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

CA686/2018
[2019] NZCA 20

	BETWEEN	NITIN MITTAL Appellant
	AND	THE QUEEN Respondent

Hearing: 14 February 2019

Court: Miller, Simon France and Peters JJ

Counsel: R L Thomson for Appellant
E J Hoskin and Z A Fuhr for Respondent

Judgment: 25 February 2019 at 2.00 pm

JUDGMENT OF THE COURT

A An extension of time to appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Peters J)

[1] The appellant, Mr Mittal, appeals against his conviction and sentence on one charge of doing an indecent act on a young person,[1] for which he was sentenced to two months' community detention and 12 months' intensive supervision.[2] In particular, Mr Mittal appeals against Judge Cunningham's refusal to grant him a discharge without conviction.[3]

[2] The appeal is brought on the ground that the Judge understated the likely consequences of a conviction and, in particular, that she failed to appreciate that it was inevitable that Mr Mittal would be deported if convicted, rather than deportation being a "real risk". As a result of this, counsel for Mr Mittal on appeal, Ms Thomson, submits that the Judge erred in determining that the consequences of a conviction would not be out of all proportion to the gravity of the offence.[4]

[3] The appeal is brought out of time. We grant Mr Mittal's application to extend time, there being no objection from the Crown.

Background

[4] The offending occurred in October 2016. Mr Mittal, an Uber driver at the time, had been engaged to drive B, a 14-year-old boy, from his home to a local post office, and then to drive him home.

[5] The following paragraphs of the Judge's sentencing notes describe the salient details of the offending. Before setting these out, we record that Mr Mittal was charged in October 2016, and pleaded guilty in March 2017. There was a disputed facts hearing in June 2017, and then Mr Mittal was sentenced in August 2017. The relevant paragraphs are:

> [4] The victim's evidence [at the disputed facts hearing] was that when he got back into the car for the return trip, Mr Mittal invited him to sit in the front seat, he had been in the back seat on the trip there. That Mr Mittal started asking him whether he wanted to touch or did he like to touch [Mr Mittal's penis]. B gave evidence, which I accepted, that on two occasions he said, "No," or, "No thanks." He said that Mr Mittal lifted up his jeans and he, the

1 Crimes Act 1961, s 134(3). Mr Mittal has now served his sentence.
2 *R v Mittal* [2017] NZDC 19320.
3 At [17].
4 Sentencing Act 2002, s 107.

> boy, put his hand down Mr Mittal's pants. He explained that the reason that he did it was that he was concerned about the fact that Mr Mittal was in charge of the car and he did not know what would happen if he did not do as he was told.
>
> [5] I accepted the account of the boy and in my decision I set out why in para (20). I also went on to say why I did not accept Mr Mittal's account. At para (24) I said, "I can appreciate Mr Mittal may have felt B was a willing participant because he did put his hand down Mr Mittal's pants, but that does not take into account B's evidence that twice he said no to Mr Mittal's invitation to touch him." At para (26) I said, "I find it proved that Mr Mittal did ask B, a teenage boy who was under the age of 16, to touch his penis. While he did not compel B to do so under any direct threat of force, I am satisfied that B did not consent to what happened. Rather, in his mind and because Mr Mittal was in control of the car he was afraid what would happen to him if he did not."

[6] There are two other points to mention. The first is that, initially, Mr Mittal claimed that B initiated the contact, and that he complied with B's requests because B said he had a gun. The second point is that Mr Mittal consistently denied the offending, even at the disputed facts hearing after he had pleaded guilty.[5]

District Court judgment

[7] A judge may grant a discharge without conviction if the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.[6] In determining whether the consequences would be so disproportionate, the Judge must assess the gravity of the offending having regard to the aggravating and mitigating factors of the offending and offender; identify the likely direct and indirect consequences of a conviction; and then assess whether the latter are out of all proportion to the former.[7]

[8] The Judge considered the offending in itself "moderately serious" but said this assessment was reduced by Mr Mittal's prior good character, his diligence in his studies and employment, his marriage, and the fact that some of his children were born in New Zealand. Mr Mittal does not challenge the Judge's characterisation of the gravity of the offence.

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5 *R v Mittal* [2017] NZDC 13055.
6 Sentencing Act 2002, ss 106 and 107.
7 *Z (CA447/2012) v The Queen* [2012] NZCA 599, [2013] NZAR 142 at [27]; *A(CA747/2010) v R* [2011] NZCA 328 at [13].

[9] The next step for the Judge was to identify the likely direct and indirect consequences of a conviction for Mr Mittal. She recognised that deportation "certainly is a real risk" and that, if Mr Mittal were not deported, a conviction for the offending would be adverse to Mr Mittal's prospects of gaining employment in particular fields.

[10] The Judge, however, was not satisfied that these likely consequences of conviction would be out of all proportion to the gravity of the offence, and she declined the application accordingly.

Discussion

[11] As we have said, Ms Thomson submits that the Judge ought to have appreciated that it was inevitable Mr Mittal would be deported if convicted, and that such was not merely a possibility. Given that, Ms Thomson submits that the balancing exercise came down clearly in favour of granting Mr Mittal the discharge sought.

[12] As to deportation, following his conviction in late-August 2017, in early 2018 Mr Mittal was served with a "deportation liability" notice. The Immigration and Protection Tribunal recently dismissed Mr Mittal's appeal against deportation and, as matters presently stand, Mr Mittal will shortly be required to leave New Zealand.[8]

[13] We do not accept the submission that the Judge erred in the manner suggested. First, although the Judge said, and quite correctly, that a conviction would render Mr Mittal "liable to deportation", the words quoted in [9] above show that the Judge was not under any illusion about Mr Mittal's prospects in that regard. Secondly, even now, deportation is not inevitable. Mr Mittal may have recourse to the High Court if he meets the statutory criteria in the Immigration Act 2009,[9] or he may apply independently of that to the Minister of Immigration for relief.[10]

[14] We do not wish to detract from any future submissions that Mr Mittal may wish to make with a view to remaining in New Zealand, including whether he and his wife

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8 *Mittal v The Minister of Immigration* [2018] NZIPT 600491.
9 Immigration Act 2009, s 245.
10 Immigration Act 2009, s 172.

continue to enjoy the support of their parents who are resident in India. The issue for us, however, is whether the Judge erred in her determination. We are not persuaded that she did and indeed agree that the likely consequences of conviction are not out of all proportion to the gravity of the offence. This was "skin-on-skin" offending committed against a 14-year-old boy entrusted to Mr Mittal's care for a confined purpose. Mr Mittal may have thought he had B's consent, but consent is not a defence to the charge, nor did the Judge find that Mr Mittal reasonably formed that view.

[15] It follows that we dismiss this appeal.

Result

[16] The application for an extension of time to file the notice of appeal is granted.

[17] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent