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IDENTIFYING PARTICULARS OF COMPLAINANT 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**

**CA511/2020  
[2021] NZCA 17**

BETWEEN	OWEN STANLEY SCHMELZ Applicant
AND	NEW ZEALAND POLICE Respondent

Court: Goddard, Lang and Hinton JJ

Counsel: R A Harrison for Applicant  
J M Irwin for Respondent

Judgment: 19 February 2021 at 3.00 pm  
(On the papers)

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**JUDGMENT OF THE COURT**

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**The application for leave for a second appeal against sentence is declined.**

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**REASONS OF THE COURT**

(Given by Goddard J)

[1] The applicant, Mr Schmelz, pleaded guilty to one charge of sexual violation by unlawful sexual connection,<sup>1</sup> four charges of indecent assault on a young person,<sup>2</sup> and one charge of common assault.<sup>3</sup> Following a sentence indication, he was sentenced in the District Court at Blenheim by Judge Zohrab on 25 May 2020 to a term of

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<sup>1</sup> Crimes Act 1961, ss 128(1)(b) and 128B.

<sup>2</sup> Section 135.

<sup>3</sup> Section 196.

two years' imprisonment.<sup>4</sup> The Judge was not prepared to sentence Mr Schmelz to home detention. He considered that imprisonment was the only appropriate response on the facts of the case.<sup>5</sup>

[2] Mr Schmelz appealed to the High Court on the ground that the sentence was manifestly excessive. On 5 August 2020 his appeal was dismissed.<sup>6</sup> Dobson J considered that the end sentence was well within range, and the presumption that imprisonment is the appropriate sentence for sexual violation was not displaced.<sup>7</sup>

[3] Mr Schmelz seeks leave to bring a second appeal against his sentence to this Court under s 253(1) of the Criminal Procedure Act 2011. Section 253(3) provides that this Court must not grant leave unless it is satisfied the appeal involves a matter of public importance, or a miscarriage of justice may have occurred or may occur unless the appeal is heard. The threshold is a high one.<sup>8</sup>

[4] The application for leave to appeal was filed seven working days out of time. The delay was short and did not cause any prejudice to the Crown. An extension of time was granted by this Court on 22 October 2020.<sup>9</sup>

[5] Mr Harrison, counsel for Mr Schmelz, submits that the proposed appeal involves a matter of public importance and, further, a miscarriage of justice may have occurred.

[6] The matter of public importance identified by Mr Harrison is that in this case the sexual violation by unlawful connection is “a fleeting kiss on the end of the [complainant's] penis”. He submits that in those circumstances, involving minimal physical connection, a starting point significantly below band one, as described by this Court in *R v AM* (two to five years' imprisonment) would have been appropriate.<sup>10</sup>

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<sup>4</sup> *R v Schmelz* [2020] NZDC 9350.

<sup>5</sup> At [40].

<sup>6</sup> *Schmelz v R* [2020] NZHC 1943 [High Court judgment].

<sup>7</sup> At [22]–[23] and [27]; and Crimes Act, s 128B(2).

<sup>8</sup> *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764.

<sup>9</sup> *Schmelz v Police* CA511/2020, 22 October 2020 at [2].

<sup>10</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [113].

[7] This Court has previously recognised in *Crump v R* that the way in which the *R v AM* guideline judgment is structured means there is actually a band beneath band one, which applies in cases of the lowest culpability.<sup>11</sup> Indeed this Court made observations to similar effect in *R v AM* itself.<sup>12</sup>

[8] Thus the principle that a starting point below the *R v AM* band one may be appropriate in sexual violation cases of the lowest culpability is already established by that decision and by *Crump*. The High Court Judge was referred to *Crump*, and proceeded on the basis that in some cases a starting point below the *R v AM* band one will be appropriate. But he did not consider that this was a case that should be ranked below the bottom of band one in *R v AM*.<sup>13</sup> The argument that Mr Schmelz advanced in the High Court, and wishes to present on appeal to this Court, does not raise any new question of principle. Rather, the issue is whether, applying the established principles that were identified and applied in the courts below, the sentence imposed was appropriate. The proposed appeal does not involve any matter of public importance.

[9] Nor do we consider that a miscarriage of justice may have occurred. In both the District Court and the High Court the minimal nature of the physical connection was recognised. However both the District Court Judge and the High Court Judge considered that a number of aggravating factors were present in this case. The offending involved a very serious level of breach of the trust reposed in Mr Schmelz by the complainant and the complainant's family. The abuse of trust was exacerbated by the large difference in age between Mr Schmelz and the complainant, and the context in which the contact between them occurred. The case involved a significant amount of planning and premeditation, and grooming of the complainant. The complainant was particularly vulnerable.<sup>14</sup>

[10] The Courts below weighed all the relevant circumstances and concluded that a sentence of two years' imprisonment was appropriate. Both Judges considered that the presumption of imprisonment in s 128B(2) of the Crimes Act 1961 was not

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<sup>11</sup> *Crump v R* [2020] NZCA 287, (2020) 29 CRNZ 402 at [98].

<sup>12</sup> *R v AM* (CA27/2009), above n 10, at [83].

<sup>13</sup> High Court Judgment, above n 6, at [14], [21].

<sup>14</sup> High Court judgment, above n 6, at [18]–[21].

displaced. The arguments that Mr Harrison wishes to make on behalf of Mr Schmelz on appeal to this Court in relation to the length of sentence, and the decision not to impose a sentence of home detention, are the same arguments that were carefully addressed in the High Court. There is no appearance of a miscarriage of justice.

[11] The application for leave for a second appeal against sentence must therefore be declined.

Solicitors:  
Crown Law Office, Wellington for Respondent