NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 40/2013
[2014] NZSC 34

BETWEEN	Y (SC 40/2013) Appellant
AND	THE QUEEN Respondent

Hearing: 5 December 2013

Court: Elias CJ, McGrath, William Young, Glazebrook and Blanchard JJ

Counsel: C B Wilkinson-Smith, M M Wilkinson-Smith and H F Brown for Appellant
A Markham and Z R Hamill for Respondent

Judgment: 3 April 2014

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by William Young J)

A conviction appeal following pleas of guilty

[1] The appellant faced counts alleging indecencies with three underage boys. There was no dispute as to the facts. On the appellant's argument his conduct did not infringe ss 132(3) and 134(3) of the Crimes Act 1961 under which the counts

were laid. In the District Court,[1] Judge Paul agreed that this was so and, accordingly, the appellant was discharged under s 347 of the Crimes Act. A Crown appeal was, however, allowed by the Court of Appeal and the s 347 discharge was set aside.[2]

[2] On the basis of the Court of Appeal's judgment the appellant had no defence to the charges he faced and, accordingly, he pleaded guilty on arraignment. He now appeals against conviction on the basis of the argument which succeeded in front of Judge Paul but was dismissed by the Court of Appeal. If this argument is right, it is common ground that he is entitled to have the convictions set aside.

[3] Because this appeal is, in substance, a challenge to the judgment of the Court of Appeal on the s 347 appeal, he was granted leave to appeal directly to this Court.[3]

The issue on the appeal

[4] Two of the boys were 11 years old at the time of the offending and the counts in respect of them were under s 132(3) of the Crimes Act. The third was 12 years old and so s 134(3) was applicable in his case. In all instances, the appellant had induced and permitted the boys to masturbate in his presence. This occurred in the appellant's garage in which there were items of likely interest to adolescent boys – a full-size flight simulator, computers, and remote control aeroplanes, helicopters and cars. On a number of occasions when the boys were in the garage, the appellant locked the connecting door to the house and showed the boys pornographic movies. This provided the context in which he permitted one of boys, and persuaded the others, to masturbate in his presence. The appellant facilitated or participated in what happened in various ways: the provision of lubricating gel, moving a stool for two of the boys and picking up one of the boys' trousers and throwing them across the room. The appellant remained in the garage while the boys were masturbating and watched. There was, however, no physical contact between him and the boys and he did not engage in any concurrent sexual activity.

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1 *R v Y* DC Auckland CRI 2011-440-3042, 25 January 2012.
2 *R v Y (CA321/2013)* [2012] NZCA 458 (Arnold, Priestley and Ronald Young JJ).
3 *Y (SC40/2013) v R* [2013] NZSC 62.

[5] Sections 132(3) and 134(3) are in similar terms. They provide respectively that everyone "who does an indecent act on" a child (being someone under 12) or a young person (being someone between 12 and 16) commits an offence. (In these reasons we use "child" as including a "young person"). The scope of these offences is amplified by s 2(1B) which is in these terms:

> For the purposes of this Act, one person does an indecent act on another person whether he or she—
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> (a) does an indecent act with or on the other person; or
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> (b) induces or permits the other person to do an indecent act with or on him or her.

[6] The allegation against the appellant was that he had permitted the three complainants "to do an indecent act with or on him". In issue is whether the acts of masturbation carried out by the boys were indecent acts "with or on" the appellant. On the appellant's argument, they were not as (a) there was no physical involvement by the appellant with the boys while they were masturbating and (b) he did not carry out, concurrently with their masturbation, any indecent acts.[4] This argument finds some support in two Court of Appeal judgments, *R v S*[5] and *Trower v R*,[6] to which we now turn.

R v S* and *Trower v R

[7] In *R v S*, the appellant had been charged under s 134(2)(b) of the Crimes Act, as it then was, which made it an offence to do "any indecent act with or upon" a 12 year old girl. He had persuaded her to pose for photographs wearing "flimsy and revealing" negligees. Two of the photographs he took were indecent. He also pinned the crutch of one of the negligees and assisted in setting the poses. The trial judge had left the case to the jury in terms which left it open to the jury to convict

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4 The District Court Judge thought that if the boys' actions had been directed at the appellant, convictions were possible: see [11] below. He concluded that they were not so directed. In this Court. counsel for the appellant adopted the reasoning of the Judge in both respects. As will become apparent, we do not consider that liability under ss 132(3) and 134(3) turns on whether the indecent acts in question were directed towards another person: see [21] below. For this reason we do not engage with this argument.

