CONSENSUAL SEXUAL ACTIVITY BEFORE A SEXUAL VIOLATION IS NOT MITIGATING

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The Court of Appeal has signalled its intention to review its guideline judgment for sexual violation sentencing, R v AM*, which includes guidance on when sentencing judges should treat prior consensual sex as mitigating. The argument this article makes is that the new guideline judgment should remove prior consensual sex as a mitigating factor for two reasons. The first is that treating consensual sexual activity before a sexual violation as mitigating embeds an outdated idea of what constitutes a "real rape" and fails to recognise and uphold sexual autonomy. The second reason for removing the mitigating factor is that it is incorrect as a matter of sentencing methodology to treat prior consensual sex as mitigating in its own right.*

I INTRODUCTION

At sentencing, sexual violation may be treated as less serious – and therefore deserving of a more lenient sentence – if the offender and the victim engaged in consensual sexual activity immediately prior to the sexual violation.[1]

The Court of Appeal has signalled its intention to review its guideline judgment for sexual violation sentencing, *R v AM*, which includes guidance on when sentencing judges should treat prior consensual sex as mitigating.[2] The argument this article makes is that the new guideline judgment should remove prior consensual sex as a mitigating factor for two reasons. First, treating consensual sexual activity before a sexual violation as mitigating embeds an outdated idea of what constitutes a "real rape" and fails to recognise and uphold sexual autonomy. Secondly, it is incorrect as a matter of sentencing methodology to treat prior consensual sex as mitigating in its own right.

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1 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [54]–[60].

2 *Crump v R* [2020] NZCA 287, [2022] 2 NZLR 454 at [98]. See *R v AM*, above n 1, at [29] and following.

After discussing the justifications the Court of Appeal has given over the years for treating consensual sexual activity immediately before a sexual violation as mitigating, I argue that it has never given a satisfactory justification for this decision. The justifications given either undermine sexual autonomy or are incorrect according to established sentencing methodology. The guidance the Court of Appeal has given for when consensual sexual activity may mitigate a sexual violation embeds an outdated view of what constitutes a "real rape".

I go on to demonstrate that the courts are, by and large, applying the Court of Appeal's guidance correctly – if the sexual violation involves something which the victim did not "sign up for" when she initially consented to sexual activity, the consensual sexual activity is not treated as mitigating.

This is followed by a critique of the Court of Appeal's reasoning in *Crump v R.*[3] *Crump* is the only case in which, on the face of it, the initially consensual sexual activity should be treated as mitigating according to the guidance in *AM*. I argue, however, that the Court gave too much weight to that factor and overlooked other relevant factors indicating that Mr Crump's culpability was higher. This case demonstrates the danger of continuing to embed into sentencing law the idea that sexual violation following the withdrawal of consent is not "real rape" – the imposition of a demonstrably inadequate sentence.

I conclude that there are no circumstances in which prior consensual sex should be treated as mitigating and the Court of Appeal should remove it when it reviews sentencing guidance for sexual violation.

II THE JUSTIFICATIONS ADOPTED FOR TREATING PRIOR CONSENSUAL SEX AS MITIGATING

It has long been considered mitigating, in some circumstances, if the victim and the offender engaged in consensual sexual activity leading up to the sexual violation. Examples include *R v Billam*, where the English Court of Appeal had said it should be treated as mitigating that "the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse".[4] In *R v Clark*, the New Zealand Court of Appeal said there should be some allowance if there are "elements of provocation or temptation in [the victim's] conduct".[5] The victim in *Clark* was a sex worker and the provocation or temptation to which she was said to have exposed Mr Clark was negotiating her fee with him.[6]

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3 *Crump v R*, above n 2.

4 *R v Billam* [1986] 1 WLR 349 (CA) at 351–352.

5 *R v Clark* [1987] 1 NZLR 380 (CA).

6 At 382.

In 1994, a full bench of the permanent Court of Appeal adopted an eight-year starting point for rape in *R v A*. In doing so, the Court discussed features of the offending which might justify sentencing below that eight-year starting point.[7] It said:[8]

> … there may be features in a particular case justifying going below, possibly even well below, the eight-year starting point. … Another illustration, depending always on the particular circumstances, may sometimes occur when consent to intercourse is refused after a degree of consensual sexual stimulation. An extreme example is *R v Brookes*, where a sentence of three years for rape was upheld on the basis that the accused was not aware of the refusal of consent until the act of intercourse had begun. The man's persistence in such a case is criminal but some allowance for the special facts may be made in sentencing.

R v A, therefore, confirmed that it will be treated as mitigating if the victim exposed the offender to temptation, provocation, intentionally led the defendant to believe she would consent to intercourse, or consensually sexually "stimulated" the offender. Presumably, the common factor in these situations is that the offender's culpability is lower because he was sexually aroused by something the victim did and that arousal made it more understandable that he went on to sexually violate the victim. In that context, the reason the Court of Appeal considered *R v Brookes* to be an "extreme example" may be the high degree of sexual arousal Mr Brookes experienced while engaging in what he believed to be consensual sexual intercourse, and the added difficulty for him given that level of arousal in stopping when he realised the victim did not consent.[9] Such reasoning fails to give men adequate credit for their ability to respect the sexual autonomy of others even when sexually aroused. It also fails to recognise and uphold the sexual autonomy of victims. It has no place in current sentencing law.

In *R v Millberry,* the English Court of Appeal reviewed its approach to rape sentencing, taking care to avoid giving the impression of blaming victims for being raped.[10] Under the heading "The Victim's Behaviour", the Court said:[11]

> Where, for example, the victim has consented to sexual familiarity with the defendant on the occasion in question, but has said "no" to sexual intercourse at the last moment, the offender's culpability for rape is somewhat less than it would have been if he had not intended to rape the victim from the outset. This is *not* to say that any responsibility for the rape attaches to the victim. It is simply to say that the offender's culpability is somewhat less than it otherwise would have been. The degree of the offender's culpability

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7 *R v A* [1994] 2 NZLR 129 (CA).

8 At 132 (citations omitted).

9 *R v Brookes* (1992) 14 Cr App R (S) 496 (CA).

10 *R v Millberry* [2002] EWCA Crim 2891, [2003] 1 WLR 546.

11 At [14].

> should be reflected in the sentence, but, given the inherent gravity of the offence of rape, the sentence adjustment in such a case should, we think, be relatively small.

The distinction the Court made in *Millberry* between intending at the outset to commit rape and forming that intention after some consensual sexual activity appears to be the source of the New Zealand Court of Appeal's decision in *R v AM* that it is the correlation with lack of premeditation or planning that is the reason prior consensual sex may be treated as mitigating.[12]

AM is the guideline judgment for sexual violation, which in 2010 replaced *R v A* as the authoritative guidance on sentencing for sexual violation by rape and introduced sentencing guidance for sexual violation by unlawful sexual connection. *AM* contained the most detailed discussion at that date of why prior consensual sex should be treated as mitigating.

