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OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA33/2022
[2023] NZCA 577**

BETWEEN	MOHAMMED TASRIF Appellant
AND	THE KING Respondent

Hearing:	31 October 2023
Court:	Wylie, Mander and Muir JJ
Counsel:	P K Hamlin and S R Hames for Appellant L P Radich and H A M Watts for Respondent
Judgment:	20 November 2023 at 10 am
Reissued:	5 February 2024
Effective date of Judgment:	20 November 2023

JUDGMENT OF THE COURT

- A The application for an extension of time is granted.**
- B The appeal is dismissed.**
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REASONS OF THE COURT

(Given by Muir J)

Introduction

[1] The appellant, Mohammed Tasrif, appeals his sentence of eight and a half years' imprisonment imposed by Judge McIlraith in the District Court¹ in respect of the following charges for which he was found guilty at trial:

- (a) sexual violation by rape (x 4);² and
- (b) sexual violation by unlawful sexual connection.³

[2] The appellant says that an end sentence in the vicinity of seven years' imprisonment is appropriate in all the circumstances, with a starting point of nine years as opposed to the 10 years adopted by the Judge.

[3] We approach the appeal on the usual basis by enquiring whether there has been an error to the required degree that a different sentence should be imposed and, in that context, whether the sentence was manifestly excessive, wrong in principle or there are exceptional circumstances.⁴

[4] The appeal is out of time.⁵ The Crown does not oppose an extension. We grant leave accordingly and proceed to deal with the substantive appeal.

Background

[5] The victim is related to the appellant by marriage. She is a national from another country who came to New Zealand for a vacation and then to attend high school. While doing so, she resided with the appellant, the appellant's wife [REDACTED] and another member of their family in their home.

[6] The offending occurred during the period [REDACTED], at which time the appellant was aged 34 and the victim was a late teen/young adult. On [REDACTED],

¹ *R v Tasrif* [2021] NZDC 19333 [Sentencing notes].

² Crimes Act 1961, ss 128(1)(a) and 128B: maximum penalty of 20 years' imprisonment.

³ Crimes Act, ss 128(1)(b) and 128B: maximum penalty of 20 years' imprisonment.

⁴ *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30]–[35].

⁵ Pursuant to the Court of Appeal (Criminal) Rules 2001, r 12, a notice that is given out of time must be treated as an application for an extension of time.

the appellant had accessed the victim's phone and discovered intimate private photographs of her. On [REDACTED], while dropping the victim off at school, the appellant mentioned that he had seen the photographs and asked her whether she had any desires she wished to share with him.

[7] The next day the appellant approached the victim while she was in a towel, after just having had a shower. He grabbed her breasts from behind, removed her towel, told her he would fulfil her desires, pulled her hair and forced her to bend over, pushed her face into the bed and proceeded to rape her. Her evidence was that she was shouting, crying, screaming in pain and that she bled as a result of the rape. The offending concluded with him ejaculating over her bottom, telling the victim to have a shower and threatening disclosure of the intimate photographs if she told anyone about what had occurred. This event formed the basis of the first charge of sexual violation by rape.

[8] The second charge related to events a few weeks later, [REDACTED]. The appellant's wife was in the shower and the victim in her bedroom. The appellant came up behind the victim, pulled down her pants and raped her. The victim attempted to resist by saying "no" and kicking and pushing the appellant, who persisted by holding her mouth shut and pushing her hair and face into the bed sheets, such that she was unable to speak. When the appellant was done, he told the victim not to tell [REDACTED].

[9] The third charge occurred during a religious festival. The victim was fasting and in her bedroom. The appellant walked past so she closed her bedroom door. The appellant then entered the room, sat on the bed and placed his arm around her. The victim told him to leave and attempted to push him away but was unsuccessful. The appellant pushed the victim down and began kissing her. She mentioned that she was fasting, but the appellant said it did not matter and he raped her again.

[10] The fourth rape occurred when the appellant's wife was absent from the house collecting her and the appellant's son from school. The appellant entered the victim's room, telling her that he needed to have sex. At that point the victim ran into another room and locked the door. The appellant threatened her from behind the closed door

then retrieved a spare key, opened the door and pinned her down. He then attempted to kiss her. Having decided the room was not “safe”, he then moved her back into her bedroom where he revealed his penis already sheathed in a condom. The appellant then removed the victim’s pants and she kicked his leg, at which point he said that if she did that again she would “not be able to sit for two or three days”. He then raped her for the fourth time.

[11] The fifth charge related to events immediately after the fourth rape when the appellant turned the victim over and roughly inserted two fingers into her vagina for around two minutes, explaining that this was punishment for disobeying him and locking the door.

[12] The victim reported the offending to a teacher at school the following day.

The sentencing decision

[13] The appellant was sentenced by reference to the guideline judgment in *R v AM (CA27/2009)*.⁶ The Judge considered that the offending was on the cusp of bands two and three (as identified in that judgment), although he ultimately adopting a starting point two years below the minimum for band three offending.⁷ He identified a number of aggravating factors, being:

- (a) Planning and premeditation, which he described as being present “to a moderate degree”, emphasising the extent to which the appellant took “advantage of opportunities” he was presented with.⁸
- (b) Violence, although “not present to anything more than a moderate degree” and being a “relatively neutral matter”.⁹

⁶ Sentencing notes, above n 1; and *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

⁷ At [36]. Rape band two carries a penalty of: seven to 13 years’ imprisonment and rape band three carries a penalty of 12 to 18 years’ imprisonment: *R v AM*, above n 6, at [90].

⁸ Sentencing decision, above n 1, at [21].

⁹ At [24].

- (c) Victim vulnerability, having regard to the fact that she was living in New Zealand with limited support and entitled to feel safe in a [REDACTED].¹⁰
- (d) Breach of trust to a significant degree, [REDACTED].¹¹
- (e) Harm to the victim, which the Judge said was “significant” and “clear to all concerned when she gave her evidence in [C]ourt”.¹²

[14] Having regard to these identified culpability factors, the Judge rejected the defence submission that the offending was within band 1 while suggesting that a band three classification was also “moot”.¹³ Acknowledging the degree of overlap between bands 2 and 3, he adopted a starting point of 10 years.¹⁴ He then allowed a discount of one year for previous good character and six months for the completion of rehabilitative programmes in custody,¹⁵ making for a final sentence of eight and a half years’ imprisonment.¹⁶

[15] The discounts are not directly in issue on the appeal, although the Crown describes the discount for good character as generous, having regard to the period of time over which the appellant continued to offend.

The appellant’s case

[16] For the appellant, Mr Hamlin submits that the sentencing Judge erred by:

- (a) effectively “double counting” the same considerations when identifying the aggravating features of breach of trust and victim vulnerability;

¹⁰ At [27].

¹¹ At [29].

¹² At [30]–[31].

¹³ At [35]–[36].

¹⁴ At [35] and [40].

¹⁵ At [42]–[43] and [46].

¹⁶ At [47].

- (b) placing undue weight on the harm caused to the victim when there was no victim impact statement and the evidence at trial indicated harm no greater than that inherent in the charges; and
- (c) failing to follow analogous case law.

[17] As to (a), Mr Hamlin says that the Judge interwove breach of trust and victim vulnerability, as illustrated by the Judge’s observation immediately after his discussion of vulnerability:

[28] The next culpability factor I will touch upon is breach of trust and my views with respect to vulnerability come through here in terms of breach of trust. ...

[18] Referring to the discussions about vulnerability in *R v AM*, Mr Hamlin says that there was not sufficient disparity in age for the victim to be considered “particularly vulnerable” and that she was a young adult, not a child or young person. He suggests that such vulnerability as there was, was inherent in the charge and that although there was a breach of trust, it was present only to a moderate degree.

