

**NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF  
COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE  
ACT 1985.**

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

**CA318/2015  
[2016] NZCA 625**

BETWEEN                      KENNETH ANGUS MACKAY  
Appellant

AND                              THE QUEEN  
Respondent

Hearing:                      19 October 2016  
Court:                          Cooper, Brewer and Peters JJ  
Counsel:                      R Vigor-Brown for Appellant  
                                        K S Grau for Respondent  
Judgment:                      19 December 2016 at 4 pm

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**JUDGMENT OF THE COURT**

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**A    The application for an extension of time to appeal is granted.**

**B    The appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Cooper J)

[1]    On 9 and 10 November 2011 the appellant, Mr Mackay, was tried before Judge Burnett and a jury on seven charges alleging sexual offending against three different complainants. He was convicted on three of the charges, one in the case of each complainant. On 9 December 2011 he was sentenced to 10 years’

imprisonment.<sup>1</sup> At the time of the offending Mr Mackay was in his early 60s. He lived with his son and his son's girlfriend, H. The complainants were school friends of H who she had invited to stay at Mr Mackay's house.

[2] Mr Mackay now seeks to appeal his conviction and sentence for one of these charges: count six in the indictment. That count alleged that, between 1 June 2010 and 30 September 2010, Mr Mackay sexually violated the first complainant, F, by raping her. Particulars given stated that this was the "first occasion" that the accused raped F. He was found not guilty on two representative charges covering the period between 1 June 2010 and 30 October 2010 alleging rape and sexual violation by unlawful sexual connection.

### **Background**

[3] F lived at Mr Mackay's house on and off between June 2010 and October 2010 when she was 16 and still attending school. The Crown's case was that Mr Mackay had sexual intercourse with her, together with associated sexual activity, on a number of occasions. F considered herself to be Mr Mackay's girlfriend and for a period they shared a bedroom at the house.

[4] The second complainant, D, stayed at Mr Mackay's house during Labour weekend in 2010, when she was 18 years of age. She awoke in a spare bedroom to find Mr Mackay digitally penetrating her vagina. Mr Mackay was convicted of sexually violating her by unlawful sexual connection.

[5] The third complainant, P, stayed at Mr Mackay's address during a school holiday in September and October 2010, when she was 17 years of age. Mr Mackay was convicted of a representative charge of indecent assault by touching P's thigh on various occasions.

[6] The Crown's case at the trial was that all three complainants were unsophisticated and vulnerable teenagers whom Mr Mackay took advantage of when

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<sup>1</sup> *R v Mackay* DC Hamilton CRI-2010-019-10211, 9 December 2011.

they stayed at his house. The defence case was that there was no sexual activity with D and P, and that Mr Mackay and F were in a consensual sexual relationship.

[7] At sentencing, Judge Burnett said of the complainants that:<sup>2</sup>

They were young school girls, or about to leave school. They were, from their appearance and their evidence, quite young in their outlook. They were homely and somewhat vulnerable young girls. They were not sophisticated girls of their age group who could have dealt with [Mr Mackay's] advances in a different manner, a more robust manner.

### **Extension of time**

[8] The notice of appeal should have been filed by early January 2012 but was not in fact filed until 8 June 2015. Consequently, Mr Mackay seeks an order extending the time for appealing by over three years, four months. The Crown opposes the application on the basis that it is not in the interest of justice. It submits there is real prejudice to the Crown and the merits of the appeal are weak.

[9] The Crown further opposes an extension of time to appeal the sentence on the basis that the appeal is out of time to such an extent that Mr Mackay has now been eligible for parole for over a year. In response to one of Mr Mackay's grounds of appeal discussed below, Ms Grau submitted for the Crown that the Parole Board was best placed to assess the role, if any, played by dementia in the offending and balance that against an assessment of any risk Mr Mackay now poses to the community.

[10] While there is force in these submissions, we nevertheless propose to grant an extension of time, despite there having been no evidence attempting to explain the delay. In particular, there is sufficient information before us concerning the potential impact of dementia to persuade us that it would not be appropriate to refuse the application for extension on the basis of delay.

[11] The application for an extension of time to appeal is accordingly granted.

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<sup>2</sup> At [4].