The Court started by affirming that people have the right to choose the level of sexual activity in which they participate and that sexual partners must respect that.[13] It decided, however, that in limited circumstances, consensual sexual activity between the offender and an adult victim may reduce the seriousness of the offending.[14] This was the position, the Court said, in the draft New Zealand sentencing guidelines,[15] the guidelines produced by the Sentencing Council for England and Wales (which cite the passage quoted above from *Millberry*),[16] and New Zealand law at the time (citing the passage from *R v A* discussed earlier).[17] The mitigating factor has since been removed from the English guidelines.[18]

The Court noted that treating prior consensual sex as mitigating is controversial, and acknowledged that the Crown opposed its retention because it "undermined the non-consensual nature of the violation and so reduced its seriousness".[19] It was the correlation with the lack of premeditation, in addition to the fact that England and Wales and the draft New Zealand sentencing guidelines retained the mitigating factor after extensive consultation, that persuaded the Court to keep prior consensual sex as mitigating.[20]

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12 *R v AM*, above n 1, [58]–[59].

13 At [54].

14 At [55].

15 At [55]. These guidelines were drafted in anticipation of the establishment of a Sentencing Council, a reform which never occurred.

16 At [56]–[57].

17 At [54]–[56].

18 Sentencing Council "Rape" <www.sentencingcouncil.org.uk>.

19 *R v AM*, above n 1, at [58].

20 At [58]–[59].

It is my argument that as a matter of accepted sentencing methodology, the absence of an aggravating factor (premeditation and planning) is neutral, not mitigating.[21] It is acceptable to treat consensual sexual activity immediately before a sexual violation as evidence that the offending was not planned, and therefore that the aggravating factor of premeditation and planning is absent. But treating consensual sexual activity as mitigating in its own right, when the justification for doing so is that it reflects the absence of an aggravating factor, is incorrect as a matter of sentencing methodology. It gives credit twice for the fact the offending was not premeditated, artificially reducing the sentence.

The Court of Appeal discussed the relevance of prior consensual sex most recently in 2020, in *Crump v R*.[22] It noted that the factor remains controversial, citing an article of mine from 2014 in which I argued that prior consensual sex was irrelevant to assessing offence seriousness,[23] then continued:[24]

> What can, however, be said is that prior and proximate consensual sexual activity may be relevant to other aggravating and mitigating considerations: it may be indicative of (or contributive to) impulsivity, it may conceivably *increase* vulnerability and breach of trust, and it may possibly have a bearing, one way or the other, on extent of harm, degree of violation and whether there was a mistaken but unreasonable belief by the offender that the victim consented.

There are two important points to be taken from that paragraph. The first is that the statement that consensual sexual activity may be *contributive* to impulsivity goes back to the idea expressed in *R v A* that the offender's culpability is lower if they were sexually aroused by something the victim did when they committed the sexual violation, which I have argued undermines sexual autonomy.

The second important point is that consensual sexual activity is best thought of as evidence for the presence or absence of particular aggravating and mitigating factors, rather than as a factor in its own right. I have already discussed how consensual sexual activity may be evidence of the absence of planning and premeditation. If the consensual sexual activity was the reason for the offender making an honest but unreasonable mistake about consent, that is already accounted for as a separate mitigating factor. Retaining prior consensual sex as a separate mitigating factor risks double-counting the same features of the offending to arrive at a starting point that is too low. Even more problematically, retaining prior consensual sex as a mitigating factor in its own right creates the risk that sentencing judges will give credit for its presence even when it increases the seriousness of the

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21 Geoff Hall *Hall's Sentencing* (online ed, LexisNexis) at [I.4.3].

22 *Crump v R*, above n 2, at [94]–[95].

23 Danica McGovern "Assessing Offence Seriousness at Sentencing: New Zealand's Guideline Judgment for Sexual Violation" (2014) 26 NZULR 243.

24 *Crump v R*, above n 2, at [95].

offending. This may be the case when the offender abuses the vulnerability and trust involved in having consensual sex in order to sexually violate the victim, in turn also increasing the harm experienced by the victim.

R v Tawa is an example of a case where sexual activity between the victim and the offender (treated as consensual although it was the subject of an indecent assault charge of which Mr Tawa was acquitted) should have been treated as aggravating but was instead treated as mitigating.[25] The victim was an intellectually disabled woman, Ms L. She had the adaptive functioning of a child between three and 10 years of age, though the Crown case was that she had the capacity to consent to sex.[26] She lived with Mr Tawa and his wife, whom she knew through church. The incident giving rise to the charges occurred after Mr Tawa had an argument with his wife.[27] It began with the victim massaging Mr Tawa's feet, Mr Tawa massaging the victim's lower legs, and continued to what is referred to throughout the judgment as "physical activity" or "sexual activity".[28] This further activity was the subject of an indecent assault charge, of which the jury acquitted Mr Tawa. Mr Tawa then digitally penetrated the victim's vagina, giving rise to a charge of sexual violation by unlawful sexual connection.[29] Mr Tawa was convicted on this count.

The Judge identified the victim's vulnerability and the breach of trust as aggravating factors. He decided, however, that the weight to be given to those aggravating factors should be limited by the fact that the victim either consented or gave Mr Tawa reasonable grounds to believe she consented to the earlier sexual activity that constituted the indecent assault charge.[30] That approach was incorrect. Ms L was vulnerable due to her intellectual disability and Mr Tawa was in a position of trust and authority in relation to her. Even if Ms L initiated sexual activity with Mr Tawa and consented to it, his responsibility in that situation, given their relationship and what he knew about her level of functioning, was to stop that sexual activity. He had the moral responsibility to maintain appropriate

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25 *R v Tawa* HC Tauranga CRI-2010-070-2009, 22 October 2010.

26 At [4].

27 At [6]–[7].

28 At [10].

29 At [10].

30 At [30]. It should be noted that a reasonable belief in consent is not required for indecent assault – only an honest belief is needed. If the Judge thought that Mr Tawa believed on reasonable grounds that Ms L consented, the evidence for that is not set out in the judgment. Additionally, treating sexual activity that was the subject of an acquittal as consensual on the basis of a reasonable belief in consent is inconsistent with the Court of Appeal's approach in *Rickit v R* [2010] NZCA 25. Effectively, in *Tawa*, the Court incorrectly imposed a more lenient sentence for the sexual violation than would have been imposed had there not also been an allegation of indecent assault. The sentence on the sexual violation should not have been increased on the basis of an allegation of indecent assault the prosecution could not prove beyond reasonable doubt, but nor should it have been decreased because of that allegation.

boundaries in the relationship. His failure to do so should not then mitigate his sexual violation of her. It is purely aggravating.[31]

The Court in *AM* noted that the English guidelines said that prior consensual sex should not be treated as mitigating when there is a breach of trust.[32] My reading of the discussion in *AM* is that the Court intended that condition to be part of its guidance and the Judge in *Tawa* overlooked it. Of more significance for this article, however, is that *Tawa* demonstrates that prior consensual sex should not be treated as a mitigating factor in its own right, because sometimes it aggravates the seriousness of the offending, such as when any sexual activity between the victim and the offender is exploitative because of the victim's vulnerability and the power imbalance between them. It could, perhaps, be argued that prior consensual sex may be taken into account unless the offending involves exploitation or abuse of a particularly vulnerable victim, and that sentencing judges are able to make that assessment on the case before them. However, the main proposition of this article is that there is no good reason in any circumstances to treat prior consensual sex as mitigating in its own right. Taking it into account as evidence of other aggravating or mitigating factors, as I advocate, would give sentencing judges a more principled and methodologically sound way to approach situations involving prior consensual sex between the offender and a vulnerable victim that involves a breach of trust.