5 *R v S* CA273/91, 20 December 1991.

6 *Trower v R* [2011] NZCA 653.

on the basis of the instructions as to the poses and the taking of the photographs. The Court of Appeal disagreed with this approach:[7]

> … the act must be done *with* or *upon* the girl. The second of these prepositions conveys the sense of the girl being the object of the act. Some kind of physical contact, direct or indirect, is required. The preposition "with", plainly intended to mean more than "upon", widens the scope of the offence. We agree with [the appellant's counsel] that it means more than "in the presence of". We doubt however that it means, as he also submitted, that the act must be one in which the man and the girl both participate.

After referring to some English authorities to which we will revert shortly, the Court went on:[8]

> It is needful to look beyond the act of photography to ascertain whether any other act of the appellant is capable of coming within the statute. While it may be possible to characterise the appellant's whole course of conduct as indecent, the statute is limited to particular acts. To widen it could be dangerous. The appellant's acts, in addition to taking the photographs, were to produce the garments, to pin the crutch of one of them and to assist in setting the poses. The first could not be described as an indecent act, but the others could be, depending on the jury's conclusion as to what the appellant actually did in those respects, and *as to his accompanying intention*.

The Court quashed the conviction for doing an indecent act and ordered a new trial.

[8] When *R v S* was decided, s 134 was addressed to sexual conduct involving girls "of or over the age of 12 years and under the age of 16 years".[9] Sections 134(2)(a) and (b) provided:

> (2) Every one is liable to imprisonment for a term not exceeding 7 years who—
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> ...
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> (b) Being a male, does any indecent act with or upon any such girl; or
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> (c) Being a male, induces or permits any such girl to do any indecent act with or upon him.

The Court's focus on the actions of the appellant and his accompanying intention were functions of the count having been laid under s 134(2)(b). The case would

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7 At 6.
8 At 6–7 (emphasis added).
9 Crimes Act 1961, s 134(1).

have been closer to the present if s 134(2)(c) had been invoked. Despite this, the drift of the judgment provides some support for the appellant's argument.

[9] In *Trower*, the conduct in question occurred when the appellant was babysitting a 10 year old boy. While doing so, and in front of the boy, the appellant watched a pornographic video and masturbated. In the course of this he sat beside the boy and attempted, unsuccessfully, to persuade him to suck his penis. When the appellant ejaculated it was partly on the boy's hand. The Crown case at trial was based on the whole sequence of events and there was no particular emphasis on the semen. The indictment alleged an indecent act under s 132(3) in its present form.

[10] Because of the way the case was run at trial, the Court of Appeal was not inclined to place any weight on the fact that semen wound up on the boy.[10] On this basis, it allowed the appeal:

> [24] We see this case as finely balanced. We accept that the term "with" can be given the expansive definition adopted by [the Judge]. But we consider it is a more natural meaning of the term in the context of s 2(1B)(a) that some form of involvement by the victim is required. … There is nothing in the Parliamentary materials which provides guidance.
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> [25] We have some concern that the adoption of the expanded definition of "with", so that it is effectively a synonym for "in the presence of", may extend the scope of s 132(3) further than Parliament intended. It would be unclear what state of knowledge the offender needed to have about the presence of the victim: would it be sufficient that the victim was present, even though the offender did not know this? Would it be necessary for the offender to know that the victim was observing the offender's actions? Would there need to be some intent on the part of the offender to have the act observed by the victim? In the absence of any guidance from Parliament on these issues, we consider the prudent interpretative approach is to interpret "with or on" in s 2(1B)(a) as requiring some form of involvement by the victim. We think that this also fits with the context, particularly s 2(1B)(b). If Parliament wishes to extend the scope of s 132(3) to include indecent acts which are in the presence of, but do not involve, a child, then we believe it needs to do so explicitly.

The judgments of the District Court Judge and Court of Appeal on s 347

[11] In ordering a discharge under s 347, Judge Paul referred to *R v S* and *Trower v R* and went on:

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[10] In this respect, the appellant was fortunate: for similar cases with different outcomes, see *R v Huntington* (1986) 29 CCC (3d) 282 (BCCA); and *R v G* (1982) 8 WCB 244 (ABQB).

