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S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA77/2014  
[2014] NZCA 107**

BETWEEN POKAI PAIA  
Appellant  
  
AND THE QUEEN  
Respondent

Hearing: 24 March 2014  
  
Court: Stevens, Keane, Andrews JJ  
  
Counsel: S J Gray and J C Harder for Appellant  
G H Vear for Respondent  
  
Judgment: 2 April 2014 at 11.30 am

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**JUDGMENT OF THE COURT**

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**The appeal against sentence is dismissed.**

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**REASONS OF THE COURT**

(Given by Stevens J)

**Introduction**

[1] The appellant, Mr Paia, was found guilty following a trial by jury of two charges of sexual violation by unlawful sexual connection. These were the digital penetration of the victim, and oral connection with the victim, occurring early in the

morning on 9 December 2012. He was sentenced to two years six months' imprisonment by Judge Ryan.<sup>1</sup> He appeals his sentence.

[2] Counsel for the appellant is unable to, and does not, challenge the fact that the verdict reached means that the appellant's belief in the victim's consent was unreasonable. This appeal is advanced on the ground that the Judge declined to take into account Mr Paia's assertion at sentencing that he held a genuine but mistaken belief in that consent. It is suggested that, had this been taken into account it would have led to a greater discount, thereby reducing his sentence, and making home detention an available option. Further, it would have assisted in displacing the presumption in favour of imprisonment.<sup>2</sup> As such, the appellant contends the sentence was manifestly excessive.

[3] Counsel for the respondent submits that the evidence did not establish that a genuine but mistaken belief in consent existed. The starting point was within range and home detention was not an available outcome, given the end point reached. The presumption in s 128B of the Crimes Act 1961 should not be displaced and the end sentence was not manifestly excessive.

[4] The key issue on appeal is whether the Judge correctly determined whether, as the appellant asserted at sentencing, there was a mitigating factor of a genuine but mistaken belief in consent.<sup>3</sup>

### **Factual background**

[5] In December 2012, the victim attended a party at which she became very intoxicated. This was corroborated at trial by numerous witnesses. She left the party between 12.30 am and 1.30 am and drove to Dominion Road, where she parked and vomited out of her vehicle. The appellant was working in his truck nearby and found the victim being sick in her car sometime around 3.00 am. The appellant moved the victim's vehicle to a more remote area away from the main thoroughfare, ostensibly out of concern that she might be discovered by police. A GPS tracker on the

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<sup>1</sup> *R v Paia* DC Auckland CRI-2012-004-19924, 21 January 2014 [Sentencing decision].

<sup>2</sup> Crimes Act 1961, s 128B.

<sup>3</sup> Sentencing Act 2002, s 24.

appellant's work truck showed that the truck was parked in the area for 32 minutes between 3.18 am and 3.50 am.

[6] The appellant went to get a drink for the victim. The victim fell asleep, and later woke up in the passenger's seat of her vehicle, with the appellant in the driver's seat. The victim's seat was reclined back, her legs up on the dashboard and her underwear around her ankles. The appellant was leaning over her and had his finger inserted inside her vagina. The appellant then proceeded to lick her vagina. He commented as he did so that he "wanted to put it in her".

[7] The victim yelled and pushed the appellant away, and started vomiting out the car door. The appellant got out of the car and left in his truck. The victim called the police immediately. The appellant admitted the sexual connection, but stated that the victim had initiated the sexual activity.

### **Sentencing decision**

[8] In sentencing the appellant, Judge Ryan considered that the offending fell within band one of sexual violation by unlawful sexual connection, as outlined in *R v AM (CA27/2009)*.<sup>4</sup> The factors placing it in this band were:<sup>5</sup>

- (a) The victim was so intoxicated so as to be considered a vulnerable person;
- (b) The offences were not brief or fleeting;
- (c) The offending was opportunistic, and the appellant desisted when the victim told him to go away; and
- (d) There was no genuine but mistaken belief in consent.

