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.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA236/2023
[2023] NZCA 467

BETWEEN	ADAM CHRISTIAN TATTERSON Appellant
AND	THE KING Respondent

Hearing:	22 August 2023
Court:	Goddard, Whata and Downs JJ
Counsel:	E T Blincoe for Appellant S R Lamb and L R van der Lem for Respondent
Judgment:	26 September 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of eight years, four months, and three weeks' imprisonment is quashed. A sentence of seven years and five months' imprisonment is substituted.

REASONS OF THE COURT

(Given by Downs J)

Introduction

[1] Adam Tatterson pleaded guilty to charges alleging serious sexual offending against his former partner, and related charges. He received a sentence of eight years, four months, and three weeks' imprisonment.[1] Mr Tatterson appeals that sentence.

[2] We must allow the appeal if there is an error in the sentence and a different sentence should be imposed.[2]

Background

[3] Mr Tatterson and the victim, whom we call M, were in a relationship from February 2020.

[4] In the early hours of 10 August 2020, Mr Tatterson gave M six millilitres of gamma-butyrolactone (GBL) to drink. M did so voluntarily, then fell unconscious. Mr Tatterson removed M's underwear and committed a variety of sexual offences against her. In summary, Mr Tatterson:

(a) Inserted the handle of a chisel into her genitalia.

(b) Repeatedly rubbed his naked buttocks and anus against M's face.

(c) Attempted to penetrate M's genitalia with a baseball bat.

(d) Applied cooking oil to the baseball bat, and then repeatedly penetrated M's genitalia with the head of the bat. Or, as the summary of facts records:

> The defendant then held the baseball bat by the handle, and penetrated the victim's genitalia with the head of the baseball bat.
>
> The defendant removed the baseball bat from the victim's genitalia and said "batter up" before reinserting the head of the baseball back into her genitalia. While the head of the baseball bat was inside the

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1 *R v Tatterson* [2023] NZHC 821 [High Court sentencing notes]. Mr Tatterson's guilty pleas followed a sentence indication, which he accepted. The acceptance of such an indication does not preclude a sentence appeal: Criminal Procedure Act 2011, s 245.

2 Section 250(2).

> victim's genitalia, the defendant twisted the bat which caused the victim's leg to flex and for her to gasp.
>
> A short time later the defendant reinserted the head of the baseball bat into the victim's genitalia. The defendant thrust the baseball bat in and out multiple times while saying, "There better not be any cocks up there".
>
> The defendant removed the baseball bat and said "now if that's not first base, second base, third base, home run – fucking don't know what the fuck is" before he reinserted the baseball bat into the victim's genitalia. The defendant then let go of the handle of the baseball bat and it fell to the ground.
>
> The defendant picked up the baseball bat and, while holding it by the handle, inserted the head of the bat briefly into the victim's genitalia before removing it and re-inserting it again.
>
> A short time later the defendant, while holding the baseball bat by the handle, inserted the head of the baseball bat into the victim's genitalia. With the head of the baseball bat inside the victim's genitalia the defendant placed the butt or handle of the baseball bat against his pelvic region and began thrusting the baseball bat back and forth simulating an intercourse motion.
>
> The defendant removed the head of the bat and said "Let's see how far it will go up aye? Get it right up there – bit further". The defendant reinserted the head of the baseball bat into the victim's genitalia before removing it and used his thumb to indicate on the shaft of the bat the depth of penetration.
>
> A short time later the defendant, while holding the baseball bat by the handle, said "batter up, strike one" before he reinserted the head of the bat into the victim's genitalia.

[5] Mr Tatterson filmed the offending on his mobile phone. He also made several films of M's genitalia, again, on his phone.

[6] M remained unconscious throughout.

[7] M awoke at approximately 6 am and began to collect her belongings. Mr Tatterson became angry, punched M in the face, and then kicked her in the groin. M fled.

[8] Mr Tatterson anticipated where M would go and waited for her. He followed M into a pedestrian tunnel and shortly thereafter, showed her the recordings he had made. Mr Tatterson said, "I did all sorts while you were asleep".

[9] M promptly went to Police, who executed a search warrant at Mr Tatterson's home. Mr Tatterson interfered with potential exhibits as they did so, including by trying to snap his phone in two. Mr Tatterson was arrested. He refused to provide the pass code to his phone and struggled during arrest.

[10] Police found:

(a) Two used methamphetamine pipes.

(b) A small snaplock bag containing less than one gram of methamphetamine.

(c) Twenty grams of cannabis packaged in small, individual snaplock bags.

(d) A set of digital scales with drug residue.

(e) Fourteen cannabis seeds.

(f) A small coke bottle containing 11 millilitres of GBL.

(g) $40 cash.

