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IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI-2018-096-004212
[2021] NZDC 7422

THE QUEEN

v

JESSIE AGTANG CAMPOS

Hearing:	23 April 2021
Appearances:	R De Silva for the Crown M Kilbride for the Defendant
Judgment:	23 April 2021

NOTES OF JUDGE S M HARROP ON SENTENCING

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[1] Mr Gardia, please explain to Mr Campos that I will deliver my sentencing remarks without interruption for you to interpret them. But what I am going to direct is that they are typed up and that you are then provided with a copy so that you can translate that into the Tagalog language for Mr Campos and, if it is necessary, I formally extend your appointment as interpreter to include that task. I am not clear when the written copy will be available, but it might be more than a week. So could you just explain that please to Mr Campos before I begin? Thank you.

[2] Mr Campos, you are here for sentence on one charge of sexual violation by rape of which the jury found you guilty after a trial which ended on 11 March. At that point, I convicted you and remanded you for sentencing today and delivered the necessary first three strikes warning. I decided it was in the interests of justice to grant you bail pending sentence, but I made it clear that that was no indication of the likely sentence which would almost inevitably be imprisonment. I also directed the preparation of a pre-sentence report which was to consider home detention as a possible sentence, but again I indicated that was a very unlikely outcome and I mentioned that there is a presumption in our law in favour of imprisonment for this type of offending. I have now received and considered a good deal of helpful information as well as the written submissions from Ms De Silva and Mr Kilbride. There is the pre-sentence report, there is the cultural report which has been prepared under s 27 of our Sentencing Act 2002, and I have also received the impressive reference from your employer's director, Bruce Barnett.

[3] As a matter of fairness to you, I will tell you at the outset that I will be imposing a sentence of imprisonment today. My primary task today is to determine the appropriate length of the prison sentence and to articulate my reasons. So, Mr Gardia, if you please explain to Mr Campos that I will be imposing a sentence of imprisonment today and that my task is to determine the appropriate length of it. I think Mr Campos should know that right at the start.

[4] In order to determine the appropriate sentence of imprisonment, I first need to determine what is called a starting point. That is the appropriate sentence of imprisonment, having regard to the seriousness of the offending, including its aggravating features and any mitigating features. They include of course the effects on [the victim of your offending], and I have to have regard to the maximum penalty of 20 years' imprisonment prescribed by Parliament and the sentencing guidance provided by our Court of Appeal.

[5] Because you did not plead guilty, the facts on which the sentencing is to be based need to be determined by me, and those are the facts which I consider must have been accepted by the jury in reaching its verdict. Because you gave evidence at trial denying the offence, in order to have found you guilty the jury must have rejected what

you said and been satisfied beyond reasonable doubt that they could and should accept what [the victim] said about what happened.

[6] After I have determined the starting point, I then need to consider what factors relating to you personally mitigate, that is reduce, the starting point, and I will then end up with an end sentence which must be finalised, having regard to the purposes and principles of our Sentencing Act, and among those is the important requirement that I impose the least restrictive sentence I reasonably can in the circumstances.

[7] Well, I begin with assessing the starting point by reference to the facts of the case. They are obviously the foundation for assessing the gravity of the offending. [The victim] was a prostitute or sex worker at a brothel in [location deleted]. You engaged her services on the evening of [date deleted] December 2018 after preselecting her from the brothel's website. She told you at the outset of the one-hour session for which you paid and before any sexual contact occurred that you must wear a condom during any sexual contact. You questioned this, but she clearly told you that it was needed, it was the law.

[8] I pause here to mention that she was right. Section 9 of the Prostitution Reform Act 2003 provides that a person must not provide or receive commercial sexual services unless he or she has taken all reasonable steps to ensure protection, I will just summarise it in that way. In addition, that section provides that if any person, so that is either the sex worker or the client, fails to do that, they commit an offence and they are liable on conviction to a fine up to $2,000.

[9] So both you and she were required by law to ensure that a condom was used, and accordingly, in committing this rape, you also committed an offence against that provision, although of course you were not charged with that.

