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**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 7/2024  
[2024] NZSC 55**

BETWEEN                      NICKOLAS KELVIN WRIGHT  
   Applicant  
  
AND                                THE KING  
   Respondent

Court:                            Glazebrook, Ellen France and Kós JJ

Counsel:                        K H Cook and S A Saunderson-Warner for Applicant  
   M J Lillico and L C Hay for Respondent

Judgment:                      8 May 2024

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**JUDGMENT OF THE COURT**

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- A      An extension of time to apply for leave to appeal is granted.**
- B      The application for leave to appeal is dismissed.**
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**REASONS**

**Introduction**

[1]      The applicant, Mr Wright, was found guilty after trial by jury of sexual violation by unlawful sexual connection, and sexual violation by rape in relation to the complainant, C. Mr Wright appealed his convictions to the Court of Appeal, where

his appeal against both convictions was dismissed. He seeks leave to appeal to this Court from his unsuccessful appeal to the Court of Appeal against conviction.<sup>1</sup>

## **Background**

[2] The incidents giving rise to the charges took place in August 2019. At the time Mr Wright was 17 years and 10 months old. A group, of which C was a part, had been socialising that evening. Mr Wright had not previously met C. The group ended up at an address where C engaged in consensual sexual activity with one of the others present, who we call M. Those present at the address included another man, P, who had previously been in a relationship with C.

[3] During the course of the evening, M asked C on several occasions, in the presence of Mr Wright, if she would engage in a threesome with himself and Mr Wright. The Court of Appeal noted that each time he asked, the complainant said “no” and/or “it’s not happening”.<sup>2</sup> Mr Wright came in and out of the room several times. During these visits M again asked if C would agree to a threesome. She repeatedly made clear she was not interested. On one occasion Mr Wright tried to force her to perform oral sex on him but she resisted and said that she was not going to have sex with him. He left the room but returned on several more occasions while M and C were having sex.

[4] At one point, during the early hours of the morning, P entered the room and encouraged Mr Wright to have sex with C. M and P left Mr Wright in the room with C. She said she was not going to carry out the sexual activity he had asked her to perform. He pinned her down on the bed with her face in the pillow and then digitally penetrated her vagina before engaging in sexual intercourse. The Court of Appeal observed that there was evidence M and P stood outside the room and could be heard laughing when Mr Wright was with C.

[5] After the complainant left the address, she telephoned her brother and told him what had happened with Mr Wright.

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<sup>1</sup> *Wright v R* [2023] NZCA 651 (Miller, Collins and Katz JJ) [CA judgment].

<sup>2</sup> At [10].

[6] Mr Wright agreed to be interviewed by the police. The Court of Appeal records the following in terms of that interview:<sup>3</sup>

He maintained that the sexual activity with C was consensual and that he had asked C whether she wanted to have sex and that she had said yes. Mr Wright told the police on a number of occasions ... that he asked C if she wanted to have sex and that “she said yeah like 100% consented”.

[16] Mr Wright told the police that [M and P] were encouraging him to have sex with C. The interviewer asked Mr Wright how C was when [M and P] left them alone. Mr Wright said:

Oh she was all good. She wasn't like, like she seemed normal like not like scared or anything. ... she said yeah and then I jumped in the bed ...

[17] When asked why he thought C was consenting, Mr Wright replied “[b]ecause I asked her, before I jumped on the bed”.

[7] The Court of Appeal also recorded that later in the interview Mr Wright was asked if there was anything C did to make him realise she was not agreeing to sex with him. He said there was nothing and that if she had done that he would have “left straight away”.<sup>4</sup>

### **The proposed appeal**

[8] The applicant advances two grounds of appeal. The first, and principal, ground is that his age at the time of the offending was relevant to his reasonable belief in consent. The second ground he wishes to raise is that the trial Judge should have directed the jury about motive to lie when the prosecutor, in her closing address, responded to suggestions made by the defence during the cross-examination of the complainant that there were possible motives for the complainant to lie. In particular, he says that the Judge should have reminded the jury that Mr Wright bore no burden of proof.

[9] The proposed grounds of appeal would have this Court reprise arguments made in the Court of Appeal. On the first proposed ground relating to reasonable belief in consent, the Court of Appeal noted there had been suggestions in case law that the age of a defendant might affect the reasonableness of the defendant's mistaken belief in

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<sup>3</sup> At [15]–[17].

<sup>4</sup> At [18].

consent.<sup>5</sup> The Court noted that there had been no conclusive decision on the matter. However, the Court did not consider the present case was an appropriate vehicle for considering the issue. That was for two reasons.