[11] Mr Tatterson ultimately pleaded guilty to:

(a) A representative charge of sexual violation by unlawful sexual connection.[3]

(b) A representative charge of indecent assault.[4]

(c) A representative charge of knowingly making an objectionable publication.[5]

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3 Crimes Act 1961, ss 128(1)(b) and 128B; maximum penalty 20 years' imprisonment.
4 Section 135; maximum penalty seven years' imprisonment.
5 Films, Videos, and Publications Classification Act 1993, ss 123(1)(a) and 124(1); maximum penalty 14 years' imprisonment.

(d) Male assaults female.[6]

(e) Resisting Police.[7]

(f) Wilfully attempting to pervert the course of justice.[8]

(g) Failing to carry out obligations in relation to a computer system search.[9]

(h) Possession of a Class C drug for sale (cannabis).[10]

(i) Possession of a Class A drug (methamphetamine).[11]

(j) Possession of a Class B drug (GBL).[12]

[12] Churchman J adopted an 11-year starting point for the sexual offending and added one year for the assault, wilful perversion, resisting, and objectionable publication charges. The Judge added nothing for the drugs charges.[13]

[13] The Judge deducted 15 per cent for Mr Tatterson's guilty pleas, 12.5 per cent for personal circumstances, and an additional 2.5 per cent in recognition of remorse.[14] The Judge declined to discount the sentence for Mr Tatterson's drug addiction.[15]

[14] As observed, this resulted in a sentence of eight years, four months, and three weeks' imprisonment.

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6 Crimes Act, s 194(b); maximum penalty two years' imprisonment.
7 Summary offences Act 1981, s 23(a); maximum penalty three months' imprisonment or $2,000 fine.
8 Crimes Act, s 117(e); maximum penalty seven years' imprisonment.
9 Search and Surveillance Act 2012, s 178; maximum penalty three months' imprisonment.
10 Misuse of Drugs Act 1975, s 6(1)(f); maximum penalty eight years' imprisonment.
11 Section 7(1)(a) and (2)(a); maximum penalty six months' imprisonment and/or $1,000 fine.
12 Section 7(1)(a) and (2)(b); maximum penalty three months' imprisonment and/or $500 fine.
13 High Court sentencing notes, above n 1, at [11].
14 At [29] and [42].
15 At [13].

A précis of the case for Mr Tatterson

[15] On Mr Tatterson's behalf, Ms Blincoe contends that the 11-year starting point for the sexual offending was too high. Ms Blincoe's primary argument is that the Judge placed undue weight on Mr Tatterson's use of implements, a form of violation not inherently more serious than rape. Ms Blincoe also contests aspects of the Judge's associated reasoning. She argues the Judge erred by:

(a) Characterising the offending as "cruel".[16]

(b) Concluding Mr Tatterson had taunted the victim about the recordings. Ms Blincoe observes that in her evidential interview, M said that she had asked to see the recordings after Mr Tatterson approached her.

(c) Saying Mr Tatterson used the implements "forcibly",[17] a term not used in the summary of facts.

[16] Ms Blincoe also contends the offending was less serious than it might otherwise have been because M appears to have used implements on herself for sexual purposes on other occasions. For these reasons, Ms Blincoe advances a nine-year starting point for the sexual offending.

[17] Ms Blincoe contends the Judge should have given Mr Tatterson full credit for his guilty pleas as, among other things, the trial was four months away; there had a been a late change in Mr Tatterson's representation; and the Crown supported a "generous" discount in relation to his pleas.

[18] Finally, Ms Blincoe contends the Judge should have awarded a five per cent discount for remorse rather than two and a half per cent and discounted the sentence for Mr Tatterson's drug addiction.

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16 High Court sentencing notes, above n 1, at [10(f)]; and *R v Tatterson* HC Wellington CRI-2022-443-52, 25 November 2022 at [26(f)] [High Court sentencing indication].

17 High Court sentencing notes, above n 1, at [10(c)]; and High Court sentencing indication, above n 16, at [26(c)].

Analysis

[19] We begin with the starting point.

[20] It was common ground at sentencing that the sexual offending came within band two of this Court's guideline judgment in *R v AM* concerning sexual violation "where the lead offence is rape, penile penetration of the mouth or anus, or violation involving objects (the rape bands)".[18] Band two of the rape bands contemplates starting points between seven and 13 years' imprisonment.[19]

[21] Mr Tatterson's offending has three obvious aggravating factors:[20]

(a) The nature, scale, and intrusiveness of the indignities performed on M.

(b) M's defencelessness, given that she was unconscious.

(c) Mr Tatterson's exploitation of that state, a feature underscored by his intimate relationship with M.

[22] We consider the seriousness of this combination placed the case firmly within band two of the rape bands. *R v B* supports this view,[21] which is the most similar case we could find. *R v B* is summarised as follows in *AM*:[22]

> - *R v B* (CA278/04): O, male, and V, female, had been in an off-and-on relationship. Events turned sour one evening when O began to question V about a previous relationship. O then set upon V in a rage, leaving V bruised, with cigarette burns and a finger needing splinting. O threatened to kill V, tied her to the bed after other degrading incidents, inserted a candle into her vagina and lit it, made her masturbate with the candle and then had anal sex with her.

[23] The sentencing Judge in *R v B* did not articulate a starting point. On appeal, this Court held that "a starting point of ten years, if not more" was justified having

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18 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [87].
19 At [90].
20 Mr Tatterson's recording of the offending was caught by the discrete one-year uplift, which is not challenged. We put it aside from the analysis for this reason.
21 *R v B* CA278/04, 25 November 2004.
22 *R v AM*, above n 18, at [102].

regard to the seriousness of the offending.[23] Overall, we consider Mr Tatterson's offending to be marginally less serious than the offending in *R v B*. We return to this point shortly.

[24] We see no error in the Judge's description of the offending as "cruel", as that description was available, or in the reference to Mr Tatterson taunting the victim about the recordings. That issue does not turn on whether M asked to see the recordings; a point not contained in the summary of facts which Mr Tatterson accepted when pleading guilty. Rather, it turns on the surrounding circumstances more generally, including Mr Tatterson's anticipation of where M would go when she fled; his following her into the pedestrian tunnel; his production of the phone in M's company, and most obviously, by his remark to her, "I did all sorts while you were asleep". In short, it was open to the Judge to describe Mr Tatterson as having taunted M about the recordings.

[25] We see no error in the Judge's use of the term "forcibly" either. The summary of facts says Mr Tatterson repeatedly "thrust" the head of the baseball bat into M's genitalia, and she was admitted to hospital with a laceration to, and bleeding from, her genitalia. That Mr Tatterson used cooking oil to lubricate the introduction of the baseball bat — a point also raised by Ms Blincoe — does not diminish the severity of the violation.

[26] We reject, emphatically, Ms Blincoe's submission that the offending was less serious than it might otherwise have been because M appears to have used implements on herself on other occasions. The submission invokes a misconception that sexual offending is less serious when the complainant has engaged in similar but consensual forms of behaviour, and is incompatible with the concerns animating ss 44 and 44A of the Evidence Act 2006, which address the inadmissibility of evidence of a complainant's sexual history in criminal cases.

[27] Having said all this, we consider Mr Tatterson's offending did not warrant an 11-year starting point. As we observed earlier, his offending is marginally less serious than the offending in *R v B*, in which a starting point of 10 years or more was held to

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[23] *R v B*, above n 21, at [12].

be appropriate. It follows we accept Ms Blincoe's primary argument to the extent that the Judge placed undue weight on Mr Tatterson's use of implements in reaching an 11-year starting point. We add an obvious point: the offending fell within the rape bands *because* Mr Tatterson used implements to commit the violations, so care was required not to over-emphasise this aspect.

[28] However, as will be apparent, we consider the suggested nine-year starting point is too low given the seriousness of Mr Tatterson's offending; the combination we mentioned earlier; and *R v B*. In recognition of these features, and in particular, that the offending involved the repeated violation of an unconscious victim, we consider a 10-year starting point appropriate.

[29] We now turn to discounts, beginning with that for Mr Tatterson's guilty pleas.

[30] We accept the factors summarised at [17] tend to support a discount of greater than 15 percent, as did the fact that Mr Tatterson was understandably awaiting the foreshadowed repeal of the three-strikes regime before pleading guilty and being sentenced: this offending would have constituted his third strike, so if he was sentenced while that regime was still in place he would have received a sentence of 20 years' imprisonment. However, the prosecution case was not merely strong but unanswerable, as the offending was captured on Mr Tatterson's own phone. In accordance with the Supreme Court's decision in *Hessell v R*,[24] that factor reduces the credit for Mr Tatterson's guilty pleas. Mr Tatterson's late change in representation should not obscure that he must have understood the case against him given the simplicity of the allegations and the nature of the Crown's evidence. We, therefore, are not persuaded of error in relation to this discount.

[31] We reach a different conclusion concerning remorse, for which the Judge deducted only two and a half per cent. Having concluded Mr Tatterson was remorseful, we consider the Judge should have afforded an orthodox reduction for this feature of five per cent.

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[24] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

[32] We accept, to borrow the Judge's language, that "Mr Tatterson clearly struggles with addiction" and that his "sexual relationship with [M] is driven in part by their mutual drug use".[25] However, we do not accept Mr Tatterson's addiction diminishes the culpability of his offending. We make the point this way: that Mr Tatterson provided M with GBL is explained, in part, by his addiction; that he then repeatedly violated her, is not.

[33] In summary, we are satisfied that the starting point is too high by one year and the Judge ought to have provided a five per cent discount for remorse, but we are otherwise unpersuaded of error. Applying these adjustments results in a sentence of seven years and five months' imprisonment.

Result

[34] The appeal is allowed.

[35] The sentence of eight years, four months, and three weeks' imprisonment is quashed. A sentence of seven years and five months' imprisonment is substituted.

Solicitors:
Ord Legal, Wellington for Appellant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent
Luke Cunningham Clere, Wellington for Respondent

[25] High Court sentencing indication, above n 16, at [34].