

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,  
OCCUPATION AND IDENTIFYING PARTICULARS OF APPELLANT  
PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS AND  
IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY  
S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF  
ANY DETAILS THAT COULD IDENTIFY THE RELATIONSHIP BETWEEN  
THE COMPLAINANTS AND THE APPELLANT REMAIN IN FORCE.**

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

**CA307/2017  
[2017] NZCA 531**

BETWEEN	A (CA307/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	4 October 2017
Court:	Winkelmann, Wylie and Whata JJ
Counsel:	C J Tennet for Appellant K S Grau for Respondent
Judgment:	20 November 2017 at 11.30 am

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**JUDGMENT OF THE COURT**

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- A     An extension of time to appeal is granted.**
- B     The appeal against conviction is dismissed.**
- C     The appeal against sentence is dismissed.**

**D Order made prohibiting publication of name, address, occupation and identifying particulars of appellant pursuant to s 200 of the Criminal Procedure Act 2011.**

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**REASONS OF THE COURT**

(Given by Whata J)

[1] The appellant, FA, was found guilty following a jury trial before Judge Hastings in the District Court at Wellington on one charge of sexual violation and three charges of indecent assault. There were three victims of his offending: TA, his stepson; and AP and DL, his nephews. He was subsequently sentenced by Judge Hastings to five years and nine months' imprisonment.<sup>1</sup>

[2] FA appeals against conviction and sentence. He says his convictions are unreasonable and makes a variety of complaints in respect of his sentence.

[3] FA also requires an extension of time to appeal. The delay is adequately explained and the Crown does not oppose. An extension is granted.

**The charges and verdicts**

[4] At trial, FA was convicted on four charges:

- (a) performing oral sex on TA between 11 September 1995 and 31 December 2000 (charge three — sexual violation by unlawful sexual connection);
- (b) touching TA's penis under a blanket between 11 September 1998 and 10 September 2002 (charge four — indecent assault);
- (c) touching AP's testicles in a kitchen in 2011 (charge five — indecent assault); and

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<sup>1</sup> *R v [FA]* [2017] NZDC 8351 [Sentencing notes].

- (d) touching DL's penis in a taxi outside a train station in 2011 (charge seven — indecent assault).

[5] FA was also found not guilty on the following charges:

- (a) touching TA's buttocks, trying to put his fingers between TA's buttocks and flicking TA's penis between 11 September 1997 and 31 December 2000 (charge one — indecent assault, representative);
- (b) touching TA's penis in a shower between 11 September 1990 and 10 September 1997 (charge two — indecency with a boy under 12); and
- (c) touching DL's testicles during the course of a massage between 1 November 2005 and 2 November 2006 (charge six — indecent assault).

### **The evidence**

[6] FA and VA married in 1991 and separated in 2011. They have three children together. TA was VA's son from a previous relationship.

#### *Charges one and two*

[7] Charges one and two were not proven. TA said FA did "little things" like touching and rubbing TA's buttocks and flicking his penis. TA said this happened "for about a week" prior to the sexual violation (charge three), and occurred when other family members were in the house but not in the same room as them. TA said he initially laughed this behaviour off.

[8] TA also referred to an occasion when FA washed TA's penis in the shower. This formed the basis of charge two. It occurred when TA was seven or eight. TA said he only recalled it after the subsequent offending.

[9] Overall, the evidence on these charges lacked detail and there was no corroborative evidence.

### *Charge three*

[10] Charge three related to events when TA was about 11 or 12. At the time, TA's mother was house-sitting for their minister, who was on a trip to Samoa. TA gave evidence that his family was getting ready for bed. FA was there, along with his three younger siblings. TA ended up sleeping next to FA. TA said he felt FA was "waiting for something", so he pretended to be asleep. He described FA touching and tickling his penis, eventually taking his pants off and then putting his mouth on his penis. This lasted for about 10 minutes.

[11] TA said he told his mum the next day, or a few days after. He said she was devastated. He also recalled a family meeting between him, FA and his mother. He said FA apologised and asked for forgiveness. All of this was confirmed by VA in her evidence. In his evidence FA simply denied any of this occurred.

[12] Unlike charges one and two, charge three was supported by detailed evidence from TA. It was also corroborated by his mother's evidence about what happened shortly after the alleged incident of sexual offending.