As for the relationship between consensual sexual activity and degree of violation, treating sexual violation that began as consensual sex as intrinsically less serious than other types of sexual violation reflects the same flawed logic as treating violation by an intimate partner as less violating. The courts have been clear for many years that sexual violation is not less serious when there has been consensual sexual intimacy on previous occasions.[33] The same should apply when the consensual intimacy is on the same occasion.

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31 *Tawa* is also the only case in which non-penetrative sexual activity has been treated as mitigating a sexual violation.

32 *R v AM*, above n 1, at [57].

33 At [61].

III HOW PRIOR CONSENSUAL SEX IS TAKEN INTO ACCOUNT AT SENTENCING

The maximum penalty for sexual violation is 20 years' imprisonment and there is a presumption that a sentence of imprisonment will be imposed.[34] The Sentencing Act 2002 contains some general guidance about factors that should be taken into account when deciding what sentence is appropriate for the seriousness of the offending (such as the level of violence involved, the degree of harm experienced by the victim, whether the victim was vulnerable or whether the offence involved an abuse of trust or authority).[35] But it is left to the courts to determine what term of imprisonment is commensurate with the seriousness of a given offence (within the legislative maximum of 20 years).

Modern guideline judgments divide the range of available prison time into "bands". *AM* has four bands for sexual violation by rape and three for sexual violation by unlawful sexual connection. Rape band one is six to eight years, band two is seven to 13 years, band three is 12 to 18 years, and band four is 16 to 20 years. The rape bands include also what the Court considered to be the more serious instances of sexual violation by unlawful sexual connection (penile penetration of the mouth and anus, and violation using objects).[36] The sexual violation by unlawful sexual connection bands (which apply to digital penetration of the vagina and anus and performing oral sex on the victim) are set lower to reflect what the Court considered to be the lesser violation involved. Unlawful sexual connection band one is two to five years, band two is four to 10 years, and band three is nine to 18 years.[37]

The Court gave examples of cases falling within each band, highlighting the relevant aggravating factors that indicate why the band is appropriate for that case and whether it would fall in the higher or lower part of the band. The sentencing judge then selects a starting point within the band (say, seven years for a rape in the middle of band one).

Rape band one, the Court said, is appropriate for offending with no aggravating factors, or where the aggravating factors are present only to a limited degree. The Court said it is not an appropriate band for offending involving serious violence (beyond that inherent in the offence itself), an extended abduction, a vulnerable victim, or offending involving multiple offenders.[38] The Court gave three examples of offending that falls into the lower end of rape band one, taken from previous cases:[39]

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34 Crimes Act 1961, s 128B.

35 Sentencing Act 2002, s 9.

36 *R v AM*, above n 1, at [65]–[112].

37 At [113]–[124].

38 At [93].

39 At [93].

> *R v Murphy*: O had been drinking and came home at dawn to find a man and a woman whom he did not know asleep in his bed. O tried to wake them and asked them to leave. The male did so. The female, V, said she woke to find a man attempting to have sexual intercourse with her. She said she thought it was the man who left the room (the two having met the previous evening) and sexual intercourse took place. When V got up and could see the man in bed she realised it was O and left the room and made her complaint.
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> *R v Pehi*: O and V were in a relationship for about six months. After some kissing in the early hours one morning in V's bedroom, O, by then extremely drunk, assaulted V and then engaged in non-consensual activity culminating in rape. V was annoyed with O but said she would have been willing nonetheless to have sex with O that night.
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> *R v Hill*: O and V became intoxicated whilst at a party. They shared a taxi ride home in the early hours of the morning and went to V's house where they drank more alcohol and talked. V asked O to leave after he said he loved her. She left the room and returned having changed into pyjama shorts and a top. O was still there and V told him again that he should leave. O pushed V into a cane basket causing minor scraping and bruising to V's thigh. O removed V's clothing and then penetrated her very briefly before stopping and apologising for his conduct.

The Court noted that the offending in these cases was relatively brief (and the degree of violation correspondingly low) and involved little or no additional violence.[40] It noted that there was some consensual sexual activity in *Pehi* but it was limited to kissing.[41]

The Court of Appeal said that there may also be cases that fall below the bottom of band one because of their "unusual fact pattern".[42] It gave the example of *R v Greaves*, an English case, as one such case:[43]

> V, 17, invited O to her flat and they engaged in sexual intimacies. It was accepted that sexual intercourse was initially consensual. However, V changed her mind during the act and asked O to stop. He did not stop until the act of sexual intercourse was completed.

The Court did not comment further, but it seems clear that it is the fact that consent was initially given to sexual intercourse that made the rape "unusual" enough in the eyes of the Court to warrant a lower starting point.

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40 At [94].

41 At [94].

42 At [96].

43 *R v Greaves* [1999] 1 Cr App R (S) 319 (CA) as cited in *R v AM*, above n 1, at [96], n 80.

The Court in *AM* also considered circumstances that were relevant to whether consensual sexual activity between an adult victim and the offender immediately before the sexual violation should be treated as mitigating. It quoted a passage from the English guidelines then in force:[44]

> Save in cases of breach of trust or grooming, an offender's culpability may be reduced if the offender and victim engaged in consensual sexual activity on the same occasion and immediately before the offence took place. Factors relevant to culpability in such circumstances include the type of consensual activity that occurred, similarity to what then occurs, and timing. However, the seriousness of the non-consensual act may overwhelm any other consideration.

The Court of Appeal noted that these same circumstances were included in the draft New Zealand guidelines.[45] The Court did not enter into any discussion of why these circumstances are relevant to determining whether and to what extent consensual sexual activity immediately before the sexual violation mitigates the offending.

It is my argument that these factors represent an outdated view of what constitutes a "real rape".[46] In 1980, a majority of the Court of Appeal in *R v Kaitamaki* confirmed that if consent to sexual intercourse is withdrawn after penetration and the offender either knows or should have known that consent has been withdrawn and continues to penetrate the victim, the offender has committed rape.[47] Woodhouse J dissented to this interpretation of the offence, saying:[48]

> It means that after he had entered her with consent she could transform his innocent and acceptable conduct into criminal activity of the most serious kind should he fail to meet her sudden indication that he must leave her. …
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> [T]he crime [of rape] has always been concerned with the criminal invasion of a woman's body by a male; and for my part I cannot understand how any woman could reasonably complain that she had been violated in the gross sense of being raped if she had agreed that her partner could enter her. …
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> As a matter of common sense the ambit and effect of the relevant consent must be consent to no more but also to no less than what is intended to follow: a normal act of intercourse.

Woodhouse J's view that consent is given "to no more but also to no less than what is intended to follow" helps to explain the relevance of those factors. I demonstrate in Part IV of this article that if the sexual violation involved a type of sex the victim did not "sign up for" when she consented to sexual activity then the consensual sexual activity will not be treated as mitigating. If there is

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44 *R v AM*, above n 1, at [57].

45 At [55].

46 Susan Estrich *Real Rape* (Harvard University Press, Cambridge, 1987).

47 *R v Kaitamaki* [1980] 1 NZLR 59 (CA).

48 At 64.

separation in time between the consensual sexual activity and the sexual violation, then the victim did not "sign up for" that later activity and so the earlier consensual sexual activity is not treated as mitigating. If the sexual violation is so serious that it overwhelms any earlier consensual sexual activity, then at that point it is clear that the sexual violation is a "real rape" and the courts are comfortable treating it as such.

