

**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

**CA82/2022
[2022] NZCA 434**

BETWEEN	RHETT SHIMMIN Appellant
AND	THE KING Respondent

Hearing:	22 August 2022
Court:	Goddard, Brewer and Edwards JJ
Counsel:	J F M O'Halloran and G H Vear for the Appellant A M McClintock for the Respondent
Judgment:	14 September 2022 at 11.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Edwards J)

[1] Following a jury trial in the District Court at Auckland, Mr Shimmin was convicted of a representative charge of sexual violation by rape; a charge of sexual violation by unlawful sexual connection (connection between penis and mouth); and a representative charge of sexual violation by unlawful sexual connection (digital penetration). He had earlier entered a guilty plea to an unrelated charge of common assault.

[2] On 18 January 2022, Judge Bergseng, who had been the trial judge, sentenced Mr Shimmin to five years and 11 months' imprisonment.¹ Mr Shimmin appeals against that sentence on the basis that insufficient credit was given for personal mitigating factors, resulting in a manifestly excessive sentence.²

The offending

[3] The following description of the offending is taken from the sentencing notes of the trial Judge.³

[4] The offending took place in the early hours of 16 February 2019. The night before, the victim and her friends were waiting for cars to take them from a nightclub back to the victim's home. One of the victim's friends approached Mr Shimmin and asked him for a light. After talking with the victim's friend for a while, Mr Shimmin was invited back by her to the victim's address, where the group continued to socialise.

[5] At around 4.00 or 5.00 am in the morning, the victim went into the kitchen to make herself a cup of tea. Mr Shimmin followed her and there was consensual kissing. Both parties moved to her bedroom where consensual sex took place. At some point the victim's friend walked into the bedroom or opened the bedroom door. The victim found this embarrassing and told Mr Shimmin she wanted the sex to come to an end. The victim went to sit up, but Mr Shimmin carried on kissing her. She stood up to put her underwear on, but he grabbed hold of her, and pulled her back onto the bed. The victim described Mr Shimmin effectively ripping her underwear off and continuing to have sex with her.

[6] The victim was saying things such as, "No, that's enough", throughout. She would try to get up, only to be pulled back down onto the bed. The victim described Mr Shimmin flipping her over, putting her in different positions, and at one point grabbing her arms. The victim told Mr Shimmin to stop having sex with her. She was repeatedly thrown on to the bed. She was also bent over the bed, causing her considerable pain. On occasion, the victim would call out things such as, "Ow" or,

¹ *R v Shimmin* [2022] NZDC 591 at [103].

² A challenge to the starting point is no longer pursued.

³ *R v Shimmin*, above n 1.

“You’re hurting me, that’s sore, don’t do that”. When Mr Shimmin would momentarily stop for a rest, she would try to move to the end of the bed and say, “That’s enough, I’m going back out”, but Mr Shimmin would continue.

[7] The offending involved Mr Shimmin forcing his penis into the victim’s mouth for about 20 seconds. At different times, he also put his fingers into her vagina having spat on them first. The Judge sentenced Mr Shimmin on the basis that the non- consensual sexual activity lasted somewhere in the range of 30 to 40 minutes.

[8] Eventually, the victim was able to leave her room. Because of her behaviour, her friends became concerned about her and she told them that she wanted Mr Shimmin to leave. Mr Shimmin refused to do so, made threats about getting a gang to visit the address, and then ultimately left. The victim had injuries to her back, hand welts on her buttocks, and nail scratches and fingerprints on her body.

[9] The common assault charge arose from events which occurred at around 1.20 am on 14 March 2021. Mr Shimmin was on bail awaiting trial at the time. He was intoxicated and became involved in an altercation with a busker on Queen Street. He lunged towards the busker’s guitar case and punched him to the back of the neck. Mr Shimmin continued to want to fight with the victim despite him gathering his belongings and readying himself to leave.

The District Court sentence

[10] The Judge canvassed the nature of the offending, Mr Shimmin’s personal circumstances, the victim impact statement, the pre-sentence report, letters of remorse from Mr Shimmin and letters from Mr Shimmin’s supporters at the outset of the sentencing.

[11] In setting the starting point, the Judge identified the aggravating features of the offending as: the harm to the victim; the forceful nature of the offending; its duration (approximately 30 to 40 minutes); and the multiple occasions when the victim sought to stop Mr Shimmin, including when she was in pain.⁴

⁴ *R v Shimmin*, above n 1, at [60].

