

**NOTE: FINAL ORDER PROHIBITING PUBLICATION OF NAME,  
ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF  
APPELLANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011:  
SEE [2024] NZDC 1360.**

**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**

**CA102/2024  
[2024] NZCA 441**

BETWEEN M(CA102/2024)  
Appellant

AND THE KING  
Respondent

Hearing: 29 July 2024  
Court: Thomas, Jagose and Grice JJ  
Counsel: N P Bourke for Appellant  
T R Simpson for Respondent  
Judgment: 13 September 2024 at 10.30 am

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**JUDGMENT OF THE COURT**

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- A The appeal is allowed.**
- B The sentence of eight and a half years' imprisonment is quashed and replaced by a sentence of six and a half years' imprisonment.**
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**REASONS OF THE COURT**

(Given by Thomas J)

[1] Having been married for over eight years, with two children and a business, the appellant and the victim separated when the appellant became “somewhat unhinged” as a result of his views on the Government’s COVID-19 response. Although they continued to have contact with one another, and at times consensual sexual relations, on two occasions the appellant sexually violated the victim. He appeals his sentence of eight and a half years’ imprisonment on the grounds the sentence was manifestly excessive, primarily because the starting point adopted by the Judge was based on an erroneous assessment of the facts.<sup>1</sup>

### **Factual background**

[2] At 17 and 19 years old respectively, the appellant and the victim met in China, her country of birth. The victim moved to New Zealand when she was 20 years old. After what was apparently a happy and successful personal and business relationship, the appellant became heavily involved in the “freedom” movement in response to the Government’s introduction of the COVID-19 vaccine mandate and, in the victim’s words, his personality “totally [changed] to become very disrespectful and arrogant”. This and other matters put significant strain on the relationship.

[3] Between November 2021 and early January 2022, the couple had a trial separation which involved the appellant returning to the family home and sharing a bed with the victim at night. This included sexual intimacy.

[4] On 9 January 2022, the appellant threatened the victim that he would take their children away from her. As a result, the victim left the family home with the children and stayed in a motel. The appellant tracked them down and demanded to see her, eventually taking the children and items belonging to the victim, including her passport.

[5] The couple continued to message each other, the appellant asking the victim to come home and alternating between threats to take the children away and saying he loved her. His behaviour in respect of COVID-19 protests and his association with

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<sup>1</sup> *R v [M]* [2024] NZDC 1360 [judgment under appeal].

likeminded people was a feature of the victim's responses and she made his cessation of those activities a condition of her returning home.

*Charges relating to 13 January 2022*

[6] On 12 January 2022, the appellant messaged the victim saying that, if she would have sex with him the following day and be a family, he would comply with her requests.

[7] On 13 January, the couple had extensive communications concerning her desire to collect her passport and continuing their discussions about reconciliation and his involvement with the protest action. The victim returned to the house knowing that the appellant was going to be there. When she entered the house, the appellant came out of the main bedroom wearing only his boxer shorts. They had a discussion during which she suggested a peaceful separation but he told her loved her and refused to accept they were separating. He then proceeded to engage in sexual activity with the victim, including kissing her and touching her breast. The victim said she attempted to push him away and told him they were not together, but she thought he interpreted that as her teasing him. The appellant then raped the victim and digitally penetrated her without her consent. There was then further sexual activity between them. The victim accepted that the appellant believed they were back together at this stage but, from her perspective, they were not.

*25 January 2022*

[8] The appellant and victim reached an agreement whereby the appellant would look after the children during the day while the victim was at work and he would leave the house when she returned from work and took over childcare responsibilities.

[9] The second rape occurred on 25 January 2022. The appellant had been in Auckland with a fellow member of the freedom protest group. He messaged the victim around 12.30 am saying he wanted to have sex. The victim did not see the message because she was asleep. At around 5.00 am the appellant entered the house and came into the bedroom where the victim was in bed asleep with the children next to her. The appellant touched the victim on the thigh but she told him she was sleeping and

tried to block him with her arm, reminding him they were separated. He responded by saying they had been married for 10 years, she was his wife and he could do what he wanted. Using his upper body to restrain her, he then fondled her, lifted her legs high and raped her. The victim stayed silent because she did not want to wake the children.