On the other hand, if the only difference between the consensual sexual activity and the sexual violation is that the victim withdrew consent, the earlier consensual sexual activity is treated as mitigating. This seems to embed Woodhouse J's view that when consenting to sexual penetration, women impliedly consent to penetration continuing until their male partner ejaculates (presumably what he meant by "a normal act of intercourse"). Although the offender commits sexual violation if he does not stop when it is clear the victim has withdrawn consent, the sexual violation is treated as less serious because the victim has violated the expectation that consent is given to penetration until ejaculation. In Part V of this article, I discuss the case of *Crump*, which provides a quintessential example of relevant sentencing considerations being overwhelmed by this outdated view of what constitutes a "real rape", resulting in a manifestly inadequate sentence.

IV CASES IN WHICH CONSENSUAL SEXUAL ACTIVITY WAS NOT TREATED AS MITIGATING

I argue in this section that, in most cases, the courts have applied the Court of Appeal's guidance in *AM* about when consensual sexual activity between the victim and the offender should be treated as mitigating in a way that is both correct on the face of *AM* and affirms the sexual autonomy of the victim. I argue that the guidance itself, however, undermines full recognition of sexual autonomy because it reflects the idea that if the sexual violation involves only what the victim "signed up for" when she initially consented to sexual activity, then the sexual violation will be treated as much less serious because it is not a "real rape".

This section is structured around the guidance provided by the Court of Appeal about the factors to be taken into account when deciding whether to treat consensual sexual activity as mitigating the sexual violation.

A Similarity between the Type of Consensual Sexual Activity and the Sexual Violation

When the consensual sexual activity between the victim and the offender was either non-penetrative or involved a different type of penetration to the sexual violation, the courts have generally not taken it into account as mitigating.

1 Non-penetrative consensual sexual activity

In *Taylor v R*, the Court declined to take non-penetrative consensual sexual activity into account as mitigating.[49] The offender and the victim had known each other at secondary school. They bumped into each other in a bar, talked and danced "quite intimately".[50] They left together to go to another bar, stopped in an alley on the way and kissed consensually "for a short time" before the victim "described ending up lying on the asphalt, with her underpants removed".[51] The offender raped her, holding on to the top of her arms, despite the victim telling him no and trying to push him away with her hips. The offender also bit the victim on the face, neck and chest, and pulled her hair.[52]

At first instance and on appeal the courts rejected the argument for Mr Taylor that the victim's willingness to engage in some consensual sexual activity should be taken into account as mitigating. The sentencing judge framed his rejection on the basis that Mr Taylor could not have genuinely believed that the complainant consented to sexual intercourse on the basis of the consensual activity up to that point and that when she made it known that she did not consent, he had an obligation to stop.[53] The Court of Appeal simply noted the argument and the Crown's opposition to it, and moved on to conclude that the offending was properly in the middle of band one, with a starting point of seven years (with the moderate level of violence involved in biting the victim being the only aggravating factor).[54]

In *Sherratt v R*, the victim and Mr Sherratt had been friends for five years.[55] When they were drinking together in the spa pool at Mr Sherratt's house one evening, the victim allowed Mr Sherratt to touch her breasts and vagina.[56] After Mr Sherratt had an argument with his partner (who had seen some of the touching), the victim got out of the spa pool, removed her wet togs, and walked naked to the spare bedroom. She woke up during the night to find Mr Sherratt on top of her with his hand over her mouth, trying to rape her. He was unsuccessful because he could not get an erection. Instead, he put his fingers in her vagina, despite the victim's protests and attempts to remove them. This sequence was repeated a second time later in the night.[57]

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49 *Taylor v R* [2012] NZCA 348.

50 At [2].

51 At [3].

52 At [3].

53 *R v Taylor* DC New Plymouth CRI-2010-043-003525, 13 February 2010 at [8].

54 *Taylor v R*, above n 49, at [20].

55 *Sherratt v R* [2021] NZHC 1901 at [3].

56 At [4].

57 At [5]–[7].

On appeal to the High Court, counsel for Mr Sherratt argued that the interactions between the victim and Mr Sherratt before the offending should be given particular weight in assessing his culpability.[58] Nation J did not accept that the consensual sexual activity mitigated the offending. He said:[59]

> It should have been abundantly clear to Mr Sherratt that the victim was rejecting his advances through repeatedly exclaiming "no", telling him to get off her, and squirming to get him off her. I do not consider Mr Sherratt could have plausibly perceived the victim's naked retirement to her room as an invitation for sexual interaction. Even if Mr Sherratt did see her nakedness as such an invitation, he could not have had any reasonable belief in consent. Mr Sherratt approached the victim when she was asleep. He restricted her speech and movement. He ignored her steadfast refusals and, after leaving the bedroom, returned and tried to rape her again.

A similar approach has been taken when there was consensual penetrative sex immediately preceding a sexual violation involving a different type of penetration.

2 Consensual penetration preceding sexual violation involving a different type of penetration

The courts have declined to treat consensual vaginal intercourse as mitigating a sexual violation by anal penetration. In *R v Ottley*, for example, Mr Ottley was sentenced for offences including a number of sexual violations against two victims.[60] One of the sexual violation offences against the first victim began with consensual vaginal intercourse. The offending was described in the following way:[61]

> You then repeatedly tried to roll her onto her stomach in order to have anal intercourse with her. She clearly stated she did not want to partake in that type of activity. She protested, but was physically unable to stop you forcing yourself on her in this way. She yelled at you to stop and said she did not like it, but you did not stop and had anal intercourse despite her protests.

The sentencing judge rejected the argument for Mr Ottley that the consensual intercourse immediately before the sexual violation should mitigate the offending, noting that the Court of Appeal

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58 At [23].

59 At [42].

60 *R v Ottley* [2016] NZHC 1324. See also *R v Benatzky* [2017] NZDC 8428 at [15].

61 *R v Ottley*, above n 60, at [7].

had said in *AM* that the relevance of this factor would depend on the type of earlier sexual activity and its similarity to the sexual violation.[62] The Judge said:[63]

> Ms A may have been consenting to vaginal intercourse immediately prior, but she made it clear to you that she was not consenting when you attempted, and then continued, to change the nature of the sexual act to anal intercourse. Those two acts are very different things, and in my view, your culpability is not lessened to any appreciable extent for this reason.

Similarly, in *R v Bloor*, the victim and the offender were in an ongoing sexual relationship, during which the victim had made it clear that she did not want to have anal sex.[64] Mr Bloor was convicted of sexual violation when, during consensual vaginal intercourse, he penetrated her anally and continued to do so despite the victim saying it hurt, asking him to stop, and pulling away. Mr Bloor held the victim face down on the bed, with her head in a pillow, and penetrated her anus again, continuing despite her protests.[65] The sentencing judge appears not to have treated the consensual vaginal intercourse as mitigating in its own right, but took it into account as evidence that the offending was not premeditated (ie as evidence of the absence of an aggravating factor), which is a principled approach.[66]

In *R v Maru*, Mr Maru paid the victim for oral sex, which she performed consensually.[67] Mr Maru then raped the victim, punched her until she became unconscious, and stole her phone. She went in and out of consciousness over the next 24 hours and was unable to call for help because Mr Maru had taken her phone. She suffered severe physical injuries from the beating and Mr Maru was convicted of wounding with intent to cause grievous bodily harm, in addition to the rape.[68] The sentencing judge noted that prior consensual sex may be a mitigating factor according to *AM* but that the Crown's position was that it was not relevant in this case because "the prior consensual sexual act was different in nature, and [Mr Maru was] aware that the victim had only agreed to perform oral sex".[69] The Court

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62 At [25], citing *R v AM*, above n 1, at [55].

