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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 102/2022
[2023] NZSC 8**

BETWEEN MAKSHUD AHMED
Applicant

AND THE KING
Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: T-A Singh for Applicant
M L Wong for Respondent

Judgment: 23 February 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Ahmed was convicted, after a jury trial, of sexual offending against a pupil in a school where he worked as a caretaker. He was sentenced to 11 years' imprisonment with a minimum period of imprisonment of 50 per cent.

[2] His appeal against conviction was dismissed by the Court of Appeal but the appeal against sentence was allowed, leading to the quashing of the minimum period of imprisonment.¹

[3] Mr Ahmed seeks leave to appeal against the dismissal of his appeal against conviction.

[4] Mr Ahmed's defence at trial was that the alleged offending did not occur. In *Christian v R* this Court said that, in such circumstances, directions still need to be given to the jury on all elements of the offence, including consent:²

For example, it would be sufficient in a case where the defendant does not raise consent or reasonable belief in consent as issues for the Judge to outline those elements of the offence, record that the defendant has not raised an issue with those elements but make it clear that the jury must nevertheless be satisfied beyond reasonable doubt that the complainant did not consent and that the defendant did not reasonably believe he or she did. The Judge's summary of the evidence should draw the jury's attention to any evidence relevant to those elements.

[5] The Judge in Mr Ahmed's trial did direct the jury that they had to be satisfied beyond reasonable doubt that the complainant did not consent and that Mr Ahmed did not believe that the complainant was consenting. Further, they also had to be satisfied that Mr Ahmed did not believe on reasonable grounds that the complainant was consenting. On the meaning of consent, the Judge said:

Consent means true consent freely given by a person who is in a position to make a rational decision. Lack of protest or physical resistance does not of itself amount to consent. Consent must be voluntarily given. Consent given because a person feels powerless or because they fear for their safety if they do not consent is not true consent.

Mr Ahmed's proposed grounds of appeal

[6] First, Mr Ahmed submits that the trial Judge should have given a warning to the jury that there is no presumption in law that the age of a person means they cannot consent and further that there is no presumption in law that the act of grooming negates consent.

¹ *Ahmed v R* [2022] NZCA 411 (Miller, Duffy and Ellis JJ) [CA judgment].

² *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [36].

[7] Secondly, Mr Ahmed submits the Judge failed to draw the jury's attention to evidence that was relevant to the issue of consent.

Court of Appeal judgment

[8] The two issues Mr Ahmed seeks to raise have been considered by the Court of Appeal.

[9] On the first issue the Court of Appeal did not accept counsel's submission that there had been a false impression given at trial that a person of the age of the complainant could not consent. Rather the jury were invited to infer that the complainant did not give true consent in the particular circumstances and that no reasonable person would have thought otherwise.³

[10] On the second issue the Court of Appeal accepted that the trial Judge failed to draw the jury's attention to evidence that may have gone to the issue of consent.⁴ The Court concluded that this did not result in a miscarriage of justice, for the following reasons:⁵

- (a) Elaborate directions on consent were not necessary because the defence's contention was that the offending never occurred. If the Judge had been more specific, this could have conveyed the impression the Judge thought there was no merit in the defence case.⁶
- (b) The jury were always aware consent was an issue because many of the acts required co-operation.⁷
- (c) The trial was brief and the evidence given was clear and fresh.⁸

³ CA judgment, above n 1, at [30].

⁴ At [32].

⁵ At [41]–[44].

⁶ At [41].

⁷ At [42].

⁸ At [43].

Our assessment

[11] The proposed appeal relates to the particular circumstances of this case and does not raise any questions of general or public importance.⁹ In *Christian* this Court has already considered the issue of consent directions when the defence is that there had been no offending. Further, nothing raised suggests that the Court of Appeal's analysis of the consent directions given may have been wrong. There is thus no risk of a miscarriage of justice.¹⁰

Result

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

Solicitors:
Public Defence Service, Wellington for Applicant
Crown Law Office, Wellington for Respondent

⁹ Senior Courts Act 2016, s 74(2)(a).

¹⁰ Section 74(2)(b).