

Introduction

[1] The appellant, Derek King, was found guilty following a trial in the High Court at Auckland on one count of encouraging young people under 18 years to provide commercial sexual services; three counts of sexual connection with a person between the age of 12 and 16 years; three counts of supplying cannabis to a person under the age of 18 years; and nine counts of receiving commercial sexual services from a person under 18 years of age. At the conclusion of the trial he pleaded guilty to two charges of indecent assault on earlier occasions.

[2] Mr King was convicted and sentenced by the trial Judge, Toogood J, to preventive detention with a minimum period of imprisonment of seven years.¹ He appeals against both his conviction and sentence.

[3] Mr King's appeal was set down for hearing before us on 20 October 2015. His assigned counsel, Mr Dodds, was granted leave to withdraw shortly beforehand. When the appeal was called, Mr King was unrepresented and sought an adjournment, which we declined for the reasons which follow. While he was reluctant to address us in support of his substantive appeal against both conviction and sentence, he did so after we advised that we would not adjourn.

Facts

[4] It is appropriate first to summarise the nature of Mr King's offending, and then the grounds of his appeal, to give context to our reasons for declining his application to adjourn this hearing.

[5] The Crown alleged that over a period of about 25 years Mr King operated as a self professed social worker or foster parent whose central Auckland home was open to vulnerable girls, generally aged between 12 and 16 years. Typically these girls lived on the street, were runaways from home, were under the care of Child Youth and Family or were routinely attracting the attention of the police. Some were sex workers.

¹ *R v King* [2012] NZHC 3353 at [39].

[6] The Crown alleged that Mr King sexually offended against five of these girls on various occasions between May 2010 and December 2011. His modus operandi was to procure girls for sex in return for payment or provision of shelter, food and other amenities like clothes and makeup. He provided some with marijuana. He also encouraged some girls to entice other adolescent girls back to his house in exchange for financial rewards. By this means Mr King secured a regular supply of young women to provide him with sexual favours.

[7] CM was the principal complainant. She lived with Mr King in early 2011. At the time CM was 14 years of age. Her evidence at trial was that Mr King demanded sex, including anal sex, from her three or four times daily. In return he supplied her with cannabis and money. Mr King was found guilty of representative and separate counts of sexual connection with her. He was also found guilty of one charge of supplying her with cannabis.

[8] Significantly, also, Mr King had earlier been sentenced in April 2002 to two and a half years imprisonment following his conviction on three counts of unlawful sexual intercourse with girls aged between 12 and 16 years and three counts of supplying them with cannabis.

[9] Mr King gave evidence in his own defence at trial. He admitted that he had sexual intercourse with all the complainants except that he denied anal intercourse with CM. He had originally denied any sexual relationship with CM when interviewed by police but admitted the relationship at trial. He admitted also to having sexual relationships with JK over a six month period between 1 January and 30 June 2011; and with CL over nearly a year between 1 January and 13 December 2011.

[10] Mr King's primary defence was that he made reasonable inquiries about the age of each complainant. He relied heavily upon MW who, at the age of 15 years, acted as an intermediary between him and the girls. He said that he had directed MW that only young women aged 18 years and older were allowed to stay. Some of the complainants confirmed that they had lied to Mr King about their ages, saying they were over 18 years old.

[11] The jury rejected the substance of Mr King's defence. He was tried on 24 charges. He was discharged on three, acquitted on three and found guilty on the remaining 18 charges.

Grounds of appeal

[12] As at 25 November 2014 Mr King's then counsel summarised Mr King's grounds of appeal against conviction as being:

- (1) The trial was unfair because Mr King was suffering from a coeliac condition caused by an inappropriate diet or illness from insufficient food.
- (2) Defence counsel, Mr Wintour, was poorly prepared to conduct the defence and did not brief Mr King's evidence properly.
- (3) The jury's guilty verdicts were contrary to the weight of evidence.

[13] By the time Mr Dodds filed his substantive submissions on 30 September 2015, Mr King's appeal was further refined to the four counts involving CM. By then the grounds were narrowed to defence counsel's failures to:

- (1) follow Mr King's instructions about the defence to be advanced to these counts, namely that no sex occurred;
- (2) take adequate instructions on significant decisions relating to the conduct of the trial and in particular to give Mr King a proper opportunity to provide adequate instructions in advance of trial;
- (3) obtain factual instructions and a signed brief of evidence from Mr King;
- (4) obtain signed instructions on all significant decisions relating to the conduct of the litigation – namely Mr King's pleas, the defences to be advanced, whether Mr King was to give or call evidence, the

admission of propensity evidence and of relevant implications arising from these instructions;

- (5) act on Mr King's instructions to seek an adjournment of the trial; and
- (6) seek an adjournment of the trial or for the jury to be discharged because of Mr King's incapacity brought about by diet related issues and missing morning and evening meals throughout the trial.

[14] Mr Dodds also advised that Mr King did not intend to pursue an appeal against sentence. However, before us on 20 October 2015 Mr King asserted that Mr Dodds acted without instructions in giving this advice. Without accepting the truth or otherwise of that assertion, we were nevertheless prepared to hear Mr King's appeal against sentence given that it has not been formally abandoned.

Adjournment

[15] Mr King filed his notice of appeal on 7 January 2013. A summary of its procedural history in this Court is as follows:

- (1) On 26 September 2013, on the application of Mr King's then counsel, Mr Tennet, White J adjourned a fixture to hear the appeal on 15 October 2013. Mr King wished to raise new grounds of appeal including allegations against his trial counsel. Also, for unexplained reasons, Mr Tennet was to be replaced by Mr Ellis.
- (2) On 5 December 2013 White J made various timetable directions. Among them were that Mr King was to file by 24 January 2014 amended grounds of appeal and an affidavit from an expert medical witness to be tendered in support of his appeal based on his medical condition; and the Crown was to file an affidavit from Mr Wintour in response to Mr King's allegations of incompetence.
- (3) On 17 February 2014, on Mr Ellis' application, White J allowed Mr King an extension of time to file and serve his affidavit and

amended grounds of appeal until 21 March 2014 and scheduled a further telephone conference to discuss expert medical evidence which Mr King proposed to call.

- (4) On 28 March 2014 White J granted further extensions of time to Mr King to file and serve his affidavit and amended grounds of appeal until 2 May 2014, noting that the extensions were final and that the appeal should be allocated a fixture.
- (5) On 6 May 2014 White J granted Mr Ellis leave to withdraw. He was then replaced as assigned counsel by Mr Wiles. In the circumstances White J extended the time for Mr King to file and serve his affidavit, any amended grounds of appeal and expert evidence by 13 June 2014.
- (6) On 25 June 2014, 21 August 2014 and 24 October 2014 Randerson J gave directions in preparation for the fixture by then allocated for 9 February 2015. He noted that Mr King had filed further affidavits and through Mr Wiles had advised that no amended grounds of appeal were to be filed. Mr Wiles had provisionally briefed a Christchurch specialist to advise on Mr King's coeliac condition and its possible effect on his wellbeing during trial. However, procedural difficulties arose in obtaining medical records and other information and at the conference on 24 October Mr King advised that the specialist was no longer willing to provide a report. Furthermore, Mr Wiles had by then withdrawn as Mr King's counsel. Randerson J directed a further telephone conference for 8 December 2014, with a warning that an application to adjourn was unlikely to be granted unless stronger grounds were made out in support.
- (7) On 26 November 2014 and 17 December 2014 Randerson J made further directions. By the latter date Mr James had been assigned as Mr King's counsel. Randerson J declined Mr King's application for an adjournment of the fixture for 9 February 2015. It was advanced on the basis that Mr King had been undergoing tests while in prison

for coeliac disease and that further tests were necessary for lactose intolerance. The Crown opposed the application on the ground that the issue for determination was not whether Mr King suffered from coeliac disease but whether such a condition caused him to suffer ill-health during the trial to the extent that it became unfair. An expert report was unlikely to assist materially on this issue. In the course of making directions for the hearing Randerson J noted that Mr King had had ample time to make available the results of medical tests to an expert.

