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SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA718/2022
[2024] NZCA 1**

BETWEEN	MICHAEL JOHN KAY Appellant
AND	THE KING Respondent

Hearing:	28 August 2023
Court:	Miller, Ellis and van Bohemen JJ
Counsel:	T J Mackenzie for Appellant S N McKenzie and R W Donnelly for Respondent
Judgment:	19 January 2024 at 1.00 pm

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
B The appeal against sentence is dismissed.
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REASONS OF THE COURT

(Given by Ellis J)

[1] Following a trial before Judge Harvey and a jury, Mr Kay was convicted of the following charges:

- (a) one charge of meeting a young person following sexual grooming;¹
- (b) two charges of sexual violation by unlawful sexual connection;² and
- (c) four charges of indecent assault on a young person under 16.³

[2] On 13 December 2022, Judge Harvey sentenced Mr Kay to six years' imprisonment.⁴

[3] Mr Kay now appeals both his conviction and sentence.

Offending and convictions

[4] Mr Kay was 43 years old at the time of the relevant events. The complainants—to whom we refer as “A” and “L”—were both 14.

[5] Mr Kay was a friend of A's family. It seems A and Mr Kay would sometimes text each other, and in the course of their messaging on 14 August 2020, Mr Kay asked if A wanted to go for a drive. He agreed that A's friend, L, could come along and said he would bring painkillers for A's knee, which was sore following an operation. Nothing untoward occurred on that occasion, although Mr Kay knew the girls were young and that they would be sneaking out of home late at night.⁵

[6] From that time until 20 August 2020, Mr Kay and A continued to text; some of Mr Kay's messages indicated a sexual interest in A.⁶ That night, both A and L again snuck out of home and Mr Kay took them for a drive to an area near Tiwai. Mr Kay was driving recklessly, which caused both girls some concern.⁷

¹ Crimes Act 1961, ss 131B(1)(a)(i) and (b)(i) (maximum penalty of seven years' imprisonment) (charge one).

² Crimes Act, ss 128(1)(b) and 128B (maximum penalty of 20 years' imprisonment) (charges two and three, charge three being representative).

³ Crimes Act, s 134(3) (maximum penalty of seven years' imprisonment) (charges four, five, six and seven).

⁴ *R v Kay* [2022] NZDC 25959 [judgment under appeal].

⁵ At [2].

⁶ At [3].

⁷ At [4].

[7] While at an area “near Tiwai”, Mr Kay gave A a 300 mg tablet of gabapentin and a codeine pill.⁸ A and L then decided to go swimming in their underwear. Unbeknownst to them, Mr Kay followed them to the water in his underwear. Feeling uncomfortable, the girls returned to Mr Kay’s car, where he said they should not get dressed but get into the back of the car where they would share body heat to warm themselves.

[8] While in the backseat, Mr Kay indecently assaulted L by rubbing her vagina through her underwear.⁹ L said she then also took a 300 mg gabapentin pill to dissociate from what had happened. Mr Kay began driving towards Bluff, with A in the front seat and L in the back. As they were driving, Mr Kay reached an arm over and inserted his finger into A’s vagina.¹⁰ A says that Mr Kay touched her in and around her vagina on at least 10 occasions over the course of the night.¹¹

[9] When they arrived in Bluff, A and L went to the Stirling Point toilets. They had thoughts of running away but could not do so because Mr Kay was sitting on a bench nearby. When they returned to the car, Mr Kay again inserted one of his fingers into A’s vagina.¹²

[10] Mr Kay dropped L off at her home. A remained in the front seat of the car and tried to tell Mr Kay that she was going to sleep. Mr Kay took his penis out of his trousers, grabbed A’s hand and forced her to masturbate him.¹³ After driving through Invercargill, Mr Kay then endeavoured to pull A onto his lap and remove her pants, but was unsuccessful.¹⁴ He drove A back to her home and again tried to pull her pants down. A resisted and got out of the car.¹⁵ Mr Kay told A that what happened was a secret.

