NOTE: PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF COMPLAINANT (EXCLUDING OCCUPATION) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA122/2022
[2022] NZCA 311

BETWEEN	JESSIE CAMPOS Appellant
AND	THE QUEEN Respondent

Hearing:	4 May 2022
Court:	French, Venning and Moore JJ
Counsel:	PVC Paino for Appellant S C Carter and R H De Silva for Respondent
Judgment:	13 July 2022 at 10.30 am

JUDGMENT OF THE COURT

A Leave to appeal out of time is granted.

B The appeal against sentence is dismissed.

C We make an order permitting the publication of the complainant's occupation as a sex worker pursuant to s 203(3)(b) of the Criminal Procedure Act 2011. Automatic suppression of the complainant's name, address and other identifying particulars remains in force.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] This appeal concerns the first "stealthing" case in New Zealand under the guideline judgment *R v AM (CA27/2009)*.[1] "Stealthing" is a term used to describe the act of removing a condom during sexual intercourse where the consent to sexual intercourse by one partner is conditional on the other partner wearing a condom throughout.

[2] The appellant, Jessie Campos, removed his condom while having what, until that point, had been consensual sex with a sex worker at a brothel. He was found guilty of one charge of rape following a jury trial in the District Court at Wellington.[2] On 23 April 2021, Judge Harrop sentenced him to three years and nine months' imprisonment.[3]

[3] Mr Campos now appeals against his sentence.[4]

Leave to appeal

[4] Mr Campos' notice of appeal was filed some nine months out of time. Leave to appeal is required. Mr Campos attributes his delay to his unfamiliarity with the New Zealand legal system and need to contact the Philippine Embassy to seek advice on his position. The Embassy then approached counsel to act for him and there was some difficulty obtaining the file.

[5] The Crown accepts that a grant of leave is likely, but opposes the appeal on its merits.

[6] We are satisfied that in the circumstances leave to appeal out of time should be granted.

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1 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
2 Crimes Act 1961, ss 128(1)(a) and 128B. Maximum penalty of 20 years' imprisonment.
3 *R v Campos* [2021] NZDC 7422.
4 Criminal Procedure Act 2011, s 244(1).

The offending

[7] On 8 December 2018, Mr Campos went to a brothel. He paid for a one-hour session with the victim. She told Mr Campos that he must wear a condom throughout any sexual contact. Mr Campos said he did not want to wear a condom. The victim told him that he was required by law to do so.

[8] Mr Campos and the victim then had consensual sex culminating in him ejaculating into the condom. The pair then lay on the bed and talked for a period before engaging in a second bout of sexual intercourse.

[9] This time Mr Campos asked that he be positioned behind the victim. She suspected that this request was to prevent her from monitoring his compliance with her demand that he wear a condom at all times. However, the victim could still see what Mr Campos was doing in a mirror.

[10] During this second session the victim's suspicions were confirmed. Mr Campos did attempt to remove the condom. The victim responded by flipping onto her back and closing her legs. She remonstrated with Mr Campos by gesturing at him with her index finger. She told him that he was required to wear a condom. The victim placed another condom on Mr Campos and the pair continued having sex.

[11] However, despite the victim's warnings Mr Campos removed the condom for a second time. He grabbed her hips and ejaculated inside her before she had any opportunity to take evasive action.

[12] The victim was understandably distressed. She threw a cushion at Mr Campos and told him to get out. She then went to her manager's office and the incident was reported to the police.

