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**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 59/2019  
[2019] NZSC 103**

BETWEEN                      LEWIS ERU CRAIG  
   Applicant

AND                              THE QUEEN  
   Respondent

Court:                          Glazebrook, O'Regan and Ellen France JJ

Counsel:                      C J Nicholls for Applicant  
   A D H Colley for Respondent

Judgment:                    26 September 2019

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

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**REASONS**

[1] Mr Craig applies for leave to appeal against a decision of the Court of Appeal dismissing his sentence appeal.<sup>1</sup>

[2] Mr Craig and four fellow defendants initially faced 65 charges, including sexual violation by rape and unlawful sexual connection, as well as abduction with intent to have sexual connection. During the trial, because of concern for the complainant's state of mind, the trial (and later sentencing) judge, Clark J, gave the

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<sup>1</sup> *Troon v R* [2019] NZCA 265 (Courtney, Lang and Whata JJ). Mr Lewis Eru Craig was one of three appellants, alongside Mr Jeffrey Troon and Mr Teri Te Waimarama Thompson.

Crown leave to amend those charges to charges of indecent assault. The defendants then pleaded guilty to the amended charges.

[3] In Mr Craig's case this means he pleaded guilty to one charge of indecent assault (placing his penis in the complainant's mouth without her consent).<sup>2</sup> He was sentenced to imprisonment for a term of two years and seven months.<sup>3</sup> The starting point was three years,<sup>4</sup> reduced by one month for time spent on bail on restrictive conditions and by just over 10 percent for the guilty plea.

### **Sentencing remarks**

[4] Clark J considered that the following aggravating factors were involved: that the defendants offended as part of a group, the disparity in ages between the complainant (17 years old) and the defendants (aged between 25 and 26 years old) and the harm to the victim as detailed in her victim impact statement.<sup>5</sup>

[5] As to the appropriate discount for guilty pleas, Clark J accepted that the pleas had been entered promptly after the decision to reduce the charges had been made.<sup>6</sup> She also accepted that the victim had received a benefit from the defendants pleading guilty.<sup>7</sup> On the other hand, Clark J noted that the complainant had been required to give evidence and had been cross-examined over a three-and-a-half day period in which she remained steadfast in her evidence.<sup>8</sup> The pleas to the lesser charges also provided an obvious benefit to the defendants, the jury had been empanelled and the Court had already expended significant resources on the trial.<sup>9</sup>

### **Court of Appeal decision**

[6] Mr Craig and two of the other defendants appealed against the sentences imposed. The Court of Appeal rejected the submissions made that Mr Craig and his

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<sup>2</sup> He had initially faced 15 charges.

<sup>3</sup> *R v Thompson* [2018] NZHC 2608 (Clark J) [Sentencing remarks] at [75].

<sup>4</sup> The Crown had suggested a starting point of two and a half years.

<sup>5</sup> At [39].

<sup>6</sup> At [28].

<sup>7</sup> At [28].

<sup>8</sup> At [29] and [32].

<sup>9</sup> At [28] and [32].

co-offenders were taken by surprise when the starting points adopted by Clark J were higher than those sought by the Crown and discussed in chambers when argument on the proposed reduced charges took place.<sup>10</sup> The Court considered that Clark J had made it clear in those discussions that she was not prepared to give a sentence indication.<sup>11</sup> Nor was she prepared to say she would impose end sentences of the type suggested by the Crown.<sup>12</sup> Further, all three appellants were aware of the possibility that a term of imprisonment could be the outcome.<sup>13</sup>

[7] The Court of Appeal also rejected the submission that the sentences imposed on the appellants were manifestly excessive. The Court considered that the indecent assaults committed by the appellants fell within the most serious in terms of culpability for offending of this type. This meant that s 8(c) of the Sentencing Act 2002 was engaged and Clark J was required to impose the maximum penalty for the offence unless the circumstances of the offender rendered that inappropriate.<sup>14</sup> The maximum sentence for each charge was seven years' imprisonment. This meant that the starting points adopted for all three appellants were too low.<sup>15</sup>

[8] The members of the Court did, however, differ on whether, in the unusual circumstances of this case, the ten per cent discount for the guilty pleas was too low but this disagreement was of no moment because all members of the Court considered that the starting points were too lenient.<sup>16</sup>

### **Mr Craig's submissions**

[9] Mr Craig submits that the Court of Appeal erred in concluding that the sentence imposed on him was not manifestly excessive. In particular, he argues that both Clark J and the Court of Appeal did not take into account the interests of the victim as required by s 7(1)(c) of the Sentencing Act.

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<sup>10</sup> CA judgment, above n 1, at [36]–[38].

<sup>11</sup> At [38].

<sup>12</sup> At [38].

<sup>13</sup> At [40].

<sup>14</sup> At [46].

<sup>15</sup> At [47].

<sup>16</sup> At [60].

[10] Mr Craig also reprises the argument made before the Court of Appeal that, despite no formal sentence indication being given, he had a reasonable expectation that he would not be imprisoned because of the interactions between Clark J and Crown counsel and defence counsel prior to the guilty pleas being entered.

### **Our assessment**

[11] We do not consider the criteria for leave are met.<sup>17</sup> It is only in rare cases that this Court will give leave to appeal on sentencing issues: where some important question of general principle arises or where there is plainly an appearance of a substantial miscarriage of justice.<sup>18</sup>

[12] In this case no error of principle has been identified. It is clear from the summary set out above of Clark J's sentencing remarks that the interests of the victim were taken into account, both in terms of the harm caused by the offending and the benefit to the complainant from the defendants pleading guilty.<sup>19</sup> We thus do not accept the submission that s 7(1)(c) of the Sentencing Act was not taken into account.

[13] Mr Craig has not identified any reason for differing from the Court of Appeal's conclusion that Mr Craig could have had no reasonable expectation, when pleading guilty, that Clark J would accept the starting point suggested by the Crown.

[14] We also do not consider that Mr Craig has shown any possibility of a miscarriage of justice.

[15] We accept the Crown's submission that the starting point adopted by Clark J was in line with that applied to his fellow defendants and with other cases<sup>20</sup> and that it could even be seen as lenient.<sup>21</sup> Clark J carefully considered the competing

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<sup>17</sup> Senior Courts Act 2016, s 74(2).

<sup>18</sup> *Burdett v R* [2009] NZSC 114 at [4]; *Forrest v R* [2010] NZSC 43; *Hakaoro v R* [2014] NZSC 169; and *Kondratyeva v R* [2015] NZSC 186 at [6].

<sup>19</sup> We consider that the latter consideration is more logically taken into account, as Clark J, when considering the discount for a guilty plea rather than in setting the starting point.

<sup>20</sup> Clark J referred to *Dayal v R* [2016] NZHC 1027 and *Johnson v R* [2016] NZCA 144: Sentencing remarks, above n 3, at [63].

<sup>21</sup> As noted by the Court of Appeal: CA judgment, above n 1, at [46] and [51]. We do not, however, need to comment on whether s 8(c) of the Sentencing Act was engaged with regard to Mr Craig.

considerations in relation to the appropriate level of discount for the guilty plea in the unusual circumstances of this case.

[16] Nothing raised by Mr Craig suggests that the final sentence imposed on him was manifestly excessive and thus outside the range available to Clark J.

### **Result**

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

Solicitors:  
Crown Law Office, Wellington for Respondent