[11] The jury found him guilty on all seven charges.

⁸ The medical evidence admitted by consent at trial was that gabapentin and codeine “might cause sedation, dizziness, and maybe nausea”. 300 mg of gabapentin is not a particularly high dose and 100 mg of codeine is in the mid-range.

⁹ This is the basis for charge seven (indecent assault).

¹⁰ This is the basis for charge two (unlawful sexual connection).

¹¹ This is the basis for charge three (unlawful sexual connection).

¹² This was the basis for a charge of unlawful sexual connection that was withdrawn before trial.

¹³ This is the basis for charge four (indecent assault).

¹⁴ This is the basis for charge five (indecent assault).

¹⁵ This is the basis for charge six (indecent assault).

Conviction appeal

Approach

[12] Under s 232(2)(a) of the Criminal Procedure Act 2011 (the CPA), a first appeal court must allow an appeal against a conviction by a jury if it is satisfied that, having regard to the evidence and the criminal standard of proof, the jury's verdict was unreasonable.¹⁶ There is no requirement to show that a miscarriage of justice has occurred; if unreasonableness is established, s 232(2)(a) presumes the verdict cannot be supported.¹⁷

[13] The following guiding principles are relevant where s 232(2)(a) is relied on:¹⁸

- (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
- (b) Appellate review of the evidence must give take appropriate account of any advantages the jury may have had such as in assessing witness honesty and reliability.
- (c) The weight to be given to individual pieces of evidence is essentially a jury function.
- (d) Reasonable minds may disagree on matters of fact.
- (e) Because the jury is the fact finder, appellate courts should not lightly interfere in this area.

[14] An appellant who invokes s 232(2)(a) must also recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate

¹⁶ *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [14], citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [86]–[87]. These cases were decided under s 385 of the Crimes Act, which has since been repealed and replaced by s 232 of the Criminal Procedure Act 2011. *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 discusses the changes made at [8]–[9] and confirms that the approach in *Owen* applies to the new section at [10(c)].

¹⁷ *Wiley v R*, above n 16, at [10(c)].

¹⁸ These principles are derived from *R v Munro*, above n 16, as expressed in *Owen v R*, above n 16, at [13].

clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.¹⁹

[15] Where unreasonableness is made out, the court retains no discretion and must allow the appeal. Similarly, where the court is not satisfied of the above, the court again retains no discretion and must dismiss the appeal.²⁰

Grounds

[16] Ultimately, the conviction appeal focused on charges two, three and seven. There were three main strands to the submissions of Mr Mackenzie, for Mr Kay, that the jury's verdicts on those charges were unreasonable:

- (a) the inconsistencies between the evidence of A and L as to the location of the offending against L;
- (b) the improbability of L's evidence that she did not see the offending against A, when she had been well-positioned in the car to do so; and
- (c) the physical difficulty involved in committing the offending as alleged (the offending against A was said to have occurred when she was fully clothed in the passenger seat while Mr Kay was driving, and the offending against L was said to have occurred when A was sitting between her and Mr Kay in the back seat).

Were the verdicts unreasonable?

[17] We consider each of the three strands of the unreasonableness argument in turn.

Location of offending against L (charge seven)

[18] The charge list given to the jury referred to the indecent assault on L taking place "near Tiwai Point". That was consistent with what L said in her evidential video

¹⁹ *Owen v R*, above n 16, at [13(f)].

²⁰ *Wiley v R*, above n 17, at [10(e)].

interview (EVI). But A said in her EVI the offending occurred somewhere else—either Stirling Point or Bluff Hill. Mr Kay contends this inconsistency cannot be reconciled and makes both complainants’ evidence overall so generally unreliable that it could not reasonably be accepted by a jury.

