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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

**CA437/2018
[2019] NZCA 430**

BETWEEN	JASON GRAHAM FARMER Appellant
AND	THE QUEEN Respondent

Hearing:	27 November 2018
Court:	Williams, Peters and Gendall JJ
Counsel:	A J D Bamford and E J Riddell for Appellant M A Corlett QC and E McGill for Respondent
Judgment:	16 September 2019 at 11.30 am

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B The appeal against sentence is dismissed.**
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REASONS OF THE COURT

(Given by Williams J)

Introduction

[1] Following a trial by jury in the District Court at Nelson, the appellant was found guilty of one charge of sexual violation by unlawful sexual connection (USC) and one charge of indecent assault both in relation to the complainant A. The appellant

had also been charged with kidnapping A but was acquitted on that charge. On conviction, the appellant was sentenced to three years' imprisonment on the lead charge of sexual violation and a concurrent term of nine months' imprisonment on the indecent assault charge.¹

[2] The appellant appeals both conviction and sentence.

The facts

[3] The appellant and A were neighbours. On A's account they were merely friends. On the appellant's account he "quite liked her" but she was "hot and cold".

[4] On Christmas Eve 2016, A had been drinking at her mother's house. She left there and went to the appellant's flat about 30 metres away to wish him a happy Christmas. They sat and talked downstairs in his flat. On her account of what happened next, the appellant grabbed her, threw her over his shoulder and carried her upstairs to his bedroom (the kidnapping charge). He then threw her on his bed, digitally penetrated her vagina (the sexual violation charge), and at some point gave her a "hickey" (the indecent assault charge). He did not let her leave the bedroom until she offered to go downstairs to fetch them both a drink. Once she got downstairs, she escaped. Apart from the initial conversation downstairs, A said everything that had occurred in the house was without her consent. A said she fought the appellant both when he manhandled her downstairs and while they were upstairs in the bedroom. She did not fight him as he carried her up the stairs as she feared this would cause a fall.

[5] The appellant gave evidence. On his account, he accepted the sexual activity described occurred, but said it was all consensual. He said they kissed downstairs where he gave her the hickey. He said A laughed as he threw her over his shoulder and carried her upstairs. There was no fighting. He said they kissed upstairs and he only ceased digitally penetrating her when he thought there was something wrong. At that point he let her go.

¹ *R v Farmer* [2018] NZDC 8643 at [22]–[23].

[6] A's house was ten metres away from the appellant's. A's flatmate was home at the relevant time. Her evidence was she heard no yelling and that although the appellant had a dog, it did not bark at all that night. The appellant said this created real doubt about A's account of ongoing physical conflict.

Conviction appeal

[7] The appellant advanced two grounds in his conviction appeal. First, the acquittal on the kidnapping charge was so inconsistent with the sexual violation and indecent assault verdicts as to render the mix of verdicts inconsistent and irrational. The essence of this argument was that the detention of A in the appellant's house whereby he forcibly carried her to his bedroom and refused to let her leave was so inextricably intertwined with the sexual charges that the only rational verdicts were acquitted on all charges or guilty on all charges.

[8] The second ground related to the direction given by Judge Treston under s 92(2)(b) of the Evidence Act 2006 where he pointed out that defence counsel failed to fully put the appellant's version of events to A. The effect of this direction, the appellant submits, was to predispose the jury against the defence case. The appellant submitted that the Judge was not required by s 92 to give such a direction and should not have done so. The result was an unfair trial.

Inconsistent verdicts

[9] The leading decision on inconsistent or irrational verdicts is *B (SC12/2013) v R*.² There the Supreme Court held that appellate court intervention will be necessary where different verdicts returned by a jury are an "affront to logic and commonsense",³ because such verdicts will strongly suggest a compromise of the performance of the jury's duties. As noted, the appellant argues that because the alleged sexual violation occurred in the course of a lengthy alleged unlawful detention, primarily in the appellant's bedroom, conviction on the violation charge could not logically stand next to acquittal on the detention charge.

² *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261.

³ At [68(e)], applying the principles in *MacKenzie v R* [1996] HCA 35, (1996) 190 CLR 348 at 366–368.

[10] We do not see any inconsistency here. The jury was directed that it was up to them what evidence to accept or reject and what weight to give any part of the evidence. They are entitled to believe a part of what A said but not other parts.⁴

[11] The Crown case was that the kidnapping charge covered the whole incident from the carrying upstairs to A's escape. The acquittal on the kidnapping charge is likely to have reflected the evidence of A's flatmate about not hearing any noises that might be associated with any kind of altercation in the appellant's house. This must have created a reasonable doubt in the minds of the jury as to whether A had actually been taken upstairs against her will. The jury may have thought this was enough to acquit even though A said she had to trick the appellant into letting her leave the bedroom once she was there. The appellant got the benefit of that doubt.

[12] Alternatively, it was open to the jury to entertain a reasonable doubt about whether the appellant intended to detain A in his bedroom, even if A genuinely thought he was doing so.

[13] Either way, it was still open for the jury to accept the rest of A's evidence; that is, that A actively protested against the digital penetration and associated indecent assault. Therefore, whatever the position in respect to the detention, the jury could have found that A did not consent to the digital penetration and her protest was such that no reasonable person in the appellant's position could believe she was consenting.

[14] The verdicts are therefore consistent.

Section 92 direction

[15] Section 92(1) of the Evidence Act provides:

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.

⁴ *R v Shipton* [2007] 2 NZLR 218 (CA) at [77], quoted with approval in *B (SC12/2013) v R*, above n 2, at [80].

[16] Despite this, two aspects of the defence case were not put to A in cross-examination. The first related to the suggestion that A rubbed the appellant's leg and groin on the sofa downstairs, and the second the suggestion that they were "kissing and rubbing" each other upstairs in the bedroom. The Crown pointed to this failure in closing and the Judge decided to direct the jury on the omissions pursuant to s 92(2) of the Evidence Act. The appellant submits that this biased the jury against his case. The duty contained in s 92 is to protect fairness.⁵ It is therefore not absolute and need not be "slavishly followed"⁶ where it would be clear to the jury the parties are at loggerheads on that aspect of the evidence and the likely response is plain. In this case, A gave evidence before the appellant. She did not know what his evidence would be so there is an argument that the defence should have given A a proper opportunity to respond to those particular allegations. But the appellant's essential narrative of consensual engagement until part way through the digital penetration *was* put to A in clear terms:

Q. And you started making it clear that you were interested in a bit more than a friendship, you put your hand on his knee?

A. No that's not true.

Q. And you kissed – the two of you kissed each other on the sofa?

A. No that's not true either.

Q. And he got up and put his glass on the kitchen bench because he didn't want to have another drink, and you followed him over and you kissed him again when he was standing beside the bench?

A. No that did not happen.

Q. And you had your arms around each other?

A. No that did not happen.

Q. And he gave you a hickey on your neck at that time?

A. No.

Q. He then picked you up and put you across his shoulder which I think you accept?

A. Yeah.

⁵ *R v Soutar* [2009] NZCA 227 at [27].

⁶ At [27].

Q. You were across his right shoulder, so he was – it was his right arm that he had around you?

A. Yeah.

Q. And he walked around the room and the two of you were laughing, he didn't go straight up the stairs, he walked around the room. More of a joke thing and you were laughing and he was laughing?

A. Nope that is not true.

Q. And he walked up the stairs and you were not protesting and you were not fighting and you were not trying to get off?

A. That is not true.

Q. And he didn't throw you on the bed, he put you on the bed. He wasn't holding you down, he lay down beside you?

A. No that is not true.

Q. And you made another comment about how you, you thought he had wanted more than that and you didn't have a problem with being sexual buddies?

A. That's absolutely not true, no

...

Q. He put his hands down your pants, you accept that?

A. Yes.

Q. He put his finger inside you?

A. He forced his fingers inside me, yes.

...

Q. And he inserted his finger three or four times into you and then something happened and you conveyed to him at that point, and that point only, that something was wrong.

A. That's not true.

[17] At each point A responded with clear and straightforward refutations. The rubbing downstairs and upstairs were points of detail with a wider context and would undoubtedly have produced the same sort of response as those provided in relation to the surrounding allegations.

[18] We are satisfied, therefore, that fairness did not require a s 92 direction. But that does not necessarily mean the giving of such direction in this case created substantive unfairness for the appellant by predisposing the jury against him. The s 92 direction the Judge gave was careful and balanced. He made a point of not being critical of counsel or the defendant, and acknowledged the omission could well have been an innocent oversight. He said:⁷

[67] ... So in evaluating the defendant's evidence on this point, you are entitled to take into account that in relation to these particular aspects, his version of events was not put to [A] for comment. However, of course it's important to recognise that counsel are human and can make mistakes. A failure such as here may simply be an oversight if [A]'s evidence on that point was not correct when she made it, it doesn't become correct simply because it wasn't challenged.

[68] So, the failure to put these matters which you may or may not, it's up to you, consider relevant, particularly in the aspect of honestly held belief is a matter of weight. Then it's certainly, even though the witness wasn't challenged on this point, and didn't have an opportunity to respond, in assessing what weight you give to the contrary evidence, this should be borne in mind. The Crown takes a different view, the Crown has said you ought to disregard the evidence of the [defendant] in that regard about the rubbing of the groin area and rubbing upstairs because it wasn't put, that's a matter for you to assess and decide upon.

[19] These aspects of the defence case *were* omitted in cross examination and it was open for the jury to take that into account. Though unnecessary, the direction was correct as far as it went. We are satisfied that no miscarriage could have resulted from the way in which this matter was handled.

Sentence Appeal

[20] The final effective three years imprisonment related to the lead charge of sexual violation. The Judge applied the guideline judgment in *R v AM (CA27/2009)*.⁸ He found that the offending should be placed in the middle of USC band one (two to five years) and adopted a starting point of three and a half years.⁹ He deducted six months after taking into account letters of support from his employers, family and

⁷ The Judge at [68] is recorded as saying "the Crown has said you ought to disregard the evidence of the complainant ...". We take this to be an error and that the Judge meant "defendant".

⁸ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

⁹ *R v Farmer*, above n 1, at [22].

a court officer, who all spoke of his good character; and the fact that he had apologised to A in writing.¹⁰

[21] The appellant submits that the starting point was too high. The starting point should have been two and a half years in his submission because the offending involved none of the aggravating features the Judge identified. These were the use of violence, harm to the victim (genital bruising and post-traumatic stress disorder), and vulnerability due to A's intoxication and her small stature.¹¹

[22] The appellant submits that the acquittal on the kidnapping charge suggested there was no particular narrative of violence in this case. Further, the harm to the victim was overstated. The appellant submits that A was in fact already on medication for post-traumatic stress before the incident, and the genital bruising was not significant. Nor was A particularly intoxicated and her small stature did not make her especially vulnerable.

[23] The court in *R v AM (CA27/2009)* held that the starting point for USC band one should be "closer to the top of the band" where one or more of the aggravating factors identified is present to a low or moderate degree.¹² Among those factors is "more than mild" violence associated with the offending.¹³

[24] We accept that there was violence to a low or moderate degree in this case, even without the kidnapping and detention narrative. The genital bruising confirmed in medical evidence tended to support the suggestion that there was roughness in the bedroom (and A said she was thrown onto the bed before the violation). We doubt that there is much in the intoxication and small stature points relied upon by the Judge, but on any view of it, the incident exacerbated A's mental condition which was itself a vulnerability.

¹⁰ At [22].

¹¹ At [20].

¹² *R v AM (CA27/2009)*, above n 8, at [114].

¹³ At [38].

[25] A starting point at three and a half years was, we think, high but not so high as to be out of range for a sentencing judge who saw and heard the evidence from both sides.¹⁴ We conclude that the starting point was available in this case.

Result

[26] The appeal against conviction is dismissed.

[27] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

¹⁴ *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [39].