Supreme Court of New Zealand

3 April 2014

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

Y v THE QUEEN
(SC 40/2013)
[2014] NZSC 34

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

The appellant, Y, faced trial in the District Court on three counts of doing an indecent act. The three counts comprised two counts under s 132(3) of the Crimes Act 1961 and one count under s 134(3) relating to alleged offending against two 11 year old boys and one 12 year old boy respectively.

In all instances, the appellant had induced and permitted the boys to masturbate in his presence. The alleged offending took place in the appellant's garage, which housed a number of items of likely interest to adolescent boys (computers, a flight simulator and numerous remote control aeroplanes, helicopters and cars). On a number of occasions the appellant showed the three boys pornographic movies and encouraged or persuaded them to masturbate in his presence. The appellant facilitated or participated in what happened in various ways (by the provision of lubricating gel, moving a stool for one of the boys and picking up another boy's trousers and throwing them across the room) and remained in the garage to watch while the boys were masturbating, but there was no physical contact between the appellant and the boys. The appellant did not engage in any concurrent sexual activity.

Sections 132(3) and 134(3) of the Crimes Act are in similar terms and provide that a person "who does an indecent act on" a child or young person commits an offence. The scope of each provision is amplified by s 2(1B) of the Crimes

Act, which provides that a person "does an indecent act on another person" if he induces or permits the other person to do an indecent act "with or on" him.

The issue on appeal was whether the acts of masturbation carried out by the boys were indecent acts "with or on" the appellant.

The appellant argued that his conduct did not constitute offences against ss 132(3) and 134(3) because there was no physical involvement by the appellant with the boys while they were masturbating and because he did not carry out, concurrently with their masturbation, any indecent acts. Reliance was placed on a Court of Appeal decision which cautioned against expanding the definition of "with" to be synonymous with "in the presence of".

The District Court accepted the appellant's argument that his conduct did not infringe ss 132(3) and 134(3). However, the Court of Appeal disagreed and considered that the appellant's presence (by remaining in the garage and watching) fell within the s 2(1B) definition.

The Supreme Court has concluded that the appellant's conduct fell within the scope of ss 132(3) and 134(3) and has unanimously dismissed the appeal.

The Supreme Court has held that the words "with or on" should be construed in accordance with ordinary English usage and that the proper interpretation of the statutory provision does not impose retrospective criminal liability. It is open to the finder of fact to conclude that the "with or on" element of each offence has been made out even where there was neither direct physical contact nor simultaneous related activity. The "with or on" element is likely to be satisfied in such circumstances where the presence of the complainant and defendant was fundamental to the acts which occurred, the indecency performed by the child was instigated by the defendant and for his or her purposes (especially if those involved sexual gratification), and where the defendant could exercise control or influence over the child or young person.

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