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S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA227/2021
[2022] NZCA 340**

BETWEEN	SHANE STEVEN HOLMES Appellant
AND	THE QUEEN Respondent

Hearing:	23 June 2022
Court:	Cooper P, French and Collins JJ
Counsel:	N Levy QC and A Jeremich for Appellant C A Brook and R E King for Respondent
Judgment:	28 July 2022 at 9.30 am

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Collins J)

INTRODUCTION

[1] Following two trials conducted before juries in the District Court at Whangārei, Mr Holmes was found guilty of:

- (a) three charges of rape, one of which was representative;
- (b) two charges of sexual violation by unlawful sexual connection;
- (c) male assaults female;
- (d) threatening grievous bodily harm;
- (e) two charges of threatening to kill; and
- (f) one charge of illegally presenting a firearm.

Before the commencement of the first trial, Mr Holmes pleaded guilty to illegally possessing a firearm in public.

[2] Two trials were required because the jury in the first trial did not reach verdicts in relation to the sexual offences we have referred to at [1(a) and (b)] (the sexual offences) and the male assaults female charge.

[3] Mr Holmes was sentenced by Judge D J McDonald to 15 years and six months' imprisonment for the sexual offences. He was sentenced to concurrent terms of six months' imprisonment in relation to all other convictions. A minimum term of imprisonment (MPI) of nine years and two months' imprisonment was imposed. This reflected 60 per cent of the sentence imposed in relation to the sexual offences.¹

¹ *R v Holmes* [2021] NZDC 7592.

[4] Mr Holmes appeals his convictions and sentence in relation to the sexual offences.

[5] There are five grounds of appeal against conviction, which can be summarised in the following way:

- (a) The trial Judge's directions on consent were inadequate. In particular, the Judge erred by failing to give a direction on "reluctant consent".
- (b) The evidence of Mr Holmes' offending against a former partner, whom we shall refer to as "Sally", should not have been admitted as propensity evidence in relation to the second trial.
- (c) Counterintuitive evidence from a psychologist was misused by the Crown.
- (d) The Crown made impermissible comments about the absence of a potential defence witness.
- (e) Judge McDonald displayed antipathy towards Mr Holmes and his trial counsel, Mr Fairley.

[6] The appeal against sentence is based on the contention that the sentence for the sexual offending was manifestly excessive and, in particular, that the Judge erred when he said there were 13 or more rapes during the period covered by the charges.

BACKGROUND

Narrative

[7] Mr Holmes and the complainant, whom we shall refer to as "Rose", met online in mid-2015. At the time Rose had four children, two of whom were living with her. At about the time Mr Holmes and Rose commenced their relationship in mid-2015, he was in the final stages of his relationship with Sally.

[8] At the time their relationship commenced, Mr Holmes was 23. Rose was 29 years of age.

[9] Rose and her two youngest children moved into Mr Holmes' house in Northland in December 2015.

[10] The Crown alleged that soon after the relationship commenced, Mr Holmes, who is a powerfully built former rugby player, started to emotionally control Rose. He demanded she submit to sex on an almost daily basis and belittled her whenever she told him that she did not want to have sex.

[11] Mr Holmes' alleged control and abuse of Rose can be summarised in the following way:

(a) *Verbal abuse*

Mr Holmes would frequently make derogatory comments about Rose's body, her general appearance, her vagina (which he said was "too loose"), how Sally was better than her and that no one else would want her. He would tell Rose that she was "old" and "haggard" and that he would be better off finding another partner.

(b) *Controlling behaviour*

Mr Holmes placed demands on the way Rose dressed and what she ate. He required her to maintain his home in a spotless condition. He also discouraged Rose from associating with her family and friends, most of whom lived about an hour's drive from Mr Holmes' property. According to Rose, Mr Holmes constantly monitored her phone.

(c) *Verbal threats*

On occasions, particularly towards the end of their relationship, Mr Holmes threatened to get revenge against Rose and even made threats against her children.

[12] Apart from one specific occasion when Mr Holmes aggressively bit Rose's ear, there is no suggestion Mr Holmes physically assaulted Rose.

[13] Rose fully accepted there were many occasions in her relationship with Mr Holmes during which he was apologetic and charming. She said there were often times when she willingly had sex with Mr Holmes.

[14] Rose gave birth to the couple's child in early October 2016. After the birth of their child, Mr Holmes again became aggressive towards Rose and threatened to "get her" if she left him or took their child away from him.

Bathroom incident

[15] The first alleged rape occurred sometime between February and June 2016. On that day, all of Rose's children were in the house where she lived with Mr Holmes. Mr Holmes had been drinking alcohol.

[16] Mr Holmes and Rose ended up in the bathroom, where he locked the door and made sexual advances towards her. The Crown case was that Rose made it clear she did not want to have sex because her children were nearby. Mr Holmes blocked Rose's efforts to leave the bathroom. He then pushed her against the basin and aggressively bit her left ear. This incident led to Mr Holmes' conviction in relation to the charge of male assaults female. Mr Holmes then digitally penetrated Rose's vagina against her will. This led to the first conviction for unlawful sexual connection.

[17] Rose told Mr Holmes to stop and that he was hurting her. Mr Holmes ignored Rose's protests and continued to digitally penetrate her despite her distress. Rose described being forced up against a hook on the bathroom wall and that as a consequence, her back was hurting. Mr Holmes ignored Rose's protests and inserted his penis into her vagina. He ignored her request that he stop and continued until he ejaculated. This led to the first conviction for rape.

