NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA744/2021
[2023] NZCA 245

	BETWEEN	FABIAN OLINDO ARROYO-MUNOZ Appellant
	AND	THE KING Respondent

Hearing:	11 May 2023
Court:	Miller, Woolford and Cull JJ
Counsel:	T M Cooper KC and C G Farquhar for Appellant Z R Hamill and B So for Respondent
Judgment:	16 June 2023 at 2.00 pm

JUDGMENT OF THE COURT

A Appeal against conviction is dismissed.

B Appeal against sentence is allowed. The sentence of seven years' imprisonment is quashed. A sentence of six years' imprisonment is substituted.

REASONS OF THE COURT

(Given by Woolford J)

[1] On 16 July 2021, a Hamilton jury found Fabian Olindo Arroyo-Munoz (the appellant) guilty of two charges of rape against the same complainant during the

course of a single incident on the evening of 14/15 September 2019. On 15 September 2021, he was sentenced to seven years' imprisonment by Judge Macdonald.[1] He now appeals against conviction and sentence.

Factual background

[2] The appellant and the complainant were known to each other. They both attended a party in Hamilton on 14/15 September 2019. The complainant became grossly intoxicated. Her friends helped her into one of the bedrooms where she fell asleep on the bed.

[3] The complainant said she woke up when someone in the hallway opened the door to the bedroom.[2] She realised that there was a man in the bedroom with her on the bed. The man on the bed got up and went to the door to close it. He then returned to the bed and either started or continued having sex with her. The complainant thought it was her boyfriend. She could not be sure whether the man had been having sex with her before the door opened because she was asleep.

[4] The sex was brief and afterwards the man got up and left. She discovered that her underwear had been taken off and her skirt had been pulled up. As the man left, the complainant saw he was wearing a white top with black writing on the sleeve and a yellow key around his neck.

[5] The complainant left the bedroom and went back to the party. Another partygoer had first seen a man come out of the hallway (inferentially the partygoer who had opened the door and saw two people having sex) and then the appellant a few minutes later followed by the complainant, who was crying.

[6] The complainant said that when she came out of the bedroom, she did not see her boyfriend. Instead, she saw the appellant, who was wearing a white jumper. She then formed the belief that he had raped her. It was at this stage that she said to others that "someone did something" to her. The appellant left the party.

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1 *R v Arroyo Munoz* [2022] NZDC 18311 at [19] [Sentencing notes].
2 A partygoer gave evidence that he opened the door and saw two people having sex.

[7] The appellant returned to the party when the complainant's brother called him and asked him to come back. He denied the allegation of rape when confronted. The complainant called police, who attended at 6:00 am. They spoke to the appellant who denied the allegation. He voluntarily accompanied them back to the police station where he spoke with another officer. There he admitted to having sex with another woman at the party but continued to deny any sexual encounter with the complainant.

[8] Later, DNA testing revealed that the complainant's DNA was in a semen stain located in the appellant's boxer shorts seized that morning. The appellant's DNA was also detected on a vaginal swab taken from the complainant.

[9] The appellant gave evidence in his defence at trial. He said that the sex was consensual. He said the complainant had met him in the hallway, hugged and kissed him before leading him into the bedroom to have sex (charge one).

[10] When someone opened the door to the bedroom he jumped out of bed, frightened that someone would see him. After he closed the door, he paused before leaving the room and later the party. He said he did not recommence having sex with the complainant (charge two).

[11] The appellant explained that he initially denied having sex with the complainant because his pregnant girlfriend was at the party. He continued to deny sexual contact to the police because he panicked and was concerned about his girlfriend finding out about him having sex with two different women on the same night.

[12] Counsel argued in his closing address that the complainant had lied about being asleep and accused the appellant of rape because she regretted the sexual encounter. Counsel maintained that the complainant was not intoxicated. He also argued that she had been unclear as to whether or not she was asleep when the interaction began.