63 *R v Ottley*, above n 60, at [25].

64 *R v Bloor* [2014] NZHC 2086 at [2].

65 At [3].

66 At [15].

67 *R v Maru* [2018] NZHC 1562 at [11].

68 At [11]–[13].

69 At [24].

noted that counsel for Mr Maru did not argue that prior consensual sex was an applicable mitigating factor in this case[70] and did not treat it as such.[71]

B Similarity in the Nature of the Consensual Sexual Activity and the Sexual Violation

When consensual sexual intercourse becomes violent or painful, and the victim withdraws consent, the courts have also declined to treat the initially consensual sex as mitigating in itself.

In *Luisi v R*, there were two rapes.[72] The victim was Mr Luisi's partner. In the first, Mr Luisi strangled the victim when they were having consensual sex, then continued to penetrate her despite her being angry about the strangulation and wanting to stop.[73] In the second rape, consensual sexual intercourse became painful for the victim and she asked Mr Luisi to stop and struggled to get away from him, leading to them falling off the bed. He penetrated her at least twice more.[74] The fact that both rapes began as consensual sexual intercourse was not taken into account as a mitigating factor at first instance.[75]

On appeal, counsel for Mr Luisi argued that the second rape should be treated as falling below band one, with a starting point of less than three years' imprisonment.[76] The Court of Appeal said that a starting point that is less than half of the starting point at the bottom of band one would not adequately reflect Mr Luisi's culpability.[77] In the end, however, the Court did not have to determine what the correct starting point would be, because it considered that the nine-year starting point to reflect both counts of rape was within the available range.[78]

In *R v Cooper*, the offender and the victim had been in a relationship for many years.[79] The offender came home intoxicated, the victim reluctantly agreed to sexual intercourse and then withdrew her consent when the offender became rough. He pulled her hair, pinned her down, and raped her.[80]

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70 At [28].

71 At [29].

72 *Luisi v R* [2020] NZCA 73 at [1].

73 At [4].

74 At [7].

75 *R v Luisi* [2019] NZDC 15079 at [12]–[14].

76 *Luisi v R*, above n 72, at [17].

77 At [22].

78 At [22].

79 *R v Cooper* [2018] NZDC 4665 at [4].

80 At [4].

Mr Cooper was convicted of two further offences arising from the same incident: assault with intent to commit sexual violation (trying to pull her pants down when he was partly on top of her) and injuring with intent to injure (punching her three times).[81] The sentencing judge emphasised the additional violence Mr Cooper used as part of the rape:[82]

> The Court does occasionally deal with cases of sexual violation by rape where consent is withdrawn. However, this is not simply a case of consent being withdrawn. This is a case of overt and additional violence surrounding that act and to enforce that act. Rape is always violent but it is made more so when there are separate acts of assault and a physical and power imbalance, as there was in this case.

The sentencing judge stated there were no mitigating factors of the offending.[83] However, he took into account that the sexual violation began as consensual ("albeit reluctant") sex as evidence that the offending was spontaneous rather than premeditated.[84] The Judge concluded that Mr Cooper's offending was much more serious than the offending in *Greaves* because of the accompanying violence,[85] but less serious than the offending in *Bloor*, which involved a different sexual act to the one the victim consented to and a greater degree of force.[86] He adopted a starting point of six years for the rape, with an uplift of six months for the other charges.[87] Again, that appears to be an appropriate starting point for the seriousness of the offending.

C Closeness in Time between the Consensual Sexual Activity and the Sexual Violation

In *Taylor v R*, the offender and the victim had consensual sexual intercourse in an upstairs bedroom at a party.[88] The victim left to take a friend home and returned about 20 minutes later.[89] The victim's evidence was that the offender then sexually violated her by anal penetration four times. After the third time, she recorded a video of herself asking him why he did it, and him saying he was an idiot and wanted to go to sleep. The fourth violation is recorded, and she can be heard saying it is hurting and asking him repeatedly to stop, to which he replied "no".[90] The offender was charged with

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81 At [1] and [5].

82 At [7].

83 At [19].

84 At [30].

85 At [27].

86 At [35].

87 At [36].

88 *Taylor v R* [2021] NZCA 605 at [5].

89 At [5].

90 At [6].

one count of sexual violation and convicted at trial. The sentencing judge declined the invitation from counsel for Mr Taylor to sentence below the bottom of band one on the basis that there had been consensual sex before the sexual violation.[91] The Judge noted the lack of "direct immediacy" between the consensual intercourse and the sexual violation, and that the earlier consensual sexual intercourse did not provide any basis for a mistaken (though unreasonable) belief that the victim consented.[92] The Judge also noted the breach of trust arising from the intimate relationship and the harm suffered by the victim, and arrived at a seven-year starting point.[93] The Court of Appeal affirmed that starting point and the sentencing judge's reasoning in relation to the earlier consensual sexual intercourse.[94]

The decision in *R v Rogers* not to treat consensual sexual intercourse between the victim and the offender earlier in the evening as mitigating is probably also best understood as being because of the timing.[95] In that case, the victim and the offender had been on a date and had consensual sex at the victim's house. They went to bed. She slept deeply due to intoxication. He indecently assaulted and raped her twice. She woke up during the second rape and told him to leave, which he did.[96] In considering the relevance of the earlier consensual sex, the Judge said that it did not detract from the fact the offender raped the victim twice, but could be taken into account as evidence that the offending was not premeditated, citing the discussion of the factor in *AM*.[97] The Judge adopted a starting point of seven and a half years' imprisonment, to reflect the serious emotional harm the victim suffered, the scale of the offending (two rapes, each preceded by an indecent assault), and the vulnerability of the victim, in that she was deeply asleep.[98] The decision and reasoning were upheld on appeal to the High Court.[99]

D The Overall Seriousness of the Sexual Violation

In cases where the consensual sexual acts are the same type as those that form the sexual violation, but the sexual violation is extremely serious, the courts have not taken the prior consensual sex into account. In *R v Nzohabona*, the offender engaged in consensual paid oral and vaginal sex with each victim, and then committed a number of sexual violations against each, all involving oral and vaginal

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91 At [10].

92 At [10].

93 At [10].

94 At [14] and [17].

95 *R v Rogers* [2016] NZDC 6615.

96 At [4]–[5].

97 At [20].

98 At [16].

99 At [19]–[20].

penetration.[100] Offending against the first victim was treated as unpremeditated, with the fact that the offender took a knife from her kitchen as evidence of lack of planning.[101] The offending against the second victim was considered to involve significant premeditation, in that it was a repeat of what he had done to the first victim the day before.[102] The initially consensual sexual connection was not discussed at any point during the assessment of the seriousness of the offending against either victim. It is likely that is because the number and seriousness of the aggravating factors (degree of violation and degradation, violence and detention, scale of the offending, vulnerability of the victims)[103] made it irrelevant, despite the violations constituting the same sexual acts as the victims consented to.