Lounge incident

[18] The next alleged sexual violation incident occurred between June and August 2016 at Mr Holmes' Northland house. He and Rose had made up a bed in the lounge near a fireplace. Mr Holmes told Rose that he wanted to make her "squirt". He penetrated her vagina with his fingers even though she told him to stop because it was causing her pain. According to Rose, Mr Holmes told her to "just handle it". When Rose tried to push Mr Holmes away, he became angry and used one hand to press down on her pelvis while he continued to digitally penetrate her. When Rose continued to protest, Mr Holmes told her that he would leave her and that he would never touch her again. This led to the second conviction for unlawful sexual connection.

[19] The Crown case was that Rose became worn down and frightened by Mr Holmes' abuse. She felt vulnerable and powerless and so decided not to resist sexual intercourse because she feared if she did continue to resist Mr Holmes, she would have to endure hours of emotional abuse from him. The intercourse was so painful that Rose was not able to properly urinate for some time afterwards.

[20] There was no specific charge of rape relating to the lounge incident because the evidence of rape on that occasion emerged during the cross-examination of Rose. Mr Fairley asked Rose "When the sexual intercourse took place [in the lounge], are you just saying you let it happen?" She answered:

No, I'm not saying I let it happen. ... I had no other choice but to do what [Mr Holmes] was wanting to do and that was to have sex because if I didn't, Mr Fairley, then I would be exposed to hours longer of his emotional and mental torment.

The lounge rape incident was treated during the second trial as an example of rape for the purposes of the representative charge of rape, which we will refer to at [22].

Hospital incident

[21] The next alleged rape occurred when Mr Holmes visited Rose in hospital during the days after she gave birth to their baby. During one of those visits Mr Holmes told Rose that he wanted sex. When she said "no" and reminded him she

had just had a baby, he became angry and told her he was not going to wait for weeks without sex. Mr Holmes then took Rose into an en suite in the maternity ward and led her into a shower unit. Mr Holmes got Rose to bend over and stand under water running from the shower. He then penetrated her vagina from behind. Rose said she made it very clear she did not want to have sex and that she felt violated and disgusted. She described watching bloody water running down the plughole beneath her as Mr Holmes continued to penetrate her vagina with his penis.

Representative charge of rape

[22] In addition to the two specific convictions for rape we have summarised at [15] to [21], Mr Holmes was convicted on a representative charge of rape that covered the 15-month period that Rose lived in his house. Rose gave specific details of rape in relation to the lounge incident but did not provide details of any other occasions covered by the representative charge. She did say however, there were “over 10 times where” Mr Holmes had sex with her when he knew she did not consent.

Other incidents leading to convictions

[23] Towards the end of the relationship, Rose and Mr Holmes got into an argument when she told him that she was leaving him. He told her that if she tried to leave and take their child then he would shoot her. He then picked up a .22 rifle and placed the muzzle of the gun against the back of her head. Believing that Mr Holmes was about to shoot her, Rose began to cry. He then placed the gun down and made comments to the effect that he was just joking.

[24] The final incident occurred on the last day of the couple’s relationship in early May 2017. During the previous evening Mr Holmes had verbally abused Rose, telling her that he was going to find another partner. He told her to leave or he would shoot her. The following morning, Rose tried to talk to Mr Holmes when he was in the bathroom with his rifle and an ammunition belt. He continued to verbally abuse Rose and at one point he threatened to kill her and shoot her children. He eventually left the house with his rifle and ammunition and was stopped by police a short distance from his home. These events led to the balance of the convictions we have referred to at [1].

First trial

[25] In the first trial, Mr Holmes was found not guilty in relation to an allegation of penetrating Rose's vagina with a carrot and four other charges of rape. He was found guilty of the grievous bodily harm and threatening to kill charges, as well as the firearms charge. As we have previously noted, the first jury could not reach verdicts on the sexual offence charges and the male assaults female charge that were the focus of the second trial. We shall refer to the charges in both trials as the "Rose charges".

Defence

[26] Mr Holmes gave evidence in both trials. He denied having non-consensual sexual intercourse with Rose or that he engaged in any form of sexual activity against her wishes. Mr Holmes denied having bitten Rose's ear in the way she described. He also said that he and Rose did not have sex in the maternity ward following the birth of their baby.

Sally

[27] Mr Holmes was in a relationship with Sally from about April 2011 to September 2015. For part of that time Mr Holmes and Sally lived together in various countries when he was sponsored to play rugby for overseas clubs.

[28] In her statement to the police, Sally said that Mr Holmes frequently assaulted her. The incidents of physical violence included punching her, pushing her to the ground, kicking her while she was on the ground and spitting at her face while verbally abusing her.

[29] Sally said Mr Holmes regularly made comments about her appearance. He called her "bitch", "fat" and "ugly". He made nasty comments about her vagina, stating it was loose and that nobody would want her. Mr Holmes often compared Sally to his former partners.

[30] Mr Holmes was charged with a number of offences relating to his physical violence towards Sally, namely:

- (a) two charges of injuring with intent to injure (one with a weapon);
- (b) two charges of threatening to kill (one with a firearm); and
- (c) one charge of male assaults female.

We will refer to these as the “Sally charges”.