[13] The appellant made three statements to the police, two on the day of the incident and a third some weeks later. In each he denied sexual activity with the complainant. During the third interview, police confronted him with DNA evidence

suggesting that sex had taken place. At trial, the appellant accepted that he had lied to police and said that the sex was consensual.

[14] On the day of the incident, police did not caution the appellant, notwithstanding that he was a suspect. The third statement was given under caution but was obtained in consequence of the two earlier statements. It was a continuation of earlier lies to which the appellant had already committed himself. A ground of appeal challenging admissibility of these statements was not pursued.

Grounds of appeal against conviction

[15] The appellant takes issue with a number of directions in the Judge's summing-up to the jury.

[16] The first challenges arise out of the comments made by the Judge after he summed up the defence case (which attacked the complainant's credibility and reliability by reference to what she said about her intoxication and whether she was asleep), as follows:

> [50] Now just some final comments from me. It may be easy to get bogged down in the detail I suppose as to whether the complainant was fully asleep or how intoxicated she might be, that sort of thing. I think as Mr Prentice [defence counsel at trial] said to you, there are only two people who know what happened in that bedroom that night and you in fact have heard from both of them. Where the problem arises, however, is that the two accounts are totally different. They cannot be reconciled in any sensible way and so you have a stark choice if you think about it. One of them is being untruthful and it really is for you to determine who that is.
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> [51] Just to recap briefly. In respect of charge 1, the complainant said she was asleep and only became aware that someone was on top of her having sex when the bedroom door was opened. If you believe her then it is open to you to infer that she must have been asleep at the time of penetration which is the material time when consent is to be considered. If she was asleep she was in no position to consent and in turn if she was asleep at the time of penetration it would be open to you to conclude that there were no reasonable grounds for the defendant to believe that she was consenting. However, if you do not believe the complainant or you are unsure on the essential matters then you must find the defendant not guilty.
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> [52] On the other hand you have the defendant's account to consider. He said that the encounter with the complainant was in the hallway, she was the one who initiated the contact, she led him into the bedroom and the sexual activity that followed was entirely consensual.

> [53] As to charge 2 and whether sexual intercourse recommenced, that depends as I said on who you believe. You have the two accounts to consider. Now in putting it that way, can I just emphasise this? It does not become [some sort of] balancing exercise for you of deciding which account is more likely, which is more probable. It is not that case at all. Instead it comes back to being sure and it comes back to the position that it is for the Crown to satisfy you beyond reasonable doubt that the charges are proved. That is important to remember.

[17] Four broad submissions are made by counsel. First, these directions ignored and usurped the jury's function as finders of fact. It was open to the jury to accept parts of either account as being true, and rejecting other parts as untrue. The jury should not have been restricted to a binary choice of either accepting or rejecting the appellant's (or the complainant's) account wholesale.

[18] Second, the Judge needed to draw the jury's attention to all of the evidence that could be relevant to consent and reasonable belief in consent, regardless of the defence run at trial.

[19] Third, the Judge conflated the issues for consent and reasonable belief in consent, which needed to be considered separately. The Judge ought to have reminded the jury that even if they accepted that the complainant had not consented, they needed to consider the evidence as to whether the defendant may have had reasonable grounds to believe she was consenting.

[20] Fourth, there was an available, credible narrative for the jury to find that the complainant did not consent to sexual intercourse, but to still acquit the appellant on the basis of reasonable belief in consent. It was open for the jury to find an amalgam of both narratives and therefore that the appellant had reasonable grounds to believe that the complainant, who believed that she was having sex with her boyfriend, had consented to the sexual activity. This should have been explained to the jury in clear terms.

[21] A further passage from the summing-up complained of is the lies direction given by the Judge, as follows:

> [20] I want to say something about lies. The defendant accepted that he lied when he claimed that he never had any sexual contact with the complainant. As I mentioned he lied to others at the party when confronted

> and it continued in his contact with the police. He lied in a written statement and in a video interview. Of course, the fact that he had lied became apparent once the DNA results were to hand.
>
> [21] Now on this matter I must remind you that people lie for a variety of reasons which might be quite unrelated and unconnected to being guilty of some offence. It could be out of panic or embarrassment or to protect someone else or sometimes out of plain stupidity and in this trial the defendant explained why he lied. He did not want his girlfriend to find out what had happened. That is his explanation and that is for you to consider. So what I am saying is that people lie for various reasons but the fact that they have lied is not a basis upon which you can then automatically conclude that the defendant must be guilty. That would be quite wrong, however, the fact that he has lied is something that you can take into account as an item of circumstantial evidence to be added to the mix when deciding if the Crown has proved its case. It may have a bearing on your view as to his credibility and it is legitimate to ask sometimes, depending on the nature of the lie, if someone has lied about one thing would they also be prepared to lie about something else?

[22] Complaint, in particular, is made about the last sentence of the lies direction. Counsel submits that this direction invited the jury to reason that the appellant was lying in his evidence because he had lied to the police. It had the effect of undoing the previous directions given on the issue of lies. This was significant in the context of this case where credibility was at issue.

[23] Finally, counsel submits that the Judge's concluding remarks, which involved contrasting the competing theories from the Crown and defence, amounted to an invitation to convict. The Judge said:

> [54] One of the last things that Mr Prentice said to you was that the complainant initiated the sexual contact and it was consensual. She then regretted it and made a false complaint against the defendant. Mr Sutcliffe did touch on that same aspect and I suggest that it may be helpful to look closely at the evidence on that issue.
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> [55] What I am suggesting you consider is, was the young woman who emerged from the bedroom apparently in a distressed state, someone who had just had consensual sexual intercourse with the defendant, something she had initiated but who had now regretted what had happened and so was making a false complaint against the defendant? Was that the woman who emerged from the bedroom? Or was the young woman who emerged from the bedroom someone who had just been sexually violated while she was asleep, who was unsure who the person was and was coming to the view and did accuse the defendant as being that person?
>
> [56] I suggest that you do have a stark choice and it is for you to resolve if you can. That is all I want to say about the evidence. I trust that what confronts you is clear enough.

[24] Counsel submits that these directions betrayed the Judge's view on the evidence, making his preference known. Further, the final direction invited them to decide in favour of the Crown – "I trust that what confronts you is clear enough."

[25] In summary, counsel for the appellant submits that the judicial directions unfairly restricted the jury's ability to make findings of fact, erroneously directed that they must decide reasonable belief in consent on the basis of whether they believed the complainant or not, removed that defence from the jury and invited the jury to not only find the appellant was lying, but also to convict him of the charges.

Discussion – conviction appeal

[26] Counsel for the appellant quite rightly submits that it was not a binary choice of either accepting or rejecting the appellant's (or the complainant's) account wholesale. The Judge had made that clear earlier in his summing-up when he said:

> [8] In determining the facts and I have spent a little bit of time on this, it is entirely for you to decide what evidence to accept and what evidence to reject. You might reject or accept the whole of a witness's evidence or you might accept parts but reject other parts. It is for you to decide what weight you attach to any evidence that you do accept and so in this process you make all the determinations about the credibility and reliability of the witnesses and that is central to this trial.

[27] In making his comments at [50] of the summing-up that there were only two people who knew what happened in that bedroom that night and the jury had heard from both of them, and one of them was being untruthful and it really was for the jury to determine who that was, the Judge merely repeated what defence counsel had said in his closing address to the jury:

> The reality … is that while you have heard from a number of other witnesses at that party there were only two people in that room who really know what went on and you've heard from both of them and it's going to be a matter for you as to whether you're satisfied as to who's telling you the truth …

[28] The appellant's counsel implies that trial counsel's comments were wrong when she submits that the Judge should not have repeated them. Trial counsel was, however, not wrong to address the jury in that way. There was a "stark choice" as the Judge put it between two very different narratives. The Judge's comments did not amount to a direction that the jury needed to decide whether they believed the

complainant or the defendant "because that was the way to decide whether the defendant was guilty or not guilty of either charge", as submitted by the appellant's counsel. At [53] the Judge specifically directed the jury that "in putting it in that way" he was not suggesting it became "[some sort of] balancing exercise for you of deciding which account is more likely, which is more probable". The Judge reiterated that the burden of proof remained on the Crown and that was "important to remember". Nor did the Judge's comments amount to a misdirection on the onus and standard of proof. The Judge directed the jury that the burden of proof had not shifted as a result of the appellant giving evidence and gave a tripartite direction which included reminding the jury to return to the evidence and put the Crown to its onus of proof.

