v AM*.<sup>2</sup> He noted the submission of Mr Pule's counsel that the case was at the lower end of sentencing band one with an appropriate starting point of around six years imprisonment, and the Crown's submission that the case was in band two, because of the number of aggravating features, with an appropriate starting point of around nine to ten years imprisonment.

[10] The Judge identified "about three", but we think actually five, aggravating features:<sup>3</sup>

- (1) *Vulnerability*: The complainant's vulnerability occasioned by her intoxication and not having her ATM card. Mr Pule was aware of this because, at the outset, the complainant had told him of her predicament.

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<sup>2</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

<sup>3</sup> Sentence notes, above n 1, at [26]–[29].

(2) *Breach of trust*: A serious breach or abuse of trust, albeit a recently-formed trust. Mr Pule knew the complainant went with him because she trusted him as a sober bouncer who could get her back into the bar where she could rejoin her friends. The Judge accepted this was not a breach of trust of the classical kind, such as a father breaching the trust of a daughter or a sports coach breaching the trust of a young member of a sports team. Nevertheless, the Judge was in no doubt that the complainant had put her trust in Mr Pule because he had told her “I’m a bouncer, I can get you into that bar”. Having gained her trust, he abused it. A feature of the appellant’s trust in Mr Pule was that she thought he was “about 45” years old, so a mature man (he was in fact 32).

(3) *“An aspect” of planning and premeditation*: There was a ruse, involving some trickery, which enabled Mr Pule to lead the complainant to a secluded place.

(4) *Harm to the complainant*: This was mental harm; there were no physical injuries. It comprised the immediate mental trauma caused by the absence of a condom and associated risk of pregnancy or sexually transmitted disease, together with the more permanent impact. The Judge noted the complainant had moved to Australia following this offence “in order to get away to start over”. Referring to what the complainant had said in her victim impact statement the Judge stated:<sup>4</sup>

... it made her have a different view of herself. She saw herself as weaker than other people. She never thought it would happen to her and she would like to have thought she could have been stronger.

(5) *Abduction*: An element of at least short-term abduction on a false pretence.

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<sup>4</sup> Sentence notes, above n 1, at [15].

[11] We accept Mr Tennet’s point that these features overlapped. For example, the element of abduction was part and parcel of Mr Pule’s plan to lead the complainant to a secluded place on the ruse that he needed to attend to something else before he could get her back into the bar where her friends were. We accept also, as did the Judge, that several of the aspects were not prominent, for example the premeditation and abduction.

[12] Nevertheless, to a greater or lesser extent, this offence featured five of the culpability assessment factors identified by this Court in *R v AM*.<sup>5</sup>

[13] In describing the type of case that came within rape band two, with sentencing starting points in the range seven to 13 years, this Court stated:

[98] By comparison with rape band one, this band is appropriate for a scale of offending and levels of violence and premeditation which are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.

[14] Given this offence had five factors increasing culpability, the Judge was not wrong to place the offence in band two. We agree with his reasons for doing this:<sup>6</sup>

[29] ... The overall flavour of the incident is somewhat sinister. It involves a breach of trust. It involves a degree of abduction. It involves a degree of planning and taking advantage of a vulnerable person. In my view those things readily justify taking the case into band 2 in *R v AM* and, indeed, they take it comfortably beyond the seven-year minimum sentence for band 2 cases.

[15] The Judge’s sentencing starting point was one-third of the way along the six-year range covered by band two. For the Crown, Ms Kelly made the point that nine years is only one year above the top of rape band one, with starting points in the range six to eight years. Beyond acknowledging the obvious point that the four rape bands spelt out in *R v AM* overlap, we do not find that a particularly instructive point.

[16] We have already accepted the overlap between the five features, and are alive to the risk of double-counting in assessing overall culpability. When read as a whole

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<sup>5</sup> *R v AM*, above n 2, at [34]–[64].

<sup>6</sup> Sentence notes, above n 1.

Judge Harrop’s sentencing remarks reflect this Court’s comments in *R v AM* on the need, when analysing culpability factors, to avoid a mechanistic approach and to evaluate all the circumstances.<sup>7</sup>

[17] This was a stern sentence. But, given the aggravating features of the offending, we cannot regard the sentence of nine years imprisonment as manifestly excessive. The Judge was justified in describing the incident as “somewhat sinister”, we think particularly because of the predatory aspect and the abuse of trust it involved.

[18] Had the Judge imposed the sentence of seven to seven and a half years imprisonment Mr Tennet contended was appropriate, Mr Tennet accepted the Judge would also have needed to impose a minimum period of imprisonment. He further conceded a minimum period of imprisonment “of up to 50 per cent couldn’t be resisted”. This concession, which we regard as responsible and appropriate, reinforces our view that the sentence of nine years imprisonment under appeal was not manifestly excessive.

## **Result**

[19] We grant Mr Pule an extension of time to appeal but the appeal against sentence is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>7</sup> *R v AM*, above n 2, at [36].