[10] Returning to the facts, when you gave evidence at the trial, you accepted that you had wanted from the outset to have sex without a condom, but you said you had accepted [the victim]'s requirement at least initially and you then had sexual intercourse using a condom. Once that had finished, you spent some time talking together on the bed and then a second episode of sexual intercourse occurred. She

says that you requested this to be in the doggy style position, which, having regard to your earlier discussion, she immediately saw as risky in the sense that you might take the opportunity to remove the condom without her seeing, but she agreed to do it because she realised she would be able to see what you were doing by means of a mirror at the side of the bedroom. During that episode of intercourse, she saw you remove the condom partway through. She reacted immediately by flipping over onto her back and closing her legs shut so that you could not enter her without the condom on. You claim the condom had fallen off, but she told you off and she emphasised that you had acted inappropriately by waggling her index finger at you as she demonstrated when she gave evidence. She looked you in the eye and told you sternly that you had to wear a condom.

[11] She then placed another condom on you and you recommenced sex in that doggy style position, but shortly afterwards you removed the condom again. You quickly grabbed her hips and, before you she could react as she had on the first occasion, you penetrated her, entered her vagina with your penis, without the condom on, and shortly after that you ejaculated inside her. [The victim] threw a cushion at you, told you to get out, and immediately left the room and went straight to the manager's office to complain about what you had done. She was very upset and the police were called immediately.

[12] The jury clearly rejected your account, which was that towards the end of the second incident of intercourse you were both in a state of arousal and that you had expressly asked her if you could take the condom off and that she had said yes. So I proceed to sentence you on the basis of the facts contained within [the victim]'s evidence and reject your evidence, as the jury did, where it differed from hers.

[13] I accept there are aggravating features of this offending. Every rape is serious and there are inherent features of that offence which make it serious, but in this particular case there are, in my view, three indeed, arguably four, aggravating features which I need to take into account. First, I accept the Crown submission that there was an element of planning and premeditation on your part. I accept that this was not necessarily for a lengthy period but was only shortly before the rape itself. You confirmed in evidence that although you questioned the need for a condom you did

understand the requirement for one and that is why you had used one on the first occasion or agreed to. But despite that, you requested that doggy style position on the second occasion and I am satisfied that that was done with a view to achieving your acknowledged aim of having intercourse without a condom. That is clear from your initially unsuccessful effort to do that and from your ultimately successful effort to do that.

[14] The second aggravating feature is the creation of the risks of unprotected sex, namely pregnancy and the transmission of a sexually transmitted disease. There is no evidence to suggest that either of those things eventuated, but mentally, from [the victim]'s point of view, the risk of those must have been of great concern to her. Furthermore, you put her employment and income as a sex worker at risk. Clearly, she would not have been able to work for quite some time had she fallen pregnant or contracted such a disease.

[15] The third feature is the significant level of mental harm that you caused to [the victim]. You have heard her explain articulately and in some detail today through her reading of the victim impact statement the psychological, the mental effects that this has all had on her. I will not repeat them, but I note that the effects have been pervasive in the sense that they have affected all aspects of her life, her self-esteem, and, importantly, they are ongoing. About two and a half years after the offending, she is still suffering and she does not know when or if she will entirely get over this. What she does say is that she will never get back the time and get over the stress that she has endured already. I do not accept Mr Kilbride's submission that those kind of consequences are merely inherent in the offending. I accept that there are mental consequences for every rape victim, but I consider that those that have been described by [the victim] are beyond the usual and aggravating.

[16] I make the point that there was nothing unlawful at all about your engaging a prostitute or about having sex using a condom, but the harm you caused was through not using a condom and ejaculating inside her, knowing very well that you had to use one. Accordingly, the background circumstances in which this occurred are irrelevant. They do not diminish the effects on the victim. A sex worker who is raped is no less a victim than any other woman, and that is emphasised by her victim impact statement.

There would have been no consequences for her mentally had the session been completed with the use of a condom throughout, but her statement shows there have been significant consequences from your deliberately having sex without a condom on a basis that she did not consent to and that you knew she did not consent to.

[17] Finally, it is strictly a further aggravating feature that you breached the Prostitution Reform Act, but I do not propose to increase the sentence on account of that.

[18] As for the mitigating factors of the offending, there are none. I do accept that there is an absence of aggravating features which will may well be present in rape cases, and in particular there was no violence beyond that which is inherent in the rape itself. I emphasise that it is not a mitigating factor of the offending that you had had consensual intercourse with [the victim] initially or that this occurred in a commercial setting. The consensual aspect of your encounter was very different because a condom was used. You had not had prior consensual sexual intercourse with [the victim] without a condom. She gave no consent at any stage to having intercourse with you without a condom and she repeatedly conveyed that message to you during your session.