[31] The Sally charges were to be heard with the Rose charges. Mr Holmes’ application to sever the Sally charges from the Rose charges was dismissed by the District Court on the basis the evidence concerning both complainants was able to be adduced as cross-propensity evidence.²

[32] Mr Holmes pleaded guilty to the Sally charges before the first Rose trial. He was sentenced by Judge McDonald to a total term of two years and eight months’ imprisonment on those charges.³

[33] An agreed summary of facts concerning the Sally charges was then presented at both trials concerning the Rose charges. The agreed summary of Sally’s evidence in the second Rose trial referred to the way Mr Holmes verbally abused and tormented Sally, as well as the specific incidents of violence that Mr Holmes admitted when he pleaded guilty to the Sally charges.

APPEAL AGAINST CONVICTIONS

First ground of appeal: directions on consent

[34] In his closing address to the jury, Mr Fairley explained that the defence was the alleged events “did not happen” and that “consent [was] not an issue in this case”.

² *R v Holmes* [2019] NZDC 4828.

³ *R v Holmes* [2019] NZDC 26477.

[35] Notwithstanding Mr Fairley telling the jury that consent was not an issue in this case, the Judge, as he was obliged to do, gave directions on consent in both his summing up to the jury and in the question trails he provided to the jury in relation to the sexual offence charges.

[36] In his summing up to the jury, the Judge said:

[31] Consent has a very specific meaning in our Crimes Act, and the Crimes Act also sets out circumstances where of themselves certain actions do not amount to consent. Now, this question relates to what is in her mind, what she was thinking, did she want it or not, so I have set out in the question trail reasonably fully what consent means. It means the true consent freely given by a person who is in a position to make a rational decision. It must be a full, voluntary, free and informed consent on her part. Lack of protest or physical resistance does not of itself amount to consent. If a complainant submits because she is frightened of what might happen if she does not, that is not a true consent. Equally, if she submits because she feels powerless, trapped, dominated or exhausted, that would not be a true consent either. Of course, a true consent can be given reluctantly and regretted afterwards. A person can consent to the commencement of a sexual act and then withdraw their consent at any time. If her consent is withdrawn then she is not consenting.

[32] It is not every constraint on a complainant's freedom of action that will negate consent. The question is ultimately a matter of judgment and degree for you as triers of the fact. You need to be satisfied that in all the circumstances [Rose] was not in a position to make a rational decision and thereby give a true consent. You heard her evidence. She told you she did not consent. She made it plain to Mr Holmes that she did not want to have sex with him in the bathroom, but to some extent she gave in because she felt she had no option. In effect, she was saying to you that she was trapped, she was powerless, she was exhausted, she was dominated.

[37] In his question trail the Judge again told the jury:

"Consent" means a true consent freely given by a person who is in a position to make a rational decision it must be a full voluntary, free and informed consent on her part. Lack of protest or physical resistance does not of itself amount to consent. If a complainant submits because she is frightened of what might happen if she does not that is not a true consent. Equally if she submits because she feels powerless, trapped, dominated or exhausted that would not be a true consent either.

A true consent can be given reluctantly and regretted afterwards.

Appellant's contentions

[38] Ms Levy QC's criticism of the Judge's directions on consent can be distilled to the following four propositions.

[39] First, the Judge erred when he instructed the jury to ask themselves “did she want it or not” Ms Levy submitted that referring to Rose’s subjective wants was not appropriate when determining if she had consented. What was relevant was whether she agreed, permitted or allowed it.

[40] Second, the adjectives full, voluntary and free in the Judge’s directions on consent were problematic. Ms Levy said “full” was captured by “informed” and was therefore superfluous, and it obscured that “very little” can still amount to consent. Ms Levy said that “free” was confusing because it could imply that consent had to be free from any influence. It was submitted by Ms Levy that it would have been more appropriate if the Judge had explained that consent had to be informed in the sense that for Rose to have given valid consent, she had to have understood her situation and was in a position to make up her mind when she agreed to the sexual activities in issue.

[41] Third, Ms Levy argued the complainant’s feelings of “powerlessness, being trapped, being dominated, or being exhausted” do not vitiate consent unless those feelings arise from force of the kind described in s 128A(2) of the Crimes Act 1961. For convenience we will set out the relevant portions of s 128A:

128A Allowing sexual activity does not amount to consent in some circumstances

- (1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.
- (2) A person does not consent to sexual activity if he or she allows the activity because of—
 - (a) force applied to him or her or some other person; or
 - (b) the threat (express or implied) of the application of force to him or her or some other person; or
 - (c) the fear of the application of force to him or her or some other person.
- ...
- (8) This section does not limit the circumstances in which a person does not consent to sexual activity.

(9) For the purposes of this section,—

allows includes acquiesces in, submits to, participates in, and undertakes

...

[42] Ms Levy said that support for her interpretation of the limited scope of the type of fear that vitiates consent can be derived from s 129A of the Crimes Act, the relevant portions of which state:

129A Sexual conduct with consent induced by certain threats

(1) Every one who has sexual connection with another person knowing that the other person has been induced to consent to the connection by threat is liable to imprisonment for a term not exceeding 14 years.

...

(3) For the purposes of subsection (1), a person who has sexual connection with another person knows that the other person has been induced to consent to the sexual connection by threat if (and only if) he or she knows that the other person has been induced to consent to the sexual connection by an express or implied threat of a kind described in subsection (5).

...

(5) The kinds of threat referred to in subsections (3) and (4)(a) are—

(a) a threat that the person making the threat or some other person will commit an offence that—

(i) is punishable by imprisonment; but

(ii) does not involve the actual or threatened application of force to any person; and

(b) a threat that the person making the threat or some other person will make an accusation or disclosure (whether true or false) about misconduct by any person (whether living or dead) that is likely to damage seriously the reputation of the person against or about whom the accusation or disclosure is made; and

(c) a threat that the person making the threat will make improper use, to the detriment of the person consenting, of a power or authority arising out of—

(i) an occupational or vocational position held by the person making the threat; or

- (ii) a commercial relationship existing between the person making the threat and the person consenting.