## **The conviction appeal**

[12] The sole basis of the conviction appeal is alleged counsel error, leading to a miscarriage of justice. Counsel for Mr Mackay, Mr Vigor-Brown, filed a memorandum under r 12A of the Court of Appeal (Criminal Rules) 2001 setting out the six alleged errors. However, not all of these were pursued in submissions and in the end the issue that assumed most prominence was an allegation that trial counsel, Mr Boot, should have briefed and called H to give evidence.

[13] H swore an affidavit in support of the appeal, which we have read. Where affidavit evidence is relied on in support of alleged counsel error in failing to call a witness it is often the case that the substance of the evidence will not in fact be fresh because, as in this case, it relates to matters that could have been the subject of evidence by the witness at the trial. However, the evidence needs to be assessed in order to consider whether there has been counsel error in not calling it and, if so, whether the failure might have affected the outcome of the trial. If the Court concludes that evidence that might have affected the outcome has not been called due to counsel error then it can be accepted as “fresh” for the purposes of a conviction appeal.<sup>3</sup>

[14] Mr Boot also gave affidavit evidence. He swore two affidavits dated 16 August 2016 and 11 October 2016, on which he was cross-examined. Mr Mackay did not provide an affidavit.

[15] Despite H’s affidavit, Mr Vigor-Brown relied principally on a statement she made to the police on 8 December 2010 concerning all three complainants. In relation to F, H said:

We had my friend [F] come and live with us for a bit as well. She moved in about a week or two after we moved out. She moved out sometime around September or October. She didn’t tell me the exact reason she moved out, but I think it was because [Mr Mackay] always wanted sex or something. [F] and [Mr Mackay] were together, as in boyfriend and girlfriend.

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<sup>3</sup> *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [33]. In *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 the Privy Council suggested at [124]–[125] that the principal reason the evidence at issue in *Fairburn* was admitted was because it would not be in the interests of justice to exclude it, not because it could properly be described as fresh. See too the discussion in *Loffley v R* [2013] NZCA 579 at [57]–[59].

I know [F] through [her high school] when I went there. [F] has just turned 17 in October, the 25th. I also know her older sister ... who is 18.

When [F] lived with us she slept in Bedroom One on my drawing with [Mr Mackay]. This was their bedroom.

This is the same bedroom that Steven is now staying in.

When [F] was staying here her and [Mr Mackay] used the same single bed that is in there now. It was under the window but they moved it to where it is now by the wall as [F] started getting cold.

When [F] first moved in her and [Mr Mackay] weren't together, it was only a couple of days later that they got together and started sleeping in the same bed.

When [F] first moved in she slept in Bedroom One.

[Mr Mackay] told me that he loved [F] and that they were having sex.

I told him that I didn't want to know because he was too old for [F].

When I said this to him, he said that it was good to tell people in case they got the cops involved, because I think he knew the cops were going to get involved because of what [F]'s said about other guys before.

He said that it's not the age; it's what in the heart.

[Mr Mackay] and [F] used to hug, kiss and hold hands in public. They would do this heaps.

Sometimes [Mr Mackay] would sleep in the lounge when they had had an argument.

[16] Mr Vigor-Brown submitted that the statement described a consensual relationship, emphasising H's statement that "it was only a couple of days later that they got together and started sleeping in the same bed". In her affidavit H went into greater detail about the nature of the relationship between Mr Mackay and F. Mr Vigor-Brown contrasted this with evidence given by F describing Mr Mackay coming into the bedroom where she was sleeping alone and initiating physical contact.

[17] Mr Vigor-Brown was critical of Mr Boot's evidence that he had decided that H should not be called at the trial because the content of her police statement would have corroborated what the complainants were saying. Mr Vigor-Brown claimed that while that may have been an appropriate response insofar as the other complainants were concerned, it was not so in the case of F. Perhaps appreciating

where the logic of this argument took him, he then endeavoured to persuade us that the charges against Mr Mackay in respect of F should have been dealt with in a separate trial.

[18] Mr Boot was cross-examined by Mr Vigor-Brown on whether or not he sought specific instructions as to whether H should be called as a witness at the trial. The Crown had intended to call H but the prosecutor decided not to do so and informed Mr Boot of this decision a little over a week before the trial began. Mr Boot said he recalled discussing with Mr Mackay the fact that the Crown would not call H and also asking him whether there was anyone he wanted to call. Mr Boot was unclear as to whether he had specifically referred to H in that respect. However, in his affidavit he said he did not consider that H's evidence would assist Mr Mackay's defence.

