EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2019-009-008807
[2022] NZDC 17588

THE QUEEN

v

DAMIN PETER COOK

Hearing:	8 September 2022
Appearances:	S Mallett for the Crown D Goldwater for the Defendant
Judgment:	8 September 2022

NOTES OF JUDGE A D GARLAND ON SENTENCING

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[1] Damin Cook on 14 July this year a jury found you guilty on two charges. One of sexual violation by unlawful sexual connection and a second charge of sexual violation by rape.

[2] The facts relating to your offending are these. At the time of this offending you lived at an address in Dalkeith Street in Christchurch. Your female flat-mate at the time was best friends with the victim [name deleted — "the victim"]. She lived at a separate address but had met you on occasions prior to the event on the evening of the incident.

[3] On 27 September 2019 your flat-mate had birthday drinks at your home. Both the victim and you were present, along with other party goers and everyone was consuming alcohol. By the early hours of the morning 28 September the victim had become quite intoxicated and had passed out. Being closest to your bedroom when she passed out, you along with others carried her into that bedroom and placed her on the bed in order for her to sleep.

[4] Later that morning you went to bed in the same room, on the same bed. At approximately 7 am the next morning the victim woke up to find you inserting your fingers into her genitalia. Then she felt a thrusting movement and could feel your penis inside her genitalia. She was scared and she pretended to remain asleep. Once you stopped she lay still for a short period of time before getting out of bed and leaving the bedroom. She woke her friend in another bedroom and disclosed what had happened. Arrangements were then made to get her home and the police were contacted.

[5] When you were first spoken to by the police you denied having sex with her. You then cooperated with the police and you provided a sample for a DNA comparison. Upon examination ESR scientists found your DNA on semen stain swabs taken from the complainant's genitalia. You then said that she must have raped you.

[6] At trial you advanced a defence of sexsomnia, a species of insane automatism. It was the defence case that you were asleep unconscious at the time that the sexual acts were performed. The jury clearly rejected that defence.

[7] I must now sentence you on the basis that you introduced your fingers and your penis into the complainant's genitalia intentionally without the complainant's consent and without any belief on reasonable grounds on your part that she consented.

[8] The probation report indicates you are now 44 years of age. It is noted you have a criminal history dating back to 1997 predominantly made up of driving and violent offending. There was noted to be a significant gap in your offending with the last offence being in 2011 for a breach of community work.

[9] When speaking to the probation officer you did not agree with the summary of facts. You said you were unable to recall what happened when you went to bed after a night drinking with your friends which included the victim. You said you fell asleep, and you had no recollection of any sexual connection with the victim. So clearly you maintained the explanation that you gave at trial when speaking to the probation officer.

[10] The offending related factors were identified as alcohol and sexual arousal. Given the gravity of your offending the probation officer acknowledges that imprisonment is the only realistic sentencing option available.

[11] We have heard the victim impact statement being read in court allowed today and so I will not repeat comments that the victim has made except to say that it is clearly manifest from that victim impact statement that your offending has caused her considerable emotional harm.

[12] In sentencing you Mr Cook I need to bear in mind the purposes of sentencing you. First of all I have to hold you accountable for the harm that you have caused. I need to promote in you a sense of responsibility and acknowledgement for that harm. I need to take into account the requirement or need to denounce conduct of this kind. I need to impose a sentence which is not just a personal deterrence, but which acts also as a general deterrence.

[13] The principles of sentencing that I must take into account are first of all, the gravity of your offending and your level of culpability or blameworthiness. I need to bear in mind the seriousness of these offences by comparison with other offences. I need to impose a sentence which is generally consistent with sentences imposed on other offenders for like offending. I also need to bear in mind that I should impose the least restrictive outcome appropriate in all the circumstances.

[14] Both counsel have filed written submissions that I have taken care to read. Further oral submissions have been made in court today. The Crown submits the starting point of eight years' imprisonment is appropriate. They do not seek any uplift

for your past history. The Crown submits that there are no personal mitigating factors that would warrant any reduction in sentence.

