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

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 117/2022
[2023] NZSC 9

BETWEEN	PAUL NILS HERLUND Applicant
AND	THE KING Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: J W Griffiths for Applicant
J A Eng for Respondent

Judgment: 28 February 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] Mr Herlund was convicted of:

(a) two charges (one representative) of performing an indecent act on a young person; and

(b) two charges (one representative) of sexual connection with a young person.

[2] Mr Herlund had initially faced 11 charges, including sexual violation by rape, performing an indecent act on a young person, sexual violation by unlawful sexual connection and supplying methamphetamine. The remaining charges were withdrawn after he accepted a sentence indication from Judge Ryan given on the second day of trial.

[3] The sentence indication was that Mr Herlund would be sentenced to five years and seven months' imprisonment if he pleaded guilty to the four charges.[1] The Judge said in her sentence indication that Mr Herlund's previous convictions did not warrant an uplift to his sentence.[2]

[4] Mr Herlund was subsequently sentenced on 13 December 2019 to five years and two months' imprisonment.[3] In her sentencing decision, Judge Ryan uplifted the starting point by two months to reflect Mr Herlund's previous convictions.[4]

Court of Appeal judgment

[5] On 21 January 2021, Mr Herlund filed a notice of appeal against conviction and then a notice of abandonment on 5 February 2021. He subsequently applied to withdraw the notice of abandonment. This was granted by the Court of Appeal along with an extension of time to apply for leave to appeal against conviction. His appeal was, however, dismissed.[5]

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1 *R v Herlund* DC Auckland CRI-2018-004-2827, 1 October 2019 (Judge Ryan) [Sentence indication] at [6].
2 At [4].
3 *R v Herlund* [2019] NZDC 253 (Judge Ryan) [Sentencing decision] at [70].
4 At [65].
5 *Herlund v R* [2022] NZCA 464 (Collins, Duffy and Edwards JJ) [Conviction appeal].

[6] The Court of Appeal rejected the submission that his trial counsel, Mr Young, pressured Mr Herlund into accepting the sentence indication from Judge Ryan, for the following reasons:[6]

(a) The Court of Appeal accepted trial counsel's evidence (supported by contemporaneous notes) that he did not pressure Mr Herlund into accepting the sentence indication and that Mr Herlund was fully informed when he pleaded guilty.[7]

(b) Mr Herlund made unfounded allegations that he had been pressured by Judge Ryan into pleading guilty.[8]

(c) Mr Herlund has considerable experience with the criminal justice system dating back to 1991. His familiarity with the criminal justice system strongly suggests he is unlikely to have been pressured into entering guilty pleas.[9]

(d) The agreement concerning the reduced charges and the sentence indication was a very good outcome for Mr Herlund. He would have fully appreciated the strength of the Crown case against him and the likelihood of him receiving a very long term of imprisonment if he were convicted of any of the rape charges he was facing at the start of the trial.[10]

(e) Finally, it was significant Mr Herlund was given the opportunity to reflect overnight about the sentence indication. He therefore had the opportunity to consider his options and he reached an informed decision when he accepted the sentence indication.[11]

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6 At [55]–[60].
7 At [56].
8 At [57]. The allegations had been shown to be erroneous from a transcript of the hearing.
9 At [58].
10 At [59].
11 At [60].

[7] With regard to the changes between the sentence indication and the uplift to reflect previous convictions, the Court of Appeal held that Mr Herlund was not adversely affected by the change in methodology adopted by Judge Ryan. Mr Herlund did not receive a higher sentence than the indication he relied on when he pleaded guilty, or receive a different type of sentence. On the contrary, because of the Judge's generous discounts, Mr Herlund received a significantly shorter sentence of imprisonment than he anticipated.[12]

[8] In these circumstances, the Court of Appeal held that Judge Ryan was not required to give Mr Herlund the opportunity to vacate his guilty plea. Nor did trial counsel err when he told Mr Herlund his only option was to appeal if he was dissatisfied with the sentence.[13]

[9] Mr Herlund's third ground of appeal was that he had been misled as to parole eligibility. This was rejected by the Court of Appeal.[14]

[10] The fourth ground of appeal was that Mr Herlund could not have committed the offences, as he had been in custody.[15] Trial counsel had made inquiries which revealed that, although Mr Herlund was in prison for a significant period of the time covered by one of the complainant's allegations, it was also clear that he was not in prison for the entire period. It was therefore quite possible for him to have offended against that complainant during the relevant period.[16]

[11] The Court of Appeal said nothing hinged on the fact that Mr Herlund now maintains he could have defended the charges concerning one of the complainants on the basis that they only had consensual sex. That was fully recorded in the draft brief of evidence and was known to be a matter that he could advance if he elected to continue with the trial. The Court of Appeal held that, rather than risk continuing with the trial, Mr Herlund made a fully informed decision to plead guilty to the reduced

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12 At [79].
13 At [80].
14 At [83]–[84].
15 Mr Herlund says this was not, in fact, a separate ground of appeal. Rather, it was advanced to show there was a genuine prospect of acquittal if he was allowed to withdraw his guilty plea and defend the charges. On our approach to the case, nothing turns on this.
16 At [85].

charges after he received a very favourable sentence indication.[17] There was therefore no error in the way trial counsel advised Mr Herlund.

Our assessment

[12] Mr Herlund would essentially have this Court reconsider the arguments made before the Court of Appeal.[18] There is no point of general or public importance.[19] All his arguments relate to the particular circumstances of this case. Furthermore, nothing raised by Mr Herlund suggests the Court of Appeal's analysis may have been wrong. There is thus no risk of a miscarriage of justice.[20]

Result

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

Solicitors:
Main Street Legal, Upper Hutt for Applicant
Crown Law Office, Wellington for Respondent

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17 At [86].
18 He also says the Court of Appeal confused the interrelated issues as to eligibility for parole and time served.
19 Senior Courts Act 2016, s 74(2)(a).
20 Section 74(2)(b).