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COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE
ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA862/2011
[2012] NZCA 602**

BETWEEN	B (CA862/2011) Appellant
AND	THE QUEEN Respondent

Hearing: 21 November 2012

Court: Wild, Chisholm and Courtney JJ

Counsel: G R Anson for Appellant
K A L Bicknell for Respondent

Judgment: 19 December 2012 at 3 pm

JUDGMENT OF THE COURT

The appeal, which is against both conviction and sentence, is dismissed.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] Mr B appeals both against his conviction and his sentence.

[2] Mr B was indicted on one charge of sexual violation by oral connection and one charge of sexual violation by rape, both against the same complainant, on 7 March 2010. He pleaded not guilty. He was tried in the Kaikohe District Court in September 2011, Judge Duncan Harvey presiding. The jury returned verdicts of not

guilty on the sexual violation by oral connection charge, but guilty on the sexual violation by rape charge.

[3] On 16 December 2011 Judge Harvey sentenced Mr B to six years and three months' imprisonment.¹

[4] Mr B appeals against his conviction on two grounds. First, that the jury's verdicts were inconsistent and therefore cannot stand. Second, that the trial Judge erred in an evidentiary ruling he gave during the trial.² Mr B contends that the miscarriage of justice resulting from these two grounds was substantial, so that the proviso to s 385(1) of the Crimes Act 1961 should not apply.

[5] The basis for the sentence appeal is that the Judge's sentencing starting point was too high, being based on a view of the facts that was not open to the Judge given the jury's verdicts.

Background

[6] The complainant, a woman in her mid 50s, had gone with her 35 year old daughter to a bar near her home for a drink in the evening. Later in the evening, the complainant returned home leaving her daughter at the bar. Once home she found a mouse in the trap she had set in her home. She rang her daughter and asked her to come and remove the mouse. The daughter declined her mother's request. Shortly afterwards Mr B arrived at the complainant's home and offered to remove the mouse. Mr B and his wife were friends of the complainant. Mr B disposed of the dead mouse. He and the complainant then had a cigarette on the veranda of the house. They then came inside the house and sat together on the couch.

[7] It was common ground at the trial that oral sex followed by sexual intercourse then took place on the couch. The complainant's evidence was that all of this was against her will, she trying unsuccessfully to push Mr B away, and telling him variously to leave, to think about his wife and children and to stop.

¹ *R v B* DC Whangarei CRI-2010-029-285, 16 December 2011 [sentencing decision].

² *R v B* DC Kaikohe CRI-2010-029-285, 20 September 2011 [evidentiary ruling].

[8] Mr B's evidence was that the complainant consented to all the sexual activity.

[9] Thus, the issue for the jury was whether the Crown had negated consent, or reasonable belief in consent.

Inconsistent verdicts?

[10] Between them, counsel referred us to a number of authorities on inconsistent verdicts, most recently *R v H*.³ It is sufficient for this appeal to re-state the following principles:

- (a) Verdicts cannot truly be said to be inconsistent unless it can be seen that a common ingredient of the crimes in issue must have been differently found by the jury: *R v Irving*.⁴
- (b) The reasonable explanation for the difference in the verdicts must be found in the evidence properly used by the jury. It will not be a reasonable explanation if it depends on a use of evidence or a process of reasoning which the law does not permit: *R v O (No 2)*.⁵
- (c) If there is a reasonable explanation to be found in the evidence such that the jury could have differentiated between the charges, then there is no inconsistency. It is only when no reasonable jury applying their minds properly to the evidence could have arrived at the conclusion that the verdicts cannot stand together: *R v K*,⁶ citing *R v Irvine*.⁷
- (d) There should be a reluctance to accept a submission of inconsistency, given the respect for the functions which the law assigns to juries, and the general satisfaction with their performance. It is too simplistic and inconsistent with the authorities to assume that a jury not being prepared to convict on a count means that any convictions rooted in

³ *R v H* [2000] 2 NZLR 581 (CA), particularly at [27]–[28] and [30].

⁴ *R v Irving* CA234/87, 4 March 1988.

⁵ *R v O (No 2)* [1999] 1 NZLR 326 (CA) at 333.

⁶ *R v K* CA49/96, 13 August 1996.

⁷ *R v Irvine* [1976] 1 NZLR 96 at 99.

the same or essentially similar evidence must be unreasonable. Neither principle nor the cases require that the explanation of an apparent inconsistency be given only by reference to the evidence: *R v H*.⁸

[11] On the evidence they heard, it was open to the jury to distinguish between the two counts, both in terms of the complainant's verbal protests, and her physical resistance.

[12] The gist of the complainant's evidence at the time Mr B had gone down and was licking her genitalia was to say things like "just stop it, don't be ... stupid" and to tell Mr B "to stop it, ... go away ... don't do this". In particular, she said that she repeatedly told Mr B to think of his wife and family, to which on one occasion she said he responded: "Oh that's all gonna be over with soon anyway".

[13] By contrast, the complainant gave evidence that when Mr B put his penis into her vagina she told him "stop, stop, stop".

[14] In terms of physical resistance the complainant's evidence was that she tried unsuccessfully to push Mr B away while he was licking her. She accepted that she could have pinched him or scratched him with her long, hard fingernails, but did not. She confirmed that Mr B pulled her underpants off before the oral sex. Initially she said her legs were apart and he had done this by yanking down one side and then the other. But she later conceded that it was "quite possible" that she had had to bring her legs together for the underpants to come off. She then said that she "could not remember" and "did not know" how her pants came off. During the oral sex the complainant was trapped on the couch only because Mr B's right leg had jammed her left leg against the back of the couch. However, when Mr B raped the complainant she was pinned by his full weight on her chest on the couch.

[15] Mr Anson for the appellant submitted that no factor bearing upon consent was present during the oral sex but absent during the sexual intercourse, or vice versa. All the factors relied upon by the Crown to negate consent appeared to be

⁸ At [28]–[30].

operative throughout the incident. Similarly, nothing in the complainant's evidence distinguished between the oral sex and the sexual intercourse. Nor did any of the other evidence at trial, for example the doctor's evidence that there was bruising on the complainant's thighs. Mr Anson also emphasised the close connection in time and circumstance between the two sexual acts. For all those reasons, Mr Anson submitted that there was no proper basis upon which the jury could distinguish between counts 1 and 2.

[16] We do not accept that. On the basis of the evidence we have summarised in [12] to [14], the jury could quite reasonably have given Mr B the benefit of a reasonable doubt as to whether the complainant was consenting to the oral sex, or whether on reasonable grounds Mr B thought she was. But that doubt evaporated in the face of the complainant's emphatic evidence that she tried to push Mr B's body away with her hands and repeatedly told Mr B to stop when he set about having sexual intercourse with her.

[17] Mr Anson submitted that the jury here were not faced with a case of overcharging by the Crown. The two counts described distinct activities so convictions on both would not have subjected Mr B to any kind of double jeopardy or resulted in unfairness to him.

[18] While all of that is correct, the jury may also have thought that this single sexual incident should not result in two convictions. In *R v H* this Court made it clear that a guilty verdict which is apparently inconsistent with an acquittal might be held to be not "unreasonable" if the innate sense of fairness and justice of the jury might properly have been applied in reaching the verdict of acquittal, for instance to avoid an unnecessary double conviction.⁹

[19] And, as this Court also made clear in *R v H*:¹⁰

... Neither principle nor the cases ... require that the explanation of an apparent inconsistency be given only by reference to the evidence.

Accordingly, we hold against the inconsistent verdicts ground of appeal.

⁹ At [27].

¹⁰ At [30].

Error in the Judge's s 44 ruling

[20] We need to start by setting out the relevant parts of s 44 of the Evidence Act 2006:

Complainants in sexual cases

44 Evidence of sexual experience of complainants in sexual cases

(1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.

(2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.

(3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

...

[21] In the course, and for the purposes, of his cross-examination of the complainant, trial defence counsel, Mr Davison QC, sought a ruling on the admissibility of the evidence of a proposed defence witness. Although no brief was available, Mr Davison explained to the Judge that this witness was a man who, like Mr B, knew the complainant. The proposed witness would describe an occasion, before that in issue in the trial, when he was contacted by the complainant while at the same local bar, and asked by her to go to her house because of a problem she was having with mice. This was around the middle of the day. When the witness got to the complainant's home she was dressed in her nightie and dressing gown and invited him in. The witness would say that he felt "distinctly uncomfortable", fixed the mice problem and left.

