IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 86/2017
[2018] NZSC 55

BETWEEN	GRAHAM THOMAS ROWE Appellant
AND	THE QUEEN Respondent

Hearing:	20 February 2018
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	S J Zindel and H Cuthill for Appellant B J Horsley and P D Marshall for Respondent
Judgment:	21 June 2018

JUDGMENT OF THE COURT

A The appeal is allowed. The appellant's conviction is quashed.

B There is no order for retrial.

REASONS

ELIAS CJ, GLAZEBROOK, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[1] Following a trial by jury in the Nelson District Court, Mr Rowe was found guilty of a charge of doing an indecent act with intent to insult contrary to s 126 of the Crimes Act 1961. The charge arose out of an incident at Kaiteriteri beach near Nelson. On the morning of 23 January 2016, Mr Rowe was discovered by an off-duty police officer taking photographs with a zoom lens. The subjects of the photographs were three bikini-clad teenage girls some distance away from Mr Rowe on the beach. They were unaware Mr Rowe was taking photographs of them.

[2] Mr Rowe appealed unsuccessfully against his conviction to the Court of Appeal.[1] His further appeal to this Court[2] raises the question as to whether the evidence was sufficient to support the conclusion that Mr Rowe's conduct comprised

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1 *Rowe v R* [2017] NZCA 316, [2017] NZAR 1211 (Clifford, Lang and Mander JJ) [*Rowe* (CA)].
2 Leave to appeal granted: *Rowe v R* [2017] NZSC 157.

an indecent act with intent to insult. I address this question after setting out the background, the statutory scheme and the approach of the Court of Appeal.

Background

[3] The relevant facts can be stated shortly.

The factual narrative

[4] On the morning of 23 January 2016, Sergeant Daniel Isherwood was visiting Kaiteriteri beach whilst on holiday. At about 9.40 am, whilst walking along the beach, Sergeant Isherwood saw a man bending down or crouching by a campervan. The man was holding a camera with the zoom lens extended pointing towards three girls whom the officer estimated were aged about 12–15 years. Sergeant Isherwood said he did not think the girls were aware of the man, identified as Mr Rowe who, at that point, was about 30 metres away.

[5] Sergeant Isherwood returned to his car in the nearby carpark but continued to watch Mr Rowe for about five minutes. His evidence was that Mr Rowe walked to a concrete seat and bench area and continued to take photographs. The Sergeant approached Mr Rowe and said he wanted to talk to him about the photographs. Mr Rowe accepted he had been taking photographs and told the officer that there was nothing wrong with that. Mr Rowe also accepted he did not have permission to take the photographs. Mr Rowe said he would show the photographs to the officer and offered to delete them. Sergeant Isherwood took the camera from Mr Rowe and went and called the Nelson police.

[6] After making this phone call, Sergeant Isherwood returned to Mr Rowe in his campervan. He saw that Mr Rowe was using three electronic devices. Mr Rowe confirmed he had images of young girls downloaded on the devices. These photographs were in a folder marked "Girls". No objectionable material was found in the extensive number of photographs of young women on the devices.

[7] The police officer who spoke to the adults with the girls after the local police arrived on the scene described one parent as "a little" upset and the other "particularly" upset on learning the photographs had been taken.

The trial process

[8] The charge faced by Mr Rowe related to five photographs. In one of these photographs the girls appear to be posing. There was evidence one of the parents had also been taking photographs of the girls. The other photographs show the girls standing around on the beach.

[9] Prior to trial, Mr Rowe applied for a dismissal of the charge under s 147 of the Criminal Procedure Act 2011. The application was unsuccessful.[3] Judge Harrop found that, depending on the circumstances, taking a photograph may comprise an indecent act. The Judge also considered there were various "circumstances of indecency" on the basis of which there was sufficient evidence to justify leaving the case to the jury.[4] At that point it was not contended there was insufficient evidence of an intention to insult.

[10] The trial proceeded on the basis of some agreed facts. The agreed facts included a reference to Mr Rowe having been given a trespass notice from the beach at Kaiteriteri earlier, in 2012.

[11] Evidence for the Crown at trial came from the two police officers who had been in contact with Mr Rowe at the beach in January 2016 and from a digital forensic analyst with the police who had analysed Mr Rowe's electronic devices. Mr Rowe gave evidence. He said in his evidence that he was preparing a travel book although he would not include photographs where (as was the case with the photographs of the three girls) the subjects were identifiable. He stated that he did not share the photographs which were for his enjoyment. Mr Rowe also said he thought he was on "solid ground" taking the photographs because he had confirmed the legality of taking

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3 *R v Rowe* [2016] NZDC 19786.

4 At [20]–[21]. The circumstances identified were Mr Rowe's age (60 at the time); the use of a telephoto lens initially at least covertly; the subjects were "scantily-clad" girls not known to Mr Rowe and had not consented to the taking of the photographs; the photographs were taken over a five minute period; and the conduct was of concern to the police officer.

photographs on a beach by checking on the police website. Finally, Mr Rowe's evidence was that he had no "sinister" motive or intention to insult.

[12] Mr Rowe was convicted and sentenced to 120 hours community service and six months supervision.[5]

The statutory scheme

[13] Section 126 is found in Part 7 of the Crimes Act. That part is headed "Crimes against religion, morality, and public welfare". Part 7 has a number of subparts, namely, "Crime against religion" (s 123: blasphemous libel); "Crimes against morality and decency" (ss 124–126); "Sexual crimes" (ss 127–144); "Sexual offences outside New Zealand" (ss 144A–144C); and "Crimes against public welfare" (ss 145–150 – the latter dealing with misconduct in respect of human remains).

[14] The subpart in which ss 125 and 126 are found includes ss 124 and 124A. Section 124 deals with the distribution or exhibition of indecent matter.[6] Section 124A(1) makes it an offence to intentionally expose a young person "to indecent material … in communicating" with the young person.[7] Indecent material includes written, spoken and visual material.

[15] Sections 125 and 126 both deal with an indecent act. Section 125 addresses an indecent act in a public place. Section 125 reads as follows:

> **125 Indecent act in public place**
>
> (1) Every one is liable to imprisonment for a term not exceeding 2 years who wilfully does any indecent act in any place to which the public have or are permitted to have access, or within view of any such place.
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> (2) It is a defence to a charge under this section if the person charged proves that he or she had reasonable grounds for believing that he or she would not be observed.

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5 *R v Rowe* [2017] NZDC 3411.

6 Section 124(1) prohibits selling any indecent model or object; exhibiting or presenting in public an indecent object or indecent show; exhibiting "in the presence of any person in consideration or expectation of any payment or … for gain, any indecent show or performance". Publications, as defined by the Films, Videos, and Publications Classification Act 1993, are not within s 124.

7 A "young person" is defined as a person under the age of 16 years: s 124A(1).

(3) For the purposes of this section, the term **place** includes any railway carriage, and also includes any ship, aircraft, or vehicle used for the carriage of passengers for hire or reward.

[16] Section 126 states:

> **126 Indecent act with intent to insult or offend**
>
> Every one is liable to imprisonment for a term not exceeding 2 years who with intent to insult or offend any person does any indecent act in any place.

[17] Sections 125 and 126 have not substantively changed since the 1879 draft Criminal Code. The heading to s 146 of the proposed code read "Indecent acts" and the section provided as follows:[8]

> Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to two years' imprisonment with hard labour, who wilfully
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> (a) Does any indecent act in any place to which the public have or are permitted to have access; or
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> (b) Does any indecent act in any place, intending thereby to insult or offend any person.

[18] Subsequent versions of New Zealand's proposed criminal code over the 1880s did not materially alter the text of the provision.[9] Section 138 of the Criminal Code Act 1893 was in similar terms and much the same wording was used in s 156 of the Crimes Act 1908.