[19] That was particularly so in the case of the complainant P: H confirmed that Mr Mackay had touched P. Insofar as the complainant D was concerned, Mr Boot's instructions were that D was never in the spare bedroom with Mr Mackay. However, H said in her statement that Mr Mackay and D were having a relationship and that D slept in one of the bedrooms with Mr Mackay. Mr Boot noted that that was completely inconsistent with the instructions given to him by Mr Mackay.

[20] Mr Boot also responded to an allegation made by H in her affidavit that she had endeavoured to talk to him at court on three occasions. He said he had no recollection of that and further noted that at the relevant time H was a prosecution witness. He did recall talking to her on one occasion when he had visited her house in an attempt to make contact with Mr Mackay. Mr Boot recalls on that occasion H said of Mr Mackay: "He's just a dirty old man. He always has young girls around." That suggested to Mr Boot that H would not be an appropriate witness for the defence.

### *Discussion*

[21] The memorandum filed by Mr Vigor-Brown in accordance with r 12A of the Court of Appeal (Criminal) Rules did not allege counsel erred by failing to seek severance of the charges concerning F from those relating to the other two

complainants. The suggestion that this should have been done emerged only in Mr Vigor-Brown's written submissions and it was made in the context of a clear concession that Mr Mackay's cause could only be advanced if the charges concerning F were severed, "otherwise [H's] evidence would count against [Mr Mackay] if given in relation to the other complainants".

[22] We regard the proposition that the charges could have been severed as most unrealistic. There was too much in common between the offending alleged in respect of all three complainants for severance to have been remotely possible. The corollary is that if severance had been ordered the Crown could have made a practically irresistible application to call P and D as propensity witnesses at the trial concerning F and important aspects of their evidence would have been corroborated by H.

[23] In the circumstances, Mr Boot's decision not to call H cannot be criticised. Even if, despite the obvious downside, she had been called, it is difficult to see how her evidence could have placed Mr Mackay in any better position concerning the charges involving F than Mr Boot was able to achieve in cross-examination. It must be remembered that Mr Mackay was acquitted on two representative charges concerning F, those alleging rape and sexual violation by unlawful sexual connection.

[24] That was no doubt a reflection of the concessions obtained from F in cross-examination. For example, F accepted that after there had been unwanted physical contact with Mr Mackay and she had been to her own home for a few days and talked things over with her mother, she had gone back to Mr Mackay's house and stayed there; that she stayed in the spare room and he would come to her bed; and that she agreed to being his girlfriend when he told her he loved her and cared for her. Asked if they had carried on as if they were girlfriend and boyfriend, she said "Not for the whole time, no", and asked how often they slept together she said she could not remember. She accepted she had kissed Mr Mackay when in bed with him, that they had touched each other and that they had sex on occasions but she said they only had sex when he forced her.

[25] Later in the cross-examination there was this exchange:

Q. So looking back on your time there at the house, would you say it wasn't a great time in your life?

A. It was not a great time.

Q. You regret what happened there?

A. Yes.

Q. I put what you're — putting to you what you're regretting though is the fact that you carried on a relationship with an older man?

A. Yes.

Q. It's true though, isn't it, that you did have a relationship with him?

A. I did have a relationship with him, but not for long.

Q. And during that time you had sexual contact in a variety [of] forms?

A. What do you mean by that?

Q. Well you had sexual intercourse, kissed, so on?

A. Yes but only once or twice was consensual.

Q. Well how did you make it known that it wasn't consensual on the other occasions?

A. Because I didn't want it.

Q. So how did you make that clear to him?

A. I said, I told him I didn't want it.

Q. But you carried on even after that sleeping in the same bed, you say, and everything?

A. Yes.

[26] We are satisfied that this evidence left Mr Mackay's defence concerning F in as good a position as it might have been had H been called and without risking the negative consequences for his defence of the charges concerning the other complainants. Consequently, even if we had been of the view that counsel erred in not calling H, we would have concluded there was no miscarriage of justice.

[27] For the reasons we have given the conviction appeal must fail.