[22] In the course of advancing his application, Mr Davison accepted that the point of the proposed evidence was to lay a basis for the defence to invite the jury to infer that the complainant was motivated by a willingness to engage in sexual activity to some degree or other with Mr B on the occasion in issue in the trial. He

contended that the proposed evidence did not go to blacken the complainant's character in terms of her prior sexual history, so that the protective purpose of s 44 was not engaged. When the Judge drew Mr Davison's attention to the words "directly or indirectly" in s 44(1) and (2), Mr Davison conceded that s 44 was engaged "if one takes a very broad view of what sexual experience is". But he contended that the proposed evidence was not evidence of sexual experience in terms of s 44(1).

[23] Judge Harvey's ruling included the following:

[7] *Mr Davison said that what has occurred, coupled with what has occurred on the earlier occasion, might well be seen as a method she has employed to encourage men to be with her in her home in dress which may seem to encourage sexual activity.* Mr Davison wants the jury to simply hear this evidence and then draw from that evidence what inferences they see fit. Mr Davison stresses that this is not a situation where he is attempting to blacken the complainant's character, and he argues that in fact this evidence does not engage s 44. If, however, the Court considers that s 44 is engaged, then Mr Davison argues that this cross-examination is essential to enable the accused to proffer an effective defence. The real relevance is that the evidence is probative due to its similarity and its relevance is to the issue of consent.

(Emphasis added).

[24] The Judge asked himself: what then is the real purpose of this evidence? He stated that he struggled to see the relevance of the evidence, which in his view "would invite the jury to speculate".¹¹ He held that the proposed evidence went indirectly to the reputation of the complainant in sexual matters. The Judge explained:

[13] ... The accused will be inviting the jury to draw the inference that this is a woman who after she has drunk alcohol is effectively on the prowl for a man. As Mr Davison said, it may be that the jury would think that this is a method employed by the complainant to encourage men to be with her in her home when she is dressed in that way, which may encourage sexual activity.

[25] In the Judge's view the proposed evidence triggered s 44. It was not of such direct relevance to the facts in issue in the trial that it would be contrary to the interests of justice to exclude it. It did not prevent the defence challenging the

¹¹ Evidentiary ruling, above n2, at [12].

complainant as to her version of what occurred, nor did it prevent Mr B giving his version to the jury in evidence. Finally, the Judge reiterated that he did not see how evidence of the earlier incident advanced Mr B's defence at all. Even if it were the case that the complainant was sexually interested in the proposed witness, that did not assist Mr B in arguing that the complainant consented to his sexual activity. The Judge therefore ruled the evidence out.

[26] Mr Anson submitted that the Judge erred in holding that the proposed evidence triggered s 44. He supported the Judge's view that s 44(1) was not engaged, because the proposed evidence did not suggest there had been any sexual activity between the complainant and the proposed witness.¹² But Mr Anson contended the Judge had erred in holding that s 44(2) applied because there was no suggestion that Mr B knew of the prior incident when he arrived at the complainant's house. Whether or not that previous incident had a sexual dimension, if Mr B knew nothing of it, then the evidence could not relate to the complainant's reputation, sexual or otherwise.

[27] We are not in doubt that s 44(2) applied to the evidence of the proposed witness and to the questions Mr Davison wanted to put to the complainant in relation to that proposed evidence. This was Mr Davison's explanation to the Judge of the relevance of the proposed evidence:¹³

So it's my submission Sir that this is relevant and it doesn't involve illegitimate speculation. It doesn't involve speculation that she was planning on engaging in sexual activity on that occasion but certainly she was putting herself in a position where at best she was ambiguous in the way in which she was presenting herself to this, this man. And in my submission that is highly relevant because it's the defence case that in this instance, after she had spoken to Mr B himself, which is the defence case, and had invited him to come and fix up the mouse in the trap, or get rid of the mouse in the trap, she did so knowing that when he turned up she was attired in a way which again may be seen to give off a certain signal. And in my submission the two are, therefore, - the first is relevant to the second and is probative of the defence proposition that she was an active and willing participant in the events that ensued.

[28] The Judge was right to rule that evidence and questions with that purpose related indirectly to the reputation of the complainant in sexual matters. Mr Anson's

¹² Evidentiary ruling at [13].

¹³ Case on Appeal (Additional Materials Vol 2) at 17.

submission that s 44(2) did not engage because Mr B knew nothing of the earlier occasion misinterprets s 44(2). There is no requirement in that subsection that the reputation of the complainant in sexual matters be known to the accused. Indeed, much of the evidence called before the predecessor to s 44 was enacted, related to evidence of sexual reputation arising from incidents of which the accused had no knowledge.¹⁴ It often involved another attempt, general and unrelated to the accused, to blacken the reputation of the complainant in sexual matters.

[29] Section 44(2) is a total bar on the adducing of evidence of a complainant's reputation in sexual matters. That makes it unnecessary to consider Mr Anson's alternative submission, that the proposed evidence met the high threshold of "direct relevance to facts in issue" in s 44(3). That threshold applies only to evidence coming within s 44(1). The Judge's consideration of the s 44(3) threshold was also unnecessary to his ruling.¹⁵

[30] For those reasons we dismiss also the challenge to the Judge's s 44 ruling.

Appeal against sentence

[31] From a starting point of seven years' imprisonment, Judge Harvey deducted nine months to reflect Mr B's previous good character, as evidenced by the references that had been placed before the Judge, to arrive at an effective end sentence of six years, three months' imprisonment.

[32] No issue is taken with the Judge's starting point. At sentencing, counsel agreed that the offending was within band 1 of this Court's guideline decision in *R v AM*,¹⁶ with starting points in the range six to eight years.

[33] Nor is any point taken with the nine months deduction for previous good character.

¹⁴ That is the predecessor of s 44 was s 23A of the Evidence Act 1908, introduced in 1977.

¹⁵ At [14].

¹⁶ *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750, at [93].

[34] The sentence appeal challenges the view the Judge took of the facts for sentencing purposes. Mr Anson contends that view was not open to the Judge because it was inconsistent with the jury's verdicts.

[35] This is the way the Judge stated the facts in his sentencing remarks:

[5] ... the complainant was telling you to stop but that, possibly because of your intoxicated state, possibly because of some mixed physical messages, you proceeded with your activity and possibly did so because you had a reasonable belief that she was in fact consenting. What is very clear, however, is that shortly after that you must have become aware that there was no continuing consent for any further sexual contact. Despite that, you did force yourself on the complainant, you penetrated her vagina with your penis and then when you withdrew you ejaculated all over her. You then left.

[36] Later in his remarks the Judge reiterated that he was sentencing on the basis "that there was some sexual activity prior to the rape, although noting that this activity was in the face of the complainant asking you to stop ...".¹⁷

[37] Given that consent or reasonable belief in consent were the only live issues at trial, Mr Anson contended that the not guilty verdict on count one could not be reconciled with the Judge's finding that Mr B was performing the oral sex "in the face of the complainant asking you to stop". The effect of the Judge's erroneous finding was to nullify the diminution of culpability which this Court had recognised may otherwise flow from consensual sexual activity immediately prior to the offending: *R v AM*.¹⁸

[38] Mr Anson also argued that the Judge's findings for sentencing purposes were not supported by the evidence. In particular, the Judge did not consider the possibility that the jury found that Mr B may have believed the complainant was consenting to sexual intercourse, but decided that that was an unreasonable mistake for him to make. Instead, the Judge found that Mr B knew the complainant was not consenting. Mr Anson contended that the Judge had ranged beyond the fact-finding latitude afforded to him by *R v Heti*.¹⁹

¹⁷ Sentencing decision, above n1, at [21].

¹⁸ At [54].

¹⁹ *R v Heti* (1992) 8 CRNZ 554 (CA) at 555.

[39] For the reasons given in [12] to [19] above, we do not accept that the Judge's view of the facts did not accord with the verdicts. In particular, the jury's not guilty verdict on the first count is explicable on the basis that the jury found Mr B had a reasonable, but mistaken, belief that the complainant was consenting to the oral sex by virtue of what she did – or did not do – despite what she was saying. As to her protestations, Ms Bicknell pointed out that most of them were directed toward her concern for Mr B's wife, who was one of the complainant's "closest friends". Those protestations could reasonably have been construed by Mr B as the guilty remarks of a willing, albeit conflicted, adulterer. Ms Bicknell pointed out that Mr B's response "Oh that's all gonna be over with soon anyway" rather supported the availability of that view.

[40] But, by the time the complainant was telling Mr B to "stop stop stop" and trying to push him off, the Judge was entitled to find that Mr B knew she was not consenting. The Judge was not bound to find that an unreasonable mistaken belief in consent on Mr B's part persisted.

[41] To summarise, we consider the Judge's sentencing starting point of seven years' imprisonment was available to him. As that is the only aspect of the sentence challenged, we dismiss the appeal against sentence.

Result

[42] Neither of Mr B's two grounds of appeal against his conviction has succeeded. That appeal is accordingly dismissed. So also is the appeal against sentence.