[15] On your behalf Mr McKenzie submits that your offending falls within band 1 of the case of *AM* and towards the bottom end of that range.[1] He submits a starting point of between six and six and a half years' imprisonment would be appropriate. As to the aggravating factors relied upon by the Crown he says it is disputed that the victim was vulnerable. He submits that the premeditation factor is that simply inherent in the offence itself, that is you must have woken up and decided to act as you did. In relation to the harm to the victim he submits that is present to a limited degree. He says that harm to the victim is inherent in this type of offending always.

[16] Mr McKenzie submitted that any lift is mitigated by two mitigating factors present, namely your remorse and delay. In the end he says it is an evaluation of all of the circumstances that is required by the Court in reaching a final sentence.

[17] Each of these charges is very serious. Each one carries a maximum penalty of 20 years' imprisonment. The appropriate approach to sentencing is to assess your overall culpability and then impose concurrent sentences that reflects that.

[18] The guideline judgment that both counsel have referred to is *R v AM*. In that case the Court of Appeal set out four bands of sexual violation offending where the lead offence is rape, penial penetration of the mouth or anus, or violation involving objects. The two bands which are relevant in this case are rape band 1 which has a starting point between six and eight year's imprisonment and rape band 2 which has a starting point between seven and 13 years' imprisonment.

[19] For guidance the *R v AM* said band 1 is appropriate where the aggravating features are either not present or present to a limited degree. In relation to band 2 the Court of Appeal said:

> By comparison with rape band 1 this band is appropriate for a scale of offending and levels of violence and premeditation which are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is

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

> appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.

[20] In your case, in my view, the following aggravating features are present. First of all I consider the victim here was most certainly vulnerable. She was so intoxicated that she has passed out and she had to be carried into the bedroom and placed on the bed. She later woke up from her unconscious state to find that you were penetrating her with your fingers. She had absolutely no opportunity to resist or consent.

[21] In the case of *Tahiri v R* the Court of Appeal confirmed that self-induced intoxication is a type of vulnerability envisaged by the Sentencing Act 2002 and where a victim is severely intoxicated the offending will usually be placed within band 2 of *R v AM*.[2] In my view this factor was present to a high degree.

[22] The second factor is premeditation. Mr McKenzie on your behalf argues, and the Crown acknowledges, that there was no premeditation involved when the victim was placed in your bedroom, on your bed. I agree. However, there was some premeditation later, clearly when you woke up and then you decided to insert your finger or fingers into her genitalia to see if she was awake before then penetrating her with your penis. I agree that this factor is only present to a low degree.

[23] Thirdly, as well as the sexual violation by rape there was also the associated digital sexual violation of the victim's genitalia. This factor is clearly present to a moderate degree.

[24] Fourthly, I take into account the harm that you have caused to the victim, as is clearly set out in her victim impact statement. In my view this factor is present to a high degree.

[25] Taking into account those factors, in my view, this case falls towards the lower end of band 2. In that regard it would have a starting point in the region between seven and 13 years' imprisonment.

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[2] *Tahiri v R* [2013] NZCA 73; BC210362721

[26] Having then considered the prior consistent sentencing cases that have been referred to by counsel, in my view, the appropriate starting point for your offending overall is at least eight years' imprisonment.

[27] I turn then to aggravating and mitigating factors personal to you. While you do have a prior criminal history and that does include several convictions for violent offending I note that the most recent of those was in 2001. You have no prior history of sexual offending. In my view, no uplift is justified.

[28] In mitigation unfortunately Mr Cook I am not able to substantially reduce your sentence on account of any genuine contrition or remorse, or early acknowledgement of responsibility because none of those factors are present.

[29] You continued to deny your guilt which you are entitled to do. Your expressed remorse is however, still based on your assertion, which you maintain, that you were unconscious at the time of the sexual acts. As I said earlier the jury rejected that claim.

[30] Mr Cook today on the charge of sexual violation by rape I sentence you to eight years' imprisonment. On the charge of sexual violation by unlawful sexual connection I sentence you to three years' imprisonment. Those terms are to be served concurrently which means the total overall sentence is eight years' imprisonment.

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Judge A D Garland
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 11/10/2022