[12] The Judge considered the offending fell within band 1 of *R v AM*.⁵ That band attracts a range of six to eight years' imprisonment. A starting point of seven years' imprisonment was adopted.⁶

[13] Mr Shimmin's prior convictions were referred to by the Judge. These included convictions for one charge of assault with intent to injure, two charges of assault and one charge of speaks threateningly from March 2019.⁷ The Judge did not apply an uplift for these prior convictions and did not consider there to be any other personal aggravating factors.

[14] As to personal mitigating factors, the Judge applied a discount of five per cent for Mr Shimmin's relative youth.⁸ Mr Shimmin was aged 24 years and nine months at the time of the offending and the Judge noted that this discount was "very much at the outer reaches" of the circumstances that usually justify a discount for youth.⁹

[15] The Judge then turned to consider the report prepared under s 27 of the Sentencing Act 2002 and the psychological report prepared on behalf of Mr Shimmin. The Judge expressed concerns about the s 27 report and considered it to be of limited value. Reliance was instead placed on the psychological report prepared by Mr van Rensburg, a registered clinical psychologist. After referring to the factors canvassed in that report, the Judge applied a 10 per cent discount for Mr Shimmin's background, willingness to engage in ongoing rehabilitation, and remorse.¹⁰

[16] Accordingly, the starting point of seven years was reduced by 15 per cent, and, with some rounding, resulted in an end sentence of five years and 11 months' imprisonment.¹¹ A sentence of one month's imprisonment, concurrent on the sentence for the sexual offending, was imposed for the common assault.¹²

⁵ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [93].

⁶ *R v Shimmin*, above n 1, at [62].

⁷ At [23].

⁸ At [75].

⁹ At [75].

¹⁰ At [97]–[98].

¹¹ At [99].

¹² At [101].

Is the sentence manifestly excessive?

[17] Ms O'Halloran, counsel for Mr Shimmin, does not challenge the starting point of seven years' imprisonment or the five per cent discount for youth. However, she submits that the aggregate 10 per cent discount applied for Mr Shimmin's background, prospects of rehabilitation, and remorse did not adequately account for each of these three mitigating features and led to a manifestly excessive sentence.

[18] We start with Mr Shimmin's background. This was canvassed in the s 27 report and the psychological report filed with the Court. Like the Judge, we find the psychological report prepared by Mr van Rensburg to be of greater value in assessing whether anything in Mr Shimmin's background diminishes his culpability for the offending.

[19] As detailed in the psychological report, Mr Shimmin was born in South Africa and immigrated to New Zealand when he was three years old. His childhood was marred by arguments between his parents, and a difficult relationship with his father. His parents divorced when he was about 11 or 12 years old and his mother remarried about 18 months later. There was conflict between Mr Shimmin and his stepfather and stepbrother.

[20] Mr Shimmin sustained a serious head injury when he was nine years old and suffered further head knocks later on when taking part in boxing. Mr Shimmin showed some signs of memory or other learning deficits which Mr van Rensburg considered could be explained by the head knocks and/or Mr Shimmin's heavy use of alcohol and MDMA. Despite these deficits, Mr Shimmin completed school, achieving NCEA Level 3. He pursued several employment opportunities after leaving school, and was working as a builder's apprentice at the time of the offending.

[21] The psychological report records that Mr Shimmin started watching adult pornography and this was where he was introduced to "rough sex" which, Mr Shimmin said, appealed to many of his one-night stands and to sex workers with whom he had sex. Mr van Rensburg notes in the report that the manner in which Mr Shimmin relayed that information left him with the impression that Mr Shimmin actually believed that "rough sex" was what most women desired.

[22] Mr van Rensburg concluded:

46. Mr Shimmin has taken responsibility for the offending and appears to be remorseful. While the offending cannot be condoned in any way, the context in which it took place as well as factors from Mr Shimmin's background, may be mitigating. It is common cause that the sexual encounter between him and his victim started on a consensual basis, while both were seemingly intoxicated. It is likely that his practice of "rough sex" was not acceptable to his victim and that she wanted to extricate herself from the encounter. The fact that he then continued to treat her "roughly" appears to have been a function of his intoxication and his misguided idea about what women want from sex, an idea that had been reinforced through his experience with pornography, one-night stands and sex workers.
47. I did not get the impression that Mr Shimmin had a hostile attitude towards women, but rather that he had very poor intimacy skills and by his own admission, did not know how to make love in a mutually gratifying and uplifting manner. While a head injury in his childhood may have played a role in impeding his academic performance and indirectly his social development, it is more likely that poor parental modelling and in particular his father's aggressive attitude towards him, contributed to his poor self-image and lack of intimacy skills. His later excessive use of alcohol and MDMA would have led to him being vulnerable and suggestible towards impulsive decisions and involvement in activities such as pornography, gambling and aberrant sexual practices.