[9] The key finding of Judge Ryan disputed by the appellant is the following:<sup>6</sup>

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<sup>4</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [114].

<sup>5</sup> Sentencing decision, above n 1, at [46]–[52].

<sup>6</sup> At [46]–[47].

[46] Having heard and seen the witnesses at trial, I am unable to find that there was a genuine, but unreasonable belief in consent. Your explanation was that this was a woman drunk to the point of vomiting and retching, who took the initiative, was coherent, able to make decisions and you simply responded. This was in sharp contrast to the evidence given by other witnesses of her state only two or three hours earlier that she was incoherent, swaying and stumbling. Your explanation was plainly rejected by the jury. In addition, I do not find it plausible.

[47] I cannot come to the conclusion based on logic or on the evidence that there was a genuine but unreasonable belief in consent. As I say, the jury rejected the story and I find it lacks plausibility. The submission which Ms Scott says she is entitled to make, I am not entitled to adopt. I cannot say there was a genuine but unreasonable belief in consent.

### **Statutory provisions**

[10] For the purposes of s 24 of the Sentencing Act 2002, a mitigating fact is defined in s 24(3) as:

**mitigating fact** means any fact that—

- (a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and
- (b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.

[11] In terms of proof of facts, the role of the Court is identified in s 24(1) thus:

#### **24 Proof of facts**

- (1) In determining a sentence or other disposition of the case, a court—
  - (a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and
  - (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.

[12] Where a fact that is relevant to the sentence is asserted by the defence and disputed by the prosecution, the prosecutor must negate beyond a reasonable doubt any disputed mitigating fact that is not wholly implausible or manifestly false.<sup>7</sup>

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<sup>7</sup> Sentencing Act, s 24(2)(c).

## **Asserted genuine belief in consent**

[13] Where a defendant at sentencing asserts the existence of a genuine belief in consent, the correct approach was described by this Court in *R v AM* as follows:<sup>8</sup>

### *Mistaken belief in consent*

[53] There is authority for the proposition that to commit rape under a mistaken but unreasonable belief that there was consent is not a mitigating factor: *R v Hill*. Obviously, one of the purposes of the rape law reforms was to make violation where there is a mistaken and unreasonable belief in consent a crime. But it does not follow or undermine that objective to say that the offender's culpability may be different in such a case. The contrast is with the position where the offender knows there is no consent. As in other areas of the criminal law, negligent acts are seen as less serious than deliberate acts. If the belief is grossly unreasonable that will not avail the offender. There may, however, be cases where it is plain that the belief, while unreasonable, was genuine and this factor may reduce culpability.

[14] Where the issue is raised on appeal this Court may reconsider the evidential basis for the conclusions reached by the sentencing judge, by undertaking an evidential review and reaching its own opinion.<sup>9</sup> Recognition should be given to the advantage enjoyed by the trial judge in having heard the evidence at first instance, but this need not be determinative.<sup>10</sup>

## **Appellant's submissions**

[15] Counsel for the appellant submits that the Judge's finding of the absence of a genuine but mistaken belief in consent is not supported by the evidence. In particular, counsel submits the victim had limited memory of events from the time she left the party (at around 12.30 am) until the time she woke up in the car sometime after 3.20 am. Counsel contends that the usual advantages of the trial Judge are somewhat diminished because of the complainant's incomplete memory of events.

[16] A further factor was that in this case, the views of the victim and the appellant were not diametrically opposed. For example, the appellant's claim that the sexual activity was initiated by the victim is not necessarily inconsistent with the

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<sup>8</sup> *R v AM* (CA27/2009), above n 4, at [53] (footnote omitted).

<sup>9</sup> *R v Heke* [2010] NZCA 476 at [19].

<sup>10</sup> At [20].

evidence of a Crown witness as to what occurred several hours earlier at the party. It is significant that when the appellant spoke to the police he would have had no knowledge about what had occurred at the party.