[29] Appellant's counsel further submits that the Judge conflated the elements of consent and reasonable belief in consent which needed to be considered separately. However, it was never the defence case at trial that if the jury found that the complainant did not consent, the appellant nevertheless had a reasonable belief in consent. In the defence opening statement, trial counsel stated:

> The defence case is simple and that is that any contact that happened between Mr Munoz and [the complainant] was consensual.

[30] This was reiterated in the opening address for the defence. Counsel stated:

> … Mr Munoz does accept now that he did have sexual intercourse with the complainant. His position is very much that he had intercourse on one occasion and that was when he was taken into the room by the complainant and they had consensual sex.

[31] Then in his closing address for the defence, trial counsel did not address the jury on any defence that the appellant may have had a reasonable belief in consent. Any acknowledgement that the complainant may not have consented was clearly inconsistent with the defence case that she had initiated the sexual intercourse by meeting the appellant in the hallway and leading him into the bedroom.

[32] Notwithstanding that a reasonable belief in consent was not part of the defence case, the Judge correctly directed the jury that the Crown had to prove that the appellant did not have a reasonable belief in consent. The Judge had set out four

questions in a question trail for the jury to answer in respect of each charge. The third and fourth questions related to the appellant's belief in consent, and read:

> **1.3 Has the Crown made you sure that, at the time the defendant penetrated the complainant's genitalia with his penis, he did not believe that she was consenting?**
>
> - If YES find the defendant guilty.
> - If NO go the next question.
>
> **1.4 Has the Crown made you sure that, at the time the defendant penetrated the complainant's genitalia with his penis, no reasonable person in the defendant's position could have believed that the complainant was consenting?**
>
> - If YES find the defendant guilty.
> - If NO find the defendant not guilty and go to charge 2.

[33] In his summing-up to the jury, the Judge stated:

> [38] The third element is that the defendant did not believe on reasonable grounds that she was consenting. Now with this third element if I can take this slowly. There are two ways in which the Crown can prove this element. The first way is that the Crown satisfies you that the defendant did not in fact believe she was consenting. That is concerned with what the defendant believed at the time. If you are satisfied the Crown has proved that then that is sufficient. The second way is that the Crown satisfies you that the defendant could not reasonably have thought that the complainant was consenting. In that situation what the defendant thinks is not the issue, it is irrelevant. It is for you to decide whether there were any reasonable grounds for him to believe that she was consenting.

[34] No complaint can be made about the question trail or this direction. The question is whether anything more was needed in the circumstances of this case.

[35] Counsel for the appellant submits that there was a credible narrative to find that the complainant did not consent to sexual intercourse but to still acquit the appellant on the basis of reasonable belief in consent. Counsel points to evidence that the complainant was mistaken as to who was having sex with her and her inconsistent evidence about whether she was asleep, sleepy, or just drunk.

[36] There is no evidence that the appellant knew that the complainant thought he was her boyfriend, when he was having sex with her, so that in itself could have no

bearing on the appellant's belief (reasonable or otherwise) in consent. And, of course, if he knew the complainant thought he was her boyfriend, then he would have to doubt that she consented to have sex with him.

[37] The most that could be said is that the complainant did not move or do anything to stop the appellant because she thought the appellant was her boyfriend. However, the failure to move or do anything to stop him could not, of itself, lead a reasonable person in the appellant's position to believe the complainant was consenting. More was required.