In this section, I have demonstrated that the courts will not treat consensual sexual activity between the offender and the victim as mitigating if the sexual violation that follows is not what the victim "signed up for" when initially consenting to sexual activity. This approach is consistent with the guidance given in *AM* for when consensual sexual activity may be mitigating. In the next section, I discuss a case in which the rape differed only from the consensual sexual activity in that the victim had withdrawn her consent. I argue that, because of this, the Court struggled to see it as a "real rape", a view that led the Court to select a much too lenient starting point and to award unusually generous discounts for personal mitigation.

V CONSENSUAL SEX PRECEDING SEXUAL VIOLATION RESULTING IN A MANIFESTLY INADEQUATE SENTENCE

Crump is an example of exactly the type of situation that Woodhouse J was so concerned about – a woman changing her mind and withdrawing consent after sexual intercourse has begun and a man being convicted of rape because he did not "meet her sudden indication that he must leave her". I argue that, even on the law as it is in *AM*, the Court of Appeal gave too much weight to the fact the sexual violation began as consensual sex. It wrongly characterised this as a case of a young man getting carried away and not stopping sex soon enough when he realised his partner no longer consented to it, and who therefore deserved a merciful sentence. Rather, I argue, the rape was one of a number of offences in which Mr Crump demonstrated contempt for his partner's autonomy and a sense of entitlement towards her. His culpability for the rape was not nearly as low as the Court of Appeal considered it to be, even if credit is given for the fact the rape began as consensual sex. Overall, this case stands for the danger of continuing to embed into sentencing law the idea that sexual violation following the withdrawal of consent is not "real rape" – the imposition of a demonstrably inadequate sentence.

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100 *R v Nzohabona* [2019] NZHC 1321 at [3]–[10].

101 At [35].

102 At [38].

103 At [35]–[39].

Mr Crump and Ms B were in a relationship.[104] Ms B reported to the police that Mr Crump had physically assaulted her on a number of occasions, threatened to kill her, and raped her. At the beginning of the trial, Mr Crump pleaded guilty to three charges.[105] The Court of Appeal's description of these charges was brief:[106]

> … assault with a weapon (hitting Ms B with a television remote); male assaults female (shaking Ms B on the bed); and endangering transport (pulling on the handbrake of the car Ms B was driving, causing it to leave the road).

The District Court sentencing decision provides further information.[107] In respect of the assault with a weapon, Mr Crump saw Ms B speak to another man when he dropped her off at work. He called and texted her numerous times while she was at work, and when she returned home he accused her of cheating on him and threw her work uniform outside, threw other items at her, and threw a television remote at her, hitting her on the arm.[108] The male assaults female charge arose from an occasion when one of Mr Crump's male friends, who was visiting their home, said hello to Ms B. Mr Crump jumped on top of Ms B on the bed and shook her.[109] For the endangering transport offence, Ms B had picked Mr Crump up from a party and on the way home he became angry and accused Ms B of cheating on him. Mr Crump told her they were both going to die then pulled the handbrake of the car when they were travelling at 85–100km per hour, causing it to spin out of control and leave the road. Ms B received bruising, cuts, scratches and a sore arm.[110]

Mr Crump was acquitted at trial of the remaining physical violence charges: male assaults female (pushing Ms B's head against a car window), assault with intent to injure (forcing Ms B's head on the floor), assault with intent to injure (putting his hands around Ms B's neck), male assaults female (pushing Ms B in the chest) and threatening to kill (telling Ms B he would kill her if she slept with anyone else).[111] He was convicted of sexual violation by rape.

The factual basis the sentencing judge adopted for the rape was that there had been some consensual sexual activity between Mr Crump and Ms B but that Mr Crump continued to have sexual intercourse with Ms B "well after" she told him she was not consenting and despite Mr Crump being

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104 *Crump v R*, above n 2, at [4].

105 At [1].

106 At [8].

107 *R v Crump* [2019] NZDC 20090.

108 At [2].

109 At [3].

110 At [4].

111 *Crump v R*, above n 2, at [1].

"quite clear" that it was non-consensual.[112] Ms B acknowledged there was consensual oral sex but said that the intercourse was non-consensual from the outset.[113] Mr Crump said that the intercourse began consensually (initiated by Ms B) but that, during the intercourse, Ms B withdrew her consent, saying "no" at least four times. Mr Crump was initially "confused" and "took a while to register" because "that had never happened before". But he acknowledged that he continued to penetrate her, despite her repeated protests.[114] The defence case was that Mr Crump did not realise that Ms B had withdrawn her consent and that this was a reasonable mistake to make in the circumstances.[115]

In his evidence in chief, Mr Crump said:[116]

> Halfway through … that she was like, "Oh no, I don't want this no more." I'm like, "What are you talking about, we're halfway through sex, this is what you wanted."

He confirmed in cross-examination that he felt "entitled" to have sex with Ms B because she had initiated it.[117] In his closing address to the jury, Mr Crump's lawyer drew on the idea that Ms B had created the expectation that they would have "a normal act of intercourse"[118] and that her conduct had sexually aroused Mr Crump, thereby explaining why the jury should find that it was reasonable that he did not stop when Ms B withdrew her consent:[119]

> … clearly her initiating the sex would have, you might think, created an expectation in him that he's about to have sex, that she's willing to have sex, that's the mindset he would have started with, and that expectation is enhanced you might think, by her [saying], "Let's do this." … They are both aroused. She rubs his penis, performs oral sex on him before they try one position, then try another position.

It appears the Court of Appeal made the factual finding that the vaginal penetration was initially consensual.[120] In the Court of Appeal's summary of the offending, the Court notes that Mr Crump "did not complete the act of intercourse but ceased belatedly after reaching an appreciation that he should not continue (and too late to avoid committing the crime of rape)".[121]

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112 *R v Crump*, above n 107, at [18].

113 *Crump v R*, above n 2, at [13].

114 At [16]–[18].

115 At [21]–[22].

116 At [17].

117 At [18].

118 *R v Kaitamaki*, above n 47, at 64.

119 *Crump v R*, above n 2, at [22].

120 At [103].

121 At [103].

The sentencing judge described the gravity of the offending as "more towards the lower end" and noted that it was not repetitive or deliberately degrading. Aggravating factors were the harm caused to the victim, that she was vulnerable by virtue of the relationship between them, and that he used violence to control and intimidate her. The Judge commented, "You showed no respect towards her as another human who is entitled to make her own decisions, rather than having to comply with everything that you want."[122]

The Judge adopted a starting point of three years and 10 months' imprisonment (well below the bottom of band one, which begins at six years).[123] He did not explain how he selected this starting point. He applied a five-month uplift for the two non-sexual assaults and the endangering transport offence, which included a 25 per cent discount for the early guilty pleas entered to those charges[124] (a large discount given that guilty pleas were entered at the beginning of the trial, when a discount more in the range of 10 per cent or less could be expected).[125]

The Judge applied generous discounts for personal mitigation. He reduced the sentence by six months (12 per cent) for previous good character, on the basis of Mr Crump's absence of previous convictions and his letters of support, including from his new partner and members of her family.[126] The Judge also awarded a 12 per cent discount for remorse and insight into the offending – a fairly substantial discount for writing a letter to Ms B and expressing remorse, especially considered in the light of his not guilty plea to the rape.[127] A 12 per cent discount was granted for Mr Crump's post-

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122 *R v Crump*, above n 107, at [12].

123 At [23].

124 At [23].

125 *McDonald v R* [2021] NZCA 531 at [37]; *SG v Milne* [2021] NZCA 134 at [62]; *Mines v R* [2022] NZCA 113 at [21]; *Harris v R* [2018] NZCA 632 at [43]; and *Lufe v R* [2018] NZCA 327.

126 *R v Crump*, above n 107, at [24]. For comparison, in *Rana v R* [2014] NZCA 468 and *Manawaiti v R* [2013] NZCA 88, discounts of seven per cent and eight per cent respectively were applied for offenders who had been convicted of sexual offences against family members and who had letters of support from family. The offenders in both those cases were also much older than Mr Crump (38 and 50 years old), making their time without any convictions more significant.

127 In *Laidler v R* [2020] NZCA 351 at [23]–[26], the Court of Appeal upheld the sentencing judge's decision not to give a discount for remorse when Mr Laidler pleaded not guilty to sexual violation offences, despite apologising to the victim the day after the sexual violation and writing a letter of apology immediately before sentencing. In *Williams v R* [2021] NZCA 535 at [115], a discount of 4.5 per cent was given for Mr Williams' expression of remorse for raping and assaulting his partner. Mr Williams had pleaded not guilty and the pre-sentence report recorded that although Mr Williams expressed some remorse, he also tried to minimise his behaviour and shift blame to his partner. In *Bullen v R* [2017] NZCA 615, the Court of Appeal noted that remorse accompanied by offers of reparation accepted as genuine by the Court tend to warrant a discount of around five to 10 per cent. The Court considered a discount in the middle of that range (seven per cent) was appropriate, keeping in mind that remorse was not expressed until close to sentencing and in the context of a not guilty plea.

traumatic stress disorder and depression, the causal nexus with the offending said to be that his mental health problems explained why he did not show "the sense to leave" the "toxic relationship".[128] In combination with the sentencing judge's observation that Mr Crump was "now in a positive and stable relationship",[129] this comment is concerning because it appears to attribute Mr Crump's violence towards Ms B to the relationship, rather than to Mr Crump himself. The end sentence was two years and nine months' imprisonment.

Mr Crump appealed against both conviction and sentence. The appeal against sentence was on the grounds that the starting point for rape that the sentencing judge used was too high.

The Court of Appeal agreed with the sentencing judge that a starting point below the bottom of band one was appropriate for Mr Crump's offending. The Court cited the example given in *AM* of a case that would fall below the bottom of band one, the English case of *Greaves*.[130] The Court of Appeal in *Crump* added further detail to the description of the facts in *Greaves* that appeared in *AM*:[131]

> … the 17-year-old complainant and 34-year-old appellant (who were not in a relationship) engaged in sexual activity short of intercourse, before the appellant began to penetrate the complainant. The complainant then said "No, Steve. This isn't what I want. Stop". The appellant continued to penetrate the complainant. It was accepted that the intercourse was initially consensual, but the appellant continued when aware the complainant had changed her mind.

In explaining why the Court considered Mr Crump's offending less serious than that in *Greaves,* the Court highlighted that Mr Crump stopped belatedly after he realised that Ms B had withdrawn her consent, as opposed to Mr Greaves continuing until ejaculation.[132] The Court's other comparisons with *Greaves* are less legitimate. The fact the Court pointed out that Mr Greaves and his victim were not in a relationship,[133] whereas the "intercourse" in *Crump* was "normal for this couple",[134] suggests, concerningly, that the Court might have considered the offending in *Crump* less serious because Mr Crump and Ms B were in a relationship and because the rape involved similar sexual activity to what they usually engaged in consensually. The Court of Appeal in *AM* explicitly stated a sense of entitlement arising from a current or previous intimate relationship between the victim and the

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128 *R v Crump*, above n 107, at [19].

129 At [20].

130 *R v AM*, above n 1, at [96]; and *R v Greaves*, above n 43.

131 *Crump v R*, above n 2, at [105].

132 At [103].

133 At [107].

134 At [103].

offender does not reduce culpability and that there is no separate regime for sexual violation of a partner or ex-partner.[135]

The Court also noted the absence of the age disparity seen in *Greaves*.[136] If an age disparity means the victim is more vulnerable, it is an aggravating factor. In highlighting the absence of an age disparity in *Crump*, the Court of Appeal overlooked the more significant vulnerability of a victim of intimate partner violence to offences against her in the home she shares with her partner. In *Solicitor-General v Hutchison* (a grievous bodily harm case), the Court of Appeal said that when the victim is the offender's partner, the "aggravating factor of vulnerability almost inevitably will be triggered. It would be a rare case of family violence where that was not so."[137] The Court of Appeal in *Crump* did not mention that the sentencing judge at first instance had treated this as an aggravating factor.[138] The offences for which Mr Crump was being sentenced paint a clear picture of Mr Crump as jealous, controlling, willing to risk causing very serious harm to his partner (pulling the handbrake while travelling on the motorway) in order to scare her or punish her, and entitled to the point where he considers he has the right to decide to end her life. The two physical assaults, in themselves, are not particularly serious but are markers of his disrespect for her autonomy – he punished her for speaking to another man and for one saying hello to her.

Unlike the sentencing judge, the Court of Appeal did not count harm to the victim as an aggravating factor, on the basis that it was difficult to separate the harm caused by the rape from the effects of the relationship itself and possibly of the relationship ending.[139] This is difficult to justify given that the rape occurred in the context of ongoing abuse committed by Mr Crump against his partner.

Having decided that there were no aggravating factors of the offending, the Court of Appeal then considered what starting point would be appropriate for the rape. Ordinarily this would be done by reference to *AM* and New Zealand cases decided since then. It is relatively unusual to have recourse to sentencing decisions in other jurisdictions because sentencing levels differ between them. On the basis that there were no comparable New Zealand decisions, the Court used *Greaves* and two Australian decisions to support the low starting point it selected.[140]

In *Greaves*, a sentence of three and a half years' imprisonment was reduced to 18 months by the English Court of Appeal. As the Court noted, however, this was the end sentence and not the starting

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135 *R v AM*, above n 1, at [61].

136 *Crump v R*, above n 2, at [103].

137 *Solicitor-General v Hutchison* [2018] NZCA 162, [2018] 3 NZLR 420 at [27].

138 *R v Crump*, above n 107, at [12].

139 *Crump v R*, above n 2, at [104].

140 At [108].

point. The Court speculated that the starting point adopted by the English Court of Appeal in *Greaves* was around 30 to 36 months' imprisonment.[141] The Court did not explain why it considered it appropriate to use an English sentencing decision from 1999 which it described as brief and which did not indicate starting points and subsequent discounts.[142]

The Court obtained further support for its very low starting point from two Australian decisions. In *R v Hennessy*, the 17-year-old offender digitally penetrated the complainant with her consent, she told him to stop when it became painful, and he raped her for several minutes.[143] He was sentenced to three years' imprisonment, to be suspended after nine months.[144] The Supreme Court of Queensland considered the sentence should be suspended after 11 weeks, which the Court in *Crump* noted was explicable because of the offender's young age.[145] The Court did not explain why this case was useful, given that, as in *Greaves*, no starting point was identified and nor were discounts for personal mitigating factors enumerated. New Zealand does not suspend sentences.