[43] Fourth, Ms Levy submitted that in *Christian v R*,⁴ the Supreme Court said that directions on all aspects of consent are required, whatever the defence, and that in the present case the Judge was required to properly explain to the jury that even if Rose reluctantly consented to the sexual activity in question, her reluctant consent was nevertheless valid consent.

Standard directions

[44] In *Christian*, the Supreme Court noted that the standard direction to juries is that consent means “true consent, freely given by a person who is in a position to make a rational decision”.⁵ That direction was first affirmed by this Court in *R v Adams*.⁶

[45] It is also common practice for judges to instruct juries that consent entails “full, voluntary, free and informed consent” on the part of the complainant. That particular formulation was approved by this Court in *R v Herbert*.⁷ More recently, the Supreme Court in *Christian* emphasised that all directions on consent in cases of unlawful sexual connection need to reflect s 128 of the Crimes Act. That section provides that the offence of unlawful sexual connection happens if person A has sexual connection with person B “without person B’s consent” and without person A “believing on reasonable grounds that person B consents”.

[46] Consent is not defined in the Crimes Act. This was probably a deliberate decision by Parliament because issues of consent in cases of alleged sexual offending vary widely and it is difficult to craft an omnibus definition of consent that will apply to every scenario of sexual offending. Thus, Parliament has left it to the courts to provide juries with guidance on the meaning of consent on a case by case basis.

⁴ *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315.

⁵ At [19], footnote 10.

⁶ *R v Adams* CA70/05, 5 September 2005 at [42].

⁷ *R v Herbert* CA81/98, 12 August 1998.

The desire for simple directions

[47] The standard directions on consent have expanded to accommodate evolving case law. Nevertheless, when deciding how to direct a jury on consent, trial judges should endeavour to frame their directions so as to avoid superfluous terms and ensure the directions given are clear, concise and relevant to the case.

[48] At the heart of the concept of consent is society's acceptance that legally and physically competent individuals are free to choose to engage in sexual acts with other individuals who are also legally and physically competent. Choice in this context involves acting intentionally, with understanding and without compulsion.

The arguments in this case

[49] We do not agree with the first point made by Ms Levy, which we have summarised at [39]. Whether Rose wanted to have sex with Mr Holmes on the occasions in issue was highly relevant to whether she was consenting.

[50] Even more important in the context of this case was whether Rose conveyed to Mr Holmes her decision not to have sex. In this case, Rose said that on each occasion to which the charges relate, she told Mr Holmes that she did not want sex at that time. It was for the jury to decide whether or not they accepted Rose's evidence on this issue, or if they had a reasonable doubt about whether she consented or not.

[51] Even if Rose had not told Mr Holmes she did not wish to have sex with him, the jury would still have needed to consider whether there was sufficient evidence that Rose consented or that Mr Holmes had a reasonable belief she consented. As the Supreme Court explained in *Christian*:⁸

[45] ... consent cannot be inferred only from the fact that the person does not protest or offer physical resistance. There must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent ... we see this as equally applicable to the evaluation of the issue of reasonable belief in consent.

[46] One such factor could be a positive expression of consent. But there could be others. For example, if the participants in the sexual activity are in a

⁸ *Christian v R*, above n 4.

relationship in which expectations have developed over time and the sexual activity is in accordance with those expectations, that may be capable of evidencing consent if there is nothing to indicate that the mutual expectations are no longer accepted.

(footnote omitted)

[52] When we examine the directions given by the Judge in this case against the standard directions on the meaning of consent, it is clear the Judge instructed the jury of their need to be satisfied beyond reasonable doubt: (a) that Rose had given true consent; (b) that her consent was freely given; and that (c) her consent was given when she was in a position to make a rational decision.

[53] We do not think the addition of the adjectives “full”, “voluntary”, “free” and “informed” in the directions meant that the Judge failed to properly direct the jury on what matters they needed to assess when determining whether or not Rose consented to sex on the occasions in dispute. In particular, the Judge made clear the jury needed to be satisfied Rose gave her informed consent on each of the occasions in question.

[54] We also do not accept that feelings of fear that may negate consent are limited to the threats of physical violence set out in s 128A(2) of the Crimes Act. Section 128A is not a code and it does not place limits on what might constitute the withholding of consent to sexual activity. That point is made clear in s 128A(8):

This section does not limit the circumstances in which a person does not consent to sexual activity.

In any event, the Crown did not rely on s 128A(2) of the Crimes Act in this case. It accepted the consequences that Rose feared if she did not resist Mr Holmes having sex with her were beyond the scope of the circumstances set out in s 128A(2). It is also abundantly clear s 129A was not engaged in this case. Nothing in that section supports Ms Levy’s narrow interpretation of what factors may vitiate consent.

[55] Finally, we also disagree with Ms Levy’s argument that *Christian* requires a full direction on consent in every case.

[56] In *Christian*, there had been no direction on consent by the trial Judge because consent was not put in issue in that case. The Court explained that trial judges should

give directions on all elements of the offence with which the defendant is charged, even if those elements are not disputed. The Court said:

[36] The directions do not need to be elaborate but need to ensure that the jury is clear that a guilty verdict can be returned only if the Crown has proved beyond reasonable doubt that the complainant did not consent and the defendant did not believe on reasonable grounds that the complainant consented. For example, it would be sufficient in a case where the defendant does not raise consent or reasonable belief in consent as issues for the Judge to outline those elements of the offence, record that the defendant has not raised an issue with those elements but make it clear that the jury must nevertheless be satisfied beyond reasonable doubt that the complainant did not consent and that the defendant did not reasonably believe he or she did. The Judge's summary of the evidence should draw the jury's attention to any evidence relevant to those elements. Of course, in outlining the evidence, the Judge must not invite the jury to disbelieve the defendant's defence of complete denial that any sexual encounter occurred.

[57] Thus, we do not accept Ms Levy's submission that trial judges are required to give directions on all elements of consent. That would be contrary to what the Supreme Court said in *Christian*. What is necessary is for trial judges to focus on the elements of consent that are relevant to the circumstances of the case.

[58] This Court has observed that the need for a reluctant consent direction⁹ will depend on the circumstances of the case and what the judge has told the jury about the meaning of consent and instruct the jury on those elements of consent that matter.¹⁰

[59] Ms Brook suggested that this was in fact not a case of reluctant consent at all. She submitted:

... on each occasion of alleged offending [Rose] made it clear she did not want to have sex with the appellant. She then *ceased resisting* because she considered it was futile to do so; she did not "reluctantly consent", she submitted to the unavoidable.

[60] While we recognise the force in Ms Brook's submission, we think this was a case in which it was wise for the Judge to give a direction on reluctant consent because Rose's evidence was, at least on some occasions, that she stopped resisting

⁹ The standard reluctant consent direction states that "consent which is given reluctantly and later regretted is nevertheless consent".

¹⁰ See for example, *Henry v R* [2019] NZCA 266 at [24].

Mr Holmes. This was far from being a clear case of reluctant consent, but no harm was done if the jury were told that reluctant consent is consent.

[61] It is very clear Judge McDonald provided the jury with assistance in understanding consent in this case by explaining that consent can be given reluctantly and regretted afterwards. This direction was given verbally by the Judge and placed in the question trails for each of the sexual offence charges.

[62] The jury would therefore have appreciated that if Rose did consent reluctantly, then Mr Holmes could not be convicted of the sexual offence charges. Whether or not Rose did consent (reluctantly or otherwise) was an issue for the jury. Having been directed on the principal elements of consent that might have been engaged in this case, the jury were able to assess all of the evidence and conclude Rose did not consent to the sexual conduct that was the subject of the charges.

[63] We are therefore satisfied that no miscarriage of justice arose through the way in which the Judge directed the jury on the topic of consent in this case.

Second ground of appeal: propensity evidence

[64] Mr Fairley questioned the admissibility of the Sally summary of facts during the second Rose trial, but he appears not to have made any submissions about the admissibility of that summary. Judge McDonald ruled the summary admissible as propensity evidence.¹¹ The Judge set out in the following way the Crown's arguments as to why the statement of facts concerning Sally's experiences with Mr Holmes was admissible in relation to the Rose charges:

[14] The Crown's case is that Mr Holmes treated [Rose] in the same general way that he had treated [Sally]. He verbally abused both calling them "ugly", "old", "sluts", that they had "loose vaginas" and that no one would want them. He made insulting comments about the way each looked. He controlled what each could eat, the way they dressed, the way they wore their hair. He made threats to take their children if they attempted to leave him. He compared both [Sally] and [Rose] to former partners of his. He made each keep the houses where they resided with Mr Holmes spotless. He ensured that they both became estranged from their families and friends.

¹¹ *R v Holmes* [2021] NZDC 4833.

[15] The Crown say[s] as a result both [Sally] and [Rose] became downtrodden, lost their self-esteem to the point where each was totally dominated by him.

[16] While he used physical violence against [Sally] but not against [Rose], apart from a bite to the ear, he did not need to do so because his presence and words was enough to dominate [Rose].

[17] The Crown's position was that the evidence showed a tendency for Mr Holmes to act in a particular way or to have a particular state of mind, that is, to use techniques to totally dominate and control both women.

[65] In the absence of submissions from Mr Fairley, the Judge suggested that Mr Fairley would probably have pointed to the following differences between the allegations made by Sally and Rose as being reasons why the Sally summary of facts was inadmissible in the second trial. The Judge said Mr Fairley:¹²

... would have submitted that there was sustained violence in respect of [Sally] but not in respect of [Rose]. [Rose] makes sexual allegations. [Sally] did not. [Sally] left, came back, left again, came back. [Rose] did not. [Sally] had property, including some sentimental property, destroyed whereas [Rose] did not.

[66] The Judge considered the factors in s 43(3) of the Evidence Act 2006, which we will refer to at [79] to [87]. Judge McDonald concluded the Sally summary of facts was highly relevant to the respective relationships that Sally and Rose had with Mr Holmes and that the Sally summary of facts was “also highly relevant as to whether [Rose] did not give a true consent to sexual activity”.¹³ The Judge was satisfied that the effect of the Sally summary of facts would not “unfairly prejudice the jury against Mr Holmes nor that the jury would give an inappropriate weight to it”.¹⁴

[67] In her written submissions Ms Levy questioned whether there was a formal objection to the admission of the Sally summary of facts prior to the second trial and said that, if trial counsel failed to object, it would be an error that caused a miscarriage of justice. There has, however, been no notice of complaint about trial counsel and no waiver of privilege has been provided. We are not prepared to entertain complaints of trial counsel competence in the absence of a waiver of privilege from Mr Holmes and a chance to hear from Mr Fairley.

¹² At [18].

¹³ At [22].