District Court sentencing

[13] Judge Harrop considered there were four aggravating features of Mr Campos' offending:

(a) the planning and premeditation involved in positioning himself behind the victim so that he could sneakily remove the condom;[5]

(b) the creation of the risk of harm consequential upon having unprotected sex, including pregnancy, sexually transmitted infection, and loss of employment (given the victim's job);[6] and

(c) the mental harm caused to the victim.[7]

[14] The Judge found that although some of the aggravating factors typically encountered in rape cases were not present, there were also no mitigating factors. In particular, he noted it was not a mitigating factor that Mr Campos had been engaged in consensual sex immediately prior to the rape. The consensual sexual conduct was conditional on the use of a condom. The victim had repeatedly conveyed to Mr Campos that he was required to use one.[8]

[15] Judge Harrop considered that Mr Campos' offending fell within band one of *R v AM*.[9] He adopted a starting point of six years and six months' imprisonment.[10]

[16] The Judge then applied discounts of 15 per cent for previous good character;[11] 10 per cent for personal circumstances including the loss of opportunity to continue working in New Zealand and sending money to family in the Philippines;[12] 7.5 per cent for time spent on bail on restrictive conditions;[13] and 10 per cent to recognise the disproportionate effect that imprisonment has on foreign nationals.[14] The Judge refused to apply a discount for cultural reasons, noting that even if there were a different societal attitude to sex work in the Philippines, rape is "just as much an offence".[15]

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5 At [13].
6 At [14].
7 At [14]–[16].
8 At [18].
9 At [19]. See also *R v AM*, above n 1.
10 At [22].
11 At [25]–[27].
12 At [31]–[32].
13 At [33]–[34].
14 At [35]–[36].
15 At [29].

[17] Applying those discounts totalling 42.5 per cent to the starting point led to an end sentence of three years and nine months' imprisonment.[16]

Approach on appeal

[18] This Court must allow the appeal if it is satisfied that for any reason there was an error in the sentence imposed on conviction and a different sentence should be imposed.[17] The focus is on the sentence imposed, rather than the process by which it is reached.[18] The Court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles.[19] To this end the concept of a "manifestly excessive" sentence is well-engrained and there is no reason not to apply it.[20]

Issues on appeal

[19] The issues raised by Mr Campos' appeal are:

(a) whether the Judge erred by adopting a starting point that was too high; and

(b) whether the Judge gave an insufficient discount for personal circumstances.

Did the Judge err by adopting a starting point that was too high?

[20] Mr Paino, for Mr Campos, submitted that the Judge adopted a starting point which was too high. He submitted that Mr Campos' offending properly falls below band one of *R v AM*. That is because the mere fact of Mr Campos positioning himself behind the victim does not inform an assessment of premeditation; none of the risks of unprotected sex (namely pregnancy or disease) eventuated; the mental harm to the victim was not beyond the typical effects of such offending; Mr Campos was previously having consensual sex with the victim but impulsively went beyond the

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16 At [36]–[38].
17 Criminal Procedure Act 2011, s 250(2).
18 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
19 At [36].
20 At [35].

bounds of that consent; and although Mr Campos' belief in consent was not reasonable, it was genuine. Mr Paino submitted that a starting point between three and four years' imprisonment was appropriate.

[21] Ms Carter, for the Crown, submitted that the Judge was correct to adopt a starting point in band one of *R v AM*. She argued that Mr Campos' offending was premeditated because he wanted to have sex without a condom from the outset and attempted to do so multiple times. Ms Carter also contended that the Judge properly took into account the risks associated with unprotected sex and the mental harm to the victim. She further submitted that the prior consensual sex was irrelevant given the clear boundaries of consent set by the victim, which Mr Campos knowingly breached.

[22] The guideline judgment for offending where the lead charge is sexual violation by rape is *R v AM*.[21] In that case, this Court set out four bands of starting points for cases where the lead offence involves sexual violation. Of relevance is band one. Band one is appropriate for offending at the lower end of the spectrum, where the aggravating culpability factors are either not present or present to a limited extent.[22] Those factors include planning and premeditation,[23] and harm to the victim.[24] Offending within band one calls for a starting point between six and eight years' imprisonment.

[23] This Court acknowledged, however, that in some circumstances offending might justify a starting point below band one:

> [96] We have said that cases may fall outside the bottom of the band because of their unusual fact pattern and an illustration of a case in that category is:
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> - *R v Greaves*: 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.
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> (Footnote omitted.)

