NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA286/2023
[2023] NZCA 583

BETWEEN	SHANE DION DIBBEN Appellant
AND	THE KING Respondent

Hearing:	1 November 2023
Court:	French, Thomas and Fitzgerald JJ
Counsel:	H T Young for Appellant R W Donnelly for Respondent
Judgment:	22 November 2023 at 10.30 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by French J)

[1] Following a jury trial in the High Court, Mr Dibben was convicted of the offence of assault with intent to commit sexual violation and was sentenced to two years and eight months' imprisonment.[1]

[2] He now appeals his conviction principally on the ground that the jury's verdict was unreasonable.

The evidence at trial

[3] In the middle of a December afternoon in 2021 the complainant was cycling on a street in Invercargill. She was 17 years of age. She stopped to check her phone when she was approached by a male stranger cycling towards her. It was not disputed the man was Mr Dibben.

[4] According to the complainant, Mr Dibben got off his bike and he struck up a conversation with her. They walked a short distance wheeling their bikes. He then made a number of highly sexualised comments to her including commenting that her lips would be good for a blow job. He asked her whether she wanted to hook up in the bushes and despite her firmly saying no several times, he persisted with requests for sexual activity. At one point of the exchange, he pointed at a nearby church and said "wouldn't it be funny if we had sex outside of the church". When she said no, he replied "do you not want to get your pussy wet?".

[5] In evidence, the complainant said she tried to get him to stop by saying she was only a minor and mentioned calling the police or her mother down. His response was to say "[y]eah, get your mother down, I bet she's hot just like you". Another comment alleged to have been made was that he called her "too developed" to be a minor.

[6] The complainant also said that during the conversation she kept her hands braced on the handlebars of her bike so that the bike was between her and the man and that she could get away quickly. Angry that someone should think it was okay to speak to her in this way, she eventually got on her bike and cycled away. However,

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1 *R v Dibben* [2023] NZHC 968.

Mr Dibben followed her on his bike. He caught up with her and was about two metres away when he said to her "that's what we could have been doing in the bushes".

[7] She tried to cycle as fast as she could but Mr Dibben got closer. The next thing that happened was that he reached out and with his hand grabbed her tote bag in what the Crown contended was an attempt to pull her off her bike. She then swerved so that he lost his grip on the bag causing him to fall off his bike and allowing her to make her escape.

[8] In cross-examination it was put to the complainant that the tote bag was not over her shoulder but on her handlebars and that as Mr Dibben was riding past her bike to go diagonally across the road and continue his journey he looked back at the traffic and as he did so his handlebars collected the shoulder strap of her tote bag.

[9] The complainant accepted that was a possibility but in re-examination said she believed it was his hand because of his proximity to her and because the scenario put to her by defence was not consistent with the alignment of their respective handlebars. She also stated that when she first got on the bike, her bag was on the handlebars but that she swung it over her shoulder while she was cycling because it was hitting the front wheel and it was safer to have it over her shoulder than on the handlebars.

[10] The bag was torn. It was tested for DNA but none was able to be extracted.

[11] Evidence was also given for the Crown by an eyewitness, Mr Mason. He did not know either Mr Dibben or the complainant. His account of what he saw was as follows.

[12] On the day in question, he was driving his car in Invercargill when his attention was drawn to two people with bicycles who looked as though they were having some sort of argument or confrontation. One was a young girl who seemed to be using her bike as a barrier. The other was a man. There was something about the scene that did not feel right to him so he did a U-turn to drive back to where they were.

[13] When he got there he saw the girl jump hastily onto her bike and start cycling. The man then also got on his bike and began chasing after her. Mr Mason described it as a cat and mouse situation. He said the young girl was in a hurry and the man was peddling as fast as he could to catch up with her. The girl got a couple of metres ahead but the man rapidly caught up. When the man was right behind the girl, he lurched and grabbed at her bag which was over her shoulder. Mr Mason was not able to tell whether the bag was over just one shoulder or also across her neck. After the man had grabbed the bag, all of a sudden the man got caught up and fell off. The girl then took the opportunity to quickly pedal away.

[14] Mr Mason lost sight of the man but located the young girl to check if she was okay. He described her as shaken up. She told him the man had been trying "to get with" her. Very shortly thereafter, Mr Mason telephoned the police to report the incident.

[15] Mr Dibben did not give or call any evidence. However, there was evidence adduced by the Crown of what he said when questioned by police. He told police he was biking to the hospital and initially denied speaking to anyone on the journey other than perhaps to say hello. He then acknowledged he may have spoken to a girl but could not remember what was said. He adamantly denied ever touching the girl and also denied grabbing her bag.

[16] On two separate occasions during the course of his police interview, Mr Dibben pointed out that he was on a GPS monitored bracelet and that it did not make sense that he would have committed a crime knowing he was being monitored.

[17] He was charged with assault with intent to commit sexual violation and an alternative charge of assault with intent to commit indecent assault.

[18] At the end of the Crown case, his trial counsel made an application under s 147 of the Criminal Procedure Act 2011 that Mr Dibben be discharged on both charges. The application focused on the sufficiency of the evidence regarding the relevant

intent required for the two offences. The application was declined by the trial Judge, Mander J.[2]

[19] As mentioned, the jury found Mr Dibben guilty of assault with intent to commit sexual violation.

