NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) 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 NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT(S) AND ANY PERSON(S) 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 58/2025
[2025] NZSC 135

BETWEEN	DAVID ALLEN FALAMOE Applicant
AND	THE KING Respondent

Court: Williams, Kós and Miller JJ

Counsel: N P Bourke for Applicant
K B Bell and B So for Respondent

Judgment: 9 October 2025

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, David Falamoe, was convicted of a range of violent and sexual offences following trial. He seeks leave to appeal a decision of the Court of Appeal

upholding his conviction on one charge, namely sexual conduct with a child under 12 in breach of s 132(3) of the Crimes Act 1961.[1]

Facts

[2] After a party and in circumstances to be described, the applicant got into the bed of TG, a nine-year-old girl. She was asleep at the time, and remained asleep throughout the entire incident. The applicant saw the girl earlier in the evening and, according to the evidence, suggested to others at the party that she "needed a good fingering". The following morning, TG came into the lounge where the applicant and his partner had slept. His partner told TG to leave. The applicant claimed to have an erection and was not wearing underwear. He too wanted TG to leave the room because he needed to go to the toilet. TG went back to her room and apparently fell asleep. The applicant put on his boxer shorts and went to the toilet. According to the Court of Appeal:[2]

> The next thing [the applicant's partner] heard was TG's mother yelling to her "look, he's in fucking bed with my daughter". [The applicant's partner] went into her bedroom, and Mr Falamoe was lying in bed next to TG, who was uncovered. [The applicant's partner] told him [to] get out immediately. She said that Mr Falamoe was near the end of the bed facing her and TG was right behind him in the middle of the bed. TG's eyes were closed, and she did not wake up. [The applicant's partner] said when she told Mr Falamoe to get out of bed he said, "I didn't see her".

[3] The evidence of TG's mother was that the applicant had been facing towards TG in the bed but, when she (the mother) yelled out, he turned away from TG and towards her.[3] No one suggested the applicant actually touched TG.

The offence and issues arising

[4] Under s 132(3) of the Crimes Act, doing an indecent act on a child is an offence (10-year maximum). Section 2(1B) provides:[4]

> For the purposes of this Act, one person does an indecent act on another person whether he or she—

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1 *Falamoe v R* [2025] NZCA 168 (Katz, Dunningham and Powell JJ) [CA judgment].
2 At [12].
3 At [13].
4 Emphasis added.

(a) does an indecent act *with or on* the other person; or

…

[5] The issues arising on the application for leave to appeal relate to the meaning of "indecent act" and "with or on". These issues have been addressed on two occasions by this Court. The first was in *Y v R* (adult male inducing boys to masturbate in front of him by showing them pornography), in which the Court found the offence was made out,[5] and the second was in *Rowe v R* (surreptitiously taking photographs of three young bikini-clad girls using a zoom lens), in which the Court found the offence was not made out.[6]

Court of Appeal

[6] The Court of Appeal considered that the simple act of an adult male getting into bed with a young girl is not necessarily indecent but circumstances surrounding that conduct may render it indecent for the purposes of s 132(3).[7] The Court reviewed the circumstances of the applicant's conduct as summarised above, and concluded there was a sufficient evidential basis for a jury to find that conduct indecent.[8] In this respect, the Court referred to and accepted Cooke J's pre-trial summary of the position, in which he said:[9]

> For an adult man to get into the bed with a young girl with whom he has no familial relationship could be considered to be an indecent act, particularly if there is no innocent explanation for that act. Whether it is or not is contextual. Parents will likely be cuddling their children of this age in their beds every night. But when there is no such familial relationship, and the surrounding circumstances show an illegitimate sexual interest by a person who is not part of the child's close domestic world, the act of the person entering the child's bed can plainly be seen as [an] indecent act by a properly directed jury even if no further acts are involved.