## **The sentence appeal**

[28] In sentencing the appellant, the Judge took the rape of F as the lead offence. She described Mr Mackay's behaviour towards all three complainants as predatory, referring to the vulnerability of the victims arising from the difference in age and what she described as their "simple and homely" nature.<sup>4</sup> She found that Mr Mackay had deliberately taken advantage of that and that he had "preyed on" them.<sup>5</sup>

[29] She took a starting point of eight years' imprisonment for the rape, to which she added two years to reflect the other offending. There were no mitigating factors. She ordered that Mr Mackay serve concurrent terms of four years' imprisonment in respect of the unlawful sexual connection with D, and six months' imprisonment in respect of the indecent assault of P. The effective term overall was a sentence of ten years' imprisonment.

[30] In advancing the sentence appeal, Mr Vigor-Brown submitted that the starting point of eight years' imprisonment for the rape was too high and that the uplift of two years was too great. He was also critical of the starting point of four years' imprisonment that the Judge took for the unlawful sexual connection with D.

[31] Mr Vigor-Brown also referred to some evidence suggesting that Mr Mackay is now suffering from dementia and may have been suffering from it at the time of the offending. In this respect, Mr Vigor-Brown referred to a report prepared by Dr Gil Newburn, a neuropsychiatrist, in August this year. Dr Newburn wrote, among other things:

An early cognitive assessment using the Montreal Cognitive Assessment tool showed impairment with a score of 22. Current assessment shows significant impairment, with disturbance in memory, attentional function, word generativity, as well as issues with motor planning and sequencing, and his capacity to learn information, hold on to that information and use it subsequently. This suggests significant frontal system impairment, along with some temporal impairment, and also right parietal impairment with his difficulty with coping [with] the 3D Diagram.

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<sup>4</sup> *R v Mackay*, above n 1, at [8].

<sup>5</sup> At [8].

[32] Dr Newburn said it was difficult to define Mr Mackay's mental state in the second half of 2010 but it was possible to make some assumptions including that "he would have been influenced, as part of a lifelong pattern, by the effects of his poor formative environment". This was a reference to the fact that Mr Mackay's father was violent when drinking, which he did frequently, and subjected him to physical violence on a regular basis. The report also commented on the long-term effects of Mr Mackay's overconsumption of alcohol.

### *Discussion*

[33] We do not consider that the sentence appeal has merit. Insofar as it relates to Mr Mackay's mental state at the time of the offending, we are unpersuaded that there is any evidence that dementia could have had any relevant role in the offending. Two features tell against the influence of dementia. First, it is clear from Dr Newburn's report that Mr Mackay was able to give his account of the events that had occurred, giving details consistent with the defence that everything that had occurred was consensual and the result of initiatives taken by the complainants. Second, no submissions were advanced to the sentencing judge that Mr Mackay's mental condition should be taken into account as a mitigating factor. It is also noteworthy that the evidence here falls short of that seen in *W (CA315/2015) v R* where there was both a medical report and affidavit evidence aimed to establish that undiagnosed dementia at the time of sexual offending may have been a causative factor in the offending.<sup>6</sup> The evidence there was still not enough to "disentangle the potential causes of the applicant's offending behaviour".<sup>7</sup>

[34] Leaving Mr Mackay's mental condition on one side, we do not consider that the sentence imposed in the District Court was excessive. While Mr Vigor-Brown was right to suggest that the rape was not attended by any violence (other than that inherent in the crime itself), there was a degree of vulnerability. While no longer a child, F was only 16 at the time of the offending and there was a very pronounced gap between the respective ages of F and Mr Mackay. This Court in *R v AM (CA27/2009)* treated the age disparity of 22 years in *R v Wirangi* as a relevantly

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<sup>6</sup> *W (CA315/2015) v R* [2016] NZCA 33.

<sup>7</sup> At [12].

aggravating feature so as to justify a sentence at the higher end of the first band of rape sentences set out in *R v AM (CA27/2009)*.<sup>8</sup> The age disparity was also present in respect of the other offending for which Mr Mackay was convicted.

[35] We do not accept Mr Vigor-Brown's submission that the starting point adopted in respect of the unlawful sexual connection with D was too high. It was within band one for such offending, as explained in *R v AM (CA27/2009)*.<sup>9</sup> In any event, it is the overall sentence that must be assessed and we do not consider that the two-year uplift given for the offending against both D and P in the present case can be criticised.

[36] For the reasons given, the sentence appeal cannot succeed.

## **Result**

[37] The application for an extension of time to appeal is granted but the appeal is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>8</sup> *R v Wirangi* [2007] NZCA 25, referred to in *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [94].

<sup>9</sup> *R v AM (CA27/2009)*, above n 8, at [113].