[19] There is nothing in this point. As Ms McKenzie, for the Crown, said, despite the apparent conflict over location, L was consistent and clear in placing Mr Kay’s assault on her at Tiwai. She maintained that position in both her EVI and under cross-examination. By contrast, A acknowledged under cross-examination that she was not wholly certain about the location, said it had been “a big night” and that she could not “exactly keep track” of all of the places they had been and in what order.

[20] And as the Judge correctly directed the jury, location is not an element of the charges faced by Mr Kay; the jury could have found the charges proven without being sure about where they occurred.²¹ Moreover, the inconsistencies between the complainants’ statements were explored by counsel and were squarely part of the defence case. The jury were entitled to find the inconsistencies did not ultimately bear on the complainants’ credibility on the key issues.

Offending against A not seen by L (charges two and three)

[21] As noted earlier, some of the offending against A took place while she was sitting in the front passenger seat of Mr Kay’s car and he was driving. A’s evidence was that digital penetration occurred numerous times during the drive.

[22] L was in the back, sitting behind the passenger seat.

[23] L’s evidence was that she saw Mr Kay’s hands on the wheel of the car, the gearstick and sometimes changing the music. She acknowledged she was watching him closely. Although L said she saw Mr Kay’s hand on A’s thigh (once) she did not see anything else happen of a sexual nature.

²¹ In a jury question, the jury asked what “near Tiwai” meant.

[24] Although Mr Mackenzie submits this absence from L's evidence constitutes an "inconsistency" between A and L, we do not agree. Not only does it point against any suggestion of collusion, but L's evidence was that she saw Mr Kay's hand on A's thigh only when she "sort of leaned to the right a bit and looked forward" while she was trying to see what song was playing on the car stereo. As a matter of common sense, L's position in the car did not give her a continuous unobstructed view of what was happening in the front seats, and it is plausible that she did not see any of the offending behaviour which, no doubt, Mr Kay would have tried to conceal. Moreover, it was dark, and A's own evidence was that Mr Kay would take his hands out of her pants every time L turned on her phone and there was light in the car. And lastly, it is possible that L may also have been under the influence of the gabapentin.

Offending physically difficult (charges two, three and seven)

[25] Mr Mackenzie also submitted that A's account of the digital penetration offending is not believable because at the time she said it happened Mr Kay was driving fast, and A was fully clothed and sitting across the car from him. He contends the offending against L is also improbable because A was sitting between L and Mr Kay in the back seat at the relevant time.

[26] The physical logistics of the offending was squarely put to A at trial. She described how she was sitting and was trying to move her legs away from Mr Kay. There was the following exchange between her and defence counsel:

Q. How was he managing to get his left hand inside your pants and your underwear –

A. Because he would, like, pull on my thigh.

Q. Yeah?

A. Mhm.

Q. While he's driving?

A. Yeah. And I wasn't risking him crashing. Like, he was already looking over, taking his eyes off the road. And I know he's stronger than me, because he used to lift me above his head.

Q. So you're absolutely certain that his fingers went inside your vagina?

A. Yes.

[27] The jury had the benefit of seeing and hearing A's evidence and were entitled to find that Mr Kay was able to lean over the centre console to touch A as alleged.

[28] In terms of the offending against L, both A and L said in evidence that, although A was sitting in the middle at this time, she leaned forward towards the front console, which was when Mr Kay was able to reach behind her and touch L's thigh. There is nothing so implausible in this account as to render the jury's conviction on that charge unreasonable.

Conclusion

[29] For the reasons we have given, the verdicts on charges two, three and seven cannot be said to be so unreasonable that no jury, properly instructed, could have been satisfied of Mr Kay's guilt beyond reasonable doubt. The conviction appeal fails accordingly.

Sentencing in the District Court

[30] In sentencing Mr Kay, the Judge agreed with the Crown that there were a number of aggravating features present in the offending:

- (a) the extent of the offending—it involved two victims who were 14 years old and, in relation to A, involved multiple instances of offending during the course of the evening;²²
- (b) the breach of trust, especially in relation to A, with whose family Mr Kay enjoyed a close relationship (to the extent that he was seen by A as an “honorary uncle”);²³
- (c) Mr Kay's intention that there be some sort of sexual contact (although the Judge did not go so far as to suggest that Mr Kay intended for the sexual contact to be without consent);²⁴

²² Judgment under appeal, above n 4, at [26].