[23] Finally, Mr van Rensburg noted that while Mr Shimmin's childhood was subject to dysfunctional family relationships, the situation had now stabilised and he enjoyed positive support from his mother and stepfather. It was recommended that Mr Shimmin receive psychological treatment in order to prioritise addressing his addictive behaviour, and deficits in intimacy, learning and memory.

[24] Ms O'Halloran submits that this psychological report identifies a causative relationship between Mr Shimmin's upbringing and cognitive distortions in relation to relationships, intimacy and sexual behaviours. The report is also relied on to support Mr Shimmin's rehabilitative prospects. Ms O'Halloran submits that the identification of deviant belief systems has allowed Mr Shimmin to reflect on his behaviour, the harm that has resulted from it, and commit to change. She says that a discount of 15 per cent for personal background factors and the prospects of rehabilitation is justified in this case and an additional five per cent discount for remorse should also be applied.

[25] On the basis of Mr van Rensburg's report, we accept that Mr Shimmin's family background and personal experiences may have contributed to Mr Shimmin having distorted beliefs around sexual relationships and behaviours. But that alone is not enough to warrant a discount. What is required is a causal nexus between the personal background factors and the offending which operates to diminish Mr Shimmin's culpability.¹³ That causal nexus is missing in this case. Whatever distorted beliefs Mr Shimmin may have been harbouring at the time, they must have been quickly dispelled by the victim's repeated and express protestations that she no longer wanted to have sex. Nevertheless, Mr Shimmin persisted with forceful and painful non- consensual sex for 30 to 40 minutes.

[26] Ms O'Halloran points to Mr van Rensburg's conclusions that Mr Shimmin lacks hostility towards women. But this simply evidences the absence of an aggravating feature rather than the presence of a mitigating feature justifying a discount from sentence.

[27] Ultimately, we are not persuaded that the link between Mr Shimmin's personal background and the offending materially diminishes his culpability for the offending.

[28] As to rehabilitative prospects, we agree that the psychological report evidences some insight by Mr Shimmin into his offending-related behaviours. The ongoing support of his mother and stepfather, and the letters of support from friends and his employer, also bode well for Mr Shimmin's reintegration into society. But these are very small steps on the path to rehabilitation and reintegration, and it is still early days. A modest recognition of these factors was justified in the circumstances.

[29] Similar observations apply to the discount for remorse. The psychologist and the Judge considered Mr Shimmin's remorse to be genuine and we have no reason to disagree. Nevertheless, the expression of remorse came relatively late in the piece, and it appears to have stemmed from Mr Shimmin's recognition of some of the underlying contributors to his offending. To this extent, there is an overlap with any discount available for rehabilitative prospects, which must be reflected in the total discount applied.

¹³ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [162].

[30] The discount applied by the Judge for Mr Shimmin’s relative youth must also be taken into account. Mr Shimmin was 24 years and nine months old at the time of the offending. As noted by the Judge, the five per cent discount applied was at the “outer reaches” of what would otherwise be available.¹⁴ It appears to have been based on the factors canvassed in Mr van Rensburg’s report, including a vulnerability to impulsive decision making. The youth discount may also reflect the rehabilitative prospects for young offenders. Here too there is an overlap between the factors captured by this discount and the others which are the subject of this appeal.

[31] Looking at these factors in the round, we are not persuaded the Judge erred by aggregating the discount available for Mr Shimmin’s background, rehabilitative prospects, and remorse. A 10 per cent discount for these factors was within range, as was the total discount of 15 per cent for personal mitigating factors. The end sentence of five years and 11 months’ imprisonment for the sexual offending was not manifestly excessive.

Result

[32] The appeal is dismissed.

Solicitors:
Public Defence Service, Auckland for Appellant
Crown Solicitor, Auckland for Respondent

¹⁴ *R v Shimmin*, above n 1, at [75].