The Court of Appeal appears to have considered *McCartney v R* relevant because, although there was no consensual sexual activity, the rape was relatively brief and did not involve violence beyond that inherent in the offence.[146] The sentencing judge adopted a starting point of three years' imprisonment, reduced by six months for the guilty plea. This was upheld by the New South Wales Court of Appeal.[147] The Court did not explain why *McCartney* was of greater relevance than the examples in *AM* of cases falling into the lower end of band one (starting points of six or seven years), which were also relatively brief and involved little or no further violence.

Without further explanation, the Court of Appeal determined that a lower starting point than that adopted by the sentencing judge was appropriate:[148]

> Standing back, as we must do, our assessment remains that, with discounts for personal factors, including that Mr Crump was a first-time offender, a non-custodial sentence is demonstrably appropriate, and a sentence of inevitable imprisonment demonstrably manifestly excessive. The stigma of conviction for rape is in itself a profound penalty, which Mr Crump will have to bear for the whole of his life. The appropriate starting point for this offending was two years and three months' imprisonment, a sentence

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141 At [105].

142 At [105].

143 *R v Hennessy* [2002] QCA 523 as cited in *Crump v R*, above n 2, at [106], n 64.

144 *R v Hennessy*, above n 143.

145 *Crump v R*, above n 2, at [106].

146 *McCartney v R* [2009] NSWCCA 244 as cited in *Crump v R*, above n 2, at [107], n 65.

147 See *Crump v R*, above n 2, at [107].

148 At [109] (footnotes omitted).

> likely to qualify a genuinely remorseful offender for a non-custodial sentence. To that starting point the five-month uplift for other offending must apply, making a sentence before discount of two years and eight months. Discounts proportionate to those allowed below must apply, four months for good character, four months for remorse and the full six months for Mr Crump's psychological state.

The Court did not explain why it considered Mr Crump a "genuinely remorseful offender" even though he had appealed his conviction for rape. Nor did the Court explain why it increased the discount for Mr Crump's psychological state from 12 to 18 per cent. One possible explanation is that the Court worked backwards to identify figures that would allow Mr Crump to be released from prison immediately. At the time the judgment was released, Mr Crump had served nine months in prison.[149] With an 18 month end sentence, he would be entitled to be released on parole automatically after serving half of it.[150] That would also explain why the Court did not substitute a non-custodial sentence despite its comment that that would be "demonstrably appropriate".

In my view, a better comparator case would have been *R v Hill*, which the Court of Appeal said in *AM* would attract a starting point of six to seven years, based on the factors and bands it set out in that case.[151] Factors that made the offending in *Hill* more serious than Mr Crump's offending are that the victim had asked Mr Hill to leave her house before the rape and that there was some additional violence (pushing the victim into a cane basket, which caused minor scrapes and bruises on her thigh). The offending in *Hill* was less serious than Mr Crump's in that it was not part of a pattern of abuse of the victim by the offender and therefore (applying *Hutchinson*) the victim was less vulnerable. If my overall argument that consensual sexual activity before a sexual violation should not be treated as mitigating is accepted, I would suggest that a starting point of six years' imprisonment would be appropriate in both *Hill* and *Crump*. Applying the same uplifts for other offending and discounts for personal mitigation as the Court of Appeal did, Mr Crump's end sentence would then be four years, eight months' imprisonment.

It would have been open to the Court, applying the law as it currently is, to decline to treat the consensual sexual activity between Mr Crump and Ms B as mitigating, on the basis of the rationale given in *AM* for treating prior consensual sex as mitigating in some circumstances – that sexual violation that began with consensual sexual activity reflects an absence of premeditation and planning, and is thus less serious. The Court could have decided in *Crump* that a rape that demonstrates characteristic disregard for the wishes of the victim (a pattern established by the offences to which Mr Crump pleaded guilty) should not be treated as impulsive and unpremeditated, whether or not it began as consensual sex, and accordingly the prior consensual sex should not reduce the seriousness of the

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149 Mr Crump was sentenced on 10 October 2019. The appeal judgment was issued on 20 July 2020.

150 Parole Act 2002, s 86.

151 *R v Hill* CA94/02, 21 October 2002 as cited in *R v AM*, above n 1, at [93], n 76.

offending.[152] The sentence would be four years, eight months' imprisonment in those circumstances also.

Even if the Court had decided to treat the consensual sexual intercourse as mitigating regardless of the rationale for including prior consensual sex as a mitigating factor, the starting point should have been no less than five and a half years. That would have been appropriate to reflect the constellation of aggravating and mitigating factors (the relative brevity of the rape, the absence of violence other than that inherent in every rape, the vulnerability of the victim due to Mr Crump's ongoing abuse of her, and the fact the rape began as consensual sex) without giving undue weight to any of them. The end sentence would then be three years, four months' imprisonment.

These sentences, particularly when calculated without credit for prior consensual sex, may seem severe. The Court of Appeal in *Crump* noted anecdotal information from the lower courts that the high starting points for rape are inhibiting offenders from pleading guilty to offences they otherwise might acknowledge.[153] An updated guideline judgment should take any evidence to support that contention into consideration when reviewing appropriate sentencing levels. In the meantime, however, the Court of Appeal should apply *AM* and follow established sentencing methodology. Had it done so in *Crump*, the sentence imposed would have been commensurate with the seriousness of Mr Crump's offending and consistent with sentences imposed in other cases.

Instead, the Court of Appeal treated the consensual sexual activity preceding the rape as overwhelmingly important in determining Mr Crump's culpability. This case illustrates how retention of consensual sexual activity as a mitigating factor embeds the outdated idea of what constitutes a "real rape" to enable the imposition of a demonstrably inadequate sentence.

VI CONCLUSION

The argument I have made in this article is that consensual sexual activity between the victim and the offender before a sexual violation should not be treated as mitigating in its own right.

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152 This is part of a broader discussion about how the seriousness of a sexual violation offence should be assessed when the offence is committed as part of a pattern of abuse of the victim, and I do not attempt to offer a definitive answer here about how that should be taken into account at sentencing. For discussion of the problems with a conventional view of premeditation in the context of serious physical violence committed against an intimate partner as part of a pattern of abuse, see Frances Gourlay "*R v Taueki:* Judgment" in Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino, a Two-Stranded Rope* (Hart Publishing, Portland, 2017) 539 at 546.

153 *Crump v R*, above n 2, at [98]. Research investigating alternative processes for sexual offences also noted a consensus among those working in the sexual violence sector that high sentences discouraged reporting, prosecution and convictions in cases where there was an ongoing relationship of some sort between the victim and the offender: Elisabeth McDonald and Rachel Souness "From "real rape" to real justice in New Zealand Aotearoa: The reform project" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 31 at 51.

There has never been a good justification for treating it as mitigating. Every justification either undermines sexual autonomy (by suggesting that the offender is less culpable if he violates the victim because he is aroused and by shifting blame to the victim for arousing him) or is incorrect as a matter of sentencing methodology (because taking consensual sexual activity into account as mitigating in itself, rather than as evidence of the presence or absence of an aggravating or mitigating factor, can result in a starting point that is too low).

I have also argued that the guidance the Court of Appeal gave in *AM* for when consensual sexual activity should be treated as mitigating embeds an outdated idea of what constitutes a "real rape". People have the right to withdraw consent to sexual activity at any time. Failure to stop sexual activity when consent has been withdrawn is a "real rape" and should be sentenced as such.

When the Court of Appeal reviews sentencing guidance for sexual violation, it should remove consensual sexual activity as a mitigating factor.