[19] As will be apparent, the current Act made two changes from the previous provisions. The first change was that the offences were split to form two separate sections. The second alteration was the introduction of the defence to s 125 of a reasonable belief that the person would not be seen engaging in the indecent act. These

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8 Criminal Code Bill Commission *Draft Code embodying the Suggestions of the Commissioners* (HMSO, 1879) (UK), s 146. See also the discussion in Francis Adams *Criminal Law and Practice in New Zealand* (2nd ed, Sweet & Maxwell, Wellington, 1971) at [3] on the links with the early English draft codes. The MacCaulay Code (Indian Penal Code 1860) included offences of assault of a woman "intending outrage" to her modesty (s 354); words or gestures intending to insult the modesty of a woman (s 509); and intentional insult likely to cause a breach of the peace (s 504).

9 The Criminal Code Bills of 1883, 1885, 1886 and 1888 in material respects reflected the language of the 1879 draft. There have been some changes to the relevant part headings. The Criminal Code Act 1893 described the offence as part of "Offences Against, Religion, Morals and Public Convenience" and under pt XIII: "Offences against Morality". That approach was carried through to the Crimes Act 1908.

changes occurred in what became the Crimes Act 1961 without any substantive explanation.

[20] The Crimes Act also includes a range of other offences which involve either an indecent act or of which indecency is an element. These offences encompass sexual conduct with children and young persons,[10] and with animals[11] as well as indecent assault.[12] In addition, s 150 of the Act sets out an offence of misconduct in respect of human remains which also refers to indecency. Relevantly, it is an offence to "improperly or indecently" interfere with or offer "any indignity to any dead human body or human remains, whether buried or not".[13]

[21] Reference should also be made to the addition to Part 9A of the Crimes Act ("Crimes against personal privacy") in 2006, of offences dealing with intimate visual recordings.[14] The sections in Part 9A create various offences concerning the use of and dealing with interception devices, the effect of disclosure of various communications and with intimate visual recordings. Broadly speaking, the provisions relating to intimate visual recordings (ss 216G to 216N) proscribe filming people engaging in sexual activities without their consent as well as what is termed "up-skirt" or "down-blouse" photography or other visual recording.

[22] To complete this overview of the statutory framework, the Summary Offences Act 1981 also sets out a number of offences "against public order" and makes indecent exposure an offence. The relevant "public order" offences are found in ss 3,[15] 4[16] and

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10 Crimes Act, ss 132 and 134.

11 Crimes Act, ss 142A and 144.

12 Crimes Act, s 135.

13 Crimes Act, s 150(b).

14 Crimes (Intimate Covert Filming) Amendment Act 2006. An "intimate visual recording" is defined in s 216G and captures visual recordings in any medium using any device where the recording is taken without the subject's knowledge or consent and where the content of the recording is what can generally be described as intimate in nature.

15 Section 3 deals with, amongst other matters, insulting behaviour "in or within view of any public place" that is likely to cause violence against persons or property. Inciting or encouraging such behaviour is also an offence under this section.

16 Section 4 prohibits, amongst other matters, offensive behaviour and the use of insulting and indecent or obscene language. Mr Rowe has been charged on two occasions of offensive behaviour for conduct similar to that occurring in this case: *Rowe v Police* (2005) 22 CRNZ 244 (HC); and *R v Rowe* [2005] 2 NZLR 833 (CA), leave to appeal declined: *Rowe v R* [2005] NZSC 40.

5.[17] Under s 27(1) it is an offence to "in or within view of any public place, intentionally and obscenely" expose any part of a person's genitals. It is a defence to this offence "if the defendant proves that he or she had reasonable grounds for believing that he or she would not be observed".[18]

The judgment of the Court of Appeal

[23] The Court of Appeal said that the taking of a photograph could constitute an indecent act. In reaching this view, the Court endorsed the approach taken in *R v Annas* to the effect that the surrounding circumstances determine whether the act of taking a photograph is an indecent act under s 126.[19] Applying that test to the present facts, the Court found there was sufficient evidence to support the charge. Lang J, delivering the judgment of the Court, identified the following as evidence supporting the charge:

(a) the use of a zoom lens with the girls as the focus;

(b) the photographs were taken over an extended period during which Mr Rowe showed no interest in anything else;

(c) the images of the girls took up the entire photograph;

(d) the photographs were taken from a distance with the zoom lens and in "an apparently surreptitious way";[20] and

(e) Mr Rowe had no legitimate reason for taking the photographs other than "his apparent desire to build up a collection of photographs of young girls".[21]

[24] The Court said it was appropriate to take a similar approach to the question of the sufficiency of the evidence on whether there was an intention to insult. That is, to

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17 Section 5 deals with disorderly behaviour on private premises.
18 Summary Offences Act 1981, s 27(2).
19 *R v Annas* [2008] NZCA 534.
20 *Rowe* (CA), above n 1, at [28].
21 At [28].

look at the circumstances surrounding the act. The Court said that the trial Judge, Judge Zohrab, correctly directed the jury to consider Mr Rowe's intention "to insult the dignity of the girls in the photos, their right to modesty or privacy" by taking these photographs "at their age and in those general circumstances".[22]

[25] The Court stated that many of the circumstances relevant to the question of indecency were also relevant to intention to insult. The Court referred to a number of factors, namely, the surreptitious or covert nature of Mr Rowe's actions; the use of the zoom lens to capture what would be seen if Mr Rowe was closer to his subjects; the girls' comparatively young age; the absence of any reason to take the photographs "other than to preserve images of" the girls' bodies for Mr Rowe's "own future enjoyment";[23] and the fact a trespass notice had been given to Mr Rowe after police were called on an earlier occasion when Mr Rowe was seen taking photographs of young girls at Kaiteriteri beach.

The submissions on appeal

[26] It is common ground that the Crown must prove two elements to establish an offence under s 126. Those elements are first, the doing of an indecent act and secondly, an intention to insult or offend. It is also not disputed that the test for the first element is objective and that the second element raises a subjective question.

[27] On the first element, the appellant's key submissions can be summarised in this way. First, it is submitted that taking photographs without more is not an act in terms of s 126 and second, taking photographs of what may ordinarily be seen in public is not conduct proscribed by s 126.

[28] On the second element, the appellant's submissions addressed the directions in *Annas* because those directions formed the basis of Judge Zohrab's directions in this case. The essential submission was that those directions were too broad. Additionally, Mr Zindel, counsel for the appellant, argued there was no basis to find Mr Rowe guilty when the dignity of the subjects of the photographs was not affected.

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22 At [31].
23 At [33].

[29] The Crown accepts that there will be a need for a screening exercise by the court as to whether a particular set of surrounding circumstances and acts could ever amount to a sufficient affront to the public. That said, the Crown's submission is that all that is required is an act which is accompanied by circumstances that would be regarded by right-thinking members of the community as an affront to the general public morality or offensive to the general public. This is the test adopted in *Annas*. An indecent act under s 126 can include the taking of photographs and need not have any sexual overlay or connotation.

[30] On the intent to insult, the Crown's approach was that the mens rea was complete when Mr Rowe completed the act of taking the photographs knowing at the time that the inevitable consequence was that he had insulted the girls. The Crown also submitted that the approach in *Annas* is correct and on this basis the jury was correctly directed in this case.

