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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA590/2019
[2020] NZCA 55

BETWEEN	MICAH JAMES MORGAN HARRIS Applicant
AND	NEW ZEALAND POLICE Respondent

Court: French, Dobson and Moore JJ

Counsel: T J Mackenzie for Applicant
M L Wong for Respondent

Judgment: (On the papers) 13 March 2020 at 2.30 pm

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Harris pleaded guilty in the District Court to one charge of sexual violation by rape and was sentenced by Judge Gilbert to a term of imprisonment of two years

and seven months.[1] He appealed the sentence to the High Court. The appeal was dismissed by Gendall J.[2]

[2] Mr Harris now applies for leave to appeal to this Court. Leave is required because it would be a second appeal. The Crown opposes leave being granted.

[3] By minute dated 18 December 2019, Gilbert J directed that the issue of leave be determined separately from the proposed appeal on the papers. This judgment is that determination.

The facts of the offending

[4] Mr Harris and the complainant had known each other for about three and a half years. During part of that time, they had been in a romantic relationship. When that relationship ended, there was a gap of approximately 12 months when they did not see each other but later they resumed their friendship. This evolved into a casual sexual relationship during times when both of them were single.

[5] The rape occurred on 5 November 2018. Up until then there had been no sexual encounters between the two for a number of months because the complainant had another partner.

[6] In the early hours of 5 November 2018, Mr Harris contacted the complainant and they arranged for her to go to his address. Once she had arrived, they walked to a nearby park and smoked some cannabis before returning to his house. She agreed to stay the night there but reminded Mr Harris that she had a boyfriend and there would not be anything sexual occurring.

[7] Mr Harris and the complainant who was partially clothed got into the same bed where they cuddled and talked for a short time. Mr Harris started to touch the complainant, but she pushed his hand away telling him not to go there. She then turned her back on him, specifically saying that she did not want to have sex. She then fell into a deep sleep.

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1 *R v Harris* [2019] NZDC 11242 [District Court decision].
2 *Harris v Police* [2019] NZHC 2846.

[8] The next thing the complainant recalled was Mr Harris waking her up. He told her that while she had been asleep he had had sex with her. He said it had not lasted long and that he had ejaculated inside her. She was shocked and immediately left the house.

[9] When interviewed by the police, Mr Harris admitted the rape. He was aged 22 at the time and the complainant was 19. He had no previous convictions.

[10] The incident had a very significant impact on the complainant as detailed in her victim impact statement. She said she felt humiliated and degraded and for several months expressed flashbacks, night terrors and panic attacks to the point where she had difficulty functioning on a day to day basis. The rape took such a toll on her energy and well being that it became overwhelming and resulted in her attempting suicide in March 2019 by taking an overdose. Although she was able to be revived, she sustained a hypoxic brain injury leaving her with short term memory issues. In April 2019 she was acutely admitted as a patient to a psychiatric hospital where she was diagnosed with complex post traumatic stress disorder. She had to spend a month in hospital and following discharge continued to require medical assistance.

Sentencing in the District Court

[11] Sentencing for sexual violation is currently based on the decision of this Court in *R v AM*.[3] The decision identifies culpability assessment factors and then sets out sentencing guidelines in the form of sentencing bands with a range of starting points. Which band any particular case will fall into depends on the number and nature of aggravating factors present.

[12] The culpability assessment factors in relation to rape include whether the offending involved planning or premeditation, additional violence over and above that inherent in sexual violation, abduction, home invasion, vulnerability of the victim, the harm suffered by the victim, whether there were multiple offenders, scale of the offending in terms of its duration, breach of trust, hate crime, degree of violation, and whether there was a mistaken belief in consent. In relation to the latter factor,

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3 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

the Court drew a contrast between a case where the offender knows there is no consent and a case where they unreasonably but genuinely believe there is consent. The Court suggested that in appropriate cases the genuineness of the mistaken belief may reduce culpability.[4]

[13] Judge Gilbert found that Mr Harris' offending fell at the lower end of rape band one which meant a starting point of six years' imprisonment.[5] It was said of rape band one in *R v AM* that it is appropriate where the aggravating features are either not present or present to a limited extent.[6] The range of starting points in band one is six to eight years' imprisonment.[7]

[14] Having identified the appropriate starting point in this case as six years' imprisonment, Judge Gilbert then reduced that by two and a half years (41 per cent) on account of Mr Harris' previous good character, his relatively young age and his genuine remorse.[8] The Judge then applied a further discount for the prompt guilty plea resulting in an end sentence of two years and seven months' imprisonment.[9]

[15] As mentioned, this sentence was upheld on appeal to the High Court.