¹⁴ At [23].

[68] In any event, it is clear that Mr Fairley questioned the admissibility of the Sally summary of facts. The admissibility of that summary was considered by the trial Judge, who provided reasons as to why the evidence was admissible. There is no basis for the suggestion that the outcome would have been different had Mr Fairley challenged the Sally summary of facts before the commencement of the second trial as opposed to during the trial. The key question is whether the Sally summary of facts was admissible as propensity evidence in the second trial.

[69] The essence of Ms Levy's submission was that there were profound differences between Sally and Rose's allegations. Those differences, or lack of similarities, concerned the fact Mr Holmes violently assaulted Sally during their relationship whereas physical violence was not a dominant feature of his relationship with Rose. Ms Levy submitted that the lack of similarities between Sally and Rose's experiences with Mr Holmes meant that the Sally summary of facts did not tend to show Mr Holmes had a propensity to act in the way alleged by Rose and therefore had no "probative value in relation to an issue in dispute" in the second trial.¹⁵

Issue in dispute

[70] In assessing the probative value of the Sally summary of facts, it is necessary to identify the issue in dispute to which the Sally summary of facts was said to be relevant.¹⁶

[71] Mr Fairley's opening statement to the jury recorded Mr Holmes' broad defence to the sexual offence charges and the male assaults female charge was that the alleged offences "did not happen", and in particular there was never an incident of non-consensual sex during the course of Mr Holmes' relationship with Rose.

[72] As we have noted at [26], Mr Holmes gave evidence. He told the jury he never bit Rose's ear or had sex in any way with her without her consent.

¹⁵ Evidence Act 2006, s 43(1).

¹⁶ Section 43(2); and *Freeman v R* [2010] NZCA 230 at [21].

[73] Thus, in relation to the sexual offence charges the issues were:

- (a) whether the sexual acts in issue took place;
- (b) if they did take place, whether Rose consented to the alleged acts; and
- (c) if she did not consent, whether Mr Holmes knew she did not consent or lacked a reasonable belief she consented.

[74] The issue in relation to the male assaults female charge was whether Mr Holmes did bite Rose on her left ear when they were in the bathroom of his house.

[75] The principal issue concerning the admissibility of the Sally summary of facts is whether her descriptions of the way Mr Holmes verbally abused, degraded and controlled her had probative value in relation to the second and third issues we have summarised at [73(b) and (c)], namely whether Rose consented to the sexual activity in issue and whether Mr Holmes knew she did not consent or if he lacked a reasonable belief that Rose consented. We must also decide if the Sally summary of facts was relevant to the male assaults female charge.

[76] It was a feature of Rose's evidence in relation to all three sexual offence incidents that she was unable to maintain her resistance to Mr Holmes' demands because of the way he controlled and dominated her. That evidence invited the jury to consider Rose did not consent to the acts of sex in issue, and that Mr Holmes knew she did not consent, or lacked a reasonable belief in consent.

[77] Rose also told the jury the bite to her ear was aggressive and painful.

[78] In assessing the probative value of the Sally summary of facts, we shall consider the relevant matters set out in s 43(3) of the Evidence Act.

Frequency of the acts referred to

[79] The events that Sally referred to took place over a four-year period. In Rose's case, the events in issue spanned about 15 months. More significantly, however,

Mr Holmes' verbal torment and degrading abuse was a constant feature of his relationship with both Sally and Rose. As we have previously noted, physical assaults were a constant feature of Mr Holmes' relationship with Sally, whereas Rose said he assaulted her on only one occasion.

Connection in time

[80] Mr Holmes' tormenting of Rose followed closely after his abuse of Sally.

Similarities

[81] Ms Levy is correct in her submission that all of the allegations made by Sally to which Mr Holmes pleaded guilty involved acts of physical violence and that there were no allegations made by Sally of sexual offending against her by Mr Holmes.

[82] That submission fails however to properly recognise that there was one charge of specific violence in relation to Rose, namely the charge that resulted in a conviction for male assaults female as a result of the biting incident in the bathroom. Furthermore, we agree with Ms Brook, counsel for the Crown, when she submitted that sexual offending is violent offending. Forced sex is a serious form of violence.

[83] It is striking how Mr Holmes tormented and dehumanised both Sally and Rose. He used similar tactics and language to belittle them and to diminish their senses of self-esteem and autonomy. Rose explained that she felt so dehumanised by Mr Holmes' taunts and abuse that she gave up resisting his sexual demands.

[84] Thus, while Sally and Rose did have different experiences in their relationships with Mr Holmes, a remarkable feature of both relationships was the way he undermined the dignity and autonomy of both women by using very similar techniques.

Number of persons

[85] Nothing hinges on the fact there were only two complainants.

Collusion

[86] There was no suggestion of collusion between Sally and Rose.

Unusual features

[87] We agree with Judge McDonald that the level and degree of Mr Holmes' domination of Sally and Rose, and the methods he used to wear down their sense of dignity and autonomy, was unusual.

Section 43(4) of the Evidence Act

[88] Judge McDonald carefully explained to the jury how it might legitimately use the Sally summary of facts. He explained that the summary was not relevant to the first issue in dispute, namely whether the alleged sexual acts and the assault actually took place. The Judge said in his summing up:

[57] What you cannot do and must not do is use [Sally's] evidence in any way in deciding whether the physical acts themselves occurred ... because [Sally's] statement has no relevance to that question, did the physical acts occur, and that is very important, ladies and gentlemen.