- (8) On 29 January 2015 Cooper J granted a fresh application by Mr King for an adjournment. He reviewed in detail expert evidence provided from Dr Mark Lane to the effect that the tests which Mr King had undergone in December 2014 did not exclude the possibility that he had coeliac disease although they provided no support for the affirmative. In Dr Lane's provisional assessment, the probability of Mr King suffering from coeliac disease was less than 5 per cent. After noting that it was extremely unsatisfactory that an appeal filed in January 2013 would have to be adjourned a second time, and that responsibility for that situation rested solely with Mr King, Cooper J reluctantly granted the application. But he recorded that it was extremely unlikely any further adjournments would be granted. He made further directions about tests necessary to establish whether Mr King suffers from coeliac disease.
- (9) On 6 May 2015 Cooper J made further orders extending the timetable and on 19 June 2015 he directed that the Registrar should set the appeal down for hearing at the first available opportunity, reinforcing to Mr King that the appeal would proceed on that date. He noted that Mr King had written to the Registrar on 8 May advising of his dismissal of his current counsel, Mr Dodds; and that by that stage Mr King had dispensed with the services successively of four lawyers assigned to represent him on his appeal, excluding Mr Wintour. Mr King sought a direction from the Court, which was not apparently

granted, that the Crown be ordered to assist him in obtaining further evidence about his claim to be suffering from coeliac disease.

- (10) On 14 July 2015 Cooper J directed that an amicus be appointed, first, to ascertain from the affidavits filed whether further enquiries should be made about Mr King's contention that he was suffering from coeliac disease and consequently was unable to focus on the trial and, second, to make any submissions on Mr King's substantive grounds of appeal which he or she considered should be raised. Cooper J anticipated that function would be concluded in advance of the adjourned hearing fixture for 11 August 2015.

[16] Subsequently, Mr Newell was appointed as amicus and the fixture was adjourned again until 20 October. Despite Mr King's advice to the Court on 8 May 2015 that he had dismissed Mr Dodds, it appears that the latter continued to act as his counsel. Significantly, as noted, Mr Dodds filed a comprehensive synopsis of submissions for Mr King on 30 September 2015. However, he was formally granted leave to withdraw on 15 October 2015.

[17] An appeal against convictions for sexual offending must be determined promptly. The delays in the disposition of Mr King's appeal are unacceptable. This Court has granted Mr King extraordinary indulgences in preparing his appeal for hearing since it was filed over two and a half years ago, including adjournments of three firm fixtures.

[18] Like Cooper J, we are satisfied that the delays are due to Mr King's decisions to dismiss a series of assigned counsel, leading us to infer he is unwilling or unable to accept legal advice about the content and conduct of his appeal. In argument before us Mr King complained that his instructions have been "ignored by a procession of legal aid lawyers". However, the state cannot be expected to bear the significant costs of funding Mr King's continual dissatisfaction with assigned counsel; and nor can the appeal process be deferred indefinitely while he decides whether or not a particular lawyer's advice is acceptable to him. He has engineered

a situation where he remains unrepresented and without what he says is a necessary medical opinion despite numerous opportunities to obtain one.

[19] We are satisfied that Mr King has abused this Court's processes to continually delay the disposition of his appeal. And, for reasons which are about to follow, we are independently satisfied that Mr King does not in any event have an arguable ground or grounds of appeal against either conviction or sentence. Accordingly, we confirm our refusal to grant Mr King any further adjournments, and will now address the merits of his appeal.

Conviction

[20] Mr King's grounds of appeal as formulated by Mr Dodds on 30 September 2015 and confirmed by Mr King in oral argument before us fall into two categories.

[21] The first ground of appeal is trial counsel incompetence. On 4 July 2014 Mr Wintour swore an extensive affidavit in answer to Mr King's various allegations of error. He detailed the steps which he took to prepare for trial and brief Mr King's evidence. In this respect he noted Mr King's determination to give evidence in his defence and advance his account of events to the jury.