> [29] When one reads s 2(1B)(a) and (b), the use of the words "with or on" appearing in both those subsections, in my view, is significant. The elements of this offence require, first, an inducement or a permitting. The facts in this case supporting the inducement are accepted, in my view, by both counsel on the face of it. The relationship of friendship between the complainants, the setup in the garage with the playing of the pornographic videos and the encouragement by the accused for the complainants to masturbate. In terms of the indecent act, the factual basis for that is obviously the masturbation and that is clearly a jury question as to whether that behaviour in those particular circumstances would be seen by right-thinking members of the community as indecent. I am not going to indicate my view of that but it seems pretty obvious to me.
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> [30] There is, however, this third element of "with or on" which has been the critical question in the argument I have heard today. If "with or on" requires involvement by the victim, then equally and logically in my view, it requires some involvement by the accused beyond the first element that I have already explained.

He concluded that if the complainant's acts of masturbation "had been directed towards the [the appellant]", the appellant would have been guilty. But he then went on:

> [31] … Here, on what could be considered a unique set of facts, that is simply not the case. The alleged indecent acts were directed towards the pornographic videos, and the accused simply remained nearby, in effect as a voyeur.
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> [32] With much reluctance, given the alleged facts, I am drawn to the conclusion that where there were no facts indicating involvement by the accused as required by the words "with or on", that is the complainants' actions were not directed at him, he simply stood by, then the conclusion I have reached is there is no evidentiary foundation for the requirement in the offence being "with or on".

[12] In allowing the Crown appeal and setting aside the s 347 discharge, the Court of Appeal observed:

> [34] Like this Court's panel in *Trower* we see this appeal as finely balanced. We consider a jury might well see the appellant's motivation as palpable. He provided a secure and erotic environment for the boys; he encouraged them to masturbate, which encouragement included the provision of gel and discarding a complainant's trousers; and he stayed watching.
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> [35] In this situation it would be open for a jury to decide the appellant had prepared for and brought about a result whereby the three boys would masturbate in his presence, with him watching. His presence satisfies, without any straining, the plain meaning of the preposition "with". The central issue will be, whether by remaining in the garage and watching, the

> appellant intended his presence to encourage the boys to perform the indecent acts of masturbation.
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> [36] The appellant's presence thus fits inside the s 2(1B)(b) definition of inducing or permitting other persons (the complainants) to do an indecent act with the appellant. That in turn would satisfy the requirements of an indecent act on a child or young person for ss 132(3) and 134(3) purposes.

Discussion

A preliminary comment

[13] As will become apparent, we consider that the words "with or on" in s 2(1B) should be construed in accordance with ordinary English usage and that cases on the meaning of similar, but different, language in other statutes are of limited assistance. But in deference to the arguments which we have heard, we will, at least briefly, review some of the authorities to which we were referred. We will also address policy arguments, including the contention that the broad approach to s 2(1B) favoured by the Court of Appeal may tend to overcriminalise and has, in effect, imposed retrospective liability on the appellant.

The authorities

[14] Most of the cases cited involved s 13 of the Sexual Offences Act 1956 (UK), s 11 of the Criminal Law Amendment Act 1885 (its similarly worded precursor) or like provisions in other jurisdictions. Section 13 of the 1956 Act provided:

> It is an offence for a man to commit an act of gross indecency with another man … or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man.

These sections were primarily aimed at homosexual activity between consenting males, albeit that non-consensual activities were also caught.[11] An indecent assault could thus be prosecuted under s 13 and in such instances it was sufficient if the act in question had been directed towards or against the other person. But if there had been no physical interaction, the fact that the indecent act had been directed towards or against someone else – in the sense of that person having been intended to see it –

[11] *R v Hall* [1964] 1 QB 273 (CA). In *Hall* there had been physical interaction. To the same effect is *R v G*, above n 10.

was not enough.[12] Some element of co-operation was required. The reasons why were explained by Scarman LJ in this way:[13]

> To construe the section so that the complete offence could be committed even though the other man did not consent could lead to embarrassment of, and injustice to, innocent men. For example, two men happened to be close to each other in a public lavatory: one, the defendant, masturbates in the presence of the other, intending that the other should watch him since it is this that gives him sexual satisfaction: the other, who is not charged, sees him and is disgusted. The act of indecency was "directed towards him: … the first man will be properly charged with committing an act of gross indecency with the other, who will be named in the indictment, though not charged, and is innocent of any indecency.
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> The embarrassment and distress that this could cause perfectly respectable men is such that we would not so construe the section unless it was incapable of any other construction.

These remarks now read somewhat strangely but it is appropriate to remember that the effect was to limit the scope of the offence created by s 13.

[15] The authorities to which we have referred thus support the proposition that, where the alleged indecent acts do not involve direct physical interaction, they are only "with" the other party if both parties were acting in concert. They have been so applied in Canada[14] and in Australia[15] in legislative contexts which, to the extent to which they use the word "with", are broadly similar to those provided by the United Kingdom legislation to which we have referred. In such instances the defendant had performed the indecent act and the other party was, at most, an unwilling or passive spectator. What is not clear from the authorities is what is meant by "acting in concert" and, in particular, whether this requires both parties to be engaging, in concert but separately, in indecent actions, or whether it is sufficient that one party performs indecent acts at the request, and for the purposes (most likely sexual gratification) of the other. The word "consent" in the remarks of Scarman LJ which we have set out was used in a way which suggests the latter interpretation.

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12 See *R v Preece* [1977] 1 QB 370 (CA).

13 See *Preece*, above n 12, at 375–376.

14 See *R v DeBattista* (1986) 26 CCC (3d) 38 (MBCA). The appellant, who had made an unsuccessful sexual advance to the complainant, masturbated in front of him. It was held that this was not a "gross indecency with another person".

15 *Crampton v R* [2000] HCA 60, (2000) 206 CLR 161. The appellant had enticed a child into a storeroom and masturbated in front of him, there being no active involvement by the child, other than the wiping up from the floor of the appellant's semen. The High Court held that this did not amount to an act of indecency "with" the child.

[16] The English authorities and the cases from other jurisdictions in which they have been applied were concerned with whether indecent acts performed by the defendant had been "with the other party". In issue in the present case is whether indecent acts committed by the boys at the request of the appellant were "with or on" him. As well, and more generally, the approach which was seen as appropriate in the case of the Sexual Offences Act and like legislation (addressed primarily to activity between consenting adults) is not of controlling relevance to offences involving sexual conduct by adults with children. There is a need to recognise the vulnerability of children to sexual exploitation, especially by someone in charge of a child or otherwise in a position to control or influence that child's conduct.

An ordinary meaning approach to "with or on"

[17] As we have noted, the focus in this case must be on the actions of the boys and, in particular, whether those actions were "with or on" the appellant. These actions occurred in his garage which he had locked and were facilitated by the pornographic videos which he supplied. And he was physically involved, at least in a peripheral way, in what happened in the respects already mentioned.[16] We realise that the counts alleged that the appellant permitted the indecent acts rather than induced them and that, in relation to one of the boys, the appellant's actions were more by way of permission than inducement. We are satisfied, however, that on the facts disclosed in the agreed summary, it would have been well open to a jury to conclude that he instigated what occurred. Quite clearly, the children were significantly under his influence. Against that background, the conclusion that the boys' acts were "with or on" the appellant might be thought to be obvious.

[18] Counsel for the appellant suggested that "with or on" should not be construed in the manner postulated because the ordinary meaning construction we have just discussed would be:

(a) overbroad as treating the "with" element of the offence as satisfied by inducement (which is independently an element of the offence) and presence; and

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[16] See [4] above.

(b) retrospective in its operation given *R v S* and *Trower*.

An overbroad approach?

[19] When s 2(1B)(b) is engaged the defendant will have induced or permitted the child to do an indecent act. In many – perhaps most – instances where there has been inducement or permission, the logical corollary will be that the act was performed by the child "with or on" the defendant. It is, however, possible to envisage situations where an adult induces or permits a child to do indecent acts which are not "with or on" the adult. A defendant may have induced the child to do an indecent act in another place (that is, with the defendant not present) or with another person. In such circumstances, the conclusion may be that the acts in question were not "with or on" the defendant. As well, an adult in charge of a child may permit that child to do an indecent act in circumstances where the adult is indifferent to whether that act is performed or perhaps just does not want to make a fuss about it. If so, the conclusion is likely to be that the act was not "with or on" the adult.

[20] When the focus is on the indecent acts of the defendant (that is, under s 2(1B)(a)) and the other person is a child, the expression "with or on" obviously has work to do, and does not just mean "while in the presence of". Where there was physical contact between the defendant and the child (direct or indirect) there should be no difficulty in concluding that the indecent act was "with or on" the child. Similar considerations will apply if, at the request of the defendant, the child performed concurrent actions which were associated with the defendant's indecent acts. But it will also be open to the finder of fact to conclude that the "with or on" element of the offence has been made out even where there was neither direct contact nor simultaneous related activity. If the presence of the child provides the motivation for the adult, and the child is, in this sense, a participant, it may be open to a finder of fact to conclude that the indecent acts in question were "with or on" the child. We consider that this is very likely to be so where the child was under the control or influence of the defendant at the time.