Arguments on appeal

[20] Mr Young submitted on behalf of Mr Dibben that the jury's verdict was unreasonable because on the evidence the reasonable possibility of accidental contact between the defendant's handlebars and the tote bag could not be excluded and/or there was insufficient evidence to prove an intent to commit sexual violation.

[21] Developing this central submission, Mr Young argued that the concession made by the complainant in cross-examination that it might have been an accident should have been fatal to the Crown case. That it was a reasonable possibility was not precluded by the other evidence. Throughout their testimony, both the complainant and Mr Mason used tentative phrases like "I believe" and "I think". Further, Mr Mason's accounts of the complainant's movements on the day were at odds with her account while generally his evidence appeared to be based more on impression rather than actually seeing things.

[22] As regards the intent element of the offence, Mr Young submitted that the evidence to support an intent to commit sexual violence was likewise insufficient. It was, he argued, inherently implausible that someone would chase down a female to rape her in the middle of the day on a very busy street with residential housing and no bushes for cover. Further although it was established Mr Dibben had made lewd comments, it was also established that at the same time he was seeking consent to any sexual activity.

[23] In Mr Young's submission, given the "extremely weak" evidence, there was no reasonable basis on which the jury could infer the requisite intent and the only thing that could explain the verdict was the jury learning about the GPS bracelet, something

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2 *R v Dibben* [2023] NZHC 205 [Discharge application ruling].

which should never have happened. In the absence of Mr Dibben providing an affidavit and a waiver of solicitor-client privilege, Mr Young conceded that trial counsel's failure to ask for exclusion of the GPS references was most likely a deliberate tactical decision. However, that did not alter the fact the GPS evidence which Mr Young described as "[standing] out like a shining beacon" was extremely damaging and unfairly so.

Analysis

[24] In our view, Mr Young's submissions overstate the impact of the GPS evidence and do not fairly reflect the strength of the Crown case.

[25] As Mr Donnelly for the Crown pointed out, although the complainant accepted it was "possible" the handlebars of Mr Dibben's bike collected the shoulder strap of her bag, she effectively discounted that possibility both in examination in chief and cross-examination as well as re-examination by virtue of her evidence as to where the bag was placed. She maintained throughout that the bag was on her shoulder.

[26] Mr Mason's description was of lurching and grabbing. He too said the bag was over her shoulder and it was never specifically put to him that he was mistaken about that.

[27] The position of the bag was critical to the issue of whether this could have been an accident or whether it was an indirect but intentional application of force to the complainant. This was reflected in the wording of the Judge's question trail. The first question was framed so as to include the position of the bag. It asked whether the jury was sure "Mr Dibben intentionally pulled or grabbed [the complainant's] bag *from the position of her shoulder*"?[3]

[28] To answer a question framed in those terms, the jury must therefore have discounted the existence of a reasonable possibility of an accident. In our view, they were properly entitled to do so in reliance on the combined evidence of the complainant and Mr Mason.

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[3] Emphasis added.

[29] As regards intent, we consider, as did Mander J in his s 147 decision,[4] that there was sufficient evidence from which the jury could reasonably infer — for example from Mr Dibben's statements to the complainant and his physical conduct — that he had the requisite intent at the time of the subsequent assault.

[30] The various strands of evidence were: the highly sexualised nature of Mr Dibben's comments to a teenage girl he had happened to come upon standing by herself; his persistent invitations to engage in sexual activity despite her repeatedly rebuffing him and threatening to call the police or her mother; and his actions after she cycled away by chasing her and physically grabbing at her.[5]

[31] Finally, as regards the GPS evidence, contrary to Mr Young's submission we are not persuaded it would have overwhelmed the jury. First, the evidence was not without some benefit for the defence which is why Mr Dibben raised it with the police himself to support his protestations of innocence. Secondly, the trial Judge gave a clear direction about the limited use the jury could make of the evidence in the following terms:

> In this case, you have heard that Mr Dibben was subject to GPS monitoring at the time of this incident. I need to stress to you the importance of not drawing any adverse prejudicial inference against Mr Dibben from that fact. Its only relevance to this case is the information that was able to be obtained about his movements that day and Mr Dibben's knowledge of the fact that he indeed was subject to GPS monitoring at the time. Any adverse inference beyond that would be entirely speculative, unfair and illegitimate and as I have said, you need to be objective and analytical in your approach.

[32] In our view, there is no reason to believe the jury failed to comply with that direction.

[33] We are reinforced in that conclusion by the fact the jury deliberated for several hours and clearly did not rush to judgment. They also asked several questions which demonstrated they were carefully and methodically considering the evidence. They wanted, for example, to know when the tote bag was sent to ESR for forensic DNA testing. Significantly for present purposes, another question asked the Judge to

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4 Discharge application ruling, above n 2, at [5] and [9].
5 At [5].

provide further guidance about inferring intent, which the Judge did. Another question was to ask whether the GPS map showed how long Mr Dibben was in the area. That question demonstrates the jury understood the use to which the GPS evidence could be put.

[34] For all these reasons, we are not persuaded the conviction should be quashed.

Outcome

[35] The appeal against conviction is dismissed.

Solicitors:
Crown Solicitor, Invercargill for Respondent