[22] When acting as Mr King's counsel, Mr Dodds gave notice that he required Mr Wintour for cross-examination. Mr Wintour was available for that purpose on 20 October. Mr King was offered an opportunity to cross-examine Mr Wintour but declined. He asserted that he was unable to cross-examine Mr Wintour effectively without access to the latter's trial file.

[23] Mr King's principal complaint is that Mr Wintour acted contrary to his instructions in conducting his cross-examination of CM and running Mr King's defence to the four charges involving her based on the premise of a consensual sexual relationship. However, as Mr Corlett for the Crown points out, any other defence would have been difficult if not impossible to sustain at trial; it would run contrary to Mr King's line of defence to the other charges that he took all reasonable steps to ascertain the complainants were 18 years or over before participating in sexual relationships with them. A denial of any sexual activity with CM would have

been at direct odds with the pattern of his acknowledged sexual relationships with the other young girls and undermined the credibility of his defence as a whole. Moreover, Mr King himself admitted on oath that he had a sexual relationship with CM, casting doubt on the credibility of his denial of that fact on appeal.

[24] Mr King complained before us that the Crown had denied him access to Mr Wintour's file and material documents. We do not accept that complaint. For example, Mr Dodds was able to inspect Mr Wintour's file notes on 6 October 2015. After Mr King was given copies he rejected Mr Dodds' advice about the merits of pursuing this ground of appeal.

[25] In any event, we are not satisfied that Mr Wintour's files would materially assist on the substance of this challenge. The jury's verdicts reflect an outright rejection of Mr King's denials of offending. He must take responsibility for the consequences of the jury's adverse credibility findings which ultimately determined his guilt. He cannot seek to attribute blame for this result to his counsel who in the challenging circumstances of this trial appears to have discharged his professional duty to Mr King with appropriate skill and care.

[26] This ground of appeal fails.

[27] Mr King's second ground of appeal is that his coeliac medical condition adversely affected his ability to participate in the trial to such an extent that the process was unfair. We have referred to the history of the opportunities given to Mr King to obtain expert medical evidence in support of this ground of appeal. Without such evidence, we can only rely upon Mr King's evidence and affidavits sworn by counsel and prison staff.

[28] Mr King's material assertions in a supplementary affidavit are that, first, he suffers from coeliac disease, making him gluten intolerant; and second, he was so unwell during the trial that he was "barely awake, semi conscious, confused or lethargic". In an affidavit sworn on 4 July 2014 Mr Wintour said this:

Mr King advised me early on that he suffered from coeliac disease. I asked him to provide me with an authority to obtain his medical reports from his

doctor so that I could ascertain if this would have any impact on his ability to instruct counsel. Mr King never provided me with an authority or name of a doctor to contact. I understood from this that he was self-diagnosed with the condition. He told me he had no formal medical records on this condition. I further discussed the condition with the court liaison nurse to ascertain if such a condition would have any impact on ability to give instructions. I was advised that it did not.

Once Mr King was remanded in custody he advised me that the prison catered for his dietary requirements adequately. When visiting him in prison, over time, I noticed that he had gained weight. Most prisoners do. He commented that he was treated very well and was healthy. During trial, at some stage, he did tell me that he was not given gluten free food at lunchtime. I recalled discussing this with the prison escort. I don't recall if I discussed with the Judge. I understood that the matter was resolved the next day. I understood that the prison prepared special food, as they do for any medical condition or cultural reason, and that this food travels to court with the prisoner. I would expect records to be available from the prison to confirm this if they were aware of Mr King's condition.

At no time prior to, or during the trial, did Mr King appear confused or distressed. He discussed the case with me during the breaks, understood and gave instructions on evidence as it was given, and never appeared to me to be "barely awake, semi-conscious, confused or lethargic" ...