### **The charges and the trial**

[10] The appellant faced 15 charges at his trial by jury.

[11] There were two representative charges, one of indecent assault alleging the appellant touched the victim's body,<sup>2</sup> and the other of rape,<sup>3</sup> both covering the period 1 November 2021 to 25 January 2022. The jury acquitted the appellant on both charges.

[12] In respect of the incident on 13 January 2022, the appellant faced the following 11 charges and was found:

- (a) guilty of rape and unlawful sexual connection by digital penetration;<sup>4</sup>
- (b) not guilty on five charges of indecent assault alleging he kissed the victim (two charges), gave her a hickey, and touched her breasts (two charges);<sup>5</sup>
- (c) not guilty on three charges of sexual violation (one related to oral sex and two digital penetration);<sup>6</sup> and
- (d) not guilty on one charge of attempted sexual violation.<sup>7</sup>

These covered allegations occurring both before and after the rape and sexual violation charges.

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<sup>2</sup> Crimes Act 1961, s 135.

<sup>3</sup> Sections 128(1)(a) and 128B(1).

<sup>4</sup> Sections 128(1)(a), 128(1)(b) and 128B(1).

<sup>5</sup> Section 135.

<sup>6</sup> Sections 128(1)(b) and 128B(1).

<sup>7</sup> Section 129(1).

[13] The appellant faced two charges relating to the events of 25 January. He was found not guilty of indecent assault by touching the victim's leg with his hand,<sup>8</sup> but guilty of rape.<sup>9</sup>

*Breach of protection order*

[14] The victim was granted a temporary protection order on 3 February 2022.

[15] On 25 March, when on bail, the appellant sent the victim photographs of the two of them together. On the same day he messaged her parents in China asking them why they had encouraged the victim to divorce him and saying she would be deported back to China if she did so. In the following days he messaged her again and reacted with a love heart to previous Facebook posts she had made. The appellant pleaded guilty to one charge of breaching a protection order.<sup>10</sup>

**District Court sentencing**

[16] The trial Judge, Judge Greig, had issued a minute prior to sentencing recording the factual basis on which he would sentence the appellant, saying he did so because of the large number of charges on which he had been acquitted.

[17] The Judge began the sentencing by referring to the appellant's somewhat "unhinged" state of mind throughout 2021 and 2022, resulting in the victim deciding to separate from the appellant, something the Judge said the appellant was unable to accept.<sup>11</sup> He described the appellant taking steps that were increasingly aggressive and increasingly controlling, saying:<sup>12</sup>

And your ultimate form of control was by taking control of her body, forcing yourself on her on two separate occasions, and they are reflected in the counts on which you were found guilty.

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<sup>8</sup> Section 135.

<sup>9</sup> Sections 128(1)(a) and 128B(1).

<sup>10</sup> Family Violence Act 2018, ss 90(b) and 112(1)(a). He also pleaded guilty to one charge of failing to stop for the police on 1 February 2022.

<sup>11</sup> Judgment under appeal, above n 1, at [2]–[4].

<sup>12</sup> At [3].

[18] In respect of the 13 January offending, the Judge said (incorrectly) that the victim thought the appellant was out of town and therefore went to the house. He described the rape as “prolonged and brutal,” saying it was physically and mentally painful and it went on for a long time.<sup>13</sup> In his minute, the Judge referred to this taking place over a period of between one and three hours.

[19] In respect of the offending on 25 January, the Judge described the victim being “utterly helpless” as the appellant “helped [himself] to her body”.<sup>14</sup> In his view, what made it even more callous was that the appellant had a friend waiting for him outside in his truck and the children were beside the victim.<sup>15</sup>

[20] The Judge expressed concern at other aspects of the appellant’s behaviour around that time, observing that he was unwell and that the appellant had, to a large extent, acknowledged that.<sup>16</sup> He referred to the letter written by the appellant as “impressive” and “moving”.<sup>17</sup>

[21] The Judge took account of the fact the appellant’s children were victims because they would be deprived of what the victim herself acknowledged is a good father.<sup>18</sup>

[22] The Judge considered, as contended by the Crown, that the offending fell into band two of *R v AM*.<sup>19</sup> He said there was planning and pre-meditation, certainly in the 25 January offending, but also in the 13 January offending on the basis it was prolonged and, what might have started spontaneously, continued for such a time that premeditation came into it. He regarded the degree of harm as significant enough to warrant being an aggravating feature over and above what would normally be found in a rape, noting the second rape was particularly callous and the first prolonged and brutal.<sup>20</sup>

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<sup>13</sup> At [8].

