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 PERSON UNDER THE AGE OF 18 YEARS WHO IS A COMPLAINANT OR 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 102/2025
[2025] NZSC 202

BETWEEN	KRISHNAN NAIDU Applicant
AND	THE KING Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: J N Olsen for Applicant
L J Sullivan for Respondent

Judgment: 22 December 2025

JUDGMENT OF THE COURT

A The application for leave to appeal against conviction is dismissed.

B The application for leave to appeal against sentence is granted (*Naidu v R* [2025] NZCA 452).

C The approved question is whether the Court of Appeal was correct in its approach to sentence.

D A decision on the application for bail pending appeal is deferred on the basis set out below at [9].

REASONS

[1] We give, brief, reasons for our decisions to dismiss the application for leave to appeal against conviction and to defer a decision on the application for bail pending the appeal.

Proposed conviction appeal

[2] The application for leave to appeal against conviction challenges the trial Judge's directions in relation to consent.[1] Three matters are relied on. First, the applicant argues that the directions erroneously expanded the definition of what is not consent contrary to s 128A of the Crimes Act 1961. Second, the applicant contends the directions given on belief on reasonable grounds were incorrect. Third, the applicant says the Judge should have directed that youth must be considered when determining belief on reasonable grounds.

[3] The proposed conviction appeal would essentially reprise the arguments made in the Court of Appeal.

[4] On the first proposed ground, the applicant argued it was wrong to tell the jury that submission out of a fear of the consequences of withholding consent, or because of feelings of powerlessness, being trapped or exhausted, was not true consent. That went beyond the statutory framework. None of these additions were necessary and the reference to "submission" effectively excluded the possibility the jury would consider reluctance or regret to be true consent.

[5] In response to these arguments, in the Court of Appeal noted that the trial Judge gave the standard direction required by *Christian v R*, namely, "that consent means 'true consent given by a person who is in a position to make a rational decision' and that 'consent must be freely given'".[2] The Court of Appeal considered the addition of the references complained about was unnecessary but had not given rise to a

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1 Leave to amend the notice of application for leave to appeal is formally granted.

2 *Naidu v R* [2025] NZCA 452 (Campbell, Venning and Eaton JJ) [CA judgment] at [20] citing *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [19], n 10 per William Young, Glazebrook, O'Regan and Ellen France JJ.

miscarriage of justice.[3] The complainant's evidence was that she "clearly communicated that she did not consent" rather than suggesting she felt powerless and had given in.[4] Further, the jury would have been aware that other references complained of — concerning directions relating to sexual activity while a complainant is asleep, unconscious, or affected by drugs or alcohol — did not relate to factors that were live at trial.

[6] On the need for a direction as to reluctant or regretted consent, the Court said the necessity for such a direction "will reflect the factual narrative available to the jury in the particular case and what the Judge has told the jury about the meaning of consent".[5] The Court, having reviewed the relevant evidence, was satisfied there was no error in not giving a direction as to reluctant or regretted consent. The Court saw the "central issue" as the credibility and reliability of the complainant's evidence, particularly her assertion that "she was both crying and repeatedly saying 'no' to" the applicant.[6]

[7] On the second and third grounds, which are related, the Court of Appeal found no error. The Court said first that the trial Judge's direction "reflects the standard direction suggested in *Gutuama v R* requiring the jury to put themselves in the defendant's shoes in assessing reasonable belief".[7] Second, the Court considered that:[8]

> … even if a defendant's age could have a bearing on the reasonableness of a mistaken belief in consent, we are satisfied that factor could not, on the narrative presented to the jury, have given rise to a different verdict. The absence of a direction that age is relevant in considering the reasonableness of a belief in consent did not create a miscarriage of justice.

[8] The approach to youth in the context of reasonable belief in consent may give rise to a question of general or public importance.[9] However, as the Court of Appeal noted, the defence here was that the complainant had consented. No evidence was

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3 The Court also noted the respondent's submission that s 128A(8) of the Crimes Act 1961 provides that the section "does not limit the circumstances in which a person does not consent to sexual activity": CA judgment, above n 2, at [46].

4 At [47].

5 At [20].

6 At [37]. The applicant relied on the complainant's "acceptance that the couple's sexual activity was predicated on reluctantly or hesitantly given consent": at [16].

7 At [55] citing *R v Gutuama* CA275/01, 13 December 2001 at [39].

8 CA judgment, above n 2, at [62].

9 Senior Courts Act 2016, s 74(2)(a); and see *Wright v R* [2024] NZSC 55.

offered by the applicant or on his behalf and nor was there a suggestion his age was a relevant factor. Those circumstances do not provide a suitable background for considering the broader issue. Nor do we see any appearance of a miscarriage of justice.[10] Nothing raised by the applicant satisfies us that the Court of Appeal was wrong to conclude none of the matters relied on gave rise to a miscarriage of justice.

Application for bail

[9] Bail is sought pending appeal. The applicant argues that bail is necessary so that his appeal is not rendered nugatory.[11] Bail is opposed by the respondent on various grounds. In our exchanges with counsel for the parties in relation to the bail application it has become apparent to the Court that we should defer consideration of the application for bail to allow the parties to provide further information concerning the application. Any further information from the respondent is to be filed and served by 5.00 pm on 30 January 2026 and by the applicant by 5.00 pm on 4 February 2026. The bail application will then be addressed.

Result

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

[11] The application for leave to appeal against sentence is granted (*Naidu v R* [2025] NZCA 452).

[12] The approved question is whether the Court of Appeal was correct in its approach to sentence.

[13] A decision on the application for bail pending appeal is deferred on the basis set out above at [9].

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

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10 Section 74(2)(b).

11 The applicant has served just over a year of his three-year six-month term of imprisonment and is eligible for parole. At a hearing before the Parole Board on 18 November 2025, at his request, the hearing was adjourned to February 2026.