[19] As to (b), Mr Hamlin submits that the circumstances of the offending do not distinguish the case from the generality of sexual offending in terms of harm inflicted, and the Judge’s observation that “[t]he harm to her was there for all to see” was not justified on the evidence.¹⁷

[20] As to (c), Mr Hamlin submits that the Judge was wrong to describe the offending in *Penman v R* (where a starting point of nine years’ imprisonment was identified) as less serious than the present case, and that although the Judge acknowledged *T (CA185/2020) v R* as a more serious case,¹⁸ it nevertheless negatively influenced him to adopt a higher starting point than was warranted in all the circumstances.

¹⁷ At [30].

¹⁸ See Sentencing notes, above n 1, at [39], referring to *Penman v R* [2015] NZCA 364 and *T (CA185/2020) v R* [2020] NZCA 635.

[21] Mr Hamlin submits that the best comparators are *R v Stojanovich* and *M (CA625/2014) v R*,¹⁹ neither of which were referred to the Judge. He says that in both cases this Court upheld starting points of nine years, which was the appropriate starting point in this case.

Discussion

[22] We are not persuaded that the Judge double counted the same considerations in his discussion of breach of trust and victim vulnerability. Although we accept that there is often some overlap between the factors, the Judge correctly identified the discrete considerations which informed each.

[23] We accept that the victim was indeed vulnerable. She was a foreign student, detached from her usual support network and with limited support in New Zealand. There was a significant age difference between her and the appellant, and her vulnerability was compounded by the imposition of COVID-19 lockdown restrictions, which limited her independence.

[24] We accept that when the Judge talked about the victim's expectation of protection and a "pleasant [REDACTED] environment" when addressing the issue of her vulnerability, he was invoking factors better analysed in terms of the appellant's breach of trust. However, we are satisfied that, independently of that expectation, the victim was moderately vulnerable within the terms discussed in *R v AM*. In addition to the factors identified by the Judge, we note that one of the rapes occurred during a religious festival when the victim was fasting and likely compromised in her ability to physically resist the appellant's advances, as she had attempted to do on other occasions, and the fact that over the course of the offending she had been threatened with the exposure of intimate photographs.

[25] As to breach of trust, we agree with the Judge that this was a significant aggravating factor. The appellant was [REDACTED]. The appellant's wife is [REDACTED] and was the victim's approved designated caregiver for the school that

¹⁹ *R v Stojanovich* [2009] NZCA 210; and *M (CA625/2014) v R* [2015] NZCA 269.

the victim attended. The appellant frequently drove the victim to school and she was, as the Judge said, entitled to expect his care and protection.²⁰

[26] In respect of victim harm, this Court observed in *R v AM (CA27/209)* that:²¹

[44] Harm is inherent in the offending. The more harmful the offending, the more serious it is. Section 9(1)(d) of the Sentencing Act applies. Physical harm, for example, cuts and bruising, are indications that the offending is more serious. Similarly, if the offending involves unprotected sex with the risk of pregnancy or infection or if it has those effects these factors indicate more serious offending. However, this is not to downplay the psychological and other non-physical harm, for example, escalation of psychological problems and restrictions on the ability to go about the victim's daily life. The impact on others, such as children, other family members or those providing care and support to the victim is also relevant.

[27] The Judge found that it was “clear” the victim was harmed by the offending based on his assessment of her evidence at trial. He did not, however, detail the basis for that assessment.

[28] We consider that the harm to the victim, as established in the evidence and the presentencing material, was indeed greater than that necessarily inherent in the offending. In respect of charge one, the victim's evidence was that the assault caused her to bleed and to scream in pain and we have no doubt that, as the victim said in evidence, the circumstances of the fourth rape and the unlawful sexual connection (involving the appellant breaching a locked room) were “terrif[ying]”.