[29] The prosecutor, Ms Jelas, swore an affidavit on 19 December 2014. She stated that during the eight sitting days of trial she did not observe any appearance by Mr King of semi-consciousness, confusion or lethargy or any other physical impairment which might have compromised the fairness of the trial. While Mr King was seated behind her for most of the trial, Ms Jelas observed him during breaks, her addresses and when he gave evidence. Nor does the trial record indicate that the Judge had noticed or was concerned about any aspect of Mr King's appearance or behaviour which might suggest that he was suffering from the effects of ill-health.

[30] Graham Yorke has been the Mount Eden Corrections facility catering manager for 29 years. In an affidavit sworn on 26 August 2014 he detailed Mr King's dietary requirements. Mr Yorke noted that on two occasions, on 28 March 2012 and 14 July 2012, he responded to alerts from the health unit to place Mr King on a gluten and lactose free diet. Notwithstanding these warnings, Mr Yorke recalled Mr King asking for dairy products, yoghurt and cheese, which were refused due to his diet restrictions. In the event that a prisoner requires a special lunch made up for Court, his request is actioned accordingly. Mr Yorke did

not receive any complaints from Mr King during the trial period of 13 to 22 August 2012.

[31] Darren Farrow is the acting assistant director of custodial services at Mount Eden Prison. In an affidavit also sworn on 26 August 2014 he detailed the prison's system for catering for prisoners with special dietary requirements. He noted that Mr King regularly ordered items through the prison local ordering system which were not gluten free including during his trial period. Examples were wheat based instant noodles and biscuits. He also noted that Mr King never declined a meal or complained about receiving a meal contrary to his diet requirements. Similarly, the prison has no record of Mr King approaching the health unit to advise that he was undergoing any allergic reactions during the trial.

[32] Finally, Robin Nuttall is a court escort working for First Security at the Auckland Courts. He confirmed his assignment to Mr King's trial on 13 August 2012. He recalls Mr King's advice to him that day of his requirement for a coeliac diet. He passed this information on to his supervisor. Arrangements were made with the prison kitchen staff to include a coeliac lunch for Mr King with the orders for the rest of the trial.

[33] In summary, this ground of appeal fails for two reasons. First, Mr King's assertion that he suffers from a coeliac condition is unsupported by medical evidence. In Dr Lane's opinion, to which we have referred, the probability that Mr King suffers from this condition is remote. Before us Mr King acknowledged that recent blood tests did not reveal any genetic predisposition to a coeliac condition; and, while that result does not exclude a coeliac diagnosis, it points against its existence. Moreover, Mr King's dietary requests for dairy and wheat based foods while in prison contradict his assertion of gluten intolerance.

[34] Second, even if Mr King was suffering from a coeliac condition, there is no evidence that it compromised his ability to participate competently in the trial process. We are not satisfied that Mr King showed any signs of disability during the trial; or that Mount Eden Prison failed to comply with his request for meals specially catered for those suffering from a coeliac condition.

[35] This ground of appeal must fail also.

Sentence

[36] In sentencing Mr King to a term of preventive detention, Toogood J, who had the particular advantage of presiding at trial, noted as follows:²

[9] While I need to be careful not to sentence you for offending with which you have not been charged, I am required to take into account the nature and scale of your offending as demonstrated by the evidence at trial and the other information provided to me as part of the sentencing process. I am satisfied that for at least the last 25-30 years you have lived in a world largely devoid of adult contact in which your attention has been devoted primarily to the sexual exploitation of the young and the vulnerable in an environment which you created specifically for the purpose.

...

[13] When you gave evidence at your trial, you described the setting up of this facility in terms which suggested that you saw yourself as providing a social service in conjunction with Police and welfare authorities. While you characterised the property as having been turned into “a safe place” for these young women, I am satisfied that the provision of food, shelter and money at your specifically modified residence was designed to provide you with a regular source of supply of vulnerable girls and young women whom you could exploit sexually. Witnesses who had stayed at your home, and those who had visited on several occasions, gave evidence that you were rarely if ever seen wearing anything other than a dressing gown. That speaks volumes about the focus of your life.