[10] First, the Court considered that to properly address the issues raised by this ground, it would be necessary to have evidence that showed the defendant's age had in fact affected belief in consent. In Mr Wright's case, the Court of Appeal declined to admit evidence from Dr Bartle, a psychologist who provided information about research on the brain development of young people. Dr Bartle also made what the Court described as "qualified comments" about the way in which a young person's underdeveloped neurocognitive capacity may affect reasonable belief in consent.<sup>6</sup> The Court declined to admit this evidence on the basis that it was not substantially helpful. That was for two reasons:<sup>7</sup>

- (a) ... Dr Bartle was unable to provide meaningful evidence as to whether or not Mr Wright had an undeveloped capacity to form a reasonable belief in consent.
- (b) Dr Bartle made clear that any limitations a young person may have to form a reasonable belief in consent are unlikely to be relevant where the complainant unambiguously makes clear they do not consent.

[11] In determining that this case was not an appropriate vehicle to address the relevance of age to reasonableness of mistaken belief in consent, the Court noted that Dr Bartle had not assessed Mr Wright and he "appeared to say that questions of age were unlikely to be relevant in cases where the complainant clearly stated that they did not want to have sex with the defendant".<sup>8</sup>

[12] The Court's second reason for concluding this was not an appropriate case to consider the relevance of age was that Mr Wright's case was "in reality a case about actual consent".<sup>9</sup>

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<sup>5</sup> At [31]–[38], referring to *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445; *R v Can* [2007] NZCA 291; *Nixon v R* [2016] NZCA 589; *Taniwha v R* [2010] NZCA 15; *S v Youth Court at Manukau* [2021] NZHC 2252; and *S v Youth Court at Manukau* [2022] NZCA 63, [2022] NZAR 159. This Court declined leave to appeal in *Can v R* [2007] NZSC 93.

<sup>6</sup> CA judgment, above n 1, at [22].

<sup>7</sup> At [26].

<sup>8</sup> At [42].

<sup>9</sup> At [43].

[13] Mr Wright challenges the relevance of these two reasons. He notes first that there was evidence before the jury as to Mr Wright's age at the time. Second, Mr Wright says that the defence did put reasonable belief in consent in issue. That was reflected in the fact that the jury asked the Judge about it.

[14] The respondent accepts that the law on this issue is not settled. However, the respondent supports the conclusion of the Court of Appeal that this is not an appropriate case to deal with the issue. That is because the evidence (referring here to that from Dr Bartle) was that most 17 year olds did not face challenges in navigating consent, and secondly that Mr Wright had asserted on multiple occasions that the complainant had in fact consented.

[15] We agree with the submission for the respondent that this not the case in which to address the point, essentially for the reasons given by the Court of Appeal. We would be addressing the point in a vacuum, not having evidence about how age may have affected Mr Wright, and in a situation where what he said to the police in fact indicated he knew consent was important, and where he said that C had in fact consented. Against that background, although reasonableness in belief was raised by the defence, in reality actual consent assumed a particular focus.

[16] The proposed second ground is not a major plank of the applicant's case. In any event, it does not raise any more general question. The Court of Appeal said that it was desirable for the trial Judge to remind juries that the defence has no onus when addressing issues about motive to lie. That is the orthodoxy. However, citing *Tuhaka v R*, the Court said there was no "hard and fast rule", and the context was important.<sup>10</sup>

[17] The Court also made the point that the prosecutor's closing address, when read as a whole, was not unbalanced. She acknowledged the absence of any onus on Mr Wright in this respect. The trial Judge directed the jury in an orthodox manner on burden of proof and said that "Mr Wright did not have to prove anything".<sup>11</sup> The

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<sup>10</sup> At [50], citing *Tuhaka v R* [2015] NZCA 540 at [18].

<sup>11</sup> At [51].

question trails also made clear to the jury that the burden of proof beyond reasonable doubt lay with the Crown.

[18] Accordingly, while this Court may wish at some point to consider the effect of age on reasonableness of belief in consent, this is not the case in which to do so.<sup>12</sup> Nor does anything raised by the applicant give rise to the appearance of a miscarriage of justice in the assessment by the Court of Appeal of these particular facts.<sup>13</sup>

[19] The application for leave to appeal is out of time but the delay is not lengthy. An extension of time to apply for leave to appeal is granted.

### **Result**

[20] An extension of time to apply for leave to appeal is granted.

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

Solicitors:

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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<sup>12</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>13</sup> Section 74(2)(b).