**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA283/2016**
**[2017] NZCA 566**

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| BETWEEN | EDWARD ANAND<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 8 November 2017 |
| Court: | Gilbert, Lang and Ellis JJ |
| Counsel: | Appellant in person (conviction appeal)<br>J J McCall for Appellant (sentence appeal)<br>I R Murray for Respondent |
| Judgment: | 5 December 2017 at 4.30 pm |

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**JUDGMENT OF THE COURT**

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**A The application for an extension of time to appeal is granted.**

**B The appeals against conviction and sentence are dismissed.**

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**REASONS OF THE COURT**

(Given by Lang J)

[1] Mr Anand stood trial in the District Court at Dunedin on 18 charges of historic sexual offending against 10 girls aged between 10 and 15 years. The trial Judge,

Judge Phillips, discharged Mr Anand on one charge during the trial. The jury found him guilty on five charges of raping and seven charges of indecently assaulting eight of the 10 complainants. He was acquitted on the remaining charges.

[2] On 4 May 2016 Judge Phillips sentenced Mr Anand to 13 years imprisonment.[1]

[3] Mr Anand appeals against both conviction and sentence. His notice of appeal was filed a few weeks out of time. He has explained the reasons for this. We are satisfied that it is appropriate to grant an extension of time to appeal.

**Background**

[4] Mr Anand worked as a social worker at the Dunedin Girls Home (the home) between December 1980 and September 1984. He then went on extended leave for approximately 15 months, before working there again for approximately six weeks between 13 January and 27 February 1986.

[5] The alleged offending relates to 10 separate complainants, all of whom were residents of the home and aged between 10 and 15 years at the time of the offending. The complainants were living in the home after being placed in the care of the State because of difficulties they had experienced in their lives.

[6] The Crown alleged Mr Anand had taken advantage of opportunities when he was alone with the complainants to sexually offend against them. The alleged offending took the form of raping six complainants, and indecently assaulting four others. The indecent assaults took the form of digital penetration of the complainants' genitalia and touching their breasts. He also persuaded one of the complainants to suck his penis and he got another to touch his penis. Some of the charges were laid on a representative basis because the offending occurred on numerous occasions.

[7] The activities giving rise to the charges took place in different areas of the home, including a secure unit in which some of the complainants were confined after they had misbehaved. The Crown also alleged Mr Anand had sexually offended

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1 *R v Anand* [2016] NZDC 7897 [Sentencing Notes].

against several complainants during outings in a van belonging to the home. In addition, the Crown contended he had taken one of the complainants to his home and sexually offended against her there.

[8] Mr Anand denied the allegations when he was interviewed by the police before his arrest. He then defended the charges on the basis that none of the complainants were telling the truth. His trial counsel, Mr Young, challenged the credibility of the complainants in cross-examination. Mr Anand also gave evidence at trial in which he maintained his innocence in respect of all charges.

**The appeal against conviction**

[9] Mr Anand presented this aspect of the appeal in person. His overall submission was that a combination of circumstances had led to an unfair trial. These included the absence of contemporaneous records that may have helped him to establish the complainants were lying. In addition, two members of the staff who were working at the home at the time of the alleged offending had died and were therefore unavailable to give evidence at trial. Mr Anand also said his trial counsel had failed to call other staff members who worked at the home at the time of the alleged offending. He suggested these persons may have been able to give evidence to establish the complainants were not telling the truth. Mr Anand also questions the ethnic makeup of the jury, and submits that this may have contributed unfairly to their verdicts. Finally, Mr Anand says that his ability to assist his trial counsel to conduct an effective defence was severely compromised by his poor health at the time of the trial.

*Absence of contemporaneous records*

[10] Four staff members who were working at the home at the time of the alleged offending gave evidence for the Crown at trial. They confirmed that staff maintained a diary at the home to record the names of staff on duty each day and daily events of significance. Staff also maintained a logbook recording details of residents who were confined in the secure unit as a result of behavioural issues. In addition, persons who used the van to transport residents when they needed to attend appointments away from the home were required to record those outings in a vehicle running sheet. The diary, secure unit logbook and vehicle running sheets in respect of the periods when

Mr Anand was working at the home cannot now be found. Mr Anand says these may have established that he was not working on the days when the offending is alleged to have occurred, or that he could not have had contact with the complainants on the occasions when offending was alleged to have occurred.

[11] This issue assumed some importance prior to the trial when Judge Phillips heard an application by Mr Anand for a stay of the proceedings on the basis that the passage of time had rendered a fair trial impossible. The Judge declined the application in a judgment delivered on 22 July 2015.[2]

[12] By the time the Judge heard the application the Crown had been able to locate the daily diary for the period between 15 November 1985 and 1 March 1986 but the other records remained missing. The Judge upheld the Crown's submission that the diary did not support Mr Anand's assertion that he had no opportunity to offend against the complainants.[3]

[13] This argument must also fail on appeal because the complainants did not say that offending occurred on particular dates. Not surprisingly, they were only able to give a general description of when it occurred. As a result, the records would not have assisted Mr Anand to establish he was absent from the home on specific dates when the complainants alleged he had offended against them.

[14] Furthermore, the records would not have been of assistance in relation to the charges where offending was said to have occurred at Mr Anand's house because they did not cover events occurring away from the home. In addition, Mr Anand confirmed when giving evidence that he was sometimes in situations where he was alone with residents of the home, even when they were confined in the secure unit. He also acknowledged occasionally taking a single girl to an appointment away from the home in the van with no other staff member present.

[15] For these reasons we are satisfied the absence of the records did not prevent Mr Anand from receiving a fair trial. This ground of appeal fails as a result.

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2 *R v Anand* [2015] NZDC 13699.
3 At [20].

*Death of key witnesses and failure to call witnesses*

[16] We deal with these grounds of appeal together because our reasoning in relation to both is the same.

[17] By the time of the trial two staff members who had worked at the home whilst Mr Anand was there had died. Mr Anand says they may have been able to assist his defence by giving evidence regarding the tightly-controlled nature of movements within the home by both staff and residents. He also says that his trial counsel ought to have called other staff members who worked at the home at the time of the offending because they may have been able to assist in establishing that the complainants were not telling the truth.

[18] Mr Anand relied on the argument relating to the deceased witnesses in advancing his application for a stay of the proceedings but Judge Phillips did not accept his argument. One of the witnesses was still alive at the time of the application and, if counsel for Mr Anand had considered her evidence to be important to the defence, it could have been taken before the trial. Mr Anand's trial counsel clearly did not consider that to be the case. Furthermore, Mr Anand's counsel advised two months later at an interlocutory hearing that the evidence of this witness was peripheral to the issues the jury would be required to decide.

[19] We do not consider either ground of appeal can succeed for three reasons. First, Mr Anand has not articulated in any detail how the witnesses could have assisted his cause. Secondly, our conclusion in relation to the first ground of appeal applies with equal force to these grounds. Other staff members could not have assisted Mr Anand to establish a defence based on absence of opportunity when his own evidence did not go that far. Thirdly, both grounds implicitly call into question the manner in which Mr Young conducted Mr Anand's defence. Mr Anand did not advance that ground expressly and, had he done so, we would have had the benefit of Mr Young's explanation for the decisions he made. During the hearing before us Mr Anand also emphasised that he was not calling into question Mr Young's competence. He said that Mr Young was "a good man and that he did his best". He said that the principal difficulty in preparing for the trial was that he lived in Auckland and Mr Young lived

in Invercargill. As a result, he had limited opportunities to discuss trial tactics with Mr Young before the trial began.

[20] Mr Anand's assessment of Mr Young's performance reflects our own impression of the manner in which Mr Young conducted the defence case. His cross-examination resulted in several of the complainants making significant concessions, and his closing address effectively highlighted problematic areas of the Crown case. Mr Young obviously had a difficult task given the historic nature of the charges and the fact that the defence had to counter allegations made by 10 different complainants. The Crown was also able to ask the jury to apply propensity reasoning in reaching its verdicts. The fact that Mr Young was able to persuade the jury to acquit Mr Anand on several charges clearly suggests that Mr Anand was well-served by Mr Young's performance at trial.

[21] These grounds of appeal fail as a result.

*Composition of the jury*

[22] Mr Anand points out that the jury comprised 12 persons of European descent, of whom nine were men. He submitted the jury ought to have included more women, and that the jury might also have been prejudiced against him because he is a Fijian Indian by birth.

[23] We reject these submissions. The gender makeup of the jury depended entirely on the order in which the Registrar selected jurors at random using a ballot box. There is no requirement in any event that there should be an equal number of men and women on a jury. The fact that the jury was able to find Mr Anand not guilty on several charges also suggests that the jury worked conscientiously through the charges and delivered verdicts in accordance with their collective view of the evidence. There is no reason to believe the jury may have been prejudiced against Mr Anand by some form of racial bias.

*Mr Anand's health during the trial*

[24] Mr Anand's argument that he was hampered by health problems at the time of the trial is not supported by any independent contemporaneous evidence. In addition, he was represented by competent counsel who was able to put the Crown to proof on the charges. Mr Anand was also able to give evidence and respond steadfastly to cross-examination over an extended period without appearing to suffer any ill effects. We are therefore unable to accept that the state of Mr Anand's health during the trial affected the outcome of the trial in any way.

*Conclusion*

[25] Regardless of whether they are viewed individually or collectively, the grounds advanced by Mr Anand do not establish that the trial was unfair or that it resulted in a miscarriage of justice. For that reason the appeal against conviction cannot succeed.

**The appeal against sentence**

[26] The fact that the offending occurred between 1980 and 1986 meant the Judge was required to sentence Mr Anand in accordance with the sentencing principles applicable at the time of the offending. During that period the maximum sentence on a charge of rape was 14 years imprisonment rather than 20 years as is now the case.

*The sentence*

[27] Judge Phillips considered that Mr Anand's offending had numerous aggravating factors.[4] The first was that it occurred over a considerable period of time and extended to different forms of sexual offending against eight separate complainants. The complainants were particularly vulnerable because they were effectively confined at the home at the time the offending occurred. The offending also involved a very considerable breach of trust because the complainants were all in Mr Anand's care when he offended against them. In addition, Mr Anand's conduct was premeditated. It involved a significant element of grooming because he understood the complainants' backgrounds and used that knowledge to gain their trust.

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4 Sentencing Notes, above n 1, at [11] and [23].

Some of the offending also involved Mr Anand providing the complainants with gifts, such as cigarettes, before offending against them. The offending has also resulted in what the Judge described as incalculable harm to the victims.[5]

[28] The Judge observed that in 1980 the starting point for the rape of a young girl was between four and seven years imprisonment.[6] The starting point on a charge of indecent assault was between one and five years imprisonment. As the lead charge the Judge selected a representative charge alleging the rape of a 13-year-old complainant on at least six occasions between December 1980 and June 1983.[7] Some of the offending had taken place whilst the complainant was confined in the secure unit. The Judge adopted a starting point of seven years imprisonment on that charge. He then increased that to 10 years to reflect the aggravating features of the offending. He added a further increase of four years to reflect the other charges involving allegations of rape, and two years to reflect the charges of indecent assault. The Judge then reduced the resulting sentence of 16 years imprisonment by one year to give effect to totality principles. This resulted in a sentence of 15 years imprisonment before taking into account mitigating factors.

