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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA531/2022
[2023] NZCA 342

BETWEEN	DAMIN PETER COOK Appellant
AND	THE KING Respondent

Hearing:	14 June 2023
Court:	Wylie, Thomas and Brewer JJ
Counsel:	A J McKenzie and D Goldwater for Appellant C E Martyn and S J Mallett for Respondent
Judgment:	4 August 2023 at 10 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed. The sentence of eight years' imprisonment on the charge of sexual violation by rape is quashed. A sentence of seven years' imprisonment is substituted. The concurrent sentence of three years' imprisonment on the charge of sexual violation by unlawful sexual connection is confirmed.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Mr Cook was found guilty by a jury of one charge of sexual violation by unlawful sexual connection[1] and one charge of sexual violation by rape.[2] On 8 September 2022 he was sentenced to eight years' imprisonment by Judge Garland.[3]

[2] Mr Cook now appeals his conviction and his sentence.

Background

[3] We reproduce Judge Garland's summary of the offending:

> [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 [X]. She lived at a separate address but had met you on occasions prior to the event on the evening of the incident.
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> [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.
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> [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.

Appeal against conviction

[4] Mr Cook's defence at trial was that he suffered from sexsomnia, a type of parasomnia or movement disorder that occurs during sleep. Mr Cook did not dispute that the sexual acts alleged by the victim occurred. His case was that, because of his sexsomnia, he was asleep at the time and acted without conscious volition.

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1 Crimes Act 1961, ss 128(1)(b) and 128B; maximum penalty 20 years' imprisonment.
2 Sections 128(1)(a) and 128B; maximum penalty 20 years' imprisonment.
3 *R v Cook* [2022] NZDC 17588.

[5] Judge Garland's directions to the jury applied the law as held by this Court in *Cameron v R*.[4] In that case, this Court held that the appellant's sexsomnia was a form of insane automatism.[5] As a result, the defendant had the burden of showing that he suffered from a disease of the mind to the extent that he did not understand the nature and quality of his act.[6] The Court did not hold that sexsomnia generally is insane automatism. The classification depends on the evidence in the particular case.[7]

[6] Mr Cook submitted to Judge Garland that *Cameron* was wrongly decided and that he should not follow it. Mr Cook wanted Judge Garland to rule that sexsomnia is a form of sane automatism. That would mean that, where there is an evidential foundation for the defence, it would be for the Crown to exclude the reasonable possibility that a defendant acted without conscious volition.

[7] Unsurprisingly, Judge Garland followed *Cameron*, as he was bound to do.

[8] Before us, Mr McKenzie repeated his submissions that *Cameron* was wrongly decided and that Mr Cook's convictions should be quashed accordingly. But, we have no reason to depart from *Cameron*. The issue of whether sexsomnia can be a form of sane automatism or insanity was central to the Court's decision. The Court conducted a review of the common law history of the defences of sane automatism and insanity. The Court's analysis was orthodox and did not result in a radical or striking change to the law. It is Mr McKenzie's argument that all cases of offending while asleep should be treated as sane automatism that is radical.

[9] This Court is ordinarily bound by its earlier decisions.[8] It will depart from them in rare cases and only where there is cogent reason to do so.[9] This Court, in *Singh v Police*, recently affirmed that it will only revisit or depart from settled

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4 *Cameron v R* [2021] NZCA 80, [2021] 3 NZLR 152.
5 At [84].
6 Crimes Act, ss 23(1) and 23(2)(a).
7 *Cameron*, above n 4, at [82] and [84].
8 Had counsel wanted the Court to find *Cameron,* above n 4, was incorrectly decided, Mr Cook ought to have requested in his notice appeal that a Full Court hear his appeal. He did not do so.
9 See, for example, *R v Chilton* [2006] 2 NZLR 341 (CA) at [83]; *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [104]; *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308 at [65]; and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [44].

precedent under four explicit exceptions, which are:[10]

(a) conflict with other equivalent precedent;

(b) conflict with a decision of a superior court;

(c) decision given *per incuriam* (where a relevant statute or precedent has been overlooked and which, if taken into account, would demand a different outcome); and

(d) departure for "innominate or evolutionary" reasons.

[10] Only the last exception could possibly apply, but this is not one of those rare cases where it could be advanced.[11]

[11] The appeal against conviction does not succeed.

Appeal against sentence

The sentencing

[12] Judge Garland sentenced on the basis that the jury had rejected Mr Cook's defence that he was asleep and unconscious at the time of the offending.[12] He was correct to do so.

[13] The Judge noted that Mr Cook was 44 years old and continued to assert that he had no memory of the offending.[13]

[14] The Crown submitted that a starting point of eight years' imprisonment should be adopted. Mr McKenzie submitted that the appropriate starting point should be in the range of six to six-and-a-half years' imprisonment. Mr McKenzie's argument was

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10 *Singh v Police* [2021] NZCA 91, at [13]–[17], citing *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA) at 725–726 and 729–730.

11 We note that the Supreme Court gave leave for Mr Cameron to appeal his conviction on the question of whether this Court was correct to treat his defence as insane automatism: *Cameron v R* [2021] NZSC 110, [2021] 1 NZLR 530. However, the appeal was not pursued.

12 *R v Cook*, above n 3, at [6]–[7].

13 At [8]–[9].

that the offending falls towards the bottom end of band one in the guideline case of *R v AM (CA27/2009)*.[14]

[15] The Judge considered the guidance given by the Court in *R v AM* in relation to bands one and two. He said:[15]

> [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.
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> [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*. In my view this factor was present to a high degree.
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> [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.
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> [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.
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> [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.
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> [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.

[16] The Judge adopted a starting point of eight years' imprisonment having regard to the aggravating factors he identified.[16]

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14 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
15 Footnote omitted.
16 *R v Cook*, above n 3, at [26].

[17] The Judge did not increase the sentence to take account of Mr Cook's criminal record, and neither did he reduce it for Mr Cook's personal circumstances. In particular, the Judge rejected the suggestion of relevant remorse.[17]

Submissions on appeal

[18] Mr McKenzie submits that the Judge overstated the extent to which the identified aggravating factors applied:

(a) *Vulnerability:* although the victim was vulnerable, her intoxication and presence in Mr Cook's bed were not part of any malign plan. Further, the intoxication was largely spent by the time of the offending.

(b) *Premeditation:* the acts of violation occurred some four to five hours after the victim was put in the bed, suggesting the offending was opportunistic.

(c) *Unlawful sexual connection:* this was part of the overall offending with the digital penetration a preliminary to the penile penetration.

(d) *Degree of harm:* some degree of harm is inevitable and that is recognised by the statutory penalties. In this case, harm to the victim is present to a moderate degree only.

(e) *Remorse:* a discount should have been given. Mr Cook expressed his remorse for the physical acts and the harm to the victim. This is not incompatible with his denial of legal responsibility.

[19] It is submitted that an end sentence of six to seven years is appropriate.

Discussion

[20] Our task is to determine whether there is an error in the sentence imposed on Mr Cook such that we should impose a different sentence. In essence, Mr Cook's case

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[17] At [28].

is that the end sentence of eight years' imprisonment is manifestly excessive and should be reduced.

[21] We make the point that deciding a sentence is not a mathematical process.[18] It is a judicial evaluation of the circumstances of the offending and the culpability of the offender. The guideline judgment in *R v AM* is just that. It provides guidelines to judges so as to be helpful and to promote consistency in sentences.

[22] Mr Cook does not dispute the existence of the aggravating factors the Judge identified. He submits only that the Judge gave them too much weight.

[23] We accept that the victim was vulnerable. She was put into Mr Cook's bed in a comatose state. She eventually woke in a place unknown to her to find she was being sexually violated. She gave no consent — indeed had no opportunity to consent — and she had no opportunity to defend herself.

[24] The fact that Mr Cook was not responsible for the victim's vulnerability is not a mitigating factor. It is the absence of a further aggravating factor.

[25] Premeditation is regarded as aggravating an offence because it goes to planning. To forethought. Here, Mr Cook woke in his bed to find the victim asleep beside him. He knew she was vulnerable. He decided to take advantage of her vulnerability. He digitally penetrated her. When that brought no response from the victim, he raped her. That is the conduct which must be considered in the sentencing evaluation. However, as we will come to, we do not agree that in these circumstances the conduct can be called premeditated.

[26] The victim was harmed. Of course a degree of harm is assumed and reflected in the statutory maximum penalty. But a sentencing judge must look at the particular case. Here, the victim reports she sank into a very dark depression. She withdrew from the world and was scared that Mr Cook would find her and harm her. The victim developed PTSD and was on antidepressants for about a year. She attempted suicide.

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[18] *Sa Leavai v R* [2017] NZCA 368 at [29]. See also *R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23 at [53] and [57]; and *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [16] and [30].

Three years after the offending the victim was still experiencing nightmares and heightened anxiety. That is the harm the Judge had to consider as part of his sentencing evaluation. We agree that the harm was properly characterised by the Judge as high.