[19] In terms of setting the starting point, there is a guideline Court of Appeal sentencing judgment from 2010 called *R v AM* and, without going through that in any detail, I have no hesitation in accepting that this case falls within what is called "Band 1", which means there is a starting point of somewhere between six and eight years' imprisonment.[1] The Court in that case did refer to the possibility of a case being assessed as being below Band 1, and indeed that possibility has been discussed further last year in a case called *Crump v R*, but that was not the sort of case that the Court is considering here.[2]

[20] The Crown submits the starting point should be no less than seven years' imprisonment. Ms De Silva's submissions refer to some other cases. I do not propose to discuss them. Inevitably, there are factual differences and it is always possible to

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1 *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750.
2 *Crump v R* [2020] NZCA 287.

distinguish them, as Mr Kilbride points out. Mr Kilbride has not proposed an alternative starting point, but he does refer to the absence of aggravating factors, although I have in effect rejected that submission.

[21] While the Court of Appeal judgment was, as the Court said, not intended to create any sort of straightjacket for sentencing judges, it is important guidance and I think there can be no serious argument about a starting point of between six and seven years, having regard to the Court of Appeal's comments about the other cases they discuss, and taking into account the facts of this case and the aggravating features I have found to be present.

[22] I am required to settle on the least restrictive starting point. I identify that as **six and a half years' imprisonment or 78 months.**

[23] Now to the mitigating factors. Many defendants who are for sentence of course have pleaded guilty, and in a case such as the present, had you pleaded guilty, you would have received a significant discount of 20 to 25 per cent, even if that had happened quite close to the trial, and that is because it would have avoided [the victim] giving evidence and going through the trauma of that and reliving the trauma of the incident. Of course, you were absolutely entitled not to plead guilty and you may never be penalised for not pleading guilty, but you do miss out on obtaining a potentially substantial credit for doing so.

[24] Also, rather than putting the Crown to proof by way of your defence, you elected to give evidence and denied the rape and explained that it was consensual. Again, you were absolutely entitled to do that and to maintain your position now, as you do, that you were wrongly convicted. But of course, I have to proceed on the basis of the jury's verdict.

[25] In terms of particular aspects which justify a discount on sentence, I first mention your previous good character. Mr Kilbride has rightly emphasised this. You are 48 and you have no previous convictions at all. You are a carpenter and you came to New Zealand as an itinerant worker in 2016 from the Philippines where you grew up. Before that, you also worked in carpentry jobs in Algeria, Libya, and Zambia.

You have done all that overseas work over many years in order to support and care for your family back in the Philippines by sending them money home. Without that support, I understand from the cultural report they would very likely be homeless and without the ability to feed themselves and to obtain employment. You have an elderly mother who is quite ill and a total of six children, three from each of your two marriages. Latterly, you have been sending about $300 a week to your second wife for her support and for the support of your three younger children, and a further $100 a week to your mother. You have been living in fairly Spartan circumstances here in a modest hostel situation with a group of other migrant workers while doing the best you can for your distant family. The fact you have done that and done it for so long speaks very well of your character.

[26] Aside from this incident, of course, your good character is emphasised further by the impressive reference that you have received from Mr Barnett, your employer. He says that the company has employed you for over four years, during which time you have proven yourself to be a hardworking and dedicated worker doing your best, doing the job to the best of your knowledge and ability. He says he has developed an enduring respect for your work ethic and trade skills, both of which are commendable. He says you are responsible, co-operative, and an attentive team player. He vouches for your good character and describes you as one of the most reliable and consistent employees at the company.

[27] So on that basis I have no hesitation in saying that this offending is very much out of character for you and it is properly seen as a brief and one-off error of judgment, serious though it is, which is unlikely to be repeated. You did a bad thing but you are not a bad person. For these reasons, I am prepared to apply a discount of **15 per cent** for your previous good character.

[28] Mr Kilbride submitted there should be a discount for remorse and willingness to entertain a restorative justice. He says that you are genuinely sorry for your actions. However, I have to say that is difficult to accept because you gave evidence on oath denying rape and claiming this was all consensual and you continue to maintain that. So although you were apparently willing to engage in restorative justice, I do not

consider I can give you credit for that when you denied that you have committed any offence.