Discussion

[31] We turn first to the text.[24]

Textual considerations

[32] There is nothing to suggest a different type of act is contemplated under s 125 than that under s 126. Indeed, both the statutory scheme and the legislative history of the sections show their commonality. As noted earlier, until 1961 the two provisions were contained in the same section.[25] When the two sections are viewed together in this way, there are indications from the text of ss 125 and 126 that both sections are primarily directed towards exhibitionism, as understood broadly, or display by a person to someone else. Hence, s 125 is directed to acts occurring in a public place or which can be seen from a public place. Further, under s 126, the act need not occur in public but it must be done with an intention to insult or offend. It is apparent that the

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[24] The appellant did not base his case on the right to freedom of expression in s 14 of the New Zealand Bill of Rights Act 1990. That factor and the approach taken to s 126 mean we have not had to consider the impact of s 14 and whether, for example, the taking of the photographs is expressive behaviour.

[25] Crimes Act 1908, s 156.

core concept is an indecent act, either taking place in a public place or with the requisite intention.

[33] Section 125 will accordingly encompass acts which, done in private, may not be offences. Classic examples of that type of act include exposure of the genitals and masturbating. Those same acts may be an offence under s 126 but only where the requisite intention is present.

[34] The availability of the defence under s 125(2) where the defendant can prove reasonable grounds for a belief the act would not be observed is also consistent with this analysis. The defence suggests that the focus under s 125 is primarily on an act where the indecent aspect is linked with what is presented to be seen.[26]

[35] Against this background, it is useful to consider next whether the Court of Appeal was correct to endorse the proposition, based on *Annas*, that the surrounding circumstances identified could be evidence that Mr Rowe's act was indecent.

Was the Court of Appeal correct to apply Annas*?*

[36] We preface this part of the discussion by noting that the facts of *Annas* mean that was a very different case. On this basis, *Annas* is not a model for the present case and should not have been treated as one.

[37] The appellant in *Annas* was convicted of sexual offending in relation to two complainants. The charges under s 126 related to one of the two complainants who said that the adult appellant had started photographing her in her underwear when she was about 12 years old. From about the age of 13, the nature of the photography changed and the appellant began to photograph the complainant naked. This continued until she was about 17 years old. Two of the counts under s 126 related to photographs of the girl naked when she was a child. The other count related to a photograph taken when she was a teenager.

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[26] As noted by William Young J at [98].

[38] In relation to the first element of s 126, that is, the performance of an indecent act, the Court said that whether taking a photograph of a naked child was objectively indecent would depend on the circumstances. The Court held that the prurient purposes of the photographer could make indecent what was otherwise not an indecent photograph.[27]

[39] The risk with an approach that focuses solely on the surrounding circumstances to show that an act is indecent under ss 125 and 126 is that the conduct in issue becomes divorced from the core concept of an indecent act central to both sections.

[40] The present case illustrates the dangers of such an approach.[28] Mr Rowe took photographs of persons in public in the manner in which they presented themselves. The only matters relied on to criminalise his conduct in contrast with, for example, that of the parent who also took photographs of the girls or of a news media representative taking a similar photograph are factors such as his motive and purpose. Those matters are treated as elevating his acts, which are not intrinsically indecent, to acts which are indecent. That approach does not fit with the features of the statutory scheme identified above. It also creates uncertainty in the application of the criminal law.[29]

[41] Similar concerns about the undue extension of the concept of an indecent act underlie the decision of the Court of Appeal in *R v S*.[30] The appellant in *R v S* appealed to the Court of Appeal against conviction on two charges relating to the 12 year old daughter of his partner. Relevantly, the second of the charges concerned doing an indecent act with the child contrary to s 134(2)(b) of the Crimes Act. At that time, the section made it an offence for everyone who "[b]eing a male, does any indecent act with or upon any such girl [aged between 12 and 16 years]".

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27 At [57].

28 These observations are confined to the meaning of "indecent" in ss 125 and 126. It is not necessary in this case to address the meaning of "indecency" in other parts of the Crimes Act or in the Summary Offences Act.

29 See, for example, Lord Gardiner *Note* [1966] 3 All ER 77; and *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [11] per Elias CJ.

30 *R v S* CA273/91, 20 December 1991.

[42] The indecency charge arose from an incident in which the appellant asked the girl if she wanted to pose for some photographs. She agreed. He went and got from the girl's mother's bedroom two "negligee type garments" both of which were "flimsy and revealing".[31] The complainant was photographed in each garment. The Court observed both of these photographs were "plainly indecent" and the charge really focused on the second and more revealing of the photographs.[32]

[43] The Court concluded the taking of a photograph could not be an indecent act. It was "no more than a manner of recording what is there to be seen".[33] Nonetheless, there were acts done by the appellant that could comprise an indecent act, in particular pinning the crutch of one garment and assisting in setting the poses.[34] Accordingly, while the appeal on this charge was allowed, a new trial was ordered.

[44] Importantly for present purposes the Court had this to say about the difference between indecent assault and an indecent act:[35]

> In the case of an indecent assault, it has long been recognised that the adjective "indecent" need not apply to the act itself; it is sufficient if it applies to the circumstances accompanying the assault. An indecent assault is thus an assault accompanied with circumstances of indecency. The Judge's ruling and subsequent direction suggest that he adopted a broadly similar approach to the meaning of "indecent act". But in doing so we think with respect he did not appreciate that it is the quality of the act itself that is significant rather than the general circumstances in which it is committed.

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31 At 2.

32 At 2.

33 At 6. By contrast, in *Graham v R* [2012] NZCA 372, the appellant was convicted of doing an indecent act with intent to insult or offend. He had taken photographs of the young complainant while she was naked from the waist down. He appealed unsuccessfully against conviction on the basis there was insufficient evidence that he took the photograph. It was not disputed that taking the photograph could constitute an indecent act under s 126 and we do not resolve that question, see: [65] below.

34 Similarly, in *Iosefo v New Zealand Police* HC Auckland CRI-2010-404-301, 4 October 2010, a conviction under s 125 was upheld on appeal where the appellant stood on a toilet seat in order to look into the cubicle next door. The defendant in *Turoa v New Zealand Police* [2016] NZHC 104 also appealed unsuccessfully having pleaded guilty to a charge under s 125 arising out of an incident where he sat down opposite the complainant in a public library and used a hand held mirror to see up under the complainant's clothing.

35 At 5.

[45] It was in this context that the Court referred to *R v George*[36] for the proposition that "an act that is not itself indecent will not constitute the offence even if the purpose is indecent".[37] Further, reference can be made to the decision of the Court of Appeal of England and Wales in *R v Rowley*.[38] The Court allowed an appeal against conviction on a charge of outraging public decency[39] but, for present purposes, the case is relevant for the observation that "intention and motive" could not "supply lewdness or obscenity to the act if the act itself lacks those qualities".[40] It is the case that the effect of the later decision of this Court in *Y v R* overrules the approach taken in *R v S* insofar as it relates to the requirement the indecent act be done "with or upon" any girl.[41] The Court's decision in *LM v R* is also of some relevance.[42] The primary issue in that case was as to the effect of s 144A of the Crimes Act. The appellant was a New Zealander who was living in Russia at the time of the offending. Section 144A provides for the prosecution of New Zealanders overseas for conduct which, if it took place in New Zealand, would be contrary to the specified sections in the Crimes Act addressing sexual offending against children and young persons. But it was accepted that the appellant's acts could comprise an indecent act under s 132(3) of the Crimes Act. The appellant took a photograph of the young complainant while she was masturbating an adult male. He had also directed the posing of the photograph.[43]

[46] To complete our discussion of the first element of s 126, it is helpful to consider the authorities from comparable jurisdictions on similar provisions.

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36 *R v George* [1956] Crim LR 52 (Assizes). That aspect of *George* was not affected by the later decision of *R v Court* [1989] AC 28 (HL) at 42 in which Lord Ackner cited *George* as supporting the proposition that: "if the circumstances of the assault are *incapable* of being regarded as indecent, then the undisclosed intention of the accused could not make the assault an indecent one".