<sup>14</sup> At [12].

<sup>15</sup> At [12].

<sup>16</sup> At [13] and [14].

<sup>17</sup> At [15].

<sup>18</sup> At [16].

<sup>19</sup> At [22], citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

<sup>20</sup> Judgment under appeal, above n 1, at [22].

[23] The Judge considered the victim was vulnerable given her cultural background and that she was a small woman against a much bigger man. He coupled that with the breach of trust, noting the victim trusted the appellant as her main support in New Zealand.<sup>21</sup>

[24] The Judge said he accepted that the jury was entirely correct in acquitting the appellant on many charges but it did not make what happened on either occasion any less culpable.<sup>22</sup> The Judge rejected the suggestion that there was any analogy with this Court's decision in *R v Crump*, discussed in more detail below.<sup>23</sup>

[25] The Judge took a starting point of 10 years' imprisonment, increased by six months because of the breach of protection order which occurred when the appellant was on electronically-monitored bail. The sentence was reduced by one year for the appellant's prior good character and a further year because the Judge accepted the physical discomfort the appellant would suffer in prison was significant, given his serious back issues. That resulted in a sentence of eight and a half years' imprisonment.<sup>24</sup>

### **The guideline judgment of *R v AM***

[26] Before we turn to address the grounds of appeal, we discuss the guideline judgment of this Court in *R v AM* and how it should be applied. We do so because, in our assessment, judges (and counsel, both prosecution and defence) can fall into error when they focus only on the sentencing bands and aggravating factors laid out in the judgment without fully appreciating the context of this Court's guidance. And, as this Court observed in *L (CA215/2021) v R*, there is the risk of upward sentencing creep and a lack of consistency if decisions applying *R v AM* are used to guide the starting point instead of applying the guidance in *R v AM* itself.<sup>25</sup>

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<sup>21</sup> At [23].

<sup>22</sup> At [24].

<sup>23</sup> At [25], citing *Crump v R* [2020] NZCA 287, [2022] 2 NZLR 454.

<sup>24</sup> Judgment under appeal, above n 1, at [28].

<sup>25</sup> *L (CA215/2021) v R* [2021] NZCA 297 at [18].

[27] In *R v AM*, a full bench of this Court gave integrated sentencing guidance for offending involving sexual violation.<sup>26</sup> It provided two sets of guidelines, the first for sexual violation where the lead offence is rape, penile penetration of the mouth or anus, or violation involving objects. The second is for other violations where unlawful sexual connection is the lead offence. These are commonly referred to as the “rape” guidelines and bands, and the “USC” guidelines and bands respectively.<sup>27</sup>

[28] The Court emphasised that the object of the case was to provide guidance for sentencing judges, noting that the average sentence length for rape had been increasing.<sup>28</sup> The Court anticipated that, under the reformulated guidelines, some offenders, particularly those whose offending was not characterised by aggravating features, might receive lesser sentences than would have been imposed under the then current practice, while others would receive longer sentences.<sup>29</sup> We refer to this comment in particular because one of the criticisms of *R v AM* has been that flexibility in sentencing has been removed and that the starting point for band one at six years’ imprisonment removes any incentive on a defendant to plead guilty on the basis that, even with allowances for mitigating factors, a sentence of imprisonment would appear to be almost inevitable.<sup>30</sup>

#### *Culpability assessment factors*

[29] In *AM*, this Court discussed factors relevant to the assessment of culpability, nine of them aggravating the seriousness of the offending and two mitigating its seriousness. The Court made some general observations for the purpose of guiding the assessment of culpability factors. First, that the guidelines were for the purpose of providing direction in the manner of application of the aggravating and mitigating factors in the Sentencing Act 2002.<sup>31</sup> Secondly, the Court emphasised the need for sentencing judges to exercise judgement, evaluate all the circumstances and not take a mechanistic approach.<sup>32</sup>

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<sup>26</sup> *R v AM*, above n 19, at [2].