[27] The Judge was entitled not to give a discount for remorse. A sentencing discount is not available merely for an expression of remorse for the effects of offending. If an offender takes responsibility for his offending and sincerely apologises to his victim, and particularly if they take positive steps to address the causes of their offending and/or offers some reparation, then a discount will usually be given. Mr Cook is not in this category.

[28] However, where an appellant submits his sentence is manifestly excessive the Court's focus is on the end sentence, not the steps by which it was determined. We will therefore examine how the guideline judgment of *R v AM* applies to this case.

[29] Rape band one has a sentence range of six to eight years. It is appropriate for offending where the aggravating features discussed in the case are either not present or present to a limited extent. It is also not appropriate where the victim is vulnerable.[19] If one or more of these factors is present to a low or moderate degree then a higher starting point within the band is required.[20]

[30] Rape band two has a sentence range of seven to 13 years. It is appropriate for a scale of offending and levels of violence and premeditation which are moderate. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.[21]

[31] As we have said, we agree with the Judge that the victim was vulnerable, and to a high degree.

[32] We disagree that premeditation is an aggravating factor, at least not as *R v AM* characterises premeditation.[22] In a recent case factually quite similar to this one (an

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19 *R v AM,* above n 14, at [93].
20 At [93].
21 At [94].
22 At [37].

adult male entered a bedroom in which a grossly intoxicated woman was asleep and raped her, continuing after a brief interruption when another person opened the bedroom door), this Court said:[23]

> [52] Premeditation is an aggravating feature under s 9 of the Sentencing Act 2002 because the "degree of planning and preparation will reflect criminality" and as such is more culpable.[24]
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> [53] We agree that the appellant's offending had none of the specific features of premeditation in relation to sexual offending referred to in *R v AM*. We also agree that there is no other evidence to suggest that the appellant had planned to rape the complainant. …

[33] As we have also said, we agree with the Judge that the factor of harm to the victim is present to a high degree.

[34] We disagree that the digital penetration immediately prior to the penile penetration amounted to an aggravating factor to a moderate degree. In *R v AM*, this factor is referred to as a scale of offending. The Court said:

> [49] On the other hand, a realistic view is to be taken where a number of offences are committed as part and parcel of what is, in substance, a single incident. Offending in one case involving indecent assaults followed by sexual violation by rape may be no more serious than offending in another case in which the only offence committed is sexual violation by rape. What is required is a common sense approach to overall culpability.

[35] In our view, the digital penetration was part of the single incident. It is an aggravating factor, but not to a moderate degree.

[36] Standing back and looking at the offending overall in the light of *R v AM*, and taking a common-sense approach to culpability, we consider that the offending is at the lower end of rape band two. This is the appropriate band where, *inter alia*, there is a scale of offending and/or the offending involves a vulnerable victim.[25] It is the appropriate band for cases which involve two or three of the aggravating factors that increase culpability to a moderate degree. We consider there were relevant aggravating factors that tip the offending into the lower level of band two.

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23 *Arroyo-Munoz v R* [2023] NZCA 245.
24 *R v Mako* [2000] 2 NZLR 170 (CA) at [36].
25 *R v AM,* above n 14, at [98].

[37] As has been discussed, the victim was highly vulnerable by way of self-induced intoxication. This was known to the appellant. This Court has previously considered that where violence is not present but the victim is highly vulnerable, the increased vulnerability is broadly comparable with a greater degree of violence.[26]

[38] As established above, the victim experienced a significant level of harm because of the offending. Further, there was a scale of offending. Considering these aggravating factors in combination with the victim's vulnerability, another identified factor, this offending appropriately falls within band two.

[39] Regardless of whether the offending falls within band one or band two, we consider that a starting point of seven years' imprisonment is called for. In the absence of another aggravating factor, such as premeditation or degrading treatment — even to a limited degree — we do not consider the Judge's eight year starting point justified.

[40] There are no factors which would reduce the starting point.

Decision

[41] The appeal against conviction is dismissed.

[42] The appeal against sentence is allowed. The sentence of eight years' imprisonment on the charge of sexual violation by rape is quashed. A sentence of seven years' imprisonment is substituted. The concurrent sentence of three years' imprisonment on the charge of sexual violation by unlawful sexual connection is confirmed.

Solicitors:
Crown Solicitor, Christchurch for Respondent

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[26] See for example *Burrell v R* [2010] NZCA 426 at [19]. In that case, the victim had taken a sleeping pill, to the knowledge of the appellant, and woke to the appellant having sexual intercourse with her. This Court considered this constituted a significant level of vulnerability, which was "broadly comparable" with the greater degree of violence involved in other cases.