37 *R v S*, above n 30, at 5–6.

38 *R v Rowley* [1991] 4 All ER 649 (CA).

39 Outraging public decency is a common law offence which is broadly similar to s 125 of the Crimes Act: see further discussion below at [48] and [49]. We do not need to decide whether Mr Rowley's conduct (suggestive notes left for boys in exchange for pocket money and gifts in circumstances where his diary suggested he wanted to lure the boys into allowing him to engage in sexual activity with them) would constitute an offence in New Zealand.

40 At 653.

41 *Y v R* [2014] NZSC 34, [2014] 1 NZLR 724 at [19]–[23]. This is relevant to the meaning of "indecency" in the context of ss 132(3) and 134(3). The current versions of these provisions refer to "child" and "a young person" respectively.

42 *LM v R* [2014] NZSC 110, [2015] 1 NZLR 23.

43 We accept the acts can involve the directing or staging of photographs.

The overseas authorities

[47] We begin with a discussion of the authorities from England and Wales.

England and Wales

[48] The Sexual Offences Act 2003 (UK) includes offences of exposure of the genitals,[44] voyeurism,[45] and sexual activity in a public lavatory.[46] In addition, there are offences concerning engaging in sexual activity in the presence of a child[47] and causing a child to watch a sexual act.[48] However, the most relevant case law deals with the first limb of the common law offence of outraging public decency; the question of whether the act is of such a lewd character as to outrage public decency.[49]

[49] The historical origins of s 125 indicate there are links with the common law offence of outraging public decency.[50] Smith and Hogan noted in the first edition of the text *Criminal Law* that "[t]he most common way of committing this offence is by indecently exposing the body".[51] The observations of Lord Simon in *R v Knuller (Publishing, Printing and Promotions) Ltd* are also helpful in illustrating the types of situations encompassed by what his Lordship considered was "a general rule whereby conduct which outrages public decency is a common law offence".[52] Lord Simon observed:[53]

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44 Sexual Offences Act 2003 (UK), s 66.

45 Section 67.

46 Section 71.

47 Section 11.

48 Section 12.

49 A great deal of attention has been given to the second limb, that is, whether the act occurred in a public place.

50 Section 126 bears similarities to s 4 of the Vagrancy Act 1824 (UK) which, relevantly, prohibited wilful exposure to view in a public place and obscene exposure in a public place with intent to insult. The predecessor to s 126 in the 1879 Code removed the requirement that the offence take place in public.

51 J C Smith and Brian Hogan *Criminal Law* (1st ed, Butterworths, London, 1965) at 318–319. *Archbold* describes "a misdemeanour indictable at common law publicly to expose the naked person": T R Fitzwalter Butler and Marston Garsia *Archbold's Criminal Pleading Evidence & Practice* (32nd ed Sweet & Maxwell, 1949) at 1362–1363. The offence originates in *R v Sidley* (1663) 1 Sid 168. This case involved Sir Charles Sidley exposing himself on his balcony to a crowd of people.

52 *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435 (HL) at 493.

53 At 492–493. There had been some debate as to whether there was a single offence of outraging public decency or a series of more specific offences, see for example, *Shaw v Director of Public Prosecutions* [1962] AC 220 (HL(E)) at 281 per Lord Reid and at 292 per Lord Morris.

> Secondly, the decided cases look odd standing on their own. Indecent exposure (*Rex* v. *Crunden* (1809) 2 Camp. 89), acts of sexual indecency in public (*Reg.* v. *Mayling* [1963] 2 Q.B. 717), indecent words (*Reg.* v. *Saunders* (1875) 1 Q.B.D. 15), disinterring a corpse (*Rex* v. *Lynn* (1788) 2 Durn. & E. 733), selling a wife (cited in *Rex* v. *Delaval* (1763) 3 Burr. 1434, 1438), exhibiting deformed children (*Herring* v. *Walround* (1681) 2 Chan.Cas. 110), exhibiting a picture of sores (*Reg.* v. *Grey* (1864) 4 F. & F. 73), procuring a girl apprentice to be taken out of the custody of her master for the purpose of prostitution (*Rex* v. *Delaval*: see also count 4 in *Reg.* v. *Howell and Bentley* (1864) 4 F. & F. 160, 161, conspiracy to procure a girl of 17 to become a common prostitute) — all these have been held to be offences. They have a common element in that, in each, offence against public decency was alleged to be an ingredient of the crime (except *Grey*, where it was said to be "disgusting and offensive", "so disgusting that it is calculated to turn the stomach").[54]

[50] In terms of the type of conduct that is encompassed by the common law offence of outraging public decency, we can begin with *R v Mayling* which is perhaps a classic illustration of what is encompassed by the offence.[55] It involved two men masturbating in a public lavatory. Two police officers watched a man go into the toilet and walk out looking disgusted. They then walked into the toilet and caught the appellant masturbating. The appellant argued that the act of indecency had to have in fact "disgusted and annoyed" those "within whose purview the behaviour was committed".[56] The Court did not accept that submission finding that an objective test applied to the question of whether the act was sufficiently outrageous.

[51] The same approach was applied in *R v May*[57] but there the issue was whether the acts were in public. That case involved a school teacher who asked two 13 year old students to instruct him to do various degrading sexual acts such as simulating sex on the desk. The facts of the case indicated that the students did this initially only at the request of the schoolmaster, but with time began to do so on their own volition because it "amused the boy[s] to humiliate the schoolteacher".[58]

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54 The elements of the common law offence were described in *R v Hamilton* [2007] EWCA Crim 2062, [2008] QB 224 at [21] as follows: "(i) The act was of such a lewd character as to outrage public decency; this element constituted the nature of the act which had to be proved… . (ii) it took place in a public place and must have been capable of being seen by two or more persons who were actually present, even if they had not actually seen it".

55 *R v Mayling* [1963] 2 QB 717 (CA).

56 At 725.

57 *R v May* [1990] 91 Cr App R 157 (CA).

58 At 159.

[52] The two appellants in *R v Gibson* were charged with committing an act outraging public decency in relation to a model with an earring made of freeze-dried human foetuses of three to four months gestation which was exhibited in an art gallery.[59] Their convictions were upheld.

[53] In *R v Hamilton* the taking of photographs was seen to be capable of comprising an act outraging public decency.[60] The defendant put a camera in his backpack, went into a supermarket and put the backpack in a position where he could point the hidden camera up the inside of a number of women's skirts. None of the women saw him filming, nor did anyone else in the store see what he was doing.

[54] There has been some debate about whether the offence of outraging public decency continues to serve a useful purpose.[61] However, the Law Commission of England and Wales reviewed the position recently and recommended the retention of the offence.[62] The Commission noted that a random sample of 47 prosecutions in 2014 found this offence was used for:[63]

> (1) exposure of genitals (8 cases);
>
> (2) masturbation in public (21 cases);
>
> (3) real or simulated sexual activity in public (8 cases);
>
> (4) making intimate videos without consent ("upskirting") (8 cases).
>
> Two cases did not fall into any of these categories: one involved a sexual assault and the other involved making child pornography, and in both cases other charges were brought in addition to outraging public decency.

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59 *R v Gibson* [1990] 2 QB 619 (CA).

60 See above n 54. The outcome may be explained by the limits on voyeurism provision in the United Kingdom deriving from the focus on recording a "private act", see for example, the discussion in Alisdair Gillespie ""Up-skirts" and "down blouses": voyeurism and the law" [2008] Crim LR 370 at 382.

61 Mary Childs "Outraging public decency: the offence of offensiveness" [1991] PL 20 at 24; and Alisdair Gillespie, above n 60, at 374.