[58] If the answer to that simple question I posed is no and you reject the idea that these incidents disclose a pattern of behaviour then you should put [Sally's] evidence to one side as it has no relevance at all in the trial. It is also important to remember the evidence of [Sally] is only one item of evidence; it may assist you, but you still need to consider all the evidence before you can find Mr Holmes guilty. Please do not simply out of dislike for the defendant arising from his prior misconduct find him guilty. Do not conclude that because he has previously been involved in misconduct towards [Sally] he therefore must be guilty of these charges in relation to [Rose]. You have heard he has done some pretty unpleasant things before to [Sally], but he is entitled to be judged by you in a manner that does not involve prejudice or sympathy.

[89] The evidence from Sally was likely to predispose the jury against Mr Holmes, but not unfairly so, because the jury had the benefit of a clear direction on what legitimate use they could make of Sally's evidence. Nor do we consider that the jury could have placed disproportionate weight on Sally's evidence in light of the directions they received from Judge McDonald.

[90] We are satisfied therefore that the Sally summary of facts was admissible as propensity evidence and that no miscarriage of justice arose through the way it was presented to the jury.

Third ground of appeal: counterintuitive evidence

[91] Dr Ahmad, a clinical psychologist, was called to give evidence by the Crown. She explained that the purpose of her evidence was to give the jury “educative information about women’s responses” to different forms of violence. She did not make any comment about Rose and made clear she had never met Rose or Mr Holmes, nor had she read any of the evidence in this case.

[92] Dr Ahmad explained population-based studies show women may remain in relationships in which they are subject to emotional or psychological abuse. She told the jury that in some cases the cycle of abuse includes “coercion”, “threats”, “name-calling, [and] mind games”. The cycle of abuse may also be characterised by periods during which the abuser is apologetic and affectionate.

[93] In explaining the techniques a victim may use to cope with an abusive relationship, Dr Ahmad said:¹⁷

Victims tend to focus on their abuser and design their lives around them. This, at times, can be a matter of keeping the peace or in severe instances a matter of survival. I know that in my clinical experience the combination of psychological abuse and isolation can induce an inability to identify their own feelings or [their ability] to make simple decisions when they feel detached from people in their lives and they develop either depression or social anxiety.

[94] Dr Ahmad explained the concept of traumatic bonding, an effect of which may make it difficult for some women to leave an abusive relationship. Dr Ahmad also described research that shows a high proportion of women who are subject to abuse in their relationships do not immediately leave the relationship and may wait months, or even years before they leave their abuser.

¹⁷ Notes of Evidence at 46, lines 27–33.

[95] Dr Ahmad was cross-examined by Mr Fairley. The focus of the cross-examination appears to have been that the jury could not assume Dr Ahmad's counterintuitive evidence applied to Rose.

[96] In her closing address, counsel for the Crown said:

The Crown says to you, members of the jury, the defendant wanted her to have no self-worth and subjected her to emotional abuse so that he could control her and manipulate her into doing things that he wanted, just like he did with [Sally]. He had emotionally abused [Rose] to the point where he could control her. I mean [Rose] told us in her evidential video interview: "He never hurt me, he never physically hurt me because he didn't have to, his words hurt enough and he knew that he could get away with it," ...

...

... She was asked specifically in cross-examination at page 145: "When the sexual intercourse took place, are you just saying you let it happen?", her answer: "No, I'm not saying I let it happen, I'm not saying I let it happen, I had no other choice but to do what [Mr Holmes] was wanting to do and that was to have sex, because if I didn't, Mr Fairley, then I would be exposed to hours longer of his emotional and mental torment." Well, that's not consent, members of the jury. *The Crown says to you that she hasn't given consent here because she had no ability to give or withhold consent.* What she wanted didn't matter. It was what the defendant wanted, so he took it.

She also told us in her interview on the 28th of July 2017, at page 20, that there were times when sex occurred and it was not how she wanted it and he would throw it back in her face that she was too old, too boring, too needy, and he didn't like that and [Sally] was so much better because she would do it without question. *Each time the Crown say she did not give true consent* and the defendant knew that but had sex with her anyway. She said that happened on about 10 occasions, members of the jury.

...

So, members of the jury, [Rose] had no voice in the relationship she was in with the defendant. She was not heard or listened to. All she was was something for him to emotionally abuse and use for his daily sex requirements, and if she didn't want to, well, that didn't matter. ...

(emphasis added)

[97] Ms Levy submitted the words we have emphasised in the Crown's closing address constituted an impermissible attempt by the Crown to use Dr Ahmad's evidence to diagnose Rose as being psychologically incapable of consenting to sexual activity.

[98] We make four points about Ms Levy's submission.

[99] First, the Crown did not draw any link between Dr Ahmad's evidence and Rose's state of mind at the time of the events that led to the sexual offence charges. The only reference to Dr Ahmad's evidence in the closing address for the Crown concerned possible reasons why Rose did not complain to persons in authority about the abuse she was enduring in her relationship with Mr Holmes. This was a proper use of Dr Ahmad's evidence.

[100] Second, at no stage was it suggested by the Crown that Rose lacked the mental capacity to consent to sex with Mr Holmes. The Crown case was that Rose did not consent to the events that formed the subject matter of the sexual offence charges because she simply stopped resisting Mr Holmes in order to avoid further emotional and psychological abuse from him.

[101] The words we have highlighted in the Crown closing address may have been problematic if they had in any way been linked to Dr Ahmad's evidence. When looked at objectively however, the words that concern Ms Levy are consistent with the Crown's theory of the case, namely that Rose did not give consent to the sexual acts in issue because she submitted to Mr Holmes' demands in order to avoid further emotional abuse and torment.

