

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF  
COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

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

**CA427/2008  
[2009] NZCA 210**

**THE QUEEN**

v

**VICTOR STOJANOVICH**

Hearing: 6 May 2009  
Court: Glazebrook, Potter and Asher JJ  
Counsel: S J Shamy for Appellant  
M D Downs for Crown  
Judgment: 27 May 2009 at 10.00 am

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**JUDGMENT OF THE COURT**

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- A The application to extend time to appeal is granted.**
- B The appeal against conviction is dismissed.**
- C The appeal against sentence is dismissed.**
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**REASONS OF THE COURT**

(Given by Asher J)

## **Introduction**

[1] On 14 March 2007, the appellant, Victor Stojanovich, was convicted of sexual violation by rape, and sexual violation by unlawful sexual connection under ss 128(1)(a) and 128(1)(b) of the Crimes Act 1961. On 22 March 2007, he was sentenced by the trial Judge, Judge Crosbie, to nine years' imprisonment on both charges. After a considerable delay, which he has, however, adequately explained in an affidavit, Mr Stojanovich appealed both conviction and sentence. The Crown responsibly did not oppose an order extending time. We indicated at the hearing that an extension of time would be granted. We now make an order extending the time for the filing of an appeal to 22 July 2008.

## **The facts**

[2] In April 2005, the complainant was 17. She had left school and was unemployed and directionless, and she was drinking heavily. She moved to Christchurch to stay with relatives. She met Mr Stojanovich and formed a family friendship with him. Her mother had briefly had a relationship with Mr Stojanovich prior to the complainant's birth and he was the father of the complainant's half-brother.

[3] The relationship developed to the point that the complainant called Mr Stojanovich "Dad". She began to live in the same house as Mr Stojanovich and his 18 year old partner and son. Mr Stojanovich would regularly buy her alcohol. She trusted Mr Stojanovich. On one occasion Mr Stojanovich allegedly kissed her sexually on the mouth near a beach, causing her to "freak out".

[4] Mr Stojanovich invited the complainant to accompany him on an overnight trip to Picton. He said the trip was for business purposes. The Crown contend that this was a ruse. The complainant understood that she would have an opportunity to see relatives in Blenheim.

[5] In the course of travelling north the complainant drank alcohol purchased by Mr Stojanovich. They booked into a motel in Blenheim. The motel had two beds, a queen and a single.

[6] In the motel room the complainant was given more alcohol purchased by Mr Stojanovich. She spent the evening drinking and watching television. She described herself as “drunk and ... feeling sick”.

[7] She preferred to sleep on the queen size bed and went to lie on it when invited to do so by Mr Stojanovich, understanding that he would move to the single bed. She fell asleep. She woke to find Mr Stojanovich touching her. She testified that he placed his hand first on her breast and then on her vagina and penetrated her with his fingers. He then raped her. At all times he was lying behind her. She cried while he was raping her and at some point began to shake. She resisted when Mr Stojanovich attempted to turn her over and the rape ended at that point.

[8] The complainant said that after the rape Mr Stojanovich backed off and asked her what was wrong. She said that he later asserted that he was sorry and that he was going to shoot himself, and that he was going to take his son and run away. She said “I didn’t ask you to fuck me” and he responded “I thought you wanted it”. The complainant continued to live with Mr Stojanovich and his family for approximately three-and-a-half weeks after the incident. During that period the complainant said to the appellant’s daughter, who was about her age, that the appellant had raped her. The appellant’s daughter described the complainant as being “scared”. Ultimately the complainant went to the police and made a complaint and a statement. At all times Mr Stojanovich denied raping the complainant and denied that there was any sexual activity between them.

[9] There was a first trial and the jury was unable to agree. This appeal relates to the second trial, where the jury found Mr Stojanovich guilty of both counts.

## **Issues raised on appeal**

[10] There are two broad grounds for appeal against conviction. First, a trial counsel competence issue is raised. It is submitted for the appellant that there were three significant discrepancies between what the complainant stated in her evidence at the second trial and what she said in her original statement to the police or in her testimony at the first trial and that her counsel at the second trial failed to put these discrepancies in cross examination. It is submitted that as a consequence there was a miscarriage of justice.

[11] The second ground of appeal is that the Judge erred in his summing up. It was submitted that the Judge's description of the Crown's obligation to prove the element of lack of consent was inadequate and that there was a failure to set out the factual detail that might support a defence of consent.

## **Trial counsel competence**

[12] The submission is that defence counsel should have explored the inconsistencies in the complainant's evidence, to damage the credibility of her evidence that there was sexual contact.

[13] Mr Shamy, counsel for Mr Stojanovich, relied on a number of alleged inconsistencies. The complainant in her evidence at the second trial did not say that there was any pause between Mr Stojanovich beginning to touch her on her breast and then removing her lower clothing. In contrast, in her original statement she said that after initially touching her, he removed his hand for "like five minutes" between that contact and putting his fingers inside her vagina. At the first trial it was the complainant's evidence that Mr Stojanovich had moved away and removed his clothing, again this was not repeated at the second trial. At the first trial she did not assert that the appellant digitally violated her, as she did at the second trial. It is asserted that the complainant inverted the sequence of events at the re-trial as compared to her statement to the police.

[14] However, in relation to this first head, it is far from clear that there were in fact any significant inconsistencies. The answers given by the complainant about the sequence of events were broadly consistent in her statement and both trials. While she did not include the pause on each occasion, this can be explained by the different questions she was asked. At the second trial she was recounting the sequence of the appellant's actual interference with her. Her statement, and her evidence at the first trial, were more discursive and covered what happened more broadly. While there was no mention of digital penetration in the first trial, the complainant stated that after the appellant had got closer to her "he started having sex with me". This statement could well have indicated that this was when the digital penetration took place, followed by the rape. The complainant did reverse the sequence of digital penetration and the appellant pulling down her pants between her statement and the second trial, but that is not a major inconsistency. It is not clear that if counsel had chosen to pursue the issue that any significant difference would have been disclosed.

[15] The second alleged inconsistency is between the complainant's evidence at the second trial that when she got on to the queen size bed she thought he was going to get out and go to the single bed, and what she said at the first trial, which was that she thought that Mr Stojanovich would "just go to sleep". Again, it is far from clear that exploration of this would have revealed an actual inconsistency. She may have meant at the first trial that she thought he was going to go to sleep on the single bed.

[16] The third alleged inconsistency is the complainant's evidence at the re-trial that when she spoke to Mr Stojanovich about going to sleep on the queen size bed, he was "sitting on the queen bed". At the first trial she had said that he was on top of the queen bed. By contrast, at the first trial she had said that he was "underneath the covers". Again, this is not a certain inconsistency, as it is possible Mr Stojanovich was sitting on the queen bed under the covers.

[17] Nevertheless, it is submitted that there were issues in the complainant's account of what happened that could have been explored and that might have weakened her credibility. The essential submission of Mr Shamy was that Mr Stojanovich's then counsel should have done so. We do not agree.

[18] The second trial was conducted without any reference to the existence of the first trial. Presumably it was decided by the defence that any reference to the earlier evidence could work against Mr Stojanovich's interests, as it could have revealed detailed prior statements by the complainant that were largely consistent with her evidence before the jury at the second trial. Any reference to the statement would entitle the prosecution to re-examine on it and reinforce the broad consistency, and the fact that she had been making the complaint for a long time. The general sequence of events of going to the motel, the complainant moving to the queen size bed, the removal of clothing, the touching and the subsequent rape while the appellant was behind the complainant, was consistently expressed throughout by the complainant.

[19] There was the added risk of the alleged inconsistencies being revealed only as a lack of elaboration. Any questions may have led to the complainant developing her evidence by explaining in more detail the exact sequence of events. Her credibility could well have been underscored by her answers to questions on alleged inconsistencies. Further, any such questioning about alleged inconsistencies may have elicited a sympathetic response from the jury towards the complainant. Putting such questions could well have appeared to the jury to have been pedantic, and a clutching at straws.

[20] Even if there had been cross-examination, and inconsistencies had been established which went unexplained, the jury could have put this down to the difficulties that a young, drunk complainant would have in remembering exact details of such events. Certainly it cannot be said that even a successful cross-examination would have improved Mr Stojanovich's chances of an acquittal. It is unlikely that these limited differences would have led to a rejection of the complainant's evidence.

[21] Therefore, it was perfectly understandable that as a matter of sound trial tactics Mr Stojanovich's defence counsel would choose not to put any possibly inconsistent earlier statements to the complainant in cross-examination. The potential detriment to the defence case outweighed any potential benefits. It is not possible to conclude that there was any error on the part of counsel at the trial in not

cross-examining on these points. As the Supreme Court noted in *R v Sungsuwan* [2006] 1 NZLR 730, the real issue is whether there has been a miscarriage of justice. We do not consider that there has been anything in counsel's conduct which caused or materially contributed to a miscarriage of justice.

[22] Mr Shamy argued that s 92 of the Evidence Act 2006 was relevant. Section 92(1) reads:

**92 Cross-examination duties**

- (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.

It was argued in written submissions that this meant that there was a duty on Mr Stojanovich's counsel to put previous inconsistent statements. However s 92(1) requires counsel to cross-examine a witness on significant matters that are relevant and in issue and which contradict the evidence of that witness. It is an articulation of the rule in *Browne v Dunn* (1893) 6 R 67 (HL), which requires counsel to put their client's case to the witnesses on the other side. Its purpose is to give an opportunity to the witness to respond to evidence that is to be called later. It is there to protect the interests of the party that has called the witness, not the interests of the party who is cross-examining the witness. This is indicated by the remedies in s 92(2) which include an order for the recall of a witness, or the exclusion of the later contradictory evidence.

[23] The section imposes no duty on counsel to cross-examine a witness for the opposing party on gaps or inconsistencies in that witness' testimony which will not be the subject of later contradictory evidence. Mr Stojanovich's counsel at trial could make up his own mind as to what questions he asked, and he had no statutory duty under s 92 of the Evidence Act to put contradictions that were not being answered by later defence evidence. Mr Stojanovich was not putting forward a different version of events that occurred when they were together on the bed, as he denied that they had been on the bed at all and that there had been any sexual contact. There was no contradictory account to put. Section 92 did not apply.

## **The direction on consent**

[24] The appellant claims that the Judge erred in his directions on the element of lack of consent to charges of unlawful sexual connection and sexual violation by rape and in his failure to give details of evidence that might be seen as supportive of actual consent and reasonable belief.

[25] In their closings at the end of the trial both counsel referred to the issue of lack of consent. Counsel for the Crown dealt with it in some detail, while acknowledging that the primary defence was that there was no sexual activity. It was acknowledged that it was for the Crown to prove that there was an absence of consent and that the appellant did not have any reasonable grounds for belief in consent. The Crown went into some statements of the appellant indicating that there was belief in consent. Counsel for the Crown submitted that there were no reasonable grounds for any such belief, and pointed out that there had been no cross-examination of the complainant on the issue of consent, and she was not asked any questions about whether she resisted.

[26] Defence counsel in his closing said that the case was simply whether or not the sexual activity took place. He said that he did not think that consent was something that the jury would need to look at because it was denied that any sexual activity happened. However, he did briefly allude to some facts that could be indicative of a reasonable belief in consent. The complainant's lack of physical resistance and Mr Stojanovich's alleged comment "I thought you wanted it" were referred to. However, he was understandably anxious not to weaken the primary defence. He went on to say:

However, the defence position is that you won't have to even consider that because to get to that stage that means you have had to reject the evidence not only of Mr Stojanovich, but also you've had to reject the evidence of [Mr Stojanovich's partner] ... my suggestion to you is you won't need to consider consent but I have got to raise it with you if you get to that stage.

[27] The Judge's summing up must be considered against this background. Early in his address he summarised the elements of the two counts, stating in relation to each that the second element was that the complainant did not consent, and the third



element was that the accused did not believe on reasonable grounds that she was consenting.

[28] The Judge then dealt with consent in more detail. He stated at [17] and [18]:

What I am about to say about consent applies to both counts. Consent means true consent freely given by a person who is in a position to make a rational decision. Lack of protest or physical resistance does not of itself amount to consent. If the complainant was so drunk that she could not consent or refused to consent then her allowing the sexual activity to occur was not consent. If she was asleep or unconscious then of course she did not consent to sexual activity. If she was so drunk that she was in no position to know whether to consent or not, then you would be justified in finding that she did not consent. On the other hand, people sometimes do things when they are drunk that they would never do when sober. A consent given by someone who is disinhibited by alcohol is still a consent.

If you are satisfied beyond reasonable doubt that the complainant did not consent then you must consider whether the Crown has proven beyond reasonable doubt that the accused did not have a reasonable belief that she was consenting. There are two ways the Crown can satisfy you on that subject. One would be for the Crown to satisfy you that the accused did not in fact believe that she was consenting. That is concerned with what the accused himself thought at the time. If he did not believe that she was consenting that would be enough from the Crown's point of view. *In this case because of what the defence position is, that is, no sexual contact at all, I suggest that this aspect will not trouble you.* A second way of satisfying you on that subject, and more relevant to this case, would be to satisfy you that no reasonable person in the accused's shoes could have thought that the complainant was consenting. That is concerned with the belief of a reasonable person placed in the accused's position. If no reasonable person would have thought that she was consenting that too would be enough from the Crown's point of view. *The onus is on the Crown to satisfy you on one or other of those requirements and it must satisfy you beyond reasonable doubt.*

[emphasis added]

[29] Following this, the Judge gave the standard tripartite direction about the accused not having to give evidence. It was stated specifically that if the jury rejected Mr Stojanovich's evidence it would have to go back to the rest of the evidence to ensure that it was satisfied beyond reasonable doubt "about guilt".

[30] The Judge's direction at [17] and [18] reflected the model direction in *R v Gutuama* CA275/01 13 December 2001. It was stated at [39]:

The memorandum was also a lost opportunity to remove any misunderstandings there may have been over onus of proof. The concept of

proving a negative has always been a difficult one. It requires even more care where there are two independent ways in which the onus can be discharged. This might explain the frequency of jury directions on the third element of sexual violation that are either barely adequate or positively wrong. We would have preferred something along these lines:

Remember that as with all aspects of the charge of sexual violation, the Crown has the onus of proving the third element. The Crown must prove that the accused did not have any reasonable belief in consent. It is not for the accused to show that he did have such a belief.

There are two ways in which the Crown could satisfy you on that subject. Either would do.

One would be to satisfy you that the accused did not in fact believe that she was consenting. That is concerned with what the accused himself thought at the time. If he himself did not believe she was consenting, that would be enough from the Crown's point of view.

The other way of satisfying the third element would be to satisfy you that no reasonable person in the accused's shoes could have thought that she was consenting. That is concerned with the belief of a reasonable person placed in the accused's position. If no reasonable person would have thought that she was consenting, that too would be enough from the Crown's point of view.

On the third element of sexual violation the onus is on the Crown to satisfy one or the other of those requirements. It must satisfy you beyond reasonable doubt.

...

[31] The Judge broadly followed this model direction. However, he interpolated between setting out the two ways of the Crown proving a lack of reasonable belief in consent, the statement: "In this case because of what the defence position is, that is, no sexual contact at all, I suggest that this aspect will not trouble you".

[32] It is submitted for Mr Stojanovich that there was a failure in the summing up to properly put to the jury the Crown's obligation to prove a lack of consent and a lack of reasonable belief in consent, and that the summing up in this regard was inadequate.

[33] It is always possible that due to embarrassment or guilt, an accused person may disavow consensual sex and instruct counsel that the trial be conducted on that basis. There always remains the possibility that there was consensual sex. A judge has an obligation to put the requirement that the Crown prove a lack of consent, and

a lack of a reasonable belief in consent, regardless of whether the defence has raised it or has relied on it, if there is an evidential basis for it: *R v Tavete* [1988] 1 NZLR 428 (CA); *R v S* [2007] NZCA 243, at [60]; *R v Hayward* [2008] NZCA 256.

[34] In *R v Hayward*, where the appeal was allowed and a new trial ordered, the Judge in summing up had expressly told the jury that it need not consider consent. That did not happen in this summing up. Rather, the issue in this part of the appeal may be identified as whether the Judge's interpolated statement about the first aspect of lack of reasonable belief in consent "not troubling the jury" meant that the jury was incorrectly directed away from a consideration of whether a lack of reasonable belief in consent was proven.

[35] The Judge in making the interpolated statement was doing no more than reflecting the observations in *R v S* [2007] NZCA 243 at [61], where the difficulty of a trial judge summing up on consent when the defence is not lack of consent but rather that there was no sexual contact, was considered. There is a danger in a judge placing too much emphasis on lack of consent, when the defence is that there was no sexual contact at all, as such an emphasis may give credence to the Crown claim that there was sexual contact. In *R v S* at [61] it was observed:

In a "it did not happen" defence, Judges normally work their way around the potential danger of confusing the jury by saying, "the defence is it did not happen and you also have to be satisfied that there was no consent, although that last point is unlikely to give you much difficulty", or words to like effect. Both the reality of the defence and the requirements of the law are thereby met.

[36] The Judge made such a statement in his interpolated sentence. There is a difficulty in the statement's position in between the two ways of proving a lack of reasonable belief in consent. There is a certain illogicality in saying that the jury will not be troubled by proof of no actual belief, but not to extend that observation to the second limb of no reasonable belief, as the defence of no sexual contact is equally inconsistent with both. It would have been more logical to put it at the beginning or the end of the direction on lack of reasonable belief. Indeed, despite the comments of this Court in *R v S*, it would have been best (as the complainant was not a young child) to make no remark at all about consent "not troubl[ing]" the jury, and to have set out the consent elements without elaboration. A description of the Crown

obligation to prove lack of consent and lack of reasonable belief in consent can be made with sufficient neutrality not to make the jury think it is being invited to disregard the primary complete denial defence. The *R v S* words have the potential of confusing the jury. If they decide to reject the primary defence, why should the issue of lack of consent and lack of reasonable belief in consent not trouble them if those elements must be proved by the Crown? It is better to use words like:

Although the focus of the defence is that there was no sexual contact, you are obliged to consider all the elements of the counts which the Crown must prove including lack of consent and lack of reasonable belief in consent ...

[37] However, this was not a case where the jury could have thought that it did not need to consider lack of consent and lack of belief on reasonable grounds that she was consenting. In the initial summary of elements in the summing up, consistent with *R v S*, the jury was made aware that it must consider whether the Crown had proven lack of consent, and a lack of a reasonably held belief in consent. This was reiterated at the end of [18] of the summing up where the Judge said that the onus was on the Crown to satisfy the jury on “one or other of the requirements” beyond reasonable doubt. The jury was also reminded at the end of the tripartite direction that if it rejected Mr Stojanovich’s evidence it “should go back to the rest of the evidence and ask yourselves...[whether] you are satisfied about guilt”. The Judge yet again alluded to the element of consent at the end of the summing up when he reminded the jury that defence counsel had said that even if the accused’s evidence was rejected “there is, in any event, insufficient evidence to prove these charges beyond a reasonable doubt”. These remarks would have left the jury in no doubt that if it rejected the defence that the events did not happen, it would still have to go back and consider whether the other elements of the counts relating to consent were proved.

[38] Therefore, despite the reference in the middle of the direction regarding reasonable belief in consent to it not troubling the jury, the jury can have been under no misapprehension as to the elements it had to consider. There was no real risk that the jury did not understand that consent, including the relevant state of mind on the part of the appellant, had to be considered by it and found to be proven beyond reasonable doubt before a verdict of guilty could be reached. The direction reflected

the model words in both *R v Gutuama* and *R v S*. The odd positioning of the *R v S* qualification did not weaken the direction, given the unambiguous statements to the jury to address the consent elements, made both before and after the qualification, and the clear references to the need to prove the consent elements in the addresses of both counsel.

[39] The Judge did not go into any of the evidence that might have been relevant to the issue of consent, but to do so would have emphasised in the jury's mind the fact that there had been sexual connection. The defence might well have argued that the Judge had undermined the defence case by implying that sexual activity had taken place, if he had explored the detail. This can be seen as reflected in the fact that there was no objection by counsel at the end of the summing up, to the way in which the elements had been put.

[40] We are satisfied, therefore that, in the context of this summing up, the directions to the jury were adequate, and did not give rise to a miscarriage of justice.

### **Appeal against sentence**

[41] The appellant argues that the addition of a year on the starting point of eight years' imprisonment was excessive.

[42] The trial Judge, following *R v A* [1994] 2 NZLR 129, adopted a starting point of eight years' imprisonment. He added a year because of three aggravating features, namely the complainant's vulnerability, Mr Stojanovich's premeditation, and the significant psychological effect of the offending on the victim.

[43] There was a proper basis for this uplift. The complainant had, at the age of 17, gone to live with Mr Stojanovich on the basis of a family relationship, and despite the lack of any blood relationship, trusted him. She was in a vulnerable state in terms of her psychological condition, her propensity to drink and her trust for him as a father figure.

[44] His actions had the mark of premeditation. He plied the complainant with drink, and arranged for them to share a small motel room. He orchestrated a situation where they both ended up being on the same bed. Mr Stojanovich exploited her trust and her condition.

[45] His actions had a very serious effect on the complainant. She became very angry and disturbed and is still affected.

[46] Given these aggravating factors, an uplift of one year was entirely within the range. The appeal against sentence is dismissed.

### **Result**

[47] The time for appealing is extended to 22 July 2008.

[48] The appeal against the convictions is dismissed.

[49] The appeal against sentence is dismissed.

Solicitors:  
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