62 Law Commission of England and Wales, "Simplification of Criminal Law: Public Nuisance and Outraging Public Decency" (EWLC No 358, 2015). The offence was seen as filling three gaps in the criminal law: (a) upskirting; (b) exposure absent an intention to cause alarm or distress; and (c) masturbation or other sexual activity in public not involving exposure: at [3.108].

63 At [3.94] (footnote omitted).

Canada

[55] The Crown places some reliance on Canadian cases on voyeurism, such as *R v Rudiger*, as supporting the distinction between visual observation and the creation of a permanent visual recording.[64] The latter will impact on reasonable expectations of privacy. Mr Rudiger was charged after surreptitiously photographing and videoing children in swimming clothes in a public park. Voith J in that case observed that the "use of technology can transform what is reasonably expected and intended to be a private setting into something that is completely different".[65] Particular reference was made to the effect of the zoom feature on the camera.

[56] However, the comments in that case as in the other similar cases relied on by the Crown have to be seen in context, namely, they arise in the context of charges of voyeurism. The Canadian provision in issue in *Rudiger* expressly deals with visual recordings of "a person who is in circumstances that give rise to a reasonable expectation of privacy".[66] Similarly, the references to privacy interests being affected in public;[67] as to the impact of capturing images as a permanent record online;[68] and as to the potential for technology to "dramatically change" matters[69] have to be seen in their particular statutory contexts.

Australia

[57] Similar provisions to ss 125 and 126 are found in the Criminal Codes of Queensland, South Australia, Western Australia, and Tasmania.[70]

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64 *R v Rudiger* 2011 BCSC 1397, (2011) 278 CCC (3d) 524. The Crown also relied on *R v Taylor* 2015 ONCJ 449; and *R v Jarvis* 2015 ONSC 6813.

65 At [93].

66 Criminal Code, s 162(1).

67 *R v Lebenfish* 2014 ONCJ 130.

68 *Taylor*, above n 64.

69 *Jarvis*, above n 64, at [39].

70 Criminal Code Act 1899 (Qld), s 227; Summary Offences Act 1953 (SA), s 23; Criminal Code Act Compilation Act 1913 (WA), ss 203–204; and Criminal Code Act 1924 (Tas), s 137. Glanville Williams *Criminal Law, The General Part* (Stevens & Sons, London, 1953) at [131] notes the influence of the English draft Criminal Codes of 1878–1880 on the codes in Queensland, Western Australia and Tasmania. Andreas Schloenhardt suggests the Queensland Code was also influenced by the New York State Criminal Code and by the Italian Penal Code 1889 in Andreas Schloenhardt *Queensland Criminal Law* (Oxford University Press, South Melbourne, 2008) at 25.

[58] *Wright v McMurchy* deals with the equivalent to s 125 in the Western Australian Criminal Code.[71] The case involved a taxi driver who, whilst on night shift and driving home an unconscious female passenger in the front seat, used his mobile phone to take a number of photographs, eight of which were "up-skirt" images and showed, for example, her general crutch area. It was accepted that the taking of the photographs could comprise an indecent act. However, the issue in *Wright* was whether the requirement the act take place "in public" was satisfied.

[59] *R v McDonald*[72] and *Pellegrino v Harman*[73] both involved s 60(1) of the Crimes Act 1900 (ACT). That section makes it an offence to commit an indecent act on or in the presence of the complainant without the complainant's consent.[74] In *McDonald* the defendant and the complainant had consensual intercourse. Unknown to the complainant, the defendant filmed their activity via Skype so that it was streamed live to their colleagues. The issue was the effect of the fact the sexual activity itself was consensual. The Judge in refusing a stay of proceedings made the point: "Many acts gain the character of indecency from the circumstances".[75] The Judge considered the position equated to that in *Wright* where "the act was not merely the taking of photographs, but the totality of what was done".[76]

[60] The appellant and the complainant in *Pellegrino v Harman* were in a relationship. Among other things, the appellant had taken a photograph of the complainant's activities immediately after they had engaged in consensual intercourse. (She says she had put her underwear back on and was going to the toilet when she saw a flash.) The test of indecency applied was "overtly sexual conduct that right-minded persons would consider to be contrary to community standards of decency".[77] In upholding the appellant's conviction, the Judge noted it was rightly conceded the taking of a photograph could be indecent.[78]

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71 *Wright v McMurchy* [2012] WASCA 257. The equivalent provision is found in s 203(1)(a) of the Criminal Code Act Compilation Act 1913 (WA).
72 *R v McDonald* [2013] ACTSC 122, (2013) 233 A Crim R 185.
73 *Pellegrino v Harman* [2016] ACTSC 366.
74 This offence is similar to s 134(3) of the Crimes Act, though without the age qualification.
75 At [53].
76 At [66].
77 At [104].
78 At [118].

[61] The cases of *R v DM*[79] and *Stroop v Harris*[80] relied on by the Crown do not assist greatly as both involve provisions directed to visual recordings.[81]

Conclusion

[62] Drawing these threads together, the textual considerations discussed suggest that s 126 is primarily directed at exhibitionism, as understood broadly, or display by a person to someone else. That approach is supported by the historical origins of ss 125 and 126 because of the link to the common law offence of outraging public decency.

[63] Policy considerations, such as the desirability of certainty in the criminal law, also support an approach which focuses on the quality of the act. Surrounding circumstances such as motive or prurient purpose cannot make an act that would not otherwise be indecent into an indecent act under ss 125 and 126. For the same reasons, the emphasis on the concept of breach of privacy advanced by the Crown as one of the circumstances of indecency has limited utility. There must be something in the nature of the act that is an affront to the public so as to make it indecent under ss 125 and 126.

[64] Exhibitionist behaviour features in the cases prosecuted under similar provisions overseas. The cases have not, though, been confined to classic illustrations of exhibitionism. The Australian cases, in particular, provide some support for the proposition that the taking of a photograph which is itself indecent can be an indecent act. In the New Zealand context there is also some support for the application of ss 125 and 126 to a broader range of cases including those where additional acts such as posing or procuring are involved along with the taking of indecent photographs.

[65] It is not, however, necessary for us to finally resolve the exact scope of s 126 in order to decide the present case. Whatever the exact bounds, there was not sufficient

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79 *R v DM* [2010] ACTSC 137.

80 *Stroop v Harris* [2017] ACTSC 294.

81 *R v DM* arose in relation to a charge under s 66(1) of the Crimes Act 1900 (ACT) dealing with, relevantly, using electronic means to suggest to a young person committing or taking part in an act of a sexual nature (that term is defined to include an act of indecency). *Stroop v Harris* dealt with charges under s 61B of the Crimes Act (ACT), a visual recording offence.

evidence to establish that Mr Rowe's acts comprised an indecent act under s 126. The factors relied on by the Court of Appeal were not evidence of indecency where neither the subject-matter nor the photographs were indecent in themselves and in the absence of any exhibitionistic type behaviour.

Intention to insult

[66] It is not necessary to deal with the second element given our conclusion on the first element. We note, in any event, that we do not consider it was possible to prove beyond reasonable doubt an intention to insult in this case where the images themselves were not indecent. The circumstances surrounding the act relied on by the Court of Appeal cannot alter this. The extent to which, as the Crown contended, this element can be met where the intention is to insult a concept, such as privacy or personal integrity, can be addressed in a case where the point is a live one.[82]

Effect of the police website

[67] Mr Rowe's appeal also raised an issue about the effect of his evidence at trial that he had relied on information on a police website to the effect that there was no reasonable expectation of privacy involved in photographing individuals on a public beach.[83] The Court of Appeal rejected any reliance on error induced by what Mr Rowe read on the police website. The Court noted that this had not been raised as an affirmative defence at trial. The Court considered Judge Zohrab was correct to direct the jury that this aspect was relevant to Mr Rowe's state of mind at the time he took the photograph, that is, it went to his intention.

[68] Because of the view the facts could not constitute the offence it is not necessary to consider the further argument about the effect of reliance on this statement on the police website. That argument is more appropriately dealt with in another case.

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82 There is also no need to address the question of the role of oblique intention, advanced by the Crown in this context in reliance on cases such as *R v Price* [1919] GLR 410 (SC).

83 The website included the statement that it was "generally lawful to take photographs of people in public places without their consent" and, further, that it was permissible to take photographs "of people where there is no expectation of privacy, such as a beach". Mr Rowe said he had checked the entry before taking the photographs.

Result

[69] For these reasons, the appeal is allowed and the conviction is quashed. Given our conclusion that there was not sufficient evidence to establish that the conduct constituted the offence, it is not appropriate to direct a retrial.

WILLIAM YOUNG J

Background

[70] The appellant has a long-standing interest in photography. His subject matter includes (although it is not confined to) girls and young women. This has resulted in three prosecutions against the appellant. The first arose from him photographing, from a concealed position in a bus, girls going to school.[84] The second involved the photography of female students in the University of Otago library.[85] The third, which gave rise to these proceedings, involved the photography of girls in bikinis at Kaiteriteri beach. In all cases, his subjects were dressed appropriately for what they were doing and there was nothing objectionable in the particular images which he captured. On the other hand, it is open to inference that he took the photographs for the purpose of what was described as his own "enjoyment", which I take to mean sexual gratification. At trial in this case, Judge Zohrab described the appellant's actions as "creepy". This was a fair description but in issue before us, as it was in the earlier two cases, is the distinct question whether the appellant's actions transgress the criminal law.

[71] In the first case, the appellant was convicted in the District Court of offensive behaviour under s 4 of the Summary Offences Act 1981 and his subsequent appeals to the High Court and Court of Appeal were dismissed.[86] I will refer to the Court of Appeal judgment in that case as *Rowe (No 1)*. The second prosecution resulted from the incident in the Otago University library. Examination of his computer in the aftermath of this incident showed that he had been photographing young women, although this had not been completely obvious to those who observed him in the

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84 *R v Rowe* [2005] 2 NZLR 833 (CA) [*Rowe (No 1)*].
85 *Rowe v Police* (2005) 22 CRNZ 244 (HC) [*Rowe (No 2)*].
86 *Rowe (No 1)*, above n 84.

library. In respect of this conduct he was found guilty in the District Court of offensive behaviour, again under s 4 of the Summary Offences Act, but this time his appeal to the High Court was allowed.[87] I will refer to the High Court judgment in that case as *Rowe (No 2)*.

[72] In both cases the Courts concluded that the question whether the behaviour was offensive was to be determined by reference to the observable externalities.[88] In *Rowe (No 1)*, the externalities of the appellant's conduct[89] made it clear that he was photographing schoolgirls whereas in *Rowe (No 2)*, it was only when his computer was later examined that it became clear that he was interested primarily in female students. As well, in *Rowe (No 1)* his conduct was distinctly more furtive than in *Rowe (No 2)*. While it might be thought questionable whether these distinctions provide an entirely satisfactory justification for the different outcomes, the results reflect the reality that his conduct in both cases was on the margins of the criminal law.

[73] In *Rowe (No 1)*, the Court of Appeal thought it at least relevant that it was probable that girls who were photographed would be offended if they found out what had happened.[90] The Court was also persuaded that the conduct was offensive by reference to the reaction of the constable who observed it;[91] a view which proceeded on the basis that conduct which excites strong disapproval from a right-minded observer can be offensive for the purposes of s 4.[92]

[74] The Court of Appeal judgment in *Rowe (No 1)* was addressed by the Chief Justice in *Morse v Police*.[93] She was of the view that it had been wrongly decided. Although *Rowe (No 1*) was not specifically referred to in the reasons of the other Judges, it is clear that the legal basis upon which *Rowe (No 1)* was decided was

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87 *Rowe (No 2)*, above n 85.
88 *Rowe (No 1)*, above n 84, at [30] and [34]; and *Rowe (No 2)*, above n 85, at [46].
89 That is, as observed by the police officer who charged the appellant: see *Rowe (No 1)*, above n 84, at [5].
90 Two of the girls who had been photographed gave evidence to this effect: see *Rowe (No 1)*, above n 84, at [7].
91 *Rowe (No 1)*, above n 84, at [43].
92 At [23] and [24].
93 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [28].

rejected by all members of the Court in favour of an approach which focuses on public order.[94]

[75] In *Ker v New Zealand Police*, the Court of Appeal appears to have concluded that on the approach in *Morse*, the appellant ought not to have been convicted in *Rowe (No 1)*;[95] in other words, that applying *Morse* to the facts of *Rowe (No 1)*, it would not have been possible to conclude that his behaviour had been offensive. I have reservations about this. It is apparent that, despite the best efforts of the appellant, his actions in taking such photographs in public are likely to be noticed. While I accept that this will not provoke a breach of the peace where the person who observes the appellant is a police officer, the position may be different if that person is either the person being photographed or someone associated with that person (say a parent). This could well lead to a breakdown in public order, perhaps associated with a contested seizure and examination of his camera. As well, and more generally, the appellant's actions, if detected, could affect the freedom of girls and young women to make use of the public space where the photos were taken and to do so in a way which goes beyond what could be expected to be tolerated by reasonable people. Of course, the success of such a prosecution would depend on the circumstances. At least as a practical matter, I suspect that the prospects of a conviction would be enhanced if his conduct were to provoke disorder.

[76] As will be apparent, in the present case the police did not proceed with a charge of offensive behaviour. I can readily understand why this is so. First, the inference that the appellant had photographed the girls for the purpose of sexual gratification was very much enhanced by extrinsic evidence, that is the images which were on his camera and computer (including the way the latter images were organised)[96] and the prior trespassing incident at Kaiteriteri. On the basis of *Rowe (No 1)* and *Rowe (No 2)* (which in this respect are unaffected by *Morse*) that extrinsic evidence was irrelevant to whether his behaviour was offensive. Secondly, in light of the approach in *Morse*,

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94 At [2] per Elias CJ, [67] per Blanchard J, [70] per Tipping J, [117] per McGrath J and [124] per Anderson J.

95 *Ker v New Zealand Police* [2016] NZCA 277 at [20].

96 For example, some of the images of women on his computer were organised using prefixes in the filename such as "Blonde" or "Asian".

it would have been at least open to argument that the appellant's conduct was insufficiently disruptive of public order to warrant conviction for offensive behaviour.

[77] Against that background, it is not surprising that the police looked elsewhere for an offence in respect of which they could realistically seek a conviction. In doing so they chose to prosecute under s 126 of the Crimes Act 1961 (the Act). As I will now explain, however, the application of this section to the appellant's conduct is, if anything, more problematic than a prosecution for offensive behaviour.

The statutory context

[78] Section 126 is in Part 7 of the Act which contains ss 123–150. This part is headed, "Crimes against religion, morality, and public welfare" and it includes a number of subparts. The first, "Crime against religion" consists only of s 123, which concerns blasphemous libel. The second, "Crimes against morality and decency", comprises s 124 (distribution or exhibition of indecent matter), s 124A (indecent communication with young person under 16) and ss 125 and 126 which I will set out shortly. The next two subparts are headed "Sexual crimes" and "Sexual offences outside New Zealand" and include offences such as indecent assault and indecent acts involving children. The last subpart, "Crimes against public welfare" now contains only ss 145 (criminal nuisance) and 150 (misconduct in respect of human remains) which encompasses, inter alia, improper or indecent interference with a dead human body or human remains.

[79] Also material is the offence created by s 216H of intentionally or recklessly making an intimate visual recording of another person. This offence means that more offensive and intrusive variations of the appellant's conduct, such as "upskirt" or "down-blouse" photography, can be dealt with otherwise than under ss 125 and 126.[97]

A single concept of indecency?

[80] In *R v Dunn* the appellants had been charged under s 124 in respect of what was alleged to have been an indecent performance at a nightclub which offered

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[97] See the definition of "intimate visual recording" in s 216G.

strip-tease entertainment.[98] The case thus concerned consensual and adult sexual activity (in that the performer was not a child and the show she provided was of a kind which the audience wished to see). At trial, Henry J summed up on the basis that the issue for the jury in respect of the performance was:[99]

> Does it offend against a reasonable and recognised standard of decency which, in the opinion of the jury, ordinary and reasonable members of the community ought to impose and observe in this day and age on entertainment of this sort of a public nature?

The appeal was advanced on the basis that the jury should have been told that they could only convict if satisfied that the performance had a tendency to deprave and corrupt those who witnessed it, an argument which was based on *R v Hicklin*.[100]

[81] In dismissing this argument, the Court observed:[101]

> The word "indecent" occurs in a number of sections of the Crimes Act. Moreover it occurs more than once in s 124 in different subsections. In some of the sections and subsections in which it is to be found, it is obvious that it can only bear its common or general connotation. We do not say, of course, that a construction must always be constant throughout all the sections of an Act, or indeed throughout all the subsections of a particular section; but we would need to be satisfied of good reason before we would place a special meaning in a particular instance on a word so often used in an Act. We see no reason at all why when it appears in s 124(1)(b), the word "indecent" should be given any other meaning than that which it is accorded in general use.

[82] These remarks suggest at least a preference for the view that the word "indecent" should be construed throughout Part 7 in accordance with its ordinary meaning. On this basis, the indecency or otherwise of an act should be determined by reference to community standards, that is how the act would be regarded by members of the public and this approach is to be applied throughout Part 7 in the absence of good reason to the contrary.

[83] I do not accept that indecency is always just a matter of fact to be determined by the trier of fact by reference to community standards and, in particular, I do not accept that we should approach the concept of "indecency" from the starting point that

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98 *R v Dunn* [1973] 2 NZLR 481 (CA).
99 At 484.
100 *R v Hicklin* (1868) LR 3 QB 360.
101 *Dunn*, above n 98, at 483.

it has a single meaning which can be applied uniformly throughout Part 7. In particular, as I will explain, I do not consider that indecency for the purposes of ss 125 and 126 has the same meaning as it does in the provisions addressed to indecent assault and indecencies with children. But, before I do so, it may be of assistance to address more generally the way in which the concept of indecency is used in Part 7.

[84] In ordinary usage, the words "decent" and "decency" can be used to denote, usually by way of approbation, any conduct which is straightforward, honest, generous, respectful of social norms or otherwise commendable. Conduct which is contrary to this broad concept of decency may sometimes be described as "indecent". Thus someone who remarries shortly after the death of a spouse might be accused of having done so with "indecent haste". That said, I do not think that it would be appropriate, or in accordance with context, to treat the terms "indecent" and "indecency" wherever they appear in Part 7 as denoting everything which is the reverse of "decent" or "decency". So while it is not decent behaviour to tell lies, I would not regard the telling of lies as an indecency.

[85] The vast majority of cases in which indecency features involve allegations of either indecent assault or indecent acts with or on children. For the purposes of such offences, indecency has a sexual connotation[102] and the question whether conduct was "indecent" is to be determined by reference to community standards. This was captured by Lord Griffiths in *R v Court* where he referred to the actus reus of indecent assault as being "an assault which … right-thinking people consider to be sexually indecent".[103] For these purposes, the trier of fact is entitled to have regard to all the circumstances of the case, including the purposes and motives of the defendant. This was the conclusion in *Court* in which their Lordships held that the appellant's purpose in spanking a young woman (namely gratification of a buttocks fetish), established by admissions made by the appellant, was material to whether the assault was indecent.[104]

[86] A different approach was taken by the Court of Appeal in *R v S*.[105] In that case the appellant had taken photographs of a young girl. For the purposes of this exercise

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102 These offences appear in the Act under the heading "Sexual crimes" which precedes s 127.
103 *R v Court* [1989] AC 28 (HL) at 35.
104 At 33 per Lord Keith, 33 per Lord Fraser, 35–36 per Lord Griffiths and 45 per Lord Ackner.
105 *R v S* CA273/91, 20 December 1991.

he had obtained two pieces of "flimsy and revealing" attire and had photographed the girl in each. One of the garments had a torn crutch which he had pinned up. Despite this, the photograph he took revealed part of her genital area. The other garment did not have a crutch and the photograph of the girl in this garment clearly showed her vagina. The Court of Appeal concluded that the taking of the photographs did not constitute an indecent act on or with the girl as the photographs were "no more than a manner of recording what [was] there to be seen".[106] Citing a 1956 English case, *R v George*,[107] the Court held that "an act that is not itself indecent will not constitute the offence even if the purpose is indecent".[108] In *George*, the defendant had assaulted young women by attempting to forcibly remove their shoes because doing so gave him sexual gratification. Streatfeild J, sitting at the Lincoln Assizes, held that the assaults were not indecent even though committed for sexual purposes.[109]

[87] *George* was referred to in the speech of Lord Ackner in *Court* as illustrating the proposition that "if the circumstances of the assault are *incapable* of being regarded as indecent, then the undisclosed intention of the accused could not make the assault an indecent one".[110] I accept that a sexual purpose or intention on the part of the offender will not necessarily render an assault indecent. At most, it will be only one of the considerations which the trier of fact will take into account in determining whether an assault is indecent. As well, I can readily accept that a sexual purpose or intention which is contextual only may not be of controlling significance. For instance, if an offender assaulted A in a non-sexual way with the intention of facilitating a sexual assault on B, that intention would not render the non-sexual assault on A indecent. That said, I have some reservations whether the reasons given in *George* can logically stand given the result arrived at in *Court*. It seems to me that where an offender has assaulted another person in order to satisfy a sexual fetish (as in *Court* and *George*), it is open to the trier of fact to conclude that the assault was indecent. Indeed, I have real difficulty with the idea that such an assault – that is one effected to satisfy a sexual fetish – could sensibly be seen as incapable of being indecent.

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106 At 6.
107 *R v George* [1956] Crim LR 52 (Assizes).
108 *R v S*, above n 105, at 5–6.
109 *George*, above n 107, at 53.
110 *Court*, above n 103, at 42.

[88] I am of the view that *R v S* was wrongly decided. The reliance on *George* was misplaced given the approach taken in *Court*. For the purposes of the offence of doing an indecent act on or with a child,[111] the taking of a photograph may be indecent and the question whether it is should be determined having regard to community standards in light of all the circumstances including: (a) its subject matter; (b) any associated posing; and (c) the purposes of the photographer. In these respects *R v S* was overruled by the decisions of this Court in *Y v R* and *LM v R*.[112] In the latter case, the taking of an indecent photograph of a child was held to be an indecent act. I regard the conduct in *LM v R* as being in substance the same as it was in *R v S* – that is the taking of an indecent photograph of a child where the child had been posed by the photographer. In this situation, I see no requirement to focus on only the act (that is the taking of the photograph) and to ignore the context which I see as including any posing. To take such a narrow approach would be inconsistent with *Court*, in which the focus was not just on the act itself, but also on the defendant's purposes in performing that act.

[89] I have distinct reservations whether the sexually indecent approach is applicable to the s 150 offence of indecently interfering with human remains. The common law antecedents of this offence were predicated on concepts of public decency in the broader sense of appropriate respect for human remains[113] and I think it is arguable that such concepts may also inform the scope of s 150.

[90] I also have reservations whether the community standards test necessarily remains applicable to s 124 notwithstanding the judgment in *Dunn*. As it happens the scope of s 124 is now limited; this because it does not extend to publications covered by the Films, Videos, and Publications Classification Act 1993.[114] I suspect that if a case such as *Dunn* were to arise now, the approach of the court would be influenced by the definition of "objectionable" in that Act[115] and by the judgment of the Supreme Court of Canada in *R v Labaye* in terms of whether harm, or a significant risk of harm, must be established.[116]

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111 Crimes Act 1961, s 132(3).
112 *Y v R* [2014] NZSC 34, [2014] 1 NZLR 724; and *LM v R* [2014] NZSC 110, [2015] 1 NZLR 23.
113 See, for example, *R v Clark* (1883) 15 Cox 171 (Assizes).
114 Crimes Act, s 124(6).
115 Films, Videos, and Publications Classification Act 1993, s 3.
116 *R v Labaye* 2005 SCC 80, [2005] 3 SCR 728.

Indecency for the purposes of ss 125 and 126

[91] Sections 125 and 126 provide:

> **125 Indecent act in public place**
>
> (1) Every one is liable to imprisonment for a term not exceeding 2 years who wilfully does any indecent act in any place to which the public have or are permitted to have access, or within view of any such place.
>
> (2) It is a defence to a charge under this section if the person charged proves that he or she had reasonable grounds for believing that he or she would not be observed.
>
> …
>
> **126 Indecent act with intent to insult or offend**
>
> Every one is liable to imprisonment for a term not exceeding 2 years who with intent to insult or offend any person does any indecent act in any place.

[92] Under s 125(2), there is a focus on whether the defendant was conscious of the risk of being seen and under s 126 a linkage between the indecent act and an intention to insult or offend. As well, neither offence concerns direct contact with the victim or anything in the nature of concerted or coordinated behaviour involving the offender and the victim.[117] The offences are thus primarily concerned with the externalities of the indecent acts. In respect of s 126, the focus is also on the intended effect on third parties and I consider that a broadly similar focus is implicit in s 125 given the s 125(2) defence. This in turn suggests that what is primarily important is how third parties who observe the conduct in question would react to that conduct.

[93] The decision of the English Court of Appeal in *R v Rowley* involved actions which were alleged to be "of a lewd, obscene and disgusting nature and outraging public decency".[118] The defendant had left notes in public lavatories which were intended to encourage young boys to meet him. The language used in the notes was not itself objectionable, albeit that the nature and location of the notes left it open to inference that the defendant wished to meet boys for sexual purposes. At trial, the prosecution was also able to point to diary entries which strongly supported this

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117 Compare the position in *Y v R*, above n 112.

118 *R v Rowley* [1991] 4 All ER 649 (CA) at 652.

inference. In summing up the Judge had directed the jury that it could have regard to the defendant's motives in leaving the notes and for this purpose to consider the diary entries. The Court of Appeal allowed his appeal against conviction commenting:[119]

> In our judgment the offence consists in the deliberate commission of an act which is per se of a lewd, obscene or disgusting nature and outraging public decency. The crux of it is therefore the nature and effect of the act itself. Although the ultimate intention of the actor and his motive for his act may be the subsequent performance of lewd, obscene or disgusting acts, his intention and motive cannot, in our judgment, supply lewdness or obscenity to the act if the act itself lacks those qualities. A member of the public is either outraged by the act or not. He will not be affected in his reaction by whether thoughts or fantasies may be in the actor's mind or his diary. Evidence of those would not be before him. Accordingly, in our view, the learned judge was in error in holding that regard should be paid to what had motivated the appellant in leaving the notes.

[94] On the approach adopted by the Court the diary entries ought not to have been admitted into evidence.[120] Not clear from the judgment is whether the Court of Appeal would have interfered with the conviction if the Judge had directed the jury to have regard only to the notes and what could be inferred from them as to a sexual motive. I note as well that there is no reference to *Court* in the judgment and I think it follows that the Court of Appeal did not have in mind offences such as indecent assault.

[95] The approach taken in *Rowley* is consistent with that taken in *Rowe (No 1)* and *Rowe (No 2)* as to the inadmissibility of extrinsic evidence under a charge of offensive behaviour and I accept that it is applicable to s 126. In other words I accept that, for the purposes of s 126, indecency is to be determined by reference only to the externalities of the defendant's behaviour. I would take the same approach in respect of s 125.

[96] On this basis the extrinsic evidence as to the appellant's purposes – consisting of the images which were taken on the day in question, the other images which were on his computer and the earlier trespassing incident at Kaiteriteri – ought to have been excluded. That, however, is not necessarily critical to the result of the appeal. This is because, even in the absence of the extrinsic evidence to which I have referred, it was at least open to inference that he was taking the photographs for the purposes of sexual

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119 At 653.
120 At 653–654.

gratification. For this reason, I think it appropriate to consider whether the appellant's actions were capable of incurring liability under s 126.

[97] I think it is clear – and I do not understand there to be any dispute as to this – that ss 125 and 126 are primarily addressed to exhibitionistic conduct. The fundamental question is whether they are confined to such conduct.

[98] In answering that question, it is helpful to postulate a prosecution against the appellant under s 125. Such a prosecution would have been premised on the contentions that:

(a) he was in a public place when he took the photographs; and

(b) his taking of the photographs was an indecent act.

On a literal approach to s 125, he would be found guilty unless he could bring himself within the s 125(2) defence by showing that "he … had reasonable grounds for believing that he … would not be observed". On this basis, the more surreptitiously he had acted (and thus the stronger his grounds for "believing that he … would not be observed"), the better his prospects of an acquittal.[121] If criminalising photographic activity of the kind involved here had been within the purposes of the legislature in 1961 when it enacted s 125, it plainly would not have envisaged that liability could be displaced so easily and unmeritoriously. This strongly suggests that the legislature had in mind only exhibitionist behaviour, that is behaviour where the indecent characteristic is associated with the presentation of a spectacle and thus something intended to be seen.

[99] An analysis of the text of s 126 also supports this view. The words "with intent to insult or offend any person" should be construed as meaning what they say. They do not encompass an intention to insult or offend an abstract concept of dignity. Rather, they apply only to actions intended to evoke from those intended to see the spectacle an emotional response – that of feeling insulted or offended. On this basis,

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[121] I assume that the availability of such a defence explains why the prosecution relied on s 126 instead of s 125.

s 126 must be confined to conduct intended by the defendant to be seen by someone and to result in that person being insulted or offended.

[100] Accordingly, I see the offences created by ss 125 and 126 as confined to exhibitionistic behaviour and thus not engaged by the appellant's conduct.

[101] As will be apparent, I have not engaged in any detail with the Court of Appeal authorities other than *R v S*. As I have made clear, I see that decision as premised on an unrealistically narrow approach to context in relation to the offences involving indecencies with children. I think it likely that the reliance on s 126 by the prosecution in later cases such as *R v Annas* and *Graham v R* (both of which involved indecent photographs of children) was a consequence of this restrictive approach.[122] Both these cases could, and in my view should, have been determined on the basis that the defendants had engaged in indecencies with children. To my way of thinking, s 126 was misapplied in both cases.

Officially induced error?

[102] Since I am of the view that the appellant's behaviour did not breach s 126, there is no occasion for me to consider this issue.

Disposition of appeal

[103] I would allow the appeal and quash the conviction. As well, because the appellant's behaviour did not contravene s 126 as I construe it, I would not order a retrial.

Solicitors:
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Crown Law Office, Wellington for Respondent

[122] *R v Annas* [2008] NZCA 534; and *Graham v R* [2012] NZCA 372.