[102] Third, a reading of Mr Fairley's closing address shows that he understood the purpose of Dr Ahmad's evidence and accurately explained the limits of her evidence to the jury. There was no suggestion in Mr Fairley's closing address that the Crown had improperly made use of Dr Ahmad's evidence or that Rose's mental capacity to consent was an issue in the trial.

[103] Finally, the Judge explained in his summing up the use the jury could properly make of Dr Ahmad's evidence. The Judge said:

The purpose of her evidence was to inform you as to the range of behaviour found amongst victims of sexual abuse and family violence so as to counter any thoughts that you might have along the lines that it would be expected that the victim of such behaviour would immediately leave the perpetrator or tell someone close to them what is occurring, would not on the one hand hate them for what they were doing and the other love them. As she said, the nature of such relationships are often good then bad then back to good then back to bad. She also educated us on the effect such a relationship can have on a person on

their ability to do anything about it, their self-esteem and *how they would react if pressured by a person who is dominating them.*

(emphasis added)

[104] Ms Levy acknowledged that the Judge made clear Dr Ahmad was speaking generally and not about the case before the jury. Ms Levy suggested, however, that the words we have highlighted from the Judge's summing up were inappropriate because they diminished the complexity and breath of possible reactions that Dr Ahmad described as being reasons why women may remain in an abusive relationship.

[105] We do not share Ms Levy's concerns about the Judge's summing up in which he properly explained the permissible use the jury could make of Dr Ahmad's evidence and that Dr Ahmad was not providing any evidence about Rose and her circumstances.

[106] The Crown made permissible use of Dr Ahmad's evidence.

Fourth ground of appeal: comments on the absence of a potential defence witness

[107] In her closing address counsel for the Crown commented on the absence from the second trial of Ms Davis, who was Rose's midwife. Ms Davis had given evidence at the first trial. Her evidence was relevant to a charge Mr Holmes was acquitted of, namely that he had raped Rose in a hospital when he was in hospital to undergo surgery. As that particular charge was no longer relevant, the Crown elected not to call Ms Davis as a witness at the second trial and notified defence counsel of that decision. Mr Fairley indicated the defence would call Ms Davis as a witness, but that did not happen.

[108] Mr Fairley sought and was granted permission to cross-examine Rose in the second trial about the incident that happened when Mr Holmes was in hospital for surgery. In his cross-examination Mr Fairley asked Rose what might have been said by her and Ms Davis about the particular incident.

[109] In her closing address counsel for the Crown said:

And let's think about the questions about [Rose] supposedly telling her own midwife, [Ms Davis], that she snuck into the hospital and had sex with Mr Holmes on the 1st of October. Now, [Rose] doesn't remember ringing her midwife on the 2nd of October and telling her that. She says she sat by his bed and she did go in late at night on one occasion. Now, we heard from a midwife and one nurse, members of the jury, but we never heard from this [Ms Davis], [Rose's] midwife, the midwife [Rose] supposedly rang, she never came along to actually give this so-called evidence. Something for you to think about, members of the jury.

[110] In his summing up the Judge told the jury:

[10] Do not speculate about others whose names have been mentioned in this trial as to what might have been said if they were called. Ms Davis, [Rose's] midwife, is a prime example of that. Neither the Crown nor Mr Holmes sought to call her, so you have not heard from her. The Crown could have called her; they did not. The defence could have called her; they did not. But, as I say, do not speculate as to what, if she had come along and spoken to you, she might have said. You do not have that evidence and that is the end of it. ...

[111] Whilst it was unwise for the Crown to have commented on the absence of a potential defence witness, the Judge properly explained to the jury to place to one side any suggestions about what Ms Davis may have said had she given evidence.

[112] We are satisfied the directions given by the Judge cured any difficulty that may otherwise have arisen through the way in which the Crown addressed the absence of Ms Davis from the trial.

Fifth ground of appeal: Judge's conduct of the trial

[113] In the hearing before us, Ms Levy accepted there was no evidence before us to support her written submission that Mr Holmes and Mr Fairley felt "got at" by the Judge.

[114] Having carefully reviewed the transcript of the evidence, counsel's addresses and the summing up we are satisfied the Judge conducted himself properly during the trial. In particular, there was no basis for the argument the Judge acted inappropriately towards Mr Holmes and Mr Fairley.

APPEAL AGAINST SENTENCE

[115] The sentence appeal is advanced on one ground. Ms Levy said Mr Holmes was wrongly sentenced for “more than 13” rapes when there were only three in evidence.

[116] That submission ignores the fact Mr Holmes was sentenced on the representative charge of rape which, on Rose’s evidence, concerned more than 10 rapes.

[117] The Judge was entitled to form his own view of the facts when sentencing Mr Holmes, provided his view of the facts was not inconsistent with the jury’s verdicts. His assessment that there had been at least 13 rapes was consistent with the verdicts and Rose’s evidence.

[118] Ms Levy submitted that as Mr Holmes had been acquitted of four charges of rape in the first trial, the Judge could not properly reason he had committed at least 13 rapes.

[119] Even if there was merit in Ms Levy’s calculations, we do not think anything meaningful hinges on whether there were nine or 13 rapes. By any analysis, Mr Holmes’ offending was egregious and repetitive. When viewed from the most advantageous position that is available to Mr Holmes, his offending was in band three of *R v AM*,¹⁸ which justified the starting point of 15 years adopted in this case.

Result

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

Solicitors:
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¹⁸ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.