<sup>27</sup> At [5].

<sup>28</sup> At [29] and [30].

<sup>29</sup> At [33].

<sup>30</sup> See for example Te Aka Matua o te Ture | New Zealand Law Commission *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 44.

<sup>31</sup> *R v AM*, above n 19, at [35].

<sup>32</sup> At [36].



[30] Those two cautions are critical. While the Sentencing Act sets out a number of mandatory aggravating and mitigating factors,<sup>33</sup> the Court strived to explain how those should be applied in considering the bands in the context of sentencing on sexual violation charges which *inherently* involve some of those aggravating factors. Violence and harm to the victim are examples of such aggravating factors. Violence is inherent in any act of sexual violation.<sup>34</sup> Harm is inherent in the offending.<sup>35</sup> The extent and seriousness of these factors needs to be assessed.

[31] What is critical is that sentencing judges do not simply count up the number of aggravating factors that *could* apply but consider them in a measured way in the context of the circumstances and using the examples the Court gives of cases which fall into the four bands.

[32] The two culpability assessment factors seen as mitigating the seriousness of the offending are a mistaken belief in consent and consensual activity immediately before the offending.<sup>36</sup> Again, it is not necessarily the case that either of these two factors will mitigate the offender's culpability. A mistaken belief in consent may do so where it is plain that the belief, while unreasonable, was genuine.<sup>37</sup> Similarly, depending upon the circumstances, culpability may be diminished where there was consensual sexual activity immediately prior to the offending.<sup>38</sup> Recognising that this is a difficult and controversial issue, the Court stressed the need to consider the totality of the behaviour comprising the sexual violation.<sup>39</sup>

*The bands and how they are to be applied*

[33] The Court made a number of general observations prior to setting out the bands. It noted that offending can vary in seriousness in terms of both the offender's culpability and effects on the victim, but said each of the bands assumes a level of unlawful activity and that any form of sexual violation involves serious offending. The seriousness of the offending is reflected in both the 20-year maximum term of

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<sup>33</sup> Sentencing Act 2002, s 9.

<sup>34</sup> *R v AM*, above n 19, at [38].

<sup>35</sup> At [44].

<sup>36</sup> At [53]–[59].

<sup>37</sup> At [53].

<sup>38</sup> At [55] and [59].

<sup>39</sup> At [60].

imprisonment and the presumption in s 128B(2) of the Crimes Act 1961 that those convicted of sexual violation must be sentenced to imprisonment unless the court considers otherwise, noting the particular circumstances of the offender and the offence.<sup>40</sup>

[34] The Court said that degrees of seriousness must be stated and that is an assessment for the sentencing judge. If offending properly falls at the lower end of the spectrum, then the judge needs to say that. It does not mean that the offending is not being treated as serious in itself.<sup>41</sup> All this was said to emphasise that what is required is an evaluative exercise. The Court specifically acknowledged that judges have a reasonable degree of latitude in assessing culpability.<sup>42</sup> While there are four bands for rape offending, the Court recognised that there will be cases which are so unusual that they will require a starting point below the bottom of band one.<sup>43</sup>

[35] Importantly, each band includes examples described by the Court as being for the purpose of assisting with the application of the culpability principles.<sup>44</sup>

[36] For the purposes of this decision, we focus on rape bands one and two. It is convenient at this point to reiterate what the bands say and to discuss the cases given as examples of those sitting at the lower and higher ends of the two bands.

*Rape band one — six to eight years*

[37] Rape band one, with starting points of six to eight years' imprisonment, is described as appropriate for offending at the lower end of the spectrum where the aggravating features are either not present or present to a limited extent.<sup>45</sup> Examples of cases, provided in *R v AM*,<sup>46</sup> with starting points at the lower end of band one demonstrate the level of seriousness attached to that lower end.

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<sup>40</sup> At [77].

<sup>41</sup> At [78].

<sup>42</sup> At [79].

<sup>43</sup> At [83].

<sup>44</sup> At [91].

<sup>45</sup> At [93].

<sup>46</sup> At [93].

[38] In *R v Murphy*, the offender came home after drinking and found an unknown man and woman asleep in his bed.<sup>47</sup> He tried to wake them. The man left but the woman woke to find the offender attempting to have sexual intercourse with her. She thought it was the man who had left the room and sexual intercourse occurred.<sup>48</sup> It was not until afterwards that she realised she had had intercourse with the offender.<sup>49</sup>

[39] In *R v Pehi*, the offender and victim had been in a relationship for about six months.<sup>50</sup> After kissing when in the victim's bedroom, the offender, by then extremely drunk, assaulted her and engaged in non-consensual activity culminating in rape. While the victim was annoyed, she said she would have been willing nevertheless to have had sex with the offender that night.<sup>51</sup>

[40] In *R v Hill*, the offender and victim became intoxicated at a party, then shared a taxi ride home to the victim's house where they drank more alcohol.<sup>52</sup> The victim asked the offender to leave, and left the room herself but, when she returned, he was still there.<sup>53</sup> She told him again he should leave, whereupon he pushed her into a cane basket, causing minor scraping and bruising to her thigh, removed her clothing, penetrated her briefly, then stopped and apologised.<sup>54</sup>

[41] Those three cases were all considered to fall within the lower end of rape band one because the encounters were considered relatively brief and the degree of violation correspondingly brief. While both *Pehi* and *Hill* involved a level of violence, it was considered relatively less serious than that seen in other cases.<sup>55</sup>

[42] The examples at the higher end of band one are *R v Wirangi*, where the 38-year-old offender, and friend of the 16-year-old victim's family, was looking after the home where the victim was staying.<sup>56</sup> He exposed himself and she asked him to

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<sup>47</sup> *R v Murphy* CA310/96, 26 September 1996, at 1.

<sup>48</sup> At 2.

<sup>49</sup> At 3.

<sup>50</sup> *R v Pehi* CA86/06, 31 October 2006 at [4].

<sup>51</sup> At [5].

<sup>52</sup> *R v Hill* CA94/02, 21 October 2002 at [3]–[4].

<sup>53</sup> At [4].

<sup>54</sup> At [5].

<sup>55</sup> *R v AM*, above n 19, at [94].

<sup>56</sup> *R v Wirangi* [2007] NZCA 25.

leave. She was later awoken by him removing her clothes. He raped her and then masturbated in front of her.<sup>57</sup>

[43] *R v Stusky* involved a 31-year-old male offender and 16-year-old female who had met as part of a group for the first time that day.<sup>58</sup> They had spent the afternoon drinking alcohol but later ended up alone. The offender grabbed the victim, pushed her into the bushes, removed her lower clothing and, despite her struggles, raped her.<sup>59</sup>

[44] In *R v H (CA248/02)*, the adult offender and victim had been in a volatile relationship, the victim at one point obtaining a protection order against him.<sup>60</sup> The offender had telephoned the victim asking to come over but she had refused. She was later awoken by him at the door. The offender pushed his way in, would not allow the victim to leave, forced her onto a bed where he performed oral sex on her and raped her. She eventually escaped.<sup>61</sup>

[45] It was the victims' youth and the age disparity which were particularly relevant in *Wirangi* and *Stusky*. *Wirangi* also involved a breach of trust and a range of sexual activity, whereas *Stusky* involved an element of abduction and a particular impact of the offending on the victim. *H* attracted a higher starting point because of the more extensive nature of the sexual activity and the fact the offending involved forced entry into the victim's home.<sup>62</sup>

#### *Rape band two – seven to 13 years*

[46] The Court said that, in comparison with rape band one, band two is appropriate for a scale of offending and levels of violence and pre-meditation which, in relative terms, are moderate. It covers offending involving a vulnerable victim or an offender acting in concert with others or some additional violence. The band is appropriate for cases involving two or three of the factors increasing culpability to a moderate

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<sup>57</sup> At [3].

<sup>58</sup> *R v Stusky* [2009] NZCA 197 at [3].

<sup>59</sup> At [4].

<sup>60</sup> *R v H (CA248/02)* CA248/02, 31 October 2002 at [2].

<sup>61</sup> At [3].