### *Charge four*

[13] TA's account of charge four is similarly detailed. In the charge notice, it is listed as occurring between 1998 and 2002. TA subsequently gave evidence he was 13 or 14. The offending occurred one morning when VA was already at work. TA said FA entered his bedroom and put his hand under the blanket. FA then tickled his penis and began to masturbate him. This lasted for about four or five minutes. TA was pretending to be asleep, but said he eventually mustered the courage to confront FA about it. He said FA made light of this challenge, suggesting he call his mother. TA recalled an argument between FA and his mother about this time, but no further action was taken. He said he assumed FA had told his mother, but that she had decided not to act further on it.

[14] FA denied any sexual offending, but did recall an incident where he arrived home in the morning after work to find TA in bed. He said he threw the blanket off TA, telling him to get up and go to school, which caused TA to be upset and leave.

### *Charge five*

[15] Charge five involved offending against AP, a first cousin of TA. AP gave a clear account of what he said happened. He said it occurred in 2011, when he would have been 25. He recalled preparing some food at TA's house for a rugby club fundraiser when FA returned home tipsy. He said FA proceeded to rub his left thigh up and down. He initially thought he was "being a bit cheeky". He recalled FA then started touching his genital area, which prompted him to ask, "are you alright Uncle?" He said at this point TA asked AP if he was alright, and told FA to "f-off".

[16] This account is corroborated by TA's evidence. VA also gave evidence of a time when AP, TA and FA were in the kitchen together, preparing food for a rugby club fundraiser. She recalled the following day a family meeting was arranged, at which TA told her FA had grabbed AP's genitals.

[17] FA recalled sitting next to AP on the evening they were preparing for the rugby club fundraiser. He recalled nudging AP with his elbow, slapping his thigh and giving him a bear hug, but said he did not touch AP's genitals. FA also could not recall TA being angry. FA said FA wasn't in the kitchen with AP for "particularly long", as FA went outside to collect his washing from the line.

### *Charge six*

[18] Charge six was not proven. It involved an allegation of offending against DL, another cousin of TA. DL recalled injuring his hamstring while playing rugby about ten or so years ago. TA said he should see FA for a Samoan massage (or fofu). The rest of the family were also at home at the time. He recalled getting into a lavalava and laying down on his stomach. He said he felt FA's wrists moving up and down his leg, eventually touching his testicles. He remembered FA squeezing his testicles against his leg. He said the massage lasted for about half an hour, until TA came back into the lounge. Shortly after, FA slapped his leg and said, "all done". DL also recalled FA joking about massaging his testicles.

[19] DL was cross-examined at some length about the massage. He accepted that he was wearing underwear under the lavalava. Mr Tennet also cross-examined DL on

who was present in the room at the time. DL maintained under cross-examination that he didn't think TA saw it, as he was out of the room. This prompted Mr Tennet to question how plausible it was for TA to be in the kitchen for 30 minutes making a sandwich.

[20] FA recalled giving DL a massage. He said his wife, kids, TA, DL and another person were in the lounge at the time. He said he didn't ask DL to change into a lavalava because he was wearing his rugby shorts. He said he told DL to lie down flat on his stomach. He refuted that he touched DL's testicles during the massage.

#### *Charge seven*

[21] Charge seven also involved offending against DL, who gave a detailed account of what occurred. He was about 24, and on his way to Waterloo Train Station to see his mother. FA saw him at Wellington Station and offered to take him in his taxi to Waterloo Station. They arrived about 15 minutes before his mother. He said while they were waiting for her to arrive, FA touched his leg. DL recalled his mother parking directly behind the taxi when she arrived. As he motioned to get out of the car, he said FA reached over and quickly touched his testicles. When he was halfway out of the car, he said FA told him, "I love you, son" and touched his buttocks as he left.

[22] DL recalled feeling shocked. He gave a detailed account of the moment at which he told his sister, his mother and TA.

[23] FA remembered seeing DL during the time he was driving taxis, and driving him to Waterloo Station. He said he worked in front of Wellington Station, and agreed he saw DL walking past and waved him to come over to his taxi. He said he touched him on the shoulder as he got out, but that "nothing significant happened". He denied touching his testicles and bottom, and telling him he loved him.

#### **Jurisdiction and grounds of appeal**

[24] Although it relates to historic offending, this proceeding was commenced after the Criminal Procedure Act 2011 entered into force. It falls to be determined in

accordance with the provisions of that Act.<sup>2</sup> This Court must allow an appeal if, having regard to the evidence, the jury's verdict was unreasonable or a miscarriage of justice has occurred for any reason.<sup>3</sup>

[25] The grounds of the conviction appeal are:<sup>4</sup>

- (a) the guilty verdict on charge four is inconsistent with the not guilty verdicts on charges one and two;
- (b) the guilty verdict on charge five is unreasonable; and
- (c) the guilty verdict on charge seven is inconsistent with the not guilty verdict on charge six.

[26] The sentence is appealed on the basis:

- (a) the initial starting point of five years and six months for the lead offence of sexual violation was manifestly excessive;
- (b) the starting point following uplift was manifestly excessive;
- (c) insufficient discount was given for personal mitigating factors; and
- (d) the end sentence was manifestly excessive.

### **The framework for assessment**

[27] The test for whether a verdict is unreasonable is as set out by the Supreme Court in *R v Owen*:<sup>5</sup>

The question is whether the verdict is unreasonable. That is the question the Court of Appeal must answer. The only necessary elaboration is that expressed earlier, namely that a verdict will be unreasonable if, having regard

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<sup>2</sup> Criminal Procedure Act 2011, s 398.

<sup>3</sup> Section 232.

<sup>4</sup> Initially, FA also appealed on the basis the verdict on charge three was unreasonable. This ground was effectively abandoned before us.

<sup>5</sup> *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

to all the evidence, the jury could not reasonably have been satisfied to the required standard that the [defendant] was guilty.

[28] In forming a view about the verdicts, it is however necessary to recall:<sup>6</sup>

- (a) the appellate court is performing a review function;
- (b) the weight to be given to discrete pieces of evidence is essentially a jury function; and
- (c) reasonable minds may disagree on matters of fact.

[29] A jury arriving at inconsistent verdicts is an example of an unreasonable verdict. As the Supreme Court explained in *B (SC12/2013) v R*, logically irreconcilable verdicts may indicate a jury's thinking has gone awry in some fundamental way.<sup>7</sup>

[T]he courts' concern with doing justice may be engaged in respect of particular verdicts. Where they deliver multiple verdicts which are not capable of logical reconciliation, juries give some insight into their thought processes. Logically irreconcilable verdicts may indicate that the jury's thinking has gone awry in some fundamental way: in particular, the jury may have acted on a misunderstanding of the law or reached an illegitimate compromise. In such circumstances, a court may feel it necessary to intervene in order to ensure that justice is done, despite its respect for the jury's function in the criminal justice process. An obvious difficulty, however, is how a court can determine the basis for a jury's apparently inconsistent verdicts given that jury deliberations are protected from outside scrutiny.

### **The claims**

[30] We turn now to each of the alleged grounds of unreasonableness or inconsistency.

*Was the guilty verdict on charge four inconsistent with the not guilty verdicts on charges one and two?*

[31] Mr Tennet for FA submitted in relation to charge four:

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<sup>6</sup> At [13] citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

<sup>7</sup> *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [67] (footnotes omitted).



- (a) FA's evidence was equally clear on charges one, two and four.
- (b) The level of detail of the evidence given on those three events is so similar they cannot be distinguished.
- (c) TA was supported by his mother on charge three (in terms of the confrontation between FA and VA) but he was not supported in a similar way in relation to charge four.
- (d) The essence of TA's evidence was that FA brazenly rang VA to say he could do what he liked, then talked to her afterwards, at which point she screamed at the receipt of bad news. This was not supported by evidence from VA.
- (e) In order to find corroboration, the jury merged this incident and an incident where TA ran away to the rugby club.

### Assessment

[32] There are clear and cogent differences between the evidence on charges one and two, and the evidence relating to charge four. As Ms Grau for the Crown noted, TA's description of the conduct underlying charge one lacked specificity, and the jury may have also been affected by the fact TA himself had laughed it off at first and described it as "little things". We also agree with Ms Grau that in relation to charge two, the jury may well have been left unsure the touching in the shower was in fact indecent or that there was an indecent motive.

[33] By contrast, charge four involved definitive evidence about the facts of the alleged offending — it was a specific event at a particular time and location. The opportunity for this to occur appears to have been corroborated by FA who admitted to an occasion of returning home to find TA in bed and throwing a blanket off. It was clearly available to the jury to prefer TA's account of the specific offending, while not accepting his evidence in relation to the other, more generalised, alleged offending. Finally, it is pure speculation to suggest the jury confused the incident where TA ran away with the allegations underpinning charge four.

[34] We therefore dismiss this ground of appeal.

*Was the guilty verdict on charge five unreasonable?*

[35] Mr Tennet conceded at the outset that as there was no other charge in relation to AP, no inconsistency arises. He submits, however, the verdict was unreasonable because:

- (a) FA was, by all accounts, drunk on the evening of the offending.
- (b) He described something playful.
- (c) The person who got most offended was TA, and the friction arose because of that.
- (d) AP's concern arose when he discussed matters in the car with TA who told him he had been "violated" by FA. He submits that influenced AP's perception of what happened.