[38] Whether the complainant was asleep, sleepy, or just drunk, was a matter of assessment, but both sleep and intoxication can vitiate consent. The Judge set down a definition of consent in the question trail:

> Definitions
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> Consent – means true consent freely given by a person who is in a position to make a rational decision. There are some circumstances where allowing sexual activity does not amount to consent, including where a woman:
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> - does not protest or offer physical resistance to the activity;
> - is asleep or unconscious;
> - is so affected by alcohol that she cannot consent or refuse to consent to the activity; or
> - is mistaken about who the other person is.

[39] No issue is taken with the definition.

[40] In the circumstances of this case, the Judge was not required to draw the jury's attention to all of the evidence that could be relevant to reasonable belief in consent because it did not form part of the defence case, nor did the circumstances suggest that such a defence was available. The issue was carefully explained to the jury who were well aware that they needed to give separate consideration to it as it was one of the essential elements of the offence to be proved by the Crown.

[41] We also see no difficulty with the lies direction. The Judge correctly directed the jury that the fact that the appellant had lied was something they could take into

account as an item of circumstantial evidence when deciding if the Crown had proved its case. The direction did not invite the jury to reason that the appellant was lying in his evidence, thereby undoing the effect of the lies direction. The direction illustrated the way in which it was legitimate or illegitimate to use the evidence that the appellant had lied. It did no more. The Judge referred to the appellant's explanation for the lie and noted it was for the jury to consider. The last sentence merely reiterated the principle behind the use of lies. It was also in the form of a question, not a direction.

[42] Finally, the concluding remarks complained of do not amount to an invitation to convict. In a similar way to the lies direction, they set out the competing accounts of the appellant and complainant, this time about what could be made of the complainant's demeanour when she left the bedroom and returned to the party. Defence trial counsel had closed with the following remarks:

> My submission to you members of the jury is that for whatever reason [the complainant] had sex with the defendant, she regrets having sex with the defendant and she's made a false complaint …

[43] The Judge repeated trial counsel's remarks and then posed the alternative scenario before stating that was all he wanted to say about the evidence. His words, "I trust that what confronts you is clear enough" did not invite the jury to convict the appellant, but merely expressed the hope that he had made the issues clear for the jury.

[44] The appellant has not shown any error by the Judge in his summing-up and the appeal against conviction must be dismissed.

Sentence appeal

[45] In sentencing the appellant, the Judge referred first to the facts of the offending before turning to his personal circumstances as outlined in the pre-sentence report, letters of support and other material before him.[3]

[46] The Judge recorded the submissions of both the Crown and defence before making his own assessment of the seriousness of the offending:

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[3] Sentencing notes, above n 1, at [3]–[11].

> [15] I have considered the submissions. I am satisfied in terms of aggravating factors that the vulnerability of the victim was present to a high degree and the same applies to the harm that you caused to her. On the issue of premeditation, I accept that it was present, but only to a moderate degree. My reasoning is that, initially, your behaviour could be seen as opportunistic, but having said that, you clearly were able to recognise that the victim was in a bedroom, on her own and vulnerable. It then required some quick thinking on your part to enter the bedroom without being seen. You must have removed the blankets from the victim, and you must have removed her clothing. Later, of course you were interrupted when the door was opened but you carried on and penetrated the victim a second time and, in my view, as part of this premeditation, you decided to ejaculate into your underwear, which reflected that irrespective of whether you were intoxicated or not, you knew that your best chance of escaping detection was to avoid leaving any DNA trace behind.
>
> [16] As to any breach of trust, I think that Mr Prentice is probably correct here and that it is a doubtful proposition. At best, this was a party of young people, … where the victim was entitled to feel safe in that setting. However, as indicated, I place no real weight on the breach of trust aspect.
>
> [17] In my view, the offending falls at the top of band 1 or at the lower end of band 2 in *R* v *AM,* and the appropriate starting point is one of eight years' imprisonment.