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21 *R v AM*, above n 1.
22 At [93].
23 At [37].
24 At [44].

[24] Mr Paino relies on *Crump v R* in submitting that it is open to the Court to impose a starting point below band one.[25] There the victim and the offender were in a "toxic" relationship.[26] The victim initiated sex with the offender by kissing him, caressing his body and penis with her hands, performing oral sex on him, and finally progressing to sexual intercourse.[27] She subsequently withdrew her consent part-way through intercourse, repeatedly telling her partner "no" and that she wanted to stop.[28] The intercourse ended shortly after.[29] This Court commented that:

> [103] The critical question for this Court then is the appropriate starting point for the rape conviction that we have upheld. Approaching sentence on the same narrative basis as the Judge, it must be the case that the offending falls below *AM*'s band one. It involved a brief period between Mr Crump realising that Ms B had (or might have) changed her mind and ceasing penetration. 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). It occurred in the course of what had started as consensual intercourse. The intercourse was normal for this couple. There was no material age disparity (they were both relatively young at, by this time, 24 and 21 respectively).

[25] The Court concluded that the appropriate starting point for Mr Crump's offending was two years and three months' imprisonment.[30]

[26] In our view the present case is distinguishable from *Crump* on its facts. *Crump* was a case of withdrawn consent. There the victim had consented to sexual intercourse in a particular set of circumstances. Sexual intercourse then took place. Some time later, the victim withdrew consent, but the offender continued doing the particular act to which the victim previously consented. That act, which was formerly consensual, subsequently constituted rape.

[27] Here, there was never any consent to the particular act which constituted rape. The victim consented to protected sex. She never consented to unprotected sex. She told Mr Campos that he must wear a condom and he was aware that her consent was

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25 *Crump v R* [2020] NZCA 287, [2022] 2 NZLR 454.
26 At [4].
27 At [12]–[18].
28 At [14].
29 At [16(b)] and [18].
30 Although there were three separate opinions and partial dissents, all members of the Court were unanimous on the sentence appeal: at [56] per Mallon J, [75] per Venning J and [76] and [109] per Kós P.

conditional on that basis. Him removing the condom and penetrating the victim is a positive and different act by the offender, which sets it aside from a withdrawn consent case where the offender's act is the same but the state of affairs is changed by the victim's withdrawal of consent. Against such a background, Mr Campos' actions in taking the condom off and continuing sexual intercourse to ejaculation was a deliberate, even cynical, breach of the parties' understanding of the basis on which consent was given. Mr Campos knew his conduct fell beyond the boundaries of the victim's consent.

[28] There remains a significant disparity in starting point between *Crump* (at two years and three months' imprisonment) and the bottom of band one of *R v AM* (at six years' imprisonment). The question is whether the offending nevertheless falls below band one.

[29] In our view the Judge was correct to find there was some degree of premeditation involved in Mr Campos' offending, albeit brief. It is apparent Mr Campos wished to have unprotected sex from the outset. Twice he attempted to remove the condom during intercourse. He was successful the second time. Both attempts were after he requested the victim to position herself in such a way that he could achieve his purpose without her detection. The trial Judge was entitled to draw the inference that Mr Campos' offending was premeditated from that evidence.

[30] We also consider the Judge was correct to take into account as aggravating factors the mental harm to the victim as well as her exposing to the risks associated with unprotected sex. In *R v AM*, this Court noted that:[31]

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

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31 *R v AM*, above n 1.

[31] There is no requirement that the risks associated with unprotected sex eventuate.

[32] We reject Mr Paino's submission that the mental consequences of the rape on the victim were those ordinarily associated with this type of offending. In her victim impact statement she describes the severe psychological impact of Mr Campos' offending. In our view the Judge properly took this into account as an aggravating factor.