<sup>62</sup> *R v AM*, above n 19, at [95].

degree.<sup>63</sup> The Court gave the example of seven cases as falling within the lower end of rape band two. These cases involved a range of offending.

[47] In *R v Dunick*, the offender and victim had been friends for about six weeks and the victim invited the offender to her house.<sup>64</sup> The victim rejected his advances but the offender removed the victim's clothing, digitally penetrated her causing pain, and then raped her. He made her kneel on the bed, and again penetrated her while slapping her buttocks and making a number of derogatory sexual references. She eventually escaped.<sup>65</sup>

[48] In *R v Batt*, a 38-year-old woman was working as a night porter in a hotel and the offender was a guest.<sup>66</sup> In the early hours of the morning, he got into her room on a subterfuge, told her he had a knife and raped her.<sup>67</sup>

[49] In *R v Castles*, the male victim and the seven male offenders were classmates and attended a party together which involved heavy drinking.<sup>68</sup> The victim was held down and his eyebrows shaved.<sup>69</sup> He then went to sleep in a bedroom. The offenders found a broomstick, smeared it with Vicks VapoRub and then attempted unsuccessfully to insert it into the victim's anus.<sup>70</sup> They returned 30 minutes later and forced the broomstick 10 cm into his anus, causing considerable injury.<sup>71</sup>

[50] In *R v W*, the male offender offended against several boys aged 11 to 16 over a 10-year period.<sup>72</sup> He was their boxing trainer. The majority of the offending involved masturbation of the victims and simulated intercourse to ejaculation. There was a single sexual violation charge.<sup>73</sup>

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<sup>63</sup> At [98].

<sup>64</sup> *R v Dunick* [2008] NZCA 482 at [1].

<sup>65</sup> At [2]–[3].

<sup>66</sup> *R v Batt* [1987] 1 NZLR 760 (CA).

<sup>67</sup> At 761.

<sup>68</sup> *R v Castles* CA105/02, 23 May 2002 at [2].

<sup>69</sup> At [3].

<sup>70</sup> At [4].

<sup>71</sup> At [5].

<sup>72</sup> *R v W* CA87/93, 4 June 1993 at 1.

<sup>73</sup> At 2.

[51] In *R v Anderson*, the 22-year-old offender saw the 18-year-old female victim walking home.<sup>74</sup> He sexually propositioned her and, as she tried to walk away, he pulled her into an empty section, covered her mouth, pushed her violently to the ground and raped her.<sup>75</sup>

[52] In *R v Stojanovich*, the offender was the father of the 17-year-old victim's sibling.<sup>76</sup> The victim was living with him and viewed him as a father-figure.<sup>77</sup> The offender took the victim on a business trip, bought her alcohol, took her to a motel room and, while she was asleep, began touching her, then penetrated her with his fingers and raped her from behind.<sup>78</sup>

[53] In *R v Takiari*, a 19-year-old visually-impaired victim was walking home when the offender grabbed her from behind and took her into nearby school grounds, where he removed her underwear, performed oral sex on her and forced her to do the same to him.<sup>79</sup>

[54] It can be seen therefore that cases at the lower end of rape band two involve significant aggravating factors: an increased level of violence, range of sexual activity, degradation, threatened or actual use of a weapon, group attack, breach of trust to a moderate degree over an extensive period, premeditation, abduction and predatory behaviour.

[55] The cases at the higher end of rape band two involve more extensive levels of violence, the use of threats, the insertion of objects and additional degrading aspects, premeditation, home invasion and multiple sexual violations.<sup>80</sup> We take just two examples. In *R v Morris*, the offending took place over a period of one and a half to two hours.<sup>81</sup> The victim and offender were hitchhiking together after having just met. While they were seeking a ride, the offender threw the victim into some bushes, raped her, forced her to have anal intercourse, hit her around the head and became more

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<sup>74</sup> *R v Anderson* CA199/05, 2 November 2005.

<sup>75</sup> At [2] and [3].

<sup>76</sup> *R v Stojanovich* [2009] NZCA 210 at [2].

<sup>77</sup> At [3].

<sup>78</sup> At [4]–[7].

<sup>79</sup> *R v Takiari* [2007] NZCA 273 at [2]–[4] and [17].