[29] The Judge allowed a discount of two years to reflect the fact that Mr Anand was 67 years of age, had no previous convictions and was dealing with health issues. This resulted in an end sentence of 13 years imprisonment. The Judge imposed that sentence on the lead charge and imposed concurrent sentences on the remaining charges.[8]

*Decision*

[30] At the relevant time a starting point of around five years imprisonment was held to be appropriate on a contested charge of rape where no aggravating features were present.[9] That would be increased to reflect aggravating factors that rendered the offending more serious. As the Judge observed, the authorities also confirmed that

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5 At [18].
6 At [11].
7 At [22].
8 At [29]–[30].
9 *R v Clark* [1987] 1 NZLR 380 (CA) at 383.

a single charge of raping a young complainant would justify a starting point of between four and seven years imprisonment.[10]

[31] We consider the Judge correctly identified the aggravating features of Mr Anand's offending. In the case of the lead charge they were such that the initial starting point of seven years imprisonment was plainly available, particularly given the repetitive nature of the offending. We consider, however, that this would be towards the upper end of the available range for offending of this type in the 1980s. We do not consider an increase of three years to reflect aggravating factors could be justified on the authorities. At the most, the starting point in respect of the lead charge should not have been more than eight years imprisonment.

[32] That sentence needed to be increased significantly to reflect Mr Anand's culpability on the remaining charges because the jury had found Mr Anand guilty on four charges of raping three other complainants. One of these was a representative charge covering multiple incidents of rape and the other three related to single incidents of rape, but in all other respects they had the same aggravating factors as the lead charge. The sentence also needed to reflect the fact that the jury had found Mr Anand guilty on seven charges of indecent assault, two of which were laid on a representative basis because they involved repetitive conduct. All of these shared the aggravating features that the Judge identified. The real issue is whether, as Mr McCall contends on Mr Anand's behalf, an effective uplift of seven years to reflect the remainder of the offending produced a final starting point that was too high.

[33] Perhaps the strongest support for Mr McCall's argument is to be found in the approach taken in *R v J*.[11] In that case the offender had been found guilty on 45 charges of raping and indecently assaulting eight complainants over a 13-year period between 1975 and 1988. The complainants were aged between five and 16 years, and included the offender's daughter and other family members. It involved gross breaches of trust and had devastating consequences for the victims. Fogarty J adopted a starting point of 13 years imprisonment to reflect the overall gravity of the offending before taking into account mitigating factors.

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10 *R v T* (1998) 15 CRNZ 602 (CA) at 609.
11 *R v J* [2015] NZHC 398.

[34] We consider the overall culpability of the offending in *R v J* was broadly comparable with that in the present case, although it did not have the added feature of offending against young girls in a custodial environment. We note also that starting points of eight to 12 years imprisonment were adopted or approved in other cases that involve offending against multiple young victims during the period between 1969 and 1990.[12]

[35] Although the nature and extent of the offending in *R v J* may be broadly comparable with that in the present case, it does not necessarily follow that the final starting point adopted in the present case was outside the available range. That is particularly so given our view that a higher starting point could well have been justified in *R v J.*

[36] To put the present offending in perspective, each of the five rape charges would ordinarily have warranted a starting point of between five and eight years imprisonment. Each of the seven charges of indecent assault justified a sentence of between two and four years imprisonment. But for the need to have regard to totality principles, the final starting point could easily have been greater than 20 years imprisonment.

[37] Totality principles are designed to ensure an offender does not receive a sentence that is out of all proportion with the overall gravity of the offending. There will always be a range of appropriate sentences for historical sexual offending against multiple victims. That is an inevitable consequence of the need to select a sentence reflecting so many variable factors. In the present case the gravity of Mr Anand's offending was such that some judges may have adopted a starting point greater than 15 years. Others may have selected a sentence in line with that imposed in *R v J.* Importantly, however, neither approach would produce a sentence that was out of all proportion to the overall gravity of the offending. We have therefore concluded that the overall nature and extent of Mr Anand's offending, taken in the context in which it occurred, was sufficiently serious to render the final starting point of 15 years imprisonment within the available range.

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[12] *R v B (CA41/07)* [2007] NZCA 292 at [50]; *R v T,* above n 10, at 609.

[38] Mr McCall did not take exception to the level of discount the Judge provided for the mitigating factors he identified. It follows that the appeal against sentence cannot succeed.

**Result**

[39] The application for an extension of time to appeal is granted.

[40] The appeals against conviction and sentence are dismissed.

Solicitors:
Papprills, Christchurch for Appellant (sentence appeal)
Crown Law Office, Wellington for Respondent