[21] Mere presence will not in itself be sufficient. Conduct of the kind usually referred to as “flashing” will not result in conviction under ss 132 and 134 just because a child happened to be present. This is obviously so where the child’s presence was merely accidental or incidental. And we consider that this is also the case even where the conduct (that is “flashing”) was directed at the child unless that child was to some extent under the control or influence of the defendant. On the other hand, if the defendant was able to conscript the child as a participant, whether active or passive, in what happened, then the “with or on” test will be satisfied.

[22] We appreciate that there is some imprecision in all of this and that, as a result, 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. In directing a jury, we consider trial judges should – depending of course on what is in issue in the case – sum up along the following lines:

(a) The “with or on” element may be satisfied by direct contact or simultaneous and related activity.

(b) If there was neither direct contact nor simultaneous related activity, the jury should approach the “with or on” question by addressing:

(i) Whether the presence of both child and defendant was fundamental to what happened. Accidental or incidental presence is not enough to satisfy the “with or on” requirement.

(ii) Where the indecencies were performed by the child, whether these were instigated by the defendant and were for his or her purposes (especially if those involved sexual gratification). An affirmative response is likely to result in the conclusion that the indecencies were “with or on” the defendant.

(iii) Whether the defendant was able to control or influence the child (so as to compel the child’s participation, whether

active or passive). If so, the likely conclusion is that the actions were "with or on" the child.

[23] It follows that we consider that (a) *Trower* was wrongly decided and (b) the judgment in *R v S* took too narrow an approach to the circumstances in which liability might be imposed.

A retrospective interpretation?

[24] Counsel argued that on the basis of *R v S*, the appellant may have thought that his actions did not breach ss 132 and 134 of the Crimes Act and that the ordinary meaning approach we have discussed would thus impose retrospective criminal liability.

[25] The criminal law should operate prospectively in the sense that no one should be punished for conduct which did not amount to an offence at the time it occurred.[17] This is reflected in s 26(1) of the New Zealand Bill of Rights Act 1990 which provides:

> **26 Retroactive penalties and double jeopardy**
>
> (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

[26] In New Zealand, criminal liability – other than for contempt of court – is only imposed by statute. In this context, s 26(1) might be thought to be addressed primarily to the legislature. There is, however, scope for argument that s 26(1) and the corresponding common law principles constrain the ability of courts to expand the scope of particular offences by abolishing or limiting recognised common law defences. In this particular context, there has been criticism of the judgments of the House of Lords[18] and the European Court of Human Rights[19] over the abolition of

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17 For an elaborate discussion of this principle, see ATH Smith "Judicial Law Making in the Criminal Law" (1984) 100 LQR 46.

18 *R v R* [1992] 1 AC 599 (HL).

19 *SW v United Kingdom* (1995) 21 EHRR 363 (ECHR).

spousal immunity for rape which arguably imposed retrospective liability on the particular defendants whose defences were disallowed.[20]

[27] No decision of this Court or the Privy Council interpreted ss 132 and 134 in a manner inconsistent with the view adopted in this judgment. The Court of Appeal judgments relied on were not dealing with behaviour of the kind involved here (where the indecent acts were performed by the children). If there has been uncertainty in relation to the scope of ss 132 and 134, the resolution of the question of interpretation in this decision does not impose retrospective liability on the appellant.

[28] We therefore conclude that the effect of our judgment is to resolve what was at most an existing uncertainty in relation to the scope of ss 132 and 134 and therefore does not impose retrospective liability on the appellant. We leave for another day more general determination of the availability of retrospectivity arguments and, if such arguments are available, the circumstances in which they might succeed.

Disposition

[29] For the reasons given, the appeal must be dismissed.

Solicitors:
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Crown Law Office, Wellington for Respondent

[20] By way of example only, see PR Ghandhi and JA James "Marital Rape and retrospectivity – the human rights dimensions at Strasbourg (1997) 9 CFLQ 17 and Marianne Giles "Judicial law-making in the criminal courts: the case of marital rape" [1992] Crim LR 407.