<sup>80</sup> See the examples listed in *R v AM*, above n 19, at [102], and the discussion at [103] and [104].

<sup>81</sup> *R v Morris* [1991] 3 NZLR 641 (CA) at 642.

violent as she screamed with pain. He then performed a further act of intercourse while threatening her with a piece of wood, saying he intended to keep her there all night. She managed to escape but became pregnant, suffering psychological harm as well as physical injury to her body.<sup>82</sup> In *R v V*, a 25-year-old offender smashed a window to gain entry to a retirement home, where he raped and threatened to kill a 77-year-old occupant.<sup>83</sup>

#### *The band beneath band one*

[56] As Kós P discussed in *Crump*, the way in which the *R v AM* guideline judgment is structured means there is actually a band beneath band one applying in cases of the lowest culpability and this fact is sometimes overlooked.<sup>84</sup>

[57] *AM* gave an example of a case outside the bottom of band one.<sup>85</sup> *R v Greaves* concerned a 17-year-old victim who invited the offender to her flat and they engaged in intimacy.<sup>86</sup> Sexual intercourse was initially consensual, but the victim changed her mind and asked the offender to stop. He did not do so until the act of sexual intercourse was complete.<sup>87</sup>

[58] Having reminded ourselves how the guidelines in *R v AM* are to be used, we now turn to address the appellant's appeal and the application of the guidelines to the facts.

#### **Did the Judge err in his assessment of the factual basis for sentencing?**

[59] This ground of appeal relates to the offending on 13 January 2022.

[60] In Mr Bourke's submission, for the appellant, the Judge made crucial errors.

[61] Although the victim had said in her evidential interview that she thought the appellant was not at home when she went to the house and she made sure his car was

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<sup>82</sup> At 643.

<sup>83</sup> *R v V* CA442/94, 23 May 1995 at 1 and 2.

<sup>84</sup> *Crump v R*, above n 23, at [98] per Kós P.

<sup>85</sup> *R v AM*, above n 19, at [96], citing *R v Greaves* [1999] 1 Cr App R (S) 319.

<sup>86</sup> *R v Greaves*, above n 85, at 319.

<sup>87</sup> At 320.

not in the driveway before entering, by the time of trial it was accepted, and indeed the victim had confirmed to the officer in charge, that she knew the appellant was going to be home. Their communications throughout the day made it abundantly clear that he would be home and was wanting to see her, and his car was parked in the driveway on her arrival.

[62] We accept that this was a material error in the Judge's sentencing and must have contributed to his assessment of the extent of premeditation involved.

[63] We also accept that the Judge erred in his description of the offending, in particular that it was wrong to describe the offending as prolonged and brutal.

[64] While the Judge was the trial Judge and as such entitled to sentence on the basis of his findings, that is only where those findings are consistent with the evidence and with the jury verdict.

[65] Although the Judge in sentencing referred to the number of acquittals, the basis of the conclusions he otherwise expressed were not consistent with those acquittals. As discussed above, the evidence was of a relatively long sexual encounter but, as the sheer number of charges discloses, the rape and digital penetration formed one part of the encounter only. The jury was satisfied that, at a minimum, the appellant had a reasonable belief in the victim's consent for the other parts of the encounter. While the Judge accepted the jury were entirely correct in acquitting the appellant on many of the charges, he observed it did not make what happened "any less culpable".<sup>88</sup> It is at this point we refer to our observations above on what this Court said in the guideline judgment of *AM*. That is, that a mistaken but unreasonable belief of consent may make matters less serious than deliberate acts.<sup>89</sup> Where it is plain that the belief, while unreasonable, was genuine, this factor may reduce culpability. That this was the case on 13 January is evidenced by the jury verdicts acquitting the appellant on the other charges and this should have been considered a mitigating factor of the offending.

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<sup>88</sup> Judgment under appeal, above n 1, at [22].

<sup>89</sup> *R v AM*, above n 19, at [53].



[66] Further, while the surrounding sexual activity is not to the same obviously consensual level as applied in *Crump*, it is relevant to an overall assessment of the appellant’s culpability.