[7] As to whether the indecency was "with or on" TG, the Court concluded that those words did not require the child to be under the applicant's "active control or influence".[10] Applying *Y v R*, the Court found it was sufficient if the presence of both

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5 *Y v R* [2014] NZSC 34, [2014] 1 NZLR 724.
6 *Rowe v R* [2018] NZSC 55, [2018] 1 NZLR 875.
7 CA judgment, above n 1, at [29].
8 At [30].
9 At [29] citing *R v Falamoe* [2022] NZHC 1534 at [29].
10 CA judgment, above n 1, at [34].

child and adult was fundamental to what happened and the child's presence was the motivation for the adult's conduct; in those circumstances, the child may be considered a participant in a manner that satisfies the "with or on" requirement.[11] Applying these principles to the facts, the Court of Appeal held:[12]

> Here, TG's presence in the bed was fundamental to what happened. It was open to the jury to find that her presence provided the motivation for [the applicant's] act of getting into bed with her, making TG a passive participant in that sense. The fact that TG was sleeping does not preclude her providing the necessary motivation for Mr Falamoe's act or being a passive participant in it.

[8] The Court found both elements of the offence were met accordingly.[13]

Submissions

[9] The applicant submits that the approach taken by the Court of Appeal in this case is inconsistent with *Y v R*, in which the Court found that "[m]ere presence will not in itself be sufficient."[14] It is submitted that even if the applicant got into bed with TG because he was sexually attracted to her, his motivation is not relevant to the question of whether what happened was "with or on" TG. Further, although TG was present, she was asleep, and not in any way under the applicant's control or influence as required by *Y v R*.

[10] As to the meaning of indecency, the applicant submits that this Court's caution in *Rowe* against overemphasis on context at the expense of focusing on the act in question is apposite.[15] The Court of Appeal in this case had fallen into that error by failing to grapple with the inherent nature of the act in question and overemphasising the applicant's alleged intention.

[11] Finally, the applicant submits that this is an appropriate case to clarify the scope of "with or on" for the purposes of ss 132 and 134, and so gives rise to a matter of general or public importance.[16]

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11 At [34]–[35] citing *Y v R*, above n 5, at [20] and [22].
12 CA judgment, above n 1, at [36].
13 At [30] and [36].
14 *Y v R*, above n 5, at [21].
15 *Rowe*, above n 6, at [44]–[45].
16 Senior Courts Act 2016, s 74(2)(a).

[12] The Crown submits that there is no lack of clarity as to the meaning of "with or on" as the Court in *Y v R* has made it clear that, while physical contact would readily satisfy the requirements of s 2(1B) and while "with or on" did not just mean while in the presence of the child, the child may be a participant in the required sense if the presence of the child is the motivation for the adult.[17]

[13] Further, it is submitted by the Crown, the Court in *Y v R* recognised that:[18]

> … there may be room for a difference of opinion as to the side of the line on which a particular case falls. That decision will be for the finder of fact.

[14] The Crown submits therefore that the result in this case reflects the application of settled principles to facts and does not give rise to any matter of general or public importance nor any risk of a substantial miscarriage of justice.[19]

Assessment

[15] We are satisfied, in accordance with the submissions of the Crown, that the issues in this case are essentially factual and give rise to no question of general or public importance.[20] As to whether the act in question was capable of being indecent, the answer provided by Cooke J in the High Court[21] shows the difficulty for the applicant in demonstrating that a jury could not reasonably find that, in the distinctive context of the case, the applicant's conduct was indecent.

[16] With that in mind, the view expressed by the Court of Appeal as to whether that potentially indecent act was "with or on" TG was an available application of principles settled in *Y v R* to the facts of this case.

[17] In those circumstances, we also see no prospect of a substantial miscarriage of justice if leave to appeal is not given.[22] It is therefore not necessary in the interests of justice for this Court to hear and determine the proposed appeal.[23]

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17 *Y v R*, above n 5, at [20].
18 At [22].
19 Senior Courts Act, s 74(2)(a)–(b).
20 Section 74(2)(a).
21 See above at [6].
22 Senior Courts Act, s 74(2)(b).
23 Section 74(1).

Result

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

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