The application for leave to appeal to this Court

[16] In order to obtain leave, Mr Harris must persuade us that his proposed appeal involves a matter of general or public importance or that a miscarriage of justice has occurred or may occur unless his proposed appeal is heard.[10]

[17] As explained by his counsel, Mr Mackenzie, the proposed appeal seeks to challenge the sentencing bands in *R v AM*, particularly band one and the entry point of six years' imprisonment. Mr Mackenzie submits that rightly or wrongly sentencing judges rarely if ever go outside the bands.[11] That in turn means, because of the six year

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4 At [53].
5 District Court decision, above n 1, at [37]–[38].
6 *R v AM,* above n 3, at [93].
7 At [90].
8 District Court decision, above n 1, at [39]–[42].
9 At [44]–[45].
10 Criminal Procedure Act 2011, s 253(3).
11 Mr McKenzie said he was unable to locate any decisions where judges had sentenced outside the bands.

entry point, that a non-custodial sentence will never be available. Mr Mackenzie contended this was contrary to the Sentencing Act 2002 and the duty on sentencing judges to impose the least restrictive outcome.

[18] If the Court acceded to this argument and were minded to apply a lower or adjusted band, then Mr Harris' appeal would address two further questions also said to be of general or public importance namely (a) a re-consideration of the approach to s 128B of the Crimes Act 1961 which creates a presumption of imprisonment for sexual violation and (b) a reconsideration of the approach to the calculation of discounts for mitigating factors in sentencing.

Our view

[19] We acknowledge the existence of concerns that some sentencing judges may be applying the *R v AM* sentencing bands in a mechanistic way, despite the *R v AM* decision itself confirming that departure from the bands is permissible and despite this Court emphasising on several occasions that guideline decisions are just that, guidelines.[12]

[20] We also acknowledge the existence of concerns that the lowest starting point in the *R v AM* bands if applied in a mechanistic way has the potential to result in excessive sentences because it effectively precludes the possibility that a rape of relatively low culpability could ever receive a non-custodial sentence such as home detention.[13]

[21] Accordingly, we would not preclude the possibility of this Court undertaking a review of the *R v AM* sentencing bands in the future in an appropriate case(s). However, we are satisfied that Mr Harris' case is not an appropriate case to be the vehicle for such a review.

[22] That is because in our view it is not reasonably arguable that this was a case of relatively low culpability where the application of the *R v AM* bands has caused

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12 *R v AM,* above n 3, at [83]. See for example *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [10(a)] and [48]; and *R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23 at [62].

13 For a recent example see the decision of *R v [I]* [2020] NZHC 374 at [43] and [88].

injustice or which raises a proper concern. This was a case where the offender knew full well the complainant was not consenting. She had told him twice that she did not want sex and had expressly rebuffed his advances before falling asleep. He knew she was in a deep sleep and knew she had been affected by cannabis. There were elements of vulnerability and breach of trust. Further, there was ejaculation inside of the complainant.[14] And there was significant emotional harm.[15]

[23] In short, a custodial sentence was fully justified on the facts of the offending. Home detention would not have been an appropriate outcome.

Outcome

[24] We therefore decline to grant leave to bring a second appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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14 As stated in *R v Nixon* [2016] NZCA 589 at [38], this is an aggravating factor.

15 As Judge Gilbert noted, although the complainant may have suffered mental health difficulties before the rape, the reality was that the offending had had a very significant impact on her. District Court decision, above n 1, at [45].