²³ At [27].

²⁴ At [28].

- (d) the provision of gabapentin to the girls for the purpose of “diminish[ing] their resistance”;²⁵
- (e) a very high degree of planning and premeditation, given the text messages, the steps taken to isolate the girls and the provision of drugs;²⁶ and
- (f) the vulnerability of the complainants.²⁷

[31] In combination, these factors satisfied the Judge that Mr Kay’s offending “[did] not fall towards the bottom end” of *R v AM* band two.²⁸

[32] The Judge considered it important that the sentencing recognised both victims and so chose to impose cumulative sentences.²⁹ He set a starting point of five years’ imprisonment for the offending against A, and 18 months’ imprisonment for the offending against L.³⁰

[33] Ultimately, the six year end sentence was comprised as follows:³¹

- (a) four years and nine months’ imprisonment for the two charges of sexual violation against A;
- (b) a cumulative 15 months’ imprisonment for the charge of indecent assault against L; and
- (c) for the three indecent assault charges and the one charge of grooming against A, a concurrent sentence of two years’ imprisonment.

²⁵ At [29]; gabapentin is usually used to help with nerve pain arriving from shingles, and in the treatment of seizures and restless leg syndrome.

²⁶ At [31].

²⁷ At [32].

²⁸ At [35], citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [117]–[119]: band two (unlawful sexual connection) has a starting point range of 4–10 years’ imprisonment.

²⁹ Judgment under appeal, above n 4, at [36].

³⁰ At [38].

³¹ At [43]–[44].

Sentence appeal

Approach

[34] Under s 250(2) of the CPA a first appeal court must allow an appeal against sentence if satisfied that:

- (a) for any reason, there is an error in the sentence imposed on conviction;
and
- (b) a different sentence should be imposed.

[35] Where these conditions are not made out, the court retains no discretion and must dismiss the appeal.³²

[36] When considering whether a different sentence should be imposed, the appeal court has regard to the end sentence, rather than the process by which it was reached.³³ It is appropriate for the court to intervene where the sentence being appealed is “manifestly excessive” and is not justified by the relevant sentencing principles.³⁴ It must be shown that there has been an error made by the sentencing Judge.³⁵ The court cannot “tinker” with a sentence imposed where that sentence is nevertheless in range.³⁶

Grounds

[37] Mr Mackenzie says several errors were made in assessing the aggravating features of Mr Kay’s offending, which led to starting points that were too high and an end sentence that was manifestly excessive.

[38] At a general level, Mr Mackenzie submitted the overall features of this case point toward a combined starting point at the lower end of band two of *R v AM*: around five years’ imprisonment. If that is discounted by six months for good character, the end sentence should have been one of four years and six months’ imprisonment.

³² Criminal Procedure Act, s 250(3).

³³ *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

³⁴ At [32]–[35].

³⁵ At [27].

³⁶ *R v Boyd* (2004) 21 CRNZ 169 (CA) at [38].

[39] More specifically, Mr Mackenzie advanced the following arguments.

- (a) The Judge effectively double counted the fact of two victims: once in finding it an aggravating feature of the offending itself and again in imposing a cumulative sentence. This error is said to have added an extra 15 months to Mr Kay's sentence.
- (b) The Judge placed too much weight on breach of trust; Mr Kay had not been "trusted" by A's family to take her out in his car, and the fact that A referred to him as an "uncle" wrongly suggested a quasi-familial relationship. A had only known Mr Kay for about four years—he was no more than as a family friend.
- (c) The Judge's reasoning on the issue of pre-meditation was inconsistent. Although the Judge said Mr Kay had not set out to commit non-consensual acts, the convictions were for non-consensual offending, and the Judge found the offending was planned and premeditated to a high degree. Mr Mackenzie submits that, on the Judge's view of the evidence, the offending could equally be described as spontaneous.
- (d) The gabapentin was overstated as an aggravating factor. A was already familiar with gabapentin (having been prescribed it herself) and had asked Mr Kay to give some to her previously. L's description of Mr Kay giving her, and her taking, the drug was more consistent with teenage curiosity than some sinister plan to drug her.
- (e) The Judge was wrong to conclude that a "high" degree of vulnerability was present. This was a case of moderate vulnerability; the complainants were otherwise normal teenagers who were able to get in and out of the car multiple times.

Was the sentence manifestly excessive?

[40] We do not consider that the end sentence here was manifestly excessive, for the reasons that follow.

[41] First, we do not accept there was double counting. That is because we do not accept the Judge considered a five year starting point for the more serious offending against A would—absent his desire to impose a cumulative sentence for the offending against L—be appropriate for that offending. Rather, it can reasonably be inferred that he arrived at five years after he had subtracted the 18 month cumulative sentence from the starting point of six years and six months’ imprisonment he would otherwise have adopted. That inference can be drawn from his comment that the offending against A “does not fall towards the bottom end” of *R v AM* band two,³⁷ which is where a starting point of five years’ imprisonment would sit.³⁸ The number of aggravating factors identified by the Judge (including that there were two complainants) also supports that inference.

[42] Second, we can discern no error in the Judge’s identification of relevant aggravating factors. More particularly:

- (a) there were two complainants, both 14 years old;
- (b) regardless of the significance of the “uncle” nomenclature, Mr Kay was friend of A’s family who was significantly older than she and in whom she was entitled to (and indeed naturally would have) placed a measure of trust and confidence;
- (c) Mr Kay also betrayed the trust of A’s parents; he exploited their friendship to get close to A and encouraged her to sneak out of their house late at night without their knowledge;

³⁷ Judgment under appeal, above n 4, at [35].

³⁸ The bands for unlawful sexual connection are: band one: 2–5 years; band two: 4–10 years; and band three: 9–18 years as per *R v AM* (CA27/2009) above n 28, at [113].

- (d) there was undoubtedly grooming behaviour which, by definition, implies premeditation; as the Judge said, it seems clear that Mr Kay intended that some sort of sexual activity would occur when he offered to take the girls driving and when he offered them drugs;³⁹
- (e) relatedly, there is nothing inconsistent or illogical in the Judge's view that Mr Kay did not plan non-consensual sexual activity with either of the complainants (hoping that they would consent), but that he did plan some kind of sexual activity, with A in particular;⁴⁰
- (f) regardless of whether A was familiar with gabapentin, whether L chose to take the drug and of whether Mr Kay was fully aware of its effects, gabapentin is a prescription only medication and his supply of it to two 14-year-old girls can, at best, be seen as an attempt to curry favour with them; and
- (g) similarly, it is impossible not to see the girls as vulnerable—despite their possession of cell phones:
 - (i) they were 14-year-old girls alone with a man in his forties late at night in a remote location;
 - (ii) Mr Kay had control over their only immediate means of getting home and they were reliant on him to drive them safely; and
 - (iii) they had consumed medication with potentially sedating effects.

[43] Considering these factors collectively—together with the number of unlawful acts committed—we agree with the Judge that this was a case towards the middle of *R v AM* band two; a starting point of six and a half years' imprisonment (or five years plus 18 months cumulative) was well within range. Quite rightly, no issue is taken

³⁹ We note the grooming charge did not ultimately form part of Mr Kay's conviction appeal.

⁴⁰ Even consensual sexual activity would have been unlawful, given A and L were both 14 at the time of the offending.

with the six-month discount for good character and so the sentence appeal must fail accordingly.

Result

[44] The appeal against conviction is dismissed.

[45] The appeal against sentence is dismissed.

Solicitor:
Crown Solicitor, Invercargill for Respondent