

**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

I TE KŌTI PĪRA O AOTEAROA

**CA556/2017
[2018] NZCA 117**

BETWEEN	MATTHEW JAMES KEVIN O'SHAUGHNESSY Appellant
AND	THE QUEEN Respondent

Hearing:	17 April 2018
Court:	Kós P, French and Miller JJ
Counsel:	J D Lucas for Appellant D L Elsmore and S J Mallett for Respondent
Judgment:	23 April 2018 at 11.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] This is an appeal against a sentence of three years' imprisonment imposed, after trial, on one charge of sexual violation by unlawful sexual connection.¹

¹ *R v O'Shaughnessy* [2017] NZDC 19417. The appellant also received a sentence of one month's imprisonment for breach of community work, imposed cumulatively. Though he appealed the whole sentence counsel focused entirely on the sexual violation charge.

[2] The facts as recorded by Judge Garland were that the victim and the appellant, who were nodding acquaintances, were in the same bar in Christchurch on the evening of 20 July 2016. Both were intoxicated, the victim heavily so. There was no interaction between them, but when she and a male associate left the premises the appellant accompanied them by taxi to another bar. The victim vomited as she got out of the taxi. The appellant arranged a glass of water for her, but otherwise had little contact with her. At about 3.40 am the victim went home by taxi. The appellant accompanied her, the Judge finding this was not by arrangement but something he just did.² She vomited out the car window on the drive.

[3] At her flat the appellant sought help from her male flatmate, who paid the taxi driver and helped clean up the vomit. The appellant helped her into the house and the two men put her into her bed, fully clothed, and left her there. The appellant and the flatmate then chatted for a while before the flatmate returned to some work he was doing. After a while he went looking for the appellant, and found him in the victim's room, sexually assaulting her. He ordered the appellant from the house.

[4] The appellant later admitted that he had performed oral sex on the victim. He said it was consensual and she was an active participant.

[5] The jury must have concluded that the sexual activity was non-consensual. For sentencing purposes, Judge Garland was prepared to accept that they may have found the appellant held a genuine but unreasonable belief that he had her consent.³

[6] The Judge noted that the appellant was then 21 (he was 20 at the time of the offence) and had no prior convictions for sexual offences, though he did have an escalating list of less serious convictions.⁴ He has not previously been imprisoned. The pre-sentence report noted that he maintained he had done no wrong and tended to blame the victim.

² At [8].

³ At [17].

⁴ At [18].

[7] The Judge placed the offending squarely within the first of the *R v AM* bands for sexual violation offences.⁵ He noted clear evidence of premeditation and planning; the appellant had very little contact with the victim that evening but chose to accompany her home in her grossly intoxicated condition; and once there, he waited for an opportunity to offend. She was extremely vulnerable. She was at home, where she ought to have been safe. And the impact on her had been severe. The Judge adopted a starting point of three years' imprisonment.⁶ There were no relevant aggravating factors and none that mitigated. He rejected a plea for a discount for youth.⁷

[8] On appeal, Mr Lucas argued that the Judge erred by finding planning and premeditation, by adopting a three-year starting point, and by giving no discount for youth.

[9] Counsel's principal argument was that having sentenced the appellant on the basis of an honest but unreasonable belief in consent, the Judge could not also find that the offending was premeditated. We reject this submission. We observe that it rests on the false premise that culpability is reduced by an honest belief in consent attributable to the defendant's own intoxication.⁸ This Court held in *AM* that culpability may be lessened where the defendant held a mistaken but unreasonable belief in consent,⁹ but it has since affirmed that that is not so where the belief is attributable to voluntary intoxication, which the Sentencing Act 2002 expressly excludes as a mitigating factor.¹⁰

[10] Nor is it correct that there can be no premeditation where the defendant believed at the time of the offence that he had the victim's consent. Premeditation is a subjective concept, but it is applicable where, at the time of the conduct said to evidence premeditation, the defendant knew of the victim's impaired condition. In this case the appellant knew by the time they reached the second bar that she was

⁵ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [114]–[116].

⁶ *R v O'Shaughnessy*, above n 1, at [26].

⁷ At [27].

⁸ The appellant was also intoxicated, and he said in interview with the probation officer that it contributed to the offending, which would not have happened had he been sober.

⁹ *R v AM (CA27/2009)*, above n 5, at [53].

¹⁰ *R v Clifford* [2011] NZCA 360, (2011) 25 CRNZ 567 at [31].

grossly intoxicated, and it was open to the Judge to conclude that he sought to exploit her condition. His behaviour at the flat indicates that he knew the flatmate would likely intervene had he been seen to go into the victim's bedroom.

[11] Having regard to the number and degree of the aggravating factors, we are not persuaded that the Judge was wrong to adopt the starting point that he did.

[12] Finally, we do not accept that the Judge was wrong to deny a discount for youth. There was nothing impetuous or naïve about the appellant's behaviour, and he was 20 at the time.

Result

[13] The appeal is dismissed.

Solicitors:
Crown Solicitor, Christchurch for Respondent