[29] The cultural report which has been prepared I found very valuable by way of background, but I accept Ms De Silva's submission that I cannot see any basis in it for reducing the sentence for cultural reasons. As far as I know, rape is also an offence in the Philippines and raping a sex worker is just as much an offence there as it would be here. I certainly do not have any clear evidence to the contrary, and while I can accept prostitution may exist and perhaps be more prevalent in the Philippines than it is here, it is present here, it is legal here. So even if there may be, and it is a question of some uncertainty, a different use, a different attitude to the use of prostitutes in the Philippines, you must have understood from your interaction with [the victim] what the rules are here. So I am not prepared to give a discount for cultural reasons.

[30] The next topic though is your personal circumstances and, although it is not my decision, I understand that you will almost certainly be deported back to the Philippines following completion of your sentence. Now, that consequence of sentencing or of your work visa expiring is not something that I can directly take into account in assessing the appropriate sentence. My job is to put that to one side and impose the appropriate sentence regardless of whether you will be in the country after it is finished.

[31] But I do have to take into account your personal circumstances, and I think it would be artificial to ignore the fact, the reality, that you will be deported after serving your sentence, and I say that because I accept that the deportation and the consequences associated with it will be significant, not just for you, but indirectly and certainly still very significantly for the family members that you support. I acknowledge that because of the absence of any social security in the Philippines your mother, your wife, and your children entirely depend on the money that you send them to live, indeed to survive. I have no doubt that you are and will continue to be devastated by the knowledge that despite all the work you have done for them for so long to support them you are no longer able to do so because your own choice of conduct in a very brief period on [date deleted] December 2018.

[32] It also seems to me that once you are back in the Philippines it is unlikely, because of this rape conviction, that you will be able to work in another country as you have in the past so as to send money back to them. I consider the mental effects on you of that knowledge which you will have to live with for many years as well as the fact and shame of deportation are a form of penalty or adverse consequence that you will suffer in addition to the court sentence, and I consider that a further **10 per cent** discount for those matters is warranted.

[33] Then there is the question of bail. For about two and a half years, you have been on bail with an 11 pm to 6 am daily curfew and with the obligation to present at the door if the police call to check that you are there. I understand there have been no breaches of bail whatsoever over that lengthy period, which is, I might add, consistent with the information I have about your general good character, as Mr Bennett has explained.

[34] Now, while under our law I am required to take into account time spent on electronically monitored bail and there is no requirement that I take into account time on least restrictive bail conditions, I nevertheless consider it is fair to do so, especially having regard to the length of time that you have been on bail. In effect, for about 30 months you have endured a form of pre-sentence detention, a restriction on your liberty, albeit at times when you would probably be sleeping anyway, but still liable to be woken up by the police. I apply a further **7.5 per cent** discount for that reason.

[35] The final mitigating factor which I identify is that the Court of Appeal has recognised most recently in a case called *De Macedo*[3] in April last year that it is appropriate to discount on sentence for offenders who will find serving a prison sentence in New Zealand substantially more difficult than those prisoners who are local or who have the ability to communicate in English and who have some measure of support from friends and family in this country. You have some English, of course, which has allowed you to get by on a daily basis, but clearly it is limited and you needed an interpreter during the trial and again today, and you have no family support in this country. So I accept that for you the feeling of isolation and the difficulties of

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3 *De Macedo v R* [2020] NZCA 132

being in prison will be considerably greater than for someone who speaks English well, and that needs to be recognised. Also, you are not someone who is familiar with spending time in prison. You have no previous convictions and, as I have said, you are clearly of good character aside from this incident. So I accept that adds to the point that it will be difficult for you to serve the sentence of imprisonment. In the *De Macedo* case, the Court of Appeal applied an eight per cent discount. I am prepared in this case to apply a **10 per cent** discount to recognise this factor.

[36] The discounts that I have applied total **42.5 per cent**. That requires me to take about 33 months off the 78 months that I had reached, bringing it down to 45 months or three years and nine months' imprisonment.

[37] Standing back and reflecting on all of the competing purposes and principles of our Sentencing Act, I am satisfied that that sentence represents a fair balance between the gravity of the offending, especially taking into account the effects that it had on [the victim], and on the other side the various personal mitigating factors that I have discussed. I consider it is the least restrictive sentence and the shortest prison sentence I can reasonably impose.

[38] So I confirm you are sentenced to **three years and nine months' imprisonment** on the charge of sexual violation by rape.

[39] Finally, I would like to thank you Mr Gardia for your work during the trial as interpreter and today and in due course when you will be translating these remarks.

Judge S M Harrop
District Court Judge

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