[17] Counsel also points to various aspects of the incident itself as demonstrating that the version of events advanced by the appellant is credible. He assisted the victim when he found her vomiting by the roadside. He took her to a “safer” environment and says that there was some dialogue between them. He went and bought her a drink and, although she was vulnerable, his evidence suggested that in the unusual circumstances that followed there was a basis for him genuinely to believe that she was consenting to the sexual activity.

### **Our analysis**

[18] The first point is that the sentencing Judge rejected the existence of a genuine belief in consent in the terms described at [9] above. In particular, Judge Ryan pointed to the objective aspects of the victim’s condition as negating the asserted mitigating factor: namely her intoxication, her vomiting and retching. In addition the Judge found, as she was entitled to do, that the appellant’s version of events “lack[ed] plausibility”.<sup>11</sup>

[19] We agree with these conclusions. There is no doubt that, from the time he came upon the victim in her vehicle, to the time he left the scene in his truck shortly before 4.00 am, the victim was vulnerable, unwell and distressed. That was confirmed by her continued vomiting and retching while she was in the appellant’s presence. Further, the appellant accepted the victim was highly intoxicated. Expert assessment of her state of inebriation, measured from a urine sample taken at 5.38 am, showed that her blood alcohol level was around double the legal limit for a driver.

[20] We consider any reliance on events at the party prior to the offending, and the specific intimate incident in a bathroom with a Crown witness at that location, to be misplaced. The witness concerned explained that he had stopped the encounter

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<sup>11</sup> At [47].

because of the victim's state of intoxication. He said that he considered her to be at the time intoxicated, and unsteady on her feet. Moreover, the victim explained in evidence that she had found that person to be attractive and had wanted to be close with him. We are satisfied that the circumstances of that incident are of a wholly different character to what took place with the appellant over four hours later.

[21] Following the encounter in the bathroom, the victim continued drinking alcohol and her intoxication level increased. She then left the party, driving her vehicle from that address. When the appellant came upon her vomiting from her vehicle in the street, she was particularly unwell and vulnerable.

[22] We have carefully reviewed the evidence relied upon by counsel for the appellant as supporting the existence of a genuine, albeit mistaken, belief. Our assessment is that any belief in consent on the part of the appellant in all the circumstances prevailing at the time was grossly unreasonable. In those circumstances there is simply no room for a contention that his belief in consent was genuine but mistaken.

[23] Accordingly we agree with the findings of the sentencing Judge and have no difficulty in upholding the assessment she made in determining the unavailability of the asserted mitigating factor of a genuine belief in consent.

### **The residual grounds of appeal**

[24] While the written submissions appeared to suggest that the three year starting point was too high, in oral submissions counsel accepted that, if the argument on the availability of a mitigating factor of genuine belief was unsuccessful, the starting point could not be challenged. We agree.

[25] The sentencing Judge correctly made a finding that the victim was vulnerable due to her state of intoxication. Moreover the offending was not fleeting or transitory. We agree that the intoxication of a victim is relevant in the assessment of

vulnerability.<sup>12</sup> Accordingly we are satisfied that the starting point adopted was well within range.

[26] The allowance of a discount of six months for remorse and previous good character was not challenged. Nor could it be.

[27] Having reached an end point of two years and six months' imprisonment, the Judge was not entitled to consider whether home detention was available.<sup>13</sup> Further, the end sentence imposed was consistent with the presumption contained in s 128B of the Crimes Act that a term of imprisonment be imposed for offending of this nature. Accordingly, we do not consider that the sentence imposed was manifestly excessive.

## **Result**

[28] For the above reasons, the appeal against sentence is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>12</sup> *B (CA817/2011) v R* [2012] NZCA 260 at [17]; *R v Seller* [2007] NZCA 422 at [4(a)].  
<sup>13</sup> Sentencing Act, s 15A.