[37] The Judge followed the necessary statutory process for imposing a term of preventive detention. After reviewing all the circumstances of Mr King’s offending, he concluded that a determinate sentence, if it was to be imposed, would be 11 years imprisonment with a minimum period of seven years imprisonment. He then noted as follows:

[31] I have received the reports required by the Sentencing Act from both a psychiatrist and a psychologist. You do not suffer any mental illness but you are described as having hypochondriac, narcissistic and obsessively compulsive traits. You regard yourself, according to the psychiatrist, as especially gifted and entitled to special treatment. You have failed almost completely to empathise with the real effects of your behaviour on your victims, and in your criminal activity you focused upon your own gratification while self-centredly claiming you were helping others. In the circumstances, the modest expression of remorse you have made can be disregarded in my view. You have demonstrated no real understanding of

² *R v King*, above n 1.

what you did to these girls and young women. Far from helping them, you took advantage of them in circumstances which make it clear to me that if given the opportunity you would do so again. In saying that, I am referring to your obsession with sex with young teenagers which means that you are likely, in my view, to reoffend in the way you did with CM.

[32] While you were in prison a decade ago you underwent a course of counselling and treatment for sex offending. The probation officer describes you as having completed the course in body but not in mind, although it appears from the other information to me that you did not actually complete the course. You suggest in your letter that you went back to the director of the Safe programme for support but you did not take advantage of that opportunity and you have re-offended in a way that has brought you here.

[33] It is obvious from the scale of your offending in 2010 and 2011, that you learned nothing from your earlier experiences. The psychiatrist says that on her assessment you represent a moderate risk of similar offending. The psychologist's assessment, which I regard as being based on more comprehensive research and assessment and as realistic and fitting in with the facts of this case as I know them, is that the risk of reoffending against vulnerable, pubescent girls following your release into the community is high. I share that view.

[38] The Judge was satisfied that Mr King had caused serious harm to vulnerable members of the community; that he took no responsibility for his offending, instead continuing to rationalise and minimise it; and that he was unlikely to be willing to make personal and environmental changes in the future. He then made this significant finding:

[35] Given your age, I have given serious consideration to the possibility that a lengthy finite term of imprisonment, which would not see you released until at least the age of 73 or 74, would be sufficient to minimise the serious community risk that you impose. The psychologist's opinion (which is supported by the evidence of the types of sexual contact you had with your victims on some occasions) is that the offending in which you engaged was not dependent on any physical vigour and that you are opportunistic and manipulative in your choice and seduction of victims. Your grooming and coercion of young vulnerable girls is likely to persist, in the psychologist's view, even with increasing age. Furthermore, you have demonstrated little motivation to understanding the reasons behind your offending. While the structured conditions of incarceration may, given time, enable you to address these issues, your prognosis is poor.

[39] The Judge carefully considered whether imposition of a determinate sentence of imprisonment together with an extended supervision order under s 107I of the Parole Act 2002 would be adequate to protect the community from Mr King upon his release after serving a determinate term. While acknowledging that such an order might extend through until Mr King was in his eighties, the Judge was not satisfied

that it would provide society with the necessary degree of protection. Accordingly, he concluded that it was necessary that Mr King be detained indefinitely.

[40] We invited Mr King to address us in support of his sentence appeal. His submissions were directed primarily to a denial of guilt. Nevertheless, he submitted that the Judge erred in not imposing a determinate sentence instead of preventive detention.

[41] We have independently considered whether any grounds are realistically available to Mr King on which to challenge the sentence. As a result, we are not satisfied that the sentence imposed was wrong in principle. The Judge correctly focussed on the ultimate rationale for a sentence of preventive detention – that is, the need to protect the community. He concluded that it would only be satisfied by Mr King's indefinite detention. He had the benefit of experts' reports confirming that Mr King was and was likely to remain for an indefinite period a real risk to a particularly vulnerable group of young people.

[42] In particular, we have considered whether a determinate sentence of imprisonment coupled with an extended supervision order might have more appropriately satisfied the purposes and principles of sentencing. We are unable to determine any error in the Judge's consideration of this issue. As a result, the appeal must fail.

Result

[43] The appeal against conviction and sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent