NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 51/2021
[2021] NZSC 165

BETWEEN	PAUL NILS HERLUND Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: Applicant in person
M R L Davie for Respondent

Judgment: 2 December 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant pleaded guilty to sexual offending against three young people, AB, CD and EF. This was after his trial had commenced and after a sentence indication (of five years and seven months' imprisonment) from the Judge. He was later sentenced to five years and two months' imprisonment.[1] His appeal against sentence was dismissed by the Court of Appeal and he now seeks leave to appeal.[2]

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1 *R v Herlund* [2019] NZDC 253 (Judge C M Ryan).
2 *Herlund v R* [2021] NZCA 71 (Courtney, Wylie and Katz JJ) [CA judgment].

[2] At the time of the offending, the applicant was approximately 50 years old. According to the summary of facts on which the applicant was sentenced:

(a) The offending against AB occurred "over the course of approximately one year", with the date range specified between March 2014 and March 2017. AB was approximately 13 to 15 years old. It involved penetrative sex, oral sex on him, and oral sex on her. The applicant pleaded guilty to two charges of sexual connection with a young person, one of which was representative.

(b) The offending against CD occurred between 1 August 2017 and 31 August 2017. CD was 15 years old. While CD was sleeping at the applicant's address, the applicant attempted to penetrate her anus with his penis. The applicant pleaded guilty to a representative charge of doing an indecent act on a young person.

(c) The offending against EF occurred between 1 July 2017 and 31 August 2017. EF was 15 years old. While EF was intoxicated at the applicant's address, the applicant removed her clothes. When EF woke up, she was naked on the floor and had a sore throat. The applicant pleaded guilty to a charge of doing an indecent act on a young person.

[3] From the material which the applicant has provided, we understand that there are four issues he wishes to raise:

(a) he was bullied into pleading guilty;

(b) in fixing the starting point, the Judge applied an uplift for prior offending (of two months) having said, when giving the sentencing indication, that she would not do so;

(c) when dismissing the sentence appeal, the Court of Appeal expressed the view that the allowance given by the Judge for pleas of guilty

(25 per cent) was extremely generous and that a discount of "at best" 5 per cent would have been appropriate;[3] and

(d) the summary of facts on which he was sentenced was wrong in relation to the date range of the offending against AB.

[4] The first three points can be dealt with briefly. In relation to the first, if the applicant wishes to challenge his pleas of guilty, he will have to do so in appropriate proceedings, not, for the first time, in this Court. For the second and third issues, the Court of Appeal considered that the Judge ought not to have added an uplift for prior offending but noted that the applicant's counsel did not seek to challenge the convictions. This meant that the appeal had to be determined on the basis of the appropriateness of the sentence. The 25 per cent discount was generous and the Court of Appeal's assessment that the uplift did not prevent the sentence being "just" is unassailable.

[5] As noted, the summary of facts in relation to AB alleged offending between March 2014 and March 2017. This was referred to in this way in the summary of facts:

> The complainant in this matter [AB] is a female … . Between the dates of 15 March 2014 and 14 March 2017 [AB] was between around 13 or 14 and 15 years old. During this time she met the defendant, Paul Herlund and began spending time with him alone. Over the course of approximately one year, and in the aforementioned timeframe, the defendant and complainant would see each other about four times a week with the defendant picking the complainant up and taking her to various hotels/motels within the greater Auckland. They would stay at the hotel/motel for periods of about eight hours at a time.

[6] Between those dates, the applicant was in custody for substantial periods and was in the community, and thus able to offend, only between 11 November 2015 and 17 June 2016 and for a one-week period in October 2016. This means that the period of offending could not have (a) started until 20 months after the beginning of the date range (15 March 2014) and (b) been longer than seven months (as compared to "approximately one year").

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3 CA judgment, above n 2, at [49].

[7] The Court of Appeal dealt with issue in this way:

> [42] … Mr Herlund accepted the summary of facts when he entered his guilty pleas. He did not seek to challenge it through a disputed facts hearing, pursuant to s 24 of the Sentencing Act. This Court has held that, where counsel have reached agreement regarding the factual summary on which a guilty plea is to be entered, sentencing must proceed on the basis of that summary, and any appeal against sentence must similarly be decided by reference to the facts contained in the summary.[4] We can see no reason to depart from this approach.
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> [43] Further, we do not consider that it would have made any difference to the sentence imposed if Mr Herlund had provided the Judge with his Department of Corrections custody records prior to sentencing. The agreed summary of facts said that the offending occurred within the specified period, and "over the course of approximately one year". That Mr Herlund was in and out of custody during the three-year period set out in the agreed summary of facts and that the offending may not have occurred within an uninterrupted period of one year does not affect the position to any great extent. Precisely when the offending occurred within the specified timeframe and the precise age of the complainant at the time is of no great moment. Clearly, there was repeated offending against AB and she was under the age of 16 years at the time.

[8] We do not accept that the summary of facts on which a plea of guilty was entered must be treated as conclusive despite inconsistent incontrovertible evidence (such as the custody records in this case). They show that the applicant could have offended over, at most, a period of seven months, as opposed to "approximately one year". As well—although this is more a matter of refinement rather than inconsistency—they show that the offending could not have started until some 20 months after the nominated start date of 15 March 2014.

[9] All of that said, we do not see an appearance of a miscarriage of justice in the result arrived at by the Court of Appeal.[5] Given the two factors identified by the Court—the repeated offending against AB and that she was under the age of 16 years at the time—the offending against her was only slightly less serious than that alleged in the summary of facts. Allowing for that, the smoothing effect of the totality approach adopted in relation to the three categories of offending, and the distinctly over-generous discount for the pleas of guilty, we see no basis upon which the sentence as imposed could be successfully challenged.

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4 *Pokai v R* [2014] NZCA 356 at [30].
5 Senior Courts Act 2016, s 74(2)(b).

[10] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent