

**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**

**CA43/2017  
[2017] NZCA 428**

|         |                            |
|---------|----------------------------|
| BETWEEN | M (CA43/2017)<br>Appellant |
| AND     | THE QUEEN<br>Respondent    |

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| Hearing:  | 31 August 2017   |
| Court:    | Miller, Courtney and Gendall JJ                          |
| Counsel:  | D M Goodlet for Appellant<br>P D Marshall for Respondent |
| Judgment: | 26 September 2017 at 11.00 am                            |

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**JUDGMENT OF THE COURT**

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

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**REASONS OF THE COURT**

(Given by Miller J)

[1] The appellant appeals against conviction and sentence for the rape of his former partner.

## **The conviction appeal**

[2] There is no dispute that the appellant subjected the complainant to a serious assault and then had sex with her. The trial issue was whether he had reasonable grounds for believing he had her consent.

[3] The evidence was that on the morning of 19 February 2015, the appellant was upset with the complainant. He grabbed her by the throat, strangling her, and then struck her hard about the head. He lifted her up by her throat, threw her to the ground and continued strangling her with both hands. She managed to break free, but he caught her and delivered an “explosive punch” to her ribs, then struck her in the head.

[4] The appellant then told the complainant to drive them somewhere, but changed his mind as they were backing out of the drive and returned to the house. He then called her into her bedroom and told her to lie down beside him. This took some time because she was in agony. After telling her the situation was her fault, he climbed on top of her, spread her legs, and pulled her underwear to one side. She began to cry. He had intercourse with her as she lay without resisting, holding her head to one side.

[5] The following day, the appellant took the complainant to hospital, where by agreement with him she accounted for her injuries by saying someone had assaulted her at a party. Her injuries were treated. She had sore ribs, pain on moving and when breathing, and a sore back. She was prescribed pain relief.

[6] At trial the appellant faced 17 charges arising from eight violent assaults on the complainant later in 2015. Some involved serious violence. He pleaded guilty to these charges.

[7] This left only the rape charge. The appellant accepted through counsel that the complainant had not consented to intercourse. His defence was that he reasonably believed he had her consent. She said that she was completely passive during intercourse, which was not normal in their relationship, but she accepted that she had tried to create the impression that she was complying with his wishes. On previous occasions she had participated in what defence counsel (not Ms Goodlet) called

“make-up sex” when resuming their relationship after the appellant had assaulted her. Some days after this incident they again had consensual intercourse.

[8] The trial was held before Judge Edwards and a jury. The Judge gave an orthodox direction about consent and reasonable belief in consent. She provided a question trail which stated relevantly that:

**Question 1**

Has the Crown satisfied you beyond reasonable doubt that [M] penetrated [N’s] genitalia with his penis on 19 February 2015?

- If your answer is “Yes”, go to question 2.
- If your answer is “No”, find [M] “Not Guilty”.

**Question 2**

Has the Crown satisfied you beyond reasonable doubt that [N] did not consent to that act?

- If your answer is “Yes”, go to question 3.
- If your answer is “No”, find [M] “Not Guilty”.

**Question 3**

Has the Crown satisfied you beyond reasonable doubt that [M] did not believe that [N] was consenting?

- If your answer is “Yes” find [M] “Guilty”.
- If your answer is “No”, go to question 4.

**Question 4**

Has the Crown satisfied you beyond reasonable doubt that [M] had no reasonable grounds to believe that [N] was consenting?

- If your answer is “Yes”, find [M] “Guilty”.
- If your answer is “No”, find [M] “Not Guilty”.

[9] After the summing up, defence counsel suggested that the Judge ought to have emphasised the sequence of events over the few days after the incident, highlighting that the appellant had taken her to hospital and the relationship had resumed. The Judge declined to do so, noting that the closing address was still fresh in the jury’s

mind and observing that what happened after the incident was not relevant to belief in consent.

[10] After deliberating for about 90 minutes the jury sought clarification of the concept of “a reasonable person in his shoes”, explaining that they were confused about a contradiction between a reasonable person in the appellant’s position and a reasonable person in the jurors’ life experiences and lifestyles. They advised that they found the question trail and statement of issues ambiguous. The Judge instructed them:

So what was the position the defendant was in at the time, that you need to place the reasonable person in?

Remember, the focus is not on the position as [M] perceived it, but on the situation he was in according to the evidence.

The evidence is that [M] had assaulted [N] around 40 minutes to an hour earlier. She was injured and in a great deal of pain. It took her a while before she could lie down on the bed properly. She did not move as he climbed on top of her and penetrated her, except to turn her head. He spread her legs and she did not resist. She was crying, although her evidence was that she didn’t think he took any notice as she didn’t think he was focused on her face.

She said she went to the bedroom at his request, lay down on the bed and did not resist in any way because she was prepared to do whatever he wanted her to do in order to keep him calm.

[N’s] evidence was that for her to simply lie there, not moving, not participating during intercourse was not a normal sexual experience for the couple. She said that theirs was a very loving intimate relationship and it was normal for her to participate.

[11] The jury were released overnight and they returned their verdict the following morning.

[12] In argument before us, Ms Goodlet (who appeared for the appellant) accepted that, the jury’s criticism notwithstanding, she could point to no error in the question trail and statement of issues. She focused on the Judge’s decision to summarise the evidence when answering the jury’s question, arguing that if the Judge was going to revisit the evidence she ought to have ensured that the summary she gave was complete. Counsel drew attention to the following passage in N’s evidence:

Q.       Yep, okay, because as you told us you were prepared to do whatever he wanted you to, weren’t you?

A. Yes.

Q. And you were taking pains to make sure that he believed that you were complying with whatever he wanted you to do?

A. I was prepared to do what he told me to do, yes.

Q. Yes. And you wanted him to believe that you were complying or doing whatever he wanted you to do?

A. Yes, I did.

[13] Ms Goodlet submitted that the Judge ought specifically to have drawn attention to the complainant's evidence that she wanted the appellant to believe that she was complying or doing whatever he wanted. She also suggested that the Judge ought to have drawn attention to a statement made by the appellant when he finished intercourse. The complainant deposed that he said "see, this is better".

[14] We find no error in the Judge's directions. She did not have to rehearse all the evidence, and what she said was balanced. She drew attention to the complainant's evidence that she was prepared to do whatever the appellant wanted in order to keep him calm.

[15] Nor is there any possibility of a miscarriage of justice. As Mr Marshall submitted for the Crown, the striking feature of this case is that the complainant's evidence was essentially accepted in its entirety. Her own description of the incident as an "ugly, brutal bashing" was apt. Perhaps the appellant did believe he had her consent to intercourse, but it is inconceivable that he could have had reasonable grounds for thinking so. Manifestly, she was distressed and in pain, and was complying out of fear.

[16] The conviction appeal fails.

### **Sentence appeal**

[17] The Judge adopted a starting point of 10 years' imprisonment for the rape,<sup>1</sup> placing it squarely in the middle of band two from *R v AM*.<sup>2</sup> She uplifted it by

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<sup>1</sup> *R v [M]* [2016] NZDC 26752 at [49].

<sup>2</sup> *R v AM (CA79/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [98].

three years for the other violent offences but deducted 15 per cent from that uplift for the late guilty pleas and made a further allowance for totality, resulting in an end sentence of 12 years' imprisonment.<sup>3</sup>

[18] Ms Goodlet sensibly challenged only the starting point. She submitted that although there was serious violence, it was not in this case used to force sexual relations upon the complainant; rather, intercourse followed the violence. She emphasised that the appellant obviously believed he had the complainant's consent.

[19] There is nothing in these points. The violence was serious and immediately proximate to the rape. It is the reason why the complainant submitted. As Mr Marshall submitted, it is a disturbing feature of the case that the appellant strangled her. He drew attention to the Law Commission's Report, *Strangulation: The case for a new offence*.<sup>4</sup> The Commission concluded that strangulation is often very serious criminal behaviour and its impact has been underestimated. Because the abuser is demonstrating that he can kill, strangulation is "a uniquely effective form of intimidation, coercion and control".<sup>5</sup> The complainant was made vulnerable by the violence. A young child witnessed it; indeed, was caught up in it to some extent. An allowance was made for the appellant's subjective belief in consent, although it need not have been.

[20] Finally, there is force in Mr Marshall's point that the uplift for the other offences, spanning eight separate incidents, was if anything generous to the appellant. They included injuring with intent to cause grievous bodily harm, wounding with intent to injure, injuring with intent, threatening to kill, and assault with a weapon.

[21] The sentence appeal fails.

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<sup>3</sup> *R v [M]*, above n 1, at [57]–[61].

<sup>4</sup> Law Commission *Strangulation: The case for a new offence* (NZLC R138, 2016).

<sup>5</sup> At [1.2].

## **Result**

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

Solicitors:  
Crown Law Office, Wellington for Respondent