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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

**CA244/2021
[2021] NZCA 439**

BETWEEN CALEB JAMES WINCHCOMBE
Appellant

AND THE QUEEN
Respondent

Hearing: 24 August 2021
Court: French, Mander and Palmer JJ
Counsel: D M M Dickinson for Appellant
J E Mildenhall for Respondent
Judgment: 6 September 2021 at 9 am

JUDGMENT OF THE COURT

The appeal is dismissed and the sentence confirmed.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Winchcombe appeals his prison sentence of eight years and eight months imposed in the District Court on charges of sexual offending and violence.¹

¹ *R v Winchcombe* [2020] NZDC 22301 [Sentencing notes] at [110].

[2] The sole ground of appeal is whether the sentencing Judge, Judge Northwood, erred in declining to allow a discount for remorse.²

The offending

[3] The offending occurred when Mr Winchcombe and the victim met up in person for the first time after communicating online. They went to Mr Winchcombe's house and engaged in some consensual sexual activity. However, when the victim told him to stop, Mr Winchcombe became enraged and violent. He then engaged in 10 separate sexual acts against the victim without her consent. They included three instances of penile penetration, two instances where he forced her to rub his penis, three instances of digital penetration, one instance where he forced her to perform oral sex and one instance where he performed oral sex on her.

[4] The sexual offending was accompanied by additional and sustained violence as the victim screamed "no", tried to push him off and sobbed. He pulled her hair and hit her repeatedly as well as biting her repeatedly about the face. He punched her about the face and head and also bit her breast. During one of the rapes, he thumped her head against the headboard of the bed causing her to momentarily lose consciousness.

[5] At one point, he showed the victim what she believed to be a gun. It was in fact ammunition.

[6] When he had finished, he apologised to the victim and offered to transfer \$2000 into her bank account if she didn't tell the police what had happened.

[7] As soon as the victim left Mr Winchcombe's address, she called her mother who notified the police. When arrested, Mr Winchcombe resisted efforts to handcuff him and had to be taken to ground. A single round of ammunition was located in his pocket. More ammunition was found in his house.

² At [99].

[8] The emotional and psychological impact of the offending on the victim was profound and life changing. She has been diagnosed with post-traumatic stress disorder. Her physical injuries included bruising and bite marks to her face and body as well significant pain to her cheek bone.

[9] Mr Winchcombe faced a raft of charges. He pleaded guilty to resisting arrest³ and unlawful possession of ammunition⁴ but defended the following charges:

- (a) three counts of sexual violation by rape;⁵
- (b) four charges of sexual violation by unlawful sexual connection;⁶
- (c) two charges of indecent assault;⁷
- (d) once charge of injuring with intent to injure;⁸ and
- (e) five charges of male assaults female.⁹

[10] The trial took place in December 2019. The jury found Mr Winchcombe guilty of injuring with intent to injure and two charges of male assaults female, acquitted him on one charge but could not agree on the remaining charges.

[11] A date for the retrial was set for August 2020. Approximately two weeks prior to the retrial, Mr Winchcombe pleaded guilty to an amended Crown charge notice incorporating one representative charge of sexual violation by rape. The agreed summary of facts however still included the wider narrative detailed above.

³ Summary Offences Act 1981, s 23(a).

⁴ Arms Act 1983, s 45(1).

⁵ Crimes Act 1961, ss 128(1)(a) and 128B.

⁶ Sections 128(1)(b) and 128B.

⁷ Section 135.

⁸ Section 189(2).

⁹ Section 194(b).

The sentencing

[12] In setting a starting point, the Judge treated the rape as the lead offence and the associated violence, the scale of the offending and the harm to the victim as significant aggravating factors. He considered that those aggravating factors placed the rape “in the middle to high end” of band two of the guideline decision of *R v AM*.¹⁰ Band two has a starting point range of between seven and 13 years’ imprisonment.¹¹

[13] Adopting a starting point for all the offending of 11 years’ imprisonment, the Judge then reduced that by 15 per cent on account of the guilty pleas and also granted a further reduction of eight months to recognise what he described as Mr Winchcombe’s “general solid personal circumstances”.¹² As mentioned, he declined to grant a discount on account of remorse.

[14] The end sentence was thus a term of imprisonment of eight years and eight months.

Arguments on appeal

[15] The grounds of appeal originally included a challenge to the starting point of 11 years’ imprisonment. However, counsel Mr Dickinson told us that having re-read the case law in light of the Crown submissions,¹³ he now conceded the starting point was within range and therefore was abandoning that ground. We consider that was an appropriate concession.

[16] The concession left as the sole ground of appeal the issue of a discount for remorse. Mr Dickinson acknowledged that Mr Winchcombe in his various statements to the report writers never said that he was sorry for what he had done because of the effect on the victim and when asked how he thought the victim might feel, declined to ascribe any feelings to her.

¹⁰ Sentencing notes, above n 1, at [70], citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

¹¹ *R v AM (CA27/2009)*, above n 10, at [98]–[104].

¹² Sentencing notes, above n 1, at [92].

¹³ *Hannagan v R* CA396/04, 9 June 2005; *R (CA13/2017) v R* [2017] NZCA 462; and *R v AM (CA27/2009)*, above n 10.

[17] Mr Dickinson however urged caution when considering that statement. He pointed out that expressions of remorse varied, that offenders were not always able to articulate remorse in the conventional way and that Mr Winchcombe should not be penalised because he did not feel confident enough to ascribe feelings to the victim. Mr Dickinson submitted there was genuine remorse and it was expressed as well as Mr Winchcombe was able. When pressed by us to identify what tangible indications there were of genuine remorse, Mr Dickinson relied on the guilty plea, the fact that Mr Winchcombe “fronted” to the report writers, demonstrated insight into his offending and was prepared to engage in rehabilitation. In Mr Dickinson’s submission, a discount in the order of five per cent was warranted.

Our view

[18] We are not persuaded the Judge erred in declining to give a discrete discount for remorse. It is well established that the mere fact of a guilty plea is not itself sufficient. It may depending on the circumstances be evidence of remorse but it is not synonymous with it.¹⁴ Not only did Mr Winchcombe never say he was sorry for what he had done to the victim, but as the Judge noted, he maintained to all the report writers and indeed at sentencing that his offending involved a mis-reading of messages from her. In light of the level of violence he inflicted on the victim, those statements were rightly characterised by the Judge as an attempt at minimisation suggesting a lack of insight and empathy.¹⁵

[19] We would add that in any event a 15 per cent discount for the guilty plea so close to trial and after the victim had already been subjected to the ordeal of giving evidence and being cross-examined was arguably generous.¹⁶

[20] On any view of it, the end sentence, having regard to all the circumstances including the very serious nature of the offending, was not manifestly excessive.

¹⁴ *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [24]–[26].

¹⁵ Sentencing notes, above n 1, at [99].

¹⁶ See *Duncan v R* CA345/2009, 15 September 2009 at [17] and [21].

[21] The appeal is accordingly dismissed and the sentence confirmed.

Solicitors:
Crown Law Office, Wellington for Respondent