[47] The Judge then turned to consider the mitigating factors personal to the appellant:

> [18] When it comes to what deductions should be made, I am going to make some small deduction for your relative youth. Twenty two years of age, believe it or not, still comes within the category of youth. I then have to look at what else can legitimately be recognised here. I have already acknowledged the extremely difficult life you had … but there is really no connection between that and your offending. And, that is especially so given your denial of the offending and your claim that the sexual activity was consensual. I appreciate that life for your partner and a young child will be difficult with you being in prison.
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> [19] In the end, in a roundabout way, I am going to deduct 12 months from my starting point, which is roughly 12 per cent, to recognise your youth and your personal circumstances in general. The sentence I impose on each charge is one of seven years' imprisonment.

Grounds of appeal against sentence

[48] The appellant submits that the Judge erred in considering that the offending was moderately premeditated. In the *R v AM (CA27/2009)*, the Court referred to specific features of premeditation in relation to sexual offending – grooming of a child or young victim, taking steps to get a victim alone, giving the victim alcohol or drugs

with a view to offending, and other predatory behaviour.[4] Counsel submits that the appellant's offending had none of these features and there is no other evidence to suggest that the appellant had planned to rape the complainant. His own intoxication, lack of prior interaction with the complainant and the brief period in which the incident occurred all point to offending that was opportunistic in nature.

[49] Counsel submits that the offending falls more naturally in band one of *R v AM* and that a starting point of seven to seven and a half years' imprisonment is therefore appropriate.

[50] Further, the appellant submits that a total discount of 20 per cent rather than the 12 per cent accorded should have been granted for personal mitigating circumstances – namely youth, previous good character, and hardship on his young family while he serves a sentence of imprisonment.

[51] In conclusion, the appellant submits that the sentence was manifestly excessive and should be reduced on appeal to no more than six years' imprisonment.

Discussion – sentence appeal

[52] Premeditation is an aggravating feature under s 9 of the Sentencing Act 2002 because the "degree of planning and preparation will reflect criminality" and as such is more culpable.[5]

[53] We agree that the appellant's offending had none of the specific features of premeditation in relation to sexual offending referred to in *R v AM*. We also agree that there is no other evidence to suggest that the appellant had planned to rape the complainant. The circumstances as described by the Judge do not, in our view, amount to premeditation. The Judge appears to have reached this conclusion largely on the basis that the appellant ejaculated into his underwear, which the Judge said reflected the fact that he knew that his best chance of escaping detection was to avoid leaving any DNA trace behind. However, it is equally plausible that the appellant panicked and focused on his girlfriend and their relationship. His girlfriend was pregnant, and

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4 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [37].
5 *R v Mako* [2000] 2 NZLR 170 (CA) at [36].

he did not wish to make the complainant pregnant as well. In any event, an attempt to avoid detection after the fact does not mean that the offending was premeditated. A hasty ill-thought-through attempt to avoid detection (if that was the case) does not reflect premeditation.

[54] We are, therefore, of the view that the Judge fell into error in determining that one of the aggravating features of the offending was moderate premeditation. In our view, the appropriate starting point for this offending is one of seven years' imprisonment.

[55] As to relevant personal mitigating factors, the appellant was aged 22 at the time of the offending. He had a number of minor driving related convictions. However, the information available at sentencing also showed that he had the support of his family and others in the community. In particular, the material illustrated the appellant's good character and his positive influence within his local community.

[56] Age can be relevant to sentencing because young people may struggle to control their impulses, may fail to appreciate the gravity of their offending, and generally have greater capacity for rehabilitation. A lengthy sentence of imprisonment on a young person can also be crushing.[6] We agree with submissions by counsel for the appellant that more weight should have been given to his previous good character. In all the circumstances, we are of the view that a global discount of 15 per cent rather than 12 per cent was warranted.

[57] The appeal against sentence is therefore allowed. The sentence of seven years' imprisonment is quashed. A sentence of six years' imprisonment is substituted.

Solicitors:
Crown Law Office, Wellington for Respondent

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6 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77(b)].