#### Assessment

[36] This ground has no merit. The relevant legal test is whether the jury could not reasonably have been satisfied to the required standard that FA was guilty. Nothing in Mr Tennet's submissions demonstrated why it would have been unreasonable for the jury to be satisfied of FA's guilt. On the contrary, there was clear and cogent evidence supporting AP's complaint, including AP's direct evidence, TA's eye-witness evidence and his mother's evidence about the family meeting which followed. It was therefore available to the jury to not accept Mr Tennet's suggestion that AP's evidence was tainted by his conversation with TA.

*Was a guilty verdict on charge seven inconsistent with a not guilty verdict on charge six?*

[37] Mr Tennet submits the verdict on charge seven is inconsistent with the verdict on charge six. In short, he contends charge six involved a prolonged and continued stroking under the pretext of giving a massage, whereas charge seven was a very brief

encounter in terms of actual touching. He says charge six was supported by other witnesses and FA agreed to all material facts (except the crucial issue of inappropriate touching), yet the jury were not satisfied beyond reasonable doubt. He says it is impossible to reconcile the two decisions when one considers the amount of evidence, and the quality of evidence, on each.

### Assessment

[38] This ground is equally meritless. The context of the allegations and the evidence supporting each allegation was entirely different. It was plainly available to the jury to reason that, in the context of a massage of the upper thigh, any touching of the genitals may have been accidental. By contrast, there could be no confusion about what happened in the taxi, given the context of that offending. The jury was then entitled to deploy, as Ms Grau submits, propensity reasoning to determine it was more likely DL was telling the truth that FA touched him indecently, having been sure about TA's and AP's allegations.

### *Outcome of the conviction appeal*

[39] Accordingly, the appeal against conviction is dismissed.

### **Sentencing appeal**

[40] Judge Hastings identified charge three (sexual violation by unlawful sexual connection) as the lead charge and sentenced FA on a concurrent basis with uplifts to reflect the totality of his offending.<sup>8</sup> He referred to four aggravating features of FA's offending: the vulnerability of TA, the trust TA placed in him, the scale of offending, and the lasting emotional and psychological harm caused.<sup>9</sup>

[41] He placed charge three in band two of the unlawful sexual connection bands (USC bands) set out in *R v AM (CA27/2009)*,<sup>10</sup> fixing a starting point of five years and six months, which he uplifted by four months for charge four (indecent assault on TA),

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<sup>8</sup> Sentencing notes, above n 1, at [7].

<sup>9</sup> At [8].

<sup>10</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [113].

and one month each for charges five and seven (the indecent assaults on AP and DL respectively).<sup>11</sup> This led to an “intermediate point” of six years’ imprisonment.<sup>12</sup>

[42] Judge Hastings identified previous good character as a mitigating factor, for which he was willing to discount three months.<sup>13</sup> He resisted a more substantial discount as although FA had no prior convictions, the present offending “was not a momentary lapse of judgement”, having taken place against three victims over ten years.<sup>14</sup> He rejected discounts for remorse, medical condition, and registration on the sex-offender register. This led to an end sentence of five years and nine months’ imprisonment.

[43] Mr Tennet submits the sentence was manifestly excessive because the Judge:

- (a) double counted the indecent assaults by treating the scale of offending as an aggravating factor in fixing the starting point on the lead sentence of sexual violation, and then also uplifting by reference to the indecent assaults;
- (b) placed too much weight on the harm to AP and DL;
- (c) wrongly took into account breach of trust in relation to AP and DL;
- (d) took into account irrelevant aggravating features which were not present (scale of offending and lasting psychological and emotional harm) — meaning the offending fell within band one, or the lowest end of band two;
- (e) uplifted excessively for the indecent assaults against AP and DL, which should either not have merited a separate uplift or should have been subsumed in a totality assessment;

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<sup>11</sup> Sentencing notes, above n 1, at [13]–[14].

<sup>12</sup> At [15].

<sup>13</sup> At [19].

<sup>14</sup> At [19].

- (f) only gave a three-month discount for good character; and
- (g) wrongly declined the request for a slight discount for sex-offender registration.

### *Assessment*

[44] We agree with the Crown that Judge Hastings was justified in placing the lead offence within band two of the USC bands given two clearly aggravating features:

- (a) FA took advantage of TA's youth and vulnerability; and
- (b) FA's offending involved a clear breach of trust as a stepfather.

[45] USC band two spans starting points of four to ten years.<sup>15</sup> A starting point of five years and six months for the sexual violation charge, while harsh, was within range.