[33] We accept Ms Carter's submission that this incident has no nexus with Mr Campos' prior sexual encounter with another sex worker at the same brothel, which he told us involved unprotected sex. That a previous sex worker may have consented to unprotected sex does not mitigate Mr Campos' culpability on the present facts, particularly because, as we have found, it was made abundantly clear to him what the terms of consent were.

[34] We are of the view that Mr Campos' offending involves the listed aggravating factors "to a limited extent". It thus sits at the bottom of band one of *R v AM*. The starting point adopted by the Judge of six years and six months' imprisonment was within the available range (albeit towards the upper end of that range).

Did the Judge err by giving an insufficient discount for personal circumstances?

[35] We next turn to consider whether the Judge made insufficient allowance for Mr Campos' personal circumstances.

[36] Mr Paino submitted that Mr Campos was forced to live overseas away from his family in order to increase his earnings potential. By doing so he could earn a sufficient income to support his family by remitting a portion to them. Mr Paino submitted that social isolation, and particularly sexual isolation, was a driver of Mr Campos' offending. He submitted a further discount was justified to recognise these factors.

[37] Ms Carter submitted that there is no causal link between Mr Campos' background and his offending. That sex work may be viewed differently

in the Philippines is self-reported, but even if unprotected sex with sex workers is routine in the Philippines, Ms Carter submitted it is clear on the facts of this case Mr Campos knew the boundaries. His cultural background and circumstances do not mitigate that.

[38] When sentencing, the court is required to take into account the offender's personal circumstances, including their personal, family, whānau, community, and cultural background.[32] The circumstances must have a nexus to the offending in a manner that mitigates that offender's culpability, albeit not necessarily as a proximate cause of the offending.[33]

[39] A s 27 cultural report was adduced at sentencing.[34] There the report writer commented that:

> 28. A distinctive feature of his upbringing and life in the Philippines is the existence of prostitution and social facilities in many places and is an expectation by many men in regard to their personal rights as being a customary facility. Jesse will explain that this is commonplace even in the villages and small towns, apart from the proliferation in big centres such as Manila, and surrounding settlements. Social attitude to such facilities, Jesse explains, is quite different from the attitude to such things in places like New Zealand and Australia. There is, accordingly, some linkage between the environment in which Jesse grew up and the social facilities that prevailed and the offending which has occurred in New Zealand. In the Philippines, his behaviour would have been regarded as perhaps more normal than is the case in New Zealand by comparison.

[40] In our view there is nothing in this argument. Societal attitudes to sex work may differ in the Philippines. However, while there may be differences, we cannot accept that in the Philippines such norms extend to having non-consensual sex with sex workers. Certainly nothing before us suggests as much.

[41] Nor is there any merit in Mr Paino's submission that Mr Campos' offending is driven by social and sexual isolation, and his attitudes towards sex. Mr Paino points to the fact that Mr Campos engaged sexual services at a brothel as evidence of this. However, the response to that submission is the same. Mr Campos could have satisfied

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32 Sentencing Act 2002, s 8(i).
33 *Carr v R* [2020] NZCA 357 at [57]–[61] and [64].
34 Sentencing Act, s 27.

his sexual desires with a consenting sexual partner (including a sex worker). His dislocation from his wife and his attitudes do not mitigate his culpability for raping someone in pursuit of sexual gratification.

[42] In any event, it is our view that the discounts applied by the Judge were generous. His discounts for previous good character, the disproportionate effect of imprisonment on a foreign national, and Mr Campos' remaining personal circumstances totalled 35 per cent. Those are significant reductions on any analysis.

[43] It follows we conclude that Mr Campos' sentence was not manifestly excessive.

Result

[44] Leave to appeal out of time is granted.

[45] The appeal against sentence is dismissed.

[46] We make an order permitting the publication of the complainant's occupation as a sex worker pursuant to s 203(3)(b) of the Criminal Procedure Act 2011. Automatic suppression of the complainant's name, address and other identifying particulars remains in force.

Solicitors:
Paino & Robinson, Upper Hutt for Appellant
Crown Solicitor, Wellington for Respondent