[67] While the Judge was clearly concerned by the surrounding context of the appellant’s behaviour around this time, it is also true on the evidence that the victim at times welcomed and even invited contact between the two of them. For example, on 31 December 2021, the victim had messaged the appellant asking if he would “like to come home and sleep with [her] please”. These comments should not be taken as suggesting the victim was not entitled to refuse to consent to sexual activity on other occasions. It is also clear from the complainant’s evidence that it took her some time to understand that the appellant’s behaviour amounted to abuse. Our concern is that the Judge focussed too much on the appellant’s overall behaviour without contextualising it.

### **Was the starting point within range?**

[68] Ms Simpson, for the Crown, submitted that the offending clearly fell within band two of *AM*. In light of our discussion above, it will be clear we do not accept that submission.

[69] The Crown referred to the victim’s vulnerability, planning and premeditation, the scale of the offending, degree of harm and breach of trust as aggravating features of the offending. This approach is an example of what this Court referred to in *Crump* as “over-compiling aggravating factors”.<sup>90</sup> We would observe that this is a trap easily fallen into when the focus is only on trying to compile aggravating factors and interpreting *AM*’s guidance as being focused on that alone. But, as we have said, judges and counsel need to focus on the guidance given by the particular examples in the guideline judgment.

[70] When those examples are considered, it is clear that the offending on 25 January, which should have been taken as the lead offence, falls at most at the lower

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<sup>90</sup> *Crump v R*, above n 23, at [101], referring to *Orchard v R* [2019] NZCA 529, [2022] 2 NZLR 37 at [28].

end of band two or more correctly the higher end of band one. It cannot be considered as on a par with *R v Batt* or *R v Castles*, for example. This Court described *Dunick* and *Batt* as being on the cusp of bands one and two, observing that in *Dunick*, the combination of the increased level of violence, range of sexual activity and associated degradation took the offending into the bottom of band two rather than the top of band one.<sup>91</sup>

[71] The offending is more similar to, although less serious than, the cases cited as falling at the higher end of band one, such as *R v Wirangi* and *R v H*.

[72] We do not accept the description of the offending as particularly callous in the context of the cases cited in *AM*. We accept the victim was vulnerable, given she was asleep in bed beside her children, there was premeditation and an entry into the bedroom when there should not have been. A breach of trust was inherent in these factors. We note that the appellant was entitled to be in the house.

[73] Without in any way minimising the impact on the victim, in the context of sexual offending generally and the guidance of *AM*, these are aggravating features at the lower end of the scale.

[74] For these reasons, we consider that the rape on 25 January falls at the top of band one, with the appropriate starting point being seven years' imprisonment.

[75] The offending on 13 January does have an unusual fact pattern but nevertheless involved a rape and sexual violation by digital penetration. Considering it in context, there should be an uplift of one and a half years' imprisonment in respect of this offending.

[76] For the sexual offending therefore, we conclude that the appropriate starting point was eight and a half years' imprisonment.

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<sup>91</sup> *R v AM*, above n 19, at [99].

### **Was the uplift for the breach of protection order manifestly excessive?**

[77] We can deal with this concisely. The answer to the question is yes, the uplift was manifestly excessive. The breach to which the appellant pleaded guilty occurred on one occasion and involved the sending of photographs, reacting with love hearts to a Facebook post and messaging the victims' parents. We agree that, on its own, offending such as this by an offender with no prior convictions and no violence or threats of violence would ordinarily be met by at most a community-based sentence, although a conviction and discharge would still be within range.

[78] In the context of a lengthy prison sentence, we do not consider there should have been any uplift in respect of this charge.

### **What sentence should be imposed?**

[79] From a starting point of eight and a half years' imprisonment, we deduct the two years allowed by the Judge for personal mitigating factors, as we are satisfied that appropriately recognises the appellant's prior good character, content of the "impressive" letter he wrote to the Judge and impact on him of imprisonment given his back issues.<sup>92</sup> The result is a final sentence of six and a half years' imprisonment.

### **Result**

[80] The appeal is allowed.

[81] The sentence of eight and a half years' imprisonment is quashed and replaced by a sentence of six and a half years' imprisonment.

Solicitors:

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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<sup>92</sup> Judgment under appeal, above n 1, at [26].