[46] We accept the Judge appears to have incorporated the indecency offending into the assessment of starting point for the sexual violation, thereby technically double counting that offending. But we do not agree that the Judge *unfairly* double counted it, because the combined uplift of six months for the three indecent assaults was small and by itself manifestly inadequate. To illustrate, a five-year starting point for the sexual violation without regard to the indecency offending was well within range. We think uplifts of three months for the offending against AP and DL (both adults at the time) would have been justified. Furthermore, an uplift of one year for the additional offending against TA, when he was still only 13 or 14, was available to the Judge. This offending exacerbated the significant harm already caused by the sexual violation.

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<sup>15</sup> As the Court of Appeal in *R v AM (CA27/2009)*, above n 10, stated at [117], band two encompasses cases involving two or three of the factors, increasing culpability to a moderate degree. As well as vulnerability and breach of trust, we note emotional and psychological harm is considered an aggravating factor: at [44].

[47] The task of an appellate court is not to dissect each aspect of sentencing, but rather to ask whether the end result was manifestly excessive.<sup>16</sup> In the result, an end starting point of six years was not manifestly excessive.

*Good character*

[48] The Judge acknowledged FA's good character in the following terms:<sup>17</sup>

[18] The first mitigating factor is that you have no previous convictions. We heard from other members of your family at trial that as far as they were concerned you were of good character. Confirming this are a number of letters of reference which have been handed to me this afternoon. [KP] writes, and I quote, "My uncle [FA] is a loving and caring person who has been committed to looking after me and my siblings. I have always seen him as a hardworking person of good moral character." Your brother-in-law writes that you are dependable, intelligent and peaceful. Your brother writes that you are a quiet, funny, humble and a pure-hearted individual. The Minister of [FA's church] writes that you are a very hard worker and a humble person. Finally, the retired Reverend Elder [TP] writes that you are, and I quote, "A person that I fully trust and adore and I have no regret, nor doubt, when I left my children in his care".

[49] But he afforded only a modest discount of three months for previous good character because the offending took place over 10 years.

[50] Mr Tennet submits a more substantial discount for good character was available, citing the following passage in *Tonga v R*:<sup>18</sup>

[24] Previous good character is always a difficult concept in cases such as this where there is prolonged offending over more than two years. It is certainly applicable at the time of the first offence, but can hardly be claimed by the time Mr Tonga filed his 10th or 20th or any of the numerous subsequent fraudulent applications.

[51] We are not attracted to Mr Tennet's argument. The principles underlying discount for good character were set out by this Court in *R v Findlay*, where it noted:<sup>19</sup>

[91] This Court has, however, recognised the place of good character and a life of community involvement as a mitigating feature. In *R v Howe* [1982] 1 NZLR 618 at 629 this Court said: "Persons who have shown themselves generally law-abiding citizens of good character are usually entitled to invoke their creditable record in mitigation when they come before the Courts, even

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<sup>16</sup> *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

<sup>17</sup> Sentencing notes, above n 1.

<sup>18</sup> *Tonga v R* [2011] NZCA 257.

<sup>19</sup> *R v Findlay* [2007] NZCA 553 at [91].

for quite serious offences”. The point finds legislative endorsement in s 9(2)(g) of the Sentencing Act. Two things underpin this feature of mitigation: recognising a fall from grace as punishment in itself, and recognising the greater potential for rehabilitation where community involvement and good character bears witness to a reduced probability of re-offending.

[52] In the present case, the first of the two principles identified in *Findlay* applies here but the second principle does not. FA continues to deny the offending. This bears negatively on both his capacity to rehabilitate and to reoffend. Furthermore, his offending spanned a considerable period and three different victims. Much of the credit for good character was therefore spent over this lengthy period of offending.<sup>20</sup> A three-month credit, while modest, was sufficient to recognise FA’s previous good character.

[53] Other issues such as old age and sex-offender registration were not pursued in argument before us but, as argued by the Crown, we see nothing in FA’s present condition to warrant a substantial discount for age or health (he has high blood pressure and requires some medication). A discount for sex-offender registration was rejected by this Court in *Bell v R*;<sup>21</sup> we see no reason to depart from it.

## **Outcome**

[54] An extension of time to appeal is granted.

[55] The appeal against conviction is dismissed.

[56] The appeal against sentence is also dismissed

[57] To protect the identity of the complainants we make an order prohibiting publication of the name, address, occupation and identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act.

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<sup>20</sup> *King v R* [2015] NZCA 475.

<sup>21</sup> *Bell v R* [2017] NZCA 90.

Solicitors:  
Crown Law Office, Wellington for Respondent