[29] In holding the appellant accountable for his actions, it is also clear that the victim has, without fault on her part, compromised the level of ongoing support she might expect from family overseas, several members of which were openly critical of her at sentencing for, in the victim's words, “making fuss”.

[30] The Judge was, in our view, therefore correct to identify victim harm as an aggravating factor of the offending.

²⁰ Sentencing notes, above n 1, at [27].

²¹ *R v AM*, above n 6.

[31] Nor are we persuaded that a lower starting point was justified on the authorities. Like the Judge, we regard the offending in *Penman v R* as less serious.²² Although there was a very significant age differential and the victim was only 11 in that case, the degree of violation was limited, involving only slight penile penetration and although there was, additionally, digital and oral sex, the offending was interrupted by others coming into the room.²³ Significantly, the offending occurred on one occasion only. We contrast the present case involving, on four occasions, full penetrative and forceful sexual intercourse, coupled with threats.

[32] We agree that the offending in *T (CA185/2020) v R*, involving eight counts of rape by a 47-year-old against his 16-year-old stepdaughter over a five-month period with threats to her family, was more serious than the present.²⁴ However, the starting point adopted in that case was three years and seven months higher than the present.

[33] We do not accept the submission that the appellant's offending is on a par with that in *R v Stojanovich*.²⁵ That case involved a single incident of rape/unlawful sexual connection,²⁶ where the 17-year-old victim was plied with alcohol from a father figure and then subjected to digital and penile penetration.²⁷ We agree with the Crown that the offending in this case was significantly more serious by virtue of its repetition over time.

[34] We make the same observation in respect of *M (CA625/2014) v R*, where again, the offending occurred on one occasion only, albeit involving a heavily intoxicated victim and a very significant breach of trust.²⁸

[35] In summary, we are satisfied that the Judge's characterisation of the victim as having been "indeed vulnerable"²⁹ was one justified by considerations other than those underpinning his finding of a significant breach of trust and that the harm to the victim

²² Sentencing notes, above n 1, at [39], referring to *Penman*, above n 18.

²³ *Penman*, above n 18.

²⁴ Sentencing notes, above n 1, at [39]; and *T (CA185/2020) v R*, above n 18.

²⁵ *Stojanovich*, above n 19.

²⁶ Mr Hamlin suggests in his written submissions that the charges were representative but that is not reflected in the judgment of *Stojanovich*, above n 19.

²⁷ *Stojanovich*, above n 19.

²⁸ *M (CA625/2014) v R*, above n 19.

²⁹ Sentencing decision, above n 1, at [27].

went beyond that inherent in the offending. As such, there were at least three of the factors identified in *R v AM* operative in terms of sentencing and to at least a moderate degree. In addition, we note, as the Judge also did, that the offending involved elements of planning and premeditation, particularly in respect of the fourth and fifth charges where the offending took place while the appellant's wife was collecting their son from school and where the appellant had prepared himself for his intended assault.

[36] We also note that although the Judge considered violence to be a “relatively neutral matter”,³⁰ violence within this context necessarily includes threats of violence.³¹ Although the Judge indicated that he would “come back to” the subject of threats later in his sentencing,³² he did not in fact do so. We consider the combination of the appellant's forceful handling of the victim on the occasions of each of the first and second rapes, coupled with his threats on the fourth occasion and rough digital penetration for expressly punitive purposes, justified violence being recognised as a moderately aggravating factor also.

[37] Taken in combination, and in the further context of multiple offences over a three-month period, these aggravating factors well justified the starting point adopted by the Judge. We also consider that with the offending having extended over that period, a one-year discount for previous good character was generous. The appeal cannot, in these circumstances, succeed.

Result

[38] The application for an extension of time in which to appeal is granted.

[39] The appeal is dismissed.

Solicitors:
Crown Solicitor, Manukau for Respondent

³⁰ At [24].

³¹ *R v AM*, above n 6, at [39].

³² Sentencing decision, above n 1, at [23].